Indian Self-Determination and Education Assistance Act

Public Law (P.L.) 93-638, as amended,
[as of August 18, 2000]

This compilation consists of:

Titles I, III, IV, V and VI of P.L. 93-638
Title I and Title V Regulations and
Relevant Legislative History

This compilation was prepared by the Legal Affairs Branch
Division of Regulatory & Legal Affairs
and the Congressional and Legislative Affairs Office

Indian Health Service
Department of Health and Human Services

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TABLE OF CONTENTS

TAB 1

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PUBLIC LAW 93-638, AS AMENDED [August 18, 2000]

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

TABLE OF CONTENTS

The following is a compilation of laws that constitute, amend, or modify the Indian Self-Determination and Education Assistance Act (ISDEAA). [1]

The Indian Self-Determination and Education Assistance Act
Public Law, 93-638, As Amended

AN ACT

To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [t]hat this Act may be cited as the "Indian Self-Determination and Education Assistance Act."

Sec. 2. Congressional statement of findings [25 U.S.C. § 450]

(a) **Findings respecting historical and special legal relationship, and resultant responsibilities**

The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) **Further findings**

The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

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[1] *There are provisions in the annual Interior and Related Agencies Appropriations Acts that affect the ISDEAA implementation but are not included in the compilation unless otherwise codified in the United States Code.*

Sec. 3. Congressional declaration of policy [25 U.S.C. § 450a]

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

[Note: Public Law 103-435, codified at 25 U.S.C. § 450a-1, amended the Act to provide for Tribal and Federal advisory committees:

> Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund advisory committees or other advisory bodies composed of members of Indian tribes or members of Indian tribes and representatives of the Federal Government to ensure tribal participation in the implementation of the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (25 U.S.C. § 450 et seq.)]

Sec. 4. Definitions [25 U.S.C. § 450b]

For purposes of this Act, the term—

(a) "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;

(b) "contract funding base" means the base level from which contract funding needs are determined, including all contract costs;

(c) "direct program costs" means costs that can be identified specifically with a particular contract objective;

(d) "Indian" means a person who is a member of an Indian tribe;

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat.

688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

(h) "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 102(a) of this Act [25 U.S.C. § 450f(a)], a contract of the tribal organization which meets this definition shall be considered to be a mature contract;

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 9 of this Act [25 U.S.C. § 450e-1]) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: Provided, That except as provided [in] the last proviso in section 105(a) of this Act [25 U.S.C. § 450j(a)], no contract (or grant or cooperative agreement utilized under section 9 of this Act [25 U.S.C. § 450e-1]) entered into under title I of this Act shall be construed to be a procurement contract;

(k) "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;

(l) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) "construction contract" means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract—

(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 Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

Sec. 5. Reporting and audit requirements for recipients of Federal financial assistance [25 U.S.C. § 450c]

(a) **Maintenance of records**

(1) Each recipient of Federal financial assistance under this Act shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of title 5, United States Code, including records which fully disclose—

(A) the amount and disposition by such recipient of the proceeds of such assistance,

(B) the cost of the project or undertaking in connection with which such assistance is given or used,

(C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and

(D) such other information as will facilitate an effective audit.

(2) For the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for Federal funds, the annual single-agency audit required by chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.], and a brief annual program report.

(b) **Access to books, documents, papers, and records for audit and examination by Comptroller General, etc.**

The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, 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 Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) **Availability by recipient of required reports and information to Indian People served or represented**

Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) **Repayment to Treasury by recipient of unexpended or unused funds**

Except as provided in section 8 or 106(a)(3) of this Act [25 U.S.C. § 13a or 450j-1(a)(3)], funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid shall be repaid to the Treasury of the United States through the respective Secretary.

(e) **Annual report to tribes**

The Secretary shall report annually in writing to each tribe regarding projected and actual staffing levels, funding obligations, and expenditures for programs operated directly by the Secretary serving that tribe.

(f) **Single-agency audit report; additional information; declination criteria and procedures**

(1) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract entered into, or grant made, under this Act, the tribal

organization that requested such contract or grant shall submit to the appropriate Secretary a single-agency audit report required by chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.].

(2) In addition to submitting a single-agency audit report pursuant to paragraph (1), a tribal organization referred to in such paragraph shall submit such additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.

(3) Any disagreement over reporting requirements shall be subject to the declination criteria and procedures set forth in section 102 [25 U.S.C. § 450f].

Sec. 6. Criminal activities involving grants, contracts, etc.; penalties [25 U.S.C. § 450d]

Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. § 452 et seq.], embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, shall be fined not more than $ 10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $ 100, he shall be fined not more than $ 1,000 or imprisoned not more than one year, or both.

Sec. 7. Wage and labor standards [25 U.S.C. § 450e]

(a) **Similar construction in locality**

All laborers and mechanics employed by contractors or subcontractors (excluding tribes and tribal organizations) in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended [40 U.S.C. § 276a et seq.]. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) [5 U.S.C. § 903 note] and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. § 276c).

(b) **Preferences requirements for wages and grants**

Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. § 452 et seq.], or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) [25 U.S.C. § 1452].

(c) **Self-determination contract**

Notwithstanding subsections (a) and (b), with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

Sec. 8. Carryover funding [25 U.S.C. § 13a]

Notwithstanding any other provision of law, any funds appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208), for any fiscal year which are not obligated or expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation or expenditures during such succeeding fiscal year. In the case of amounts made available to a tribal organization under a self-determination contract, if the funds are to be expended in the succeeding fiscal year for the purpose for which they were originally appropriated, contracted or granted, or for which they are authorized to be used pursuant to the provisions of section 106(a)(3) [25 U.S.C. § 450 j-1(a)(3)] , no additional justification or documentation of such purposes need be provided by the tribal organization to the Secretary as a condition of receiving or expending such funds.

Sec. 9. Grant and cooperative agreements [25 U.S.C. § 450e-1]

The provisions of this Act shall not be subject to the requirements of chapter 63 of title 31, United States Code [31 U.S.C. § 6301 et seq.]: Provided, That a grant agreement or a cooperative agreement may be utilized in lieu of a contract under sections 102 [25 U.S.C. § 450f] and 103 [25 U.S.C. § 450g][2] of this Act when mutually agreed to by the appropriate Secretary and the tribal organization involved.

[Note: Public Law 105-83, Title III, § 310, codified at 25 U.S.C. § 450e-2, amended the Act to limit use of excess funds from construction project costs, and provides:

> Beginning in fiscal year 1998 and thereafter, where the actual costs of construction projects under self-determination contracts, compacts, or grants, pursuant to Public Laws 93-638, 103-413, or 100-297, are less than the estimated costs thereof, use of the resulting excess funds shall be determined by the appropriate Secretary after consultation with the tribes.]

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[2] *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

Title I – Indian Self-Determination Act

Sec. 101. Title

This title may be cited as the "Indian Self-Determination Act."

Sec. 102. Self-determination contracts [25 U.S.C. § 450f]

(a) **Request by tribe; authorized programs**

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—[3]

(A) provided for in the Act of April 16, 1934 (48 Stat. 596) [25 U.S.C. § 452 et seq.], as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674) [42 U.S.C. § 2001 et seq.], as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

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[3] *Pub.L. 105-83, Pub.L. 105-277, § 351 and Pub.L. 106-260, § 12 have substantively modified tribal rights to enter ISDEAA agreements. Also, for tribes in Alaska's Ketchikan Gateway Borough, the ability to enter into health care agreements under the ISDEAA is further modified by Title II of Pub.L. 105-143, as amended.*

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) [25 U.S.C. § 450j-1(a)]; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,[4] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 106(a) [25 U.S.C. § 450j-1(a)],

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 106(a) [25 U.S.C. § 450j-1(a)]. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) **Procedure upon refusal of request to contract**

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

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[4] *Reads so in the original. Probably should read "paragraph".*

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 110(a) [25 U.S.C. § 450m-1(a)].

(c) **Liability insurance; waiver of defense**

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this Act. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 [25 U.S.C. § 1452] (88 Stat. 77; 25 U.S.C. § 1451 et seq.), except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) **Tribal organizations and Indian contractors deemed part of Public Health Service**

For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42 U.S.C. § 233(a)), as amended by section 4 of the Act of December 31, 1970 (84 Stat. 1870), with respect to claims, by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28, United States Code, with respect to claims by any such person, on or after the date of the enactment of the Indian Self-Determination and Education Assistance Act Amendments of 1990 [enacted Nov. 29, 1990], for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 102 or 103 of this Act [25 U.S.C. § 450f or 450h] is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28, United States

Code, and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) **Burden of proof at hearing or appeal declining contract; final agency action**

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) or any civil action conducted pursuant to section 110(a) [25 U.S.C. § 450m-1(a)], the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) shall be made either—

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

Sec. 103. Grants to tribal organizations or tribes [25 U.S.C. § 450h]

(a) **Request by tribe for contract or grant by Secretary of the Interior for improving, etc., tribal governmental, contracting, and program planning activities**

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to the Act of November 2, 1921 (42 Stat. 208, 25 U.S.C. § 13), and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for—

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 102 of this Act [25 U.S.C. § 450f] and the additional costs associated with the initial years of operation under such a contract or contracts; or

(3) the acquisition of land in connection with items (1) and (2) above: Provided, That in the case of land within Indian country (as defined in chapter 53 of title 18, United States Code [18 U.S.C. § 1151 et seq.]) or which adjoins on at least two sides, lands

held in trust by the United States for the tribe or for individual Indians, the Secretary of Interior may (upon request of the tribe) acquire such land in trust for the tribe.

(b) **Grants by Secretary of Health and Human Services for development, maintenance, etc., of health facilities or services and improvement of contract capabilities implementing hospital and health facility functions**

The Secretary of Health and Human Services may, in accordance with regulations adopted pursuant to section 107 of this Act [25 U.S.C. § 450k], make grants to any Indian tribe or tribal organization for—

(1) the development, construction, operation, provision, or maintenance of adequate health facilities or services including the training of personnel for such work, from funds appropriated to the Indian Health Service for Indian health services or Indian health facilities; or

(2) planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 103 [25 U.S.C. § 450g] of this Act.[5]

(c) **Use as matching shares for other similar Federal grant programs**

The provisions of any other Act notwithstanding, any funds made available to a tribal organization under grants pursuant to this section may be used as matching shares for any other Federal grant programs which contribute to the purposes for which grants under this section are made.

(d) **Technical assistance**

The Secretary is directed, upon the request of any tribal organization and subject to the availability of appropriations, to provide technical assistance on a nonreimbursable basis to such tribal organization—

(1) to develop any new self-determination contract authorized pursuant to this Act;

(2) to provide for the assumption by such tribal organization of any program, or portion thereof, provided for in section 102(a)(1) of this Act [42 U.S.C. § 450f(a)(1)]; or

(3) to develop modifications to any proposal for a self-determination contract which the Secretary has declined to approve pursuant to section 102 of the Act [25 U.S.C. § 450f].

(e) **Grants for technical assistance and for planning, etc., Federal programs for tribe.**

The Secretary is authorized, upon the request of an Indian tribe, to make a grant to any tribal organization for—

(1) obtaining technical assistance from providers designated by the tribal organization, including tribal organizations that operate mature contracts, for the purposes of program planning and evaluation, including the development of any management systems necessary for contract management, and the development of cost allocation plans for indirect cost rates; and

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5 *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

(2) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe, including Federal administrative functions.

Sec. 104. Retention of Federal employee coverage, rights and benefits by employees of tribal organizations [25 U.S.C. § 450i]

[Note: Subsections (a-d) were omitted from Public Law 93-638, section 104. The relevant sections are codified elsewhere in various titles of the U.S. Code, and are provided here for convenience.]

(a) [To ensure federal coverage, rights and benefits for tribal employees, Section 3371(2) of Title 5 was amended to include the following in the definitions of "local government":

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and includes any tribal organization as defined in section 4 of the Indian Self-Determination and Education Assistance Act [25 U.S.C. § 450b]. 5 U.S.C. § 3371(2)(C).]

(b) [The Secretary's authority to assign commissioned officers to a service area is codified in Section 2004b of Title 42:

> In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended [42 U.S.C. § 215(d)], upon the request of any Indian tribe, band, group, or community, commissioned officers of the Service may be assigned by the Secretary for the purpose of assisting such Indian tribe, group, band, or community in carrying out the provisions of contracts with, or grants to, tribal organizations pursuant to sections 102 [25 U.S.C. § 450f] and 103 [25 U.S.C. § 450g][6] of the Indian Self-Determination and Education Assistance Act. 42 U.S.C. § 2004b.]

(c) [Commissioned officers' exemption from selective service registration is codified in Section 456 of Title 50, Appendix:

> Commissioned officers of the Public Health Service and members of the Reserve of the Public Health Service while on active duty and assigned to staff the various offices and bureaus of the Public Health Service, including the National Institutes of Health, or...who are assigned to assist Indian tribes, groups, bands, or communities pursuant to the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. § 2001 et seq.], shall not be required to be registered under section 3 [50 U.S.C. App. § 453] and shall be relieved from liability for training and service under section 4 [50 U.S.C. App. § 454]. 50 U.S.C. App. § 456(a)(2).]

(d) [Tribal governments' status as local government for purposes of intergovernmental personnel programs is codified in Section 4762 of Title 42:

> Notwithstanding the population requirements of section 203(a) and 303(c) of this Act [42 U.S.C. §§ 4723(a) and 4743(c)], a "local government" and a "general local government" also mean the recognized governing body of an Indian tribe, band,

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[6] *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

pueblo, or other organized group or community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which performs substantial governmental functions. The requirements of sections 203(c) and 303(d) of this Act [42 U.S.C. §§ 4723(c) and 4743(d)], relating to reviews by the Governor of a State, do not apply to grant applications from the governing body of an Indian tribe, although nothing in this Act is intended to discourage or prohibit voluntary communication and cooperation between Indian tribes and State and local governments. 42 U.S.C. § 4762(5).]

(e) **Eligible employees; Federal employee programs subject to retention**

Notwithstanding the provisions of sections 8347(o), 8713, and 8914 of title 5, United States Code, executive order, or administrative regulation, an employee serving under an appointment not limited to one year or less who leaves Federal employment to be employed by a tribal organization, the city of St. Paul, Alaska, the city of St. George, Alaska, upon incorporation, or the Village Corporations of St. Paul and St. George Islands established pursuant to section 8 of the Alaska Native Claims Settlement Act (Public Law 92-203) [43 U.S.C. § 1607] in connection with governmental or other activities which are or have been performed by employees in or for Indian communities is entitled, if the employee and the tribal organization so elect, to the following:

(1) To retain coverage, rights, and benefits under subchapter I of chapter 81 ("Compensation for Work Injuries") of title 5, United States Code [5 U.S.C. § 8101 et seq.], and for this purpose his employment with the tribal organization shall be deemed employment by the United States. However, if an injured employee, or his dependents in case of his death, receives from the tribal organization any payment (including an allowance, gratuity, payment under an insurance policy for which the premium is wholly paid by the tribal organization, or other benefit of any kind) on account of the same injury or death, the amount of that payment shall be credited against any benefit payable under subchapter I of chapter 81 of title 5, United States Code [5 U.S.C. § 8101 et seq.], as follows:

(A) payments on account of injury or disability shall be credited against disability compensation payable to the injured employee; and

(B) payments on account of death shall be credited against death compensation payable to dependents of the deceased employee.

(2) To retain coverage, rights, and benefits under chapter 83 ("Retirement") or chapter 84 ("Federal Employees Retirement System") of title 5, United States Code [5 U.S.C. §§ 8301 et seq. or 8401 et seq.], if necessary employee deductions and agency contributions in payment for coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Civil Service Retirement and Disability Fund (section 8348 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed creditable service under section 8332 of title 5, United States Code. Days of unused sick leave to the credit of an employee under a formal leave system at the time the employee leaves Federal employment to be employed by a tribal organization remain to his credit for retirement purposes during covered service with the tribal organization.

(3) To retain coverage, rights, and benefits under chapter 89 ("Health Insurance") of title 5, United States Code [5 U.S.C. § 8901 et seq.], if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Employee's Health Benefit Fund (section 8909 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is

deemed service as an employee under chapter 89 of title 5, United States Code [5 U.S.C. § 8901 et seq.].

(4) To retain coverage, rights, and benefits under chapter 87 ("Life Insurance") of title 5, United States Code [5 U.S.C. § 8701 et seq.], if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organizations are currently deposited in the Employee's Life Insurance Fund (section 8714 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 87 of title 5, United States Code [5 U.S.C. § 8701 et seq.].

(f) **Deposit by tribal organization of employee deductions and agency contributions in appropriate funds**

During the period an employee is entitled to the coverage, rights, and benefits pursuant to the preceding subsection, the tribal organization employing such employee shall deposit currently in the appropriate funds the employee deductions and agency contributions required by paragraphs (2), (3), and (4) of such preceding subsection.

(g) **Election for retention by employee and tribal organization before date of employment by tribal organization; transfer of employee to another tribal organization**

An employee who is employed by a tribal organization under subsection (e) of this section and such tribal organization shall make the election to retain the coverages, rights, and benefits in paragraphs (1), (2), (3), and (4) of such subsection (e) before the date of his employment by a tribal organization. An employee who is employed by a tribal organization under subsection (e) of this section shall continue to be entitled to the benefits of such subsection if he is employed by another tribal organization to perform service in activities of the type described in such subsection.

(h) **"Employee" defined**

For the purposes of subsections (e), (f), and (g) of this section, the term "employee" means an employee as defined in section 2105 of title 5, United States Code.

(i) **Promulgation of implementation regulations by President**

The President may prescribe regulations necessary to carry out the provisions of subsections (e), (f), (g), and (h) of this section and to protect and assure the compensation, retirement, insurance, leave, reemployment rights, and such other similar civil service employment rights as he finds appropriate.

(j) **Additional employee employment rights**

Anything in sections 205 and 207 of title 18, United States Code to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under section 3372 of title 5, United States Code, or section 2072 of the Revised Statutes (25 U.S.C. § 48) and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection w[i]th any matter pending before any department, agency, court, or commission, including any matter in which the United States is a party or has a direct and substantial interest: Provided, That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.

[Note: Subsections (k and l) were omitted from Public Law 93-638, section 104. The relevant sections are codified elsewhere in various titles of the U.S. Code, and are provided here for convenience.]

(k) [Assignment of replacement employees to or from tribal organizations is governed by Section 3372(a)(2) of Title 5, United States Code:

> If the assigned employee fails to complete the period of assignment and there is another employee willing and available to do so, the Secretary may assign the employee to complete the period of assignment and may execute an agreement with the tribal organization with respect to the replacement employee. That agreement may provide for a different period of assignment as may be agreed to by the Secretary and the tribal organization. [5 U.S.C. § 3372(a)(2).]

(l) [Employees assigned to tribal organizations are further governed by Section 3372 of Title 5, United States Code:

> (d) Where the employee is assigned to a tribal organization, the employee shall be eligible for promotions, periodic step-increases, and additional step-increases, as defined in chapter 53 of this title [5 U.S.C. § 5301 et seq.], on the same basis as other Federal employees. [5 U.S.C. § 3372(d).]

(m) **Conversion to career appointment**

The status of an Indian (as defined in section 19 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. § 479)) appointed (except temporary appointments) to the Federal service under an excepted appointment under the authority of section 12 of the Act of June 18, 1934 (25 U.S.C. § 472), or any other provision of law granting a preference to Indians in personnel actions, shall be converted to a career appointment in the competitive service after three years of continuous service and satisfactory performance. The conversion shall not alter the Indian's eligibility for preference in personnel actions.

Sec. 105. Contract or grant provisions and administration [25 U.S.C. § 450j]

(a) **Applicability of Federal contracting laws and regulations; waiver of requirements**

(1) Notwithstanding any other provision of law, subject to paragraph (3), the contracts and cooperative agreements entered into with tribal organizations pursuant to section 102 [25 U.S.C. § 450f] shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.

(2) Program standards applicable to a nonconstruction self-determination contract shall be set forth in the contract proposal and the final contract of the tribe or tribal organization.

(3)(A) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. § 401 et seq.) and the regulations relating to acquisitions promulgated under such Act shall apply only to the extent that the application of such provision to the construction contract (or subcontract) is—

(i) necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) directly related to the construction activity; and

(iii) not inconsistent with this Act.

(B) A list of the Federal requirements that meet the requirements of clauses (i) through (iii) of subparagraph (A) shall be included in an attachment to the contract pursuant to negotiations between the Secretary and the tribal organization.

(C)(i) Except as provided in subparagraph (B), no Federal law listed in clause (ii) or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal Government shall apply to a construction contract that a tribe or tribal organization enters into under this Act, unless expressly provided in such law.

(ii) The laws listed in this paragraph are as follows:

(I) The Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 471 et seq.).

(II) Section 3709 of the Revised Statutes [41 U.S.C.A. § 5].

(III) Section 9(c) of the Act of Aug. 2, 1946 (60 Stat. 809, chapter 744).

(IV) Title III of the Federal Property and Administrative Services Act of 1949 (63 Stat. 393 et seq., chapter 288) [41 U.S.C. § 251 et seq.].

(V) Section 13 of the Act of Oct. 3, 1944 (58 Stat. 770; chapter 479) [50 App. U.S.C. § 1622].

(VI) Chapters 21, 25, 27, 29, and 31 of title 44, United States Code [44 U.S.C. §§ 2101 et seq., 2501 et seq., 2701 et seq., 2901 et seq. and 3101 et seq.].

(VII) Section 2 of the Act of June 13, 1934 (48 Stat 948, chapter 483) [40 U.S.C. § 276c].

(VIII) Sections 1 through 12 of the Act of June 30, 1936 (49 Stat. 2036 et seq. chapter 881) [41 U.S.C. §§ 35-45].

(IX) The Service Control Act of 1965[7] (41 U.S.C. § 351 et seq.).

(X) The Small Business Act (15 U.S.C. § 631 et seq.).

(XI) Executive Order Nos. 12138 [15 U.S.C. § 631 note], 11246 [42 U.S.C. § 2000e note], 11701 [38 U.S.C. § 4212 note] and 11758 [29 U.S.C. § 701 note].

(b) **Payments; transfer of funds by Treasury for disbursement by Tribal organization; accountability for interest accrued prior to disbursement.**

Payments of any grants or under any contracts pursuant to sections 102 and 103 of this Act [25 U.S.C. §§ 450f and 450h] may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

(c) **Term of self-determination contracts; annual renegotiation**

(1) A self-determination contract shall be—

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[7] *The reference to "The Service Control Act of 1965" is probably a typographical error. The title of the Act codified at 41 U.S.C. § 351 et seq. is "The Service Contract Act of 1965."*

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

(d) **Calendar year basis for contracts**

(1) Beginning in fiscal year 1990, upon the election of a tribal organization, the Secretary shall use the calendar year as the basis for any contracts or agreements under this Act, unless the Secretary and the Indian tribe or tribal organization agree on a different period.

(2) The Secretary shall, on or before April 1 of each year beginning in 1992, submit a report to the Congress on the amounts of any additional obligation authority needed to implement this subsection in the next following fiscal year.

(e) **Effective date for retrocession of contract**

If an Indian tribe, or a tribal organization authorized by a tribe, requests retrocession of the appropriate Secretary for any contract or portion of a contract entered into pursuant to this Act, unless the tribe or tribal organization rescinds the request for retrocession, such retrocession shall become effective on—

(1) the earlier of—

(A) the date that is 1 year after the date the Indian tribe or tribal organization submits such request; or

(B) the date on which the contract expires; or

(2) such date as may be mutually agreed by the Secretary and the Indian tribe.

(f) **Use of existing school buildings, hospitals, and other facilities and equipment therein; acquisition and donation of excess or surplus Government personal property**

In connection with any self-determination contract or grant made pursuant to section 102 or 103 of this Act [25 U.S.C. § 450f or 450h], the appropriate Secretary may—

(1) permit an Indian tribe or tribal organization in carrying out such contract or grant, to utilize existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance;

(2) donate to an Indian tribe or tribal organization title to any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, except that—

(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the contract or purchased with funds under any self-determination contract or grant agreement

shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization;

(B) if property described in subparagraph (A) has a value in excess of $ 5,000 at the time of the retrocession, rescission, or termination of the self-determination contract or grant agreement, at the option of the Secretary, upon the retrocession, rescission, or termination, title to such property and equipment shall revert to the Department of the Interior or the Department of Health and Human Services, as appropriate; and

(C) all property referred to in subparagraph (A) shall remain eligible for replacement on the same basis as if title to such property were vested in the United States; and

(3) acquire excess or surplus Government personal or real property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this Act.

(g) **Performance of personal services**

The contracts authorized under section 102 of this Act [25 U.S.C. § 450f] and grants pursuant to section 103 of this Act [25 U.S.C. § 450h] may include provisions for the performance of personal services which would otherwise be performed by Federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary: Provided, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

(h) **Fair and uniform provision by tribal organization of services and assistance to covered Indians**

Contracts and grants with tribal organizations pursuant to sections 102 and 103 of this Act [25 U.S.C. §§ 450f and 450h] shall include provisions to assure the fair and uniform provision by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

(i) **Division of administration of program**

(1) If a self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract, including program redesign in consultation with the tribal organization and all affected tribes.

(2) Nothing in this title shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable Federal law. Any tribe or tribal organization that alleges that a self-determination contract is in violation of this section may apply the provisions of section 110 [25 U.S.C. § 450m-1].

(j) **Proposal to redesign program, activity, function, or service**

Upon providing notice to the Secretary, a tribal organization that carries out a nonconstruction self-determination contract may propose a redesign of a program, activity, function, or service carried out by the tribal organization under the contract, including any

nonstatutory program standard, in such manner as to best meet the local geographic, demographic, economic, cultural, health, and institutional needs of the Indian people and tribes served under the contract. The Secretary shall evaluate any proposal to redesign any program, activity, function, or service provided under the contract. With respect to declining to approve a redesigned program, activity, function, or service under this subsection, the Secretary shall apply the criteria and procedures set forth in section 102 [25 U.S.C. § 450f].

(k) **Access to Federal sources of supply**

For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this Act shall be deemed an executive agency and part of the Indian Health Service when carrying out such contract, grant, or agreement and the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access. For purposes of carrying out such contract, grant, or agreement, the Secretary shall, at the request of an Indian tribe, enter into an agreement for the acquisition, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or under any other Federal law, including acquisitions from prime vendors. All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements.

(l) **Lease of facility used for administration and delivery of services**

(1) Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this Act.

(2) The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

(m) **Statutory requirements; technical assistance; precontract negotiation phase; fixed price construction contract**

(1) Each construction contract requested, approved, or awarded under this Act shall be subject to—

(A) except as otherwise provided in this Act, the provisions of this Act, other than sections 102(a)(2), 106(l), 108 and 109 [25 U.S.C. §§ 450f(a)(2), 450j-1(l), 450l and 450m]; and

(B) section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (104 Stat. 1959) [25 U.S.C. § 450f note].

(2) In providing technical assistance to tribes and tribal organizations in the development of construction contract proposals, the Secretary shall provide, not later than 30 days after receiving a request from a tribe or tribal organization, all information available to the Secretary regarding the construction project, including construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments or environmental impact reports, and archaeological reports.

(3) Prior to finalizing a construction contract proposal pursuant to section 102(a) [25 U.S.C. § 450f(a)], and upon request of the tribe or tribal organization that submits the proposal, the Secretary shall provide for a precontract negotiation phase in the development of a contract proposal. Such phase shall include, at a minimum, the following elements:

(A) The provision of technical assistance pursuant to section 103 [25 U.S.C. § 450h] and paragraph (2).

(B) A joint scoping session between the Secretary and the tribe or tribal organization to review all plans, specifications, engineering reports, cost estimates, and other information available to the parties, for the purpose of identifying all areas of agreement and disagreement.

(C) An opportunity for the Secretary to revise the plans, designs, or cost estimates of the Secretary in response to concerns raised, or information provided by, the tribe or tribal organization.

(D) A negotiation session during which the Secretary and the tribe or tribal organization shall seek to develop a mutually agreeable contract proposal.

(E) Upon the request of the tribe or tribal organization, the use of an alternative dispute resolution mechanism to seek resolution of all remaining areas of disagreement pursuant to the dispute resolution provisions under subchapter IV of chapter 5 of title 5 [5 U.S.C. § 571 et seq.], United States Code.

(F) The submission to the Secretary by the tribe or tribal organization of a final contract proposal pursuant to section 102(a) [25 U.S.C. § 450f(a)].

(4)(A) Subject to subparagraph (B), in funding a fixed-price construction contract pursuant to section 106(a) [25 U.S.C. § 450j-1(a)], the Secretary shall provide for the following:

(i) The reasonable costs to the tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract.

(ii) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract and other relevant considerations.

(B) In establishing a contract budget for a construction project, the Secretary shall not be required to separately identify the components described in clauses (i) and (ii) of subparagraph (A).

(C) The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties, including the following costs:

(i) The reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of this Act and any other applicable law.

(ii) The costs of preparing the contract proposal and supporting cost data.

(iii) The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract.

(iv) In the case of a fixed-price contract, a fair profit determined by taking into consideration the relevant risks and local market conditions.

(v) If the Secretary and the tribe or tribal organization are unable to develop a mutually agreeable construction contract proposal pursuant to the procedures set forth

in this subsection, the tribe or tribal organization may submit a final contract proposal to the Secretary. Not later than 30 days after receiving such final contract proposal, the Secretary shall approve the contract proposal and award the contract, unless, during such period the Secretary declines the proposal pursuant to sections 102(a)(2) and 102(b) of section 102 [25 U.S.C. § 450f(a)(2) and (b)] (including providing opportunity for an appeal pursuant to section 102(b) [25 U.S.C. § 450f(b)]).

(n) **Rental rates for housing for Government employees in Alaska**

Notwithstanding any other provision of law, the rental rates for housing provided to an employee by the Federal Government in Alaska pursuant to a self-determination contract shall be determined on the basis of—

(1) the reasonable value of the quarters and facilities (as such terms are defined under section 5911 of title 5, United States Code) to such employee, and

(2) the circumstances under which such quarters and facilities are provided to such employee,

as based on the cost of comparable private rental housing in the nearest established community with a year-round population of 1,500 or more individuals.

(o) **Patient records**

(1) **In general**

At the option of an Indian tribe or tribal organization, patient records may be deemed to be Federal records under those provisions of title 44, United States Code, that are commonly referred to as the "Federal Records Act of 1950" for the limited purposes of making such records eligible for storage by Federal Records Centers to the same extent and in the same manner as other Department of Health and Human Services patient records.

(2) **Treatment of records**

Patient records that are deemed to be Federal records under those provisions of title 44, United States Code, that are commonly referred to as the "Federal Records Act of 1950" pursuant to this subsection shall not be considered Federal records for the purposes of chapter 5 of title 5, United States Code [5 U.S.C. § 500 et seq.].

Sec. 106. Contract funding and indirect costs [25 U.S.C. § 450j-1]

(a) **Amount of funds provided**

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under section 106(a)(1).

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 8 [25 U.S.C. § 13a].

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) **Reductions and increases in amount of funds provided**

The amount of funds required by subsection (a)—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c) [25 U.S.C. § 450j(c)].

Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

(c) **Annual reports**

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 105(d) [25 U.S.C. § 450j(d)].

(d) **Treatment of shortfalls in indirect and cost recoveries**

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) **Liability for indebtedness incurred before fiscal year 1992**

Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(f) **Limitation on remedies relating to costs disallowances**

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to enactment of chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.] [enacted Oct. 19, 1984], any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 110 [25 U.S.C. § 450m-1]. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31 [31 U.S.C. § 7501 et seq.], United States Code, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. § 476).

(g) **Addition to contract of full amount contractor entitled; adjustment**

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(h) **Indirect costs for contracts for construction programs**

In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(i) **Indian Health Service and Bureau of Indian Affairs budget consultations**

On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(j) **Use of funds for matching or cost participation requirements**

Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) **Allowable uses of funds without approval of Secretary**

Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this Act.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(l) **Suspension, withholding, or delay in payment of funds**

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(m) **Use of program income earned**

The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(n) **Reduction of administrative and other responsibilities of the Secretary; use of savings**

To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a), the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(o) **Rebudgeting by tribal organization**

Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

Indian Health Service Funds; permissible uses [25 U.S.C. § 450j-2]

That, heretofore and hereafter and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act[8] or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

Indian self-determination or self-governance contract or grant support cost funds; permissible uses [25 U.S.C. § 450j-3]

Notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, hereafter funds available to the Department of the Interior for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act of 1975 and hereafter funds appropriated in this title[9] shall not be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact or funding agreement entered into between an Indian tribe or tribal organization and any entity other than an agency of the Department of the Interior.

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[8] *This Act, referred to in text, is Department of the Interior and Related Agencies Appropriations Act, 1999, Pub.L. 105-277, Div. A, §101(e), Oct. 21, 1998, 112 Stat. 2681-231. 25 U.S.C.A. § 450j-2 note.*

[9] *This title, referred to in text, means Pub.L. 106-113, Div. B, § 1000(a)(3) [Title I], Nov. 29, 1999, 113 Stat. 1535, 1501A-135. 25 U.S.C.A. § 450j-3 note.*

Sec. 107. Rules and Regulations [25 U.S.C. § 450k]

(a) Authority of Secretaries of the Interior and of Health and Human Services to promulgate rules and regulations; time restriction

(1) Except as may be specifically authorized in this subsection, or in any other provision of this Act, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this Act relating to chapter 171 of title 28 [28 U.S.C. § 2671 et seq.], United States Code, commonly known as the "Federal Tort Claims Act", the Contract Disputes Act of 1978 (41 U.S.C. § 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103 [25 U.S.C. § 450h], property donation procedures arising under section 105(f) [25 U.S.C. § 450j(f)], internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this Act, including the regulations referred to in this subsection, shall be promulgated—

(i) in conformance with sections 552 and 553 of title 5, United States Code and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this Act shall expire if final regulations are not promulgated within 20 months after the date of enactment of the Indian Self-Determination Contract Reform Act of 1994 [enacted Oct. 25, 1994].

(b) Conflicting laws and regulations

The provisions of this Act shall supersede any conflicting provisions of law (including any conflicting regulations) in effect on the day before the date of enactment of the Indian Self-Determination Contract Reform Act of 1994 [enacted Oct. 25, 1994], and the Secretary is authorized to repeal any regulation inconsistent with the provisions of this Act.

(c) Revisions and amendments; procedures applicable

The Secretary of the Interior and the Secretary of Health and Human Services are authorized, with the participation of Indian tribes and tribal organizations, to revise and amend any rules or regulations promulgated pursuant to this section: Provided, That prior to any revision or amendment to such rules or regulations, the respective Secretary or Secretaries shall present the proposed revision or amendment to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives and shall, to the extent practicable, consult with appropriate national or regional Indian organizations and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

(d) Consultation in drafting and promulgating; negotiation process; interagency committees; extension of deadlines

(1) In drafting and promulgating regulations as provided in subsection (a) (including drafting and promulgating any revised regulations), the Secretary of the Interior and the

Secretary of Health and Human Services shall confer with, and allow for active participation by, representatives of Indian tribes, tribal organizations, and individual tribal members.

(2)(A) In carrying out rulemaking processes under this Act, the Secretary of the Interior and the Secretary of Health and Human Services shall follow the guidance of—

(i) subchapter III of chapter 5 of title 5 [5 U.S.C. § 571 et seq.], United States Code, commonly known as the "Negotiated Rulemaking Act of 1990"; and

(ii) the recommendations of the Administrative Conference of the United States numbered 82-4 and 85-5 entitled "Procedures for Negotiating Proposed Regulations" under sections 305.82-4 and 305.85-5 of title 1, Code of Federal Regulations, and any successor recommendation or law (including any successor regulation).

(B) The tribal participants in the negotiation process referred to in subparagraph (A) shall be nominated by and shall represent the groups described in this paragraph and shall include tribal representatives from all geographic regions.

(C) The negotiations referred to in subparagraph (B) shall be conducted in a timely manner. Proposed regulations to implement the amendments made by the Indian Self-Determination Contract Reform Act of 1994 shall be published in the Federal Register by the Secretary of the Interior and the Secretary of Health and Human Services not later than 180 days after the date of enactment of such Act [enacted Oct. 25, 1994].

(D) Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund such interagency committees or other interagency bodies, including advisory bodies comprised of tribal representatives, as may be necessary or appropriate to carry out the provisions of this Act.

(E) If the Secretary determines that an extension of the deadlines under subsection (a)(2)(B) and subparagraph (C) of this paragraph is appropriate, the Secretary may submit proposed legislation to Congress for the extension of such deadlines.

(e) **Exceptions in or waiver of regulations**

The Secretary may, with respect to a contract entered into under this Act, make exceptions in the regulations promulgated to carry out this Act, or waive such regulations, if the Secretary finds that such exception or waiver is in the best interest of the Indians served by the contract or is consistent with the policies of this Act, and is not contrary to statutory law. In reviewing each request, the Secretary shall follow the timeline, findings, assistance, hearing, and appeal procedures set forth in section 102 [25 U.S.C. § 450f].

Sec. 108. Contract or grant specifications [25 U.S.C. § 450l]

(a) **Terms**

Each self-determination contract entered into under this Act shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

(b) **Payments; Federal records**

Notwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of such model agreement. As provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such

section shall not be considered Federal records for purposes of chapter 5 of title 5 [5 U.S.C. § 500 et seq.], United States Code.

(c) **Model agreement**

The model agreement referred to in subsection (a)(1) reads as follows:

"Section 1. Agreement between the Secretary and the _____Tribal Government.

"(a) **Authority and purpose.—**

"(1) **Authority**.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) are incorporated in this agreement.

"(2) **Purpose**.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act [25 U.S.C. § 450f(a)], including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) **Terms, provisions, and conditions**.—

"(1) **Term**.--Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j(c)(1)), the term of this contract shall be -- years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. § 450j(d)) [25 U.S.C. § 450j(d)(1)], upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

"(2) **Effective date**.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

"(3) **Program standard**.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

"(4) **Funding amount**.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j-1) [25 U.S.C. § 450j-1(a)].

"(5) **Limitation of costs**.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity

conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

"(6) **Payment**.—

"(A) **In general**.—Payments to the Contractor under this Contract shall—

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

"(B) **Quarterly, semiannual, lump-sum, and other methods of payment**.—

"(i) **In general**.—Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act [subsec. (b) of this section], and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) **Method of quarterly payment**.--If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

"(iii) **Applicability**.—Chapter 39 of title 31 [31 U.S.C. § 3901 et seq.], United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

"(7) **Records and monitoring**.—

"(A) **In general**.—Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of chapter 5 of title 5 [5 U.S.C. § 500 et seq.], United States Code.

"(B) **Recordkeeping system**.—The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

"(C) **Responsibilities of Contractor**.—The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the

Contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this Contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless—

"(i) the Contractor agrees to one or more additional visits; or

"(ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist.

No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

"(8) **Property**.—

"(A) **In general**.—As provided in section 105(f) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j(f)), at the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonably divisible real property, facilities, equipment, and personal property that the Secretary has used to provide or administer the programs, services, functions, and activities covered by this Contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

"(B) **Records**.—The Contractor shall maintain a record of all property referred to in subparagraph (A) or other property acquired by the Contractor under section 105(f)(2)(A) of such Act [25 U.S.C. § 450j(f)(2)(A)] for purposes of replacement.

"(C) **Joint use agreements**.—Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the parties of real or personal property that is not reasonably divisible.

"(D) **Acquisition of property**.—The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgment of the Contractor to support the programs, services, functions, and activities operated pursuant to this Contract.

"(E) **Confiscated or excess property**.—The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

"(F) **Screener identification card**.—A screener identification card (General Services Administration form numbered 2946) shall be issued to the Contractor not later than the effective date of this Contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

"(G) **Capital equipment**.—The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

"(9) **Availability of funds**.—Notwithstanding any other provision of law, any funds provided under this Contract—

"(A) shall remain available until expended; and

"(B) with respect to such funds, no further—

"(i) approval by the Secretary, or

"(ii) justifying documentation from the Contractor,

shall be required prior to the expenditure of such funds.

"(10) **Transportation**.—Beginning on the effective date of this Contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this Contract.

"(11) **Federal program guidelines, manuals, or policy directives**.—Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

"(12) **Disputes**.—

"(A) **Third-party mediation defined**.—For the purposes of this Contract, the term 'third-party mediation' means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of the Interior, the Secretary of Health and Human Services, or the Contractor, to serve as a third-party mediator to mediate disputes under this Contract.

"(B) **Alternative procedures**.—In addition to, or as an alternative to, remedies and procedures prescribed by section 110 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450m-1), the parties to this Contract may jointly—

"(i) submit disputes under this Contract to third-party mediation;

"(ii) submit the dispute to the adjudicatory body of the Contractor, including the tribal court of the Contractor;

"(iii) submit the dispute to mediation processes provided for under the laws, policies, or procedures of the Contractor; or

"(iv) use the administrative dispute resolution processes authorized in subchapter IV of chapter 5 of title 5 [5 U.S.C. § 571 et seq.], United States Code.

"(C) **Effect of decisions**.—The Secretary shall be bound by decisions made pursuant to the processes set forth in subparagraph (B), except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

"(13) **Administrative procedures of Contractor**.—Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. § 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

"(14) **Successor annual funding agreement**.—

"(A) **In general**.—Negotiations for a successor annual funding agreement, provided for in subsection (f)(2), shall begin not later than 120 days prior to the

conclusion of the preceding annual funding agreement. Except as provided in section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j(c)(2)) the funding for each such successor annual funding agreement shall only be reduced pursuant to section 106(b) of such Act (25 U.S.C. § 450j-1(b)).

"(B) **Information**.—The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection (f)(2) of this Contract.

"(15) **Contract requirements; approval by Secretary**.—

"(A) **In general**.—Except as provided in subparagraph (B), for the term of the Contract, section 2103 of the Revised Statutes (25 U.S.C. § 81), section 16 of the Act of June 18, 1934 (48 Stat. 987, chapter 576; 25 U.S.C. § 476), and the Act of July 3, 1952 (25 U.S.C. § 82a), shall not apply to any contract entered into in connection with this Contract.

"(B) **Requirements**.—Each Contract entered into by the Contractor with a third party in connection with performing the obligations of the Contractor under this Contract shall—

"(i) be in writing;

"(ii) identify the interested parties, the authorities of such parties, and purposes of the Contract;

"(iii) state the work to be performed under the Contract; and

"(iv) state the process for making any claim, the payments to be made, and the terms of the Contract, which shall be fixed.

"(c) **Obligation of the Contractor**.—

"(1) **Contract performance**.—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) **Amount of funds**.—The total amount of funds to be paid under this Contract pursuant to section 106(a) [25 U.S.C. § 450j-1(a)] shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) **Contracted programs**.—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

"(4) **Trust services for individual Indians.**—

"(A) **In general**.—To the extent that the annual funding agreement provides funding for the delivery of trust services to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

"(B) **Trust services to individual Indians**.—For the purposes of this paragraph only, the term 'trust services for individual Indians' means only those services that pertain to land or financial management connected to individually held allotments.

"(5) **Fair and uniform services**.—The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

"(d) **Obligation of the United States**.—

"(1) **Trust responsibility**.—

"(A) **In general**.—The United States reaffirms the trust responsibility of the United States to the -- Indian tribe(s) to protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.

"(B) **Construction of contract**.--Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

"(2) **Good faith**.—To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.).

"(3) **Programs retained**.—As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in the annual funding agreement under subsection (f)(2).

"(e) **Other Provisions**.—

"(1) **Designated officials**.—Not later than the effective date of this Contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the Contract, and other purposes for this Contract.

"(2) **Contract modifications or amendment**.—

"(A) **In general**.—Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

"(B) **Exception**.—The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2) [25 U.S.C. § 450j-1(b)(2)], shall not be subject to subparagraph (A).

"(3) **Officials not to benefit**.—No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Contract if such contract is made with a corporation for the general benefit of the corporation.

"(4) **Covenant against contingent fees**.—The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide

established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

"(f) **Attachments**.—

"(1) **Approval of contract**.—Unless previously furnished to the Secretary, the resolution of the -- Indian tribe(s) authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as attachment 1.

"(2) **Annual funding agreement**.—

"(A) **In general.**—The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) **Incorporation by reference.**—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

Sec. 109. Rescission of contract or grant and assumption of control of program, etc.; authority; grounds; procedure; correction of violation as prerequisite to new contract or grant agreement; construction with occupational safety and health requirements [25 U.S.C. § 450m]

Each contract or grant agreement entered into pursuant to sections 102 [25 U.S.C. § 450f], 103 [25 U.S.C. § 450h], and 104[10] of this Act shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, or in the management of trust fund, trust lands or interests in such lands pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and a hearing on the record to such tribal organization, rescind such contract or grant agreement, in whole or in part, and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by the Secretary to remedy the contract deficiency, except that the appropriate Secretary may, upon written notice to a tribal organization, and the tribe served by the tribal organization, immediately rescind a contract or grant, in whole or in part, and resume control or operation of a program, activity, function, or service, if the Secretary finds that (i) there is an immediate threat of imminent harm to the safety of any person, or imminent substantial and irreparable harm to trust funds, trust lands, or interests in such lands, and (ii) such threat arises from the failure of the contractor to fulfill the requirements of the contract. In such

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[10] *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

cases, the Secretary shall provide the tribal organization with a hearing on the record within ten days or such later date as the tribal organization may approve. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. In any hearing or appeal provided for under this section, the Secretary shall have the burden of proof to establish, by clearly demonstrating the validity of the grounds for rescinding, assuming, or reassuming the contract that is the subject of the hearing. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. § 651 [et seq.]).

Sec. 110. Contract disputes and claims [25 U.S.C. § 450m-1]

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) [25 U.S.C. § 450f(a)(2)] or to compel the Secretary to award and fund an approved self-determination contract).

(b) Revision of contracts

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

(c) Application of laws to administrative appeals

The Equal Access to Justice Act (Publ[i]c Law 96-481, Act of October 1, 1980; 92 Stat. 2325, as amended)[11], section 504 of title 5, United States Code, and section 2412 of title 28, United States Code shall apply to administrative appeals pending on or filed after the date of enactment of the Indian Self-Determination and Education Assistance Act Amendments of 1988 [enacted Oct. 5, 1988] by tribal organizations regarding self-determination contracts.

(d) Application of Contract Disputes Act

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. § 601 et seq.] shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. § 607).

(e) Application of subsection (d)

Subsection (d) of this section shall apply to any case pending or commenced on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services except that in any such cases finally

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[11] *As so in the original. The correct cite to the Equal Access to Justice Act, referred to in subsec. (c), is Pub.L. 96-481, Title II, Oct. 21, 1980, 94 Stat. 21325.*

disposed of before the date of enactment of these amendments [enacted Oct. 5, 1988], the thirty-day period referred to in section 504(a)(2) of title 5, United States Code, shall be deemed to commence on the date of enactment of this subsection [enacted Oct. 5, 1988].

Sec. 111. Sovereign immunity and trusteeship rights unaffected [25 U.S.C. § 450n]

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

Title III – Tribal Self-Governance Demonstration Project
[25 U.S.C. § 450f note]

[Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734.]

[Note: Section 11 of P.L. 106-260 reads, "Funds appropriated for title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f note) shall be available for use under title V of such Act."]

Title IV – Tribal Self-Governance

Sec. 401. Establishment [25 U.S.C. § 458aa]

The Secretary of the Interior (hereinafter in this title [25 U.S.C. § 458aa et seq.] referred to as the "Secretary") shall establish and carry out a program within the Department of the Interior to be known as Tribal Self-Governance (hereinafter in this title [25 U.S.C. § 458aa et seq.] referred to as "Self-Governance") in accordance with this title [25 U.S.C. § 458aa et seq.].

Sec. 402. Selection of participating Indian tribes [25 U.S.C. § 458bb]

(a) Continuing participation

Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project at the Department of the Interior under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] on the date of enactment of this title [enacted Oct. 25, 1994] shall thereafter participate in Self-Governance under this title [25 U.S.C. § 458aa et seq.] and cease participation in the Tribal Self-Governance Demonstration Project under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] with respect to the Department of the Interior.

(b) Additional participants

(1) 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.

(2) 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.

(c) Applicant pool

The qualified applicant pool for Self-Governance shall consist of each tribe that—

(1) successfully completes the planning phase described in subsection (d);

(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.

(d) Planning phase

Each Indian tribe seeking to begin participation in Self-Governance shall complete a planning phase in accordance with this subsection. The tribe shall be eligible for a grant to plan and negotiate participation in Self-Governance. The planning phase shall include—

(1) legal and budgetary research; and

(2) internal tribal government planning and organizational preparation.

Sec. 403. Funding agreements [25 U.S.C. § 458cc]

(a) Authorization

The Secretary shall negotiate and enter into an annual written funding agreement with the governing body of each participating tribal government in a manner consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people.

(b) **Contents**

Each funding agreement shall—

(1) authorize the tribe to plan, conduct, consolidate, and administer programs, services, 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), 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;

(2) 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 405(c) [25 U.S.C. § 458ee(c)], 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;

(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 programs described in paragraph (2), a joint agreement between the Secretary and the tribe shall be required;

(4) prohibit the inclusion of funds provided—

(A) pursuant to the Tribally Controlled Community College Assistance Act of 1978 [Tribally Controlled College or University Assistance Act of 1978] (25 U.S.C. § 1801 et seq.);

(B) for elementary and secondary schools under the formula developed pursuant to section 1128 of the Education Amendments of 1978 (25 U.S.C. § 2008); 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 102 [25 U.S.C. § 450f];

(5) specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretary pursuant to the agreement;

(6) authorize the tribe and the Secretary to reallocate funds or modify budget allocations within any year, and specify the procedures to be used;

(7) allow for retrocession of programs or portions of programs pursuant to section 105(e) [25 U.S.C. § 450j(e)];

(8) provide that, for the year for which, and to the extent to which, funding is provided to a tribe under this section, the tribe—

(A) shall not be entitled to contract with the Secretary for such funds under section 102 [25 U.S.C. § 450f], except that such tribe shall be eligible for new programs on the same basis as other tribes; and

(B) shall be responsible for the administration of programs, services, functions, and activities pursuant to agreements entered into under this section; and

(9) prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, and other laws.

(c) **Additional activities**

Each funding agreement negotiated pursuant to subsections (a) and (b) may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.

(d) **Provisions relating to the Secretary**

Funding agreements negotiated between the Secretary and an Indian tribe shall include provisions—

(1) to monitor the performance of trust functions by the tribe through the annual trust evaluation, and

(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.

(e) **Construction projects**

(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 [41 U.S.C. § 401 et seq.] and Federal acquisition regulations in any funding agreement entered into under this Act. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply.

(2) In all construction projects performed pursuant to this title [25 U.S.C. § 458aa et seq.], the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements.

(f) **Submission for review**

Not later than 90 days before the proposed effective date of an agreement entered into under this section, the Secretary shall submit a copy of such agreement to—

(1) each Indian tribe that is served by the Agency that is serving the tribe that is a party to the funding agreement;

(2) the Committee on Indian Affairs of the Senate; and

(3) the Subcommittee on Native American Affairs of the Committee on Natural Resources of the House of Representatives.

(g) **Payment**

(1) At the request of the governing body of the tribe and under the terms of an agreement entered into under this section, the Secretary shall provide funding to the tribe to carry out the agreement.

(2) The funding agreements authorized by this title [25 U.S.C. § 458aa et seq.] and title III of this Act [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] shall provide for advance payments to the tribes in the form of annual or semi-annual installments at the discretion of the tribes.

(3) Subject to paragraph (4) of this subsection and paragraphs (1) through (3) of subsection (b), the Secretary shall provide funds to the tribe under an agreement under this title [25 U.S.C. § 458aa et seq.] for programs, services, functions, and activities, or portions thereof, in an amount equal to the amount that the tribe would have been eligible to receive under contracts and grants under this Act, including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the tribe or its members, without regard to the organization level within the Department where such functions are carried out.

(4) Funds for trust services to individual Indians shall be available under an agreement entered into under this section only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the tribe.

(h) **Civil actions**

(1) Except as provided in paragraph (2), for the purposes of section 110 [25 U.S.C. § 450m-1], the term "contract" shall include agreements entered into under this title [25 U.S.C. § 458aa et seq.].

(2) For the period that an agreement entered into under this title [25 U.S.C. § 458aa et seq.] is in effect, the provisions of section 2103 of the Revised Statutes of the United States (25 U.S.C. § 81), section 16 of the Act of June 18, 1934 (25 U.S.C. § 476), 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 title [25 U.S.C. § 458aa et seq.].

(i) **Facilitation**

(1) Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that will facilitate—

(A) the inclusion of programs, services, functions, and activities in the agreements entered into under this section; and

(B) the implementation of agreements entered into under this section.

(2)(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.

(j) **Funds**

All funds provided under funding agreements entered into pursuant to this Act, and all funds provided under contracts or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching requirements under any other Federal law.

(k) **Disclaimer**

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 sections 403(b)(2) and 405(c)(1) [subsec. (b)(2) of this section and 25 U.S.C. § 458ee(c)(1)] with respect to functions that are inherently Federal or where the statute establishing the existing 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 section 403(b)(2) [subsec. (b)(2) of this section].

(l) **Incorporate self-determination provisions**

At the option of a participating tribe or tribes, any or all provisions of title I of this Act shall be made part of an agreement entered into under title III of this Act [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] or this title [25 U.S.C. § 458aa et seq.]. 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 [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] or this title [25 U.S.C. § 458aa et seq.].

Sec. 404. Budget request [25 U.S.C. § 458dd]

The Secretary shall identify, in the annual budget request of the President to the Congress under section 1105 of title 31, United States Code, any funds proposed to be included in agreements authorized under this title [25 U.S.C. § 458aa et seq.].

Sec. 405. Reports [25 U.S.C. § 458ee]

(a) **Requirement**

The Secretary shall submit to Congress a written report on January 1 of each year following the date of enactment of this title [enacted Oct. 25, 1994] regarding the administration of this title [25 U.S.C. § 458aa et seq.].

(b) **Contents**

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).

(c) **Report on non-BIA programs**

(1) In order to optimize opportunities for including non-Bureau of Indian Affairs programs, services, functions, and activities, or portions thereof, in agreements with tribes participating in Self-Governance under this title [25 U.S.C. § 458aa et seq.], the Secretary shall—

(A) review all programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, without regard to the agency or office concerned; and

(B) not later than 90 days after the date of enactment of this title [enacted Oct. 25, 1994], provide to the appropriate committees of Congress a listing of all such programs, services, functions, and activities, or portions thereof, that the Secretary determines, with the concurrence of tribes participating in Self-Governance under this title [25 U.S.C. § 458aa et seq.], are eligible for inclusion in such agreements at the request of a participating Indian tribe.

(2) The Secretary shall establish programmatic targets, after consultation with tribes participating in Self-Governance under this title [25 U.S.C. § 458aa et seq.], to encourage bureaus of the Department to assure that a significant portion of such programs, services, functions, and activities are actually included in the agreements negotiated under section 403 [25 U.S.C. § 458cc].

3) The listing and targets under paragraphs (1) and (2) shall be published in the Federal Register and be made available to any Indian tribe participating in Self-Governance under this title [25 U.S.C. § 458aa et seq.]. The list shall be published before January 1, 1995, and annually thereafter by January 1 preceding the fiscal year in which the targets are to be met.

(4) Thereafter, the Secretary shall annually review and publish in the Federal Register, after consultation with tribes participating in Self-Governance under this title [25 U.S.C. § 458aa et seq.], a revised listing and programmatic targets.

(d) **Report on Central Office funds**

Within 90 days after the date of the enactment of this title [enacted Oct. 25, 1994], the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs for inclusion in the Self-Governance compacts. The Secretary shall include such formula in the annual report submitted to the Congress under subsection (b), together with the views of the affected Indian tribes.

Sec. 406. Disclaimers [25 U.S.C. § 458ff]

(a) **Other services, contracts, and funds**

Nothing in this title [25 U.S.C. § 458aa et seq.] 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 102 [25 U.S.C. § 450f] or any other applicable Federal law.

(b) **Federal trust responsibilities**

Nothing in this Act shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments.

(c) **Application of other sections of Act**

All provisions of sections [5(d)], 6, 102(c), 104, 105(f), 110, and 111 of this Act [25 U.S.C. §§ 450c(d), 450d, 450f(c), 450i, 450j(f), 450m-1, and 450n][12] shall apply to agreements provided under this title [25 U.S.C. § 458aa et seq.].

Sec. 407. Regulations [25 U.S.C. § 458gg]

(a) **In general**

Not later than 90 days after the date of enactment of this title [enacted Oct. 25, 1994], at the request of a majority of the Indian tribes with agreements under this title [25 U.S.C. § 458aa et seq.], the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5 [5 U.S.C. § 571 et seq.], United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title [25 U.S.C. § 458aa et seq.].

(b) **Committee**

A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be representatives of Indian tribes with agreements under this title [25 U.S.C. § 458aa et seq.].

(c) **Adaptation of procedures**

The Secretary shall adapt the negotiated rulemaking procedures to the unique context of Self-Governance and the government-to-government relationship between the United States and the Indian tribes.

(d) **Effect**

The lack of promulgated regulations shall not limit the effect of this title [25 U.S.C. §§ 458aa et seq.].

Sec. 408. Authorization of appropriations [25 U.S.C. § 458hh]

There are authorized to be appropriated such sums as may be necessary to carry out this title [25 U.S.C. § 458aa et seq.].

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[12] *Public Law 105-288 permanently amended the Act by making § 450c(d) of the ISDEAA (section 5(d)) applicable to Title V. (Cong. Rec. p. H11115, Oct. 19, 1988.)*

Title V – Tribal Self-Governance Amendments of 2000

An Act

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

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

Sec. 1. Short Title [25 U.S.C. § 450 note]

This Act may be cited as the "Tribal Self-Governance Amendments of 2000".

Sec. 2. Findings [25 U.S.C. § 458aaa note]

Congress finds that—

(1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes;

(3) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs;

(4) the Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450f note) [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] was designed to improve and perpetuate the government-to-government relationship between Indian tribes and the United States and to strengthen tribal control over Federal funding and program management;

(5) although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to tribal governments, upon tribal request, over decision making for Federal programs, services, functions, and activities (or portions thereof)—

(A) is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian tribes; and

(B) strengthens the Federal policy of Indian self-determination.

Sec. 3. Declaration of Policy [25 U.S.C. § 458aaa note]

It is the policy of Congress—

(1) to permanently establish and implement tribal self-governance within the Department of Health and Human Services;

(2) to call for full cooperation from the Department of Health and Human Services and its constituent agencies in the implementation of tribal self-governance—

(A) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;

(B) to permit each Indian tribe to choose the extent of its participation in self-governance in accordance with the provisions of the Indian Self-Determination and Education Assistance Act [25 U.S.C. § 450 et seq.] relating to the provision of Federal services to Indian tribes;

(C) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals;

(D) to affirm and enable the United States to fulfill its obligations to the Indian tribes under treaties and other laws;

(E) to strengthen the government-to-government relationship between the United States and Indian tribes through direct and meaningful consultation with all tribes;

(F) to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of the individual tribal communities;

(G) to provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian tribes;

(H) to encourage the Secretary to identify all programs, services, functions, and activities (or portions thereof) of the Department of Health and Human Services that may be managed by an Indian tribe under this Act [25 U.S.C. § 458 et seq.] and to assist Indian tribes in assuming responsibility for such programs, services, functions, and activities (or portions thereof); and

(I) to provide Indian tribes with the earliest opportunity to administer programs, services, functions, and activities (or portions thereof) from throughout the Department of Health and Human Services.

Sec. 4. Tribal Self-Governance

The Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) is amended by adding at the end the following:

Sec. 501. Definitions [25 U.S.C. § 458aaa]

(a) **In general**

In this title [25 U.S.C. § 458aaa et seq.]:

(1) **Construction project**

The term "construction project"—

(A) means an organized noncontinuous 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 4(m) [25 U.S.C. § 450b(m)], that may otherwise be included in a funding agreement under this title [25 U.S.C. § 458aaa et seq.].

(2) **Construction project agreement**

The term "construction project agreement" means a negotiated agreement between the Secretary and an Indian tribe, that at a minimum—

(A) establishes project phase start and completion dates;

(B) defines a specific scope of work and standards by which it will be accomplished;

(C) identifies the responsibilities of the Indian tribe and the Secretary;

(D) addresses environmental considerations;

(E) identifies the owner and operations and maintenance entity of the proposed work;

(F) provides a budget;

(G) provides a payment process; and

(H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

(3) **Gross mismanagement**

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.

(4) **Inherent Federal functions**

The term "inherent Federal functions" means those Federal functions which cannot legally be delegated to Indian tribes.

(5) **Inter-tribal consortium**

The term "inter-tribal consortium" means a coalition of two more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations.

(6) **Secretary**

The term "Secretary" means the Secretary of Health and Human Services.

(7) **Self-governance**

The term "self-governance" means the program of self-governance established under section 502 [25 U.S.C. § 458aaa-1].

(8) **Tribal share**

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.

(b) **Indian tribe**

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 title [25 U.S.C. § 458aaa et seq.], 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 [25 U.S.C. § 458aaa et seq.]). In such event, the term "Indian tribe" as used in this title [25 U.S.C. § 458aaa et seq.] shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

Sec. 502. Establishment [25 U.S.C. § 458aaa-1]

The Secretary shall establish and carry out a program within the Indian Health Service of the Department of Health and Human Services to be known as the "Tribal Self-Governance Program" in accordance with this title [25 U.S.C. § 458aaa et seq.].

Sec. 503. Selection of participating Indian tribes [25 U.S.C. § 458aaa-2][13]

(a) **Continuing participation**

Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] on the date of the enactment of this title [enacted Aug. 18, 2000] may elect to participate in self-governance under this title [25 U.S.C. § 458aaa et seq.] under existing authority as reflected in tribal resolution.

(b) **Additional participants**

(1) **In general**

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.

(2) **Treatment of certain Indian tribes**

(A) **In general.** 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 Indian tribe meets the eligibility criteria specified in subsection (c).

(B) **Effect of withdrawal.** 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.

(C) **Participation in self-governance.** 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.

(c) **Applicant pool**

(1) **In general**

The qualified applicant pool for 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

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[13] *Section 12 of the Tribal Self-Governance Amendments of 2000 states that nothing in the Act is meant to affect certain rights or prohibitions applicable to tribes in Alaska. With regard to health programs in Alaska, Pub.L. 105-83, § 325 and Pub.L. 105-277, § 351 have substantially modified tribal rights to enter ISDEAA agreements.*

For tribes in Alaska's Ketchican Gateway Borough, the ability to enter into health care agreements under the ISDEAA is further modified by Title II of Pub.L. 105-143, as amended.

(C) has demonstrated, for 3 fiscal years, financial stability and financial management capability.

(2) **Criteria for determining financial stability and financial management capacity**

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.

(d) **Planning phase**

Each Indian tribe seeking participation in self-governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian tribe and shall include—

(1) legal and budgetary research; and

(2) internal tribal government planning and organizational preparation relating to the administration of health care programs.

(e) **Grants**

Subject to the availability of appropriations, any Indian tribe meeting the requirements of paragraph (1)(B) and (C) of subsection (c) shall be eligible for grants—

(1) to plan for participation in self-governance; and

(2) to negotiate the terms of participation by the Indian tribe or tribal organization in self-governance, as set forth in a compact and a funding agreement.

(f) **Receipt of grant not required**

Receipt of a grant under subsection (e) shall not be a requirement of participation in self-governance.

Sec. 504. Compacts [25 U.S.C. § 458aaa-3]

(a) **Compact required**

The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) **Contents**

Each compact required under subsection (a) 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.

(c) **Existing compacts**

An Indian tribe participating in the Tribal Self-Governance Demonstration Project under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] on the date of the enactment of this title [enacted Aug. 18, 2000] shall have the option at any time after the date of the enactment of this title [enacted Aug. 18, 2000] to—

(1) retain the Tribal Self-Governance Demonstration Project compact of that Indian tribe (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title; or

(2) instead of retaining a compact or portion thereof under paragraph (1), negotiate a new compact in a manner consistent with the requirements of this title.

(d) **Term and effective date**

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.

Sec. 505. Funding agreements [25 U.S.C. § 458aaa-4]

(a) **Funding agreement required**

The Secretary shall negotiate and enter into a written funding agreement with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) **Contents**

(1) **In general**

Each funding agreement required 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, 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.

(2) **Inclusion of certain programs, services, functions, and activities**

Such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, activities (or portions thereof), including grants (which may be added to a funding agreement after an award of such 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 office functions so administered under the authority of—

(A) the Act of November 2, 1921 (42 Stat. 208; chapter 115; 25 U.S.C. § 13);

(B) the Act of April 16, 1934 (48 Stat. 596; chapter 147; 25 U.S.C. § 452 et seq.);

(C) the Act of August 5, 1954 (68 Stat. 674; chapter 658) [42 U.S.C. § 2001 et seq.];

(D) the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.);

(E) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. § 2401 et seq.);

(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).

(c) **Inclusion in compact or funding agreement**

It shall not be a requirement that an Indian tribe or Indians be identified in the authorizing statute for a program or element of a program to be eligible for inclusion in a compact or funding agreement under this title [25 U.S.C. §§ 458aaa et seq.].

(d) **Funding agreement terms**

Each funding agreement under this title [25 U.S.C. §§ 458aaa et seq.] shall set forth—

(1) terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered; and

(2) for the items identified in paragraph (1)—

(A) the general budget category assigned;

(B) the funds to be provided, including those funds to be provided on a recurring basis;

(C) the time and method of transfer of the funds;

(D) the responsibilities of the Secretary; and

(E) any other provision with respect to which the Indian tribe and the Secretary agree.

(e) **Subsequent funding agreements**

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.

(f) **Existing funding agreements**

Each Indian tribe participating in the Tribal Self-Governance Demonstration Project established under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] on the date of the enactment of this title [enacted Aug. 18, 2000] shall have the option at any time thereafter to—

(1) retain the Tribal Self-Governance Demonstration Project funding agreement of that Indian tribe (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title [25 U.S.C. § 458aaa et seq.]; or

(2) instead of retaining a funding agreement or portion thereof under paragraph (1), negotiate a new funding agreement in a manner consistent with the requirements of this title [25 U.S.C. § 458aaa et seq.].

(g) **Stable base funding**

At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under section 106(a) [25 U.S.C. § 450j-1(a)]) 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-sub activity excluding earmarks.

Sec. 506. General provisions [25 U.S.C. § 458aaa-5]

(a) **Applicability**

The provisions of this section shall apply to compacts and funding agreements negotiated under this title [25 U.S.C. § 458aaa et seq.] and an Indian tribe may, at its option, include provisions that reflect such requirements in a compact or funding agreement.

(b) **Conflicts of interest**

Indian tribes participating in self-governance under this title [25 U.S.C. § 458aaa et seq.] 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).

(c) **Audits**

(1) **Single Agency Audit Act**

The provisions of chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.], requiring a single agency audit report shall apply to funding agreements under this title [25 U.S.C. § 458aaa et seq.].

(2) **Cost principles**

An Indian tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by section 106 [25 U.S.C. § 450j-1][,] other provisions of law, or by any exemptions to applicable Office of Management and Budget circulars subsequently granted by the Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. 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) [25 U.S.C. § 450j-1(f)].

(d) **Records**

(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, United States Code [5 U.S.C. § 500 et seq.].

(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, United States Code.

(e) **Redesign and consolidation**

An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 505 [25 U.S.C. § 458aaa-4] 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.

(f) **Retrocession**

An Indian tribe may retrocede, fully or partially, to the Secretary programs, services, functions, or activities (or portions thereof) included in the compact or funding agreement. Unless the Indian tribe rescinds the request for retrocession, such retrocession will become effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of such a specification, such retrocession shall become effective on—

(1) the earlier of—

(A) 1 year after the date of submission of such request; or

(B) the date on which the funding agreement expires; or

(2) such date as may be mutually agreed upon by the Secretary and the Indian tribe.

(g) **Withdrawal**

(1) **Process**

(A) **In general**

An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact or funding agreement.

(B) **Effective date**

The withdrawal referred to in subparagraph (A) shall become effective within the timeframe specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific timeframe set forth in the resolution, such withdrawal shall become effective on—

(i) the earlier of—

(I) 1 year after the date of submission of such request; or

(II) the date on which the funding agreement expires; or

(ii) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.

(2) **Distribution of funds**

When 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 [25 U.S.C. § 458aaa et seq.] fully or partially withdraws from a participating inter-tribal consortium or tribal organization—

(A) the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activities (or

portions thereof) 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 in the funding agreement of the inter-tribal consortium or tribal organization); and

(B) the funds referred to in subparagraph (A) shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, on the condition that the provisions of sections 102 and 105(i) [25 U.S.C. § 450f and § 450j(i)], as appropriate, shall apply to that withdrawing Indian tribe.

(3) **Regaining mature contract status**

If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) carried out under a compact or funding agreement under this title [25 U.S.C. § 458aaa et seq.] 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.

(h) **Nonduplication**

For the period for which, and to the extent to which, funding is provided under this title [25 U.S.C. § 458aaa et seq.] or under the compact or funding agreement, the Indian tribe shall not be entitled to contract with the Secretary for such funds under section 102 [25 U.S.C. § 450f], except that such Indian tribe shall be eligible for new programs on the same basis as other Indian tribes.

Sec. 507. Provisions relating to the Secretary [25 U.S.C. § 458aaa-6]

(a) **Mandatory provisions.**

(1) **Health status reports**

Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision that requires the Indian tribe to report on health status and service delivery—

(A) to the extent such data is not otherwise available to the Secretary and specific funds for this purpose are provided by the Secretary under the funding agreement; and

(B) if such reporting shall impose minimal burdens on the participating Indian tribe and such requirements are promulgated under section 517[25 U.S.C. § 458aaa-16]

(2) **Reassumption.**

(A) **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.

(B) **Prohibition**

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.

(C) **Exception**

(i) **In general**

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.

(ii) **Reassumption**

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.

(D) **Hearings**

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.

(b) **Final offer**

In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

(c) **Rejection of final offers**

(1) **In general**

If the Secretary rejects an offer made under subsection (b) (or one or more provisions or funding levels in such offer), the Secretary shall provide—

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

(i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title [25 U.S.C. § 458aaa et seq.];

(ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

(iv) the Indian tribe is not eligible to participate in self-governance under section 503 [25 U.S.C. § 458aaa-2];

(B) technical assistance to overcome the objections stated in the notification required by subparagraph (A);

(C) the Indian tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, except that the Indian tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a Federal district court pursuant to section 110(a) [25 U.S.C. § 450m-1(a)]; and

(D) the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

(2) **Effect of exercising certain option**

If an Indian tribe exercises the option specified in paragraph (1)(D), that Indian tribe shall retain the right to appeal the Secretary's rejection under this section, and subparagraphs (A), (B), and (C) of that paragraph shall only apply to that portion of the proposed final compact, funding agreement, or provision thereof that was rejected by the Secretary.

(d) **Burden of proof**

With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b).

(e) **Good faith**

In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this title [25 U.S.C. § 458aaa et seq.] in a manner that maximizes the policy of tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000 [25 U.S.C. § 458aaa note].

(f) **Savings**

To the extent that programs, functions, services, or activities (or portions thereof) carried out by Indian tribes under this title [25 U.S.C. § 458aaa et seq.] reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 508(c) [25 U.S.C. § 458aaa-7(c)], the Secretary

shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(g) **Trust responsibility**

The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(h) **Decisionmaker**

A decision that constitutes final agency action and relates to an appeal within the Department of Health and Human Services conducted under subsection (c) shall be made either—

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

(2) by an administrative judge.

Sec. 508. Transfer of funds [25 U.S.C. § 458aaa-7]

(a) **In general**

Pursuant to the terms of any compact or funding agreement entered into under this title [25 U.S.C. § 458aaa et seq.], the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

(b) **Multiyear funding**

The Secretary is authorized to employ, upon tribal request, multiyear funding agreements. References in this title [25 U.S.C. § 458aaa et seq.] to funding agreements shall include such multiyear funding agreements.

(c) **Amount of funding**

The Secretary shall provide funds under a funding agreement under this title [25 U.S.C. § 458aaa et seq.] in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) [25 U.S.C. § 450j-1(a)(1)] and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) [25 U.S.C. § 450j-1(a)(2), (3), (5), and (6)], including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

(d) **Prohibitions**

(1) **In general**

Except as provided in paragraph (2), the Secretary is expressly prohibited from—

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

(B) withholding portions of such funds for transfer over a period of years; and

(C) reducing the amount of funds required under this Act—

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

(ii) in subsequent years, except pursuant to—

(I) a reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(II) a congressional directive in legislation or accompanying report;

(III) a tribal authorization;

(IV) a change in the amount of pass-through funds subject to the terms of the funding agreement; or

(V) completion of a project, activity, or program for which such funds were provided;

(iii) to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this Act; or

(iv) to pay for costs of Federal personnel displaced by self-determination contracts under this Act or self-governance;

(2) **Exception**

The funds described in paragraph (1)(C) may be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)(2) [25 U.S.C. § 450j(c)(2)].

(e) **Other resources**

In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of interagency motor pool vehicles) or other Federal resources (including supplies, services, and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), the Secretary shall acquire and transfer such personnel, supplies, or resources to the Indian tribe.

(f) **Reimbursement to Indian Health Service**

With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service shall provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment. The reimbursements received from those goods and services, along with the funds received from the Indian tribe pursuant to this title [25 U.S.C. § 458aaa et seq.], may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

(g) **Prompt Payment Act**

Chapter 39 of title 31, United States Code [31 U.S.C. § 3901 et seq.], shall apply to the transfer of funds due under a compact or funding agreement authorized under this title [25 U.S.C. § 458aaa et seq.].

(h) **Interest or other income on transfers**

An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this title [25 U.S.C. § 458aaa et seq.] shall be managed using the prudent investment standard.

(i) **Carryover of funds**

All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from 1 year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

(j) **Program income**

All Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

(k) **Limitation of costs**

An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

Sec. 509. Construction projects [25 U.S.C. § 458aaa-8]

(a) **In general**

Indian tribes participating in tribal self-governance may carry out construction projects under this title [25 U.S.C. § 458aaa et seq.] 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 of the responsible Federal official under such environmental laws.

(b) **Negotiations**

Construction project proposals shall be negotiated pursuant to the statutory process in section 105(m) [25 U.S.C. § 450j(m)] and resulting construction project agreements shall be incorporated into funding agreements as addenda.

(c) **Codes and standards**

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.

(d) **Responsibility for completion**

The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the negotiated construction project agreement.

(e) **Funding**

Funding for construction projects carried out under this title [25 U.S.C. § 458aaa et seq.] 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. The Secretary shall include associated project contingency funds with each advance payment installment. The Indian tribe shall be responsible for the management of the contingency funds included in funding agreements.

(f) **Approval**

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. The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually. The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

(g) **Wages**

All laborers and mechanics employed by contractors and subcontractors (excluding tribes and tribal organizations) in the construction, alteration, or repair, including painting or decorating of a building or other facilities in connection with construction projects funded by the United States under this Act shall be paid wages at not less than those prevailing wages on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494) [40 U.S.C. § 276a et seq.]. With respect to construction alteration, or repair work to which the Act of March 3, 1931 [40 U.S.C. § 276a et seq.], is applicable under this section, the Secretary of Labor shall have the authority and functions set forth in the Reorganization Plan numbered 14, of 1950 [5 U.S.C. § 903 note], and section 2 of the Act of June 13, 1934 (48 Stat. 948) [40 U.S.C. § 276c].

(h) **Application of other laws**

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 title [25 U.S.C. § 458aaa et seq.].

Sec. 510. Federal procurement laws and regulations [25 U.S.C. § 458aaa-9]

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 (41 U.S.C. § 401 et seq.) and Federal acquisition regulations in any funding agreement entered into under this part [title] [25 U.S.C. §§ 458aaa et seq.]. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply.

Sec. 511. Civil actions [25 U.S.C. § 458aaa-10]

(a) **Contract defined**

For the purposes of section 110 [25 U.S.C. § 450m-1], the term "contract" shall include compacts and funding agreements entered into under this title [25 U.S.C. § 458aaa et seq.].

(b) **Applicability of certain laws**

Section 2103 of the Revised Statutes (25 U.S.C. § 81) and section 16 of the Act of June 18, 1934 (48 Stat. 987; chapter 576; 25 U.S.C. § 476), shall not apply to attorney and other professional contracts entered into by Indian tribes participating in self-governance under this title [25 U.S.C. § 458aaa et seq.].

(c) **References**

All references in this Act to section 1 of the Act of June 26, 1936 (49 Stat. 1967; chapter 831) [25 U.S.C. § 501] are hereby deemed to include the first section of the Act of July 3, 1952 (66 Stat. 323; chapter 549; 25 U.S.C. § 82a).

Sec. 512. Facilitation [25 U.S.C. § 458aaa-11]

(a) **Secretarial interpretation**

Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate—

(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section;

(2) the implementation of compacts and funding agreements entered into under this title [25 U.S.C. § 458aaa et seq.]; and

(3) the achievement of tribal health goals and objectives.

(b) **Regulation waiver.**

(1) **In general**

An Indian tribe may submit a written request to waive application of a regulation promulgated under section 517 [25 U.S.C. § 458aaa-16] or the authorities specified in section 505(b) [25 U.S.C. § 458aaa-4(b)] for a compact or funding agreement entered into with the Indian Health Service under this title [25 U.S.C. § 458aaa et seq.], to the Secretary identifying the applicable Federal regulation sought to be waived and the basis for the request.

(2) **Approval**

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 title [25 U.S.C. § 458aaa et seq.], 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.

(c) **Access to Federal property**

In connection with any compact or funding agreement executed pursuant to this title [25 U.S.C. § 458aaa et seq.] or an agreement negotiated under the Tribal Self-Governance Demonstration Project established under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734], as in effect before the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], upon the request of an Indian tribe, the Secretary—

(1) shall permit an Indian tribe to use existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the Indian tribe for their use and maintenance;

(2) may donate to an Indian tribe title to any personal or real property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—

(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;

(B) if property described in subparagraph (A) has a value in excess of $ 5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Department of Health and Human Services; and

(C) all property referred to in subparagraph (A) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States; and

(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appropriate for use by the Indian tribe for any purpose for which a compact or funding agreement is authorized under this title [25 U.S.C. § 458aaa et seq.].

(d) **Matching or cost-participation requirement**

All funds provided under compacts, funding agreements, or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

(e) **State facilitation**

States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this title [25 U.S.C. § 458aaa et seq.] and other Federal laws benefiting Indians and Indian tribes.

(f) **Rules of construction**

Each provision of this title [25 U.S.C. § 458aaa et seq.] and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

Sec. 513. Budget request [25 U.S.C. § 458aaa-12]

(a) **Requirement of annual budget request**

(1) **In general**

The President shall identify in the annual budget request submitted to Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title [25 U.S.C. § 458aaa et seq.], 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 505 [25 U.S.C. § 458aaa-4].

(2) **Rule of construction**

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 Office of Tribal Self-Governance under this section.

(b) **Present funding; shortfalls**

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 title [25 U.S.C. § 458aaa et seq.].

Sec. 514. Reports [25 U.S.C. § 458aaa-13]

(a) **Annual report**

(1) **In general**

Not later than January 1 of each year after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of this title [25 U.S.C. § 458aaa et seq.].

(2) **Analysis**

The report under paragraph (1) shall include a detailed analysis of the level of need being presently funded or unfunded for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this Act. In compiling reports pursuant to this

section, the Secretary may not impose any reporting requirements on participating Indian tribes or tribal organizations, not otherwise provided in this Act.

(b) **Contents**

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 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;

(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.

(c) **Report on fund distribution method**

Not later than 180 days after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], the Secretary shall, after consultation with Indian tribes, submit a written report to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate that describes the method or methods 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.

Sec. 515. Disclaimers [25 U.S.C. § 458aaa-14]

(a) **No funding reduction**

Nothing in this title [25 U.S.C. § 458aaa et seq.] 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 Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 110 [25 U.S.C. § 450m-1].

(b) **Federal trust and treaty responsibilities**

Nothing in this Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(c) **Obligations of the United States**

The Indian Health Service under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Indian tribe to do so.

Sec. 516. Application of other sections of the Act [25 U.S.C. § 458aaa-15]

(a) **Mandatory application**

All provisions of sections 5(b), 6, 7, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act [25 U.S.C. § 450c(b), 450d, 450e, 450f(c) and (d), 450i, 450j(k) and (l), 450j-1(a)-(k), and 450n] and section 314 of Public Law 101-512 [25 U.S.C. § 450f note] (coverage under chapter 171 of title 28, United States Code [28 U.S.C. § 2671 et seq.], commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this title [25 U.S.C. § 458aaa et seq.], shall apply to compacts and funding agreements authorized by this title [25 U.S.C. § 458aaa et seq.].

(b) **Discretionary application**

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 title [25 U.S.C. § 458aaa et seq.], shall be made a part of a funding agreement or compact entered into under this title [25 U.S.C. § 458aaa et seq.]. 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 title [25 U.S.C. § 458aaa et seq.]. 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.

Sec. 517. Regulations [25 U.S.C. § 458aaa-16]

(a) **In general**

(1) **Promulgation**

Not later than 90 days after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code [5 U.S.C. § 561 et seq.], to negotiate and promulgate such regulations as are necessary to carry out this title [25 U.S.C. § 458aaa et seq.].

(2) **Publication of proposed regulations**

Proposed regulations to implement this title [25 U.S.C. § 458aaa et seq.] shall be published in the Federal Register by the Secretary no later than 1 year after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000].

(3) **Expiration of authority**

The authority to promulgate regulations under paragraph (1) shall expire 21 months after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000].

(b) **Committee**

(1) **In general**

A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this Act.

(2) **Requirements**

The committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

(c) **Adaptation of procedures**

The Secretary shall adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes.

(d) **Effect**

The lack of promulgated regulations shall not limit the effect of this title [25 U.S.C. § 458aaa et seq.].

(e) **Effect of circulars, policies, manuals, guidances, and rules**

Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Indian Health Service, except for the eligibility provisions of section 105(g) [25 U.S.C. § 450j(g)] and regulations promulgated under section 517 [this section].

Sec. 518. Appeals [25 U.S.C. § 458aaa-17]

In any appeal (including civil actions) involving decisions made by the Secretary under this title [25 U.S.C. § 458aaa et seq.], the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—

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

(2) that the decision is fully consistent with provisions and policies of this title [25 U.S.C. § 458aaa et seq.].

Sec. 519. Authorization of appropriations [25 U.S.C. § 458aaa-18]

(a) **In general**

There are authorized to be appropriated such sums as may be necessary to carry out this title [25 U.S.C. § 458aaa et seq.].

(b) **Availability of appropriations**

Notwithstanding any other provision of this Act, the provision of funds under this Act shall be subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe in order to make funds available to another tribe or tribal organization under this Act.

Sec. 5. Tribal Self-Governance Department

The Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) is amended by adding at the end the following:

Title VI – Tribal Self-Governance
Department of Health and Human Services

[Title VI, as added Aug. 18, 2000, P.L. 106-260, § 5, 114 Stat. 731, provides:]

Sec. 601. Definitions. [25 U.S.C. § 450f note]

(a) **In general**

In this title, the Secretary may apply the definitions contained in title V [25 U.S.C. § 458aaa et seq.].

(b) **Other definitions**

In this title:

(1) **Agency**

The term 'agency' means any agency or other organizational unit of the Department of Health and Human Services, other than the Indian Health Service.

(2) **Secretary**

The term 'Secretary' means the Secretary of Health and Human Services.

Sec. 602. Demonstration project feasibility.

(a) **Study**

The Secretary shall conduct a study to determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the agency.

(b) **Considerations**

In conducting the study, the Secretary shall consider—

(1) the probable effects on specific programs and program beneficiaries of such a demonstration project;

(2) statutory, regulatory, or other impediments to implementation of such a demonstration project;

(3) strategies for implementing such a demonstration project;

(4) probable costs or savings associated with such a demonstration project;

(5) methods to assure quality and accountability in such a demonstration project; and

(6) such other issues that may be determined by the Secretary or developed through consultation pursuant to section 603.

(c) **Report**

Not later than 18 months after the date of the enactment of this title, the Secretary shall submit a report to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives. The report shall contain—

(1) the results of the study under this section;

(2) a list of programs, services, functions, and activities (or portions thereof) within each agency with respect to which it would be feasible to include in a tribal self-governance demonstration project;

(3) a list of programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) that could be included in a tribal self-governance demonstration project without amending statutes, or waiving regulations that the Secretary may not waive;

(4) a list of legislative actions required in order to include those programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) but not included in the list provided pursuant to paragraph (3) in a tribal self-governance demonstration project; and

(5) any separate views of tribes and other entities consulted pursuant to section 603 related to the information provided pursuant to paragraphs (1) through (4).

Sec. 603. Consultation.

(a) **Study protocol.**

(1) **Consultation with Indian tribes**

The Secretary shall consult with Indian tribes to determine a protocol for consultation under subsection (b) prior to consultation under such subsection with the other entities described in such subsection.

(2) **Requirements for protocol**

The protocol shall require, at a minimum, that—

(A) the government-to-government relationship with Indian tribes forms the basis for the consultation process;

(B) the Indian tribes and the Secretary jointly conduct the consultations required by this section; and

(C) the consultation process allows for separate and direct recommendations from the Indian tribes and other entities described in subsection (b).

(b) **Conducting study**

In conducting the study under this title, the Secretary shall consult with Indian tribes, States, counties, municipalities, program beneficiaries, and interested public interest groups, and may consult with other entities as appropriate.

Sec. 604. Authorization of appropriations.

There are authorized to be appropriated such sums as may be necessary to carry out this title. Such sums shall remain available until expended.

Sec. 12. Application to Alaska.

(a) Notwithstanding any other provision of law, nothing in this Act, the amendments made thereby, nor its implementation, shall affect—

(1) the right of the Consortium of Southcentral Foundation to carry out the programs, functions, services and activities as specified in section 325 of Public Law 105-83 (111 Stat. 55-56); or

(2) the prohibitions in section 351 of section 101(e) of division A, Public Law 105-277.

(b) Section 351 of section 101(e) of division A, Public Law 105-277 and section 326 of Public Law 105-83 (111 Stat. 57) are amended by inserting "as amended" after the phrase "Public Law 93-638 (25 U.S.C. § 450 et seq.)" where such phrase appears in each section.

Sec. 13. Effective Date. [25 U.S.C. § 458aaa note]

Except as otherwise provided, the provisions of this Act shall take effect on the date of the enactment of this Act.

TAB 2

federal register

Monday
June 24, 1996

Part II

Department of the Interior

Bureau of Indian Affairs

Department of Health and Human Services

Indian Health Service

25 CFR Part 900

Indian Self-Determination and Education Assistance Act Amendments; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

25 CFR Part 900

RINs 1076–AD21; 0905–AC98

Indian Self-Determination and Education Assistance Act Amendments

AGENCIES: Departments of the Interior and Health and Human Services.

ACTION: Final rule.

SUMMARY: The Secretaries of the Department of Interior (DOI) and the Department of Health and Human Services (DHHS) hereby issue a joint rule to implement section 107 of the Indian Self-Determination Act, as amended, including Title I, Pub. L. 103–413, the Indian Self-Determination Contract Reform Act of 1994. This joint rule, as required by section 107(a)(2)(A)(ii) of the Act, will permit the Departments to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for single program legislation. In section 107(a)(1) of the Act Congress delegated to the Departments limited legislative rulemaking authority in certain specified subject matter areas, and the joint rule addresses only those specific areas. As required by section 107(d) of the Act, the Departments have developed this final rule with active tribal participation, using the guidance of the Negotiated Rulemaking Act.

DATES: This rule will become effective on August 23, 1996.

FOR FURTHER INFORMATION CONTACT: James Thomas, Division of Self-Determination Services, Bureau of Indian Affairs, Department of the Interior, Room 4627, 1849 C Street N.W., Washington, DC 20240, Telephone (202) 208–5727 or Merry Elrod, Division of Self-Determination Services, Office of Tribal Activities, Indian Health Service, Room 6A–19, 5600 Fishers Lane, Parklawn Building, Rockville, MD 20857, Telephone (301) 443–6840/1104/1044.

SUPPLEMENTARY INFORMATION: The 1975 Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, gave Indian tribes the authority to contract with the Federal government to operate programs serving their tribal members and other eligible persons. The Act was further amended by the Technical Assistance Act and other Acts, Pub. L. 98–250; Pub. L. 100–202; Interior Appropriations Act for Fiscal Year 1988, Pub. L. 100- 446; Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100–472; Indian Reorganization Act Amendments of 1988, Pub. L. 100–581; miscellaneous Indian Law Amendments, Pub. L. 101–301; Pub. L. 101–512; Indian Self-Determination and Education Assistance Act Amendments of 1990, Pub. L. 101–644; Pub. L. 102–184; Pub. L. 103–138; Indian Self-Determination Act Amendments of 1994, Pub. L. 103–413; and Pub. L. 103–435. Of these, the most significant were Pub. L. 100–472 (the 1988 Amendments) and Pub. L. 103–413 (the 1994 Amendments).

The 1988 Amendments substantially revised the Act in order ''to increase tribal participation in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs.'' Senate Report 100–274 at 2. The 1988 Amendments were also ''intended to remove many of the administrative and practical barriers that seem to persist under the Indian-Self-Determination Act.'' Id. at 2. In fashioning the amendments, Congress directed that the two Departments develop implementing regulations over a 10-month period with the active participation of tribes and tribal organizations. In this regard, Congress delegated to the Departments broad legislative rulemaking authority.

Initially the two Departments worked closely with Indian tribes and tribal organizations to develop new implementing regulations, culminating in a joint compromise September 1990 draft regulation reflecting substantial tribal input. Thereafter, however, the two Departments continued work on the draft regulation without any further tribal input. The revised proposed regulation was completed under the previous administration, and the current administration published the proposed regulation (1994 NPRM) for public comment on January 20, 1994, at 59 FR 3166. In so doing, the current administration expressed its concern over the absence of tribal participation in the regulation drafting process in the years following August 1990, and invited tribes to review the 1994 NPRM closely for possible revisions.

Tribal reaction to the January 1994 proposed regulation was extremely critical. Tribes, tribal organizations, and national Indian organizations criticized both the content of the 1994 NPRM and its length, running over 80 pages in the Federal Register. To address tribal concerns in revising the proposed regulations into final form, the Departments committed to establish a Federal advisory committee that would include at least 48 tribal representatives from throughout the country, and be jointly funded by the two Departments.

In the meantime, Congress renewed its examination into the regulation drafting process, and the extent to which events since the 1988 amendments, including the lengthy and controversial regulation development process, justified revisiting the Act anew. This Congressional review eventually led to the October 1994 amendments. (Similar efforts by tribal representatives to secure amendments to the Act in response to the developing regulations had been considered by Congress in 1990 and 1992.)

The 1994 amendments comprehensively revisit almost every section of the original Act, including amending the Act to override certain provisions in the January 1994 NPRM. Most importantly for this new NPRM, the 1994 amendments also remove Congress' prior delegation to the Departments of general legislative rulemaking authority. Instead, the Departments' authority is strictly limited to certain areas, a change explained in the Senate report that accompanied the final version of the bill:

> Section 105 of the bill addresses the Secretaries' authority to promulgate interpretative regulations in carrying out the mandates of the Act. It amends section 107 (a) and (b) of the Act by limiting the delegated authorization of the Secretaries to promulgate regulations. This action is a direct result of the failure of the Secretaries to respond promptly and appropriately to the comprehensive amendments developed by this committee six years ago.
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> Section 105(l) amends section 107(a) by delegating to the Secretary the authority only to promulgate implementing regulations in certain limited subject matter areas. By and large these areas correspond to the areas of concern identified by the Departments in testimony and in discussions. Beyond the areas specified in subsection (a) * * * no further delegated authority is conferred.

Sen. Rep. No. 103–374 at 14. For this reason, the new rule covers substantially fewer topics than the January 1994 NPRM.

As specified by Congress, the new rule is limited to regulations relating to chapter 171 of title 28 of the United States Code, commonly known as the ''Federal Tort Claims Act;'' the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.); declination and waiver procedures; appeal procedures; reassumption procedures; discretionary grant procedures for grants awarded

under section 103 of the Act; property donation procedures arising under section 105(f) of the Act; internal agency procedures relating to the implementation of this Act; retrocession and tribal organization relinquishment procedures; contract proposal contents; conflicts of interest; construction; programmatic reports and data requirements; procurement standards; property management standards; and financial management standards. All but three of these permitted regulatory topics—discretionary grant procedures, internal agency procedures, and tribal organization relinquishment procedures—are addressed in this rule.

The 1994 amendments also required that, if the Departments elected to promulgate regulations, the Departments must use the notice and comment procedures of the Administrative Procedure Act, and must promulgate the regulations as a single set of regulations in title 25 of the Code of Federal Regulations. Section 107(a)(2). Finally, the 1994 amendments required that any regulations must be developed with the direct participation of tribal representatives using as a guide the Negotiated Rulemaking Act of 1990. This latter requirement is also explained in the accompanying Senate Report:

> To remain consistent with the original intent of the Act and to ensure that the input received from the tribes and tribal organizations in the regulation drafting process is not disregarded as has previously been the case, section 107 also has been amended by adding a new subsection (d), requiring the Secretaries to employ the negotiated rulemaking process.

Sen. Rep. No. 103–374 at 14. As a result of the October 1994 amendments and earlier initiatives previously discussed, the Departments chartered a negotiated rulemaking committee under the Federal Advisory Committee Act. The committee's purpose was to develop regulations that implement amendments to the Act.

The advisory committee had 63 members. Forty-eight of these members represented Indian tribes—two tribal members from each BIA area and two from each IHS area. Nine members were from the Department of the Interior and six members were from the Department of Health and Human Services. Additionally, four individuals from the Federal Mediation and Conciliation Service served as facilitators. The committee was co-chaired by four tribal representatives and two Federal representatives. While the committee was much larger than those usually chartered under the Negotiated Rulemaking Act, its larger size was justified due to the diversity of tribal interests and programs available for contracting under the Act.

In order to complete the regulations within the statutory timeframe, the committee divided the areas subject to regulation among six working groups. The workgroups made recommendations to the committee on whether regulations in a particular area were desirable. If the committee agreed that regulations were desirable, the workgroups developed options for draft regulations. The workgroups presented their options to the full committee, where the committee discussed them and eventually developed the proposed regulations.

The first meeting of the committee was in April of 1995. At that meeting, the committee established six workgroups, a meeting schedule, and a protocol for deliberations. Between April and September of 1995, the committee met five times to discuss draft regulations produced by the workgroups. Each of these meetings generally lasted three days. Additionally, the workgroups met several more times between April and September to develop recommendations for the committee to consider.

The policy of the Departments was, whenever possible, to afford the public an opportunity to participate in the rulemaking process. All of the sessions of the committee were announced in the Federal Register and were open to the public.

The Departments published draft regulations in a Notice of Proposed Rulemaking in the Federal Register on January 24, 1996, at 61 FR 2038. (1996 NPRM) In the 1996 NPRM, the Departments invited the public to comment on the draft provisions. In addition, the Departments outlined five areas in which the Committee had not yet reached consensus and asked for public comments specifically addressing those topics.

Ultimately, the Departments received approximately 76 comments from Indian tribes and tribal organizations, addressing virtually every aspect of the proposed regulation. The full committee reconvened in Denver between April 29, 1996 and May 3, 1996 to review the comments, to evaluate changes suggested by the comments, and to approve final regulatory language.

As a result of that meeting, the full committee was able to transmit a report to the Secretaries which included consensus regulatory language on all but four issues: internal agency procedures; contract renewal proposals; conflicts of interest; and construction management services. Tribal and Federal representatives prepared non-consensus reports on these four issues, which were submitted to the Secretaries for a decision. One additional question arose, pertaining to § 900.3(b)(11) of the regulation, and that was also referred to the Secretaries. On May 23, 1996 a delegation of tribal representatives met with the Chiefs of Staff of the two departments to present the tribal view of the unresolved issues. Decisions have been made based upon the arguments presented at that meeting, and the regulation incorporates those decisions.

The Departments commend the ability of the committee to cooperate and develop a rule that addresses the interests of the tribes and the Federal agencies. This negotiated rulemaking process has been a model for developing successful Federal and tribal partnerships in other endeavors. The consensus process allowed for true bilateral negotiations between the Federal government and the tribes in the best spirit of the government-to-government relationship.

In developing regulatory language, consensus was reached on the regulations which follow under subparts ''A'' through ''P''. In addition, at the request of tribal and Federal representatives, the Secretaries agreed to publish additional introductory materials under subpart ''A.''

Summary of Regulations and Comments Received

The narrative and discussion of comments below is keyed to specific subparts of the rule. Matters addressed under the heading ''Key Areas of Disagreement'' in the Notice of Proposed Rulemaking are discussed under the appropriate Subpart.

Subpart A—Policy

Summary of Subpart

This subpart contains key congressional policies contained in the Act and adds several Secretarial policies that will guide the Secretaries' implementation of the Act.

A number of comments recommended that the statement that tribal records are exempt from disclosure under the Freedom of Information Act (§ 900.2(d)) be further explained to include annual audit reports prepared by tribal contractors and tribal records archived by the Federal government. The suggestion regarding archived tribal records has been adopted. However, section 7502(f) of the Single Audit Act of 1984, 31 U.S.C. 7502(f), and OMB Circular No. A–128, Audits of State and Local Governments, subparagraph 13(e), state that single audit reports shall be available for public inspection within

30 days after the completion of the audit. Therefore, these audit reports are available for public inspection.

Numerous comments expressed concern over the nonapplicability of the Privacy Act to tribal medical records, in section 900.2(e). Although section 108(b) of the Act is binding in this respect, Subpart C (§ 900.8) has been amended to address the confidentiality of medical records. Indian Tribes and tribal organizations remain free to adopt their own confidentiality procedures, including procedures that are similar to Privacy Act procedures.

A large number of comments urged that the NPRM be amended to include a Secretarial policy to interpret Federal laws and regulations in a manner that will facilitate the inclusion of programs in contracts authorized by the Act. In response to these comments, the Committee has added the language in Secretarial policy statement in § 900.3(b)(8). This policy is not intended to limit in any manner the scope of programs, functions, services or activities that are contractible under section 102(a)(1) of the Act.

Discussion of Comments

Several comments recommended that various policy statements be clarified to reflect the congressional policy that funds for programs, services, functions and activities are transferred to tribal contractors when contracts are awarded under the Act. These comments have been adopted and appropriate changes made to § 900.3(a)(4), § 900.3(b)(4) and § 900.3(b)(9).

One comment found the last two words of § 900.3(a)(8) confusing due to the inclusion of the words ''as appropriate.'' In response, these words have been deleted in the final rule.

Several comments recommended that the phrase ''and for which funds are appropriated by Congress'' be deleted from the Secretarial policy statement set forth in § 900.3(b)(1). The Committee agreed and deleted this phrase in the final rule.

The Committee revised 900.3(b)(7) (referring to the scope of programs that are contractible under the Act) to be consistent with the new policy set forth in 900.3(b)(8).

Several comments urged that § 900.d(b)(9) be amended to articulate more clearly the Secretaries' duty to commence planning for the transfer of programs to tribal operation immediately upon receipt of a contract proposal. In response to the comments, § 900.3(b)(9) has been revised.

A large number of comments urged that the provision regarding Federal program guidelines, manuals, or policy directives set forth in § 900.5 of the NPRM be revised to refer more generally to any unpublished requirements. In response to these comments, § 900.5 has been revised in the final rule.

Some comments urged that language be included to identify the inherent Federal functions that cannot lawfully be carried out by an Indian tribe or tribal organization, and that therefore may not be contracted under the Act. The Committee did not adopt these comments due to the subject-matter limitations on its rulemaking authority set forth in section 107(a)(1) of the Act. Similarly, the Committee did not address comments relating to the appropriate uses of program income generated under the Federal Medicare and Medicaid programs.

One comment expressed concern regarding the absence of clear provisions for tribal participation in the administration of Federal Indian programs. No change was made as this concern is already dealt with in § 900.3(a)(1).

One comment recommended that the Secretary adopt a policy that Indian tribes participate in the development of the budgets of agencies other than the Indian Health Service and the Bureau of Indian Affairs. The Committee did not adopt this proposal due to the subject-matter limitation set forth in section 107(a)(1) of the Act, and the limitation in section 106(I) of the Act regarding tribal participation.

One comment urged that the Secretarial policy regarding tribal participation in budgetary matters set forth in § 900.3(b)(6) be more clearly articulated as a mandatory duty. Nothing in the new regulation is intended to change the Department's current consultation requirements. Accordingly, no change was made in the text of the regulation.

A few comments urged that the phrase ''for the benefit of Indians because of their status as Indians'' or the phrase ''for the benefit of Indians'' be further defined in the regulation. The Committee rejected suggestions that the concept of ''contractibility'' be further explored in the regulations due to the specific subject-matter limitations of section 107(a)(1) of the Act.

Subpart B—Definitions

Summary of Subpart

Subpart B sets forth definitions for key terms used in the balance of the regulations. Terms unique to one subpart are generally defined in that subpart, rather than in subpart B.

Summary of Comments

In response to one comment regarding the term ''awarding official'' the definition has been revised and an additional sentence added to make clear that an ''awarding official'' need not necessarily be a warranted contracting officer. Who the awarding official is in a particular situation will depend on to whom the Secretary has delegated authority to award the contract.

In response to comments regarding the scope of Subpart C (which deals with ''initial contract proposals''), the term ''initial contract proposal'' has been added as a new definition in the final rule. The definition clarifies that the requirements for an ''initial contract proposal'' do not apply to other proposals such as proposals to renew contracts governing programs, services, functions or activities that are already under tribal operation.

In response to one comment regarding the procedural aspects of reassumption, the definition of ''reassumption'' has been revised to refer the reader to the notice and other procedures set forth in Subpart P.

One comment requested that the term ''Indian tribe'' be revised. The Committee rejected the comment in favor of the definition of this term already set forth in the statute and repeated in § 900.6 of the final rule.

Two comments urged that the Secretary add a new definition of the term ''consultation'' to establish a framework for this activity. The Committee rejected this proposal as beyond the scope of subjects which may be regulated under section 107(a)(1) of the Act. Similarly, the Committee rejected requests that the regulations include a definition of ''trust responsibility.''

In the NPRM, the public was invited to comment on the disagreement within the Committee regarding the development of internal agency procedures. Specifically, as noted in 61 FR at 2039–2040, tribal representatives on the Committee urged that internal agency procedures be developed in precisely the same fashion as other regulations implementing the Indian Self-Determination Act Amendments of 1994, through the use of the negotiated rulemaking process. Federal representatives on the Committee supported instead a joint tribal and Federal commitment to work together to generate a procedural manual which would promote the purposes underlying the Act and facilitate contracting by Indian tribes and tribal organizations. The Federal committee members proposed committing to a firm timeline

within which to produce such a manual. Further, the Federal Government committed to ''meaningful consultation'' throughout the manual development process.

The Departments received many comments from tribal representatives addressing the issue of internal agency procedures as a subject for negotiated rulemaking. Those comments consistently supported the tribal proposal to include a Subpart in the regulation concerning internal agency procedures.

Many of the comments indicated a belief that all internal agency procedures under which Indian tribes and tribal organizations exercise their self-determination should be promulgated by negotiated rulemaking. Those comments cited sections 107 (a) and (d) of the Act as authority for their recommendation.

Tribal representatives also indicated a concern that absent formal rulemaking, Federal agencies might use internal procedures to circumvent the policies underlying the Act, thwarting the intent to simplify the contracting process and free Indian tribes from excessive Federal control. Two comments suggested that negotiating rulemaking procedures will ensure that Federal agencies would be bound to follow uniform procedures to implement and interpret the Act and the regulations.

Two other comments wanted the regulation to state explicitly that the Secretaries lack authority to interpret the meaning or application of any provision of the Act or the regulations. Tribal representatives feared that a myriad of letters containing policy statements and correspondence interpreting reporting requirements would result if internal agency procedures are not tied to formal rulemaking.

In response to the Federal proposal as detailed in the NPRM, several comments stated that it would not be acceptable to develop a manual in a setting which is less formal and structured than a negotiated rulemaking committee. In addition, comments objected that developing such a manual after the publication of a final regulation would violate the mandatory deadline imposed on the Secretaries by Congress.

Several comments were suspicious of the government's commitment to seek tribal consultation on internal agency procedures. They stated that consultation alone would be insufficient to ensure that Indian tribes and tribal organizations are accorded the full benefits of the Act. Without full and active participation, one comment stated, Indian tribes would be in the position of attempting to change decisions made in advance by Federal agencies.

The Departments agree to an enhanced consultation process in developing procedures that do not involve resource allocation issues. Features of this enhanced process could include facilitation by professional facilitators, consensus decision-making, opportunity for comment by tribal entities, and reporting of decisions to the Secretaries. The Departments will convene a meeting to begin this process within sixty days of the regulations becoming effective.

Subpart C—Contract Proposal Contents

Summary of Regulation

Subpart C contains provisions relating to initial contract proposal contents. In this area, the committee opted to have minimal regulations. Subpart C consists of a checklist of 13 items that must be addressed in a proposal. In addition, the regulation contains a provision relating to the availability of technical assistance to assist Indian tribes and tribal organizations in preparing a contract proposal, and a provision relating to the identification of Federal property that the tribe or tribal organization intends to use during contract performance.

Summary of Comments

Several comments recommended amending § 900.7 to permit the Secretary to provide technical assistance funding in addition to technical assistance. To reflect the concerns the two sentences were added at the end of the section. The first sentence authorizes the Secretary to make technical assistance grants, and the second authorizes an Indian tribe or tribal organization to request reimbursement of pre-award costs for obtaining technical assistance under the Act.

One comment recommended the insertion of objective standards in § 900.7 to measure the authenticity of a claim that technical assistance cannot be provided due to the availability of appropriations. This recommendation was not adopted because the provision that technical assistance be subject to the availability of appropriations comes directly from Section 103(d) of the Act. In addition, it is clear that if qualified agency personnel are available, technical assistance will be provided to prepare an initial contract proposal.

Several comments recommended deleting the word ''must'' and inserting the word ''should'' in the first sentence of § 900.8. This recommendation was not adopted because the proposal requirements in this subsection represent the minimum amount of information required for the Departments to approve a proposal.

Several comments generally objected to § 900.8 on the grounds that it requires the production of information that the Federal Government has no right to know, or that is in excess of statutory requirements. Although some modifications were made to § 900.8 in response to comments, it is the consensus of the Committee that the information included in the final version of § 900.8 is necessary to protect Indian tribes or tribal organizations, or because it is essential information required by the Departments in order to be able to review or decline a contract proposal, to determine whether any of the statutory declination criteria exist.

A number of comments expressed concern that § 900.8(d) does not clearly bar the Secretary from revising service area boundaries over the objections of tribes located in an established service area. This recommendation was not adopted because it is the intent of this provision for the applicant to define the service area. This specific provision was debated at length by the Negotiated Rulemaking Committee, and the proposed regulatory provision in § 900.8(d) is the compromise agreed to by consensus of the Committee.

In response to a comment, the words ''an identification'' were deleted from § 900.8(e), and replaced with the words ''the name, title,'' for clarification purposes.

In response to a comment, the words ''a description'' were deleted from § 900.8(g)(3), and replaced with the words ''an identification'' for clarification purposes.

In response to a comment, § 900.8(g)(7) was amended to read ''minimum staff qualifications proposed by the Indian tribe or tribal organization, if any'' for clarification purposes.

In response to several comments objecting to the requirement in § 900.8(g)(4) that financial, procurement, and property management standards be included in the proposal, reference to these standards was deleted from this subsection, and a new subsection (g)(8) was added to require a statement that the Indian tribe or tribal organization meet minimum procurement, property, and financial management standards set forth in Subpart F, subject to waivers that may have been granted under Subpart K.

In response to several comments requesting that the words ''tribal shares'' be defined, § 900.8(h)(1) was modified by removing these words and inserting

''the Indian tribe or tribal organization's share of funds.''

In response to a comment, § 900.8(h)(2) was amended by including the word ''start-up'' after the word ''one-time'' to make this section consistent with the Act.

Several comments objected to the use of the word ''budget'' in § 900.8(h), and to the level of detail required under this subsection. This subsection was redrafted to delete the word ''budget'' wherever it appears, and replace it with ''amount of funds requested'' or ''funding request.'' In addition, §§ 900.8(h)(1) (i), (ii), and (iii) were deleted.

In response to a comment that the information sought in § 900.8(h)(5) was unnecessary, this subsection was redrafted for clarification purposes, and the words ''[a]t the option of the Indian tribe or tribal organization'' were added at the beginning of the subsection.

A new subparagraph (m) was added to § 900.8 to provide that in its contract proposal, an Indian tribe or tribal organization must state that it will implement procedures appropriate to the program being contracted to assure the confidentiality of information relating to the financial affairs of individual Indians obtained under a proposed contract, and of medical records, or as otherwise required by law. While tribal comments objected to the imposition of regulatory procedures on confidentiality of personal financial information, many comments were received from Indian tribes indicating a concern that the confidentiality of personal medical records in the hands of tribal contractors be preserved, notwithstanding the opinion of DHHS Office of General Counsel that the Privacy Act does not apply to such records. The provision for such an assurance with respect to personal financial information resulted from a compromise in the Committee between the Federal and tribal positions.

In response to a comment suggesting that Indian tribes or tribal organizations should receive a list of Federal property used in carrying out programs to be contracted, a new question and answer were added immediately preceding § 900.10. In response to a comment, this new section also includes a requirement that the condition of the property be described.

In response to a comment, § 900.11(a)(4) was modified to add the words ''real and personal'' before the word ''property'' for clarification purposes.

Several comments requested clarification regarding whether the contract proposal becomes part of the contract document. In response, a new question and answer were added to clarify that the contract proposal becomes part of the final contract only by mutual agreement of the parties.

Several comments suggested that Subpart C be clarified to address what is contractible and what is inherently Federal and thus residual. The Committee did not adopt the suggestion. Federal agency decisions regarding residual functions are subject to the appeals process.

Subpart D—Review and Approval of Contract Proposals

Summary of Regulation

Although this topic is part of the declination process, it has been pulled out for separate treatment to facilitate a clearer understanding of the entire contracting process. In this area, the committee opted to have minimal regulations. This subpart details what the Secretary must do upon receiving a contract proposal, the time frames applicable to Secretarial review, how the 90-day review period can be extended, and what happens if a proposal is not declined within the 90-day period.

Summary of Comments

One comment indicated that the word ''Secretary'' in this Subpart does not define where the proposal should actually be submitted. Subpart B defines the word ''Secretary'' to include either Secretary or their delegates. It is clear that a proposal should therefore be submitted to the agency with jurisdiction over the program to be contracted, i.e., the Bureau of Indian Affairs, the Indian Health Service, the Bureau of Land Management, the National Park Service, etc.

A comment suggested amending § 900.15(a) to require the Secretary to return any proposal lacking the required authorizing resolution(s) to the applicant without further action. This suggestion was not adopted because § 900.15(b) requires that the applicant be notified of any missing information. It should be clear, however, that Section 102(a)(2) of the Act only requires the Secretary to consider a proposal if ''so authorized by an Indian tribe'' pursuant to the tribal resolution required under Section 102(a)(1) of the Act. Therefore, although technically outside of the enumerated declination criteria in Section 102(a)(2) of the Act, it is also clear that the Act precludes the approval of any proposal and award of any self-determination contract absent an authorizing tribal resolution.

Several comments requested that the 15-day timeframe in § 900.15 be cut to 10 days. This suggestion was not adopted because 15 days are needed to evaluate the application. The word ''request'' was added before the words ''that the items'' in this subsection for clarification purposes, and in response to several comments.

Several comments expressed concerns with the failure of this Subpart to specify what happens when a proposal is approved. The comments recommended addressing the award and funding of the contract. In response to these concerns, the question and the answer in § 900.16 were amended to reflect that the award of the contract occurs upon approval of the proposal. Also, the committee added the words ''and add to the contract the full amount of funds pursuant to § 106(a) of the Act'' were added at the end of § 900.18. Also, a new section was added to explain what happens when a proposal is approved.

One comment suggested adding a provision in § 900.18 to provide that costs incurred after the 90-day period be deemed allowable costs under the contract and be reimbursed. This suggestion was not adopted because it is beyond the scope of this Subpart.

A comment inquired whether the 90-day period continues to run if the Indian tribe is notified that there are missing items, or whether the 90-day period starts only when there is a complete proposal. The regulation in § 900.15(b) requires the Secretary to notify the applicant of any missing items, and to request the applicant to furnish these items within 15 days. If the applicant fails to submit the missing items altogether, the Secretary must either approve or decline the proposal that was received within 90 days of receipt. Similarly, if the applicant submits the missing items within the 15-day deadline, the 90-day period continues to run from the time of receipt of the original proposal.

Subpart E—Declination Procedures

Summary of Subpart

This subpart implements sections 102 (a)(2), (a)(4), (b) and (d) of the Act. It restates the statutory grounds for declining a contract proposal, clarifies that a proposal cannot be declined based on any objection that will be overcome through the contract, and details procedures applicable for partial declinations. Subpart E also informs Indian tribes and tribal organizations of the requirements the Secretary must follow when a declination finding is made, contains provisions for technical

assistance to Indian tribes and tribal organizations to avoid a declination finding, and to overcome stated declination grounds after a declination finding is made.

Summary of Comments

Several comments noted that the proposed regulations fail to address the continuation of mature contracts, and recommended that this issue be addressed. This recommendation was not adopted because there is no statutory authority to issue regulations on the mature contract process. In addition, the right to mature contracts is addressed in Section 105(c)(1) of the Act and in the Model Contract under Section 108 of the Act. Continuation of any contract is also addressed in § 900.32 of the final rule.

One comment recommended that declination of construction contracts be addressed in this Subpart. This recommendation was not adopted because this issue is addressed in § 900.123 of the final rule.

Several comments recommended a further explanation of the criteria in § 900.22. These comments were not adopted because it was decided not to interpret the declination criteria in the regulation, but to leave their interpretation to case-by-case adjudication.

One comment suggested adding an applicant's failure to submit the single agency audit report and/or failure to correct prior audit deficiencies as a declination ground in § 900.22. This comment was not adopted because there is no statutory authority to add declination criteria to those specified in Section 102(a)(2) of the Act.

In response to a comment, the reference to Section 106 of the Act in § 900.26 was replaced with a reference to Section 102(a) of the Act.

There were numerous comments objecting to the document disclosure provisions in § 900.27 of NPRM (now § 900.29). In response to these objections, § 900.27(a) was amended to delete the words ''when appropriate'' and replace them with the words ''within 20 days.'' In addition, § 900.27(c) was deleted in its entirety.

Several comments requested that the Secretary's burden of proof when declining a proposal in § 900.297(a) be changed to ''clear and convincing evidence.'' This recommendation was not adopted because it is different from the statutory burden of proof contained in Section 102(a)(2) of the Act.

A comment requested that the technical assistance to be provided in § 900.30 be clearly identified. This recommendation was not adopted because the type of technical assistance required will vary with each proposal. It is impossible to define generally the type of technical assistance required for all proposals.

Pursuant to several comments, the word ''substantively'' was deleted from two places in § 900.32, and replaced by the word ''substantially.''

The Committee received several comments regarding the ability of the BIA and other agencies of the Department of the Interior to review contract renewal proposals for declination issues, where the renewal proposal is substantially similar to the contract previously held by that Indian tribe or tribal organization. In the past, as a matter of practice, neither IHS nor the BIA has reviewed contract renewal proposals for declination issues. Therefore, the Departments have agreed that IHS and the BIA will not use the declination process in contract renewals where there is no material or significant change to the contract. However, as no past practice exists for the non-BIA agencies within DOI, those agencies will have discretion to use the declination process in appropriate contract renewal situations. The regulatory language of § 900.32 has been amended to reflect this decision.

Subpart F—Standards for Tribal or Tribal Organization Management Systems

Summary of Subpart

Indian self-determination contracts are unique agreements because, by definition, they are not procurement contracts, discretionary grants or cooperative agreements. This means that none of the usual procurement or grant regulations apply to the management of the Federal funds provided under these contracts. The absence of established guidelines presented a special challenge to the committee to develop standards which would assure appropriate stewardship of the Federal funds and other assets being transferred through these contracts. Deliberations on this issue led to the review of OMB Circular A–102 and the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (the ''Common Rule''). Although an Indian self-determination contract is not a discretionary grant, the Common Rule provides certain government-to-government management principles that apply to discretionary Federal grants to states, local governments, and Indian tribes.

The Common Rule has two-tiered management rules. On one tier, it generally defers to state law and regulations and accepts a state's management standards without imposing more detailed requirements. On the second tier, other local governments and Indian tribes (which vary greatly in size and structure) must observe the Rule's more detailed standards for the management of Federal grants.

In the interest of giving greater recognition to the government-to-government relationship which exists between Indian tribes and the Federal government, and to transfer greater responsibility to Indian tribes commensurate with their status, the committee established standards permitting the management of contract resources in accordance with tribal laws, regulations and procedures, just as the Common Rule permits states to manage Federal resources in accordance with state laws and procedures. Systems established by Indian tribes will govern the administration of contracts provided that they include the core management principles or standards adopted from the Common Rule which the committee determined best meet the needs of Indian tribes and tribal organizations.

Subpart F contains provisions relating to the following management standards: (1) Financial Management; (2) Procurement Management and (3) Property Management. In all of these areas the advisory committee designed minimal regulations that focus on the minimum standards for the performance of the three management systems used by Indian tribes and tribal organizations when carrying out self-determination contracts.

The standards contained in this subpart are designed to be the targets which the Indian tribe and tribal organization's management systems should be designed and implemented to meet. The management systems themselves are to be designed by the Indian tribe or tribal organization.

Section 900.36 contains general provisions which apply to all management system standards contained in this subpart. Subpart F includes provisions that: (1) Identify the management systems that are addressed; (2) set forth the requirements imposed; (3) limit the applicability of OMB circulars; (4) provide that the Indian tribe or tribal organization has the option to impose these standards upon subcontractors; (5) identify the difference between a standard and a system; and (6) specify when the management standards and management systems are evaluated.

Section § 900.44 contains the standards for financial management

systems. Subpart F establishes the minimum requirements for seven elements including: (1) Financial reports; (2) accounting records; (3) internal control; (4) budget control; (5) allowable costs; (6) source documentation; and (7) cash management.

Section 900.47 contains standards for procurement management systems. This subpart establishes the minimum requirements for seven elements: (1) To ensure that vendors and subcontractors perform in accordance with the terms of purchase orders or contracts; (2) to require the Indian tribe or tribal organization to maintain standards of conduct for employees award contracts to avoid any conflict of interest; (3) to review proposed procurements to avoid buying unnecessary or duplicative items; (4) to provide full and open competition, to the extent feasible in the local area, subject to the Indian preference and tribal preference provisions of the Act; (5) to ensure that procurement awards are made only to entities that have the ability to perform consistent with the terms of the award; (6) to maintain records on significant history of all major procurements; and (7) to establish that the Indian tribe or tribal organization is solely responsible for processing and settling all contractual and administrative issues arising out of a procurement. In addition, the regulation provides that each Indian tribe or tribal organization must establish its own small purchase threshold and definition of ''major procurement transactions''; establish minimum requirements for subcontract terms, and include a provision in its subcontracts that addresses the application of Federal laws, regulations and executive orders to subcontractors.

Section 900.51 contains the minimum requirements for property management systems. Subpart F addresses the standards for both Federally-titled property and property titled to an Indian tribe or tribal organization, with differences based upon who possesses title to the property. As a general rule the requirements for property where the Federal agency retains title are higher than requirements for property where the Indian tribe or tribal organization holds the title. Subpart F addresses elements including: (1) Property inventories; (2) maintenance of property; (3) differences in inventory and control requirements for property where the Federal agency retains title to the property; and (4) the disposal requirements for Federal property.

Summary of Comments

A comment requested that the rule clarify the application of Office of Management & Budget (OMB) Circulars or portions of OMB Circulars that apply to the operation of Indian Self-Determination Act contracts.

Section 900.37 specifies that the only OMB Circulars that apply to self-determination contracts are those (1) Incorporated the by Act, such as OMB Circular A–128, ''Audits of States and Local Governments''; (2) adopted by these regulations; or (3) agreed to by the Indian tribe or tribal organization pursuant to negotiations with the Secretary. In regard to these regulations, § 900.45(e) identifies the appropriate OMB Circular Cost Principles that should be used in determining the propriety of contract costs.

One comment asked the Committee to delete § 900.40(a) because it is overreaching and exceeds statutory requirements. This section was a fundamental underpinning of the entire Subpart. The negotiators agreed that the regulations would include standards, to be treated as minimum requirements, for the administration of contracts. For an initial contract proposal only, Federal officials may review the standards proposed by the Indian tribe or tribal organization, to determine that they meet or exceed these minimum regulatory requirements. Indian tribes or tribal organizations are responsible for the implementation of administrative systems that meet the standards and that are subject to review in accordance with the Single Agency Audit requirements as provided in Section 5(f) of the Act. In many respects, this dichotomy between the standards and systems was designed to acknowledge the unique and special nature of self-determination contacts (non-procurement intergovernmental agreements) and a shift in the regulatory emphasis from the unnecessary and burdensome review of systems to an emphasis on the acceptance of fundamental guiding management principles. This approach is consistent with provisions in the Act at Sections 5(b), 102(a)(2), 105 (a)(1) (2) and (3) and 107(a)(1) and in the Model Contract Section 108(b)(7)(c). For these reasons no change was made in § 900.40.

It was suggested that the Committee delete the words ''or tribal organization'' in § 900.42 from both the question and the answer as this section applies only to Indian tribes. The comment was correct and the words have been deleted.

The Committee was requested to clarify the period of time that Indian tribes and tribal organizations must retain records of contract operations. A new § 900.41 was created to address these issues. That section specifies that Indian tribes and tribal organizations should keep: (1) Financial records for three years from the date of the single audit submission; (2) procurement records for three years from the date of final payment to the supplier; and (3) property management records for three years from the date of disposition, replacement or transfer of the property. In addition, records related to litigation, audit exceptions and claims should be retained until the action is completed.

One comment suggested that the regulation provide for the Secretary to obtain consistent and timely financial information to respond to Congressional inquiries and to otherwise support budget justifications. Section 900.45(a) was amended by adding a provision that provides for the submission of a Financial Status Report, SF 269A. The frequency of submission of the SF 269A remains the subject of negotiation between the Indian tribe or tribal organization and the Secretary. The Department expect that the frequency will not be less than once per year. This change only affects how the information is transmitted to the government and is consistent with Section 5(f)(2) of the Act.

The committee was asked to specify which of the three Office of Management and Budget Circulars dealing with cost principles apply to a tribal organization. In that regard, a tribal organization could be a chartered entity of a tribe, a non-profit organization, and/or an educational institution.

Section 900.45(e) has been amended by revising the parenthetical statement and including a chart to clarify the application of the Office of Management & Budget circulars. The parenthetical statement makes clear that which circular is applicable is negotiable with the Secretary and that current agreements concerning Office of Management & Budget cost principles need not be renegotiated.

The committee was asked to adopt proposed clarifying language for Subsection 900.45(g). The regulations were amended to adopt the suggested language that provides a more accurate description of the standards for a cash management component of financial management systems.

One comment suggested adding the following new language to § 900.45(h):

If an Indian tribe or tribal organization contracts to assume a program, service, function, or activity which includes a physical trust asset or natural resource, the

Indian tribe or tribal organization shall enter upon its financial management system and provide for an accurate, current, and complete disclosure of the value of those assets, provide for an accurate, current and complete disclosure of funds by source and application utilized to keep the physical trust assets or natural resources in good repair and maintenance; provide for an accurate, current, and complete disclosure of any increase or decrease in the valuation of the asset; and provide for an accurate, current and complete disclosure of any other costs, function or activity which would improve, increase, or cause devaluation or decrease in the value of the physical trust asset or natural resource as would be required to account for any asset using generally accepted accounting principles and standards.

The Committee did not include this provision principally because it is beyond the scope of these regulations. Currently, the United States does not track the values of natural resources (i.e. national parks or Indian lands) in this fashion. Therefore, no financial basis exists to begin the process. The cost of establishing the basis would undermine and frustrate self-determination contracting. While the proposal has merits, it would not be possible to implement it effectively until appropriate guidance is issued on valuation of Federal natural resources, the United States enters the information in its financial records, and funds are made available to tribal governments to cover the cost of implementation. In regard to guidance, the Federal Accounting Standards Advisory Board has not issued any authoritative instructions on the valuation of Federal natural resources. This matter is currently under consideration by the Board.

Another comment asked the Committee to revise § 900.46 to require the Secretary to be held to a ''strict standard of compliance with the terms of the contract and the annual funding agreement.'' Further, the comment suggested deleting the words ''In regard to paragraph (g) of Sec. 900.44 [of the NPRM]'' and ''based upon the payment schedule provided for in.'' The Committee was asked to add ''in strict compliance with'' for the last phrase deleted. Section 900.46 was amended to make this section of the regulations consistent with the statute.

A comment recommended that § 900.48(c) be amended to include provisions requiring ''cost and price analysis'' in the procurement standards. Subsection § 900.48(c) was amended by adding the phrase ''and ensure the reasonableness of the price'' at the end of the subsection. This was done to ensure that cost or price analysis be considered in all procurements, but to avoid the application of a full Federal procurement-type cost or price analysis since self-determination contracts are not subject to the Federal Acquisition Regulations (FARs). It is the responsibility of the Indian tribe or tribal organization to design a procurement system based upon the standards in Subpart F. The amendment will require those systems to consider the ''reasonableness of price'' when making procurement purchases.

The Committee was asked to clarify § 900.50, including the provision of further guidance about the application of tribal law generally and the application of Tribal Employment Rights Ordinances (TERO) specifically. § 900.50 was substantially revised, to make clear that subcontracts by an Indian tribe or tribal organization may require the subcontractor to comply with certain provisions of the Act and other Federal laws. The new language informs subcontractors that they are responsible for identifying and complying with applicable Federal laws and regulations. The section was further amended to provide that, to the extent the Secretary and the Indian tribe or tribal organization identify and specify laws and regulations that are applicable to subcontracts in the negotiation of the self- determination contract, those identified and specified provisions will then be included in subcontracts.

These regulations do not specifically address the application of tribal law, but establish minimum standards for the operations of management systems. Indian tribes may exercise discretion and create higher standards by operation or enactment of tribal law. Similarly, an Indian tribe may seek a waiver of a standard as noted in § 900.36 of the regulations. Nothing in the regulations is designed to supersede or suspend the operation of tribal law that meets these standards. Further nothing in the regulations affects the operation of tribal law to activities not paid for by self-determination contract funds.

Sections 7(b) and (c) of the Act authorize the application of Indian Preference and Tribal Preference (TERO) in the performance of a self-determination contract. To the extent a TERO ordinance is consistent with the terms of Section 7(b) and (c) of the Act it can be made applicable to procurement subcontracts.

Property Management

The Committee was asked to define ''sensitive property'' in § 900.52, and as a result, a definition of ''sensitive personal property'' was inserted at § 900.52(b). That definition includes all firearms and provides that the Indian tribes and tribal organization are to define such other personal property ''that is subject to theft and pilferage.'' Since the activities vary from contract to contract to such a large extent, the committee decided that a locally-created definition best meets the needs of all contractors.

One comment indicated § 900.60(b) might require revision regarding the authority of an Indian tribe or tribal organization to dispose of Federal property. The Committee revised subsection (b) of § 900.60 by deleting all of subsection (1), that previously allowed for disposal if the Secretary failed to respond to a disposal request. As a result, if the Secretary fails to respond to a request from an Indian tribe or tribal organization within the sixty day period, the Indian tribe or tribal organization may return the Federal property to the Secretary. The Secretary is required to accept the property and is required to reimburse the contractor for all costs associated with the transfer. This ensures that Indian tribes and tribal organizations have a process to dispose of unneeded Federal property, and the reimbursement of transfer costs should provide the Secretary with an incentive to respond in a timely fashion to disposal requests.

The committee was asked to clarify that the property disposal procedures in § 900.60 only apply to personal property, because the answer to the question uses the terms ''personal property'' and ''property.'' Using the term ''property'' which, by definition, includes both real and personal property, creates ambiguity about application of the paragraph to the disposal of real property.

Section 900.60 only applies to the disposal of personal property. The matter has been clarified through editorial revision of the introductory question, to read as follows: ''How does an Indian tribe or tribal organization dispose of Federal personal property?''

Subpart G—Programmatic Reports and Data Requirements

Summary of Subpart

This brief subpart provides for the negotiation of all reporting and data requirements between the Indian tribe or tribal organization and the Secretary. Failure to reach an agreement on specific reporting and data requirements is subject to the declination process. Although the Indian Health Service proposes to develop a uniform data set, that data set will only be used as a guide for negotiation of specific requirements.

Summary of Comments

One comment argued for the revision of § 900.65, that provides for the submission of programmatic reports and data ''to meet the needs of the contracting parties.'' The comment was concerned that the section could be used to force Federal minimum reporting requirements upon Indian tribes and tribal organizations despite the provision in Section 5(f) of the Act that make reporting the subject of negotiations.

Section 900.65 has been amended to address the comment. A new introductory sentence was added that makes clear that unless there is a statutory requirement, these regulations create no mandatory reporting requirements. The negotiation of reporting is to be responsive to the needs of the parties and appropriate for the purpose of the contract. This provides the Indian tribe or tribal organization, as well as the Secretary, with guidance and limits for negotiations. Furthermore, because of the numerous comments made concerning the § 900.65 provision, ''meet the needs of the contracting parties,'' and the amendment noted above, § 900.67 was also amended to make it consistent with § 900.65 by substituting, ''which responds to the needs of the contracting parties,'' for ''meets the needs of the contracting parties''.

The Committee was asked to clarify grammar in § 900.68. The Committee concluded that the word ''for'' was inadvertently included in the first line of § 900.68. The ''for'' has been and a comma added between ''set'' and ''applicable'' in the first line. This should eliminate the confusion.

Subpart H—Lease of Tribally-Owned Buildings by the Secretary

Summary of Subpart

Section 105(l) of the Act authorizes the Secretary to lease tribally-owned or tribally-leased facilities and allows for the definition of ''other reasonable expenses'' to be determined by regulation. This subpart provides a non-exclusive list of cost elements that may be included as allowable costs under a lease between the Indian tribe or tribal organization and the Secretary. It further clarifies that except for ''fair market rental,'' the same types of costs may be recovered as direct or indirect charges under a self-determination contract.

The Subpart was substantially revised based upon comments received following the NPRM. Please note that two sections have been added, and previous § 900.71 and § 900.72 have now become § 900.73 and § 900.74 respectively.

Summary of Comments

Comments requested that the Committee specify the type of account and the guardian of the account for a reserve for replacement of facilities identified in § 900.70(c).

The final regulation adds two new sections to accomplish this. New § 900.71 was added to set forth the type of account as a ''special revenue fund'' or a ''capital project fund.'' New § 900.72 was also added to provide that the Indian tribe or tribal organization is the guardian of the fund. It permits fund investments in a manner consistent with the laws, regulations and policies of the Indian tribe or tribal organization, subject to lease terms and the self-determination contract.

The Committee was asked to add landscaping costs to those items of cost included in § 900.70(e)(1–16). No such addition was made as the Committee believed that such costs were included in either subsection (8) or subsection (16) of § 900.70(e).

Likewise, another comment suggested adding profit to those matters listed in § 900.70(e). In the Committee's view, a lease based upon fair market value provides for the recovery of profit, adjusted as appropriate, based upon the Federal Share (if any) of acquisition or construction. Therefore, no change was made to this provision.

The committee was asked to identify the source of funds for these lease payments. The source of funds is a subject of negotiation between the parties to a self-determination contract.

Subpart I—Property Donation Procedures

Summary of Subpart

This subpart establishes procedures to implement section 105(f) of the Act. Section 900.85 provides a statement of the purpose of the subpart and explains that while the Secretary has discretion in the donation of excess and surplus property, ''maximum'' consideration must be given to an Indian tribe or tribal organization's request.

This subpart also contains a provision for the Secretary to elect to reacquire property under specific conditions. It clarifies that certain property is eligible for operation and maintenance funding, as well as for replacement funding on the same basis as if title to the property were held by the United States.

Section 900.87 provides for the transfer of property used in connection with a self-determination contract. It provides slightly different procedures for personal property versus real property furnished before the effective date of the 1994 amendments and another procedure for property furnished after the enactment of the 1994 amendments.

Sections 900.91 and 900.92 address § 105(f)(2)(A) of the Act, which provides that a tribal contractor automatically takes title to property acquired with contract funds unless an election is made not to do so. It also addresses the process for requesting that real property be placed ''in trust.''

Section 900.97 addresses BIA and IHS excess property donation while § 900.102 addresses excess or surplus property from other Agencies.

Summary of Comments

The committee was asked to clarify this Subpart as it is confusing and generally repetitive. The Subpart addresses the methodology that provides property to Indian tribes and tribal organizations pursuant to the Indian Self-Determination Act. Because there are several classes of property, with varying rights and mechanisms, the Subpart must address each separately. In order to reduce confusion, the final regulations provide more uniformity depending on the property type.

It was suggested that the Committee restore the language that was initially adopted by the Committee, but not included, in § 900.86. The language change in the NPRM accommodates the use of ''plain English'' and was not intended to change the manner in which the Secretary exercised discretion. The Committee has reinstated the originally-approved version by striking the words ''give maximum weight'' and substituting ''exercise discretion in a way that gives maximum effect'' following the word ''will'' in the first line of the answer in § 900.86. A similar amendment can be found at § 900.97(a).

To ensure clarity, several comments requested that the regulation specify as to whether property is real property or personal property in given instances. The Committee has used the word ''property'' in these regulations to mean both real and personal property except where not applicable to one or the other type of property. If either the words ''real'' or ''personal'' modify ''property'' that provision is limited to that type of property.

The committee was asked to change the incorrect reference to 41 CFR 101–47, 202.2(b)(10) in §§ 900.87 (b)(2) and (c)(2). The miscitation has been corrected.

In addition, the committee was asked to delete the terms ''justify and certify''

in § 900.86 as well as § 900.97 and § 900.104 because these terms frustrate the statutory intent and limit access to property needed to carry out self-determination contracts. The Committee amended the above-noted sections and substituted ''state how'' or ''statement of how'' for the ''justify and certify'' provision. This was done to make clear that what is needed is a concise, simple statement of how the subject property is ''appropriate for use for a purpose of which a self-determination contract is authorized under the Act,'' the statutory language. The Committee expects that the deletion of the terms ''justify or certify'' makes it clear that no detailed submission will be required by the Secretary or his designee.

Comments requested revision in the process described in § 900.87 pertaining to property that was made available before or after October 25, 1994. The Committee has chosen not to make changes, as the October 25, 1994 date is the result of the 1994 Amendments to the Act. That date is the effective date of Public Law 103–413. Those amendments provided at Section 105 of the Act that Indian tribes or tribal organizations could take title to government-furnished property used in performance of the contract property unless the Indian tribe or tribal organization preferred the Secretary to retain title. Prior to October 25, 1994, title to such property remained with the Secretary.

This provision allows an Indian tribe or tribal organization to receive title to government-furnished property put in use prior to October 25, 1994. In part, that allows Indian tribes or tribal organizations greater flexibility with the Property Management standards in Subpart F above. For these, reasons no further changes were made in § 900.87.

One comment suggested that the regulation clarify the references to the value of property subject to reacquisition or acquisition by the Secretary at the time of retrocession, reassumption, termination or expiration of the contract. Among the concerns expressed were the value at the time of reacquisition, whether it was acquisition or reacquisition, the lack of consideration of depreciation, and the use of property by multiple contracts when only one or a portion of one contract triggers this issue. These comments relate to Sections 900.89, 900.93, and 900.100, all of which address this issue depending upon the class of property.

The Committee took action to make uniform sections 900.89, 900.93, and 900.100. These new sections all contain an additional subsection that addresses the issue of property used in multiple contracts. This new subsection provides that the Secretary and contractor shall negotiate an ''acceptable arrangement'' for continued sharing and the title to the property.

In order to address current value (at the time of retrocession, etc.) the section was revised to ''current fair market'' and another clause was added, ''less the cost of improvements borne by the Indian tribe or tribal organization.'' This was done so that where an Indian tribe or tribal organization has made improvements to a piece of property, the value of the improvements is factored into arriving at the $5,000 value threshold. The Committee also reviewed the depreciation questions but concluded that the current fair market value approach would adequately take these factors into consideration. Moreover, since services would be provided to Indian beneficiaries by the Secretary, the best approach with the reacquired property was current fair market value.

In regard to § 900.93, one comment proposed a change to the question by substituting ''reacquire'' for ''acquire.'' Upon review the Committee concluded that ''acquire'' was the correct term because this section addresses contractor-purchased property. In that instance, the Secretary has never had title and ''acquire'' is the proper term.

The revisions to the above-noted sections have also been incorporated into Subpart P of the regulations. No further comments will be discussed in this preamble on Sections 900.89, 900.93, or 900.100 since the operative provisions are now uniform.

With regard to Sections 900.96 and 900.103, several comments asked when the Secretary will notify Indian tribes and tribal organizations about the availability of excess BIA and IHS personal property and GSA excess and surplus property. Suggestions of quarterly or semi-annually were made. At both § 900.96 and § 900.103 the term ''not less than annually'' has been added. This creates a minimum requirement that the Secretary must meet yet allows for more frequent notices.

Some comments asked the Committee to provide further instruction in § 900.97(b) relating to multiple requests by contractors the same excess or surplus property.

The Committee revised these subsections to clarify what will occur in that situation. In regard to personal property, the request first received by the Secretary will have precedence. If the requests are received by the Secretary on the same date, the requestor with the lowest transportation costs will prevail.

A technical amendment was made to § 900.97(c) by changing ''piece of real property'' to ''parcel of real property.''

The committee was asked to delete the reference to the Federal Property Management Regulation, 41 CFR Chapter 101, as that reference had at § 900.104(b) the potential to incorporate an entirely different set of regulations, not consistent with the Act. The references to the Federal Property Management Regulation (FPMR) and 41 CFR Chapter 101 were deleted and ''Section 900.86 of this Subpart'' was substituted. The Committee made this revision to reflect that these regulations are unique to self-determination contracts and to avoid any conflict between these regulations and the FPMR.

Several comments were made concerning the need for the Secretary to act expeditiously to acquire excess or surplus government property when the property is frozen by the Indian tribe or tribal organization, in § 900.104(c). The Committee revised subsection (c) of § 900.104 by harmonizing the several suggestions.

Several comments called for clarification of § 900.107 by explaining which type of property remains eligible for replacement funding. The Committee changed the question in § 900.107 and deleted ''Yes'' from the answer. This makes clear that government-furnished property, contractor-purchased property and excess BIA and IHS property are eligible for replacement funding consistent with Section 105(f) of the Act. Only excess or surplus government property from other agencies is not eligible for such replacement.

Subpart J—Construction Contracts

Summary of Subpart

Subpart J addresses the process by which an Indian tribe or tribal organization may contract for construction activities or portions thereof. The subpart is written to inform readers of the breadth and scope of construction contracting activities conducted by the Departments, and provides opportunities for Indian tribes or tribal organizations to choose the degree to which they wish to participate in those activities. The subpart provides for extensive cooperation and sharing of information between the Departments and an Indian tribe or tribal organization throughout the construction process. The subpart provides for different construction contracting methods, such as award of

contracts through subpart J, award of contracts through section 108 of the Act, and award of grants in lieu of contracts depending on the degree of Federal involvement and the phase(s) of construction activities for which the Indian tribe or tribal organization seeks to contract.

The construction process is described in phases, starting with a preplanning phase, followed by a planning phase, a design phase, and a construction phase. Provisions are included so an Indian tribe or tribal organization can seek a contract through section 108 of the Act for the planning phase and for construction management services. It is not required that these functions be pursued through a section 108 contract: if the Indian tribe or tribal organization so elects, these activities can be part of a subpart J contract.

Definitions are provided that are specific to this subpart and this subpart establishes new procedures to facilitate tribal contracting, through such measures as tribal notification and other provisions.

The subpart promotes the exploration of alternative contracting methods, and eliminates the applicability of the Federal acquisition regulations except as may be mutually agreed to by the parties.

The subpart describes the process for negotiating a construction contract, including the process for arriving at a fair and reasonable price, and details the process for resolving disagreements in the contracting process. The subpart also sets forth minimum requirements for contract proposals, and details the respective roles of tribes and the Secretary.

The subpart promotes tribal flexibility in several areas, including through periodic payments at least quarterly, and the payment of contingency funds to be administered by the tribal contractor.

Summary of Comments

Approximately 185 comments were received from non-governmental representatives, most of these from Nations and tribes rather than individuals. This preamble reflects the committee response to each comment in a section-by-section format. References to no action being taken by the Committee indicate that no change was made to the regulation.

Several comments proposed that the phrase ''or real property'' be added after ''Federal facilities.'' The comments were adopted to ensure that related construction work was covered under Subpart J. The new phrase adds ''and/or other related work'' after ''demolition.''

Eight comments argued that supportive administrative functions should be specifically recognized as contractible in the language of § 900.111. The Committee decided that the language was adequate as published. One comment proposed adding ''or tribal organization authorized'' after ''tribe.'' This comment was adopted.

One comment proposed to add a bid award phase. The comment was not adopted because it is presently included in the individual phases described in the regulation. Three comments stated that tribal involvement was not included in the site selection process. Site selection was adopted and inserted into subsection 900.112(a)(2) and (3). One comment proposed to add ''assessment and'' after ''initial'' at § 900.112(a)(1) and ''associated activities'' after ''assessments'' at § 900.112(b)(2). Both comments were adopted.

Several comments stated that § 900.113(b) implies that Indian tribes and tribal organizations will always subcontract with a consultant rather than using tribal employees to perform certain functions. This was not the intent of the proposed regulation. The Committee adopted the proposed language: ''An Indian tribe or tribal organization's employee or construction management services consultant (typically an engineer or architect) performs such activities as:'' and struck ''The construction management services consultant (typically an engineer or architect) assists and advises the Indian tribe or tribal organizations in such activities as.''

Five comments suggested that the phrase ''and real property'' should be included at § 900.113(c) after ''Buildings and Facilities.'' The committee took no action on these comments.

Three comments stated that the critical distinction between construction contracts and section 108 model agreements are the requirements which apply to each. The committee took no action on this comment.

One comment stated that § 900.115(b)(1) should be clarified to indicate that the term ''Act'' refers to the Office of Federal Procurement Policy Act. The comment was adopted and the work ''such'' was deleted and the word ''that'' was inserted.

Nine comments suggested that cost reimbursement contracts should also allocate the risk. The Committee took no action. One comment suggested replacing ''fixed-price'' with ''negotiated.'' The Committee adopted ''negotiated'' and inserted it before ''fixed-price'' in both the question and response.

Two comments stated that subsection 900.117(a)(2) treats the consequences of the Secretary's failure to act in a way that is very unfavorable to Indian tribes and, therefore, against the policy of the Self-Determination Act. The comments argued that the Secretary's failure to act should render the POR *accepted* rather than rejected. The Committee did not agree on this change. Three comments stated that this section should contain standards or other objective criteria against which the POR will be reviewed. The Committee concluded that these criteria will be negotiated between the parties and identified in the contract. One comment suggested revising the timeframes contained in the subsection to accommodate a shorter construction period due to weather concerns. The Committee decided to add a subsection at the end of Subpart J to address this issue.

Seven comments argued that construction management services may be performed by tribal employees. The Committee adopted the language ''and/or tribal or tribal organization employees'' after ''consultants.''

The Committee received two comments on subsection 900.120. The first urged that the 30-day time period be reduced to 14 days. The Committee did not agree with this change. The second comment recommended inserting the word ''shall'' in place of ''will'' and inserting ''By registered mail with return receipt in order to document mailing after notify.'' This language was adopted.

The Committee received eight comments on subsection 900.121 of the NPRM. Six suggested inserting the word ''each'' before the word ''phase,'' requiring the Secretary to notify Indian tribes and tribal organizations before each phase. One comment proposed adding the following language: ''Failure of the tribe or tribal organization to notify the Secretary within 45 days after receiving Secretarial notice described in § 900.120 shall not serve as a bar to the applicant tribe or tribal organization from contracting for the desired project.'' Although the proposed language accurately reflects a Comptroller General's Opinion, the Committee did not agree to this addition. To resolve the impasse, the Committee struck subsection 900.121 in its entirety.

Eight comments suggested adding language to § 900.121 to clarify who will be solicited and how. The committee took no action on these suggestions.

Three comments stated that section 105(m) of the Act establishes a

negotiation process to be invoked at the tribes' option, and section 105(m) language should be reflected in subsection 900.122 rather than imposing a mandatory process that may not be applicable in all situations. The regulation will be interpreted consistently with the applicable statutory provisions. The reference ''in accordance with section 900.121(a)'' was stricken since § 900.121 was in its entirety. One comment suggested changing ''will'' to ''shall'' after ''Secretary'' in § 900.122(a). This change was adopted.

Eight comments stated that the language of this section should be changed to mirror the requirements found at § 900.29. The Committee took no action on these comments. One comment suggested adding ''and provide all documents relied on in making the declination decision'' at § 900.123(b)(1) after the words ''in writing.'' The Committee agreed to this language with the addition after the word ''decision'' of ''within 20 days of such decision.'' The Committee did not agree to the proposed addition of subsection 900.124(b)(1)(I): ''The Secretary shall be barred from relying on any and all such documents which are not provided in any defense of this declination decision.'' The regulation therefore does not address what the Secretary may or may not rely upon, leaving such matters for decision by administrative bodies or the courts.

Three comments on § 900.124 stated that the requirements for grants are not clear. The Committee took no action.

Five comments raised the issue of the applicability of the Contract Work Hours Act. The Committee agreed that the applicability of the Contract Work Hours Act and other laws is adequately addressed in § 900.125(d). Accordingly, the reference to the Contract Work Hours Act at § 900.125(c)(4) was deleted.

One comment stated that § 900.125(c)(1) requires the contract to state that the tribal contractor will not alter title to real property ''without permission and instructions from the awarding Agency'' and is, therefore, inconsistent with section 105(f) of the Act, which states that title to property furnished by the Federal government for a contracted program ''shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization.'' The Committee adopted ''elects not to take title (pursuant to Subpart I) to Federal property used in carrying out the contract'' at § 900.125(c)(1) after the word ''organization.'' The Committee also struck the language ''proposes to use Federal property in carrying out the contract.''

One comment stated that ''engineers'' should be deleted at § 900.126(a)(1) and § 900.130(c)(1) because the Act does not require the use of licensed engineers, only architects. The comment was adopted and the word ''engineers'' was deleted from those sections.

One comment suggested that § 900.125(a)(8) be expanded to include the following language after the word ''manuals'': ''and the Secretary shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs.'' The Committee adopted this language.

One comment stated that § 900.125(b)(8) was overreaching and required production of information that the Federal government had no legitimate need to know. The Committee compromised by agreeing to strike the language as written and to substitute the following: ''(8) Identify if the tribe or tribal organization has a CMS contract related to this project,'' and added after the word ''section'' at § 900.125(b)(4) ''and minimum staff qualifications proposed by the tribe or tribal organization, if any.''

One comment proposed adding language at § 900.125(d) which would include tribal laws, ordinances and resolutions. The Committee agreed and added the sentence ''The parties will make a good faith effort to identify tribal laws, ordinances and resolutions which may affect either party in the performance of the contract.''

Three comments questioned the applicability of § 900.126 to cost reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action.

Ten comments proposed changes to the provision on contingency funds. Four suggested the following language: ''the amount of the contingency provided shall be 10 percent of the contingency funds, whichever is greater.'' Two comments proposed that 100 percent of the available contingency should be open for negotiation and one comment advocated that 100 percent of the available contingency should be included in the contract. The comments proposed alternative language: ''* * * allow all of the contingency funds to be transferred to the tribe unless the government could show proof as to why such funds should not be transferred.'' The Committee compromised on the following language: ''The amount of the contingency provided shall be 3 percent of activities being contracted or 50 percent of the available contingency funds, whichever is greater.'' Additionally, the following sentence was added to address concerns regarding funding: ''In the event provision of required contingency funds will cause the project to exceed available project funds, the discrepancy shall be reconciled in accordance with § 900.129(e).''

One comment objected to the term ''contract budget,'' and urged the language be changed to ''funding proposal.'' The Committee took no action, and noted that the present language was written to accommodate redistribution of funds within the budget.

One comment stated that the ''fair and reasonable'' language at § 900.127(a) ''gives too much discretion to government officials to determine what is fair and reasonable.'' The Committee adopted the reference to § 900.129 at the end of § 900.127(a).

Three comments raised the question of the applicability of § 900.128 to cost reimbursement, fixed-price, and non-construction contract construction activities. The Committee took no action on this concern, but to clarify changes made at § 900.127(e)(8), the following language at § 900.128(d)(3): ''including but not limited to contingency.''

Seven comments stated that § 900.129(e)(1) should be amended to reflect that only the amount in excess of the available amount may be declined. The Committee decided not to make the recommended change, but did adopt the following language after the word ''Act'' at § 900.129(e)(1): ''or, if the contract has been awarded, dispute the matter under the Contract Disputes Act.''

One comment urged that § 900.129(e)(2)(i) ''should be modified to expressly authorize the parties to jointly agree on a lump-sum advance payment to generate earned interest, in order to bridge the gap between a fair and reasonable price and the amount available to the Secretary.'' The Committee added the phrase ''advance payments in accordance with section 900.132'' at § 900.129(e)(2)(i) after ''contingency funds.''

Three comments raised the applicability of § 900.129 to cost reimbursement, fixed-price, and non-construction contract construction activities. The Committee took no action.

Five comments stated that architect and engineer services were appropriate at the design phase (§ 900.130(b)(1)) but not required at the construction phase and should be deleted. One comment addressed the language requiring licensed engineers at §§ 900.130(b)(1) and (c)(1). The Committee struck ''and

engineers'' in both places, and inserted the word ''as'' before ''needed.''

Three comments stated that language at § 900.130(c)(5) should be changed to read: ''The tribe or tribal organization may not issue a change order which is outside the general scope of work defined in the contract or which exceeds the contract budget including contingency funds without Secretarial approval.'' The Committee took no action.

One comment argued that the timing of the independent cost estimate should be clarified to facilitate negotiations. The Committee took no action.

Three comments raised the applicability of § 900.130 to cost-reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action.

One comment proposed that § 900.130(b)(5) should delete the Secretarial approval and substitute ''review and provide written comments.'' In compromise, the Committee adopted language which allows for Secretarial review and written comments on the project plans and specifications only at the concept phase, the schematic (or preliminary design) phase, the design development phase, and the final construction documents phase, and Secretarial approval of the project plans and specifications for general compliance with contract requirements only at the schematic (or preliminary design) phase and the final construction documents phase, or as otherwise negotiated.

One comment proposed replacing the word ''shall'' at § 900.130(b)(8) with ''may,'' and striking the last sentence requiring production of copies of contracts and subcontracts. In compromise, the Committee struck the following language: ''of contracts and major subcontracts and modifications * * * and A/E service deliverables.'' At the end of the first sentence of § 900.130(b)(8) the Committee adopted the following language: ''including but not limited to descriptions of contracts, major subcontracts and modifications implemented during the report period and A/E service deliverables.''

The Committee struck the following language at § 900.130(c)(7)(ii): ''of change orders, contracts and major subcontracts'' and inserted at § 900.130(c)(8) ''contracts, major subcontracts, modifications.''

One comment argued that § 900.130(e) should require the Secretary to act ''within 30 days or as negotiated between and agreed to by the parties.'' Another comment suggested that the word ''sufficient'' replace ''additional'' before''funds are awarded.'' The Committee took no action on the first comment and adopted the word ''sufficient'' in addition to, rather than in lieu of, ''additional.''

Six comments urged that § 900.131(b)(7) be rewritten as follows: ''The tribe or tribal organization may not issue a change order which is outside the general scope of work defined in the contract or which exceeds the contract budget including contingency funds without Secretarial approval.'' The Committee took no action.

Eight comments recommended the deletion of § 900.131(b)(11)(i)(A), stating that this section takes authority from an Indian tribe when the tribe is acting as the contracting officer for its subcontracts. The Committee took no action.

Eight comments suggested that overhead costs should be included at § 900.131(b)(11)(i)(D)(iii). The Committee adopted the language ''including but not limited to overhead costs'' before ''reasonable costs.''

One comment stated that the Secretary's role under § 900.131 generally should be substantially narrower. Specifically, the comment stated:

> The Secretary should not have final approval authority over planning documents once a contract is set for planning activities, the Secretary should not retain final approval authority for general compliance with contract requirements, and the Secretary should not be able to decline acceptance of the constructed building or facility. The Secretary should instead be limited to monitoring contract performance and to invoking such remedies as may be available to the Secretary under the Contract Disputes Act or under other provisions of the Self-Determination Act.

The Committee adopted compromise language on this issue at § 900.130(b)(5).

One comment stated that the independent cost estimate described at § 900.131(b)4) is a fully contractible function and the report should be shared with both parties. The Committee took no action on this comment.

One comment urged that § 900.131(b)(11)(i)(B) is unacceptable because it allows the Secretary subjective discretion to determine what is ''materially non-compliant work,'' The Committee took no action on this comment.

Three comments questioned the applicability of § 900.131 to cost-reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action on those comments.

One comment proposed eliminating the Secretarial approval function at § 900.131(b)(1) and inserting the word ''maximum'' before the words ''tribal participation.'' The Committee adopted the word ''comment'' before ''and approval functions'' and ''full'' before ''tribal participation.'' The Committee also adopted the words ''in writing'' with regard to Secretarial notification of any concerns or issues that may lead to disapproval and the words ''and documents'' after ''relevant information.'' The Committee struck the language ''accommodate tribal recommendations'' and inserted ''resolve all issues and concerns of the tribe or tribal organization'' after the words ''good faith effort to.'' The Committee added ''appropriate'' before the word ''Secretary'' at § 900.131(b)(2).

One comment proposed changing § 900.131(b)(4) to read ''Secretary may rely on the Indian tribe's or tribal organization's cost estimate or the Secretary may'' obtain an independent government cost estimate that is derived from the final project plans and specifications, striking the balance of the sentence. The Committee adopted this comment and, after ''tribal organization,'' added the following: ''and shall provide all supporting documentation of the independent cost estimate to the tribe or tribal organization within the 90-day time limit.''

One comment proposed to strike ''approve'' at § 900.131(b)(5) and insert ''provide written comments.'' The Committee adopted the following language after ''the Secretary shall have the authority to review'': ''for general compliance with the contract requirements and provide written comments on,'' and struck ''approve for general compliance with contract requirements.'' After ''final construction documents phase,'' the Committee also added ''and approve for general compliance with contract requirements the project plans specifications only at the schematic phase and final construction documents phase.''

One comment argued that § 900.131(b)(9) be deleted and the following substituted: ''The Secretary shall be limited to the number of on-site monitoring visits negotiated between and agreed upon by the parties.'' The Committee achieved consensus by striking ''retains the right to'' and inserting ''may'' after ''the Secretary.''

In response to a comment regarding § 900.131(b)(1)(iii), the Committee inserted ''including but not limited to overhead costs.''

One comment proposed an additional subsection at § 900.131(b)(13)(vi) to read: ''The Indian tribe or tribal organization shall be compensated for

reasonable costs incurred due to termination of the contract.'' The Committee adopted this comment.

One comment proposed adding ''No further approval or justifying documentation by the contractor shall be required before expenditure of funds'' to § 900.134. The Committee adopted this suggestion.

Two additional subsections to Subpart J were adopted by the Committee. One responds to tribal concerns regarding the short period of actual time available to engage in construction activities where weather is an issue. The second clarifies that tribal employment rights ordinances do apply to construction contracts and subcontracts.

The Committees received comments urging both approval and rejection of Subpart J as proposed. The Committee only considered comments which addressed a specific subsection and/or proposed language.

Construction management services: Of the comments received regarding the proposed rule for construction activities under Public Law 93–638, many were directed towards the definition of Construction Management Services (CMS) and Construction Project Management (CPM) contained as part of the rule. Indeed, one comment, representative of several Indian tribes, ''. . . objects to the excessively narrow definition of construction management services (§ 900.113(b)) in a fashion which unlawfully defeats the tribal right to contract for management services through an ordinary self-determination contract, contrary to section 4(m) of the Act.'' CMS is a management process for construction projects that in some instances can provide for project delivery. Several comments feel that the activities described in the definition of CPM should be considered CMS activities. The distinction is important in that the statute provides that self-determination contracts for CMS can be through the Section 108 Model Agreement and not through a self-determination construction contract (Subpart J) as the regulations require for conduct of CPM activities.

The statute does not provide a definition for CMS and efforts to develop a definition dominated Committee discussion through the regulation process. At the start of the negotiation process, discussion departed upon a path that quickly stalled in a quagmire of divided opinion as to the role, both appropriate and statutorily permissible, available to the Federal government in self-determination contracts involving construction. However, at no point was there any dispute between tribal or Federal representatives that a tribe can contract for all management functions of a construction contract. The dispute regarding this issue revolves around the contracting vehicle utilized—a self-determination contract versus a Section 108 Model Agreement—and not the contractibility of management functions. Consistent with the Federal argument for limited Federal involvement in construction projects was an unwavering view that a Model Agreement, invoked through provision CMS, could not be used to circumvent other provisions of the statute dealing with construction.

To move forward, the Committee set aside initial efforts to define roles and involvement, and instead focused on describing processes through which tribes could pursue construction activities. From these scenarios, much discussion ensued and the roles of each party developed. Through these efforts, the regulations evolved in a manner that provides for Indian tribes or tribal organizations to contract for a spectrum of responsibilities, ranging from oversight of Federal efforts to tribal responsibility for all aspects of the construction process, through multiple options of contracting methods. From the standpoint of the tribal representatives that actively and consistently participated throughout the negotiation process, the practical effect of the CMS definition is negligible towards the overall goal of increasing tribal control of the contracting process. The limit of the Federal involvement, as described in § 900.132 of the regulation, is a direct reflection of efforts to describe reasonable points of Federal involvement. Both tribal and Federal representatives of the Committee charged with developing the regulations agree that the end result reflects a lessening Federal involvement in and an increase of tribal control of the construction process through 638 contracting.

However, Federal and tribal committee members did not reach consensus on the definition of CMS. Tribal and federal representatives included this issue in their non-consensus reports. The tribal non-consensus position sought to eliminate the definition of ''construction project management'' and include a less restrictive definition of ''construction management services'' with conforming changes to the balance of Subpart J. Tribal representatives are of the view that these definitions inappropriately limit the scope of construction management activities which should be contractible outside Subpart J. They are further of the view that the precise contours of ''construction management services'' should be worked out on a case-by-case basis as tribes engage in negotiations with particular agencies over specific construction projects. Accordingly, the Departments did not change the definition of CPM.

While the Departments have given careful consideration to the views of the tribal representatives on this issue, they cannot accept the tribal proposal. The Departments are persuaded that, as a legal matter, the Act treats construction contracts governed by Subpart J differently from contracts for other activities which may be contracted using the model agreement in section 108 of the Act. The two definitions allow contracting under a section 108 model, agreement for certain administrative support, coordination, and monitoring activities. However, construction project design and construction activities (including day-to-day on site project management and administration) are appropriately contracted under Subpart J. Although the tribal representatives are of a different legal view, we believe that expanding the definition of ''construction management services'' so that construction projects may be conducted under a section 108 construction management agreement circumvents the statutory requirements for a construction contract between the government and the Indian tribe or tribal organization.

Subpart K—Waiver Procedures

Summary of Subpart

This subpart implements section 107(e) of the Act, which authorizes the Secretary to make exceptions to the regulations promulgated to implement the Act or to waive such regulations under certain circumstances. Section 107(e) of the Act provides that in reviewing waiver requests, the Secretary shall follow the time line, findings, assistance, hearing, and appeal procedures set forth in section 102 of the Act. Subpart K explains how an Indian tribe or tribal organization applies for a waiver, how the waiver request is processed, the applicable timeframes for approval or declination of waiver requests, and whether technical assistance is available. In addition, subpart K restates the declination criteria of section 102 of the Act, which apply to waiver requests, and specifies that a denial of a waiver request is appealable under subpart L of these regulations. Finally, subpart K implements section 107(b) of the Act by providing a process for a determination

by the Secretary that a law or regulation has been superseded by the provisions of the Indian Self-Determination Act, as amended.

Summary of Comments

Several comments indicated that the scope of Subpart K was unclear. Some argued that the scope should be narrowed to authorizing only waivers under Part 900, while others argued that it should be expanded to include other regulations as well. The language in § 900.140 has been redrafted to clarify that the statutory waiver authority in Section 107(e) of the Act is limited to regulations under this Part. It should be noted that the Secretary of the Interior has the reserved authority to waive other regulations in 25 CFR if permitted by law. *See* 25 CFR 1.2.

One comment asked whether the Secretary can delegate his or her authority to waive regulations to lower administrative levels. The Secretary does have such authority, but has not chosen to exercise it.

One comment recommended a modifying of the last sentence of § 900.143 to require a ''clear and convincing'' burden of proof on the Secretary where a waiver request is denied. This recommendation was rejected because it is different from the statutory burden of proof in Section 102(a)(2) of the Act.

One comment objected that the 90-day period in § 900.143 was too long, and recommended shortening it to 30 days. This recommendation was rejected because it is contrary to the 90-day time frame in Section 102(a)(2) of the Act. Section 107(e) of the Act specifically provides that the timeline in Section 102 of the Act applies to the review of waiver requests.

One comment asked whether waivers can be granted even if they are against the law. Although such a clarification is unnecessary in this regulation, the Secretary is not authorized to waive any provision of the Act that may be restated in these regulations.

One comment stated that § 900.146 should be amended to allow Indian tribes or tribal organizations the discretion to draw on expertise from other tribes and/or tribal organizations to meet their needs. To address this concern, § 900.146 was amended to cross-reference the provision of technical assistance under § 900.7.

One comment recommended the inclusion of an additional paragraph in § 900.148 requiring the Secretary to attach a list of all applicable Federal requirements to each contract. This suggestion was not adopted because any addition to the contract must be by mutual agreement of the parties pursuant to Section 108 of the Act.

The Office of Management and Budget (OMB) expressed concern about recognition of its ultimate responsibility for the approval of waivers of any principles contained in OMB cost circulars. Therefore, in reviewing waivers of any cost principles, OMB requests that the Secretary consult with OMB prior to approving any requests under Subpart K.

Subpart L—Appeals

Summary of Subpart

The advisory committee decided to develop substantive regulations governing appeals of pre-award decisions by Federal officials. This subpart does not govern appeals of post-award decisions subject to the Contract Disputes Act, since the provisions governing disputes under a contract can be found in subpart N of these regulations. Subpart L implements sections 102(b), 102(e), and 109 of the Act, as well as various other provisions requiring the Secretary to provide an administrative appeals process when making certain decisions under the Act. It provides a road map to the appeals process for Indian tribes and tribal organizations.

The regulation is divided in two parts: the first part concerns appeals from decisions relating to declination of a proposal, an amendment of a proposal, or a program redesign; non-emergency reassumption decisions; decisions to refuse to waive regulations under section 107(e) of the Act; disagreements over reporting requirements; decisions relating to mature status conversions; decisions relating to a request that a law or regulation has been superseded by the Act; and a catchall provision relating to any other preaward decisions, except Freedom of Information Act appeals and decisions relating to the award of discretionary grants under section 103 of the Act. The second part concerns decisions relating to emergency reassumptions under section 109 of the Act and decisions relating to suspension, withholding, or delay of payments under section 106(l) of the Act.

Subpart L allows for an informal conference to avoid more time-consuming and costly formal hearings, but delineates the appeal process available to Indian tribes and tribal organizations that are either unhappy with the results of the informal conference or who choose to bypass the informal process altogether. Subpart L also states that an Indian tribe or tribal organization may go directly to Federal district court rather than exhaust the administrative appeal process under this regulation.

Under the regulation, all appeals must be filed with the Interior Board of Indian Appeals. Hearings on the record are conducted by an Administrative Law Judge of the Department of the Interior's Office of Hearings and Appeals, Hearings Division, who renders a recommended decision. Objections to this recommended decision may be filed either with the Interior Board of Indian Appeals, if the case relates to a Department of the Interior decision, or with the Secretary for Health and Human Services, if the case relates to the Department of Health and Human Services.

The second part contains similar provisions concerning emergency reassumption and suspension decisions, but these decisions are treated separately because of the statutory requirement that a hearing on the record be held within ten days of the Secretary's notice of his or her intent to rescind and reassume a program immediately, or a notice of intent to suspend, withhold, or delay payment under a contract.

Summary of Comments

Several comments noted that the words ''you'' and ''your'' appear throughout this Subpart, rather than the words ''Indian tribe'' and ''tribal organization.'' Where appropriate, the words ''you'' and ''your'' have been replaced throughout this Subpart.

Pursuant to several comments, § 900.150 was amended by adding a new paragraph (j) subjecting decisions relating to requests for determination that a law or regulation has been superseded by the Act to the appeal procedures under this Subpart.

One comment objected to having IHS appeals go to the Interior Board of Indian Appeals (IBIA). This recommendation was not adopted because to have all appeals heard by a single administrative appeals body so that the Act and these regulations are uniformly interpreted by both Departments.

One comment recommended that Indian tribes should be required to go through the administrative appeal process before going to Federal district court. This recommendation was not adopted because Section 110 of the Act specifically authorizes direct access to Federal courts.

One comment recommended that there be a mandatory completion time of six months from the time an Indian tribe or tribal organization files a notice of appeal to the time for a final decision

from the IBIA. This recommendation was not adopted because there is no way for the IBIA to anticipate when all briefings, discovery extensions, and settlement discussions will be concluded. Flexibility needs to be maintained during this process. The regulation already includes time frames for the IBIA to render decisions once all required filings have been made. *See, e.g.,* § 900.167 and § 900.174.

One comment recommended enlarging the 30-day period in § 900.152 to 90 days. This recommendation was not adopted because § 900.159 already provides for an extension of time.

Several comments requested that § 900.152 be clarified to provide that Indian tribes may appeal decisions made by agencies of DHHS besides the IHS. This recommendation was adopted, and the question in § 900.152 was amended to reflect this clarification.

One comment suggested that § 900.155(b) be redrafted to define the words ''adequate representation'' and suggested that the section be redrafted so that the costs of the appeal are chargeable either to the contract, if the tribe prevails on the appeal, or to the tribe if the appeal is unsuccessful. These recommendations were not adopted. Federal agencies reserve the rights to determine what is adequate representation in specific cases. To force tribes to repay the expense of appeals either through a charge to the contract or through tribal funds would be unjust and would discourage appeals which are well taken.

Many comments objected to a provision in § 900.152 and § 900.156 which provides that ''the IBIA will determine whether you are entitled to a hearing.'' This sentence was deleted from these two sections. As pointed out in many comments, the standards governing these decisions are set forth in § 900.160.

Several comments objected to the certification requirement in § 900.158(d) because it is not a statutory requirement of the Act, and conflicts with the government-to-government relationship between tribes and U.S. Government. This recommendation was not adopted. The certification requirements here are the same as in courts and other administrative appeal forums. The purpose of the requirement is simply to ensure that the deciding official has been informed that his/her decision has been appealed, and that the IBIA be informed of this notification. It is not intended to be a burdensome requirement, but merely a certification that is obtained for information purposes.

Pursuant to a comment, the words ''good reason'' in § 900.159 were changed to the words ''valid reason.''

One comment recommended deletion of § 900.159 because any request for an extension should be made within the 30-day time frame in § 900.158. This recommendation was not adopted because, although a matter of considerable debate during the Committee's negotiations, it was agreed that there could be extenuating circumstances that could prevent a Indian tribe or tribal organization from filing its notice of appeal within the 30-day time frame in § 900.158.

One comment sought clarification of what happens if the IBIA determines not to grant an extension. If the IBIA determines that the appellant does not have a valid reason to extend the deadline, and the tribe disagrees with this determination, it can appeal that decision to Federal District Court pursuant to Section 110 of the Act.

Section 900.160(a) was restructured into two sentences for clarification purposes. The second sentence of § 900.160 now begins with the words ''[i]f so.

One comment recommended changing the 15-day time frame in § 900.161(b) to a longer period. This recommendation was not adopted because it is the Committee's belief that the time frame is adequate to hold a pre-hearing conference.

Several comments suggested that § 900.163 be amended to impose a clear and convincing evidence burden of proof on the Secretary. This recommendation was rejected because it is different from the statutory burden of proof in Section 102(a)(2) of the Act.

Several comments recommended rewriting the question in § 900.163 to include all appealable issues. This recommendation was not adopted because the burden of proof is on the appellant to show by a preponderance of the evidence that the agency erred for issues under appeals in §§ 900.150(h), (i), and (j). This is consistent with the usual Administrative Procedure Act standard.

One comment objected to the agency which is one of the parties to the appeal making the final decision in § 900.167. The regulatory provision is consistent with the Act. Section 102(e)(2) of the Act provides that any decision which represents final agency action shall be made ''by an official of the Department who holds a position at a higher organizational level within the Department * * * than the agency * * * in which the decision was made'' or by an administrative judge.

Several comments noted that Subpart L does not address the statutory right of Indian tribes to recover attorney fees under the Equal Access to Justice Act (EAJA). In response to these comments, a new section was added at the end of Subpart L clarifying that EAJA applies to administrative appeals under this Subpart, and cross-referencing the appropriate EAJA regulations.

Subpart M—Federal Tort Claims Act Coverage

Summary of Subpart

Coverage of the Federal Tort Claims Act (FTCA) has been extended to Indian tribes, tribal organizations and Indian contractors carrying out contracts, grants, and cooperative agreements under the Act. This subpart explains which tort claims are covered by the FTCA and which tort claims are not covered by the FTCA, for both medical and non-medical related claims. It also provides for tribal assistance in giving notice of tort claims to the Federal agency involved, and in providing assistance during the administrative claim or litigation process.

Summary of Comments

Two comments stated that there should be no distinction between medical-related and non-medical-related functions under self-determination contracts for purposes of FTCA coverage, defense or payment. This comment was rejected because the medical provisions have a unique history grounded in the Public Health Service Act, and in Section 102(d) of the Act.

Several comments expressed concern that the proposed regulations lacked guidance regarding insurance. Insurance is beyond the scope of FTCA authority for these regulations.

Several comments stated that portions of this Subpart reflect a fundamental misunderstanding of the scope of the Federal government's obligation to defend and indemnify tribal contractors for non-tort claims and claims outside the contract. Another set of comments requested that § 900.183 be amended to explain that an Indian tribe or tribal organization may not be sued for claims beyond the scope of the FTCA arising out of the performance of self-determination contacts. In amending § 900.183, the Committee determined to narrow the scope of the regulation strictly to the remedial FTCA provisions of section 102(d) of the Act and section 314 of Public Law 101–512, as required by section 107(a)(1) of the Act. The Committee therefore chose not to address the extent to which Indian

tribes or tribal organizations are protected from suits on other claims, which is beyond the scope of these regulations.

One comment recommended that ''Indian contractor,'' as defined in § 900.181(a), should be expanded to include non-medical services as well as medical services. Although the Eighth Circuit Court of Appeals (see *FGS Constructors, Inc.* v. *Carlow,* 64 F.3d 1230) has interpreted this provision as applying only to health programs, § 900.181(a)(3) was added to reflect the desire of some Indian tribes to continue disputing the scope of this term.

One comment recommended deleting § 900.181(b) since ''contract'' is defined elsewhere. The comment was adopted.

One comment suggested clarifying § 900.183(a) by stating with specificity which tort claims are barred. The comment was adopted and this section was changed.

One comment recommended § 900.183(b) be amended by adding a new subsection including activities performed by an employee which are outside of the scope of employment. The comment was adopted.

One comment asked what law will be used to implement breach of contract claims and whether tribal contractors are subject to Federal employment statutes. The comment was rejected because this subject is beyond the scope of regulatory authority under section 107(a)(1) of the Act.

One comment questioned the reference to violations of the U.S. Constitution in § 900.183(b)(4). The provision was deleted. As sovereigns pre-existing the Constitution, Indian tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on Federal and state authority. See *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978). To the extent applicable, 28 U.S.C. 2679(b)(2) continues to be relevant.

Several comments asked whether tribal law applied to tort claims. No change was made because state law applies to the determination of liability for tort claims under the FTCA.

One comment suggested amending § 900.188(c)(7) to add ''including Federal employees assigned to the contractor,'' after the word ''employees.'' The comment was adopted and the sentence re-written.

Two comments recommended that the notice requirements of 28 U.S.C. 2679(c) be referenced in § 900.188(b). Also, one comment suggested adding the same notice provision to § 900.203. The comments were adopted.

One comment recommended synchronizing § 900.206 with § 900.192 so that the list of employees covered for non-medical-related claims is the same as for medical-related claims. The comment was adopted.

Subpart N—Post-Award Contract Disputes

Summary of Subpart

Under section 110(d) of the Act, the Contract Disputes Act (CDA) applies to post-award contract claims. This subpart explains when a CDA claim can be filed, the contents of a claim, and where to file the claim. It also explains the difference in the handling of claims over $100,000 and those less than that amount.

Summary of Comments

Several comments recommended that language from the withdrawn 1994 NPRM regarding the application of the Equal Access to Justice Act be incorporated into the Subpart. The comments were adopted by adding § 900.216(c).

Several comments recommended adding paragraph 900.805(k) from the withdrawn 1994 NPRM regarding using accounting principles as ''guides'' rather ''rigid measures'' in IBCA appeals. The comments were adopted and a new section was added.

One comment was concerned that § 900.217 was silent regarding the Tribal Court system alternative for alternative disputes resolution. A change was made in § 900.217(b) to adopt this recommendation. Two comments indicated that § 900.217(b) needs to add the right of the tribe, if it desires, to file in Federal District Court or the Court of Federal Claims. This concern is already addressed in § 900.222.

Several comments recommended that § 900.220(b) be revised to read: ''supporting documents or data are accurate and complete to the best of the Indian tribe or tribal organization's knowledge and belief.'' The comments were adopted.

Two comments recommended that § 900.224 be amended so that delay of the awarding official in making a final decision should be treated as though the claim were approved, rather than denied. These comments were rejected because the existing language is statutory.

Several comments recommended adding the following language to § 900.227: ''If a decision is withdrawn and a new decision acceptable to the contractor is not issued, the contractor may proceed with the appeal based on the new decision or, if no new decision is issued, proceed under § 900.224.'' The comments were adopted and a new § 900.227(c) was added.

One comment expressed concern that § 900.230(a) requires an Indian tribe to keep performing its contract in spite of the possibility that the claim being appealed represents crucial operating funds from the contact. This is addressed by the limitation of cost clause of the model contract.

Subpart O—Conflicts of Interest

Summary of Subpart

Section 900.231 defines an organizational conflict of interest, and § 900.233 defines personal conflicts of interest which could affect self-determination contracts. The balance of the subpart advises Indian tribes what must be done in the event a conflict arises. The subpart also provides that Indian tribes may elect to negotiate specific conflicts provisions on a contract-by-contract basis.

Summary of Comments

The area of conflict of interests—where an Indian tribe or tribal organization's and/or their employees' administrations of a self-determination contract affecting allottees and others could be impaired by financial bias—raises difficult questions for DOI, including the proper balance between the Federal-tribal government-to-government relationship and the Secretary's mandated trust responsibility. Additional issues include the degree of monitoring required for conflicts, if any, where the United States contracts with Indian tribes to perform duties that directly affect the statutory rights of third parties. In attempting to reconcile these difficult questions, the DOI has opted for an approach that seeks to minimize intrusion and burden to Indian tribes and tribal organizations, yet provides for a degree of accountability where conflicts arise.

The Committee reached consensus on a personal conflict of interest provision in the procurement management standards in Subpart F. The Federal committee members believed this section should be supplemented by a regulation addressing conflicts of the Indian tribe or tribal organization itself and conflicts of individual employees involved in trust resource management. These regulations appear in Subpart O of the final regulation and only apply to contracts awarded by the DOI.

Several comments on the NPRM noted that no provision on conflicts of interest has previously been adopted in the 20 years of contracting trust

programs. The need to address the conflicts issue in some form has become more apparent as the DOI's experience with 638 contracts has increased.

Some comments assert that excellent tribal track records make it clear that no federal regulation is necessary. Several other comments state that the NPRM proposal suggests that in the absence of regulation Indian tribes will engage in fraudulent actions. The DOI does not contend that there is a widespread problem of unmitigated conflicts of interest. Rather it is adopting the rule in recognition of its responsibility as trustee to ensure that in a trust relationship, the acts of its agents are in accordance with high fiduciary standards. Therefore, the rule is intended to protect trust beneficiaries. Because the regulation only requires an Indian tribe or tribal organization to provide notice in the case of an organizational conflicts of interest, compliance should not be burdensome.

Several comments stated that any potential conflict between a tribe and allottees is no different than any other relationship between a government and its citizens, where a government uses its own employees to value private land to be condemned for government purposes. Several other comments state the NPRM's ''organizational conflict'' proposal was vague and nonsensical since the United States retains a residual component (such as lease approval or taking fee land into trust status) which gives the DOI ample opportunity to protect the interests of the United States. A related comment stated that this proposal appeared to pass on to Indian tribes the costs of the federal government's continuing responsibilities as trustee, constituting an unauthorized failure to perform non-delegable functions.

The final regulations do address organizational conflicts, because there is a significant difference between the obligation of a trustee to a beneficiary and that of a government to a citizen. In response to these comments, the DOI significantly altered the organizational conflicts regulation from the NPRM. First, the final regulation clearly states that it only applies when the contract affects the interests of allottees, trust resources or statutory obligations to third parties. Second, the Indian tribe or tribal organization is only required to provide notice to the federal government when such a situation arises, that is not already covered in their 638 contract.

Several Indian tribes commented that Federal regulations must not dictate internal tribal operations in the area of personal conflicts of interest. Some of them acknowledge that the federal proposal would not be particularly burdensome, but state that it is inconsistent with the federal policy of Indian self-determination.

The personal conflict of interest provisions are narrowly drawn to cover only trust programs. While there is a strong federal policy of Indian self-determination, there is also a strong federal policy of strict adherence to the trust responsibilities arising from treaty and statute. The self-determination statute does not sever the fiduciary relationship between the United States and Indian trust beneficiaries. For this reason the ethical standards involved are not solely an internal tribal concern.

One comment recommended reliance on tribal codes, supplemented by negotiated contract provisions, to protect against personal conflicts of interest. The comment analogized the federal proposal to unsatisfactory past experiences with BIA ''model codes.''

The rule accommodates tribal codes and negotiated contract provisions, that the Department agrees would be the ideal manner in which to address conflicts. However it also provides a rule to apply in the absence of tribal code or contract terms that adequately protect trust beneficiaries from conflicts of interest.

Several comments agree that regulations should address the problem of conflicts of interest arising from familial relations, organizational relations where elected officials also serve in programmatic capacities, and financial relations. These comments suggest that Indian tribes be authorized to employ their own written codes of standards of conducts. Until the Secretary approves such codes, the comments suggest terms that should apply that draw upon standards applicable to federal employees and other government contractors.

The Department agrees that regulations are needed and has provided in § 900.236 that it will negotiate conflicts provisions in contracts, to displace these regulations if there is agreement to provide equivalent protection to these regulations. The Department's regulations focus solely on financial interests, and not familial and organizational relations, believing that the latter is more susceptible to internal tribal regulation. Because of concerns about tribal sovereignty, the final regulation does not require Departmental approval of tribal codes, except as agreed to in individual contract negotiations.

Some comments described the proposal in the NPRM as presenting micro-management opportunities for federal agency personnel inconsistent with a government-to-government relationship. To avoid micro-management, the final rule was modified, in the case of organizational conflicts, to require only notice to the DOI when and Indian tribe or tribal organization learns of the existence of a conflict. No mitigation plan, as proposed in the 1996 NPRM, is required. The personal conflicts regulation only requires the Indian tribe to address the conflict in a manner that enables the Department to meet its trust responsibilities.

Some comments recommended that Indian tribes and the DOI rely on contract-by-contract negotiations for addressing conflicts provision. As mentioned earlier, because of the trust and legal responsibilities of the Department, the regulations are necessary to address situations where terms cannot be negotiated in the short time permitted for negotiation.

Several Indian tribes commented that the Government does not similarly regulate its own actions, and consult with Indian tribes concerning conflicts with actions proposed on allottee properties. The DOI agrees that consultations is appropriate, but recognized that it has a very high duty to assure that actions taken with respect to allottee properties are consistent with its fiduciary responsibilities to those allottees. The rule does not require consultation with allottees on actions concerning tribal lands, or vice versa.

One comment written on behalf of several individual owners of trust resources, strongly supported the adoption of minimum standards to assure the integrity of the performance and administration of trust resources. The comment suggests that, at a minimum trust resources be subject to the same conflict standards applied to procurement in the proposed § 900.48.

The final rule is very similar to the agreed provisions in § 900.48.

Subpart P—Retrocession and Reassumption Procedures

Summary of Subpart

Section 107(a)(1) of the Act authorizes the Secretaries to promulgate regulations governing retrocession and reassumption procedures. Sections 900.240 through 900.245 define retrocession, what entities are entitled to retrocede, tribal rights for contracting and funding as a result of retrocession, and tribal obligations regarding the return of property to the Secretary after retrocession.

Sections 900.246 through 900.256 explain what is meant by reassumption,

the two types of reassumption authorized under the Act, necessary circumstances when using emergency and non-emergency reassumption authority, and Secretarial responsibilities, including detailed written notice requirements when reassumption is invoked. The subpart describes a number of activities after reassumption has been completed, such as authorization for ''wind up'' costs, tribal obligations regarding the return of property to the Secretary, and a funding reduction protection.

Summary of Comments

One comment recommended that the phrase ''may retrocede a contract'' be added to the end of the answer in § 900.232 to provide a more complete answer to the question of who may retrocede a contract. This suggestion adds clarity to the answer, and has been adopted.

Several comments recommended that an additional question and answer be added to address when a retrocession becomes effective. The recommended language is contained in the Act, provides meaningful information to the users of this regulation, and has been adopted and inserted as a new § 900.233.

Several comments recommended that the term ''fair market'' be added to the answer in § 900.236 and § 900.246 in describing the value of property to be returned to the Secretary in the event of a retrocession or reassumption. While the essence of this recommendation has been adopted, to remain consistent throughout the regulation the definition of ''fair market'' as provided in Subpart I will be restated in this Subpart. (Subpart I states ''current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization in excess of $5,000.'') Also, for clarity the word ''requested'' has been added to the answer in § 900.236 in describing property to be returned to the Secretary.

One comment recommended that the answer provided in § 900.238, which has (a) and (b) components, be reversed to track the order of the question and avoid confusion. This recommendation has been adopted to promote uniformity in this question and answer.

A comment recommended language be added to the answer in § 900.239 incorporating the option for the award of grants to Indian tribes from the Secretary for technical assistance to overcome non-emergency deficiencies. While the exact language suggested is not used, the recommendation has been adopted since such grants are authorized under the Act.

Several comments recommended that language be added to § 900.238(b)(1) dealing with the conditions for emergency reassumptions. These comments were not adopted because the language now contained in § 900.238(b)(1) precisely tracks the Act and the suggested additional language may confuse statutory intent.

One comment recommended that a statement be added to § 900.242 that the Secretary will not rescind a contract until there is a final decision in any administrative hearing or appeal on a non-emergency reassumption. This recommendation has been adopted.

Internal Agency Procedures

The Departments' position is that a comprehensive manual for the internal management of self-determination contracts should not be developed through the formal rulemaking process. Internal agency procedures are more appropriately developed outside the negotiated rulemaking process, to allow flexibility in addressing practical considerations which arise in the field, and to allow maximum participation from those agency officials who bear much of the responsibility for implementing the Act to its fullest capability. The Federal position supports a joint tribal and Federal commitment to work together to generate a procedural manual which will promote the purposes underlying the Indian Self-Determination Act and facilitate contracting by Indian tribes and tribal organizations.

One goal of the full committee is to have uniform procedures for the implementation and interpretation of the act and these regulations which apply to all Federal agencies which administer contracted programs. The Federal members of the committee propose that the parties formally agree to work together to develop a manual which guides all contracting agencies through the contracting process. This is consistent with the position taken by the work group charged with making recommendations regarding internal agency procedures.

To that end, Federal committee members would commit to a firm time line within which to produce a manual.

Administrative Matters

This rule is a significant regulatory action Executive Order 12866 and requires review by the Office of Management and Budget.

The Departments certify that this rule will not have significant economic effects on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

In accordance with Executive Order 12630 the Department of the Interior and the Department of Health and Human Services have determined that this regulation does not have significant takings implications. The rule does not pertain to the taking of private property interests, nor does it have an effect on private property.

The Department of the Interior and the Department of Health and Human Services have determined that this rule does not have significant Federalism effects under Executive Order 12612 and will not interfere with the roles, rights, and responsibilities of states.

The Departments of the Interior and Health and Human Services have determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental policy Act of 1969.

This rule imposes no unfunded mandates on any governmental or private entity in excess of $100 million annually and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

Paperwork Reduction Act of 1995

The Office of Management and Budget has approved, under 44 U.S.C. chapter 35, the information collection requirements in part 900 under assigned control number 1076–0136. The information for part 900 is being collected and used by the Departments to determine applicant eligibility, evaluate applicant capabilities, protect the service population, safeguard Federal funds and other resources, and permit the Departments to administer and evaluate contract programs.

The Departments estimate that the average burden of complying with the collection, broken down by subpart, will be as follows: Subpart C (Contract Proposal Contents), 222 hours; Subpart F (Standards for Tribal or Tribal Organization Management Systems), 250 hours; Subpart G (Programmatic Reports and Data Requirements), 150 hours; Subpart I (Property Donation Procedures), 10 hours; Subpart J (Construction), 564 hours; Subpart K (Waiver Procedures), 10 hours; and Subpart L (Appeals), 40 hours.

Responses to the collection of information under this regulation are required in order for Indian tribes or tribal organizations to obtain or retain benefits under the Act. However, not every tribal contractor will need to respond to each request for information contained in the regulation, as some of the requests pertain to specific

situations or to certain types of self-determination contracts. Moreover, under section 5(f)(2) of the Act, tribal organizations are given authority to negotiate their individual reporting requirements with the Secretary on a contract-by-contract basis. Any disagreements over reporting requirements are subject to the declination criteria and procedures in section 102 of the Act and subpart E of the regulation.

There is no assurance of confidentiality provided to respondents concerning this information collection.

The Departments may not conduct or sponsor a collection of information, nor are Indian tribes or tribal organizations or other persons required to respond to such collections unless the Departments display a currently valid OMB control number.

List of Subjects in 25 CFR Part 900

Indians; Administrative practice and procedure, Buildings and facilities, Claims, Government contracts, Grant programs—Indians, Health care, Indians—business and finance, Government property management.

For the reasons given in the preamble, the Departments of the Interior and Health and Human Services hereby establish a new part 900 in chapter V of title 25 of the Code of Federal Regulations as set forth below.

Dated: June 14, 1996.

Bruce Babbitt,

Secretary of the Interior.

Dated: June 13, 1996.

Donna Shalala,

Secretary of Health and Human Services.

CHAPTER V—BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, AND INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 900—CONTRACTS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Subpart A—General Provisions

Subpart B—Definitions

Subpart C—Contract Proposal Contents

Subpart D—Review and Approval of Contract Proposals

Subpart E—Declination Procedures

Subpart F—Standards for Tribal or Tribal Organization Management Systems

General

Standards for Financial Management Systems

Authority: 25 U.S.C. 450f et seq.

Subpart A—General Provisions

§ 900.1 Authority.

These regulations are prepared, issued, and maintained jointly by the Secretary of Health and Human Services and the Secretary of the Interior, with the active participation and representation of Indian tribes, tribal organizations, and individual tribal members pursuant to the guidance of the Negotiated Rulemaking procedures required by section 107 of the Indian Self-Determination and Education Assistance Act.

§ 900.2 Purpose and scope.

(a) *General.* These regulations codify uniform and consistent rules for contracts by the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI) in implementing title I of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, 25 U.S.C. 450 et seq., as amended and sections 1 through 9 preceding that title.

(b) *Programs funded by other Departments and agencies.* Included under this part are programs administered (under current or future law or interagency agreement) by the DHHS and the DOI for the benefit of Indians for which appropriations are made to other Federal agencies.

(c) *This part included in contracts by reference.* Each contract, including grants and cooperative agreements in lieu of contracts awarded under section 9 of the Act, shall include by reference the provisions of this part, and any amendment thereto, and they are binding on the Secretary and the contractor except as otherwise specifically authorized by a waiver under section 107(e) of the Act.

(d) *Freedom of Information.* Access to records maintained by the Secretary is governed by the Freedom of Information Act (5 U.S.C. 552) and other applicable

Federal law. Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping systems of the DHHS or the DOI, or both, records of the contractors (including archived records) shall not be considered Federal records for the purpose of the Freedom of Information Act. The Freedom of Information Act does not apply to records maintained solely by Indian tribes and tribal organizations.

(e) *Privacy Act.* Section 108(b) of the Indian Self-Determination Act states that records of the tribal government or tribal organizations shall not be considered Federal records for the purposes of the Privacy Act.

(f) *Information Collection*. The Office of Management and Budget has approved, under 44 U.S.C. chapter 35, the information collection requirements in Part 900 under assigned control number 1076–0136. The information for Part 900 is being collected and used by the Departments to determine applicant eligibility, evaluate applicant capabilities, protect the service population, safeguard Federal funds and other resources, and permit the Departments to administer and evaluate contract programs.

§ 900.3 Policy statements.

(a) Congressional policy.

(1) Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction, planning, conduct and administration of educational as well as other Federal programs and services to Indian communities so as to render such programs and services more responsive to the needs and desires of those communities.

(2) Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(3) Congress has declared that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(4) Congress has declared that the programs, functions, services, or activities that are contracted and funded under this Act shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the Department that carries out such functions. Contracting of the administrative functions described herein shall not be construed to limit or reduce in any way the funding for any program, function, service, or activity serving any other tribe under the Act or any other law. The Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another Indian tribe or tribal organization under this Act.

(5) Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under the Act, including all related administrative functions, from the Federal government to the contractor.

(6) Congress has declared that one of the primary goals of the 1994 amendments to the Act was to minimize the reporting requirements applicable to tribal contractors and to eliminate excessive and burdensome reporting requirements. Reporting requirements over and above the annual audit report are to be negotiated with disagreements subject to the declination procedures of section 102 of the Act.

(7) Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process.

(8) Congress has declared that all self-determination contract proposals must be supported by the resolution of an Indian tribe(s).

(9) Congress has declared that to the extent that programs, functions, services, and activities carried out by tribes and tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under Section 106(a) of the Act, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(b) *Secretarial policy.* (1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

(2) It is the policy of the Secretary to encourage Indian tribes and tribal organizations to become increasingly knowledgeable about the Departments' programs administered for the benefit of Indians by providing information on such programs, functions and activities and the opportunities Indian tribes have regarding them.

(3) It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act. The rules contained herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct, and administration of those Federal programs serving Indian people. The Secretary shall afford Indian tribes and tribal organizations the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs.

(4) The Secretary recognizes that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the

associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(5) The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

(6) The Secretary shall maintain consultation with tribal governments and tribal organizations in the Secretary's budget process relating to programs, functions, services and activities subject to the Act. In addition, on an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(7) The Secretary is committed to implementing and fully supporting the policy of Indian self-determination by recognizing and supporting the many positive and successful efforts and directions of tribal governments and extending the applicability of this policy to all operational components within the Department. By fully extending Indian self-determination contracting to all operational components within the Department having programs or portions of programs for the benefit of Indians under section 102(a)(1) (A) through (D) and for the benefit of Indians because of their status as Indians under section 102(a)(1)(E), it is the Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities. It is also the policy of the Secretary to have all other operational components within the Department work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality.

(8) It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians under section 102(a)(1) (A) through (D) of the Act, and that are for the benefit of Indians because of their status of Indians under section 102(a)(1)(E) of the Act.

(9) It is the Secretary's policy that no later than upon receipt of a contract proposal under the Act (or written notice of an Indian tribe or tribal organization's intention to contract), the Secretary shall commence planning such administrative actions, including but not limited to transfers or reductions in force, transfers of property, and transfers of contractible functions, as may be necessary to ensure a timely transfer of responsibilities and funding to Indian tribes and tribal organizations.

(10) It is the policy of the Secretary to make available to Indian tribes and tribal organizations all administrative functions that may lawfully be contracted under the Act, employing methodologies consistent with the methodology employed with respect to such functions under titles III and IV of the Act.

(11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.

§ 900.4 Effect on existing tribal rights.

Nothing in these regulations shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding this trust responsibility;

(c) Mandating an Indian tribe to apply for a contract(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian tribes to administer Indian programs under any other applicable law.

§ 900.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Except as specifically provided in the Act, or as specified in Subpart J, an Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian tribe or tribal organization and the Secretary, or otherwise required by law.

Subpart B—Definitions

§ 900.6 Definitions.

Unless otherwise provided in this Part:

Act means Secs. 1 through 9, and Title I of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.

Annual funding agreement means a document that represents the negotiated agreement of the Secretary to fund, on an annual basis, the programs, services, activities and functions transferred to an Indian tribe or tribal organization under the Act.

Appeal means a request by an Indian tribe or tribal organization for an administrative review of an adverse Agency decision.

Awarding official means any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the United States of America and make determinations and findings with respect thereto. Pursuant to the Act, this person can be any Federal official, including but not limited to, contracting officers.

BIA means the Bureau of Indian Affairs of the Department of the Interior.

Contract means a self-determination contract as defined in section 4(j) of the Act.

Contract appeals board means the Interior Board of Contract Appeals.

Contractor means an Indian tribe or tribal organization to which a contract has been awarded.

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department(s) means the Department of Health and Human Services (HHS) or the Department of the Interior (DOI), or both.

IHS means the Indian Health Service of the Department of Health and Human Services.

Indian means a person who is a member of an Indian Tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Indirect cost rate means the rate(s) arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal Agency.

Indirect costs means costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved.

Initial contract proposal means a proposal for programs, functions, services, or activities that the Secretary is authorized to perform but which the Indian tribe or tribal organization is not now carrying out.

Real property means any interest in land together with the improvements, structures, and fixtures and appurtenances thereto.

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization pursuant to the notice and other procedures set forth in Subpart P.

Retrocession means the voluntary return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.

Secretary means the Secretary of Health and Human Services (HHS) or the Secretary of the Interior (DOI), or both (and their respective delegates).

Tribal organization means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: provided, that, in any case where a contract is let or a grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

Trust resources means an interest in land, water, minerals, funds, or other assets or property which is held by the United States in trust for an Indian tribe or an individual Indian or which is held by an Indian tribe or Indian subject to a restriction on alienation imposed by the United States.

Subpart C—Contract Proposal Contents

§ 900.7 What technical assistance is available to assist in preparing an initial contract proposal?

The Secretary shall, upon request of an Indian tribe or tribal organization and subject to the availability of appropriations, provide technical assistance on a non-reimbursable basis to such Indian tribe or tribal organization to develop a new contract proposal or to provide for the assumption by the Indian tribe or tribal organization of any program, service, function, or activity (or portion thereof) that is contractible under the Act. The Secretary may also make a grant to an Indian tribe or tribal organization for the purpose of obtaining technical assistance, as provided in section 103 of the Act. An Indian tribe or tribal organization may also request reimbursement for pre-award costs for obtaining technical assistance under sections 106(a) (2) and (5) of the Act.

§ 900.8 What must an initial contract proposal contain?

An initial contract proposal must contain the following information:

(a) The full name, address and telephone number of the Indian tribe or tribal organization proposing the contract.

(b) If the tribal organization is not an Indian tribe, the proposal must also include:

(1) a copy of the tribal organization's organizational documents (e.g., charter, articles of incorporation, bylaws, etc.).

(2) The full name(s) of the Indian tribe(s) with which the tribal organization is affiliated.

(c) The full name(s) of the Indian tribe(s) proposed to be served.

(d) A copy of the authorizing resolution from the Indian tribe(s) to be served.

(1) If an Indian tribe or tribal organization proposes to serve a specified geographic area, it must provide authorizing resolution(s) from all Indian tribes located within the specific area it proposes to serve. However, no resolution is required from an Indian tribe located outside the area proposed to be served whose members reside within the proposed service area.

(2) If a currently effective authorizing resolution covering the scope of an initial contract proposal has already been provided to the agency receiving the proposal, a reference to that resolution.

(e) The name, title, and signature of the authorized representative of the Indian tribe or tribal organization submitting the contract proposal.

(f) The date of submission of the proposal.

(g) A brief statement of the programs, functions, services, or activities that the tribal organization proposes to perform, including:

(1) A description of the geographical service area, if applicable, to be served.

(2) The estimated number of Indian people who will receive the benefits or services under the proposed contract.

(3) An identification of any local, Area, regional, or national level departmental programs, functions, services, or activities to be contracted, including administrative functions.

(4) A description of the proposed program standards;

(5) An identification of the program reports, data and financial reports that the Indian tribe or tribal organization will provide, including their frequency.

(6) A description of any proposed redesign of the programs, services, functions, or activities to be contracted,

(7) Minimum staff qualifications proposed by the Indian tribe and tribal organization, if any; and

(8) A statement that the Indian tribe or tribal organization will meet the minimum procurement, property and financial management standards set forth in Subpart F, subject to any waiver that may have been granted under Subpart K.

(h) The amount of funds requested, including:

(1) An identification of the funds requested by programs, functions, services, or activities, under section 106(a)(1) of the Act, including the Indian tribe or tribal organization's share of funds related to such programs, functions, services, or activities, if any, from any Departmental local, area, regional, or national level.

(2) An identification of the amount of direct contract support costs, including one-time start-up or preaward costs under section 106(a)(2) and related provisions of the Act, presented by major categories such as:

(i) Personnel (differentiating between salary and fringe benefits);

(ii) Equipment;

(iii) Materials and supplies;

(iv) Travel;

(v) Subcontracts; and

(vi) Other appropriate items of cost.

(3) An identification of funds the Indian tribe or tribal organization requests to recover for indirect contract support costs. This funding request must include either:

(i) a copy of the most recent negotiated indirect cost rate agreement; or

(ii) an estimated amount requested for indirect costs, pending timely establishment of a rate or negotiation of administrative overhead costs.

(4) To the extent not stated elsewhere in the budget or previously reported to the Secretary, any preaward costs, including the amount and time period covered or to be covered; and

(5) At the option of the Indian tribe or tribal organization, an identification of programs, functions, services, or activities specified in the contract proposal which will be funded from sources other than the Secretary.

(i) The proposed starting date and term of the contract.

(j) In the case of a cooperative agreement, the nature and degree of Federal programmatic involvement anticipated during the term of the agreement.

(k) The extent of any planned use of Federal personnel and Federal resources.

(l) Any proposed waiver(s) of the regulations in this part; and

(m) A statement that the Indian tribe or tribal organization will implement procedures appropriate to the programs, functions, services or activities proposed to be contracted, assuring the confidentiality of medical records and of information relating to the financial affairs of individual Indians obtained under the proposal contract, or as otherwise required by law.

§ 900.9 May the Secretary require an Indian tribe or tribal organization to submit any other information beyond that identified in § 900.8?

No.

§ 900.10 How does an Indian tribe or tribal organization secure a list of all Federal property currently in use in carrying out the programs, functions, services, or activities that benefit the Indian tribe or tribal organization to assist in negotiating a contract?

The Indian tribe or tribal organization submits a written request to the Secretary. The Secretary shall provide the requested information, including the condition of the property, within 60 days.

§ 900.11 What should an Indian tribe or tribal organization that is proposing a contract do about specifying the Federal property that the Indian tribe or tribal organization may wish to use in carrying out the contract?

The Indian tribe or tribal organization is encouraged to provide the Secretary, as early as possible, with:

(a) A list of the following Federal property intended for use under the contract:

(1) Equipment;

(2) Furnishings;

(3) Facilities; and

(4) Other real and personal property.

(b) A statement of how the Indian tribe or tribal organization will obtain each item by transfer of title under § 105(f)(2) of the Act and section 1(b)(8) of the model agreement set forth in section 108(c) of the Act, through a temporary use permit, similar arrangement, or otherwise; and

(c) Where equipment is to be shared by contracted and non-contracted programs, services, functions, or activities, a proposal outlining proposed equipment sharing or other arrangements.

§ 900.12 Are the proposal contents requirements the same for renewal of a contract that is expiring and for securing an annual funding agreement after the first year of the funding agreement?

No. In these situations, an Indian tribe or tribal organization should submit a renewal proposal (or notification of intent not to renew) or an annual funding agreement proposal at least 90 days before the expiration date of the contract or existing annual funding agreement. The proposal shall provide funding information in the same detail and format as the original proposal and may also identify any significant proposed changes.

§ 900.13 Does the contract proposal become part of the final contract?

No, unless the parties agree.

Subpart D—Review and Approval of Contract Proposals

§ 900.14 What does this subpart cover?

This Subpart covers any proposal to enter into a self-determination contract, to amend an existing self-determination contract, to renew an existing self-determination contract, or to redesign a program through a self-determination contract.

§ 900.15 What shall the Secretary do upon receiving a proposal?

Upon receipt of a proposal, the Secretary shall:

(a) Within two days notify the applicant in writing that the proposal has been received;

(b) Within 15 days notify the applicant in writing of any missing items required by § 900.8 and request that the items be submitted within 15 days of receipt of the notification; and

(c) Review the proposal to determine whether there are declination issues under section 102(a)(2) of the Act.

§ 900.16 How long does the Secretary have to review and approve the proposal and award the contract, or decline a proposal?

The Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal in compliance with section 102 of the Act and subpart E. At any time during the review period the Secretary may approve the proposal and award the requested contract.

§ 900.17 Can the statutory 90-day period be extended?

Yes, with written consent of the Indian tribe or tribal organization. If consent is not given, the 90-day deadline applies.

§ 900.18 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

A proposal that is not declined within 90 days (or within any agreed extension under § 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to Section 106(a) of the Act.

§ 900.19 What happens when a proposal is approved?

Upon approval the Secretary shall award the contract and add to the contract the full amount of funds to which the contractor is entitled under section 106(a) of the Act.

Subpart E—Declination Procedures

§ 900.20 What does this Subpart cover?

This subpart explains how and under what circumstances the Secretary may decline a proposal to contract, to amend an existing contract, to renew an existing contract, to redesign a program, or to waive any provisions of these regulations. For annual funding agreements, see § 900.32.

§ 900.21 When can a proposal be declined?

As explained in Secs. 900.16 and 900.17, a proposal can only be declined within 90 days after the Secretary receives the proposal, unless that period

is extended with the voluntary and express written consent of the Indian tribe or tribal organization.

§ 900.22 For what reasons can the Secretary decline a proposal?

The Secretary may only decline to approve a proposal for one of five specific reasons:

(a) The service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(b) Adequate protection of trust resources is not assured;

(c) The proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(d) The amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the Act; or

(e) The program, function, service, or activity (or a portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under section 102(a)(1) of the Act because the proposal includes activities that cannot lawfully be carried out by the contractor.

§ 900.23 Can the Secretary decline a proposal where the Secretary's objection can be overcome through the contract?

No. The Secretary may not decline to enter into a contract with an Indian tribe or tribal organization based on any objection that will be overcome through the contract.

§ 900.24 Can a contract proposal for an Indian tribe or tribal organization's share of administrative programs, functions, services, and activities be declined for any reason other than the five reasons specified in § 900.22?

No. The Secretary may only decline a proposal based upon one or more of the five reasons listed above. If a contract affects the preexisting level of services to any other tribe, the Secretary shall address that effect in the Secretary's annual report to Congress under section 106(c)(6) of the Act.

§ 900.25 What if only a portion of a proposal raises one of the five declination criteria?

The Secretary must approve any severable portion of a proposal that does not support a declination finding described in § 900.20, subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

§ 900.26 What happens if the Secretary declines a part of a proposal on the ground that the proposal proposes in part to plan, conduct, or administer a program, function, service or activity that is beyond the scope of programs covered under section 102(a) of the Act, or proposes a level of funding that is in excess of the applicable level determined under section 106(a) of the Act?

In those situations the Secretary is required, as appropriate, to approve the portion of the program, function, service, or activity that is authorized under section 102(a) of the Act, or approve a level of funding that is authorized under section 106(a) of the Act. As noted in § 900.25, the approval is subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

§ 900.27 If an Indian tribe or tribal organization elects to contract for a severable portion of a proposal, does the Indian tribe or tribal organization lose its appeal rights to challenge the portion of the proposal that was declined?

No, but the hearing and appeal procedures contained in these regulations only apply to the portion of the proposal that was declined.

§ 900.28 Is technical assistance available to an Indian tribe or tribal organization to avoid declination of a proposal?

Yes. In accordance with section 103(d) of the Act, upon receiving a proposal, the Secretary shall provide any necessary requested technical assistance to an Indian tribe or tribal organization, and shall share all relevant information with the Indian tribe or tribal organization, in order to avoid declination of the proposal.

§ 900.29 What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?

If the Secretary decides to decline all or a severable portion of a proposal, the Secretary is required:

(a) To advise the Indian tribe or tribal organization in writing of the Secretary's objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in § 900.22 exists, together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days, any documents relied on in making the decision; and

(b) To advise the Indian tribe or tribal organization in writing of the rights described in § 900.31.

§ 900.30 When the Secretary declines all or a portion of a proposal, is the Secretary required to provide an Indian tribe or tribal organization with technical assistance?

Yes. The Secretary shall provide additional technical assistance to overcome the stated objections, in accordance with section 102(b) of the Act, and shall provide any necessary requested technical assistance to develop any modifications to overcome the Secretary's stated objections.

§ 900.31 When the Secretary declines all or a portion of a proposal, is an Indian tribe or tribal organization entitled to any appeal?

Yes. The Indian tribe or tribal organization is entitled to an appeal on the objections raised by the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are in subpart L of these regulations. Alternatively, at its option the Indian tribe or tribal organization has the right to sue in Federal district court to challenge the Secretary's decision.

§ 900.32 Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement?

No. If it is substantially the same as the prior annual funding agreement (except for funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act) and the contract is with DHHS or the BIA, the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor annual funding agreement. Any portion of an annual funding agreement proposal which is not substantially the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity), or any annual funding agreement proposal which pertains to a contract with an agency of DOI other than the BIA, is subject to the declination criteria and procedures in subpart E. If there is a disagreement over the availability of appropriations, the Secretary may decline the proposal in part under the procedure in subpart E.

§ 900.33 Are all proposals to renew term contracts subject to the declination criteria?

Department of Health and Human Services and the Bureau of Indian Affairs will not review the renewal of a term contract for declination issues where no material and substantial

change to the scope or funding of a program, functions, services, or activities has been proposed by the Indian tribe or tribal organization. Proposals to renew term contracts with DOI agencies other than the Bureau of Indian Affairs may be reviewed under the declination criteria.

Subpart F—Standards for Tribal or Tribal Organization Management Systems

General

§ 900.35 What is the purpose of this subpart?

This subpart contains the minimum standards for the management systems used by Indian tribes or tribal organizations when carrying out self-determination contracts. It provides standards for an Indian tribe or tribal organization's financial management system, procurement management system, and property management system.

§ 900.36 What requirements are imposed upon Indian tribes or tribal organizations by this subpart?

When carrying out self-determination contracts, Indian tribes and tribal organizations shall develop, implement, and maintain systems that meet these minimum standards, unless one or more of the standards have been waived, in whole or in part, under section 107(e) of the Act and Subpart K.

§ 900.37 What provisions of Office of Management and Budget (OMB) circulars or the ''common rule'' apply to self-determination contracts?

The only provisions of OMB Circulars and the only provisions of the ''common rule'' that apply to self-determination contracts are the provisions adopted in these regulations, those expressly required or modified by the Act, and those negotiated and agreed to in a self-determination contract.

§ 900.38 Do these standards apply to the subcontractors of an Indian tribe or tribal organization carrying out a self-determination contract?

An Indian tribe or tribal organization may require that some or all of the standards in this subpart be imposed upon its subcontractors when carrying out a self-determination contract.

§ 900.39 What is the difference between a standard and a system?

(a) Standards are the minimum baseline requirements for the performance of an activity. Standards establish the ''what'' that an activity should accomplish.

(b) Systems are the procedural mechanisms and processes for the day-to-day conduct of an activity. Systems are ''how'' the activity will be accomplished.

§ 900.40 When are Indian tribe or tribal organization management standards and management systems evaluated?

(a) Management standards are evaluated by the Secretary when the Indian tribe or tribal organization submits an initial contract proposal.

(b) Management systems are evaluated by an independent auditor through the annual single agency audit report that is required by the Act and OMB Circular A–128.

§ 900.41 How long must an Indian tribe or tribal organization keep management system records?

The Indian tribe or tribal organization must retain financial, procurement and property records for the minimum periods described below. Electronic, magnetic or photographic records may be substituted for hard copies.

(a) *Financial records.* Financial records include documentation of supporting costs incurred under the contract. These records must be retained for three years from the date of submission of the single audit report to the Secretary.

(b) *Procurement records.* Procurement records include solicitations, purchase orders, contracts, payment histories and records applicable of significant decisions. These records must be retained for three years after the Indian tribe or tribal organization or subcontractors make final payment and all other pending matters are closed.

(c) *Property management records.* Property management records of real and personal property transactions must be retained for three years from the date of disposition, replacement, or transfer.

(d) *Litigation, audit exceptions and claims.* Records pertaining to any litigation, audit exceptions or claims requiring management systems data must be retained until the action has been completed.

Standards for Financial Management Systems

§ 900.42 What are the general financial management system standards that apply to an Indian tribe carrying out a self-determination contract?

An Indian tribe shall expend and account for contract funds in accordance with all applicable tribal laws, regulations, and procedures.

§ 900.43 What are the general financial management system standards that apply to a tribal organization carrying out a self-determination contract?

A tribal organization shall expend and account for contract funds in accordance with the procedures of the tribal organization.

§ 900.44 What minimum general standards apply to all Indian tribe or tribal organization financial management systems when carrying out a self-determination contract?

The fiscal control and accounting procedures of an Indian tribe or tribal organization shall be sufficient to:

(a) Permit preparation of reports required by a self-determination contract and the Act; and

(b) Permit the tracing of contract funds to a level of expenditure adequate to establish that they have not been used in violation of any restrictions or prohibitions contained in any statute that applies to the self-determination contract.

§ 900.45 What specific minimum requirements shall an Indian tribe or tribal organization's financial management system contain to meet these standards?

An Indian tribe or tribal organization's financial management system shall include provisions for the following seven elements.

(a) *Financial reports.* The financial management system shall provide for accurate, current, and complete disclosure of the financial results of self-determination contract activities. This includes providing the Secretary a completed Financial Status Report, SF 269A, as negotiated and agreed to in the self-determination contract.

(b) *Accounting records.* The financial management system shall maintain records sufficiently detailed to identify the source and application of self-determination contract funds received by the Indian tribe or tribal organization. The system shall contain sufficient information to identify contract awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income.

(c) *Internal controls.* The financial management system shall maintain effective control and accountability for all self-determination contract funds received and for all Federal real property, personal property, and other assets furnished for use by the Indian tribe or tribal organization under the self-determination contract.

(d) *Budget controls.* The financial management system shall permit the comparison of actual expenditures or outlays with the amounts budgeted by

the Indian tribe or tribal organization for each self-determination contract.

(e) *Allowable costs.* The financial management system shall be sufficient to determine the reasonableness, allowability, and allocability of self-determination contract costs based upon the terms of the self-determination contract and the Indian tribe or tribal organization's applicable OMB cost principles, as amended by the Act and these regulations. (The following chart lists certain OMB Circulars and suggests the entities that may use each, but the final selection of the applicable circular may differ from those shown, as agreed to by the Indian tribe or tribal organization and the Secretary. Agreements between an Indian tribe or tribal organization and the Secretary currently in place do not require renegotiation.) Copies of these circulars are available from the Executive Office of the President, Publications Service, 725 17th Street N. W., Washington, D. C. 20503.

Type of tribal organization	Applicable OMB cost circular
Tribal Government	A–87, ''Cost Principles for State, Local and Indian Tribal Governments.''
Tribal private non-profit other than: (1) an institution of higher education, (2) a hospital, or (3) an organization named in OMB Circular A–122 as not subject to that circular.	A–122, ''Cost Principles for Non-Profit Organizations.''
Tribal educational institution	A–21, ''Cost Principles for Educational Institutions.''

(f) *Source documentation.* The financial management system shall contain accounting records that are supported by source documentation, e.g., canceled checks, paid bills, payroll records, time and attendance records, contract award documents, purchase orders, and other primary records that support self-determination contract fund expenditures.

(g) *Cash management.* The financial management system shall provide for accurate, current, and complete disclosure of cash revenues disbursements, cash-on-hand balances, and obligations by source and application for each Indian tribe or tribal organization, and subcontractor if applicable, so that complete and accurate cash transactions may be prepared as required by the self-determination contract.

§ 900.46 What requirements are imposed upon the Secretary for financial management by these standards?

The Secretary shall establish procedures, consistent with Treasury regulations as modified by the Act, for the transfer of funds from the United States to the Indian tribe or tribal organization in strict compliance with the self-determination contract and the annual funding agreement.

Procurement Management System Standards

§ 900.47 When procuring property or services with self-determination contract funds, can an Indian tribe or tribal organization follow the same procurement policies and procedures applicable to other Indian tribe or tribal organization funds?

Indian tribes and tribal organizations shall have standards that conform to the standards in this Subpart. If the Indian tribe or tribal organization relies upon standards different than those described below, it shall identify the standards it will use as a proposed waiver in the initial contract proposal or as a waiver request to an existing contract.

§ 900.48 If the Indian tribe or tribal organization does not propose different standards, what basic standards shall the Indian tribe or tribal organization follow?

(a) The Indian tribe or tribal organization shall ensure that its vendors and/or subcontractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(b) The Indian tribe or tribal organization shall maintain written standards of conduct governing the performance of its employees who award and administer contracts.

(1) No employee, officer, elected official, or agent of the Indian tribe or tribal organization shall participate in the selection, award, or administration of a procurement supported by Federal funds if a conflict of interest, real or apparent, would be involved.

(2) An employee, officer, elected official, or agent of an Indian tribe or tribal organization, or of a subcontractor of the Indian tribe or tribal organization, is not allowed to solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, with the following exemptions. The Indian tribe or tribal organization may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.

(3) These standards shall also provide for penalties, sanctions, or other disciplinary actions for violations of the standards.

(c) The Indian tribe or tribal organization shall review proposed procurements to avoid buying unnecessary or duplicative items and ensure the reasonableness of the price. The Indian tribe or tribal organization should consider consolidating or breaking out procurement to obtain more economical purchases. Where appropriate, the Indian tribe or tribal organization shall compare leasing and purchasing alternatives to determine which is more economical.

(d) The Indian tribe or tribal organization shall conduct all major procurement transactions by providing full and open competition, to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.

(1) Indian tribes or tribal organizations shall develop their own definition for ''major procurement transactions.''

(2) As provided in sections 7 (b) and (c) of the Act, Indian preference and tribal preferences shall be applied in any procurement award.

(e) The Indian tribe or tribal organization shall make procurement awards only to responsible entities who have the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Indian tribe or tribal organization will consider such matters as the contractor's integrity, its compliance with public policy, its record of past performance, and its financial and technical resources.

(f) The Indian tribe or tribal organization shall maintain records on the significant history of all major procurement transactions. These records may include, but are not limited to, the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the contract price.

(g) The Indian tribe or tribal organization is solely responsible, using good administrative practice and sound business judgment, for processing and settling all contractual and administrative issues arising out of a procurement. These issues include, but

are not limited to, source evaluation, protests, disputes, and claims.

(1) The settlement of any protest, dispute, or claim shall not relieve the Indian tribe or tribal organization of any obligations under a self-determination contract.

(2) Violations of law shall be referred to the tribal or Federal authority having proper jurisdiction.

§ 900.49 What procurement standards apply to subcontracts?

Each subcontract entered into under the Act shall at a minimum:

(a) Be in writing;

(b) Identify the interested parties, their authorities, and the purposes of the contract;

(c) State the work to be performed under the contract;

(d) State the process for making any claim, the payments to be made, and the terms of the contract, which shall be fixed; and

(e) Be subject to sections 7 (b) and (c) of the Act.

§ 900.50 What Federal laws, regulations, and Executive Orders apply to subcontractors?

Certain provisions of the Act as well as other applicable Federal laws, regulations, and Executive Orders apply to subcontracts awarded under self-determination contracts. As a result, subcontracts should contain a provision informing the recipient that their award is funded with Indian Self-Determination Act funds and that the recipient is responsible for identifying and ensuring compliance with applicable Federal laws, regulations, and Executive Orders. The Secretary and the Indian tribe or tribal organization may, through negotiation, identify all or a portion of such requirements in the self-determination contract and, if so identified, these requirements should be identified in subcontracts.

Property Management System Standards

§ 900.51 What is an Indian tribe or tribal organization's property management system expected to do?

An Indian tribe or tribal organization's property management system shall account for all property furnished or transferred by the Secretary for use under a self-determination contract or acquired with contract funds. The property management system shall contain requirements for the use, care, maintenance, and disposition of Federally-owned and other property as follows:

(a) Where title vests in the Indian tribe, in accordance with tribal law and procedures; or

(b) In the case of a tribal organization, according to the internal property procedures of the tribal organization.

§ 900.52 What type of property is the property management system required to track?

The property management system of the Indian tribe or tribal organization shall track:

(a) Personal property with an acquisition value in excess of $5,000 per item;

(b) Sensitive personal property, which is all personal property that is subject to theft and pilferage, as defined by the Indian tribe or tribal organization. All firearms shall be considered sensitive personal property; and

(c) Real property provided by the Secretary for use under the contract.

§ 900.53 What kind of records shall the property management system maintain?

The property management system shall maintain records that accurately describe the property, including any serial number or other identification number. These records should contain information such as the source, titleholder, acquisition date, cost, share of Federal participation in the cost, location, use and condition of the property, and the date of disposal and sale price, if any.

§ 900.54 Should the property management system prescribe internal controls?

Yes. Effective internal controls should include procedures:

(a) For the conduct of periodic inventories;

(b) To prevent loss or damage to property; and

(c) To ensure that property is used for an Indian tribe or tribal organization's self-determination contract(s) until the property is declared excess to the needs of the contract consistent with the Indian tribe or tribal organization's property management system.

§ 900.55 What are the standards for inventories?

A physical inventory should be conducted at least once every 2 years. The results of the inventory shall be reconciled with the Indian tribe or tribal organization's internal property and accounting records.

§ 900.56 What maintenance is required for property?

Required maintenance includes the performance of actions necessary to keep the property in good working condition, the procedures recommended by equipment manufacturers, and steps necessary to protect the interests of the contractor and the Secretary in any express warranties or guarantees covering the property.

§ 900.57 What if the Indian tribe or tribal organization chooses not to take title to property furnished or acquired under the contract?

If the Indian tribe or tribal organization chooses not to take title to property furnished by the government or acquired with contract funds, title to the property remains vested in the Secretary. A list of Federally-owned property to be used under the contract shall be included in the contract.

§ 900.58 Do the same accountability and control procedures described above apply to Federal property?

Yes, except that requirements for the inventory and disposal of Federal property are different.

§ 900.59 How are the inventory requirements for Federal property different than for tribal property?

There are three additional requirements:

(a) The Indian tribe or tribal organization shall conduct a physical inventory of the Federally-owned property and reconcile the results with the Indian tribe or tribal organization's property records annually, rather than every 2 years;

(b) Within 90 days following the end of an annual funding agreement, the Indian tribe or tribal organization shall certify and submit to the Secretary an annual inventory of all Federally-owned real and personal property used in the contracted program; and

(c) The inventory shall report any increase or decrease of $5,000 or more in the value of any item of real property.

§ 900.60 How does an Indian tribe or tribal organization dispose of Federal personal property?

The Indian tribe or tribal organization shall report to the Secretary in writing any Federally-owned personal property that is worn out, lost, stolen, damaged beyond repair, or no longer needed for the performance of the contract.

(a) The Indian tribe or tribal organization shall state whether the Indian tribe or tribal organization wants to dispose of or return the property.

(b) If the Secretary does not respond within 60 days, the Indian tribe or tribal organization may return the property to the Secretary, who shall accept transfer, custody, control, and responsibility for the property (together with all associated costs).

Subpart G—Programmatic Reports and Data Requirements

§ 900.65 What programmatic reports and data shall the Indian tribe or tribal organization provide?

Unless required by statute, there are no mandatory reporting requirements. Each Indian tribe or tribal organization shall negotiate with the Secretary the type and frequency of program narrative and program data report(s) which respond to the needs of the contracting parties and that are appropriate for the purposes of the contract. The extent of available resources will be a consideration in the negotiations.

§ 900.66 What happens if the Indian tribe or tribal organization and the Secretary cannot come to an agreement concerning the type and/or frequency of program narrative and/or program data report(s)?

Any disagreements over reporting requirements are subject to the declination criteria and procedures in section 102 of the Act and subpart E.

§ 900.67 Will there be a uniform data set for all IHS programs?

IHS will work with Indian tribe or tribal organization representatives to develop a mutually defined uniform subset of data that is consistent with Congressional intent, imposes a minimal reporting burden, and which responds to the needs of the contracting parties.

§ 900.68 Will this uniform data set be required of all Indian tribe or tribal organizations contracting with the IHS under the Act?

No. The uniform data set, applicable to the services to be performed, will serve as the target for the Secretary and the Indian tribes or tribal organizations during individual negotiations on program data reporting requirements.

Subpart H—Lease of Tribally-Owned Buildings by the Secretary

§ 900.69 What is the purpose of this subpart?

Section 105(l) of the Act requires the Secretary, at the request of an Indian tribe or tribal organization, to enter into a lease with the Indian tribe or tribal organization for a building owned or leased by the tribe or tribal organization that is used for administration or delivery of services under the Act. The lease is to include compensation as provided in the statute as well as ''such other reasonable expenses that the Secretary determines, by regulation, to be allowable.'' This subpart contains requirements for these leases.

§ 900.70 What elements are included in the compensation for a lease entered into between the Secretary and an Indian tribe or tribal organization for a building owned or leased by the Indian tribe or tribal organization that is used for administration or delivery of services under the Act?

To the extent that no element is duplicative, the following elements may be included in the lease compensation:

(a) Rent (sublease);

(b) Depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds;

(c) Contributions to a reserve for replacement of facilities;

(d) Principal and interest paid or accrued;

(e) Operation and maintenance expenses, to the extent not otherwise included in rent or use allowances, including, but not limited to, the following:

(1) Water, sewage;

(2) Utilities;

(3) Fuel;

(4) Insurance;

(5) Building management supervision and custodial services;

(6) Custodial and maintenance supplies;

(7) Pest control;

(8) Site maintenance (including snow and mud removal);

(9) Trash and waste removal and disposal;

(10) Fire protection/fire fighting services and equipment;

(11) Monitoring and preventive maintenance of building structures and systems, including but not limited to:

(i) Heating/ventilation/air conditioning;

(ii) Plumbing;

(iii) Electrical;

(iv) Elevators;

(v) Boilers;

(vi) Fire safety system;

(vii) Security system; and

(viii) Roof, foundation, walls, floors.

(12) Unscheduled maintenance;

(13) Scheduled maintenance (including replacement of floor coverings, lighting fixtures, repainting);

(14) Security services;

(15) Management fees; and

(16) Other reasonable and necessary operation or maintenance costs justified by the contractor;

(f) Repairs to buildings and equipment;

(g) Alterations needed to meet contract requirements;

(h) Other reasonable expenses; and

(i) The fair market rental for buildings or portions of buildings and land, exclusive of the Federal share of building construction or acquisition costs, or the fair market rental for buildings constructed with Federal funds exclusive of fee or profit, and for land.

§ 900.71 What type of reserve fund is anticipated for funds deposited into a reserve for replacement of facilities as specified in § 900.70(c)?

Reserve funds must be accounted for as a capital project fund or a special revenue fund.

§ 900.72 Who is the guardian of the fund and may the funds be invested?

(a) The Indian tribe or tribal organization is the guardian of the fund.

(b) Funds may be invested in accordance with the laws, regulations and policies of the Indian tribe or tribal organization subject to the terms of the lease or the self-determination contract.

§ 900.73 Is a lease with the Secretary the only method available to recover the types of cost described in § 900.70?

No. With the exception of paragraph (i) in § 900.70, the same types of costs may be recovered in whole or in part under section 106(a) of the Act as direct or indirect charges to a self-determination contract.

§ 900.74 How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?

There are three options available:

(a) The lease may be based on fair market rental.

(b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of § 900.70, provided that no element of expense is duplicated in fair market rental.

(c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.

Subpart I—Property Donation Procedures

General

§ 900.85 What is the purpose of this subpart?

This subpart implements section 105(f) of the Act regarding donation of Federal excess and surplus property to Indian tribes or tribal organizations and acquisition of property with funds provided under a self-determination contract or grant.

§ 900.86 How will the Secretary exercise discretion to acquire and donate BIA or IHS excess property and excess and surplus Federal property to an Indian tribe or tribal organization?

The Secretary will exercise discretion in a way that gives maximum effect to the requests of Indian tribes or tribal organizations for donation of BIA or IHS

excess property and excess or surplus Federal property, provided that the requesting Indian tribe or tribal organization shall state how the requested property is appropriate for use for any purpose for which a self-determination contract or grant is authorized.

Government-Furnished Property

§ 900.87 How does an Indian tribe or tribal organization obtain title to property furnished by the Federal government for use in the performance of a contract or grant agreement pursuant to section 105(f)(2)(A) of the Act?

(a) For government-furnished personal property made available to an Indian tribe or tribal organization before October 25, 1994:

(1) The Secretary, in consultation with each Indian tribe or tribal organization, shall develop a list of the property used in a self-determination contract.

(2) The Indian tribe or tribal organization shall indicate any items on the list to which the Indian tribe or tribal organization wants the Secretary to retain title.

(3) The Secretary shall provide the Indian tribe or tribal organization with any documentation needed to transfer title to the remaining listed property to the Indian tribe or tribal organization.

(b) For government-furnished real property made available to an Indian tribe or tribal organization before October 25, 1994:

(1) The Secretary, in consultation with the Indian tribe or tribal organization, shall develop a list of the property furnished for use in a self-determination contract.

(2) The Secretary shall inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202.2(b)(10). If the Indian tribe or tribal organization desires to take title to any real property on the list, the Indian tribe or tribal organization shall inform the Secretary, who shall take such steps as necessary to transfer title to the Indian tribe or tribal organization.

(c) For government-furnished real and personal property made available to an Indian tribe or tribal organization on or after October 25, 1994:

(1) The Indian tribe or tribal organization shall take title to all property unless the Indian tribe or tribal organization requests that the United States retain the title.

(2) The Secretary shall determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202.2(b)(10).

§ 900.88 What should the Indian tribe or tribal organization do if it wants to obtain title to government-furnished real property that includes land not already held in trust?

If the land is owned by the United States but not held in trust for an Indian tribe or individual Indian, the Indian tribe or tribal organization shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of a tribe.

(a) If the Indian tribe or tribal organization requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title.

(b) If the Indian tribe or tribal organization requests beneficial ownership with fee title to be held by the United States in trust for an Indian tribe:

(1) The Indian tribe or tribal organization shall submit with its request a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered.

(2) If the request is submitted to the Secretary of Health and Human Services for land under the jurisdiction of that Secretary, the Secretary shall take all necessary steps to effect a transfer of the land to the Secretary of the Interior and shall also forward the Indian tribe or tribal organization's request and the tribe's resolution.

(3) The Secretary of the Interior shall expeditiously process all requests in accordance with applicable Federal law and regulations.

(4) The Secretary shall not require the Indian tribe or tribal organization to furnish any information in support of a request other than that required by law or regulation.

§ 900.89 When may the Secretary elect to reacquire government-furnished property whose title has been transferred to an Indian tribe or tribal organization?

(a) Except as provided in paragraph (b) of this section, when a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of government-furnished property:

(1) That title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization in excess of $5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.90 Does government-furnished real property to which an Indian tribe or tribal organization has taken title continue to be eligible for facilities operation and maintenance funding from the Secretary?

Yes.

Contractor-Purchased Property

§ 900.91 Who takes title to property purchased with funds under a self-determination contract or grant agreement pursuant to section 105(f)(2)(A) of the Act?

The contractor takes title to such property, unless the contractor chooses to have the United States take title. In that event, the contractor must inform the Secretary of the purchase and identify the property and its location in such manner as the contractor and the Secretary deem necessary. A request for the United States to take title to any item of contractor-purchased property may be made at any time. A request for the Secretary to take fee title to real property shall be expeditiously processed in accordance with applicable Federal law and regulation.

§ 900.92 What should the Indian tribe or tribal organization do if it wants contractor-purchased real property to be taken into trust?

The contractor shall submit a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered. If the request to take contractor-purchased real property into trust is submitted to the Secretary of Health and Human Services, that Secretary shall transfer the request to the Secretary of the Interior. The Secretary of the Interior shall expeditiously process all requests in accord with applicable Federal law and regulation.

§ 900.93 When may the Secretary elect to acquire title to contractor-purchased property?

(a) Except as provided in paragraph (b) of this section when a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of government-furnished property:

(1) Whose title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.94 Is contractor-purchased real property to which an Indian tribe or tribal organization holds title eligible for facilities operation and maintenance funding from the Secretary?

Yes.

BIA and IHS Excess Property

§ 900.95 What is BIA or IHS excess property?

BIA or IHS excess property means property under the jurisdiction of the BIA or IHS that is excess to the agency's needs and the discharge of its responsibilities.

§ 900.96 How can Indian tribes or tribal organizations learn about BIA and IHS excess property?

The Secretary shall not less than annually send to Indian tribes and tribal organizations a listing of all excess BIA or IHS personal property before reporting the property to GSA or to any other Federal agency as excess. The listing shall identify the agency official to whom a request for donation shall be submitted.

§ 900.97 How can an Indian tribe or tribal organization acquire excess BIA or IHS property?

(a) The Indian tribe or tribal organization shall submit to the appropriate Secretary a request for specific property that includes a statement of how the property is intended for use in connection with a self-determination contract or grant. The Secretary shall expeditiously process the request and shall exercise discretion in a way that gives maximum effect to the request of Indian tribes or tribal organizations for the donation of excess BIA or IHS property.

(b) If more than one request for the same item of personal property is submitted, the Secretary shall award the item to the requestor whose request is received on the earliest date. If two or more requests are received on the same date, the Secretary shall award the item to the requestor with the lowest transportation costs. The Secretary shall make the donation as expeditiously as possible.

(c) If more than one request for the same parcel of real property is submitted, the Secretary shall award the property to the Indian tribe or tribal organization whose reservation or trust land is closest to the real property requested.

§ 900.98 Who takes title to excess BIA or IHS property donated to an Indian tribe or tribal organization?

The Indian tribe or tribal organization takes title to donated excess BIA or IHS property. The Secretary shall provide the Indian tribe or tribal organization with all documentation needed to vest title in the Indian tribe or tribal organization.

§ 900.99 Who takes title to any land that is part of excess BIA or IHS real property donated to an Indian tribe or tribal organization?

(a) If an Indian tribe or tribal organization requests donation of fee title to excess real property that includes land not held in trust for an Indian tribe, the Indian tribe or tribal organization shall so specify in its request for donation. The Secretary shall take the necessary action under Federal law and regulations to transfer the title to the Indian tribe or tribal organization.

(b) If an Indian tribe or tribal organization asks the Secretary to donate excess real property that includes land and requests that fee title to the land be held by the United States in trust for an Indian tribe, the requestor shall submit a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered.

(1) If the donation request is submitted to the Secretary of Health and Human Services, that Secretary shall take all steps necessary to transfer the land to the Secretary of the Interior with the Indian tribe or tribal organization's request and the Indian tribe's resolution. The Secretary of the Interior shall expeditiously process all requests in accordance with applicable Federal law and regulations.

(2) The Secretary shall not require the Indian tribe or tribal organization to furnish any information in support of a request other than that required by law or regulation.

§ 900.100 May the Secretary elect to reacquire excess BIA or IHS property whose title has been transferred to an Indian tribe or tribal organization?

Yes. When a self-determination contract or grant agreement, or portion— thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of the property;

(a) Except as provided in paragraph (b) of this section when a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of government-furnished property:

(1) Whose title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000.

(b) To the extent that any property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.101 Is excess BIA or IHS real property to which an Indian tribe or tribal organization has taken title eligible for facilities operation and maintenance funding from the Secretary?

Yes.

Excess or Surplus Government Property of Other Agencies

§ 900.102 What is excess or surplus government property of other agencies?

(a) ''Excess government property'' is real or personal property under the control of a Federal agency, other than BIA and IHS, which is not required for the agency's needs and the discharge of its responsibilities.

(b) ''Surplus government property'' means excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration (GSA).

§ 900.103 How can Indian tribes or tribal organizations learn about property that has been designated as excess or surplus government property?

The Secretary shall furnish, not less than annually, to Indian tribes or tribal organizations listings of such property as may be made available from time to time by GSA or other Federal agencies, and shall obtain listings upon the request of an Indian tribe or tribal organization.

§ 900.104 How may an Indian tribe or tribal organization receive excess or surplus government property of other agencies?

(a) The Indian tribe or tribal organization shall file a request for specific property with the Secretary, and shall state how the property is appropriate for use for a purpose for which a self-determination contract or grant is authorized under the Act.

(b) The Secretary shall expeditiously process such request and shall exercise discretion to acquire the property in the manner described in § 900.86 of this Subpart.

(c) Upon approval of the Indian tribe or tribal organization's request, the Secretary shall immediately request acquisition of the property from the GSA or the holding agency, as appropriate, by submitting the necessary documentation in order to acquire the requested property prior to the expiration of any ''freeze'' placed on the property by the Indian tribe or tribal organization.

(d) The Secretary shall specify that the property is requested for donation to an Indian tribe or tribal organization pursuant to authority provided in section 105(f)(3) of the Act.

(e) The Secretary shall request a waiver of any fees for transfer of the property in accordance with applicable Federal regulations.

§ 900.105 Who takes title to excess or surplus Federal property donated to an Indian tribe or tribal organization?

(a) Title to any donated excess or surplus Federal personal property shall vest in the Indian tribe or tribal organization upon taking possession.

(b) Legal title to donated excess or surplus Federal real property shall vest in the Indian tribe or tribal organization upon acceptance by the Indian tribe or tribal organization of a proper deed of conveyance.

(c) If the donation of excess or surplus Federal real property includes land owned by the United States but not held in trust for an Indian tribe, the Indian tribe or tribal organization shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of an Indian tribe.

(1) If the Indian tribe or tribal organization requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title to the Indian tribe or tribal organization.

(2) If the Indian tribe or tribal organization requests beneficial ownership with fee title to be held by the United States in trust for an Indian tribe:

(i) The Indian tribe or tribal organization shall submit with its request a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered.

(ii) If the donation request of the Indian tribe or tribal organization is submitted to the Secretary of Health and Human Services, that Secretary shall take all necessary steps to acquire the land and transfer it to the Secretary of the Interior and shall also forward the Indian tribe or tribal organization's request and the Indian tribe's resolution.

(iii) The Secretary of the Interior shall expeditiously process all requests in accord with applicable Federal law and regulations.

(iv) The Secretary shall not require submission of any information other than that required by Federal law and regulation.

§ 900.106 If a contract or grant agreement or portion thereof is retroceded, reassumed, terminated, or expires, may the Secretary reacquire title to excess or surplus Federal property of other agencies that was donated to an Indian tribe or tribal organization?

No. Section 105(f)(3) of the Act does not give the Secretary the authority to reacquire title to excess or surplus government property acquired from other agencies for donation to an Indian tribe or tribal organization.

Property Eligible for Replacement Funding

§ 900.107 What property to which an Indian tribe or tribal organization obtains title under this Subpart is eligible for replacement funding?

Government-furnished property, contractor-purchased property and excess BIA and IHS property donated to an Indian tribe or tribal organization to which an Indian tribe or tribal organization holds title shall remain eligible for replacement funding to the same extent as if title to that property were held by the United States.

Subpart J—Construction

§ 900.110 What does this subpart cover?

(a) This subpart establishes requirements for issuing fixed-price or cost-reimbursable contracts to provide: design, construction, repair, improvement, expansion, replacement, erection of new space, or demolition and other related work for one or more Federal facilities. It applies to tribal facilities where the Secretary is authorized by law to design, construct and/or renovate, or make improvements to such tribal facilities.

(b) Activities covered by construction contracts under this subpart are: design and architectural/engineering services, construction project management, and the actual construction of the building or facility in accordance with the construction documents, including all labor, materials, equipment, and services necessary to complete the work defined in the construction documents.

(1) Such contracts may include the provision of movable equipment, telecommunications and data processing equipment, furnishings (including works of art), and special purpose equipment, when part of a construction contract let under this subpart.

(2) While planning services and construction management services as defined in § 900.113 may be included in a construction contract under this subpart, they may also be contracted separately using the model agreement in section 108 of the Act.

§ 900.111 What activities of construction programs are contractible?

The Secretary shall, upon the request of any Indian tribe or tribal organization authorized by tribal resolution, enter into a self-determination contract to plan, conduct, and administer construction programs or portions thereof.

§ 900.112 What are construction phases?

(a) Construction programs generally include the following activities in phases which can vary by funding source (an Indian tribe or tribal organization should contact its funding source for more information regarding the conduct of its program):

(1) *The preplanning phase.* The phase during which an initial assessment and determination of project need is made and supporting information collected for presentation in a project application. This project application process is explained in more detail in § 900.122;

(2) *The planning phase.* The phase during which planning services are provided. This phase can include

conducting and preparing a detailed needs assessment, developing justification documents, completing and/or verifying master plans, conducting predesign site investigations and selection, developing budget cost estimates, conducting feasibility studies, and developing a project Program of Requirements (POR);

(3) *The design phase.* The phase during which licensed design professional(s) using the POR as the basis for design of the project, prepare project plans, specifications, and other documents that are a part of the construction documents used to build the project. Site investigation and selection activities are completed in this phase if not conducted as part of the planning phase.

(4) *The construction phase.* The phase during which the project is constructed. The construction phase includes providing the labor, materials, equipment, and services necessary to complete the work in accordance with the construction documents prepared as part of the design phase.

(b) The following activities may be part of phases described in paragraphs (a)(2), (a)(3), and (a)(4) of this section:

(1) Management; and

(2) Environmental, archeological, cultural resource, historic preservation, and similar assessments and associated activities.

§ 900.113 Definitions.

(a) *Construction contract* means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract:

(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 Secretary of the Interior; or

(3) For the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

(b) *Construction management services* (CMS) means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. An Indian tribe or tribal organization's employee or construction management services consultant (typically an engineer or architect) performs such activities as:

(1) Coordination and information exchange between the Indian tribe or tribal organization and the Federal government;

(2) Preparation of Indian tribe or tribal organization's construction contract proposals;

(3) Indian tribe or tribal organization subcontract scope of work identification and subcontract preparation, and competitive selection of Indian tribe or tribal organization construction contract subcontractors (see § 900.110);

(4) Review of work to ensure compliance with the POR and/or the construction contract. This does not involve construction project management as defined in paragraph (d) of this section.

(c) *Construction programs* include 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, water conservation, flood control, and port facilities, and environmental, archeological, cultural resource, historic preservation, and conduct of similar assessments.

(d) *Construction project management* means direct responsibility for the construction project through day-to-day on-site management and administration of the project. Activities may include cost management, project budgeting, project scheduling, procurement services.

(e) *Design* means services performed by licensed design professionals related to preparing drawings, specifications, and other design submissions specified in the contract, as well as services provided by or for licensed design professionals during the bidding/negotiating, construction, and operational phases of the project.

(f) *Planning services* means activities undertaken to support agency and/or Congressional funding of a construction project. Planning services may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed and completion of approved justification documents and a program of requirements (POR) for the project.

(g) *Program of Requirements* (POR) is a planning document developed during the planning phase for an individual project. It provides background about the project; site information; programmatic needs; and, for facilities projects, a detailed room-by-room listing of spaces, including net and gross sizes, finish materials to be used, furnishings and equipment, and other information and design criteria on which to base the construction project documents.

(h) *Scope of work* means the description of the work to be provided through a contract issued under this subpart and the methods and processes to be used to accomplish that work. A scope of work is typically developed based on criteria provided in a POR during the design phase, and project construction documents (plans and specifications) during the construction phase.

§ 900.114 Why is there a separate subpart in these regulations for construction contracts and grants?

There is a separate subpart because the Act differentiates between construction contracts and the model agreement in section 108 of the Act which is required for contracting other activities. Construction contracts are separately defined in the Act and are subject to a separate proposal and review process.

§ 900.115 How do self-determination construction contracts relate to ordinary Federal procurement contracts?

(a) A self-determination construction contract is a government-to-government agreement that transfers control of the construction project, including administrative functions, to the contracting Indian tribe or tribal organization to facilitate effective and meaningful participation by the Indian tribe or tribal organization in planning, conducting, and administering the construction project, and so that the construction project is responsive to the true needs of the Indian community. The Secretary's role in the conduct of a contracted construction project is limited to the Secretary's responsibilities set out in § 900.131.

(b) Self-determination construction contracts are not traditional ''procurement'' contracts.

(1) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and the regulations promulgated under that Act, shall apply to a construction contract or subcontract only to the extent that application of the provision is:

(i) Necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) Directly related to the construction activity; and

(iii) Not inconsistent with the Act.

(2) A list of the Federal requirements that meet the requirements of this

paragraph shall be included in an attachment to the contract under negotiations between the Secretary and the Indian tribe or tribal organization.

(3) Except as provided in paragraph (b)(2) of this section, no Federal law listed in section 105(3)(C)(ii) of the Act or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal government shall apply to a construction contract that an Indian tribe or tribal organization enters into under this Act, unless expressly provided in the law.

(c) Provisions of a construction contract under this subpart shall be liberally construed in favor of the contracting Indian tribe or tribal organization.

§ 900.116 Are negotiated fixed-price contracts treated the same as cost-reimbursable contracts?

Yes, except that in negotiated fixed-price construction contracts, appropriate clauses shall be negotiated to allocate properly the contract risks between the government and the contractor.

§ 900.117 Do these ''construction contract'' regulations apply to planning services?

(a) These regulations apply to planning services contracts only as provided in this section.

(1) The Indian tribe or tribal organization shall submit to the Secretary for review and approval the POR documents produced as a part of a model contract under section 108 of the Act or under a construction contract under this subpart.

(i) Within 60 days after receipt of the POR from the Indian tribe or tribal organization for a project that has achieved priority ranking or that is funded, the Secretary shall:

(A) Approve the POR;

(B) Notify the Indian tribe or tribal organization of and make available any objections to the POR that the Secretary may have; or

(C) Notify the Indian tribe or tribal organization of the reasons why the Secretary will be unable either to approve the POR or to notify the Indian tribe or tribal organization of any objections within 60 days, and state the time within which the notification will be made, provided that the extended time shall not exceed 60 additional days.

(ii) Within a maximum of 180 days after receipt of a POR from an Indian tribe or tribal organization for a project that is not funded and is not described in paragraph (a)(1)(i) of this section, the Secretary shall:

(A) Approve the POR; or

(B) Notify the Indian tribe or tribal organization of and make available any objections to the POR; or

(C) Notify the Indian tribe or tribal organization of the reasons why the Secretary will be unable either to approve the POR or to notify the Indian tribe or tribal organization of any objections within 180 days, and state the time within which the notification will be made, provided that the extended time shall not exceed 60 additional days.

(2) Any failure of the Secretary to act on a POR within the applicable period required in paragraph (a)(1) of this section will be deemed a rejection of the POR and will authorize the commencement of any appeal as provided in section 110 of the Act, or, if a model agreement under section 108 of the Act is used, the disputes provision of that agreement.

(3) If an Indian tribe or tribal organization elects to provide planning services as part of a construction contract rather than under a model agreement as set out in section 108 of the Act, the regulations in this subpart shall apply.

(b) The parties to the contract are encouraged to consult during the development of the POR and following submission of the POR to the Secretary.

§ 900.118 Do these ''construction contract'' regulations apply to construction management services?

No. Construction management services may be contracted separately under section 108 of the Act. Construction management services consultants and/or Indian tribe or tribal organization employees assist and advise the Indian tribe or tribal organization to implement construction contracts, but have no contractual relationship with or authority to direct construction contract subcontractors.

(a) If the Indian tribe or tribal organization chooses to contract solely for construction management services, these services shall be limited to:

(1) Coordination and exchange of information between the Indian tribe or tribal organization and the Secretary;

(2) Review of work produced by the Secretary to determine compliance with:

(i) The POR and design contract during the design stage; or

(ii) The project construction documents during the construction stage;

(3) Disputes shall be resolved in accordance with the disputes clause of the CMS contract.

(b) If the Indian tribe or tribal organization conducts CMS under section 108 of the Act and the Indian tribe or tribal organization contracts separately under this subpart for all or some of the activities in § 900.110, the contracted activities shall be limited to:

(1) Coordination and exchange of information between the Indian tribe or tribal organization and Secretary;

(2) Preparation of tribal or tribal organization construction subcontract scope of work identification and subcontract preparation, and competitive selection of tribal or tribal organization construction contract subcontractors;

(3) Review of work produced by tribal or tribal organization construction subcontractors to determine compliance with:

(i) The POR and the design contract during the design stage; or

(ii) The project construction documents during the construction stage.

§ 900.119 To what extent shall the Secretary consult with affected Indian tribes before spending funds for any construction project?

Before spending any funds for a planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary shall consult with any Indian tribe or tribal organization(s) that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible concerning: size, location, type, and other characteristics of the project.

§ 900.120 How does an Indian tribe or tribal organization find out about a construction project?

Within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the Secretary shall notify, by registered mail with return receipt in order to document mailing, the Indian tribe or tribal organization(s) to be benefitted by the availability of the funds for each phase of a project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a contract proposal.

(a) The Secretary shall, within 30 days after receiving a request from an Indian tribe or tribal organization, furnish the Indian tribe or tribal organization with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(b) An Indian tribe or tribal organization is not required to request this information prior to submitting a notification of intent to contract or a contract proposal.

(c) The Secretary shall have a continuing responsibility to furnish information.

§ 900.121 What happens during the preplanning phase and can an Indian tribe or tribal organization perform any of the activities involved in this process?

(a) The application and ranking process for developing a priority listing of projects varies between agencies. There are, however, steps in the selection process that are common to most selection processes. An Indian tribe or tribal organization that wishes to secure a construction project should contact the appropriate agency to determine the specific steps involved in the application and selection process used to fund specific types of projects. When a priority process is used in the selection of construction projects, the steps involved in the application and ranking process are as follows:

(1) *Application.* The agency solicits applications from Indian tribes or tribal organizations. In the request for applications, the Secretary provides specific information regarding the type of project to be funded, the objective criteria that will be used to evaluate applications, the points or weight that each criterion will be assigned, and the time when applications are due. An Indian tribe or tribal organization may prepare the application (technical assistance from the agency, within resources available, shall be provided upon request from an Indian tribe or tribal organization) or may rely upon the agency to prepare the application.

(2) *Ranking/Prioritization.* The Secretary evaluates the applications based on the criteria provided as part of the application preparation process. The Secretary applies only criteria and weights assigned to each criteria that were disclosed to the Indian tribe or tribal organization during the application stage. The applications are then ranked in order from the application that best meets application criteria to the application that least meet the application criteria.

(3) *Validation.* Before final acceptance of a ranked application, the information, such as demographic information, deficiency levels reported in application, the condition of existing facilities, and program housing needs, is validated. During this process, additional information may be developed by the Indian tribe or tribal organization in support of the original information or the Secretary may designate a representative of the Department to conduct an on-site review of the information contained in the application.

(b) [Reserved]

§ 900.122 What does an Indian tribe or tribal organization do if it wants to secure a construction contract?

(a) The Act establishes a special process for review and negotiation of proposals for construction contracts which is different than that for other self-determination contract proposals. The Indian tribe or tribal organization should notify the Secretary of its intent to contract. After notification, the Indian tribe or tribal organization should prepare its contract proposal in accordance with the sections of this subpart. While developing its construction contract proposal, the Indian tribe or tribal organization can request technical assistance from the Secretary. Not later than 30 days after receiving a request from an Indian tribe or tribal organization, the Secretary shall provide to the Indian tribe or tribal organization all information available about the construction project, including construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports, and archaeological reports. The responsibility of the Secretary to furnish this information shall be a continuing one.

(b) At the request of the Indian tribe or tribal organization and before finalizing its construction contract proposal, the Secretary shall provide for a precontract negotiation phase during the development of a contract proposal. Within 30 days the Secretary shall acknowledge receipt of the proposal and, if requested by the Indian tribe or tribal organization, shall confer with the Indian tribe or tribal organization to develop a negotiation schedule. The negotiation phase shall include, at a minimum:

(1) The provision of technical assistance under section 103 of the Act and paragraph (a) of this section;

(2) A joint scoping session between the Secretary and the Indian tribe or tribal organization to review all plans, specifications, engineering reports, cost estimates, and other information available to the parties, for the purpose of identifying all areas of agreement and disagreement;

(3) An opportunity for the Secretary to revise plans, designs, or cost estimates of the Secretary in response to concerns raised, or information provided by, the Indian tribe or tribal organization;

(4) A negotiation session during which the Secretary and the Indian tribe or tribal organization shall seek to develop a mutually agreeable contract proposal; and

(5) Upon the request of the Indian tribe or tribal organization, the use of alternative dispute resolution to resolve remaining areas of disagreement under the dispute resolution provisions under subchapter IV of chapter 5 of the United States Code.

§ 900.123 What happens if the Indian tribe or tribal organization and the Secretary cannot develop a mutually agreeable contract proposal?

(a) If the Secretary and the Indian tribe or tribal organization are unable to develop a mutually agreeable construction contract proposal under the procedures in § 900.122, the Indian tribe or tribal organization may submit a final contract proposal to the Secretary. Not later than 30 days after receiving the final contract proposal, the Secretary shall approve the contract proposal and award the contract, unless, during the period the Secretary declines the proposal under sections 102(a)(2) and 102(b) of the Act (including providing opportunity for an appeal under section 102(b)).

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts under section 102(a)(2) of the Act, the Secretary shall:

(1) State any objections to the contract proposal (as submitted by the Indian tribe or tribal organization) in writing and provide all documents relied on in making the declination decision within 20 days of such decision to the Indian tribe or tribal organization;

(2) Provide assistance to the Indian tribe or tribal organization to overcome the stated objections;

(3) Provide the Indian tribe or tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under the regulations set forth in subpart L, except that the Indian tribe or tribal organization may, in lieu of filing the appeal, initiate an action in a Federal district court and proceed directly under section 110(a) of the Act.

§ 900.124 May the Indian tribe or tribal organization to use a grant in lieu of a contract?

Yes. A grant agreement or a cooperative agreement may be used in lieu of a contract under sections 102 and 103 of the Act when agreed to by the Secretary and the Indian tribe or tribal

organization. Under the grant concept, the grantee will assume full responsibility and accountability for design and construction performance within the funding limitations. The grantee will manage and administer the work with minimal involvement by the government. The grantee will be expected to have acceptable management systems for finance, procurement, and property. The Secretary may issue Federal construction guidelines and manuals applicable to its construction programs, and the government shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs.

§ 900.125 What shall a construction contract proposal contain?

(a) In addition to the full name, address, and telephone number of the Indian tribe or tribal organization submitting the construction proposal, a construction contract proposal shall contain descriptions of the following standards under which they propose to operate the contract:

(1) The use of licensed and qualified architects;

(2) Applicable health and safety standards;

(3) Adherence to applicable Federal, State, local, or tribal building codes and engineering standards;

(4) Structural integrity;

(5) Accountability of funds;

(6) Adequate competition for subcontracting under tribal or other applicable law;

(7) The commencement, performance, and completion of the contract;

(8) Adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals and the Secretary shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs);

(9) The use of proper materials and workmanship;

(10) Necessary inspection and testing;

(11) With respect to the self-determination contract between the Indian tribe or tribal organization and Federal government, a process for changes, modifications, stop work, and termination of the work when warranted;

(b) In addition to provisions regarding the program standards listed in paragraph (a) of this section or the assurances listed in paragraph (c) of this section, the Indian tribe or tribal organization shall also include in its construction contract proposal the following:

(1) In the case of a contract for design activities, this statement, ''Construction documents produced as part of this contract will be produced in accordance with the Program of Requirements and/or Scope of Work,'' and the POR and/or Scope of Work shall be attached to the contract proposal. If tribal construction procedures, standards and methods (including national, regional, state, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards then the Secretary shall accept the tribally proposed standards; and

(2) In the case of a contract for construction activities, this statement, ''The facility will be built in accordance with the construction documents produced as a part of design activities. The project documents, including plans and specifications, are hereby incorporated into this contract through this reference.'' If tribal construction procedures, standards and methods (including national, regional, state, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards then the Secretary shall accept the tribally proposed standards; and

(3) Proposed methods to accommodate the responsibilities of the Secretary provided in § 900.131; and

(4) Proposed methods to accommodate the responsibilities of the Indian tribe or tribal organization provided in § 900.130 unless otherwise addressed in paragraph (a) of this section and minimum staff qualifications proposed by the Indian tribe or tribal organization, if any;

(5) A contract budget as described in § 900.127; and

(6) A period of performance for the conduct of all activities to be contracted;

(7) A payment schedule as described in § 900.132;

(8) A statement indicating whether or not the Indian tribe or tribal organization has a CMS contract related to this project;

(9) Current (unrevoked) authorizing resolutions in accordance with § 900.5(d) from all Indian tribes benefitting from the contract proposal; and

(10) Any responsibilities, in addition to the Federal responsibilities listed in § 900.131, which the Indian tribe or tribal organization proposes the Federal government perform to assist with the completion of the scope of work;

(c) The Indian tribe or tribal organization will provide the following assurances in its contract proposal:

(1) If the Indian tribe or tribal organization elects not to take title (pursuant to subpart I) to Federal property used in carrying out the contract, ''The Indian tribe or tribal organization will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. The Indian tribe or tribal organization will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure nondiscrimination during the useful life of the project''; and

(2) ''The Indian tribe or tribal organization will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 et seq.)'' which prohibits the use of lead based paint in construction or rehabilitation of residential structures;

(3) ''The Indian tribe or tribal organization will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646),'' which provides for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal participation in purchases; and

(4) ''Except for work performed by tribal or tribal organization employees, the Indian tribe or tribal organization will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. 276c and 18 U.S.C. 874),'' for Federally assisted construction subagreements;

(5) ''The Indian tribe or tribal organization will comply with the flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234),'' which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more;

(6) ''The Indian tribe or tribal organization will comply with all applicable Federal environmental laws, regulations, and Executive Orders;''

(7) ''The Indian tribe or tribal organization will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 et seq.) related to protecting the components or potential components of the national wild and scenic rivers system;''

(8) ''The Indian tribe or tribal organization will assist the awarding agency in assuring compliance with

section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and preservation of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a–1 et seq.).''

(d) The Indian tribe or tribal organization and the Secretary will both make a good faith effort to identify any other applicable Federal laws, Executive Orders, or regulations applicable to the contract, share them with the other party, and refer to them in the construction contract. The parties will make a good faith effort to identify tribal laws, ordinances, and resolutions which may affect either party in the performance of the contract.

§ 900.126 Shall a construction contract proposal incorporate provisions of Federal construction guidelines and manuals?

Each agency may provide or the Indian tribe or tribal organization may request Federal construction guidelines and manuals for consideration by the Indian tribe or tribal organization in the preparation of its contract proposal. If tribal construction procedures, standards and methods (including national, regional, State, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards, the Secretary shall accept the tribally proposed standards.

§ 900.127 What can be included in the Indian tribe or tribal organization's contract budget?

(a) The costs incurred will vary depending on which phase (see § 900.112) of the construction process the Indian tribe or tribal organization is conducting and the type of contract that will be used. The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties (see § 900.129).

(b) Costs for activities under this subpart that have not been billed, allocated, or recovered under a contract issued under section 108 of the Act should be included.

(c) The Indian tribe or tribal organization's budget should include the cost elements that reflect an overall fair and reasonable price. These costs include:

(1) The reasonable costs to the Indian tribe or tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of the Act and any other applicable law;

(2) The costs of preparing the contract proposal and supporting cost data;

(3) The costs associated with auditing the general and administrative costs of the Indian tribe or tribal organization associated with the management of the construction contract; and

(4) In cases where the Indian tribe or tribal organization is submitting a fixed-price construction contract:

(i) The reasonable costs to the Indian tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract;

(ii) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract, local market conditions, and other relevant considerations.

(d) In establishing a contract budget for a construction project, the Secretary shall not be required to identify separately the components described in paragraphs (c)(4)(i) and (c)(4)(ii) of this section.

(e) The Indian tribe or tribal organization's budget proposal includes a detailed budget breakdown for performing the scope of work including a total ''not to exceed'' dollar amount with which to perform the scope of work. Specific budget line items, if requested by the Indian tribe or tribal organization, can include the following:

(1) The administrative costs the Indian tribe or tribal organization may incur including:

(i) Personnel needed to provide administrative oversight of the contract;

(ii) Travel costs incurred, both local travel incurred as a direct result of conducting the contract and remote travel necessary to review project status with the Secretary;

(iii) Meeting costs incurred while meeting with community residents to develop project documents;

(iv) Fees to be paid to consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who will provide construction management services;

(2) The fees to be paid to architects and engineers to assist in preparing project documents and to assist in oversight of the construction process;

(3) The fees to be paid to develop project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance, and;

(4) In the case of a contract to conduct project construction activities, the fees to provide a part-time or full-time on-site inspector, depending on the terms of the contract, to monitor construction activities;

(5) In the case of a contract to conduct project construction activities, project site development costs;

(6) In the case of a contract to conduct project construction activities, project construction costs including those costs described in paragraph (c)(4), of this section;

(7) The cost of securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(8) A contingency amount for unanticipated conditions of the construction phase of cost-reimbursable contracts. The amount of the contingency provided shall be 3 percent of activities being contracted or 50 percent of the available contingency funds, whichever is greater. In the event provision of required contingency funds will cause the project to exceed available project funds, the discrepancy shall be reconciled in accordance with § 900.129(e). Any additional contingency funds for the construction phase will be negotiated on an as-needed basis subject to the availability of funds and the nature, scope, and complexity of the project. Any contingency for other phases will be negotiated on a contract-by-contract basis. Unused contingency funds obligated to the contract and remaining at the end of the contract will be considered savings.

(9) Other costs incurred that are directly related to the conduct of contract activities.

§ 900.128 What funding shall the Secretary provide in a construction contract?

The Secretary shall provide an amount under a construction contract that reflects an overall fair and reasonable price to the parties. These costs include:

(a) The reasonable costs to the Indian tribe or tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of the Act and any other applicable law;

(b) The costs of preparing the contract proposal and supporting cost data; and

(c) The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract; and

(d) If the Indian tribe or tribal organization is submitting a fixed-price construction contract:

(1) The reasonable costs to the Indian tribe or tribal organization for general administration incurred in connection

with the project that is the subject of the contract;

(2) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract, local market conditions, and other relevant considerations including but not limited to contingency.

(3) In establishing a contract budget for a construction project, the Secretary is not required to identify separately the components described in paragraph (d) (1) and (d) (2) of this sections.

§ 900.129 How do the Secretary and Indian tribe or tribal organization arrive at an overall fair and reasonable price for the performance of a construction contract?

(a) Throughout the contract award process, the Secretary and Indian tribe or tribal organization shall share all construction project cost information available to them in order to facilitate reaching agreement on an overall fair and reasonable price for the project or part thereof. In order to enhance this communication, the government's estimate of an overall fair and reasonable price shall:

(1) Contain a level of detail appropriate to the nature and phase of the work and sufficient to allow comparisons to the Indian tribe or tribal organization's estimate;

(2) Be prepared in a format coordinated with the Indian tribe or tribal organization; and

(3) Include the cost elements contained in section 105(m)(4) of the Act.

(b) The government's cost estimate shall be an independent cost estimate based on such information as the following:

(1) Prior costs to the government for similar projects adjusted for comparison to the target location, typically in unit costs, such as dollars per pound, square meter cost of building, or other unit cost that can be used to make a comparison;

(2) Actual costs previously incurred by the Indian tribe or tribal organization for similar projects;

(3) Published price lists, to include regional adjustment factors, for materials, equipment, and labor; and

(4) Projections of inflation and cost trends, including projected changes such as labor, material, and transportation costs.

(c) The Secretary shall provide the initial government cost estimate to the Indian tribe or tribal organization and make appropriate revisions based on concerns raised or information provided by the Indian tribe or tribal organization. The Secretary and the Indian tribe or tribal organization shall continue to revise, as appropriate, their respective cost estimates based on changed or additional information such as the following:

(1) Actual subcontract bids;

(2) Changes in inflation rates and market conditions, including local market conditions;

(3) Cost and price analyses conducted by the Secretary and the Indian tribe or tribal organization during negotiations;

(4) Agreed-upon changes in the size, scope and schedule of the construction project; and

(5) Agreed-upon changes in project plans and specifications.

(d) Considering all of the information available, the Secretary and the Indian tribe or tribal organization shall negotiate the amount of the construction contract. The objective of the negotiations is to arrive at an amount that is fair under current market conditions and reasonable to both the government and the Indian tribe or tribal organization. As a result, the agreement does not necessarily have to be in strict conformance with either party's cost estimate nor does agreement have to be reached on every element of cost, but only on the overall fair and reasonable price of each phase of the work included in the contract.

(e) If the fair and reasonable price arrived at under paragraph (d) of this section would exceed the amount available to the Secretary, then:

(1) If the Indian tribe or tribal organization elects to submit a final proposal, the Secretary may decline the proposal under section 105(m)(4)(C)(v) of the Act or if the contract has been awarded, dispute the matter under the Contract Disputes Act; or

(2) If requested by the Indian tribe or tribal organization:

(i) The Indian tribe or tribal organization and the Secretary may jointly explore methods of expanding the available funds through the use of contingency funds, advance payments in accordance with § 900.132, rebudgeting, or seeking additional appropriations; or

(ii) The Indian tribe or tribal organization may elect to propose a reduction in project scope to bring the project price within available funds; or

(iii) The Secretary and Indian tribe or tribal organization may agree that the project be executed in phases.

§ 900.130 What role does the Indian tribe or tribal organization play during the performance of a self-determination construction contract?

(a) The Indian tribe or tribal organization is responsible for the successful completion of the project in accordance with the approved contract documents.

(b) If the Indian tribe or tribal organization is contracting to perform design phase activities, the Indian tribe or tribal organization shall have the following responsibilities:

(1) The Indian tribe or tribal organization shall subcontract with or provide the services of licensed and qualified architects and other consultants needed to accomplish the self-determination construction contract.

(2) The Indian tribe or tribal organization shall administer and disburse funds provided through the contract in accordance with subpart F, § 900.42 through § 900.45 and implement a property management system in accordance with subpart F, § 900.51 through § 900.60.

(3) The Indian tribe or tribal organization shall direct the activities of project architects, engineers, and other project consultants, facilitate the flow of information between the Indian tribe or tribal organization and its subcontractors, resolve disputes between the Indian tribe or tribal organization and its subcontractors or between its subcontractors, and monitor the work produced by its subcontractors to ensure compliance with the POR.

(4) The Indian tribe or tribal organization shall direct the work of its subcontractors so that work produced is provided in accordance with the contract budget and contract performance period as negotiated between and agreed to by the parties.

(5) The Indian tribe or tribal organization shall provide the Secretary with an opportunity to review and provide written comments on the project plans and specifications only at the concept phase, the schematic phase (or the preliminary design), the design development phase, and the final construction documents phase and approve the project plans and specifications for general compliance with contract requirements only at the schematic phase (or the preliminary design) and the final construction documents phase or as otherwise negotiated.

(6) The Indian tribe or tribal organization shall provide the Secretary with the plans and specifications after their final review so, if needed, the Secretary may obtain an independent government cost estimate in accordance with § 900.131(b)(4) for the construction of the project.

(7) The Indian tribe or tribal organization shall retain project records and design documents for a minimum of

3 years following completion of the contract.

(8) The Indian tribe or tribal organization shall provide progress reports and financial status reports quarterly, or as negotiated, that contain a narrative of the work accomplished, including but not limited to descriptions of contracts, major subcontracts, and modifications implemented during the report period and A/E service deliverables, the percentage of the work completed, a report of funds expended during the reporting period, and total funds expended for the project. The Indian tribe or tribal organization shall also provide copies, for the information of the Secretary, of an initial work and payment schedule and updates as they may occur.

(c) If the Indian tribe or tribal organization is contracting to perform project construction phase activities, the Indian tribe or tribal organization shall have the following responsibilities:

(1) The Indian tribe or tribal organization shall subcontract with or provide the services of licensed and qualified architects and other consultants as needed to accomplish the self-determination construction contract.

(2) The Indian tribe or tribal organization shall administer and dispense funds provided through the contract in accordance with subpart F, § 900.42 through § 900.45 and implement a property management system in accordance with subpart F, § 900.51 through § 900.60.

(3) The Indian tribe or tribal organization shall subcontract with or provide the services of construction contractors or provide its own forces to conduct construction activities in accordance with the project construction documents or as otherwise negotiated between and agreed to by the parties.

(4) The Indian tribe or tribal organization shall direct the activities of project architects, engineers, construction contractors, and other project consultants, facilitate the flow of information between the Indian tribe or tribal organization and its subcontractors, resolve disputes between itself and its subcontractors or between its subcontractors, and monitor the work produced by its subcontractors to assure compliance with the project plans and specifications.

(5) The Indian tribe or tribal organization shall manage or provide for the management of day-to-day activities of the contract including the issuance of construction change orders to subcontractors except that, unless the Secretary agrees:

(i) The Indian tribe or tribal organization may not issue a change order to a construction subcontractor that will cause the Indian tribe or tribal organization to exceed its self-determination contract budget;

(ii) The Indian tribe or tribal organization may not issue a change order to a construction subcontractor that will cause the Indian tribe or tribal organization to exceed the performance period in its self-determination contract budget; or

(iii) The Indian tribe or tribal organization may not issue to a construction subcontractor a change order that is a significant departure from the scope or objective of the project.

(6) The Indian tribe or tribal organization shall direct the work of its subcontractors so that work produced is provided in accordance with the contract budget and performance period as negotiated between and agreed to by the parties.

(7) The Indian tribe or tribal organization shall provide to the Secretary progress and financial status reports.

(i) The reports shall be provided quarterly, or as negotiated, and shall contain a narrative of the work accomplished, the percentage of the work completed, a report of funds expended during the reporting period, and total funds expended for the project.

(ii) The Indian tribe or tribal organization shall also provide copies, for the information of the Secretary, of an initial schedule of values and updates as they may occur, and an initial construction schedule and updates as they occur.

(8) The Indian tribe or tribal organization shall maintain on the job-site or project office, and make available to the Secretary during monitoring visits: contracts, major subcontracts, modifications, construction documents, change orders, shop drawings, equipment cut sheets, inspection reports, testing reports, and current redline drawings.

(d) Upon completion of the project, the Indian tribe or tribal organization shall provide to the Secretary a reproducible copy of the record plans and a contract closeout report.

(e) For cost-reimbursable projects, the Indian tribe or tribal organization shall not be obligated to continue performance that requires an expenditure of more funds than were awarded under the contract. If the Indian tribe or tribal organization has a reason to believe that the total amount required for performance of the contract will be greater than the amount of funds awarded, it shall provide reasonable notice to the Secretary. If the Secretary does not increase the amount of funds awarded under the contract, the Indian tribe or tribal organization may suspend performance of the contract until sufficient additional funds are awarded.

§ 900.131 What role does the Secretary play during the performance of a self-determination construction contract?

(a) If the Indian tribe or tribal organization is contracting solely to perform construction management services either under this subpart or section 108 of the Act, the Secretary has the following responsibilities:

(1) The Secretary is responsible for the successful completion of the project in accordance with the approved contract documents. In fulfilling those responsibilities, the Secretary shall consult with the Indian tribe or tribal organization on a regular basis as agreed to by the parties to facilitate the exchange of information between the Indian tribe or tribal organization and Secretary;

(2) The Secretary shall provide the Indian tribe or tribal organization with regular opportunities to review work produced to determine compliance with the following documents:

(i) The POR, during the conduct of design phase activities. The Secretary shall provide the Indian tribe or tribal organization with an opportunity to review the project construction documents at the concept phase, the schematic phase, the design development phase, and the final construction documents phase, or as otherwise negotiated. Upon receipt of project construction documents for review, the Indian tribe or tribal organization shall not take more than 21 days to make available to the Secretary any comments or objections to the construction documents as submitted by the Secretary. Resolution of any comments or objections shall be in accordance with dispute resolution procedures as agreed to by the parties and contained in the contract; or

(ii) The project construction documents, during conduct of the construction phase activities. The Indian tribe or tribal organization shall have the right to conduct monthly or critical milestone on-site monitoring visits or as negotiated with the Secretary;

(b) If the Indian tribe or tribal organization is contracting to perform design and/or construction phase activities, the Secretary shall have the following responsibilities:

(1) In carrying out the responsibilities of this section, and specifically in carrying out review, comment, and approval functions under this section, the Secretary shall provide for full tribal participation in the decision making process and shall honor tribal preferences and recommendations to the greatest extent feasible. This includes promptly notifying the Indian tribe or tribal organization of any concerns or issues in writing that may lead to disapproval, meeting with the Indian tribe or tribal organization to discuss these concerns and issues and to share relevant information and documents, and making a good faith effort to resolve all issues and concerns of the Indian tribe or tribal organization. The time allowed for Secretarial review, comment, and approval shall be no more than 21 days per review unless a different time period is negotiated and specified in individual contracts. The 21-day time period may be extended if the Indian tribe or tribal organization agrees to the extension in writing. Disagreements over the Secretary's decisions in carrying out these responsibilities shall be handled under subpart N governing contract disputes under the Contract Disputes Act.

(2) To the extent the construction project is subject to NEPA or other environmental laws, the appropriate Secretary shall make the final determination under such laws. All other environmentally related functions are contractible.

(3) If the Indian tribe or tribal organization conducts planning activities under this subpart, the Secretary shall review and approve final planning documents for the project to ensure compliance with applicable planning standards.

(4) When a contract or portion of a contract is for project construction activities, the Secretary may rely on the Indian tribe or tribal organization's cost estimate or the Secretary may obtain an independent government cost estimate that is derived from the final project plans and specifications. The Secretary shall obtain the cost estimate, if any, within 90 days or less of receiving the final plans and specifications from the Indian tribe or tribal organization and shall provide all supporting documentation of the independent cost estimate to the Indian tribe or tribal organization within the 90 day time limit.

(5) If the contracted project involves design activities, the Secretary shall have the authority to review for general compliance with the contract requirements and provide written comments on the project plans and specifications only at the concept phase, the schematic phase, the design development phase and the final construction documents phase, and approve for general compliance with contract requirements the project plans and specifications only at the schematic phase and the final construction documents phase or as otherwise negotiated.

(6) If the contracted project involves design activities, the Secretary reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, for Federal government purposes:

(i) The copyright in any work developed under a contract or subcontract of this subpart; and

(ii) Any rights of copyright to which an Indian tribe or tribal organization or a tribal subcontractor purchases ownership through this contract.

(7) Changes that require an increase to the negotiated contract budget or an increase in the negotiated performance period or are a significant departure from the scope or objective of the project shall require approval of the Secretary.

(8) Review and comment on specific shop drawings as negotiated and specified in individual contracts.

(9) The Secretary may conduct monthly on-site monitoring visits, or alternatively if negotiated with the Indian tribe or tribal organization, critical milestone on-site monitoring visits.

(10) The Secretary retains the right to conduct final project inspections jointly with the Indian tribe or tribal organization and to accept the building or facility. If the Secretary identifies problems during final project inspections the information shall be provide to the Indian tribe or tribal organization and shall be limited to items that are materially noncompliant.

(11) The Secretary can require an Indian tribe or tribal organization to suspend work under a contract in accordance with this paragraph. The Secretary may suspend a contract for no more than 30 days unless the Indian tribe or tribal organization has failed to correct the reason(s) for the suspension or unless the cause of the suspension cannot be resolved through either the efforts of the Secretary or the Indian tribe or tribal organization.

(i) The following are reasons the Secretary may suspend work under a self-determination contract for construction:

(A) Differing site conditions encountered upon commencement of construction activities that impact health or safety concerns or shall require an increase in the negotiated project budget;

(B) The Secretary discovers materially non-compliant work;

(C) Funds allocated for the project that is the subject of this contract are rescinded by Congressional action; or

(D) Other Congressional actions occur that materially affect the subject matter of the contract.

(ii) If the Secretary wishes to suspend the work, the Secretary shall first provide written notice and an opportunity for the Indian tribe or tribal organization to correct the problem. The Secretary may direct the Indian tribe or tribal organization to suspend temporarily work under a contract only after providing a minimum of 5 working days' advance written notice to the Indian tribe or tribal organization describing the nature of the performance deficiencies or imminent safety, health or environmental issues which are the cause for suspending the work.

(iii) The Indian tribe or tribal organization shall be compensated for reasonable costs, including but not limited to overhead costs, incurred due to any suspension of work that occurred through no fault of the Indian tribe or tribal organization.

(iv) Disputes arising as a result of a suspension of the work by the Secretary shall be subject to the Contract Disputes Act or any other alternative dispute resolution mechanism as negotiated between and agreed to by the parties and contained in the contract.

(12) The Secretary can terminate the project for cause in the event non-compliant work is not corrected through the suspension process specified in paragraph (11) of this section.

(13) The Secretary retains authority to terminate the project for convenience for the following reasons:

(i) Termination for convenience is requested by the Indian tribe or tribal organization;

(ii) Termination for convenience is requested by the Secretary and agreed to by the Indian tribe or tribal organization;

(iii) Funds allocated for the project that is the subject of the contract are rescinded by Congressional action;

(iv) Other Congressional actions take place that affect the subject matter of the contract;

(v) If the Secretary terminates a self-determination construction contract for convenience, the Secretary shall provide the Indian tribe or tribal organization 21 days advance written notice of intent to terminate a contract for convenience; or

(vi) The Indian tribe or tribal organization shall be compensated for

reasonable costs incurred due to termination of the contract.

§ 900.132 Once a contract and/or grant is awarded, how will the Indian tribe or tribal organization receive payments?

(a) A schedule for advance payments shall be developed based on progress, need, and other considerations in accordance with applicable law. The payment schedule shall be negotiated by the parties and included in the contract. The payment schedule may be adjusted as negotiated by the parties during the course of the project based on progress and need.

(b) Payments shall be made to the Indian tribe or tribal organization according to the payment schedule contained in the contract. If the contract does not provide for the length of each allocation period, the Secretary shall make payments to the Indian tribe or tribal organization at least quarterly. Each allocation shall be adequate to provide funds for the contract activities anticipated to be conducted during the allocation period, except that:

(1) The first allocation may be greater than subsequent allocations and include mobilization costs, and contingency funds described in § 900.128(e)(8); and

(2) Any allocation may include funds for payment for materials that will be used during subsequent allocation periods.

(c) The Indian tribe or tribal organization may propose a schedule of payment amounts measured by time or measured by phase of the project (e.g., planning, design, construction).

(d) The amount of each payment allocation shall be stated in the Indian tribe or tribal organization's contract proposal. Upon award of the contract, the Secretary shall transfer the amount of the first allocation to the Indian tribe or tribal organization within 21 days after the date of contract award. The second allocation shall be made not later than 7 days before the end of the first allocation period.

(e) Not later than 7 days before the end of each subsequent allocation period after the second allocation, the Secretary shall transfer to the Indian tribe or tribal organization the amount for the next allocation period, unless the Indian tribe or tribal organization is delinquent in submission of allocation period progress reports and financial reports or the Secretary takes action to suspend or terminate the contract in accordance with § 900.131(b)(11), § 900.131(b)(12), or § 900.131(b)(13).

§ 900.133 Does the declination process or the Contract Dispute Act apply to construction contract amendments proposed either by an Indian tribe or tribal organization or the Secretary?

The Contract Disputes Act generally applies to such amendments. However, the declination process and the procedures in § 900.122 and § 900.123 apply to the proposal by an Indian tribe or tribal organization when the proposal is for a new project, a new phase or discreet stage of a phase of a project, or an expansion of a project resulting from an additional allocation of funds by the Secretary under § 900.120.

§ 900.134 At the end of a self-determination construction contract, what happens to savings on a cost-reimbursement contract?

The savings shall be used by the Indian tribe or tribal organization to provide additional services or benefits under the contract. Unexpended contingency funds obligated to the contract, and remaining at the end of the contract, are savings. No further approval or justifying documentation by the Indian tribe or tribal organization shall be required before expenditure of funds.

§ 900.135 May the time frames for action set out in this subpart be reduced?

Yes. The time frames in this subpart are intended to be maximum times and may be reduced based on urgency and need, by agreement of the parties. If the Indian tribe or tribal organization requests reduced time frames for action due to unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested time frames.

§ 900.136 Do tribal employment rights ordinances apply to construction contracts and subcontracts?

Yes. Tribal employment rights ordinances do apply to construction contracts and subcontracts pursuant to § 7(b) and § 7(c) of the Act.

§ 900.137 Do all provisions of the other subparts apply to contracts awarded under this subpart?

Yes, except as otherwise provided in this subpart and unless excluded as follows: programmatic reports and data requirements, reassumption, contract review and approval process, contract proposal contents, and § 900.150 (d) and (e) of these regulations.

Subpart K—Waiver Procedures

§ 900.140 Can any provision of the regulations under this Part be waived?

Yes. Upon the request of an Indian tribe or tribal organization, the Secretary shall waive any provision of these regulations, including any cost principles adopted by the regulations under this part, if the Secretary finds that granting the waiver is either in the best interest of the Indians served by the contract, or is consistent with the policies of the Act and is not contrary to statutory law.

§ 900.141 How does an Indian tribe or tribal organization get a waiver?

To obtain a waiver, an Indian tribe or tribal organization shall submit a written request to the Secretary identifying the regulation to be waived and the basis for the request. The Indian tribe or tribal organization shall explain the intended effect of the waiver, the impact upon the Indian tribe or tribal organization if the waiver is not granted, and the specific contract(s) to which the waiver will apply.

§ 900.142 Does an Indian tribe or tribal organization's waiver request have to be included in an initial contract proposal?

No. Although a waiver request may be included in a contract proposal, it can also be submitted separately.

§ 900.143 How is a waiver request processed?

The Secretary shall approve or deny a waiver within 90 days after the Secretary receives a written waiver request. The Secretary's decision shall be in writing. If the requested waiver is denied, the Secretary shall include in the decision a full explanation of the basis for the decision.

§ 900.144 What happens if the Secretary makes no decision within the 90-day period?

The waiver request is deemed approved.

§ 900.145 On what basis may the Secretary deny a waiver request?

Consistent with section 107(e) of the Act, the Secretary may only deny a waiver request based on a specific written finding. The finding must clearly demonstrate (or be supported by controlling legal authority) that if the waiver is granted:

(a) The service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(b) Adequate protection of trust resources is not assured;

(c) The proposed project or function to be contracted for cannot be properly

completed or maintained by the proposed contract;

(d) The amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the Act; or

(e) The program, function, service, or activity (or portion of it) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities that are contractible under the Act because the proposal includes activities that cannot lawfully be carried out by the contractor.

§ 900.146 Is technical assistance available for waiver requests?

Yes. Technical assistance is available as provided in section 900.7 to prepare a waiver request or to overcome any stated objection which the Secretary might have to the request.

§ 900.147 What appeal rights are available?

If the Secretary denies a waiver request, the Indian tribe or tribal organization has the right to appeal the decision and request a hearing on the record under the procedures for hearings and appeals contained in subpart L of these regulations. Alternatively, the Indian tribe or tribal organization may sue in Federal district court to challenge the Secretary's action.

§ 900.148 How can an Indian tribe or tribal organization secure a determination that a law or regulation has been superseded by the Indian Self-Determination Act, as specified in section 107(b) of the Act?

Any Indian tribe or tribal organization may at any time submit a request to the Secretary for a determination that any law or regulation has been superseded by the Act and that the law has no applicability to any contract or proposed contract under the Act. The Secretary is required to provide an initial decision on such a request within 90 days after receipt. If such a request is denied, the Indian tribe or tribal organization may appeal under Subpart L of these regulations. The Secretary shall provide notice of each determination made under this Subpart to all Indian tribes and tribal organizations.

Subpart L—Appeals

Appeals Other Than Emergency Reassumption and Suspension, Withholding or Delay in Payment

§ 900.150 What decisions can an Indian tribe or tribal organization appeal under this Subpart?

(a) A decision to decline to award a self-determination contract, or a portion thereof, under section 102 of the Act;

(b) A decision to decline to award a construction contract, or a portion thereof, under sections 105(m) and 102 of the Act;

(c) A decision to decline a proposed amendment to a self-determination contract, or a portion thereof, under section 102 of the Act;

(d) A decision not to approve a proposal, in whole or in part, to redesign a program;

(e) A decision to rescind and reassume a self-determination contract, in whole or in part, under section 109 of the Act except for emergency reassumptions;

(f) A decision to refuse to waive a regulation under section 107(e) of the Act;

(g) A disagreement between an Indian tribe or tribal organization and the Federal government over proposed reporting requirements;

(h) A decision to refuse to allow an Indian tribe or tribal organization to convert a contract to mature status, under section 4(h) of the Act;

(i) All other appealable pre-award decisions by a Federal official as specified in these regulations, whether an official of the Department of the Interior or the Department of Health and Human Services; or

(j) A decision relating to a request for a determination that a law or regulation has been superseded by the Act.

§ 900.151 Are there any appeals this subpart does not cover?

This subpart does not cover:

(a) Disputes which arise after a self-determination contract has been awarded, or emergency reassumption of self-determination contracts or suspension of payments under self-determination contracts, which are covered under § 900.170 through § 900.176 of these regulations.

(b) Other post-award contract disputes, which are covered under Subpart N.

(c) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 43 CFR 2 for the Department of the Interior and 45 CFR 5 for the Department of Health and Human Services; and

(d) Decisions relating to the award of discretionary grants under section 103 of the Act, which may be appealed under 25 CFR 2 for the Department of the Interior, and under 45 CFR 5 for the Department of Health and Human Services.

§ 900.152 How does an Indian tribe or tribal organization know where and when to file its appeal from decisions made by agencies of DOI or DHHS?

Every decision in any of the ten areas listed above shall contain information which shall tell the Indian tribe or tribal organization where and when to file the Indian tribe or tribal organization's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 25 CFR 900.154, or appeal this decision under 25 CFR 900.158 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.158 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.153 Does an Indian tribe or tribal organization have any options besides an appeal?

Yes. The Indian tribe or tribal organization may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. The Indian tribe or tribal organization may also choose to sue in U.S. District Court under section 102(b)(3) and section 110(a) of the Act.

§ 900.154 How does an Indian tribe or tribal organization request an informal conference?

The Indian tribe or tribal organization shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian tribe or tribal organization may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Indian tribe or tribal organization mails the request, it will be considered filed on the date the Indian tribe or tribal organization mailed it by certified mail.

§ 900.155 How is an informal conference held?

(a) The informal conference shall be held within 30 days of the date the request was received, unless the Indian tribe or tribal organization and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian tribe or tribal organization's office. If the meeting cannot be held at the Indian tribe or tribal organization's office and is held more than fifty miles from its office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(c) The informal conference shall be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Indian tribe or tribal organization, or authorized by the Secretary of Health and Human Services or by the appropriate agency of the Department of the Interior, are allowed to make presentations at the informal conference.

§ 900.156 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference shall prepare and mail to the Indian tribe or tribal organization a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference shall contain the following language:

Within 30 days of the receipt of this recommended decision, you may file an appeal of the initial decision of the DOI or DHHS agency with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.157. You may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.157 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.157 Is the recommended decision always final?

No. If the Indian tribe or tribal organization is dissatisfied with the recommended decision, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian tribe or tribal organization does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under § 900.159, the recommended decision becomes final.

§ 900.158 How does an Indian tribe or tribal organization appeal the initial decision, if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Indian tribe or tribal organization decides to appeal, it shall file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision.

(b) The Indian tribe or tribal organization may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian tribe or tribal organization mails the Notice of Appeal, it will be considered filed on the date the Indian tribe or tribal organization mailed it by certified mail. The Indian tribe or tribal organization should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

(c) The Notice of Appeal shall:

(1) Briefly state why the Indian tribe or tribal organization thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian tribe or tribal organization wants a hearing on the record, or whether the Indian tribe or tribal organization wants to waive its right to a hearing.

(d) The Indian tribe or tribal organization shall serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian tribe or tribal organization shall certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary of Health and Human Services or the authorized representative of the Secretary of the Interior will be considered a party to all appeals filed with the IBIA under the Act.

§ 900.159 May an Indian tribe or tribal organization get an extension of time to file a notice of appeal?

Yes. If the Indian tribe or tribal organization needs more time, it can request an extension of time to file its Notice of Appeal within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian tribe or tribal organization shall be in writing, and shall give a reason for not filing its notice of appeal within the 30-day time period. If the Indian tribe or tribal organization has a valid reason for not filing its notice of appeal on time, it may receive an extension from the IBIA.

§ 900.160 What happens after an Indian tribe or tribal organization files an appeal?

(a) Within 5 days of receiving the Indian tribe or tribal organization's notice of appeal, the IBIA will decide whether the appeal falls under § 900.150(a) through § 900.150(g). If so, the Indian tribe or tribal organization is entitled to a hearing.

(1) If the IBIA determines that the appeal of the Indian tribe or tribal organization falls under § 900.150(h), § 900.150(i), or § 900.150(j), and the Indian tribe or tribal organization has requested a hearing, the IBIA will grant the request for a hearing unless the IBIA determines that there are no genuine issues of material fact to be resolved.

(2) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian tribe or tribal organization, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(b) If the IBIA decides that the Indian tribe or tribal organization is not entitled to a hearing or if the Indian tribe or tribal organization has waived its right to a hearing on the record, the IBIA will ask for the administrative record under 43 CFR 4.335. The IBIA shall tell the parties that the appeal will be considered under the regulations at 43 CFR 4, Subpart D, except the case shall be docketed immediately, without waiting for the 20-day period described in 43 CFR 4.336.

§ 900.161 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer the Indian tribe or tribal organization's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) A briefing and discovery schedule;

(2) A schedule for the exchange of information, including, but not limited

to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 900.162 What happens when a hearing is necessary?

(a) The ALJ shall hold a hearing within 60 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the government agency shall file and serve the Indian tribe or tribal organization with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian tribe or tribal organization's office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.163 What is the Secretary's burden of proof for appeals from decisions under § 900.150(a) through § 900.150(g)?

For those appeals, the Secretary has the burden of proof (as required by section 102(e)(1) of the Act) to establish by clearly demonstrating the validity of the grounds for declining the contract proposal.

§ 900.164 What rights do Indian tribes, tribal organizations, and the government have during the appeal process?

Both the Indian tribe or tribal organization and the government agency have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

(d) Introduce oral or documentary evidence, or both;

(e) Require that oral testimony be under oath;

(f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

(h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.165 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian tribe or tribal organization has the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC, 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.165(c). An appeal to the IBIA under 25 CFR 900.165(c) shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 900.166 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections shall be served on all other parties. The recommended decision shall become final 30 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final.

§ 900.167 If an Indian tribe or tribal organization objects to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary of Health and Human Services or the IBIA has 20 days from the date it receives any timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary of Health and Human Services or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or the IBIA shall:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law which are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 900.168 Will an appeal hurt the Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.169 Will the decisions on appeals be available for the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

Appeals of Emergency Reassumption of Self-Determination Contracts or Suspensions, Withholding or Delay of Payments Under a Self-Determination Contract

§ 900.170 What happens in the case of emergency reassumption or suspension or withholding or delay of payments?

(a) This subpart applies when the Secretary gives notice to an Indian tribe or tribal organization that the Secretary intends to:

(1) Immediately rescind a contract or grant and reassume a program; or

(2) Suspend, withhold, or delay payment under a contract.

(b) When the Secretary advises an Indian tribe or tribal organization that the Secretary intends to take an action referred to in paragraph (a)(1) of this section, the Secretary shall also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

§ 900.171 Will there be a hearing?

Yes. The Deputy Director of the Office of Hearings and Appeals shall appoint an Administrative Law Judge (ALJ) to hold a hearing.

(a) The hearing shall be held within 10 days of the date of the notice referred to in § 900.170 unless the Indian tribe or tribal organization agrees to a later date.

(b) If possible, the hearing will be held at the office of the Indian tribe or tribal organization. If the hearing is held more than 50 miles from the office of the Indian tribe or tribal organization, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Indian tribe or tribal organization.

§ 900.172 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian tribe or tribal organization has the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.165(c). An appeal to the IBIA under 25 CFR 900.165(c) shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed.

You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 900.173 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. You shall serve a copy of your objections on the other party. The recommended decision will become final 15 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 900.174 If an Indian tribe or tribal organization objects to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary or the IBIA has 15 days from the date he/she receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or of the IBIA shall:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law which are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 900.175 Will an appeal hurt an Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.176 Will the decisions on appeals be available for the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

Applicability of the Equal Access to Justice Act

§ 900.177 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes. EAJA claims against the DOI or the DHHS will be heard by the IBIA under 43 CFR 4.601–4.619. For DHHS, appeals from the EAJA award will be according to 25 CFR 900.165(b).

Subpart M—Federal Tort Claims Act Coverage General Provisions

§ 900.180 What does this subpart cover?

This subpart explains the applicability of the Federal Tort Claims Act (FTCA). This section covers:

(a) Coverage of claims arising out of the performance of medical-related functions under self-determination contracts;

(b) Coverage of claims arising out of the performance of non-medical-related functions under self-determination contracts; and

(c) Procedures for filing claims under FTCA.

§ 900.181 What definitions apply to this subpart?

Indian contractor means:

(1) In California, subcontractors of the California Rural Indian Health Board, Inc. or, subject to approval of the IHS Director after consultation with the DHHS Office of General Counsel, subcontractors of an Indian tribe or tribal organization which are:

(i) Governed by Indians eligible to receive services from the Indian Health Service;

(ii) Which carry out comprehensive IHS service programs within

geographically defined service areas; and

(iii) Which are selected and identified through tribal resolution as the local provider of Indian health care services.

(2) Subject to the approval of the IHS Director after consultation with the DHHS Office of General Counsel, Indian tribes and tribal organizations which meet in all respects the requirements of the Indian Self-Determination Act to contract directly with the Federal Government but which choose through tribal resolution to subcontract to carry out IHS service programs within geographically defined service areas with another Indian tribe or tribal organization which contracts directly with IHS.

(3) Any other contractor that qualifies as an ''Indian contractor'' under the Indian Self-Determination Act.

§ 900.182 What other statutes and regulations apply to FTCA coverage?

A number of other statutes and regulations apply to FTCA coverage, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671–2680) and related Department of Justice regulations in 28 CFR part 14.

§ 900.183 Do Indian tribes and tribal organizations need to be aware of areas which FTCA does not cover?

Yes. There are claims against self-determination contractors which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. General guidance is provided below as to these matters but is not intended as a definitive description of coverage, which is subject to review by the Department of Justice and the courts on a case-by-case basis.

(a) *What claims are expressly barred by FTCA and therefore may not be made against the United States, an Indian tribe or tribal organization?* Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

(b) *What claims may not be pursued under FTCA?*

(1) Except as provided in § 900.181(a)(1) and § 900.189, claims against subcontractors arising out of the performance of subcontracts with a self-determination contractor;

(2) claims for on-the-job injuries which are covered by workmen's compensation;

(3) claims for breach of contract rather than tort claims; or

(4) claims resulting from activities performed by an employee which are outside the scope of employment.

(c) *What remedies are expressly excluded by FTCA and therefore are barred?*

(1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and

(2) other remedies not permitted under applicable state law.

§ 900.184 Is there a deadline for filing FTCA claims?

Yes. Claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

§ 900.185 How long does the Federal government have to process an FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

Six months.

§ 900.186 Is it necessary for a self-determination contract to include any clauses about Federal Tort Claims Act coverage?

No, it is optional. At the request of Indian tribes and tribal organizations, self-determination contracts shall include the following clauses to clarify the scope of FTCA coverage:

(a) The following clause may be used for all contracts:

> For purposes of Federal Tort Claims Act coverage, the contractor and its employees (including individuals performing personal services contracts with the contractor to provide health care services) are deemed to be employees of the Federal government while performing work under this contract. This status is not changed by the source of the funds used by the contractor to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the contractor.

(b) The following clause is for IHS contracts only:

> Under this contract, the contractor's employee may be required as a condition of employment to provide health services to non-IHS beneficiaries in order to meet contractual obligations. These services may be provided in either contractor or non-contractor facilities. The employee's status for Federal Tort Claims Act purposes is not affected.

§ 900.187 Does FTCA apply to a self-determination contract if FTCA is not referenced in the contract?

Yes.

§ 900.188 To what extent shall the contractor cooperate with the Federal government in connection with tort claims arising out of the contractor's performance?

(a) The contractor shall designate an individual to serve as tort claims liaison with the Federal government.

(b) As part of the notification required by 28 U.S.C. 2679(c), the contractor shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the contractor or any of its employees that relates to performance of a self-determination contract or subcontract.

(c) The contractor, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include as appropriate:

(1) The date, time and exact place of the accident or incident;

(2) A concise and complete statement of the circumstances of the accident or incident;

(3) The names and addresses of tribal and/or Federal employees involved as participants or witnesses;

(4) The names and addresses of all other eyewitnesses;

(5) An accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;

(6) A statement as to whether any person involved was cited for violating a Federal, State or tribal law, ordinance, or regulation;

(7) The contractor's determination as to whether any of its employees (including Federal employees assigned to the contractor) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the contract at the time the incident occurred;

(8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The contractor shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Secretary, the contractor shall make an assignment and subrogation of all the contractor's rights and claims (except those against

the Federal government) arising out of a tort claim against the contractor.

(f) If requested by the Secretary, the contractor shall authorize representatives of the Secretary to settle or defend any claim and to represent the contractor in or take charge of any action. If the Federal government undertakes the settlement or defense of any claim or action the contractor shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 900.189 Does this coverage extend to subcontractors of self-determination contracts?

No. Subcontractors or subgrantees providing services to a Public Law 93–638 contractor or grantee are generally not covered. The only exceptions are Indian contractors such as those under subcontract with the California Rural Indian Health Board to carry out IHS programs in geographically defined service areas in California and personal services contracts under § 900.193 (for § 900.183(b)(1)) or § 900.183(b) (for § 900.190).

Medical-Related Claims

§ 900.190 Is FTCA the exclusive remedy for a tort claim for personal injury or death resulting from the performance of a self-determination contract?

Yes, except as explained in § 900.183(b). No claim may be filed against a self-determination contractor or employee for personal injury or death arising from the performance of medical, surgical, dental, or related functions by the contractor in carrying out self-determination contracts under the Act. Related functions include services such as those provided by nurses, laboratory and x-ray technicians, emergency medical technicians and other health care providers including psychologists and social workers. All such claims shall be filed against the United States and are subject to the limitations and restrictions of the FTCA.

§ 900.191 Are employees of self-determination contractors providing health services under the self-determination contract protected by FTCA?

Yes. For the purpose of Federal Tort Claims Act coverage, an Indian tribe or tribal organization and its employees performing medical-related functions under a self-determination contract are deemed a part of the Public Health Service if the employees are acting within the scope of their employment in carrying out the contract.

§ 900.192 What employees are covered by FTCA for medical-related claims?

(a) Permanent employees;

(b) Temporary employees;

(c) Persons providing services without compensation in carrying out a contract;

(d) Persons required because of their employment by a self-determination contractor to serve non-IHS beneficiaries (even if the services are provided in facilities not owned by the contractor); and

(e) Federal employees assigned to the contract.

§ 900.193 Does FTCA coverage extend to individuals who provide health care services under a personal services contract providing services in a facility that is owned, operated, or constructed under the jurisdiction of the IHS?

Yes. The coverage extends to individual personal services contractors providing health services in such a facility, including a facility owned by an Indian tribe or tribal organization but operated under a self-determination contract with IHS.

§ 900.194 Does FTCA coverage extend to services provided under a staff privileges agreement with a non-IHS facility where the agreement requires a health care practitioner to provide reciprocal services to the general population?

Yes. Those services are covered, as long as the contractor's health care practitioners do not receive additional compensation from a third party for the performance of these services and they are acting within the scope of their employment under a self-determination contract. Reciprocal services include:

(a) Cross-covering other medical personnel who temporarily cannot attend their patients;

(b) Assisting other personnel with surgeries or other medical procedures;

(c) Assisting with unstable patients or at deliveries; or

(d) Assisting in any patient care situation where additional assistance by health care personnel is needed.

§ 900.195 Does FTCA coverage extend to the contractor's health care practitioners providing services to private patients on a fee-for-services basis when such personnel (not the self-determination contractor) receive the fee?

No.

§ 900.196 Do covered services include the conduct of clinical studies and investigations and the provision of emergency services, including the operation of emergency motor vehicles?

Yes, if the services are provided in carrying out a self-determination contract. (An emergency motor vehicle is a vehicle, whether government, contractor, or employee-owned, used to transport passengers for medical services.)

§ 900.197 Does FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract?

Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract.

§ 900.198 Are Federal employees assigned to a self-determination contractor under the Intergovernmental Personnel Act or detailed under section 214 of the Public Health Service Act covered to the same extent that they would be if working directly for a Federal agency?

Yes.

§ 900.199 Does FTCA coverage extend to health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a self-determination contract on the condition that such practitioner provide health services to IHS beneficiaries covered by FTCA?

Yes, health care practitioners with staff privileges in a facility operated by a contractor are covered when they perform services to IHS beneficiaries. Such personnel are not covered when providing services to non-IHS beneficiaries.

§ 900.200 May persons who are not Indians or Alaska Natives assert claims under FTCA?

Yes. Non-Indian individuals served under the contract whether or not on a fee-for-service basis, may assert claims under this Subpart.

Procedure for Filing Medical-Related Claims

§ 900.201 How should claims arising out of the performance of medical-related functions be filed?

Claims should be filed on Standard Form 95 (Claim for Damage, Injury or Death) or by submitting comparable written information (including a definite amount of monetary damage claimed) with the Chief, PHS Claims Branch, Room 18–20, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, or at such other address as shall have been provided to the contractor in writing.

§ 900.202 What should a self-determination contractor or a contractor's employee do on receiving such a claim?

They should immediately forward the claim to the PHS Claims Branch at the address indicated in § 900.201 and notify the contractor's tort claims liaison.

§ 900.203 If the contractor or contractor's employee receives a summons and/or a complaint alleging a tort covered by FTCA, what should the contractor do?

As part of the notification required by 28 U.S.C. 2679(c), the contractor should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue SW., Room 5362, Washington, DC 20201, and the contractor's tort claims liaison, and forward the following materials:

(a) Four copies of the claimant's medical records of treatment, inpatient and outpatient, and any related correspondence, as well as reports of consultants;

(b) A narrative summary of the care and treatment involved;

(c) The names and addresses of all personnel who were involved in the care and treatment of the claimant;

(d) Any comments or opinions that the employees who treated the claimant believe to be pertinent to the allegations contained in the claim; and

(e) Other materials identified in § 900.188(c).

Non-Medical Related Claims

§ 900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?

Yes. Except as explained in § 900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical-related functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA.

§ 900.205 To what non-medical-related claims against self-determination contractors does FTCA apply?

It applies to:

(a) All tort claims arising from the performance of self-determination contracts under the authority of the Act on or after October 1, 1989; and

(b) Any tort claims first filed on or after October 24, 1989, regardless of when the incident which is the basis of the claim occurred.

§ 900.206 What employees are covered by FTCA for non-medical-related claims?

(a) Permanent employees;

(b) Temporary employees;

(c) Persons providing services without compensation in carrying out a contract;

(d) Persons required because of their employment by a self-determination contractor to serve non-IHS beneficiaries (even if the services are provided in facilities not owned by the contractor); and

(e) Federal employees assigned to the contract.

§ 900.207 How are non-medical related tort claims and lawsuits filed for IHS?

Non-medical-related tort claims and lawsuits arising out of the performance of self-determination contracts with the Indian Health Service should be filed in the manner described in § 900.201 (for both § 900.207 and § 900.208).

§ 900.208 How are non-medical related tort claims and lawsuits filed for DOI?

Non-medical-related claims arising out of the performance of self-determination contracts with the Secretary of the Interior should be filed in the manner described in § 900.201 with the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240.

§ 900.209 What should a self-determination contractor or contractor's employee do on receiving a non-medical related tort claim?

(a) If the contract is with DHHS, they should immediately forward the claim to the PHS Claims Branch at the address indicated in § 900.201 and notify the contractor's tort claims liaison.

(b) If the contract is with DOI, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., Washington, DC 20240.

§ 900.210 If the contractor or contractor's employee receives a summons and/or complaint alleging a non-medical related tort covered by FTCA, what should an Indian tribe or tribal organization do?

(a) If the contract is with the DHHS, they should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue S.W., Room 5362, Washington, DC 20201 and the contractor's tort claims liaison.

(b) If the contract is with the Department of the Interior, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., Washington, DC 20240, and the contractor's tort claims liaison.

Subpart N—Post-Award Contract Disputes

§ 900.215 What does this subpart cover?

(a) This subpart covers:

(1) All HHS and DOI self-determination contracts, including construction contracts; and

(2) All disputes regarding an awarding official's decision relating to a self-determination contract.

(b) This subpart does not cover the decisions of an awarding official that are covered under subpart L.

§ 900.216 What other statutes and regulations apply to contract disputes?

(a) The Contract Disputes Act of 1978 (CDA), Public Law 95–563 (41 U.S.C. 601 as amended);

(b) If the matter is submitted to the Interior Board of Contract Appeals, 43 CFR 4.110–126; and

(c) The Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412 and regulations at 43 CFR 4.601 through 4.619 (DOI) and 45 CFR 13 (DHHS).

§ 900.217 Is filing a claim under the CDA our only option for resolving post-award contract disputes?

No. The Federal government attempts to resolve all contract disputes by agreement at the awarding official's level. These are alternatives to filing a claim under the CDA:

(a) Before issuing a decision on a claim, the awarding official should consider using informal discussions between the parties, assisted by individuals who have not substantially participated in the matter, to aid in resolving differences.

(b) In addition to filing a CDA claim, or instead of filing a CDA claim, the parties may choose to use an alternative dispute resolution mechanism, pursuant to the provisions of the Administrative Dispute Resolution Act, Public Law 101–552, as amended, 5 U.S.C. 581 et seq., or the options listed in section 108(1)(b)(12) of the Indian Self-Determination Act, as applicable.

§ 900.218 What is a claim under the CDA?

(a) A claim is a written demand by one of the contracting parties, asking for one or more of the following:

(1) Payment of a specific sum of money under the contract;

(2) Adjustment or interpretation of contract terms; or

(3) Any other claim relating to the contract.

(b) However, an undisputed voucher, invoice, or other routing request for payment is not a claim under the CDA. A voucher, invoice, or routing request for payment may be converted into a CDA claim if:

(1) It is disputed as to liability or amount; or

(2) It is not acted upon in a reasonable time and written notice of the claim is given to the awarding official by the

senior official designated in the contract.

§ 900.219 How does an Indian tribe, tribal organization, or Federal agency submit a claim?

(a) An Indian tribe or tribal organization shall submit its claim in writing to the awarding official. The awarding official shall document the contract file with evidence of the date the claim was received.

(b) A Federal agency shall submit its claim in writing to the contractor's senior official, as designated in the contract.

§ 900.220 Does it make a difference whether the claim is large or small?

Yes. The Contract Disputes Act requires that an Indian tribe or tribal organization making a claim for more than $100,000 shall certify that:

(a) The claim is made in good faith,

(b) Supporting documents or data are accurate and complete to the best of the Indian tribe or tribal organization's knowledge and belief;

(c) The amount claimed accurately reflects the amount believed to be owed by the Federal government; and

(d) The person making the certification is authorized to do so on behalf of the Indian tribe or tribal organization.

§ 900.221 What happens next?

(a) If the parties do not agree on a settlement, the awarding official will issue a written decision on the claim.

(b) The awarding official shall always give a copy of the decision to the Indian tribe or tribal organization by certified mail, return receipt requested, or by any other method which provides a receipt.

§ 900.222 What goes into a decision?

A decision shall:

(a) Describe the claim or dispute;

(b) Refer to the relevant terms of the contract;

(c) Set out the factual areas of agreement and disagreement;

(d) Set out the actual decision, based on the facts, and outline the reasoning which supports the decision; and

(e) Contain the following language:

This is a final decision. You may appeal this decision to the Interior Board of Contract Appeals (IBCA), U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. If you decide to appeal, you shall, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the IBCA and provide a copy to the individual from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the IBCA, you may bring an action in the U.S. Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

§ 900.223 When does an Indian tribe or tribal organization get the decision?

(a) If the claim is for more than $100,000, the awarding official shall issue the decision within 60 days of the day he or she receives the claim. If the awarding official cannot issue a decision that quickly, he or she shall tell you when the decision will be issued.

(b) If the claim is for $100,000 or less, and you want a decision within 60 days, you shall advise the awarding official in writing that you want a decision within that period. If you advise the awarding official in writing that you do want a decision within 60 days, the awarding official shall issue the decision within 60 days of the day he or she receives your written notice.

(c) If your claim is for $100,000 or less and you do not advise the awarding official that you want a decision within 60 days, or if your claim exceeds $100,000 and the awarding official has notified you of the time within which a decision will be issued, the awarding official shall issue a decision within a reasonable time. What is ''reasonable'' depends upon the size and complexity of your claim, and upon the adequacy of the information you have given to the awarding official in support of your claim.

§ 900.224 What happens if the decision does not come within that time?

If the awarding official does not issue a decision within the time required under § 900.223, the Indian tribe or tribal organization may treat the delay as though the awarding official has denied the claim, and proceed according to § 900.222(e),

§ 900.225 Does an Indian tribe or tribal organization get paid immediately if the awarding official decides in its favor?

Yes. Once the awarding official decides that money should be paid under the contract, the amount due, minus any portion already paid, should be paid as promptly as possible, without waiting for either party to file an appeal. Any payment which is made under this subsection will not affect any other rights either party might have. In addition, it will not create a binding legal precedent as to any future payments.

§ 900.226 What rules govern appeals of cost disallowances?

In any appeal involving a disallowance of costs, the Board of Contract Appeals will give due consideration to the factual circumstances giving rise to the disallowed costs, and shall seek to determine a fair result without rigid adherence to strict accounting principles. The determination of allowability shall assure fair compensation for the work or service performed, using cost and accounting data as guides, but not rigid measures, for ascertaining fair compensation.

§ 900.227 Can the awarding official change the decision after it has been made?

(a) The decision of the awarding official is final and conclusive, and not subject to review by any forum, tribunal or government agency, unless an appeal or suit is timely commenced as authorized by the Contract Disputes Act. Once the decision has been made, the awarding official may not change it, except by agreement of the parties, or under the following limited circumstances:

(1) If evidence is discovered which could not have been discovered through due diligence before the awarding official issued the decision;

(2) If the awarding official learns that there has been fraud, misrepresentation, or other misconduct by a party;

(3) If the decision is beyond the scope of the awarding official's authority;

(4) If the claim has been satisfied, released or discharged; or

(5) For any other reason justifying relief from the decision.

(b) Nothing in this subpart shall be interpreted to discourage settlement discussions or prevent settlement of the dispute at any time.

(c) If a decision is withdrawn and a new decision is issued that is not acceptable to the contractor, the contractor may proceed with the appeal based on the new decision. If no new decision is issued, the contractor may proceed under § 900.224.

(d) If an appeal or suit is filed, the awarding official may modify or withdraw his or her final decision.

§ 900.228 Is an Indian tribe or tribal organization entitled to interest if it wins its claim?

Yes. If an Indian tribe or tribal organization wins the claim, it will be entitled to interest on the amount of the award. The interest will be calculated from the date the awarding official receives the claim until the day it is paid. The interest rate will be the rate which the Secretary of the Treasury sets for the Renegotiation Board under the Renegotiation Act of 1951, Public Law 92–41, 26 U.S.C. 1212 and 26 U.S.C. 7447.

§ 900.229 What role will the awarding official play during an appeal?

(a) The awarding official shall provide any data, documentation, information or support required by the IBCA for use in deciding a pending appeal.

(b) Within 30 days of receiving an appeal or learning that an appeal has been filed, the awarding official shall assemble a file which contains all the documents which are pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken;

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties which relates to the appeal, including the letter or letters of claims in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of the proceedings, and affidavits or statements of any witnesses on the matter in dispute, which were made before the filing of the notice of appeal with the IBCA; and

(5) Any additional information which may be relevant.

§ 900.230 What is the effect of a pending appeal?

(a) Indian tribes and tribal organizations shall continue performance of a contract during the appeal of any claims to the same extent they would had there been no dispute.

(b) A pending dispute will not affect or bar the negotiation or award of any subsequent contract or negotiation between the parties.

Subpart O—Conflicts of Interest

§ 900.231 What is an organizational conflict of interest?

An organizational conflict of interest arises when there is a direct conflict between the financial interests of the contracting Indian tribe or tribal organization and:

(a) The financial interests of beneficial owners of Indian trust resources;

(b) The financial interests of the United States relating to trust resources, trust acquisitions, or lands conveyed or to be conveyed pursuant to the Alaska Native Claims Settlement Act 43 U.S.C. 1601 *et seq.*; or

(c) An express statutory obligation of the United States to third parties. This section only applies if the conflict was not addressed when the contract was first negotiated. This section only applies where the financial interests of the Indian tribe or tribal organization are significant enough to impair the Indian tribe or tribal organization's objectivity in carrying out the contract, or a portion of the contract.

§ 900.232 What must an Indian tribe or tribal organization do if an organizational conflict of interest arises under a contract?

This section only applies if the conflict was not addressed when the contract was first negotiated. When an Indian tribe or tribal organization becomes aware of an organizational conflict of interest, the Indian tribe or tribal organization must immediately disclose the conflict to the Secretary.

§ 900.233 When must an Indian tribe or tribal organization regulate its employees or subcontractors to avoid a personal conflict of interest?

An Indian tribe or tribal organization must maintain written standards of conduct to govern officers, employees, and agents (including subcontractors) engaged in functions related to the management of trust assets.

§ 900.234 What types of personal conflicts of interest involving tribal officers, employees or subcontractors would have to be regulated by an Indian tribe?

The Indian tribe or tribal organization would need a tribally-approved mechanism to ensure that no officer, employee, or agent (including a subcontractor) of the Indian tribe or tribal organization reviews a trust transaction in which that person has a financial or employment interest that conflicts with that of the trust beneficiary, whether the tribe or an allottee. Interests arising from membership in, or employment by, an Indian tribe or rights to share in a tribal claim need not be regulated.

§ 900.235 What personal conflicts of interest must the standards of conduct regulate?

The standards must prohibit an officer, employee, or agent (including a subcontractor) from participating in the review, analysis, or inspection of trust transactions involving an entity in which such persons have a direct financial interest or an employment relationship. It must also prohibit such officers, employees, or agents from accepting any gratuity, favor, or anything of more than nominal value, from a party (other than the Indian tribe) with an interest in the trust transactions under review. Such standards must also provide for sanctions or remedies for violation of the standards.

§ 900.236 May an Indian tribe elect to negotiate contract provisions on conflict of interest to take the place of this regulation?

Yes. An Indian tribe and the Secretary may agree to contract provisions, concerning either personal or organizational conflicts, that address the issues specific to the program and activities contracted in a manner that provides equivalent protection against conflicts of interest to these regulations. Agreed-upon contract provisions shall be followed, rather than the related provisions of this regulation. For example, the Indian tribe and the Secretary may agree that using the Indian tribe's own written code of ethics satisfies the objectives of the personal conflicts provisions of this regulation, in whole or in part.

Subpart P—Retrocession and Reassumption Procedures

§ 900.240 What does retrocession mean?

A retrocession means the return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.

§ 900.241 Who may retrocede a contract, in whole or in part?

An Indian tribe or tribal organization authorized by an Indian tribe may retrocede a contract.

§ 900.242 What is the effective date of retrocession?

The retrocession is effective on the date which is the earliest date among:

(a) One year from the date of the Indian tribe or tribal organization's request;

(b) The date the contract expires; or

(c) A mutually agreed-upon date.

§ 900.243 What effect will an Indian tribe or tribal organization's retrocession have on its rights to contract?

An Indian tribe or tribal organization's retrocession shall not negatively affect:

(a) Any other contract to which it is a party;

(b) Any other contracts it may request; and

(c) Any future request by the Indian tribe or tribal organization to contract for the same program.

§ 900.244 Will an Indian tribe or tribal organization's retrocession adversely affect funding available for the retroceded program?

No. The Secretary shall provide not less than the same level of funding that would have been available if there had been no retrocession.

§ 900.245 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the retroceded program?

On the effective date of any retrocession, the Indian tribe or tribal organization shall, at the request of the

Secretary, deliver to the Secretary all requested property and equipment provided under the contract which have a per item current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000 at the time of the retrocession.

§ 900.246 What does reassumption mean?

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization. There are two types of reassumption: emergency and non-emergency.

§ 900.247 Under what circumstances is a reassumption considered an emergency instead of non-emergency reassumption?

(a) A reassumption is considered an emergency reassumption if an Indian tribe or tribal organization fails to fulfill the requirements of the contract and this failure poses:

(1) An immediate threat of imminent harm to the safety of any person; or

(2) Imminent substantial and irreparable harm to trust funds, trust lands, or interest in such lands.

(b) A reassumption is considered a non-emergency reassumption if there has been:

(1) A violation of the rights or endangerment of the health, safety, or welfare of any person; or

(2) Gross negligence or mismanagement in the handling or use of:

(i) Contract funds;

(ii) Trust funds;

(iii) Trust lands; or

(iv) Interests in trust lands under the contract.

§ 900.248 In a non-emergency reassumption, what is the Secretary required to do?

The Secretary must:

(a) Notify the Indian tribes or tribal organizations served by the contract and the contractor in writing by certified mail of the details of the deficiencies in contract performance;

(b) Request specified corrective action to be taken within a reasonable period of time, which in no case may be less than 45 days; and

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the contractor to overcome the deficiencies in contract performance. The Secretary may also make a grant for the purpose of obtaining such technical assistance as provided in section 103 of the Act.

§ 900.249 What happens if the contractor fails to take corrective action to remedy the contract deficiencies identified in the notice?

The Secretary shall provide a second written notice by certified mail to the Indian tribes or tribal organizations served by the contract and the contractor that the contract will be rescinded, in whole or in part.

§ 900.250 What shall the second written notice include?

The second written notice shall include:

(a) The intended effective date of the reassumption;

(b) The details and facts supporting the intended reassumption; and

(c) Instructions that explain the Indian tribe or tribal organization's right to a formal hearing within 30 days of receipt of the notice.

§ 900.251 What is the earliest date on which the contract will be rescinded in a non-emergency reassumption?

The contract will not be rescinded by the Secretary before the issuance of a final decision in any administrative hearing or appeal.

§ 900.252 In an emergency reassumption, what is the Secretary required to do?

(a) Immediately rescind, in whole or in part, the contract;

(b) Assume control or operation of all or part of the program; and

(c) Give written notice to the contractor and the Indian tribes or tribal organizations served.

§ 900.253 What shall the written notice include?

The written notice shall include the following:

(a) A detailed statement of the findings which support the Secretary's determination;

(b) A statement explaining the contractor's right to a hearing on the record under § 900.160 and § 900.161 within 10 days of the emergency reassumption or such later date as the contractor may approve;

(c) An explanation that the contractor may be reimbursed for actual and reasonable ''wind up costs'' incurred after the effective date of the rescission; and

(d) A request for the return of property, if any.

§ 900.254 May the contractor be reimbursed for actual and reasonable ''wind up costs'' incurred after the effective date of rescission?

Yes.

§ 900.255 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the rescinded contract?

On the effective date of any rescission, the Indian tribe or tribal organization shall, at the request of the Secretary, deliver to the Secretary all property and equipment provided under the contract which has a per item current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000 at the time of the retrocession.

§ 900.256 Will a reassumption adversely affect funding available for the reassumed program?

No. The Secretary shall provide at least the same level of funding that would have been provided if there had been no reassumption.

[FR Doc. 96–15793 Filed 6–21–96; 8:45 am]

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TAB 3

Federal Register

Friday,
May 17, 2002

Part III

Department of Health and Human Services

42 CFR Part 36, et al.
Tribal Self-Governance Amendments of 2000; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Parts 36, 36a, 136, 136a, and 137

RIN 0917–AA05

Tribal Self-Governance Amendments of 2000

AGENCY: Indian Health Service, DHHS.

ACTION: Final rule.

SUMMARY: The Secretary of the Department of Health and Human Services (DHHS) hereby issues this final rule to implement Title V of the Tribal Self-Governance Amendments of 2000 (the Act). The final rule has been negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the DHHS. The final rule includes provisions governing how DHHS/Indian Health Service (IHS) carries out its responsibility to Indian Tribes under the Act and how Indian Tribes carry out their responsibilities under the Act. As required by section 517 (b) of the Act, the Department has developed this final rule with active Tribal participation of Indian Tribes, inter-Tribal consortia, Tribal organizations and individual Tribal members, using the guidance of the Negotiated Rulemaking Act.

DATES: This rule will become effective on June 17, 2002.

FOR FURTHER INFORMATION CONTACT: Paula Williams, Director, Office of Tribal Self-Governance, The Reyes Building, 801 Thompson Ave., Suite 240, Rockville, MD 20852, Telephone 301–443–7821. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The ''Tribal Self-Governance Amendments of 2000,'' Pub. L. 106–260, repeals Title III of the Indian Self-Determination Act, Pub. L. 93–638, as amended, (ISDA) and enacts a new Title V that establishes a permanent Self-Governance program within DHHS. Thus, Indian and Alaska Native Tribes are now able to compact for the operation, control, and redesign of various IHS activities on a permanent basis. Section 517 of Title V requires the Secretary, not later than 90 days after the date of the enactment of the Act, to initiate procedures under the Negotiated Rulemaking Act, 5 U.S.C. 561 et seq, to negotiate and promulgate the regulations necessary to carry out Title V. The Act calls for the establishment of a negotiated rulemaking committee pursuant to 5 U.S.C. 565, comprised only of Federal and Tribal representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance (the Committee) conferred with and allowed representatives of Indian Tribes, inter-Tribal consortia, Tribal organizations, and individual Tribal members to actively participate in the rulemaking process.

Copies of the Committee's charter are on file with the appropriate committees of Congress and with the Library of Congress in accordance with section 9(c) of the Federal Advisory Committee Act, 5 U.S.C. Appendix.

Public Participation in Pre-Rulemaking Activity

A Notice of Intent to establish the Committee was published in the **Federal Register** at 65 FR 75906 on December 5, 2000. In the Notice of Intent, we proposed a rulemaking committee of representatives from 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials totaling 30 members. The Notice of Intent established a deadline of January 4, 2001, for submission of written comments. Twenty comments were received. The comments provided valuable input from Indian Tribes, organizations, and individuals. In order to change the composition of the Committee, as suggested by some comments, the Committee would have needed to be increased to more than 30 members. Carrying out the negotiated rulemaking process through a committee with more than 30 members would be cumbersome and challenging in reaching consensus under the time period required by section 517. Therefore, the size of the Committee was not changed. The members, representing 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials, met the requirements of the Act. The Committee was co-chaired by one Tribal representative and one Federal representative.

The negotiated rulemaking meetings were open to the public. Individuals that were not voting members of the Committee had an opportunity to attend meetings and to give input to the 30 members of the Committee. The public was informed about the establishment of the Committee through a notice in the **Federal Register** at 66 FR 15063 on March 15, 2001.

The first meeting of the Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance was held in San Diego, California on March 15–16, 2001. At that meeting, the Committee established three sub-committees, a meeting schedule, and a protocol for deliberations. The Committee agreed to operate based on consensus decision-making. The DHHS committed to publish all consensus decisions as the proposed rule. The Committee further agreed that any committee member and his/her constituents could comment on this proposed rule.

To complete the regulations within the statutory timeframe, the Committee divided the areas subject to regulation among three subcommittees, each co-chaired by one Federal and one Tribal representative. The sub-committees made recommendations to the Committee on whether regulations in a particular area were desirable. If the Committee agreed that regulations were desirable, the sub-committees developed options for draft regulations. The sub-committees presented their options to the Committee, which discussed them and eventually approved the proposed regulations.

Between April 2001 and August 2001, the Committee met five times in different locations throughout the country. All meetings were announced in the **Federal Register** at 66 FR 10182, 66 FR 17657, and 66 FR 27620. Generally, the meetings lasted three days. Sub-committees also met and held teleconferences to develop draft material in support of the Committee meetings.

The Department published proposed regulations in a Notice of Proposed Rulemaking in the **Federal Register** on February 14, 2002, at 67 FR 6998 (NPRM). In the NPRM the Department invited the public to comment on the proposed provisions. In addition, the Department outlined three issues where consensus was not yet reached and invited the public to comment on those issues as well.

Ultimately, the Department received comments from 36 Indian Tribes and Tribal organizations, one individual, and one State. The full committee reconvened in Bethesda, Maryland, between April 15 and April 18, 2002, to review the comments, to evaluate changes suggested by the comments, and to recommend final regulatory language.

As a result of the meeting, the full committee was able to reach consensus on regulatory language on all but three issues. Discussion of these three issues are contained under the appropriate subpart in the following Summary of Regulation and Comments Received.

The Department commends the ability of the committee to cooperate and develop a rule that addresses the interests of the Tribes and the Agency. We believe this negotiated rulemaking process has been a model for developing

successful Federal and Tribal partnership in other endeavors.

Summary of Regulations and Comments Received

The narrative and discussion of comments below is keyed to specific subparts of the rule.

Subpart A—General Provisions

Summary of Subpart

This subpart contains provisions describing the authority, purpose and scope of these regulations. This subpart contains Congressional policies set forth in Title V. This subpart also contains provisions regarding the effect of these regulations on existing Tribal rights, whether Title V may be construed to reduce funding for programs serving a Indian Tribe under this Title or other laws, and the effect of these regulations on Federal policy directives.

Discussion of Comments

Several comments noted the lack of any Secretarial policy in the NPRM for Title V. In negotiating the NPRM for Title V, Federal and Tribal members reached an impasse based on this issue. However, to respond to the comments, Federal and Tribal committee members further negotiated language on Secretarial policy. Based upon this Administration's statements before Congress and other policy directives, the Federal representatives drafted language which recognizes the sovereign status of Indian Tribes and the Administration's support of the government-to-government relationship between Tribes and the United States. The following language was agreed upon by the Federal and Tribal members and is included as a new section 137.6:

Section 137.6 Secretarial Policy.

In carrying out Tribal self-governance under Title V, the Secretary recognizes the right of Tribes to self-government and supports Tribal sovereignty and self-determination. The Secretary recognizes a unique legal relationship with Tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. The Secretary supports the self-determination choices of each Tribe and will continue to work with all Tribes on a government-to-government basis to address issues concerning Tribal self-determination.

Subpart B—Definitions

Summary of Subpart

This subpart sets forth definitions for key terms used in the balance of the regulations. Most of the definitions come from definitions set forth in Title I or Title V.

Discussion of Comments

There were two comments regarding the definitions in section 137.10. One comment recommended that the definition of ''Compact'' be clarified. With a slight change to the proposal, the Committee agreed with the recommendation and amended the definition to include the phrase '', including such terms as the parties intend shall control year after year,''.

One comment suggested that the term ''Tribal Self-Governance Advisory Committee,'' a term used in section 137.204, be defined. The Committee agreed and added the following definition:

Tribal Self-Governance Advisory Committee means the Committee established by the Director of IHS that consists of Tribal representatives from each of the IHS Areas participating in Self-Governance, and that provides advocacy and policy guidance for implementation of Tribal Self-Governance within IHS.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

Summary of Subpart

This subpart describes the eligibility criteria an Indian Tribe must satisfy to participate in self-governance. This subpart also describes that planning and negotiation grants may be available, but not required, for participation.

Discussion of Comments

A comment was received regarding section 137.25, recommending that the timing of planning and negotiation grants be spelled out in more detail. The Committee did not accept this comment because this matter can be dealt with more effectively in annual announcements regarding these grants. Therefore no change was made.

One comment recommended that the answer to section 137.26 should be amended to make it parallel to the question by adding ''and to negotiate'' at the end of the sentence. The Committee agreed and made the change. Another comment suggested adding additional questions and answers that provide instructions to Tribes seeking to participate in self-governance. The Committee determined that these issues are better addressed in annual agency announcements.

Subpart D—Compact

Summary of Subpart

This subpart describes the authority for Self-Governance Tribes to negotiate compacts and identifies what is included in a compact.

Discussion of Comments

No comments were received on Subpart D.

Subpart E—Funding Agreements

Summary of Subpart

This subpart describes the authority for Self-Governance Tribes to negotiate funding agreements and identifies what is included in a funding agreement. This subpart also describes the terms required to be included in a funding agreement and the terms that may be included at the Self-Governance Tribe's option.

Discussion of Comments

One comment to section 137.42 recommended explaining more about the effect of including ''Tribal shares of IHS discretionary grants'' in a funding agreement. The Committee concluded that Subpart E adequately addresses this matter and did not accept the recommendation.

One comment to section 137.43 suggested amending the question to make it clearer. The Committee agreed and amended the question to read: ''May a Tribe negotiate and leave funds with IHS for retained services?'' The Committee also changed the first word of the answer to ''Yes'' to be consistent with the revised question.

One comment suggested adding ''or portions thereof'' after ''PSFAS'' in the answer to section 137.43. The answer already states that ''Tribal shares may be left, in whole or in part with IHS''. The proposed language would be redundant and the Committee did not make the requested change.

One comment recommended substituting statutory language for the term ''Tribal share'' in section 137.43. The Committee made no change because the term ''Tribal share'' is already defined in section 137.10 and is used appropriately in section 137.43.

One comment suggested adding in the answer to section 137.56 the words '', including all recurring increases received and continuing eligibility for other increases.'' The Committee agreed and made the change.

Subpart F—Statutorily Mandated Grants

Summary of Subpart

This subpart describes to what extent statutorily mandated grants may be

added to a funding agreement after award. It also addresses annual lump sum advance payment after the grant is awarded, interest on grant awards, reallocation and redesign, and FTCA coverage of statutorily mandated grants added to a funding agreement.

Discussion of Comments

Several comments were submitted supporting the Tribal position in the Preamble that Title V provisions apply to statutorily mandated grants. The Committee did not reach agreement on this issue. Tribal committee members urged that the rule state clearly that Title V applies to statutorily mandated grants. Federal committee members rejected the Tribal view. The Secretary has included the following question and answer to the final rule as new question and answer 137.73:

Section 137.73 What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

None of the provisions of Title V apply.

While the final rule includes the question and answer, Tribal committee members wish to make clear that they strongly disagree with the Department's interpretation of the statute on this issue. The full discussion of the conflict in statutory construction is found in the NPRM at 67 Fed. Reg. 6999 (February 14, 2002).

Subpart G—Funding

Summary of Subpart

This subpart describes what funds must be transferred to a Self-Governance Tribe in a funding agreement and when those funds must be transferred. This subpart describes those circumstances where the Secretary is prohibited from reducing or failing to transfer funds and where the Secretary is permitted to increase funds. This subpart also describes miscellaneous provisions pertaining to funding provided under a funding agreement. This subpart describes that a funding agreement may provide for a stable base budget and describes what funds are included in the stable base budget.

Discussion of Comments

In negotiating proposed rules, the Committee agreed to the following language which was published in the NPRM as section 137.77:

Section 137.77 When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?

When the period covered by a funding agreement crosses Federal fiscal years and unless 100 percent of the funding is available and agreed to in the funding agreement, funding for the funding agreement will be apportioned between the two fiscal years and payments due under the funding agreement associated with each respective fiscal year and will be made on the later of:

(a) The effective date of the funding agreement, or

(b) Ten days after apportionment from OMB.

One comment was received which recommended replacing section 137.77 with language reflecting the holding St. Regis Mohawk Tribe v. Area Director, Nashville Area, Indian Health Service, (D.A.B. Jan. 17, 2002). The comment proposed a new question and answer:

When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?

When a period covered by a funding agreement crosses Federal fiscal years a Tribe is entitled to be paid one hundred percent of the funding for both fiscal years at the beginning of the funding agreement.

Tribal Committee members agreed with the comment. Federal Committee members clarified that under Title V IHS provides a process for transfer of funds for this purpose. Because the Tribal and Federal Committee members disagreed on the interpretation of the holding to application of this case, the Secretary decided to delete section 137.77.

A comment on section 137.78 recommended that specific conditions be set forth in the rule regarding the timing of payments. The Committee believes that the rule adequately addresses this matter and did not make a change.

One comment recommended addressing carryover of grants in section 137.105. The Committee believes that the provisions applicable to various grants are adequately addressed in other sections and that no changes to the regulations are needed.

One comment recommended clarifying a citation to the Indian Health Care Improvement Act (IHCIA) found in Section 137.110. The Committee believes it is best not to try to interpret the IHCIA in these regulations and did not make a change.

Several comments were made regarding funds that may be included in a stable base budget. In response to the comment that the words ''including direct contract support'' be included in section 137.121(a), the Department is committed to recognizing all allowable program and contract support costs under section 106(a) of the Act, whether those costs are classified as direct or indirect. The proposed regulations reflect this commitment without singling out any particular classification of costs. The suggestion that Section 137.121 identify other funds that IHS agrees to is dealt with in Section 137.122. Thus, the Committee has made no change to section 137.121.

Subpart H—Final Offer

Summary of Subpart

This subpart describes the final offer and rejection process.

Discussion of Comments

One comment suggested adding more detail about the process by which Tribes and IHS achieve resolution after a final offer. The Committee determined that Subpart H provides sufficient detail and the Committee did not add additional questions and answers.

The Committee noted that ''or'' was inadvertently omitted at the end of subsection 137.132(a)(1) and has inserted it in the final rule.

In section 137.143 of the NPRM the term ''Tribal shares'' was substituted for the statutory language approved by the Committee. Several comments were received recommending reinsertion of the statutory language which is more accurate in the context of this rule. The Committee agreed and replaced the term ''Tribal shares'' with ''any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.''

One comment recommended that section 137.190 be improved to make clear that the duplication prohibition applies to both funds and PSFAs. The comment was agreed to and the reference to ''such funds'' was changed to ''the same funds or PSFA''. In addition, for additional clarification the concluding clause regarding eligibility for other, non-duplicative PSFAs was set forth as a free-standing sentence, and the words ''except that'' were deleted.

One comment recommended that section 137.210 be expanded to explain how savings are identified and distributed. In light of the provision in

section 137.407(a) requiring that savings be included in the Secretary's annual report, the Committee did not accept the recommendation.

Subpart I—Operational Provisions

Summary of Subpart

This subpart contains provisions that address most of the operational aspects of self-governance.

Discussion of Comments

One comment recommended that section 137.215 address what happens to Federally furnished property upon retrocession or reassumption. This is addressed expressly in the subparts regarding retrocession and reassumption at sections 137.251 and 137.264, respectively and thus, no action was required.

Subpart J—Regulation Waiver

Summary of Subpart

This subpart contains procedures authorizing the Secretary to waive regulations promulgated to implement Title V or regulations promulgated under the authority specified in section 505(b) of the Act.

Discussion of Comments

No comments were received on Subpart J.

Subpart K—Withdrawal

Summary of Subpart

This subpart addresses the procedures that apply when a Self-Governance Tribe withdraws from a Tribal organization or inter-Tribal consortium.

Discussion of Comments

Several comments objected to the NPRM's deletion of an additional sentence in section 137.238 and section 137.250 regarding the handling of contract support cost funds. Since the Act is clear and does not distinguish funds by type or treat them differently in this regard, there is no need to reference an agency policy to deal with one type of funding in a compact or funding agreement. Contract support costs are generally handled pursuant to the IHS contract support cost circular in effect.

Subpart L—Retrocession

Summary of Subpart

This subpart addresses the procedures that apply when a Self-Governance Tribe retrocedes a program to the Secretary.

Discussion of Comments

No comments were received on Subpart L.

Subpart M—Reassumption

Summary of Subpart

This subpart addresses procedures by which the Secretary, without the consent of the Self-Governance Tribe, may reassume the operation of a program and associated funding in a compact or funding agreement.

Discussion of Comments

The citation in section 137.257(d) regarding appeals was corrected in response to a comment.

One comment noted that in section 137.264, the word ''reassume'' should be ''reassumed.'' The Committee agreed and has made the change in both the question and answer.

Subpart N—Construction

Summary of Subpart

This subpart addresses the process by which participating Self-Governance Tribes may agree to undertake construction projects and programs under section 509 of the Act. In its scope, this subpart distinguishes between construction projects, and ongoing programs that support construction projects. This subpart sets forth the process for Self-Governance Tribes to enter into and administer self-governance construction project agreements for construction projects, which may include Tribal shares of related construction programs. Alternatively, Self-Governance Tribes may assume construction programs (but not projects) using the compact and funding agreement process set forth in Subparts D and E.

Definitions are provided that are unique to this subpart. Self-Governance Tribes performing construction under section 509 are required to assume the Secretary's responsibilities for the completion of the construction project under the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act (NHPA), and related Federal environmental laws. This subpart describes the Secretary's responsibility to notify and consult with Indian Tribes concerning the development of construction budgets and new funding allocation methodologies, as well as when funds are available for the planning, design and construction of IHS construction projects. This subpart further describes the process that Self-Governance Tribes and the Secretary use to develop, negotiate and approve (or reject) construction project agreements under Title V. This subpart describes the Self-Governance Tribes' responsibility to complete construction project agreements and provide day-to-day management and administration for construction projects, within available funding. This subpart sets forth how Self-Governance Tribes will receive payments for construction project agreements, the process for Secretarial review and approval of project planning and design documents, as well as Secretarial review and approval of any proposed amendments to the construction project agreement.

Discussion of Comments

One comment recommended changing the term ''scope of work'' in the definitions in section 137.280 to read ''specific scope of work'' to resolve an inconsistency between the proposed definition and section 501(a)(2)(B) of the Act. The comment further recommended that the definition of ''specific scope of work'' be revised to clarify the level of detail required for the construction project agreement. The Committee agreed to modify the term in the final rule to resolve the inconsistency, and further agreed to specify that a scope of work is a brief, written description of the work.

One comment asked if the Department may delegate its responsibilities under the NHPA without the participation or approval of the Advisory Council on Historic Preservation. Section 509(a) of the Act provides:

> Indian Tribes participating under 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 * * * the National Historic Preservation Act * * * and related provisions of law that would apply if the Secretary were to undertake the construction project.

This provision requires the Department to delegate Federal environmental responsibilities for construction project agreements to Self-Governance Tribes, including the Department's responsibilities under NHPA. Subpart N sets forth procedures for a Self-Governance Tribe to assume these Federal environmental responsibilities, but is not intended to modify the statutory role of either the Council on Environmental Quality or the Advisory Council on Historic Preservation. Section 137.285 clarifies that Self-Governance Tribes must assume these Federal environmental responsibilities to carry out a construction project under Title V of the Act. Section 137.288 summarizes the Federal responsibility under section 106 of the NHPA to ''afford the Advisory Council on Historic Preservation, acting through the State Historic Preservation Officer or the Tribal Historic

Preservation Officer, a reasonable opportunity to comment'' on applicable undertakings. For these reasons, the Committee believed that Subpart N is consistent with the statutory requirements of the NHPA.

One comment suggested that because the abbreviations NEPA and NHPA are provided in the definitions, they should be used consistently throughout Subpart N. The Committee agreed with the comment and the abbreviations are used throughout Subpart N. The Committee also corrected the statutory reference to the NHPA in 137.288 to read 16 U.S.C. 470f.

One comment suggested that section 137.294 (a)(1) be revised to read ''consult with *applicable* Tribal, Federal, State, and local officials and interested parties * * *'' The Committee agreed that the regulation should be revised but concluded that ''appropriate'' should be inserted instead of ''applicable.'' The Committee did not intend to use ''appropriate'' as a term of art but only to indicate that IHS consultation requirements vary based on the project under review.

One comment referenced section 137.297, which provides that if a Tribe adopts a Federal agency's environmental review policy, then the Federal agency is responsible for ensuring that the policy meets the requirements of NEPA, NHPA, and any related environmental laws. This comment also recommended that an additional question and answer be added to clarify that if a Tribe adopts its own environmental review procedures, then the Tribe is responsible for deciding that it has met the requirements of these related environmental laws. The Committee agreed that Tribes are to be permitted to adopt their own environmental review policies and procedures that comply with these Federal environmental statutes without oversight by the Department, but believed that sections 137.295, 137.296, 137.308 adequately discuss the Tribes' authority to develop such policies and procedures.

One comment asked if Subpart N will apply to construction projects carried out on non-Tribal lands. The comment stated that under the Advisory Council on Historic Preservation's regulations, 36 CFR Part 800, Tribes may only apply Tribal policies and procedures to Tribal lands. Subpart N applies to all construction project agreements carried out under Title V of the Act. The Department is required to carry out its Federal environmental responsibilities wherever it undertakes construction projects, whether on Tribal or non-Tribal lands. Section 509(a) of the Act requires that the Self-Governance Tribe assume the same responsibilities that would apply if the Department were to undertake the construction project. Section 509(a) of the Act does not exempt non-Tribal lands from its coverage. As discussed above, Subpart N only sets forth procedures for the delegation of Federal environmental procedures and does not modify any Federal environmental statutory requirements.

One comment expressed concern that the regulations do not assure that Tribal policies and procedures are the same or equivalent to the Advisory Council of Historic Preservation regulations at 36 CFR part 800. The Comment further stated that Section 137.296 does not appear to be consistent with the 36 CFR part 800 provisions regarding the approval of alternate procedures.

As discussed above, Section 509(a) independently requires the Department to delegate its Federal environmental responsibilities to Self-Governance Tribes carrying out construction projects under Title V. Notwithstanding section 106 of the NHPA, section 517(a)(1) of the ISDEAA provides ''the Secretary shall initiate procedures under subchapter III of chapter 5 of Title 5 [the Negotiated Rulemaking Act] to negotiate and promulgate such regulations as are necessary to carry out [Title V of the Act].'' Pursuant to this authority, Subpart N sets forth the procedures for Self-Governance Tribes to assume Federal environmental responsibilities when carrying out construction projects under Title V of the Act. Section 137.296 authorizes Self-Governance Tribes to adopt Tribal or Federal environmental review procedures that comply with the statutory requirements.

One comment recommended that section 137.301(b) be revised to clarify when the Secretary is involved in addressing unforeseen environmental review costs. The Committee agreed with the comment and revised section 137.301(b) to provide that it is at the request of the Self-Governance Tribe that the Secretary will become involved. The Committee further revised section 137.301(b) to clarify that this regulation applies to unforeseen environmental review costs identified during any phase of the construction project.

One comment stated that the last sentence of section 137.307 is not grammatically correct. The committee agreed and revised the sentence in the final rule.

One comment recommended that language be restored in Section 137.320 to reflect the answer that was originally proposed by the Committee but was deleted in the NPRM. The Committee agreed with the concerns raised by the comment that the final rule reflect the consensus of the Committee and revised section 137.320 to read in part as follows:

> the Secretary must consult with any Indian Tribe that would be significantly affected by the expenditure to determine and to honor Tribal preferences whenever practicable concerning the size, location, type, and other characteristics of the project.

This language is consistent with the Secretary's duty under 25 U.S.C. § 1631 to honor Tribal preferences as determined through consultation.

The Committee received four comments on behalf of twenty eight Tribes and Tribal organizations supporting the Tribal position on Department of Justice representation of Tribes and Tribal certifying officers for environmental claims brought under Section 509 of the Act. The comments proposed adding the additional question and answer suggested in the Tribal position on this area of disagreement in the NPRM:

Q: Are Indian Tribes and Tribal certifying officers entitled to the benefit of a Federal defense if they are sued as a result of carrying out their Federal environmental responsibilities?

A: Yes. Indian Tribes and Tribal certifying officers are performing Federal functions when carrying out these Federal environmental responsibilities, and they are deemed to be Federal agencies and Federal officials for this limited purpose. Under section 314 of Public Law 101–512, as amended, the Department of Justice is authorized and directed to defend Indian Tribes and Tribal employees who are sued with respect to claims resulting from the performance of these Federal functions.

The Federal and Tribal committee members did not reach consensus on whether the Department of Justice would represent Tribes and Tribal certifying officers in environmental actions. The Tribal representatives believe that the potential for Self-Governance Tribes to assume Federal responsibilities for NEPA and NHPA compliance under Title V removes a substantial burden from IHS construction program managers and places that burden on Tribal officials. In transferring this burden, it is important to treat Tribal and Federal certifying officials equally. The Tribal representatives believe this can best be achieved by assuring Tribal certifying officials the benefit of a Federal defense under section 314 of Pub. L. 101–512 for NEPA enforcement actions brought against them. This protection is essential and fundamentally fair.

The Tribal representatives believe their position is fully consistent with the language of the statute and greatly furthers the Title V Congressional policy of providing Self-Governance Tribes with all the resources, benefits and protections that IHS officials would have in carrying out this core governmental function.

The Tribal representatives believe that a narrow interpretation of the coverage of section 314 would shift the burden from the Department of Justice to the IHS, or worse still, to American Indian and Alaska Native beneficiaries of IHS health programs. A narrow interpretation would require Self-Governance Tribes to incur substantial expense for liability insurance and/or legal representation. The IHS would then, in the Tribal representatives' view, be legally obliged to provide adequate contract support funds to cover these expenses. If it failed to do so as a result of shortfalls or for some other reason, funds that should be used to provide direct services would be diverted and the beneficiaries would suffer from diminished health care services, again contrary to Congress' intent. An unduly narrow interpretation would thus conflict with Congressional intent in Title V and impair the Federal trust responsibility to deliver health care to Indian people. See S. Rep. 100–274, Dec. 21, 1987 at 2646 (''The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal Government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility.'').

The Tribal Representatives believe that Congress clearly intended to confer on Self-Governance Tribes the same benefits that Federal officials enjoy when performing these Federal functions. It is clear that Self-Governance Tribes are carrying out Federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a Tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and Tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function. S. Rep. 100–274, Dec. 21, 1987 at 2645. Similarly, transferring the obligation to perform NEPA compliance determinations from Federal to Tribal officials, with virtually no additional funding and without providing these officials with a Federal defense, would create a windfall for the Federal Government, at the expense of Indian health care, contrary to Congressional intent. Department of Justice attorneys are well-experienced in APA litigation and would be in a better position to defend Tribal government officials in NEPA enforcement actions than would members of the private bar. The rare cases likely to be brought under this law will create no undue hardship or expense for the Department of Justice.

Tribal representatives are committed to working with the Secretary to address the concerns identified by the Committee through Secretarial interpretation, further rulemaking, and clarifying legislation that further fosters self-governance. Further clarification of the Tribal position may be found at 67 FR 7000–01 (February 14, 2002).

While the Department has carefully considered the views of the Tribal representatives on this issue, it cannot accept the Tribal proposal to add a question and answer providing Department of Justice representation for environmental actions brought under section 509(a). Section 314 of Public Law 101–512 applies only to actions brought under the Federal Tort Claims Act, not suits seeking to enforce NEPA, NHPA, or related environmental statutes. Moreover, as a matter of law, the Act treats the enforcement of environmental responsibilities differently from any other claims brought against a Self-Governance Tribe arising from self-governance compacts or construction project agreements. Section 509 of the Act specifically requires that the Self-Governance Tribe designate a certifying officer and accept the jurisdiction of the Federal court for purposes of enforcement of environmental statutes. The Tribal position, that suits to enforce environmental responsibilities are to be deemed suits against the United States, conflicts with these statutory requirements.

One comment recommended revising section 137.336(b)(5) and adding a new section 137.343(c) to allow Self-Governance Tribes to designate excess funds remaining at the end of a lump sum fixed price project as either savings or profit. The Committee agreed and adopted the recommendation in the final rule.

One comment recommended that section 137.338 be revised to replace the word ''may'' with ''shall'' to be consistent with similar provisions in Title I of the Act. The Committee agreed with the recommendation and revised section 137.338 to replace the word ''may'' with the word ''must.''

One comment expressed appreciation to the Committee for the payment provisions set forth in section 137.341 ''as a prime example of a regulatory provision that seeks to liberally construe the Act to favor Self-Governance Tribes.'' No action was required.

One comment read section 137.372 as requiring that Self-Governance Tribes submit fee to trust applications to the Secretary of Health and Human Services for real property purchased with construction project agreement funds. The comment questioned why the Secretary of DHHS needs to be involved at all in the process of transferring fee land into trust when the Department of Interior's regulations at 25 CFR Part 151 already set forth a detailed process for transferring land into trust. The Committee agreed with the comment and revised section 137.372 in the final rule.

Consistent with this comment, the Committee also revised sections 137.373 and 137.374 to clarify that all references to the Secretary taking title to property purchased with construction project agreement funds refer to fee title, not trust title. The question in section 137.374 was also revised to include leasing to be consistent with the answer. One Committee member recommended that section 137.374 be further revised to discuss Tribal acquisitions of government surplus property. The Committee did not accept this recommendation because the revised regulation covers all acquisitions of property, including government surplus property.

The Committee received four comments on behalf of twenty-eight Tribes and Tribal organizations supporting the Tribal position on whether the Davis-Bacon Act applies to construction project agreements that include funds from both Federal and non-Federal sources, including Tribal contributions and State funds. The comments proposed adding the additional question and answer suggested in the Tribal position on this area of disagreement in the NPRM:

Q: Do Davis-Bacon wage rates apply to construction projects performed by Tribes using both Federal funds and non-Federal funds?

A: The Davis-Bacon wage rates only apply to the portion of the project that is funded with Federal funds. The Davis-Bacon Act and wage rates do not apply to portions of the project funded with non-Federal funds or when Tribes perform work with their own employees.

The Federal and Tribal committee members did not reach consensus on whether the Davis-Bacon Act applies to

projects funded with both Federal and non-Federal funds. Tribal and Federal officials included this issue in their non-consensus reports. The Tribal representatives believe this proposed regulation would give Self-Governance Tribes performing Title V construction projects greater autonomy and would advance Title V's goal of effectively ''implementing the Federal policy of government-to-government relations with Indian Tribes'' and of further ''strengthen[ing] the Federal policy of Indian self-determination.'' *See* 25 U.S.C.A. § 458aaa (Pub. L. 106–260, Sec. 2(6), Title V Congressional findings reproduced as note following section 458aaa).

The Tribal representatives believe the proposed regulation is supported by 509(g) of the Act, and at best, this section of the Act is ambiguous. Section 512 requires that the ''Secretary shall interpret all Federal laws * * * in a manner that will facilitate * * * the achievement of Tribal health goals and objectives.'' Furthermore, even if the language of Title V is open to more than one reasonable interpretation, rules of statutory construction for Indian legislation require that the statute be construed liberally in favor of the Self-Governance Tribes. *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (''Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit.''). In *Ramah Navajo Chapter v. Lujan*, the Tenth Circuit held that, ''if the [ISDA] can reasonably be construed as the Tribe would have it construed, it must be construed that way.'' Id. at 1462 (quoting *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)).

Tribal representatives are committed to working with the Secretary to address the concerns identified by the Committee through Secretarial interpretation, further rulemaking, and clarifying legislation that further fosters self-governance. Further clarification of the Tribal position may be found at 67 FR 7000 (February 14, 2002).

While the Department has given careful consideration to the views of the Tribal representatives on this issue, it cannot accept the Tribal proposal. The Department recognizes that requiring the use of Federal Davis-Bacon wage rates on jointly funded projects is cumbersome, especially for Self-Governance Tribes located in multiple prevailing wage jurisdictions. Moreover, the Department is concerned that this requirement may discourage Self-Governance Tribes from using non-Federal funds to build or improve health care facilities. However, the Department is persuaded that the wording of section 509(e) of the Act precludes adopting the proposed Q&A.

Subpart O—Secretarial Responsibility and Budget Request

Summary of Subpart

This subpart addresses consultation with Self-Governance Tribes in the budget formulation process.

Discussion of Comments

Several comments raised concerns about the deletion of sections 137.400, 401 and 402 and asked that they be reinstated in the final rule. Sections 137.400 and 137.402 were included in the proposed rule recommended by the rulemaking committee but deleted from the proposed rule published in the **Federal Register** because they purported to require the President, in consultation with Indian Tribes, to identify in his annual budget request to the Congress all funds necessary to fully fund all funding agreements authorized under Title V. To include the provisions in Departmental regulations raised concerns under Article II, Section 3 of the United States Constitution, because they would place requirements on the President and Administration officials regarding what to include in the President's budget request to the Congress. With respect to section 137.401, which concerned Tribal consultation on budget issues, the Committee decided to include in the final rule a revised section 137.401 on Tribal consultation, as follows:

Section 137.401 What Role Does Tribal Consultation Play in the IHS Annual Budget Request Process?

The IHS will consult with Tribes on budget issues consistent with Administration policy on Tribal consultation.

One comment noted that the term ''Title I'' in section 137.405 should be capitalized. The correction was made.

In response to a comment regarding a grammatical correction to section 137.407(d), the word ''headquarter's'' was changed to ''headquarters''.

The committee found that the word ''and'' had been misplaced in section 137.419(b). The word has been moved to section 137.419(c).

Subpart P—Appeals

Summary of Subpart

This subpart addresses post-award appeals, pre-award appeals (including informal conferences), appeals of immediate reassumptions, and attorneys fees and costs under the Equal Access to Justice Act.

Discussion of Comments

One comment recommended that section 137.421 be clarified to have the deadline to request an informal conference run from the date of receipt, and to provide Tribes with 45 days rather than 30 days to request an informal conference. Since section 137.421 already provides that the deadline runs from the date of receipt, rather than mailing, the Committee made no change.

One comment suggested additional language in subsection 137.422(c) to address the participation by an OTSG representative in the informal conference. In response, the Committee agreed to add the following sentence to the end of section 137.422(d):

Such designated representatives may include OTSG.

Administrative Matters

We have examined the impacts of this rule as required by Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612) as amended by subtitle D of the Small Business Regulatory Fairness Act of 1996 (Public Law 104–121) and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Unless it is certified that the final rule is not expected to have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires analysis of regulatory options that minimize any significant economic impact of a rule on small entities. Section 202 of the Unfunded Mandates Reform Act (Public Law 104–4) requires an assessment of anticipated costs and benefits before proposing any rule that may result in expenditure by State, local, and Tribal governments, in aggregate, or by the private sector, of $110 million in any one year (adjusted annually for inflation). We have determined that this rule is consistent with the principles set forth in the Executive Order and in these statutes and find that this rule will not have an effect on the economy that exceeds $110 million in any one year (adjusted for inflation). Therefore, no further analysis is required under the Unfunded Mandates Reform Act. Because this rule

does not impose any new costs on small entities, it will not result in a significant economic impact on a substantial number of small entities. Thus, a Regulatory Flexibility Analysis is not required. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this final rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that this final rule would not have substantial direct effect on the States, on the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. As this rule has no Federalism implications, a Federalism summary impact statement is not required.

In accordance with the Act, this final rule was developed by a negotiated rulemaking committee comprised only of Federal and Tribal representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The committee agreed to operate based on consensus decisionmaking. The regulations have been agreed on by consensus except as noted in the preamble.

The DHHS has determined that this final rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to NEPA.

Paperwork Reduction Act (PRA) of 1995

This regulation contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Management Reduction Act of 1995 (44 U.S.C. 3501–3520). The information collection requirements were negotiated between the Department and Tribal representatives through the negotiated rulemaking process and were agreed to by the parties in the negotiation. Health status reporting requirements will be negotiated on an individual Tribal basis and included in individual compacts or funding agreements. Response to the data collection is voluntary; however, submission of the data is essential to participation in the Tribal Self-governance process. Self-governance Tribes have the option of participating in a voluntary national uniform data collection effort with the IHS. Final submission of these requirements have been sent to OMB for approval pursuant to PRA. In the course of its review, OMB will consider any public comments received on these requirements as expressed in the proposed rule. The information to be collected is as follows:

Subpart C—Selection of Tribes for Participation in Self-Governance

The provisions in this subpart require collection of information that indicates successful completion of the planning phase, a Tribal resolution requesting participation in self-governance, and information that demonstrates financial stability and financial capacity for participation in self-governance. The Department needs and uses this information to determine the qualified applicant pool for the self-governance project. The information is collected at the time the Indian Tribe requests participation in self-governance. The annual reporting and record keeping burden for this collection of information is estimated to average 10 hours for each new request for 50 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 500 hours.

Subparts D and E—Compact and Funding Agreement

The compact sets forth the general terms of the government-to-government relationship between the Self-Governance Tribe and the Secretary and any terms the parties intend to control year after year. A funding agreement is required for each Self-Governance Tribe participating in self-governance and it provides the information that authorizes the Self-Governance Tribe to plan, conduct, consolidate, administer, and receive funding. The funding agreement identifies the programs, services, functions, and activities (or portions thereof) (PSFAs) to be performed or administered; the budget category; the funds to be provided; the time and method of transfer of the funds; and, information regarding any other negotiated provisions or Tribal requests for stable base funding.

The provisions in this subpart require collection of information or record-keeping requirements that may be contained in either the compact or the funding agreement, such as the information provided in health status reports or the information needed when requesting multi-year funding. The Department needs and uses this information to determine eligibility of the applicant; to evaluate applicant capabilities; and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties. The information is collected at the time the Self-Governance Tribe makes an initial request to compact or when the Self-Governance Tribe decides to take specific action to retrocede. The annual reporting and record keeping burden for this collection of information is estimated to average 34 hours for each response for 50 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 1700 hours.

Subpart N—Construction Projects

The provisions in this subpart require collection of information regarding the Self-Governance Tribes' assumption of Federal responsibilities with respect to construction, including building codes and architectural and engineering standards (including health and safety), the successful completion of the construction project, and carrying out the negotiated construction project agreement. The information needed includes the semi-annual construction project progress and financial reports.

The Department needs and uses this information to determine eligibility of the applicant and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties.

The information is collected at the time the Self-Governance Tribe negotiates the construction project agreement and through semi-annual reports. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 30 respondents. The total annual burden for the collection is estimated to be 1200 hours.

Subpart P—Appeals

This subpart provides the appeals procedures available to Indian Tribes. It explains how to file a notice of appeal and what the notice should contain as well as instructions for submitting a written statement of objections. The Department uses this information to evaluate and grant or deny an appeal. The information is collected and reported once an Indian Tribe files an appeal. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 8 respondents. The total annual reporting

and record keeping burden for this collection is estimated to be 320 hours.

In accordance with the PRA, no person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. This number will appear in 42 CFR part 137 upon approval.

This rule imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

List of Subjects

42 CFR Parts 36 and 136

Employment, Government procurement, Health care, Health facilities, Indians, Penalties, Reporting and recordkeeping requirements.

42 CFR Parts 36a and 136a

Grant programs-education, Grant programs-health, Grant programs-Indians, Health care, Health professions, Indians, Penalties, Reporting and recordkeeping requirements, Scholarships and fellowships, Student aid.

42 CFR Part 137

Grant programs-Indians, health care.

Dated: April 23, 2002.

Michael H. Trujillo,

Assistant Surgeon General, Director.

Dated: May 10, 2002.

Tommy G. Thompson,

Secretary.

For the reasons set out in the preamble, we are amending chapter I of title 42 of the Code of Federal Regulations as follows:

PART 36—[REDESIGNATED AS PART 136]

1. The authority for part 36 continues to read as follows:

Authority: 25 U.S.C. 13; sec. 3, 68 Stat. 674 (42 U.S.C. 2001, 2003); Sec. 1, 42 Stat. 208 (25 U.S.C. 13); 42 U.S.C. 2001, unless otherwise noted.

2. Part 36—Indian Health is redesignated as part 136 and transferred to a new Subchapter—Indian Health Service, Department of Health and Human Services.

3. In redesignated part 136, in the section listed in the first column, the references listed in the second column are revised to read as shown in the third column:

In redesignated Part 136	References to §	Are revised to read §
136.14	36.12	136.12
136.21	36.61(c)	136.61
136.23	36.12	136.12
136.23	36.61	136.61
136.42	36.41	136.41
136.43	36.41	136.41
136.53	36.51	136.51
136.53	36.54	136.54
136.56	36.54	136.54
136.106	36.105	136.105
136.116	36.114	136.114
136.303	36.302	136.302
136.321	36.320	136.320
136.322	36.332	136.332
136.351(b)(4)	36.350(a)	136.350(a)
136.351(b)(5)	36.350(a)	136.350(a)
136.351(b)(7)	36.350(a)	136.350(a)
136.351(b)(10)	36.350(a)	136.350(a)
136.353	36.350(a)(7) and (8)	136.350(a)(7) and (8)
136.371	36.370	136.370
136.372	36.332	136.332

PART 36a—[REDESIGNATED AS PART 136a]

4. The authority for part 36a continues to read as follows:

Authority: Sec.203, 83 Stat. 763; 30 U.S.C.843, unless otherwise noted.

5. Part 36a—Indian Health is redesignated as Part 136a and transferred to new Subchapter—Indian Health Service, Department of Health and Human Services.

6. Add a new part 137 to new subchapter M to read as follows:

SUBCHAPTER M—INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 137—TRIBAL SELF-GOVERNANCE

Subpart A—General Provisions

Sec.

Subpart B—Definitions

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

Planning Phase

Authority: 25 U.S.C. 458 *et seq.*

Subpart A—General Provisions

§ 137.1 Authority, purpose and scope

(a) Authority. These regulations are prepared, issued and maintained with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by section 517 of the Act [25 U.S.C. 458aaa–16].

(b) Purpose. These regulations codify rules for self-governance compacts, funding agreements, and construction project agreements between the Department of Health and Human Services (DHHS) and Self-Governance Tribes to implement sections 2, 3, and 4 of Pub. L. 106–260.

(c) Scope. These regulations are binding on the Secretary and on Indian Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs) under Title V except as otherwise specifically authorized by a waiver under section 512(b) of the Act [25 U.S.C. 458aaa–11(b)].

(d) Information collection. The information collection requirements have been submitted to the Office of Management and Budget (OMB) and are pending OMB approval.

§ 137.2 Congressional policy.

(a) According to section 2 of Pub. L. 106–260, Congress has declared that:

(1) The Tribal right of self-government flows from the inherent sovereignty of Indian Tribes and nations;

(2) The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of the Indian Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;

(3) Although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded Tribal Self-Governance and dominates Tribal affairs.

(4) The Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination Act (ISDA) [25 U.S.C. 450f note] was designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen Tribal control over Federal funding and program management;

(5) Although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian Tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to Tribal governments, upon Tribal request, over decision making for Federal PSFAs:

(i) Is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian Tribes; and

(ii) Strengthens the Federal policy of Indian self-determination.

(b) According to section 3 of Pub. L. 106–260, Congress has declared its policy to:

(1) Permanently establish and implement Tribal Self-Governance within the DHHS;

(2) Call for full cooperation from the DHHS and its constituent agencies in the implementation of Tribal Self-Governance to—

(i) Enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian Tribes;

(ii) Permit each Indian Tribe to choose the extent of its participation in self-governance in accordance with the provisions of the ISDA relating to the provision of Federal services to Indian Tribes;

(iii) Ensure the continuation of the trust responsibility of the United States to Indian Tribes and Indians;

(iv) Affirm and enable the United States to fulfill its obligations to the Indian Tribes under treaties and other laws;

(v) Strengthen the government-to-government relationship between the United States and Indian Tribes through direct and meaningful consultation with all Tribes;

(vi) Permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities;

(vii) Provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian Tribes;

(viii) Encourage the Secretary to identify all PSFAs of the DHHS that may be managed by an Indian Tribe under this Act and to assist Indian Tribes in assuming responsibility for such PSFAs; and

(ix) Provide Indian Tribes with the earliest opportunity to administer PSFAs from throughout the Department.

(c) According to section 512(a) of the Act [25 U.S.C. 458aaa–11(a)], Congress has declared, except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:

(1) The inclusion of PSFAs and funds associated therewith, in the agreements entered into under this section;

(2) The implementation of compacts and funding agreements entered into under this title; and

(3) The achievement of Tribal health goals and objectives.

(d) According to section 512(f) of the Act [25 U.S.C. 458aaa–11(f)], Congress has declared that each provision of Title V and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in and any ambiguity shall be resolved in favor of the Indian Tribe.

(e) According to section 515(b) of the Act [25 U.S.C. 458aaa–14(b)], Congress has declared that nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Indian Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(f) According to section 507(g) of the Act [25 U.S.C. 458aaa–6(g)], Congress has declared that the Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(g) According to section 515(c) of the Act [25 U.S.C. 458aaa–14(c)], Congress has declared that the Indian Health Service (IHS) under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Tribe to do so. Nothing in this section shall impair the right of the IHS or an Indian Tribe to seek recovery from third parties section 206 of the Indian Health Care Improvement Act [25 U.S.C. 1621e], under section 1 of the Federal Medical Care Recovery Act [42 U.S.C. 2651], and any other applicable Federal, State or Tribal law.

(h) According to section 507(e) of the Act [25 U.S.C. 458aaa–6(e)], Congress has declared that in the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out Title V in a manner that maximizes the policy of Tribal Self-Governance, and in a manner

consistent with the purposes specified in section 3 of the Act.

§ 137.3 Effect on existing Tribal rights.

Nothing in this part shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian Tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians. The Secretary must act in good faith in upholding this trust responsibility;

(c) Mandating an Indian Tribe to apply for a compact(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.

§ 137.4 May Title V 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?

No, if an Indian Tribe alleges that a compact or funding agreement violates section 515(a) of the Act [25 U.S.C. 458aaa–14(a)], the Indian Tribe may apply the provisions of section 110 of the Act [25 U.S.C. 450m–1].

§ 137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Unless expressly agreed to by the Self-Governance Tribe in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the IHS, except for the eligibility provisions of section 105(g) of the Act [25 U.S.C. 450j(g)] and regulations promulgated under section 517 of the Act [25 U.S.C. 458aaa–16(e)].

§ 137.6 Secretarial policy.

In carrying out Tribal self-governance under Title V, the Secretary recognizes the right of Tribes to self-government and supports Tribal sovereignty and self-determination. The Secretary recognizes a unique legal relationship with Tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. The Secretary supports the self-determination choices of each Tribe and will continue to work with all Tribes on a government-to-government basis to address issues concerning Tribal self-determination.

Subpart B—Definitions

§ 137.10 Definitions.

Unless otherwise provided in this part:

Act means sections 1 through 9 and Titles I and V of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.

Appeal means a request by an Indian Tribe for an administrative review of an adverse decision by the Secretary.

Compact means a legally binding and mutually enforceable written agreement, including such terms as the parties intend shall control year after year, that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

Congressionally earmarked competitive grants as used in section 505(b)(1) of the Act [25 U.S.C. 458aaa–4(b)(1)] means statutorily mandated grants as defined in this section and used in subpart H of this part.

Contract means a self-determination contract as defined in section 4(j) of the Act [25 U.S.C. 450b].

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department means the Department of Health and Human Services.

Director means the Director of the Indian Health Service.

Funding agreement means a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from the Service Unit, Area, and Headquarter's levels in support of those PSFAs and such other terms as are required, or may be agreed upon, pursuant to Title V.

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 PSFAs assumed by a Self-Governance Tribe.

IHS means Indian Health Service.

IHS discretionary grant means a grant established by IHS pursuant to the IHS' discretionary authority without any specific statutory directive.

Indian means a person who is a member of an Indian Tribe.

Indian Tribe means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies, and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; provided that 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 Title V, 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 part). In such event, the term ''Indian Tribe'' as used in this part includes such other authorized Indian Tribe, inter-Tribal consortium, or Tribal organization.

Indirect costs shall have the same meaning as it has in 25 CFR 900.6 as applied to compacts, funding agreements and construction project agreements entered into under this part.

Inherent Federal functions means those Federal functions which cannot legally be delegated to Indian Tribes.

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.

OMB means the Office of Management and Budget.

PSFA means programs, services, functions, and activities (or portions thereof).

Real property means any interest in land together with the improvements, structures, and fixtures and appurtenances thereto.

Reassumption means rescission, in whole or part, of a funding agreement and assuming or resuming control or operation of the PSFAs by the Secretary without consent of the Self-Governance Tribe.

Retained Tribal share means those funds that are available as a Tribal share but which the Self-Governance Tribe elects to leave with the IHS to administer.

Retrocession means the voluntary return to the Secretary of a self-governance program, service, function or activity (or portion thereof) for any reason, before or on the expiration of the term of the funding agreement.

Secretary means the Secretary of Health and Human Services (and his or her respective designees.)

Self-Governance means the program of self-governance established under section 502 of the Act [25 U.S.C. 458aaa–1].

Self-Governance Tribe means an Indian Tribe participating in the program of self-governance pursuant to section 503(a) of the Act [25 U.S.C. 458aaa–2(a)] or selected and participating in self-governance pursuant to section 503(b) of the Act [25 U.S.C. 458aaa–2(b)].

Statutorily mandated grant as used in this section and subpart F of this part means a grant specifically designated in a statute for a defined purpose.

Title I means sections 1 through 9 and Title I of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Title V means Title V of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Tribal organization means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; provided, that in any case where a contract or compact is entered into, or a grant is made, to an organization to perform services benefitting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the entering into or making of such contract, compact, or grant.

Tribal Self-Governance Advisory Committee means the Committee established by the Director of IHS that consists of Tribal representatives from each of the IHS Areas participating in Self-Governance, and that provides advocacy and policy guidance for implementation of Tribal Self-Governance within IHS.

Tribal share means an Indian Tribe's portion of all funds and resources that support secretarial PSFAs that are not required by the Secretary for the performance of inherent Federal functions.

Subpart C—Selection of Indian Tribes for Participation in Self-Governance

§ 137.15 Who may participate in Tribal Self-Governance?

Those Self-Governance Tribes described in 503(a) of the Act [25 U.S.C. 458aaa–2(a)] participating in the Title III Tribal Self-Governance Demonstration Project and up to 50 additional Indian Tribes per year that meet the criteria in § 137.18 may participate in self-governance.

§ 137.16 What if more than 50 Indian Tribes apply to participate in self-governance?

The first Indian Tribes who apply and are determined to be eligible shall have the option to participate in self-governance. Any Indian Tribe denied participation due to the limitation in number of Indian Tribes that may take part is entitled to participate in the next fiscal year, provided the Indian Tribe continues to meet the financial stability and financial management capacity requirements.

§ 137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?

Yes, Indian Tribes may either:

(a) Each sign the same compact and/or funding agreement, provided that each one meets the criteria to participate in self-governance and accepts legal responsibility for all financial and administrative decisions made under the compact or funding agreement, or

(b) Authorize another Indian Tribe to participate in self-governance on their behalf.

§ 137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

To be eligible to participate in self-governance, an Indian Tribe must have:

(a) Successfully completed the planning phase described in § 137.20;

(b) Requested participation in self-governance by resolution or other official action by the governing body of each Indian Tribe to be served; and

(c) Demonstrated, for three fiscal years, financial stability and financial management capability.

Planning Phase

§ 137.20 What is required during the planning phase?

The planning phase must be conducted to the satisfaction of the Indian Tribe and must include:

(a) legal and budgetary research; and

(b) internal Tribal government planning and organizational preparation relating to the administration of health programs.

§ 137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?

The Indian Tribe provides evidence that, for the three years prior to participation in self-governance, the Indian Tribe has 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.

§ 137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?

Yes, if the Indian Tribe chooses to centralize its self-determination or self-governance financial and administrative functions with non-self-determination or non-self-governance financial and administrative functions, such as personnel, payroll, property management, etc., the Secretary may consider uncorrected significant and material audit exceptions related to the integrity of a cross-cutting centralized function in determining the Indian Tribe's eligibility for participation in the self-governance program.

§ 137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider any other information regarding the Indian Tribe's financial stability and financial management capacity?

No, meeting the criteria set forth in §§ 137.21 and 137.22, shall be conclusive evidence of the required stability and capability to participate in self-governance.

§ 137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?

Yes, any Indian Tribe may apply, as provided in § 137.25, for a grant to assist it to:

(a) Plan to participate in self-governance; and

(b) Negotiate the terms of the compact and funding agreement between the Indian Tribe and Secretary.

§ 137.25 Are planning and negotiation grants available?

Subject to the availability of funds, IHS will annually publish a notice of the number of planning and negotiation grants available, an explanation of the application process for such grants, and the criteria for award. Questions may be directed to the Office of Tribal Self-Governance.

§ 137.26 Must an Indian Tribe receive a planning or negotiation grant to be eligible to participate in self-governance?

No, an Indian Tribe may use other resources to meet the planning requirement and to negotiate.

Subpart D—Self-Governance compact

§ 137.30 What is a self-governance compact?

A self-governance compact is a legally binding and mutually enforceable

written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

§ 137.31 What is included in a compact?

A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility and statutory and treaty obligations to Indian Tribes and such other terms as the parties intend to control from year to year.

§ 137.32 Is a compact required to participate in self-governance?

Yes, Tribes must have a compact in order to participate in self-governance.

§ 137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?

Yes, at an Indian Tribe's option, a funding agreement may be negotiated prior to or at the same time as the negotiation of a compact.

§ 137.34 May a funding agreement be executed without negotiating a compact?

No, a compact is a separate document from a funding agreement, and the compact must be executed before or at the same time as a funding agreement.

§ 137.35 What is the term of a self-governance compact?

Upon approval and execution of a self-governance compact, the compact remains in effect for so long as permitted by Federal law or until terminated by mutual written agreement or retrocession or reassumption of all PSFAs.

Subpart E—Funding Agreements

§ 137.40 What is a funding agreement?

A funding agreement is a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from service unit, area and headquarters levels in support of those PSFAs and such other terms as are required or may be agreed upon pursuant to Title V.

§ 137.41 What PSFAs must be included in a funding agreement?

At the Self-Governance Tribe's option, all PSFAs identified in and in accordance with section 505(b) of the Act must be included in a funding agreement, subject to section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.42 What Tribal shares may be included in a funding agreement?

All Tribal shares identified in sections 505(b)(1) [25 U.S.C. 458aaa–4(b)(1)] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)] may be included in a funding agreement, including Tribal shares of IHS discretionary grants.

§ 137.43 May a Tribe negotiate and leave funds with IHS for retained services?

Yes, at the discretion of the Self-Governance Tribe, Tribal shares may be left, in whole or in part, with IHS for certain PSFAs. These shares are referred to as a ''retained Tribal shares.''

Terms in a Funding Agreement

§ 137.45 What terms must be included in a funding agreement?

A funding agreement must include terms required under section 505(d) of the Act [25 U.S.C. 458aaa–4(d)] and provisions regarding mandatory reporting and reassumption pursuant to section 507(a) of the Act [25 U.S.C. 458aaa–6(a)], unless those provisions have been included in a compact.

§ 137.46 May additional terms be included in a funding agreement?

Yes, at the Self-Governance Tribe's option, additional terms may be included as set forth in sections 506 [25 U.S.C. 458aaa–5] and 516(b) of the Act [25 U.S.C. 458aaa–15(b)]. In addition, any other terms to which the Self-Governance Tribe and the Secretary agree may be included.

§ 137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?

(a) Yes, the provisions of Title I listed in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] and section 314 of Pub. L. 101–512, as amended, [25 U.S.C. 450f note] mandatorily apply to a compact, funding agreement and construction project agreement to the extent they are not in conflict with Title V. In addition, at the option of a Self-Governance Tribe, under section 516(b) of the Act [25 U.S.C. 458aaa–15(b)] any provisions of Title I may be included in the compact or funding agreement.

(b) The provisions of Title I referenced in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] are sections 5 [25 U.S.C. 450c], 6 [25 U.S.C. 450d], 7 [25 U.S.C. 450e], 102(c) and (d) [25 U.S.C. 450f(c) and (d)], 104 [25 U.S.C. 450i], 105(k) and (l) [25 U.S.C. 450j(k) and (l)], 106(a) through (k) [25 U.S.C. 450j–1(a) through (k)], and 111 [25 U.S.C. 450n] of the Act.

§ 137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?

The incorporated Title I provision shall have the same force and effect as if it were set out in full in Title V.

§ 137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?

In that event, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

Term of a Funding Agreement

§ 137.55 What is the term of a funding agreement?

A funding agreement shall have the term mutually agreed to by the parties. Absent notification from an Indian Tribe that it is withdrawing or retroceding the operation of one or more PSFAs identified in the funding agreement, the funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

§ 137.56 Does a funding agreement remain in effect after the end of its term?

Yes, the provisions of a funding agreement, including all recurring increases received and continuing eligibility for other increases, remain in full force and effect until a subsequent funding agreement is executed. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

§ 137.57 How is a funding agreement amended during the effective period of the funding agreement?

A funding agreement may be amended by the parties as provided for in the funding agreement, Title V, or this part.

Subpart F—Statutorily Mandated Grants

§ 137.60 May a statutorily mandated grant be added to a funding agreement?

Yes, in accordance with section 505(b)(2) of the Act [25 U.S.C. 458aaa–4(b)(2)], a statutorily mandated grant may be added to the funding agreement after award.

§ 137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?

Yes, grant funds shall be added to the funding agreement as an annual lump sum advance payment after the grant is awarded.

§ 137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?

Yes, a Self-Governance Tribe may keep Interest Earned on Statutorily Mandated Grant Funds.

§ 137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?

Interest earned on such funds must be used to enhance the grant program including allowable administrative costs.

§ 137.68 May funds from a statutorily mandated grant added to a funding agreement be reallocated?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, funds from a statutorily mandated grant may not be reallocated.

§ 137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, a program added to a funding agreement under a statutorily mandated grant may not be redesigned.

§ 137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?

Yes, the reporting requirements for a statutorily mandated grant program added to a funding agreement are subject to the terms and conditions of the grant award.

§ 137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?

Yes, the Secretary and the Self-Governance Tribe may develop separate programmatic reporting requirements for statutorily mandated grants.

§ 137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?

Yes, Self-Governance Tribes and their employees carrying out statutorily mandated grant programs are added to a funding agreement covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

§ 137.73 What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

None of the provisions of Title V apply.

Subpart G—Funding

General

§ 137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?

Subject to the terms of any compact or funding agreement, the Secretary must transfer to a Tribe all funds provided for in the funding agreement, pursuant to section 508(c) of the Act [25 U.S.C. 458aaa–7(c)] and § 137.80. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

§ 137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?

When a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise.

§ 137.77 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?

The Secretary must transfer any funds that were not paid in the initial lump sum payment within 10 days after distribution methodologies and other decisions regarding payment of those funds have been made by the IHS.

§ 137.78 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?

Yes, upon Tribal request, the Secretary must negotiate a funding agreement for a term longer or shorter than a year. All references in these regulations to funding agreements shall also include funding agreements for a term longer or shorter than one year.

§ 137.79 What funds must the Secretary include in a funding agreement?

The Secretary must include funds in a funding agreement in an amount equal to the amount that the Self-Governance Tribe would have been entitled to receive in a contract under Title I, including amounts for direct program costs specified under section 106(a)(1) of the Act and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)]. In addition, the Secretary shall include any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Self-Governance Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

Prohibitions

§ 137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?

Yes, sections 508(d)(1)(A) and (B) of the Act [25 U.S.C. 458aaa–7(d)(1)(A) and (B)] expressly prohibit the Secretary from:

(a) Failing or refusing to transfer to a Self-Governance Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under Title V, except as required by Federal law, and

(b) From withholding portions of such funds for transfer over a period of years.

§ 137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?

Yes, the Secretary is prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration.

§ 137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?

No, in accordance with section 508(d)(1)(C)(ii) of the Act [25 U.S.C. 458aaa–7(d)(1)(C)(ii)], the Secretary is prohibited from reducing the amount of funds required under Title V in subsequent years, except pursuant to:

(a) A reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(b) A Congressional directive in legislation or accompanying report;

(c) A Tribal authorization;

(d) A change in the amount of pass-through funds subject to the terms of the funding agreement; or

(e) Completion of a project, activity, or program for which such funds were provided.

§ 137.88 May the Secretary reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?

No, the Secretary may not reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee

retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act.

§ 137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V?

No, the Secretary may not reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V.

§ 137.90 May the Secretary increase the funds required under the funding agreement?

Yes, the Secretary may increase the funds required under the funding agreement. However, the Self-Governance Tribe and the Secretary must agree to any transfer of funds to the Self-Governance Tribe unless otherwise provided for in the funding agreement.

Acquisition of Goods and Services From the IHS

§ 137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?

Yes, a Self-Governance Tribe may choose to purchase from the IHS any goods and services transferred by the IHS to a Self-Governance Tribe in a compact or funding agreement. The IHS shall provide any such goods and services to the Self-Governance Tribe, on a reimbursable basis, including payment in advance with subsequent adjustment.

Prompt Payment Act

§ 137.96 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?

Yes, the Prompt Payment Act, 39 U.S.C. section 3901 et seq., applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to Title V. See also § 137.76 through 137.78 and 137.341(f).

Interest or Other Income on Transfers

§ 137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?

Yes, pursuant to section 508(h) of the Act [25 U.S.C. 458aaa–7(h)], a Self-Governance Tribe may retain and spend interest earned on any funds paid under a compact or funding agreement.

§ 137.101 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?

A Self-Governance Tribe is under a duty to invest and manage the funds as a prudent investor would, in light of the purpose, terms, distribution requirements, and provisions in the compact or funding agreement and Title V. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the Self-Governance Tribe. In making and implementing investment decisions, the Self-Governance Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so. In addition, the Self-Governance Tribe must:

(a) Conform to fundamental fiduciary duties of loyalty and impartiality;

(b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Self-Governance Tribe.

Carryover of Funds

§ 137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

Yes, pursuant to section 508(i) of the Act, a Self-Governance Tribe may carryover from one year to the next any funds that remain at the end of the funding agreement.

Program Income

§ 137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?

All Medicare, Medicaid, or other program income earned by a Self-Governance Tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Self-Governance Tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Self-Governance Tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

Limitation of Costs

§ 137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

No, if a Self-Governance Tribe believes that the total amount of funds provided for a specific PSFA in a compact or funding agreement is insufficient, the Self-Governance Tribe must provide reasonable written notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement in a quantity sufficient for the Self-Governance Tribe to complete the PSFA, as jointly determined by the Self-Governance Tribe and the Secretary, the Self-Governance Tribe may suspend performance of the PSFA until such time as additional funds are transferred.

Stable Base Budget

§ 137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?

Yes, at the option of a Self-Governance Tribe, a funding agreement may provide for a stable base budget, specifying the recurring funds to be transferred to a Self-Governance Tribe for a period specified in the funding agreement.

§ 137.121 What funds may be included in a stable base budget amount?

The stable base budget amount may include, at the option of the Self-Governance Tribe,

(a) Recurring funds available under section 106(a) of the Act [25 U.S.C. 450j–1] ;

(b) Recurring Tribal shares; and

(c) Any recurring funds for new or expanded PSFAs not previously assumed by the Self-Governance Tribe.

§ 137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?

Yes, the funding agreement may include non-recurring funds, other recurring funds, and other funds the Self-Governance Tribe is entitled to include in a funding agreement that are not included in the stable base budget amount.

§ 137.123 Once stable base funding is negotiated, do funding amounts change from year to year?

Stable base funding amounts are subject to adjustment:

(a) Annually only to reflect changes in Congressional appropriations by sub-sub activity excluding earmarks;

(b) By mutual agreement of the Self-Governance Tribe and the Secretary; or

(c) As a result of full or partial retrocession or reassumption.

§ 137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?

No, the Self-Governance Tribe may provide in its funding agreement that the effective period of the stable base budget will be either longer or shorter than the term of the funding agreement.

Subpart H—Final Offer

§ 137.130 What is covered by this subpart?

This subpart explains the final offer process provided by the statute for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.

§ 137.131 When should a final offer be submitted?

A final offer should be submitted when the Secretary and an Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels).

§ 137.132 How does the Indian Tribe submit a final offer?

(a) A written final offer should be submitted:

(1) During negotiations to the agency lead negotiator *or*

(2) Thereafter to the Director.

(b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a ''Final Offer.''

§ 137.133 What does a final offer contain?

A final offer contains a description of the disagreement between the Secretary and the Indian Tribe and the Indian Tribe's final proposal to resolve the disagreement.

§ 137.134 When does the 45 day review period begin?

The 45 day review period begins from the date the IHS receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

§ 137.135 May the Secretary request and obtain an extension of time of the 45 day review period?

Yes, the Secretary may request an extension of time before the expiration of the 45 day review period. The Indian Tribe may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person authorized by the Indian Tribe to grant the extension before the expiration of the 45 day review period.

§ 137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?

The final offer is accepted automatically by operation of law.

§ 137.137 If the 45 day review period or extension thereto, has expired, and the Tribes offer is deemed accepted by operation of law, are there any exceptions to this rule?

No, there are no exceptions to this rule if the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law.

§ 137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

Rejection of Final Offers

§ 137.140 On what basis may the Secretary reject an Indian Tribe's final offer?

The Secretary may reject an Indian Tribe's final offer for one of the following reasons:

(a) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under the Act;

(b) the PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian Tribe;

(c) the Indian Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health; or

(d) the Indian Tribe is not eligible to participate in self-governance under section 503 of the Act [25 U.S.C. 458aaa–2].

§ 137.141 How does the Secretary reject a final offer?

The Secretary must reject a final offer by providing written notice to the Indian Tribe based on the criteria in § 137.140 not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Self-Governance Tribe consistent with this subpart.

§ 137.142 What is a ''significant danger'' or ''risk'' to the public health?

A significant danger or risk is determined on a case-by-case basis in accordance with section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.143 How is the funding level to which the Indian Tribe is entitled determined?

The Secretary must provide funds under a funding agreement in an amount equal to the amount that the Indian Tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) of the Act [25 U.S.C. 450j–1(a)(1)] and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)], including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

§ 137.144 Is technical assistance available to an Indian Tribe to avoid rejection of a final offer?

Yes, upon receiving a final offer, the Secretary must offer any necessary technical assistance, and must share all relevant information with the Indian Tribe in order to avoid rejection of a final offer.

§ 137.145 If the Secretary rejects a final offer, is the Secretary required to provide the Indian Tribe with technical assistance?

Yes, the Secretary must offer and, if requested by the Indian Tribe, provide additional technical assistance to overcome the stated grounds for rejection.

§ 137.146 If the Secretary rejects all or part of a final offer, is the Indian Tribe entitled to an appeal?

Yes, the Indian Tribe is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart P of this part. Alternatively, at its option, the Indian Tribe has the right to sue pursuant to section 110 of the Act [25 U.S.C. 450m–1] in Federal district court to challenge the Secretary's decision.

§ 137.147 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?

Yes, subject to section 507(c)(1)(D) of the Act [25 U.S.C. 458aaa–6(c)(1)(D)].

§ 137.148 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement, or amendment?

No, appealing the decision of the Secretary does not prevent entering into the compact, funding agreement, or amendment.

Burden of Proof

§ 137.150 What is the burden of proof in an appeal from rejection of a final offer?

With respect to any appeal, hearing or civil action, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final offer.

Decision Maker

§ 137.155 What constitutes a final agency action?

A final agency action shall consist of a written decision from the Department to the Indian Tribe either:

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

(b) By an administrative judge.

Subpart I—Operational Provisions

Conflicts of Interest

§ 137.160 Are Self-Governance Tribes required to address potential conflicts of interest?

Yes, self-Governance Tribes participating in self-governance under Title V must ensure that internal measures are in place to address conflicts of interest in the administration of self-governance PSFAs.

Audits and Cost Principles

§ 137.165 Are Self-Governance Tribes required to undertake annual audits?

Yes, under the provisions of section 506(c) of the Act [25 U.S.C. 458aaa–5(c)], Self-Governance Tribes must undertake annual audits pursuant to the Single Audit Act, 31 U.S.C. 7501 *et seq.*

§ 137.166 Are there exceptions to the annual audit requirements?

Yes, the exceptions are described in 31 U.S.C. 7502 of the Single Audit Act.

§ 137.167 What cost principles must a Self-Governance Tribe follow when participating in self-governance under Title V?

A Self-Governance Tribe must apply the cost principles of the applicable OMB circular, except as modified by:

(a) Section 106 (k) of the Act [25 U.S.C. 450j–1],

(b) Other provisions of law, or

(c) Any exemptions to applicable OMB circulars subsequently granted by the OMB.

§ 137.168 May the Secretary require audit or accounting standards other than those specified in § 137.167?

No, no other audit or accounting standards shall be required by the Secretary.

§ 137.169 How much time does the Federal Government have to make a claim against a Self-Governance Tribe relating to any disallowance of costs, based on an audit conducted under § 137.165?

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

§ 137.170 When does the 365 day period commence?

For the purpose of determining the 365 day period, an audit report is deemed received on the date of actual receipt by the Secretary, at the address specified in § 137.172, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency audit report as insufficient due to non-compliance with chapter 75 of title 31, United States Code or noncompliance with any other applicable law.

§ 137.171 Where do Self-Governance Tribes send their audit reports?

(a) For fiscal years ending on or before June 30, 1996, the audit report must be sent to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

(b) For fiscal years, beginning after June 30, 1996, the audit report must be sent to: Single Audit Clearinghouse, 1201 E. 10th St., Jeffersonville, IN 47132.

§ 137.172 Should the audit report be sent anywhere else to ensure receipt by the Secretary?

Yes, the Self-Governance Tribe should also send the audit report to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

§ 137.173 Does a Self-Governance Tribe have a right of appeal from a disallowance?

Yes, the notice must set forth the right of appeal and hearing to the Interior Board of Contract Appeals, pursuant to section 110 of the Act [25 U.S.C. 450m–1].

Records

§ 137.175 Is a Self-Governance Tribe required to maintain a recordkeeping system?

Yes. Tribes are required to maintain records and provide Federal agency access to those records as provided in § 137.177.

§ 137.176 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?

No, except to the extent that a Self-Governance Tribe specifies otherwise in its compact or funding agreement, the records of the Self-Governance Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

§ 137.177 Is the Self-Governance Tribe required to make its records available to the Secretary?

Yes, after 30 days advance written notice from the Secretary, the Self-Governance Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of title 44 United States Code.

§ 137.178 May Self-Governance Tribes store patient records at the Federal Records Centers?

Yes, at the option of a Self-Governance Tribe, patient records may be stored at Federal Records Centers to the same extent and in the same manner as other Department patient records in accordance with section 105(o) of the Act [25 U.S.C. 450j(o)].

§ 137.179 May a Self-Governance Tribe make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178?

Yes, a Self-Governance Tribe may make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178.

§ 137.180 Are there other laws that govern access to patient records?

Yes, a Tribe must consider the potential application of Tribal, Federal and state law and regulations that may apply to requests for access to Tribal patient records, such as the provisions 42 CFR 2.1–2.67 pertaining to records regarding drug and/or alcohol treatment.

Redesign

§ 137.185 May a Self-Governance Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?

Yes, a Self-Governance Tribe may redesign or consolidate PSFAs included in a funding agreement and reallocate or redirect funds for such PSFAs in any manner which the Self-Governance 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.

Non-Duplication

§ 137.190 Is a Self-Governance Tribe that receives funds under Title V also entitled to contract under section 102 of the Act [25 U.S.C. 450(f)] for such funds?

For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Self-Governance Tribe is not entitled to contract with the Secretary for the same funds or PSFA under section 102 of the Act [25 U.S.C. 450f]. Such Self-Governance Tribe is eligible for new programs on the same basis as other Indian Tribes.

Health Status Reports

§ 137.200 Are there reporting requirements for Self-Governance Tribes under Title V?

Yes, compacts or funding agreements negotiated between the Secretary and a Self-Governance Tribe must include a provision that requires the Self-Governance Tribe to report on health status and services delivery. These reports may only impose minimal burdens on the Self-Governance Tribes.

§ 137.201 What are the purposes of the Tribal reporting requirements?

Tribal reports enable the Secretary to prepare reports required under Title V and to develop the budget request. The reporting requirements are not intended as a quality assessment or monitoring tool, although such provision may be included at the option of the Self-Governance Tribe. Under no circumstances will the reporting requirement include any confidential, proprietary or commercial information. For example, while staffing levels may be a part of a report, pay levels for the staff are considered confidential between the Self-Governance Tribe and the employee.

§ 137.202 What types of information will Self-Governance Tribes be expected to include in the reports?

Reports will be derived from existing minimal data elements currently collected by Self-Governance Tribes, and may include patient demographic and workload data. Not less than 60 days prior to the start of negotiations or a mutually agreed upon timeframe, the IHS will propose a list of recommended minimal data elements, along with justification for their inclusion, to be used as a basis for negotiating these requirements into the Self-Governance Tribe's compact or funding agreement.

§ 137.203 May a Self-Governance Tribe participate in a voluntary national uniform data collection effort with the IHS?

Yes, in order to advance Indian health advocacy efforts, each Self-Governance Tribe will be encouraged to participate, at its option, in national IHS data reporting activities such as Government Performance Results Act, epidemiologic and surveillance reporting.

§ 137.204 How will this voluntary national uniform data set be developed?

IHS will work with representatives of Self-Governance Tribes, in coordination with the Tribal Self Governance Advisory Committee (TSGAC), to develop a mutually-defined annual voluntary uniform subset of data that is consistent with Congressional intent, minimizes reporting burdens, and responds to the needs of the Self-Governance Tribe.

§ 137.205 Will this voluntary uniform data set reporting activity be required of all Self-Governance Tribes entering into a compact with the IHS under Title V?

No, to the extent that specific resources are available or have not otherwise been provided to Self-Governance Tribes for this purpose, and if the Self-Governance Tribes choose to participate, the IHS will provide resources, hardware, software, and technical assistance to the Self-Governance Tribes to facilitate data gathering to ensure data consistency and integrity under this voluntary effort.

§ 137.206 Why does the IHS need this information?

This information will be used to comply with sections 513 [25 U.S.C. 458aaa–12] and 514 [25 U.S.C. 458aaa–13] of the Act as well as to assist IHS in advocating for the Indian health system, budget formulation, and other reporting required by statute, development of partnerships with other organizations that benefit the health status of Indian Tribes, and sharing of best practices.

§ 137.207 Will funding be provided to the Self-Governance Tribe to compensate for the costs of reporting?

Yes, reporting requirements are subject to the Secretary providing specific funds for this purpose in the funding agreement.

Savings

§ 137.210 What happens if self-governance activities under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings?

To the extent that PSFAs carried out by Self-Governance Tribes under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 508(c) of the Act [25 U.S.C. 458aaa–7(c)], the Secretary must make such savings available to the Self-Governance Tribes, for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

§ 137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in § 137.210.

The annual report prepared pursuant to section 514(b)(2) [25 U.S.C. 458aaa–13(b)(2)] of the Act must specifically identify any such savings.

Access to Government Furnished Property

§ 137.215 How does a Self-Governance Tribe obtain title to real and personal property furnished by the Federal Government for use in the performance of a compact, funding agreement, construction project agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa–11(c)]?

(a) For government-furnished real and personal property made available to a Self-Governance Tribe, the Self-Governance Tribe must take title to all real or personal property unless the Self-Governance Tribe requests that the United States retain the title.

(b) For government-furnished personal property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with each Self-Governance Tribe, must develop a list of the property used in a compact, funding agreement, or construction project agreement.

(2) The Self-Governance Tribe must indicate any items on the list to which the Self-Governance Tribe wants the Secretary to retain title.

(3) The Secretary must provide the Self-Governance Tribe with any documentation needed to transfer title to the remaining listed property to the Self-Governance Tribe.

(c) For government-furnished real property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with the Self-Governance Tribe, must develop a list of the property furnished for use in a compact, funding agreement, or construction project agreement.

(2) The Secretary must inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202–2(b)(10).

(3) The Self-Governance Tribe must indicate on the list to the Secretary any items of real property to which the Self-Governance Tribe wants the Secretary to retain title and those items of property to which the Self-Governance Tribe wishes to obtain title. The Secretary must take such steps as necessary to transfer title to the Self-Governance Tribe those items of real property which the Self-Governance Tribe wishes to acquire.

Matching and Cost Participation Requirements

§ 137.217 May funds provided under compacts, funding agreements, or grants made pursuant to Title V be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

Yes, funds provided under compacts, funding agreements, or grants made pursuant to Title V may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

Federal Tort Claims Act (FTCA)

§ 137.220 Do section 314 of Public Law 101–512 [25 U.S.C. 450f note] and section 102(d) of the Act [25 U.S.C. 450f(d)] (regarding, in part, FTCA coverage) apply to compacts, funding agreements and construction project agreements?

Yes, regulations governing FTCA coverage are set out at 25 CFR Part 900, Subpart M.

Subpart J—Regulation Waiver

§ 137.225 What regulations may be waived under Title V?

A Self-Governance Tribe may request a waiver of regulation(s) promulgated under section 517 of the Act [25 U.S.C. 458aaa–16] or under the authorities specified in section 505(b) of the Act [25 U.S.C. 458aaa–4(b)] for a compact or funding agreement entered into with the IHS under Title V.

§ 137.226 How does a Self-Governance Tribe request a waiver?

A Self-Governance Tribe may request a waiver by submitting a written request to the Secretary identifying the applicable Federal regulation(s) sought to be waived and the basis for the request.

§ 137.227 How much time does the Secretary have to act on a waiver request?

The Secretary must either approve or deny the requested waiver in writing within 90 days after receipt by the Secretary.

§ 137.228 Upon what basis may the waiver request be denied?

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.

§ 137.229 What happens if the Secretary neither approves or denies a waiver request within the time specified in § 137.227?

The waiver request is deemed approved.

§ 137.230 Is the Secretary's decision on a waiver request final for the Department?

Yes, the Secretary's decision on a waiver request is final for the Department.

§ 137.231 May a Self-Governance Tribe appeal the Secretary's decision to deny its request for a waiver of a regulation promulgated under section 517 of the Act [25 U.S.C. 458aaa–16]?

The decision may not be appealed under these regulations but may be appealed by the Self-Governance Tribe in Federal Court under applicable law.

Subpart K—Withdrawal

§ 137.235 May an Indian Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?

Yes, an Indian Tribe may fully or partially withdraw from a participating inter-Tribal consortium or Tribal organization its share of any PSFAs included in a compact or funding agreement.

§ 137.236 When does a withdrawal become effective?

A withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating Tribal organization or inter-Tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on

(a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or

(b) Such date as may be mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the participating Tribal organization or inter-Tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian Tribe, inter-Tribal consortium, or Tribal organization.

§ 137.237 How are funds redistributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement and elects to enter a contract or compact?

When an Indian Tribe eligible to enter into a contract under Title I or a compact or funding agreement under Title V fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization, and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:

(a) The withdrawing Indian Tribe is entitled to its Tribal share of funds supporting those PSFAs that the Indian Tribe will be carrying out under its own contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-Tribal consortium or Tribal organization); and

(b) the funds referred to in paragraph (a) of this section must be transferred from the funding agreement of the inter-Tribal consortium or Tribal organization, on the condition that the provisions of sections 102 [25 U.S.C. 450f] and 105(i) of the Act [25 U.S.C. 450j], as appropriate, apply to the withdrawing Indian Tribe.

§ 137.238 How are funds distributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Indian Tribe and the withdrawing Indian Tribe elects not to enter a contract or compact?

All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Indian Tribe's returned PSFAs, less close out costs, shall be returned by the inter-Tribal consortium or Tribal organization to the IHS for operation of the PSFAs included in the withdrawal.

§ 137.239 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, is the resulting contract considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)]?

Yes, if the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, the resulting contract is considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)] at the option of the Indian Tribe.

Subpart L—Retrocession

§ 137.245 What is retrocession?

Retrocession means the return by a Self-Governance Tribe to the Secretary of PSFAs, that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

§ 137.246 How does a Self-Governance Tribe retrocede a PSFA?

The Self-Governance Tribe submits a written notice to the Director of its intent to retrocede. The notice must specifically identify those PSFAs being retroceded. The notice may also include a proposed effective date of the retrocession.

§ 137.247 What is the effective date of a retrocession?

Unless the request for retrocession is rescinded, the retrocession becomes effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of a specification, the retrocession becomes effective on:

(a) The earlier of 1 year after:

(1) The date of submission of the request, or

(2) The date on which the funding agreement expires; or

(b) Whatever date is mutually agreed upon by the Secretary and the retroceding Self-Governance Tribe.

§ 137.248 What effect will a retrocession have on a retroceding Self-Governance Tribe's rights to contract or compact under the Act?

A retrocession request shall not negatively affect:

(a) Any other contract or compact to which the retroceding Self-Governance Tribe is a party;

(b) Any other contracts or compacts the retroceding Self-Governance Tribe may request; and

(c) Any future request by such Self-Governance Tribe or an Indian Tribe to compact or contract for the same program.

§ 137.249 Will retrocession adversely affect funding available for the retroceded program?

No, the Secretary shall provide no less than the same level of funding that would have been available if there had been no retrocession.

§ 137.250 How are funds distributed when a Self-Governance Tribe fully or partially retrocedes from its compact or funding agreement?

Any funds not obligated by the Self-Governance Tribe and associated with the Self-Governance Tribe's returned PSFAs, less close out costs, must be returned by the Self-Governance Tribe to IHS for operation of the PSFA's associated with the compact or funding agreement from which the Self-Governance Tribe retroceded in whole or in part.

§ 137.251. What obligation does the retroceding Self-Governance Tribe have with respect to returning property that was provided by the Secretary under the compact or funding agreement and that was used in the operation of the retroceded program?

On the effective date of any retrocession, the retroceding Self-Governance Tribe, shall, at the option of the Secretary, deliver to the Secretary all requested property and equipment provided by the Secretary under the compact or funding agreement, to the extent used to carry out the retroceded PSFAs, which at the time of retrocession has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe in excess of $5,000 at the time of the retrocession.

Subpart M—Reassumption

§ 137.255 What does reassumption mean?

Reassumption means rescission by the Secretary without consent of the Self-Governance Tribe of PSFAs and associated funding in a compact or funding agreement and resuming responsibility to provide such PSFAs.

§ 137.256 Under what circumstances may the Secretary reassume a program, service, function, or activity (or portion thereof)?

(a) Subject to the steps in § 137.257, the Secretary may reassume a program, service, function, or activity (or portion thereof) and associated funding if the Secretary makes a specific finding relative to that PSFA of :

(1) Imminent endangerment of the public health caused by an act or omission of the Self-Governance Tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement; or

(2) Gross mismanagement with respect to funds transferred to the Self-Governance Tribe by a compact or funding agreement, as determined by the Secretary, in consultation with the Inspector General, as appropriate.

(b) Immediate reassumption may occur under additional requirements set forth in § 137.261.

§ 137.257 What steps must the Secretary take prior to reassumption becoming effective?

Except as provided in § 137.261 for immediate reassumption, prior to a reassumption becoming effective, the Secretary must:

(a) Notify the Self-Governance Tribe in writing by certified mail of the details of findings required under § 137.256(a)(1) and (2);

(b) Request specified corrective action within a reasonable period of time, which in no case may be less than 45 days;

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Self-Governance Tribe to overcome the conditions that led to the findings described under (a); and

(d) Provide the Self-Governance Tribe with a hearing on the record as provided under Subpart P of this part.

§ 137.258 Does the Self-Governance Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?

Yes, at the Self-Governance Tribe's request, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § 137.257(b).

§ 137.259 What happens if the Secretary determines that the Self-Governance Tribe has not corrected the conditions that the Secretary identified in the notice?

(a) The Secretary shall provide a second written notice by certified mail to the Self-Governance Tribe served by the compact or funding agreement that the compact or funding agreement will be rescinded, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the reassumption;

(2) The details and facts supporting the intended reassumption; and

(3) Instructions that explain the Indian Tribe's right to a formal hearing within 30 days of receipt of the notice.

§ 137.260 What is the earliest date on which a reassumption can be effective?

Except as provided in § 137.261, no PSFA may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Self-Governance Tribe with an opportunity

to take corrective action in response to any adverse final ruling.

§ 137.261 Does the Secretary have the authority to immediately reassume a PSFA?

Yes, the Secretary may immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding upon providing to the Self-Governance Tribe written notice in which the Secretary makes a finding:

(a) of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian Tribe; and

(b) the endangerment arises out of a failure to carry out the compact or funding agreement.

§ 137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?

If the Secretary immediately reassumes a PSFA, the Secretary must provide the Self-Governance Tribe with a hearing under Subpart P of this part not later than 10 days after such reassumption, unless the Self-Governance Tribe and the Secretary agree to an extension.

§ 137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under § 137.257?

Yes, the Secretary may make a grant for the purpose of obtaining technical assistance as provided in section 103 of the Act [25 U.S.C. 458aaa-h].

§ 137.264 To what extent may the Secretary require the Self-Governance Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the reassumed program?

On the effective date of any reassumption, the Self-Governance Tribe, shall, at the option of the Secretary and only to the extent requested by the Secretary, deliver to the Secretary property and equipment provided by the Secretary under the compact or funding agreement, to the extent the property was used to directly carry out the reassumed program, service, function, or activity (or portion thereof), provided that at the time of reassumption the property has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe, in excess of $5,000 at the time of the reassumption.

§ 137.265 May a Tribe be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption?

Yes, a Tribe may be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption.

Subpart N—Construction

Purpose and Scope

§ 137.270 What is covered by this subpart?

This subpart covers IHS construction projects carried out under section 509 of the Act [25 U.S.C. 458aaa-8].

§ 137.271 Why is there a separate subpart in these regulations for construction project agreements?

Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Provisions of a construction project agreement and this subpart shall be liberally construed in favor of the Self-Governance Tribe.

§ 137.272 What other alternatives are available for Self-Governance Tribes to perform construction projects?

Self-Governance Tribes also have the option of performing IHS construction projects under a variety of other legal authorities, including but not limited to Title I of the Act, the Indian Health Care Improvement Act, Public Law 94–437, and Public Law 86–121. This subpart does not cover projects constructed pursuant to agreements entered into under these authorities.

§ 137.273 What are IHS construction PSFAs?

IHS construction PSFAs are a combination of construction projects as defined in § 137.280 and construction programs.

§ 137.274 Does this subpart cover construction programs?

No, except as provided in § 137.275, this subpart does not cover construction programs such as the:

(a) Maintenance and Improvement Program;

(b) Construction program functions; and,

(c) Planning services and construction management services.

§ 137.275 May Self-Governance Tribes include IHS construction programs in a construction project agreement or in a funding agreement?

Yes, Self-Governance Tribes may choose to assume construction programs in a construction project agreement, in a funding agreement, or in a combination of the two. These programs may include the following:

(a) Maintenance and improvement program;

(b) Construction program functions; and

(c) Planning services and construction management services.

Construction Definitions

§ 137.280 Construction Definitions.

ALJ means administrative law judge.

APA means Administrative Procedures Act, 5 U.S.C. 701—706.

Budget means a statement of the funds required to complete the scope of work in a construction project agreement. For cost reimbursement agreements, budgets may be stated using broad categories such as planning, design, construction, project administration, and contingency. For fixed price agreements, budgets may be stated as lump sums, unit cost pricing, or a combination thereof.

Categorical exclusion means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

CEQ means Council on Environmental Quality in the Office of the President.

Construction management services (CMS) means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. CMS activities typically include:

(1) Coordination and information exchange between the Self-Governance Tribe and the Federal Government;

(2) Preparation of a Self-Governance Tribe's project agreement; and

(3) A Self-Governance Tribe's subcontract scope of work identification and subcontract preparation, and competitive selection of construction contract subcontractors.

Construction phase is the phase of a construction project agreement during which the project is constructed, and includes labor, materials, equipment and services necessary to complete the work, in accordance with the construction project agreement.

Construction project means:

(1) An organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities described in a project agreement, and

(2) Does not include construction program administration and activities described in sections 4(m)(1) through (3) of the Act [25 U.S.C. 4b(m)(1) through (3)], that may otherwise be included in a funding agreement under section 505 of the Act [25 U.S.C. 458aaa–4].

Construction project agreement means a negotiated agreement between the Secretary and a Self-Governance Tribe, that at a minimum:

(1) Establishes project phase start and completion dates;

(2) Defines a specific scope of work and standards by which it will be accomplished;

(3) Identifies the responsibilities of the Self-Governance Tribe and the Secretary;

(4) Addresses environmental considerations;

(5) Identifies the owner and operations and maintenance entity of the proposed work;

(6) Provides a budget;

(7) Provides a payment process; and

(8) Establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

Design phase is the phase of a construction project agreement during which project plans, specifications, and other documents are prepared that are used to build the project. Site investigation, final site selection activities and environmental review and determination activities are completed in this phase if not conducted as a part of the planning phase.

Maintenance and improvement program:

(1) As used in this subpart means the program that provides funds for eligible facilities for the purpose of:

(i) Performing routine maintenance;

(ii) Achieving compliance with accreditation standards;

(iii) Improving and renovating facilities;

(iv) Ensuring that Indian health care facilities meet existing building codes and standards; and

(v) Ensuring compliance with public law building requirements.

(2) The maintenance and improvement program is comprised of routine maintenance and repair funding and project funding. Typical maintenance and improvement projects have historically been funded out of regional or national project pools and may include, but are not limited to, total replacement of a heating or cooling system, remodel of a medical laboratory, removal of lead based paint, abatement of asbestos and abatement of underground fuel storage tanks. Maintenance and repair program funding provided under a funding agreement is not covered under this subpart.

NEPA means the National Environmental Policy Act of 1969 [42 U.S.C. 4321 *et seq.*].

NHPA means the National Historic Preservation Act [16 U.S.C. 470 *et seq.*].

Planning phase is the phase of a construction project agreement during which planning services are provided.

Planning services may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed, conducting environmental review activities and justifying the need for the project.

SHPO means State Historic Preservation Officer.

Scope of work or specific scope of work means a brief written description of the work to be accomplished under the construction project agreement, sufficient to confirm that the project is consistent with the purpose for which the Secretary has allocated funds.

THPO means Tribal Historic Preservation Officer.

NEPA Process

§ 137.285 Are Self-Governance Tribes required to accept Federal environmental responsibilities to enter into a construction project agreement?

Yes, under section 509 of the Act [25 U.S.C. 458aaa–8], Self-Governance Tribes must assume all Federal responsibilities under the NEPA of 1969 [42 U.S.C. 4321 *et seq.*] and 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, but only those responsibilities directly related to the completion of the construction project being assumed.

§ 137.286 Do Self-Governance Tribes become Federal agencies when they assume these Federal environmental responsibilities?

No, while Self-Governance Tribes are required to assume Federal environmental responsibilities for projects in place of the Secretary, Self-Governance Tribes do not thereby become Federal agencies. However, because Self-Governance Tribes are assuming the responsibilities of the Secretary for the purposes of performing these Federal environmental responsibilities, Self-Governance Tribes will be considered the equivalent of Federal agencies for certain purposes as set forth in this subpart.

§ 137.287 What is the National Environmental Policy Act (NEPA)?

The NEPA is a procedural law that requires Federal agencies to follow established environmental review procedures, which include reviewing and documenting the environmental impact of their actions. NEPA establishes a comprehensive policy for protection and enhancement of the environment by the Federal Government; creates the Council on Environmental Quality in the Office of the President; and directs Federal agencies to carry out the policies and procedures of the Act. CEQ regulations (40 CFR 1500–1508) establish three levels of environmental review: categorical exclusions, environmental assessments, and environmental impact statements.

§ 137.288 What is the National Historic Preservation Act (NHPA)?

The NHPA requires Federal agencies to take into account the effects of their undertakings, such as construction projects, on properties covered by the NHPA, such as historic properties, properties eligible for listing on the National Register of Historic Places, or properties that an Indian Tribe regards as having religious and/or cultural importance. Section 106 of the NHPA [16 U.S.C. 470f] requires Federal agencies to afford the Advisory Council on Historic Preservation, acting through the SHPO or the THPO, a reasonable opportunity to comment on such undertakings.

§ 137.289 What is a Federal undertaking under NHPA?

The Advisory Council on Historic Preservation has defined a Federal undertaking in 36 CFR 800.16(y) as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

§ 137.290 What additional provisions of law are related to NEPA and NHPA?

(a) Depending upon the nature and the location of the construction project, environmental laws related to NEPA and NHPA may include:

(1) Archaeological and Historical Data Preservation Act [16 U.S.C. 469];

(2) Archeological Resources Protection Act [16 U.S.C. 470aa];

(3) Clean Air Act [42 U.S.C. 7401];

(4) Clean Water Act [33 U.S.C. 1251];

(5) Coastal Barrier Improvement Act [42 U.S.C. 4028 and 16 U.S.C. Sec. 3501];

(6) Coastal Barrier Resources Act [16 U.S.C. 3501];

(7) Coastal Zone Management Act [16 U.S.C. 1451];

(8) Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601];

(9) Endangered Species Act [16 U.S.C. 1531 *et seq.*];

(10) Farmland Protection Policy Act [7 U.S.C. 4201 *et seq.*];

(11) Marine Protection, Research, and Sanctuaries Act [33 U.S.C. 1401–1445; 16 U.S.C. 1431–1447F; 33 U.S.C. 2801–2805];

(12) National Historic Preservation Act [16 U.S.C. 470 *et seq.*];

(13) National Trails System Act [16 U.S.C. 1241];

(14) Native American Graves Protection and Repatriation Act [25 U.S.C. 3001];

(15) Noise Control Act [42 U.S.C.4901];

(16) Resource Conservation and Recovery Act [42 U.S.C. 6901];

(17) Safe Drinking Water Act [42 U.S.C. 300F];

(18) Toxic Substance Control Act [15 U.S.C. 2601];

(19) Wild and Scenic Rivers Act [16 U.S.C. 1271]; and

(20) Wilderness Act [16 U.S.C. 1131].

(b) This section provides a list of environmental laws for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.291 May Self-Governance Tribes carry out construction projects without assuming these Federal environmental responsibilities?

Yes, but not under section 509 of the Act [25 U.S.C. 458aaa–8]. Self-Governance Tribes may otherwise elect to perform construction projects, or phases of construction projects, under other legal authorities (see § 137.272).

§ 137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

Self-Governance Tribes assume environmental responsibilities by:

(a) Adopting a resolution or taking an equivalent Tribal action which:

(1) Designates a certifying officer to represent the Self-Governance Tribe and to assume the status of a responsible Federal official under NEPA, NHPA, and related provisions of law; and

(2) Accepts the jurisdiction of the Federal court, as provided in § 137.310 and § 137.311 for purposes of enforcement of the Federal environmental responsibilities assumed by the Self-Governance Tribe; and

(b) Entering into a construction project agreement under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?

No, the Self-Governance Tribe may adopt a single resolution or take equivalent Tribal action to assume environmental responsibilities for a single project, multiple projects, a class of projects, or all projects performed under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.294 What is the typical IHS environmental review process for construction projects?

(a) Most IHS construction projects normally do not have a significant impact on the environment, and therefore do not require environmental impact statements (EIS). Under current IHS procedures, an environmental review is performed on all construction projects. During the IHS environmental review process, the following activities may occur:

(1) Consult with appropriate Tribal, Federal, state, and local officials and interested parties on potential environmental effects;

(2) Document assessment of potential environmental effects; (IHS has developed a form to facilitate this process.)

(3) Perform necessary environmental surveys and inventories;

(4) Consult with the Advisory Council on Historic Preservation, acting through the SHPO or THPO, to ensure compliance with the NHPA;

(5) Determine if extraordinary or exceptional circumstances exist that would prevent the project from meeting the criteria for categorical exclusion from further environmental review under NEPA, or if an environmental assessment is required;

(6) Obtain environmental permits and approvals; and

(7) Identify methods to avoid or mitigate potential adverse effects;

(b) This section is for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.295 May Self-Governance Tribes elect to develop their own environmental review process?

Yes, Self-Governance Tribes may develop their own environmental review process or adopt the procedures of the IHS or the procedures of another Federal agency.

§ 137.296 How does a Self-Governance Tribe comply with NEPA and NHPA?

Self-Governance Tribes comply with NEPA and the NHPA by adopting and following:

(a) their own environmental review procedures;

(b) the procedures of the IHS; and/or

(c) the procedures of another Federal agency.

§ 137.297 If the environmental review procedures of a Federal agency are adopted by a Self-Governance Tribe, is the Self-Governance Tribe responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?

No, the Federal agency is responsible for ensuring its own policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws, not the Self-Governance Tribe.

§ 137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, but Self-Governance Tribes may at their option, choose to voluntarily comply with Executive Orders. For facilities where ownership will vest with the Federal Government upon completion of the construction, Tribes and the Secretary may agree to include the goals and objectives of Executive Orders in the codes and standards of the construction project agreement.

§ 137.299 Are Federal funds available to cover the cost of Self-Governance Tribes carrying out environmental responsibilities?

Yes, funds are available:

(a) for project-specific environmental costs through the construction project agreement; and

(b) for environmental review program costs through a funding agreement and/or a construction project agreement.

§ 137.300 Since Federal environmental responsibilities are new responsibilities, which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?

Yes, the Secretary must transfer not less than the amount of funds that the Secretary would have otherwise used to carry out the Federal environmental responsibilities assumed by the Self-Governance Tribe.

§ 137.301 How are project and program environmental review costs identified?

(a) The Self-Governance Tribe and the Secretary should work together during the initial stages of project development to identify program and project related costs associated with carrying out environmental responsibilities for proposed projects. The goal in this process is to identify the costs associated with all foreseeable environmental review activities.

(b) If unforeseen environmental review and compliance costs are identified during the performance of the construction project, the Self-Governance Tribe or, at the request of the Self-Governance Tribe, the Self-Governance Tribe and the Secretary (with or without amendment as required by § 137.363) may do one or more of the following:

(1) Mitigate adverse environmental effects;

(2) Alter the project scope of work; and/or

(3) Add additional program and/or project funding, including seeking supplemental appropriations.

§ 137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?

(a) Yes, start-up costs are available as provided in section 508(c) of the Act [25 U.S.C. 458aaa–7(c)]. During the initial year that these responsibilities are assumed, the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] must include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the agreement necessary:

(1) To plan, prepare for, and assume operation of the environmental responsibilities; and

(2) To ensure compliance with the terms of the agreement and prudent management.

(b) Costs incurred before the initial year that the agreement is in effect may not be included in the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

§ 137.303 Are Federal or other funds available for training associated with Tribal assumption of environmental responsibilities?

Yes, Self-Governance Tribes may use construction program and project funds for training and program development. Training and program development funds may also be available from other Federal agencies, such as the Environmental Protection Agency and the National Park Service, state and local governments, and private organizations.

§ 137.304 May Self-Governance Tribes buy back environmental services from the IHS?

Yes, Self-Governance Tribes may ''buy back'' project related services in their construction project agreement, including design and construction engineering, and environmental compliance services from the IHS in accordance with Section 508(f) of the Act [25 U.S.C. 458aaa–7(f)] and § 137.95, subject to the availability of the IHS's capacity to conduct the work.

§ 137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?

Yes, Self-Governance Tribes assuming Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8] are entitled to receive equal consideration, on the same basis as any Federal agency, for lead, cooperating, and joint lead agency status. For informational purposes, the terms ''lead,'' ''cooperating,'' and ''joint lead agency'' are defined in the CEQ regulations at 40 CFR 1508.16, 1508.5, and 1501.5 respectively.

§ 137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?

Self-Governance Tribes may be recognized as having lead, cooperating, or joint lead agency status through funding or other agreements with other agencies. To the extent that resources are available, the Secretary will encourage and facilitate Federal, state, and local agencies to enter into agreements designating Tribes as lead, cooperating, or joint lead agencies for environmental review purposes.

§ 137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] remain with the Secretary. Federal agencies, including the IHS, retain responsibility for ensuring their environmental review procedures meet the requirements of NEPA, NHPA and related provisions of law, as called for in § 137.297.

(b) The Secretary will provide information updating and changing IHS agency environmental review policy and procedures to all Self-Governance Tribes implementing a construction project agreement, and to other Indian Tribes upon request. If a Self-Governance Tribe participating under section 509 of the Act [25 U.S.C. 458aaa–8] does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide technical assistance to the Self-governance tribe to assist the Self-governance Tribe in carrying out Federal environmental responsibilities.

§ 137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, the Secretary does not have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.309 How are NEPA and NHPA obligations typically enforced?

NEPA and NHPA obligations are typically enforced by interested parties who may file lawsuits against Federal agencies alleging that the agencies have not complied with their legal obligations under NEPA and NHPA. These lawsuits may only be filed in Federal court under the provisions of the APA, 5 U.S.C. 701–706. Under the APA, a Federal judge reviews the Federal agency's actions based upon an administrative record prepared by the Federal agency. The judge gives appropriate deference to the agency's decisions and does not substitute the court's views for those of the agency. Jury trials and civil discovery are not permitted in APA proceedings. If a Federal agency has failed to comply with NEPA or NHPA, the judge may grant declaratory or injunctive relief to

the interested party. No money damages or fines are permitted in APA proceedings.

§ 137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

Yes, but only as provided in this section. Unless Self-Governance Tribes consent to the jurisdiction of a court, Self-Governance Tribes are immune from civil lawsuits. Self-Governance Tribes electing to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8] must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Self-Governance Tribes are not required to waive any other immunity.

§ 137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

(a) Yes, Section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)] only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Self-Governance Tribes are not required to subject themselves to suit in their own name, to submit to trial by jury or civil discovery, or to waive immunity for money damages, attorneys fees, or fines.

(b) Self-Governance Tribes may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying official's actions are based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities; and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.

§ 137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

Only the designated Tribal certifying officer acting in his or her official capacity may be sued. Self-Governance Tribes and other Tribal officials are not proper defendants in lawsuits brought under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)].

Notification (Prioritization Process, Planning, Development and Construction)

§ 137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?

Yes, before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes. In addition, before spending any funds for planning, design, construction, or renovation projects, whether subject to a competitive application and ranking process or not, the Secretary must consult with any Indian Tribe that would be significantly affected by the expenditure to determine and honor Tribal preferences whenever practicable concerning the size, location, type, and other characteristics of the project.

§ 137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?

In addition to the requirements contained in section 513 of the Act [25 U.S.C. 458aaa–12], Indian Tribes and the Secretary are encouraged to jointly identify health facility and sanitation needs at the earliest possible date for IHS budget formulation. In developing budget justifications for specific projects to be proposed to Congress, the Secretary shall follow the preferences of the affected Indian Tribe(s) to the greatest extent feasible concerning the size, location, type, and other characteristics of the project.

§ 137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?

(a) Yes, within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the Secretary shall notify, by registered mail with return receipt in order to document mailing, the Indian Tribe(s) to be benefitted by the availability of the funds for each phase of a project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a construction project proposal.

(b) The Secretary shall, within 30 days after receiving a request from an Indian Tribe, furnish the Indian Tribe with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(c) An Indian Tribe is not required to request this information prior to either submitting a notification of intent or a construction project proposal.

(d) The Secretary shall have a continuing responsibility to furnish information to the Indian Tribes.

Project Assumption Process

§ 137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) A Self-Governance Tribe may start the process of developing a construction project agreement by:

(1) Notifying the Secretary in writing that the Self-Governance Tribe wishes to enter into a pre-agreement negotiation phase as set forth in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)]; or

(2) Submitting a proposed construction project agreement. This proposed agreement may be the final proposal, or it may be a draft for consideration and negotiation, or

(3) A combination of the actions described in paragraphs (a)(1) and (2) of this section.

(b) Upon receiving a Self-Governance Tribe's request to enter into a pre-negotiation phase the Secretary shall take the steps outlined in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)].

§ 137.326 What must a Tribal proposal for a construction project agreement contain?

A construction project proposal must contain all of the required elements of a construction project agreement as defined in § 137.280. In addition to these minimum requirements, Self-Governance Tribes may propose additional items.

§ 137.327 May multiple projects be included in a single construction project agreement?

Yes, a Self-Governance Tribe may include multiple projects in a single construction project agreement proposal or may add additional approved projects by amendment(s) to an existing construction project agreement.

§ 137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?

(a) No, the Self-Governance Tribe and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects.

(b) The Secretary may provide, or the Self-Governance Tribe may request, Federal construction guidelines and

manuals for consideration by the Self-Governance Tribe in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards) are consistent with or exceed otherwise applicable nationally recognized standards, the Secretary must accept the Tribally proposed standards.

§ 137.329 What environmental considerations must be included in the construction project agreement?

The construction project agreement must include:

(a) Identification of the Tribal certifying officer for environmental review purposes,

(b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in §§ 137.310 and 137.311.

(c) Identification of the environmental review procedures adopted by the Self-Governance Tribe, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Self-Governance Tribe's adopted procedures.

§ 137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?

The Self-Governance Tribe may submit a final construction project proposal to the Secretary. No later than 30 days after the Secretary receives the final construction project proposal, or within a longer time agreed to by the Self-Governance Tribe in writing, the Secretary shall review and make a determination to approve or reject the construction project proposal in whole or in part.

§ 137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?

No, the Secretary may not reject a final construction project proposal based on a determination of Tribal capacity or capability.

§ 137.332 On what basis may the Secretary reject a final construction project proposal?

(a) The only basis for rejection of project activities in a final construction project proposal are:

(1) The amount of funds proposed in the final construction project proposal exceeds the applicable funding level for the construction project as determined under sections 508(c) [25 U.S.C. 458aaa–7(c)] and 106 of the Act [25 U.S.C. 450j–1].

(2) The final construction project proposal does not meet the minimum content requirements for construction project agreements set forth in section 501(a)(2) of the Act [25 U.S.C. 458aaa(a)(2)]; and

(3) The final construction project proposal on its face clearly demonstrates that the construction project cannot be completed as proposed.

(b) For construction programs proposed to be included in a construction project agreement, the Secretary may also reject that portion of the proposal that proposes to assume an inherently Federal function that cannot legally be delegated to the Self-Governance Tribe.

§ 137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?

Whenever the Secretary rejects a final construction project proposal in whole or in part, the Secretary must:

(a) Send the Self-Governance Tribe a timely written notice of rejection that shall set forth specific finding(s) that clearly demonstrates, or that is supported by controlling legal authority supporting the rejection;

(b) Within 20 days, provide all documents relied on in making the rejection decision to the Self-Governance Tribe;

(c) Provide assistance to the Self-Governance Tribe to overcome any objections stated in the written notice of rejection;

(d) Provide the Self-Governance Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal of the decision to reject the final construction contract proposal, under the regulations set forth in subpart P of this part, except that the Self-Governance Tribe may, in lieu of filing an appeal, initiate an action in Federal district court and proceed directly under sections 511 [25 U.S.C. 458aaa–10] and 110(a) of the Act [25 U.S.C. 450m–1(a)]. With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final construction project proposal (or portion thereof); and

(e) Provide the Self-Governance Tribe with the option of entering into the severable portions of a final proposed construction project agreement (including a lesser funding amount) that the Secretary did not reject, subject to any additional alterations necessary to conform the construction project agreement to the severed provisions. Exercising this option does not affect the Self-Governance Tribe's right to appeal the portion of the final construction project proposal that was rejected by the Secretary.

§ 137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?

If the Secretary fails to notify the Self-Governance Tribe of the decision to approve or reject within 30 days (or a longer period if agreed to by the Self-Governance Tribe in writing), then the proposal will be deemed approved by the Secretary.

§ 137.335 What costs may be included in the budget for a construction agreement?

(a) A Self-Governance Tribe may include costs allowed by applicable OMB Circulars, and costs allowed under sections 508(c) [25 U.S.C. 458aaa–7(c)], 106 [25 U.S.C. 450j–1] and 105 (m) of the Act [25 U.S.C. 450j(m)]. The costs incurred will vary depending on which phase of the construction process the Self-Governance Tribe is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement is fixed price or cost-reimbursement, budgets may include costs or fees associated with the following:

(1) Construction project proposal preparation;

(2) Conducting community meetings to develop project documents;

(3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans and specifications, and to assist in oversight of the design during construction;

(4) Real property lease or acquisition;

(5) Development of project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance;

(6) Project management, superintendence, safety and inspection;

(7) Travel, including local travel incurred as a direct result of conducting the construction project agreement and remote travel in conjunction with the project;

(8) Consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel

who provide services, to include construction management services;

(9) Project site development;

(10) Project construction cost;

(11) General, administrative overhead, and indirect costs;

(12) Securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(13) Other costs directly related to performing the construction project agreement;

(14) Project Contingency:

(i) A cost-reimbursement project agreement budgets contingency as a broad category. Project contingency remaining at the end of the project is considered savings.

(ii) Fixed-price agreements budget project contingency in the lump sum price or unit price.

(c) In the case of a fixed-price project agreement, a reasonable profit determined by taking into consideration the relevant risks and local market conditions.

§ 137.336 What is the difference between fixed-price and cost-reimbursement agreements?

(a) Cost-reimbursement agreements generally have one or more of the following characteristics:

(1) Risk is shared between IHS and the Self-Governance Tribe;

(2) Self-Governance Tribes are not required to perform beyond the amount of funds provided under the agreement;

(3) Self-Governance Tribes establish budgets based upon the actual costs of the project and are not allowed to include profit;

(4) Budgets are stated using broad categories, such as planning, design, construction project administration, and contingency;

(5) The agreement funding amount is stated as a ''not to exceed'' amount;

(6) Self-Governance Tribes provide notice to the IHS if they expect to exceed the amount of the agreement and require more funds;

(7) Excess funds remaining at the end of the project are considered savings; and

(8) Actual costs are subject to applicable OMB circulars and cost principles.

(b) Fixed Price agreements generally have one or more of the following characteristics:

(1) Self-Governance Tribes assume the risk for performance;

(2) Self-Governance Tribes are entitled to make a reasonable profit;

(3) Budgets may be stated as lump sums, unit cost pricing, or a combination thereof;

(4) For unit cost pricing, savings may occur if actual quantity is less than estimated; and,

(5) Excess funds remaining at the end of a lump sum fixed price project are considered profit, unless, at the option of the Self-Governance Tribe, such amounts are reclassified in whole or in part as savings.

§ 137.337 What funding must the Secretary provide in a construction project agreement?

The Secretary must provide funding for a construction project agreement in accordance with sections 106 [25 U.S.C. 450j–1] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)].

§ 137.338 Must funds from other sources be incorporated into a construction project agreement?

Yes, at the request of the Self-Governance Tribe, the Secretary must include funds from other agencies as permitted by law, whether on an ongoing or a one-time basis.

§ 137.339 May a Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?

Yes, notwithstanding any other provision of law, all funds provided under a construction project agreement may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

§ 137.340 May a Self-Governance Tribe contribute funding to a project?

Yes, the Self-Governance Tribe and the Secretary may jointly fund projects. The construction project agreement should identify the Secretarial amount and any Tribal contribution amount that is being incorporated into the construction project agreement. The Self-Governance Tribe does not have to deposit its contribution with the Secretary.

§ 137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?

(a) For all construction project agreements, advance payments shall be made annually or semiannually, at the Self-Governance Tribe's option. The initial payment shall include all contingency funding for the project or phase of the project to the extent that there are funds appropriated for that purpose.

(b) The amount of subsequent payments is based on the mutually agreeable project schedule reflecting:

(1) Work to be accomplished within the advance payment period,

(2) Work already accomplished, and

(3) Total prior payments for each annual or semiannual advance payment period.

(c) For lump sum, fixed price agreements, at the request of the Self-Governance Tribe, payments shall be based on an advance payment period measured as follows:

(1) One year; or

(2) Project Phase(e.g., planning, , design, construction.) If project phase is chosen as the payment period, the full amount of funds necessary to perform the work for that phase of the construction project agreement is payable in the initial advance payment. For multi-phase projects, the planning and design phases must be completed prior to the transfer of funds for the associated construction phase. The completion of the planning and design phases will include at least one opportunity for Secretarial approval in accordance with § 137.360.

(d) For the purposes of payment, Sanitation Facilities Construction Projects authorized pursuant to Pub. L. 86–121, are considered to be a single construction phase and are payable in a single lump sum advance payment in accordance with paragraph (c)(2) of this section.

(e) For all other construction project agreements, the amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year.

(f) Any agreement to advance funds under paragraphs (b), (c) or (d) of this section is subject to the availability of appropriations.

(g) (1) Initial advance payments are due within 10 days of the effective date of the construction project agreement; and

(2) subsequent payments are due:

(i) Within 10 days of apportionment for annual payments or

(ii) Within 10 days of the start date of the project phase for phase payments.

§ 137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?

All funds, including contingency funds, remaining at the conclusion of the project are considered savings and may be used by the Self-Governance Tribe to provide additional services for the purpose for which the funds were originally appropriated. No further approval or justifying documentation is required before the expenditure of the remaining funds.

§ 137.343 What happens to funds remaining at the conclusion of a fixed price construction project?

(a) For lump sum fixed price construction project agreements, all funds remaining at the conclusion of the project are considered profits and belong to the Self-Governance Tribe.

(b) For fixed price construction project agreements with unit price components, all funds remaining that are associated with overestimated unit price quantities are savings and may be used by the Self-Governance Tribe in accordance with section 137.342. All other funds remaining at the conclusion of the project are considered profit and belong to the Self-Governance Tribe.

(c) At the option of the Self-Governance Tribe, funds otherwise identified in paragraphs (a) and (b) as ''profit'' may be reclassified, in whole or in part, as savings and to that extent may be used by the Self-Governance Tribe in accordance with section 137.142.

§ 137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?

Yes, a Self-Governance Tribe may reallocate funds among construction project agreements to the extent not prohibited by applicable appropriation law(s).

Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements

§ 137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?

Yes, a Self-Governance Tribe assumes responsibility for completing a construction project, including day-to-day on-site management and administration of the project, in accordance with the negotiated construction project agreement. However, Self-Governance Tribes are not required to perform beyond the amount of funds provided. For example, a Self-Governance Tribe may encounter unforeseen circumstances during the term of a construction project agreement. If this occurs, options available to the Self-Governance Tribe include, but are not limited to:

(a) Reallocating existing funding;

(b) Reducing/revising the scope of work that does not require an amendment because it does not result in a significant change;

(c) Utilizing savings from other projects;

(d) Requesting additional funds or appropriations;

(e) Utilizing interest earnings;

(f) Seeking funds from other sources; and/or

(g) Redesigning or re-scoping that does result in a significant change by amendment as provided in §§ 137.363 and 137.364.

§ 137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?

Yes, a Self-Governance Tribe must provide the Secretary with construction project progress and financial reports semiannually or, at the option of the Self-Governance Tribe, on a more frequent basis. Self-Governance Tribes are only required to submit the reports, as negotiated in the Construction Project Agreement, after funds have been transferred to the Self-Governance Tribe for a construction project. Construction project progress reports and financial reports are only required for active construction projects.

§ 137.352 What is contained in a construction project progress report?

Construction project progress reports contain information about accomplishments during the reporting period and issues and concerns of the Self-Governance Tribe, if any.

§ 137.353 What is contained in a construction project financial report?

Construction project financial reports contain information regarding the amount of funds expended during the reporting period, and financial concerns of the Self-Governance Tribe, if any.

Roles of the Secretary in Establishing and Implementing Construction Project Agreements

§ 137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?

The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Self-Governance Tribe in advance of construction if the Self-Governance Tribe is required to submit planning or design documents as a part of the scope of work under a construction project agreement.

§ 137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?

Yes, but only if there is an amendment to the construction project agreement that results in a significant change in the original scope of work.

§ 137.362 May construction project agreements be amended?

Yes, the Self-Governance Tribe, at its discretion, may request the Secretary to amend a construction project agreement to include additional projects. In addition, amendments are required if there is a significant change from the original scope of work or if funds are added by the Secretary. The Self-Governance Tribe may make immaterial changes to the performance period and make budget adjustments within available funding without an amendment to the construction project agreement.

§ 137.363 What is the procedure for the Secretary's review and approval of amendments?

(a) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance Tribe, the Secretary intends to disapprove the proposed amendment, then the Secretary shall follow the procedures set forth in § 137.330 through 137.334.

(b) The time allowed for Secretarial review, comment, and approval of amendments is 30 days, or within a longer time if agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 30 days shall be deemed approved.

(c) The timeframe set forth in paragraph (b) of this section is intended to be the maximum time and may be reduced based on urgency and need, by agreement of the parties. If the Self-Governance Tribe requests reduced timeframes for action due to unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested timeframes.

§ 137.364 What constitutes a significant change in the original scope of work?

A significant change in the original scope of work is:

(a) A change that would result in a cost that exceeds the total of the project funds available and the Self-Governance Tribe's contingency funds; or

(b) A material departure from the original scope of work, including substantial departure from timelines negotiated in the construction project agreement.

§ 137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?

(a) The Secretary shall review and approve planning documents to ensure

compliance with planning standards identified in the construction project agreement. The Secretary shall review and approve design documents for general compliance with requirements of the construction project agreement.

(b) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance Tribe, the Secretary intends to disapprove the documents, then the Secretary shall follow the procedures set forth in § 137.333.

(c) The time allowed for Secretarial review, comment, and approval of planning and design documents is 21 days, unless otherwise agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 21 days shall be deemed approved.

§ 137.366 May the Secretary conduct onsite project oversight visits?

Yes, the Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule negotiated in the construction project agreement. The Secretary must provide the Self-Governance Tribe with reasonable advance written notice to assist the Self-Governance Tribe in coordinating the visit. The purpose of the visit is review the progress under the construction project agreement. At the request of the Self-Governance Tribe, the Secretary must provide the Self-Governance Tribe a written site visit report.

§ 137.367 May the Secretary issue a stop work order under a construction project agreement?

No, the Secretary has no role in the day-to-day management of a construction project.

§ 137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8]?

No, the Secretary is not responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8].

Other

§ 137.370 Do all provisions of this part apply to construction project agreements under this subpart?

Yes, to the extent the provisions are not inconsistent with the provisions in this subpart. Provisions that do not apply include: programmatic reports and data requirements; reassumption; compact and funding agreement review, approval, and final offer process; and compact and funding agreement contents.

§ 137.371 Who takes title to real property purchased with funds provided under a construction project agreement?

The Self-Governance Tribe takes title to the real property unless the Self-Governance Tribe requests that the Secretary take title to the property.

§ 137.372 Does the Secretary have a role in the fee-to-trust process when real property is purchased with construction project agreement funds?

No, the Secretary does not have a role in the fee-to-trust process except to provide technical assistance if requested by the Self-Governance Tribe.

§ 137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary to take fee title to the property.

§ 137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring or leasing real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary take fee title to the property. The Self-Governance Tribe is responsible for acquiring all real property needed to perform a construction project under a construction project agreement, not the Secretary. The Secretary shall not withhold funds or refuse to enter into a construction project agreement because of a disagreement between the Self-Governance Tribe and the Secretary over the Self-Governance Tribe's decisions to purchase or lease real property.

§ 137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?

Yes, Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] are eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States.

§ 137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] subject to Federal metric requirements?

No, however, the Self-Governance Tribe and the Secretary may negotiate the use of Federal metric requirements in the construction project agreement when the Self-Governance Tribe will design and/or construct an IHS facility that the Secretary will own and operate.

§ 137.377 Do Federal procurement laws and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, unless otherwise agreed to by the 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 section 509 of the Act [25 U.S.C. 458aaa–8]. The Secretary and the Self-Governance Tribe may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction project agreement or funding agreement. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

§ 137.378 Do the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?

No, the Federal Davis-Bacon Act and wage rates do not apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds.

§ 137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?

Davis-Bacon Act wage rates only apply to laborers and mechanics employed by the contractors and subcontractors (excluding Indian Tribes, inter-Tribal consortia, and Tribal organizations) retained by Self-Governance Tribes to perform construction. The Davis-Bacon Act and wage rates do not apply when Self-Governance Tribes perform work with their own employees.

Subpart O—Secretarial Responsibilities

Budget Request

§ 137.401 What role does Tribal consultation play in the IHS annual budget request process?

The IHS will consult with Tribes on budget issues consistent with Administration policy on Tribal consultation.

Reports

§ 137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?

Yes, no later than January 1 of each year after the date of enactment of the Tribal Self-Governance Amendments of 2000, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of Title V. The report shall include a detailed analysis of the funding requirements presently funded or unfunded for each Indian Tribe or Tribal organization, either directly by the Secretary, under self-determination contracts under Title I, or under compacts and funding agreements authorized under Title V.

§ 137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?

No, in compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V.

§ 137.407 What guidelines will be used by the Secretary to compile information required for the report?

The report shall be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds. The report must identify:

(a) The relative costs and benefits of self-governance, including savings;

(b) 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;

(c) The funds transferred to each Self-Governance Tribe and the corresponding reduction in the Federal bureaucracy;

(d) The funding formula for individual Tribal shares of all headquarters' funds, together with the comments of affected Self-Governance Tribes, developed under § 137.405 of this subpart; 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.

Subpart P—Appeals

§ 137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m–1] does the term contract include compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, for the purposes of section 110 of the Act [25 U.S.C. 450m–1] the term ''contract'' includes compacts, funding agreements, and construction project agreements entered into under Title V.

Post-Award Disputes

§ 137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V.

Pre-Award Disputes

§ 137.415 What decisions may an Indian Tribe appeal under § 137.415 through 137.436?

An Indian Tribe may appeal:

(a) A decision to reject a final offer, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(c) A decision to rescind and reassume a compact or funding agreement, in whole or in part, under section 507(a)(2) of the Act [25 U.S.C. 458aaa–6(a)(2)], except for immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)];

(d) A decision to reject a final construction project proposal, or a portion thereof, under section 509(b) of the Act [25 U.S.C. 458aaa–8(b)] and subpart N of this part; and

(e) For construction project agreements carried out under section 509 of the Act [25 U.S.C. 458aaa–8], a decision to reject project planning documents, design documents, or proposed amendments submitted by a Self-Governance Tribe under section 509(f) of the Act [25 U.S.C. 458aaa–8(f)] and subpart N of this part.

§ 137.416 Do §§ 137.415 through 137.436 apply to any other disputes?

No, §§ 137.415 through 137.436 only apply to decisions listed in § 137.415. Specifically, §§ 137.415 through 137.436 do not apply to any other dispute, including, but not limited to:

(a) Disputes arising under the terms of a compact, funding agreement, or construction project agreement that has been awarded;

(b) Disputes arising from immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)] and § 137.261 and 137.262, which are covered under § 137.440 through 137.445.

(c) Other post-award contract disputes, which are covered under § 137.412.

(d) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 45 CFR part 5.

(e) Decisions relating to the award of grants under section 503(e) of the Act [25 U.S.C. 458aaa–2(e)], which may be appealed under 45 CFR part 5.

§ 137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?

The IBIA may use the procedures set forth in 43 CFR 4.22–4.27 as a guide.

§ 137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?

Every decision in any of the areas listed in § 137.415 must contain information which shall tell the Indian Tribe where and when to file the Indian Tribe's appeal. Each decision shall include the following statement:

> Within 30 days of the receipt of this decision, you may request an informal conference under 42 CFR 137.421, or appeal this decision under 42 CFR 137.425 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 137.419 What authority does the IBIA have under §§ 137.415 through 137.436?

The IBIA has the authority:

(a) to conduct a hearing on the record;

(b) to permit the parties to engage in full discovery relevant to any issue raised in the matter;

(c) to issue a recommended decision; *and*

(d) to take such action as necessary to insure rights specified in § 137.430.

§ 137.420 Does an Indian Tribe have any options besides an appeal?

Yes, the Indian Tribe may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. Or, the Indian Tribe may, in lieu of filing an administrative appeal under this subpart or upon completion of an informal conference, file an action in Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.421 How does an Indian Tribe request an informal conference?

The Indian Tribe must file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian Tribe may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the request, it will be considered filed on the date the Indian Tribe mailed it by certified mail.

§ 137.422 How is an informal conference held?

(a) The informal conference must be held within 30 days of the date the request was received, unless the Indian Tribe and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian Tribe's office. If the meeting cannot be held at the Indian Tribe's office and is held more than fifty miles from its office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(c) The informal conference must be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Indian Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference. Such designated representatives may include Office of Tribal Self-Governance.

§ 137.423 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference must prepare and mail to the Indian Tribe a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference must contain the following language:

Within 30 days of the receipt of the recommended decision from the informal conference, you may file an appeal of the initial decision of the DHHS agency with the Interior Board of Indian Appeals (IBIA) under 42 CFR 137.425. You may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. Alternatively you may file an action in Federal court pursuant to section 110 of the Act. [25 U.S.C. 450m–1].

§ 137.424 Is the recommended decision from the informal conference final for the Secretary?

No. If the Indian Tribe is dissatisfied with the recommended decision from the informal conference, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under § 137.426 , the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.425 How does an Indian Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Indian Tribe decides to appeal, it must file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision from the informal conference.

(b) The Indian Tribe may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the Notice of Appeal, it will be considered filed on the date the Indian Tribe mailed it by certified mail. The Indian Tribe should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

(c) The Notice of Appeal must:

(1) Briefly state why the Indian Tribe thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian Tribe wants a hearing on the record, or whether the Indian Tribe wants to waive its right to a hearing.

(d) The Indian Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian Tribe must certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the IBIA under the Act.

(f) In lieu of filing an administrative appeal an Indian Tribe may proceed directly to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.426 May an Indian Tribe get an extension of time to file a notice of appeal?

Yes, if the Indian Tribe needs additional time, the Indian Tribe may request an extension of time to file its Notice of Appeal with the IBIA within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian Tribe must be in writing, and must give a reason for not filing its notice of appeal within the 30-day time period. If the Indian Tribe has a valid reason for not filing its notice of appeal on time, it may receive an extension.

§ 137.427 What happens after an Indian Tribe files an appeal?

(a) Within 5 days of receiving the Indian Tribe's notice of appeal, the IBIA will decide whether the appeal falls under § 137.415. If so, the Indian Tribe is entitled to a hearing.

(b) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian Tribe, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the IBIA decides that the Indian Tribe is not entitled to a hearing or if the Indian Tribe has waived its right to a hearing on the record, the IBIA will dismiss the appeal and inform the Indian Tribe that it is not entitled to a hearing or has waived its right to a hearing.

§ 137.428 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer the Indian Tribe's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing

conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) A briefing and discovery schedule;

(2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 137.429 What happens when a hearing is necessary?

(a) The ALJ must hold a hearing within 90 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the Secretary must file and serve the Indian Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.430 What is the Secretary's burden of proof for appeals covered by § 137.415?

As required by section 518 of the Act [25 U.S.C. 458aaa–17], the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

§ 137.431 What rights do Indian Tribes and the Secretary have during the appeal process?

Both the Indian Tribe and the Secretary have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

(d) Introduce oral or documentary evidence, or both;

(e) Require that oral testimony be under oath;

(f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

(h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.432 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision must contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian Tribe has the right to object to the recommended decision.

(b) The recommended decision shall contain the following statement:

> Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 42 CFR 137.43. An appeal to the Secretary under 42 CFR 137.43 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC, 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 137.433 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections must be served on all other parties. The recommended decision shall become final for the Secretary 30 days after the Indian Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final for the Secretary.

§ 137.434 If an Indian Tribe objects to the recommended decision, what will the Secretary do?

(a) The Secretary has 45 days from the date it receives the final authorized submission in the appeal to modify, adopt, or reverse the recommended decision. The Secretary also may remand the case to the IBIA for further proceedings. If the Secretary does not modify or reverse the recommended decision or remand the case to the IBIA during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 137.435 Will an appeal adversely affect the Indian Tribe's rights in other compact, funding negotiations, or construction project agreement?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

§ 137.436 Will the decisions on appeal be available for the public to review?

Yes, all final decisions must be published for the Department under this subpart. Decisions can be found on the Department's website.

Appeals of an Immediate Reassumption of a Self-Governance Program

§ 137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)]?

(a) The Secretary may, upon written notification to the Self-Governance Tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if:

(1) The Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Self-Governance Tribe; and

(2) The endangerment arises out of a failure to carry out the compact or funding agreement.

(b) When the Secretary advises a Self-Governance Tribe that the Secretary

intends to take an action referred to in paragraph (a) of this section, the Secretary must also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

§ 137.441 Will there be a hearing?

Yes, unless the Self-Governance Tribe waives its right to a hearing in writing. The Deputy Director of the Office of Hearings and Appeals must appoint an Administrative Law Judge to hold a hearing,

(a) The hearing must be held within 10 days of the date of the notice referred to in § 137.440 unless the Self-Governance Tribe agrees to a later date.

(b) If possible, the hearing will be held at the office of the Self-Governance Tribe. If the hearing is held more than 50 miles from the office of the Self-Governance Tribe, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Self-Governance Tribe.

§ 137.442 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJs findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Self-Governance Tribe has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under § 137.443. An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 137.443 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Self-Governance Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 137.444 If a Self-Governance Tribe objects to the recommended decision, what action will the Secretary take?

(a) The Secretary has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Secretary.

§ 137.445 Will an immediate reassumption appeal adversely affect the Self-Governance Tribe's rights in other self-governance negotiations?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

Equal Access to Justice Act Fees

§ 137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes, EAJA claims against the Department will be heard pursuant to 25 CFR 900.177.

[FR Doc. 02–12346 Filed 5–16–02; 8:45 am]
BILLING CODE 4160–16–P

TAB 4

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1988

P.L. 100-472, see page 102 Stat. 2285

DATES OF CONSIDERATION AND PASSAGE

House: October 27, 1987; September 9, 1988

Senate: May 27, September 15, 1988

House Report (Interior and Insular Affairs Committee) No. 100-393, Oct. 26, 1987 [To accompany H.R. 1223]

Senate Report (Indian Affairs Committee) No. 100-274, Dec. 21, 1987 [To accompany S. 1703]

Cong. Record Vol. 133 (1987)

Cong. Record Vol. 134 (1988)

The House bill was passed in lieu of the Senate bill after amending its language to contain much of the text of the Senate bill. The Senate Report is set out below.

SENATE REPORT NO. 100-274

[page 1]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1703) a bill to amend the Indian Self-Determination and Education Assistance Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE

The Indian Self-Determination and Education Assistance Act was signed into law by President Ford on January 4, 1975.[1] The Indian Self-Determination Act authorizes tribes to contract with the Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services to administer previously authorized programs otherwise administered directly by those Departments. The Act was intended to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities.

S. 1703, the Indian Sêlf-Determination Act Amendments of 1987, represents a comprehensive reexamination by Congress and Indian

[page 2]

tribes of the Indian Self-Determination and Education Assistance Act of 1975. The amendments contained in S. 1703 are intended to increase tribal participation in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs. The amendments are intended to remove many

[1] Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203 as amended. See also Public Law 98-250, Act of April 3, 1984, 98 Stat. 118.

of the administrative and practical barriers that seem to persist under the Indian Self-Determination Act.

BACKGROUND AND NEED

FEDERAL POLICY AND THE TRUST RELATIONSHIP

The Federal Government has provided services to Indians for nearly two hundred years. The earliest federal services to Indians were based on treaties and were intended as compensation to Indians for land cessions and other benefits granted to the United States. In negotiating treaties with Indian tribes, the federal government generally offered some type of quid pro quo for land and other tribal concessions. In addition, early federal services to Indians were authorized by statute. For example, the Snyder Act of 1921 authorized the Bureau of Indian Affairs to administer programs "for the benefit, care, and assistance of the Indians throughout the United States.[2] The broad declaration of purposes contained in the Snyder Act provides congressional authorization for expenditures for many BIA activities, including health, education, employment, administration of Indian property, and irrigation.

Since the 1930's the reassertion of tribal self-government, coupled with a growing federal interest in decentralization, have resulted in an increase in services initiated or administered by Indian tribes. This development was stimulated by passage of the Indian Reorganization Act of 1934. The 1934 Act began a trend of transferring control of federal services to tribes reorganized under the Act.

The extent of tribal control over federal Indian programs was modest until the 1970's. Passage of the Indian Self Determination and Education Assistance Act of 1975 and such measures as the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing) and the Comprehensive Employment and Training Act of 1973 revived and expanded upon many policies first enunciated in the Indian Reorganization Act. Today, many tribes are undertaking their own education, health, and job-training programs, making use of their own revenues as well as grants from relevant federal agencies. These activities have enhanced the development and perception of Indian tribes as self-governing entities.

The federal policy of Indian self-determination is one of the most progressive federal Indian polices in our Nation's history. The self-determination policy is premised on the notion that Indian tribes are the basic governmental units of Indian policy. The self-determination policy was first formally enunciated in 1970 by President Richard M. Nixon. In his Special Message to the Congress on Indian Affairs, President Nixon explained that

[2] Ch 115, 42 Stat. 208 (Codified as amended at 215 U.S.C. 13).

[page 3]

> For years we have 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 treat 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.[3]

In fact, the Indian Self-Determination Act has been the major reason for assumption by Indian tribes of responsibility for Federal Indian programs. The Act directs the Secretary of Interior and the Secretary of Health, Education and Welfare, to enter into a contract with Indian organizations at the request of Indian tribes. Self-determination contracts with Indian tribes are not discretionary. The Act contains only limited reasons for declination to contract by either Secretary. If a contract application is declined, the burden of proof is on the Secretary to show that the statutory grounds for declination exist.

The federal policy of Indian self-determination is premised upon the legal relationship between the United States and Indian tribal governments. The present right of Indian tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government today are recognized by the Constitution, Acts of Congress, treaties between the United States and Indian tribes, judicial decisions, and administrative practice.

The right of tribal self-government is further protected by the trust relationship between the Federal Government and Indian tribes. The concept of a federal trust responsibility to Indian people was fashioned gradually by the Federal courts. The concept first appeared in Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia*.[4] During the twentieth century the trust principles articulated in *Cherokee Nation* v. *Georgia* have been applied in many specific situations to establish and protect rights of Indian tribes and individuals. Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government for breach of its trust responsibility. Even more broadly, federal action toward Indians as expressed in treaties, agreements statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.

[3] "Special Message to the Congress on Indian Affairs", [1970] Pub. Papers 564, 567 (President Richard M. Nixon).
[4] 30 U.S. (5 Pet.) 1 (1831).

Self-Determination and Tribal Economic Development

Indian tribal governments have developed rapidly since passage of the Indian Self-Determination Act. In addition to operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection, tribes have developed the expertise to manage natural resources and to engage in sophisticated economic and community development. All of these achievements have taken place during a time when tribes have also developed sophisticated systems to manage and account for financial, personnel and physical resources. Most Indian communities share with rural non-Indian communities problems of inadequate infrastructure and lack of access to managerial talent. Nevertheless, compared to state, county and municipal governments of similar demographic and geographic characteristics, the level of development attained by tribal governments over the past twelve years is remarkable. This progress is directly attributable to the success of the federal policy of Indian self-determination.

Improvements in tribal financial, personnel, property, and procurement systems have enabled tribes to manage increasingly complex matters. In response to both federal and tribal demands for accountability, most Indian tribes that operate programs now have annual single-agency audits of tribal finances. The Department of Interior Office of Inspector General has reported an increase in tribal assumption of responsibility for tribal financial management. These improvements have been financed by a combination of tribal funds, indirect cost reimbursements associated with self-determination contracts, Bureau of Indian Affairs self-determination grants, and Indian Health Service tribal management grants.

The conditions for successful economic development on Indian lands are essentially the same as for any other predominantly rural community. There must be community stability, including adequate law enforcement and judicial systems and basic human services. There must be adequate infrastructure including roads, safe water and waste disposal systems, and power and communications utilities. When these systems and services are in place, tribes are in the best position to implement economic development plans, taking into account the available natural resources, labor force, financial resources and markets.

Tribal control of economic development programs is essential to the success of business enterprises, regardless of whether they are tribal, private or joint venture activities. In many cases of successful Indian economic development, a general pattern is apparent. Indian tribes use self-determination contracts to meet basic human needs in Indian communities. The tribes then use tribal, federal and private resources to create jobs and support businesses on Indian lands.

With self-determination contracts to support local government services on Indian lands, tribes are in a better position to utilize tribal financial resources, including interest earned on tribal trust funds, as contributions toward maximizing the financing of economic enterprises. Tribal self-determination contracts to conduct comprehensive planning, land use studies, and natural resource in-

ventories have been essential to the success of Indian economic development efforts. The obvious conclusion is the same for Indian and non-Indian rural communities: the development of local government services, the provision of supportive human services, and local planning are essential to successful economic development. The Indian Self-Determination Act has made these conditions possible on many Indian reservations.

Improving the Management and Delivery of Tribal Services

A fundamental objective of the federal policy of Indian self-determination is to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members. Consequently, the Indian Self-Determination Act provides tribes with the flexibility to redesign Federal programs and services to meet the needs of Indian people. For example, according to the Bureau of Indian Affairs Manual, the primary purposes of the BIA social services program are to provide general assistance payments, to place Indian children in residential placements and to place elderly Indian people in custodial care placements. When tribes have assumed control of social service programs, however, they almost invariably have reversed these priorities and have emphasized providing supportive casework services to keep Indian families intact and to enable elderly Indian people to continue living independently in their homes.

One of the most important developments in Indian health care has been the role of Indian community health workers in providing outreach services to isolated Indian families. Outreach services have helped to overcome cultural barriers between traditional Indian people and modern health delivery systems. As a result, over the past decade, there has been a tremendous increase in the utilization of health facilities by Indian people. Morover, there have been major increases in the utilization of health facilities for preventive services, as opposed to the use of such facilities for acute and emergency care only.

With funds authorized by the Indian Sanitation Facilities Act of 1959,[5] self-determination contracts have enabled tribes to build safe water and sanitary waste disposal systems and generally to improve health conditions on Indian lands. Many Indian tribes now control the safety and quality of drinking water for Indian communities. These tribally-controlled water and waste systems have contributed directly to a decrease in the incidence of communicable diseases and in some of the major causes of infant mortality.

An essential factor in the success of the policy of Indian self-determination is that it allows tribes to plan and deliver services appropriate to their diverse demographic, geographic, economic and institutional needs. According to the 1980 census, there are 278 Indian reservations and 209 Alaska Native villages. They range in size from the Navajo Nation, which is the largest tribe in the United States with a population of 173,018 Indian reservation residents, to small rancherias in California with less than a few dozen residents.

[5] Public Law 86-121.

Many tribes are situated on rural and isolated reservations. Other tribes have lands that are adjacent to major metropolitan areas. The Puyallup Tribe, for example, resides on a reservation that is entirely within the boundaries of the City of Tacoma, the second largest city in Washington state. In stark contrast to the Puyallup Tribe, the Havasupai Tribe resides in a portion of the Grand Canyon accessible only by foot, by horse or by helicopter.

Given the diversity of tribal conditions, broad new federal policies rarely meet the needs of all tribes. The Indian Self-Determination Act provides tribes with the opportunity to design and implement policies appropriate to their local needs.

Implementation of the Policy of Indian Self-Determination

The Indian Self-Determination Act uniquely requires the Secretary of the Interior and the Secretary of Health and Human Services to continue providing direct services until such time as a tribe freely chooses to contract to operate those services. At that point, the Secretaries are required to transfer resources and control over those programs to the tribe. There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources. The Committee recognizes that the uniqueness of this Act has made its implementation a complex process for both the tribes and the Federal agencies.

The Federal agencies charged with implementing the Indian self-determination policy have made remarkable progress over the past decade. As of fiscal year 1985, the Bureau of Indian Affairs has entered into 1,421 self-determination contracts with tribal organizations. The funding for these contracts has totaled $234,790,000 in direct funds and $37,749,000 in indirect funds. The total sum of $272,539,000 contracted to tribes represents 25 percent of the entire budget of the Bureau of Indian Affairs. This represents a substantial transfer of federal program responsibilities and resources to Indian tribes which have strengthened tribal governmental capabilities.

In Fiscal Year 1987, the Indian Health Service directly operated 45 hospitals, 71 health centers and several hundred smaller health stations and satellite clinics.[6] At the same time, tribal organizations operated 6 hospitals and approximately 300 outpatient health clinics.[7] In addition, with funds provided by the Indian Health Service, Indian tribes provide community health outreach and public health nursing services, and alcohol and drug counseling and treatment.

Generally, Indian self-determination has been a successful federal policy. There have been problems, however, associated with its implementation. When the Indian Self-Determination Act was passed, both the Congress and the Executive branch envisioned a clear-cut transfer of federal responsibilities as well as federal financial, administrative, technical and other resources to the tribes. This transfer has been complicated by subsequent laws and federal

[6] Fiscal Year 1988 Budget Request, Indian Health Service.
[7] Id.

policies which have interfered with the contractual relationship contemplated by the Act between the Federal Government and tribal governments. Attempts to transfer federal funds to tribes have been further complicated by the difficult federal budget pressures of the past decade. As a result, federal agencies and tribes have been competing for the same federal funds to carry out their respective responsibilities.

On April 22, 1987, in response to numerous complaints from Indian tribes about problems associated with implementation of the Indian Self-Determination Act and suggestions by tribes for its improvement, the Committee conducted an oversight hearing on the Act. At that hearing, tribal witnesses described the policy of Indian Self-Determination as a positive and constructive federal policy. The tribal witnesses testified that the transfer of program control and resources to the tribes made possible by this law has resulted in greater utilization of health facilities by Indian people, in better educational achievement by Indian children in Indian-controlled schools, in stronger Indian families because of tribal emphasis on child welfare services, and in more effective law enforcement by tribal officers. Increased stability in Indian communities as a result of programs operated by tribal governments has, in turn, enabled tribal leaders to focus their efforts on economic development.

The tribal witnesses explained, however, that while there has been great progress, there have also been obstacles to Indian self-determination. Inappropriate application of federal procurement laws and federal acquisition regulations to self-determination contracts has resulted in excessive paperwork and unduly burdensome reporting requirements. Furthermore, witnesses explained that the failure of Federal agencies to reimburse tribes for the cost of program operation has resulted in a tremendous drain on tribal financial resources.

The federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs has been replaced by a contract monitoring bureaucracy. Many tribes have found themselves reporting to Contracting Officer's Representatives (CORs) and Subordinate Contracting Officer's Representatives ("Sub-CORs") at the local agencies of the Bureau of Indian Affairs. These federal monitoring personnel impose additional reporting requirements on tribal contractors which often are not required under applicable laws and regulations, thereby making the contracting process much more burdensome and time-consuming. For example, federal officials will require a tribe to submit a list of the serial numbers of all law enforcement vehicles operated by the tribe, as a condition of approving a law enforcement contract. Or, a Superintendent for Education will require tribes to submit certificates of Indian blood for Indian children served by tribal Johnson-O'Malley contracts, although the BIA does not require the same information from public schools. Tribes are forced to fill out and submit lengthy computer data reports. The data from those reports are not provided to the tribes, and are frequently inaccurate. Consequently, the reports essentially are useless for tribal management purposes. Tribes that successfully deliver services and manage their resources are still required to submit lengthy quarterly reports and voluminous contract reapplications.

Tribes that intend to contract with the Bureau of Indian Affairs must submit their applications to the local BIA Agency Superintendent. A contract for law enforcement, for example, must be reviewed by the program staff associated with the law enforcement program. The Agency "638 (self-determination) specialist" then reviews the proposal package to determine whether or not the tribe has submitted all required certifications, resolutions and forms. The Superintendent then makes a recommendation, but not a decision, on the contract application and forwards the package to the Area Office.

At the Area Office, the contract application is again reviewd for identical purposes by the branch of law enforcement staff and by another self-determination specialist. In addition, the application is reviewed by the Area branch of property and supply to insure that the contract application adheres to all applicable federal acquisition regulations. These offices then make a recommendation to the Area Director.

Following these six layers of review, if the Area Director approves the application, it is then returned to the branch of property and supply. Area Director approval of an application and a contract funding award by the contract officer are separate matters. If the contract funding is awarded by the Contracting Officer, the complete package must then be sent to the Finance Office to have the tribe's award placed on a letter of credit so that the tribe can begin to obligate and draw down funds. The existing law provides sixty days for contract approval by the Secretary. In practice, however, the approval and award process often takes up to six months and sometimes longer.

Fluctuations in annual funding levels for self-determination contracts attributable to budgetary allocations to cover federal pay costs, retirement costs and other federal needs inject uncertainty into the planning and management of tribal programs. Funds allocated for tribal contracts often are reallocated by the Bureau of Indian Affairs to pay for such items as federal computer equipment acquisition and software development costs. The Fiscal Year 1988 Budget Request for the Indian Health Service contained a proposal to fund federal pay and retirement costs partly out of funds appropriated for tribal health programs. In the Bureau of Indian Affairs' Phoenix Area, for example, tribal contract funds have been routinely reduced, in violation of Section 106(h) of the current law, to pay for federal contract monitoring costs.

Indirect Costs

Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal

funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

The Federal agencies have imposed requirements for accountability on tribes that are more stringent than the requirements that are imposed on the Federal agencies themselves. The Self-Determination Act requires the Federal agencies to make available the same amount of funding to operate a program under contract as would have been available if the Federal Government were operating the program. In practice, however, the Federal agencies provide less funding to Indian tribes to operate programs than is provided to the Federal agencies. Tribal governments are required to pay for independent financial audits, which are often expensive. The Federal Government does not incur this audit cost in its operation of a program. Further, tribal governments must carry liability insurance, premiums for which have skyrocketed in the last few years, just as they have for other units of government. The Federal Government, because it is covered under the provisions of the Federal Tort Claims Act, does not have to incur the cost of purchasing such insurance. The Federal Government requires Indian tribes to submit quarterly and annual program and financial reports. These administrative demands require sophisticated and costly management systems.

Tribal governments, like state and local governments, use indirect costs to pay for these administrative costs. The indirect cost method is a widely accepted management tool for allocating costs common to many different programs and functions within a government entity. The Office of Management and Budget has established guidelines for federal agencies to use to determine indirect cost rates.[8] Tribal indirect cost rates are negotiated and approved according to OMB guidelines by the Department of Interior Office of Inspector General.

For several years the Bureau of Indian Affairs and the Indian Health Service have failed to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts. Consequently, tribes have been forced to request supplemental appropriations directly from Congress to make up the shortfall. The Senate Committee on Appropriations questioned the chronic shortfalls of contract support costs in its report on the Fiscal Year 1984 Appropriations Act for the Department of the Interior and Related Agencies. The Senate Committee Report stated that

> Contract Support Costs have increased far out of proportion with the rather small increases in total dollar volume of contracts. While the Inspector General is charged with

[8] Office of Managment and Budget Circular A-87, "Cost Principles for State and Local Governments".

> the responsibility for determining "allowable costs" neither the IG nor the BIA make any effort to determine the reasonableness of such costs. The Committee believes that this should be the responsibility of the Bureau. Various options for controlling indirect costs are currently under consideration and the Committee expects a report with recommendations to be included in the submission of the fiscal year 1985 budget which will alter the budget format as indirect costs are to be included in the program accounts rather than as a line item.[9]

The Select Committee on Indian Affairs does not agree with the analysis of this issue presented by the Senate Appropriations Committee. Part of the problem with this view of indirect cost was that the term "contract support costs" had not been operationally defined. The term has variously meant administrative overhead costs, indirect costs and the incremental costs associated with the management of a new contract. Another aspect of the problem is that the Bureau of Indian Affairs has failed to accurately represent the facts regarding indirect costs, including failing to acknowledge an important study conducted in 1983 by the Department of Interior Office of Inspector General.

In its Fiscal Year 1985 Budget Request, the Bureau of Indian Affairs responded to the Senate Committee on Appropriations by allocating "contract support funds" to the various funding activities (combining support costs with direct program dollars), and maintaining the program element "contract support funds" for new contracts only. Previously, the Bureau had contracted with the American Indian Law Center to conduct an analysis of Bureau of Indian Affairs Public Law 93-638 indirect cost and contract support policy, procedures and practice.[10] The American Indian Law Center conducted a review of written document and interviews with officials of the Bureau of Indian Affairs and other federal agencies. The American Indian Law Center concluded that

> [the decision to fund] tribal indirect costs associated with Public Law 93-638 contracts * * * through a separate Contract Support fund * * * did not, as intended, merely provide for the additional funds required for a tribe to manage a new program * * * [it] also created an open-ended uncontrollable, entitlement fund, the size and distribution of which depended solely on the initiative and ingenuity of each tribe in expanding its administrative organization and shifting the maximum amount of expenses to the indirect, rather than direct, category.[11]

In the spring of 1987, the Senate Select Committee on Indian Affairs challenged the Bureau of Indian Affairs to produce evidence of improper tribal manipulation of indirect cost pools. The Bureau has been unable to substantiate these charges.

[9] S. Rept. 98-184, 98th Congress, 1st Sess. 46 (1983).
[10] BIA Contract K51C14201178 (March 1982).
[11] Id., quoted in United States Department of the Interior, Budget Justifications, F.Y. 1985, Bureau of Indian Affairs BIA-105. Both the BIA and the American Indian Law Center recommended a flat rate, in lieu of indirect costs, which was calculated at 15 percent.

In 1983, the Department of Interior Office of Inspector General issued its own report on indirect costs.[12] In contrast to the American Indian Law Center study, the Office of Inspector General actually examined the indirect cost rates of eighty-one Indian tribes for a five-year period from 1979 through 1983. The Inspector General concluded that tribal indirect cost rates did, in fact, increase during the five-year period. Instead of attributing this increase to tribal "ingenuity", the Inspector General concluded that

> First, Indian tribes have been trying to improve their administration and comply with Federal requirements. This costs more money. Second, administrative costs tend to be more fixed than variable. Consequently, the two categories of cost will not change in the same proportions.[13]

The Inspector General further identified four significant components of the increase in tribal indirect cost pools. The report stated:

> 1. Salary costs increased by 81.5 percent over the 5-year period. This trend can be justified as part of the overall objective of improving administration. However, we believe there is an additional explanation for the continued increase in 1982 and 1983. This period coincides with reductions in the CETA program which paid for some administrative positions. Consequently, financing of these positions was shifted to the indirect cost pool.
>
> 2. Tribal council costs show an 86.2 percent increase over the 5-year period. Our policy is to accept 50 percent of such costs as allocable to direct programs, i.e., allowable indirect cost items. A few tribes are able to justify a higher percentage by presenting documentation showing that more than 50 percent of the council's time is spent administering direct programs. The trend of increasing tribal council costs is easily explained. Historically, most tribal councils were paid only when they met or were unpaid. As Federal programs became available, more became available for administration and more money to pay for tribal council salaries. The current trend is to place tribal council members [officers] on a full time salary basis.
>
> 3. Audit costs have gone up 230.5 percent over the 5-year period. The most dramatic increase was 1983 over 1982—up 102.2 percent. This is directly attributable to some tribes contracting with CPA firms to meet audit requirements of OMB Circular A-102, Attachment P. If this trend continues, we believe audit costs will increase by an additional 400 percent.
>
> 4. EDP [Electronic Data Processing] costs increased by 225.7 percent over the 5-year period. This is reflective of the general pattern of increased use of the computer. However, we could not discern any evidence that increased use of the computer produced a reduction in any other cost element.[14]

The use of indirect costs is widely accepted by state, county and local governments, and by universities, hospitals and nonprofit organizations. The most relevant issue is the need to fully fund indirect costs associated with self-detemination contracts. The Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services should request the full amount of funds from the Congress that are adequate to fully fund tribal indirect costs. Furthermore, the Bureau of Indian Affairs and the Indian Health Service must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services.

The Committee's amendment to the Indian Self-Determination Act are designed to require the Bureau of Indian Affairs and the Indian Health Service to comply with the requirement of the Act that indirect costs be added to the amount of funds available for direct program costs. These amendments are supported by a recent report of the President's Council on Integrity and Efficiency. The President's Council recommended that indirect costs of tribes be fully funded. The Council recommended that

> the Assistant Secretary for Indian Affairs submit proposals to Congress and the Office of Management and Budget to change the method of reimbursing Indian organizations by (1) removing the legislative and administrative restrictions that affect the reimbursement of indirect costs of Indian organizations, (2) authorizing the Bureau of Indian Affairs to negotiate lump-sum agreements to directly fund all indirect costs relative to Federal contracts and grants, (3) budgeting and providing full funding to the Bureau of Indian Affairs for indirect cost lump-sum agreements, and (4) authorizing Indian organizations to use any unexpended balance (savings) of lump-sum agreements for indirect or direct costs incurred in subsequent years. We also recommend that the Assistant Secretary for Indian Affairs not proceed with the Bureau of Indian Affairs efforts to establish a flat-rate reimbursement procedure for indirect costs.[15]

Tribal witnesses at the Committee hearings on the Indian Self-Determination Act repeatedly described the overwhelming administrative problems caused by indirect cost shortfalls. Tribes are held liable by the Office of Inspector General to collect the full amount of their indirect costs, even if Federal agencies fail to reimburse tribes for those costs. Tribes then operate at a deficit and carry forward a "theoretical" overrecovery, which adversely affects ther rates in subsequent years. Some tribes have found themselves owing the Federal government several hundred thousand dollars because of "theoretical" overrecoveries which result from indirect cost shortfalls, which in turn result from the failure of Federal agencies to pay their full share of indirect costs.

Many tribes are forced to use tribal trust fund revenues to subsidize indirect costs. One tribe in Nevada was forced to budget over $90,000 to cover shortfalls in Federal indirect costs for just one year. Consequently, that tribe was unable to use its trust fund rev-

[12] "Trend Analysis Using Data Available from the Indirect Cost Rate Negotiation Process With Indian Tribes," (Inspector General, July 15, 1983).
[13] Department of the Interior, Office of Inspector General (July 1983).
[14] "Trend Analysis Using Data Available From the Indirect Costs Rate Negotiation Process with Indian Tribes," Department of the Interior, Office of Inspector General, July 1983).
[15] "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred," President's Council on Integrity and Efficiency (September 1987).

enues to leverage private funds for economic development. The failure of federal agencies to provide their share of indirect costs has even more devastating impacts on those tribes and tribal organizations that have no sources of independent income. Tribes and tribal organizations with no independent income are faced with the onerous choice of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems. The Committee is greatly concerned that tribes will choose a third alternative: to retrocede the contract back to the Federal agency.

The Federal Government would not consider it proper to shortchange funding for contracts with private suppliers of goods and services. When the Bureau of Indian affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

According to a recent report prepared by the Affiliated Tribes of Northwest Indians,

> It really comes down to this important point: to implement true self-determination, Congress and the BIA/IHS must budget and appropriate adequate funds to contract for federal Indian programs and services. To provide less than adequate funds, in many cases, causes financial hardship and prolongs dependence on the Federal Government. In short, to allow the BIA and IHS to underfund the Public Law 93-638 contracts is to plot a sure path to programmatic failure.[16]

The Committee believe that these amendments are necessary in order to meet the challenge presented by the tribes: to fully support the successful implementation of the federal policy of Indian Self-Determination.

Legislative History

The Indian Self-Determination and Education Assistance Act was signed into law by President Ford on January 4, 1975. The act is intended to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities. The Indian Self-Determination Act authorizes tribes to contract with the Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services to administer previously authorized programs otherwise administered directly by those Departments.

The Indian Self-Determination Act was amended by Public Law 98-250, signed on April 3, 1984. The technical amendment provides that the Indian Self-Determination Act shall not be subject to the requirements of the Federal Grant and Cooperative Agreement Act of 1977 (Public Law 95-224). The 1984 amendment allows tribes to

[16] Determining the True Cost of Contracting Programs for Indian Tribes, Affiliated Tribes of Northwest Indians (May 1987).

use a grant or cooperative agreement instrument in lieu of a contract instrument when mutually agreed to by the tribe and the appropriate Secretary.

S. 1703 was introduced in the Senate on September 18, 1987 by Senator Evans, for himself, and Senators Inouye, McCain, Burdick, DeConcini, Murkowski, Daschle, Domenici, Hatfield, Packwood, Cochran, Hecht, Bingaman, Adams, Melcher, Gore, Pell and Chafee. S. 1703 was referred to the Select Committee on Indian Affairs. The Committee held a hearing on S. 1703 on October 2, 1987. On October 30, 1987, the Committee ordered reported an amendment in the nature of a substitute to S. 1703.

A companion bill, H.R. 1223, was introduced by Congressman Udall, for himself and Congressman Richardson on February 24, 1987 and was referred to the House Committee on Interior and Insular Affairs. H.R. 1223 was ordered reported by the Interior and Insular Affairs Committee on October 7, 1987. On October 27, 1987, H.R. 1223 was passed by the House of Representatives.

Tribal Participation in the Development of S. 1703

The Committee recognizes the importance to Indian tribes of the Indian Self-Determination Act and the complexity of the issues involved in amending the Act. Consequently, the Committee enlisted the assistance of Indian tribal leaders in developing the draft amendment. Committee staff met with an informal working group of tribal elected officials, finance managers, program managers and planners in Washington, D.C. for two days in March 1987 to discuss tribal concerns with implementation of the Indian Self-Determination Act. This tribal working group was instrumental in assisting the Committee to address many very difficult concerns.

The Committee held an oversight hearing on the Indian Self-Determination Act in Washington, D.C., on April 22, 1987. At that hearing, the Committee heard recommendations from tribal leaders and experts in tribal contracting, including the following:

Clarify that federal acquisition regulations (41 CFR) should not apply to self-determination contracts (25 CFR, and the Single Agency Audit Act would still apply to self-determination contracts).

Allow tribes that have successfully operated contracts for three or more years, and that have clean audits, to consolidate those contracts into one "mature" contract.

Reduce the reporting requirements for "mature" contracts and emphasize the role of the annual single agency audit in financial accountability.

Provide protection for tribal contract funding against federal encroachments for federal pay costs, retirement costs, computer equipment costs, contract monitoring costs and other federal administrative costs.

Provide a framework for enabling the Congress to determine the amount of appropriations needed for tribal indirect costs.

Insure that the Bureau of Indian Affairs and the Indian Health Service fully fund tribal indirect costs associated with self-determination contracts.

Provide remedies for indirect cost rate problems caused by the failure of Federal agencies other than the BIA or IHS to fully fund their share of indirect costs.

Provide Federal Tort Claims Act coverage for tribes carrying out self-determination contracts.

Provide for Federal district court jurisdiction in contract disputes, and provide that the Contract Disputes Act applies to self-determination contracts.

Shortly after the April 1987 hearing and based on the testimony presented there, the Committee developed a draft bill and sent the bill to all tribal government leaders in the United States for review and comment. The draft bill was also sent to the Assistant Secretary for Indian Affairs and to the Director of the Indian Health Service. After thorough discussion of the draft bill, Senator Evans, on behalf of himself, Committee Chairman Inouye, and several other senators introduced S. 1703 on September 18, 1987.

The Committee held a hearing on S. 1703 on September 21, 1987 in Tampa, Florida, in conjunction with the annual meeting of the National Congress of American Indians. The purpose of this hearing was to hear further recommendations regarding the proposed legislation. At the September 21 hearing, tribal witnesses reemphasized the need for full funding of indirect costs and protection of tribal contract funds from reallocation by Federal agencies to other programs. Witnesses also described the serious problem associated with the costs of medical malpractice premiums for tribal health contractors. In the Indian Health Service Juneau Area, for example, premiums for contractors have increased from $293,406 in 1984 to $1,314,465 in 1987, an increase of 448%. These costs must be taken out of funds that would otherwise be available for health care services. Thus, the necessity to obtain liability insurance has led to decreases in the level of health services that tribal contractors are able to provide to Indian people.

On October 2, 1987, the Committee held a hearing in Washington, D.C., to receive the views of the Administration on S. 1703. The testimony of the Assistant Secretary for Indian Affairs included detailed comments and recommendations for improvement upon certain provisions included in S. 1703. The Director of the Indian Health Service also testified at that hearing.

Based upon comments and recommendations received from the tribes and from the Administration, the Committee staff began to develop amendments to the bill as introduced. The Vice-Chairman of the Committee directed staff to review these proposed amendments to S. 1703 with the tribal working group prior to Committee action on the bill. Accordingly, the Committee staff met with the tribal working group on October 14, 1987. The working group reviewed S. 1703 and the proposed changes and provided valuable insights and suggestions. On the following day, the Committee staff and the tribal working group met with the Assistant Secretary for Indian Affairs to consider suggestions of the Assistant Secretary, many of which were incorporated in S. 1703.

Section-by-Section Analysis

TITLE I—ADMINISTRATIVE PROVISIONS

Section 101. Short Title and Table of Contents.—Section 101 provides that S. 1703 is to be referred to as the "Indian Self-Determination and Education Assistance Act Amendments of 1987".

Section 102. Declaration of Policy.—The existing declaration of policy is amended to emphasize the commitment of the United States to assist individual Indian tribes to strengthen tribal program administration and reservation economices. This change in the statement of policy is intended to strengthen the government-to-government basis of Federal services to tribes, and to emphasize the need for the Federal government to recognize the diversity of individual Indian tribes. This section is also intended to emphasize the need for the Federal government to consider tribal needs on a tribe-by-tribe basis, and to move beyond the tendency to develop "generic" policies applicable to all tribes regardless of needs or conditions. A corollary of this statement is that new tribal policy proposals, if they are to be effective, will have to come from the tribes themselves. Therefore, the Committee amendment declares that the Federal government needs to be more flexible in responding to policies proposed by the tribes.

Section 103. Definitions.—New definitions are added to the Indian Self-Determination Act to clarify the meaning of terms used in the Act.

The term "construction programs" is defined in order to make clear the intent of the Congress that Indian tribes have the right to contract with the appropriate Secretary under the authority of the Indian Self-Determination Act to carry out construction activities and programs including the planning, design, construction, repair, rehabilitation, improvement, and expansion of buildings or facilities. In addition to the specific programs listed in the statute, the term is intended to include pre- and post-construction costs such as site preparation, dredging, land clearance and reclamation. The term "construction programs" also includes programs to construct facilities related to natural resource projects such as timber access roads and fish passage facilities.

The term "contract costs" is intended to insure that the Federal government provides an amount of funds to a tribal contractor that will enable the contractor to provide at least the same amount of services as the Secretary would have otherwise provided. The terms "reasonable and necessary" within the definition of the term "contract costs" is defined to mean all costs that are allowable under Office of Management and Budget Circular A-87, "Cost Principles for State and Local Governments," as published in the Federal Register on Wednesday, January 28, 1981. This means that the Secretary should provide funds to tribal contractors to cover the costs of annual pay cost increases appropriated by the Congress, personnel benefit costs not directly borne by the Bureau of Indian Affairs or the Indian Health Service but incurred by tribal contractors, and similarly, liability insurance costs not incurred by the federal agencies but incurred by tribal contractors.

The term "contract funding base" means the sum of direct program costs plus indirect costs. The intent of the Committee in defining this term is to prevent tribal contract funding amounts from being unilaterally reduced by the Secretary once the contract funding amount has been established. The contract funding base can be reduced only by the tribal contractors or by reductions in appropriations by Congress.

"Direct program costs" include all the funds that are available to the Secretary to operate a program for the benefit of a tribe. These funds are to be provided to a tribe under an Indian self-determination contract. For example, the Secretary is prevented from reducing the amount of funds that would have been available to a tribe for the operation of a program in order to pay for Federal contract monitoring costs.

"Direct program costs" also include that a tribe expends for social services grants, higher education grants and vocational education grants to individuals, and contract health service payments for individuals, and is intended to prevent the Secretary from prohibiting tribes from collecting indirect costs on those so-called pass-through funds. The Federal government incurs administrative costs for administering grants to individuals. Those costs include the costs of personnel in Agency, Area, Field and Central offices directly associated with those programs, along with administrative support staff in the branches of finance, and property and supply. Furthermore, the Federal government incurs costs through the Regional Disbursing Offices which write and distribute the checks to individuals for the Federal agencies. The definition is intended to recognize the fact that there are costs associated with the administration of programs that provide financial benefits to Indian individuals, whether those programs are operated by the Secretary or by a tribe.

The term "indirect costs" is defined to eliminate the confusion that has surrounded the use of the term "contract support costs" in the past. The Committee intends, by defining this term, to make it absolutely clear that the Secretary of the Interior and the Secretary of Health and Human Services should fully fund tribal indirect costs associated with a self-determination contract.

Upon the strong advice of the tribal working group, the Committee avoided using the term "contract support funds" in the drafting of this legislation. That term has been defined to mean, for example, "additional or incremental costs as the result of accepting Public Law 93-638 contracts".[17] While such a definition may seem theoretically valid, there is no practical methodology to measure such costs without efforts disproportionate to the results achieved. The term "indirect costs" is used because it is associated with known management practices. Those practices are recognized and defined in Office of Management and Budget Circular A-87. The circular anticipates a variety of organizational structures, and therefore allows maximum flexibility while excluding unallowable costs.

[17] "Contract Support/Indirect Cost Rates," Memorandum from the Acting Director of Audit and Investigations to the Assistant Secretary for Indian Affairs (Oct. 16, 1978).

The indirect cost system described in OMB Circular A-87 is used not only by tribal governments, but also by state governments, counties, municipalities, universities, hospitals and nonprofit organizations. The intent of the legislation is to end the confusion by making clear that the Congress supports the payment of indirect costs associated with self-determination contracts, and therefore calls such costs "indirect costs" instead of "contract support costs", a term that cannot be operationally defined. The legislation does not prevent the negotiation and use of lump-sum payments or other similar systems used by contract schools or organizations that have limited sources of funding. Indeed, the provisions under the new section 106 provide for the Department of the Interior Office of Inspector General to communicate more directly with Federal agencies and with tribes, and where necessary, to assist tribes in the use of alternate indirect costs methods including lump-sum agreements, provisional-fixed rates, and multiple rate agreements.

The Committee urges the Appropriations Committees of the Senate and the House of Representatives to substitute the term "indirect costs" for the term "contract support costs" in the budget format for the Bureau of Indian Affairs, and to remove employee displacement costs from the indirect costs (contract support costs) line-item and locate those costs in a more appropriate line-item, such as "employee compensation payments".[18]

A definition of "mature contract" is included in order to simplify reporting requirements for contracts that have been successfully operated by tribes for three or more years. It is the intent of the Committee that self-determination contracts that have been successfully operated for three or more years, and for which there are no significant and material audit exceptions in the most recent annual audit report of the contractor, should, upon the request of an Indian tribe, be treated as "mature contracts" on the date of enactment of this title. The term "significant and material audit exceptions" means: unresolved audit exceptions involving amounts of questioned costs or reporting deficiences; a qualified opinion on the part of the auditor resulting from serious departure from generally accepted accounting principles which call into question the financial results being reported; or clear findings of financial mismanagement or misappropriation of funds.

The term "self-determination contract" means an intergovernmental contract that is not a procurement contract. This definition recognizes the unique nature of self-determination contracts between the Federal Government and Indian tribal governments, or tribal organizations authorized by tribal governments to enter into such contracts with the Federal Government. The Committee amendment also makes clear that self-determination contracts are not procurement contracts, as defined in the Federal Grant and Cooperative Agreement Act of 1977, and that the system of federal acquisition regulations contained in Title 41 of the Code of Federal Regulations should not apply to self-determination contracts.

[18] See generally "Determining the True Cost of Contracting Federal Programs for Indian Tribes" (The Affiliated Tribes of Northwest Indians, 1987); "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred," (The President's Council on Integrity and Efficiency, 1987); "Trend Analysis Using Data Available From the Indirect Cost Rate Negotiation Process with Indian Tribes," (Department of Interior Office of Inspector General, 1983).

The elimination of otherwise applicable federal procurement law and acquisition regulations, combined with authorization by the Committee amendment of so-called "mature contracts", is intended to decrease the volume of contract compliance and reporting requirements associated with tribal contracts, and to decrease the volume of unnecessary contract monitoring requirements on the Federal agencies. The Committee therefore expects that the federal contract monitoring bureaucracy that has replaced the federal service bureaucracy will be greatly reduced over the next three years.

Technical amendments to the Indian Self-Determination Act enacted in 1984 (Public Law 98-250; 98 Stat. 118) added a new section 9 to the Act which provided that contracts entered into pursuant to the Act were exempt from the requirements of the Federal Grant and Cooperative Agreement Act of 1977.[19] Nevertheless, the Act continued to allow a tribe and the appropriate Secretary to utilize a grant or cooperative agreement instrument in lieu of a self-determination contract instrument.[20]

The differences between self-determination contracts, grants, and cooperative agreements were the subject of extensive discussions with the tribes. The Committee considered deleting the term "contract" and using another term such as "self-determination grant" or "intergovernmental agreement". Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party. Furthermore, the Committee believes that the retention of the term "contract" is consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.

The term "Secretary" is defined to mean either the Secretary of the Interior or the Secretary of Health and Human Services, or both.

The Committee amendment does not change the definition in current law of the term "tribal organization". The Committee considered the possibility of changing the definition in order to prevent Federal agencies from using the requirement to obtain tribal resolutions as an obstacle to contracting. The Committee believes that the term may at times have been misinterpreted, but that an amendment is unnecessary. The Committee does wish to clarify its understanding, however, of the intent of the requirement to obtain tribal resolutions.

Clearly, the law envisions maintaining tribal government control of the contracting process. These amendments strengthen the requirement for a tribal resolution in Section 102(a) as amended. Sections 102 and 103 in the original Act contain provisions for "community support for the contract" which the Secretary has correctly interpreted to mean a tribal resolution. However, it is also clear

[19] (Public Law 95-224, 92 Stat. 3).

[20] Specifically, the Act states as follows: *Provided*, That a grant agreement or cooperative agreement may be utilized in lieu of a contract under sections 102 and 103 of this Act when mutually agreed to by the appropriate Secretary and the tribal organization involved."

from the definition of "tribal organization" that a tribal organization needs to obtain tribal resolutions only from the tribes it proposes to serve. For example, if a tribal organization proposes to serve five tribes, then the tribal organization needs to obtain tribal resolutions of support from those five tribes only. To require tribal organizations to obtain resolutions from all tribes in a "service area" is not consistent with the intent and the letter of the law, particularly when a service area is creation of the area office and did not exist prior to delivery of services by the tribal organization.

Another situation involves a tribal organization that proposes to serve one tribe. The tribal organization obtains tribal resolution from that one tribe and enters into a contract with the Secretary. Under existing law, other individuals who are eligible for federal Indian health services but who may not be members of that particular tribe may utilize the services provided by the tribal organization, and tribal organization is authorized to provide services to those eligible Indians. It is the intent of the existing law that the Indian Health Service should not require the tribal organization to obtain resolutions from the tribes with which those individuals are affiliated.

Section 104. Reporting and Audit Requirement.—The Committee recommends that current law be amended to require the Secretary of the Interior and Secretary of Health and Human Services to publish proposed contract reporting requirements in the Federal Register in conformance with procedures required under the Administrative Procedures Act prior to imposing such reporting requirements on contractors. The intent of this amendment is to prevent Federal agencies from imposing unnecessary contract compliance and reporting requirements on tribal contractors through the use of administrative policy directives such as the Indian Self-Determination Memoranda ("ISDM") and the Indian Self-Determination Advisories ("ISDA") which have been used in the past to impose new conditions on tribal contractors.

Similarly, the Committee intends for the amendment to prevent the Bureau of Indian Affairs from requiring tribal contractors to adhere to standards or procedures contained in the Bureau of Indian Affairs Manual. The Committee amendment also prevents the Bureau of Indian Affairs from requiring tribal contractors to utilize financial, procurement, travel and personnel systems or procedures utilized by the Federal Government for the internal operation of Federal agencies. This amendment is further intended to prevent other agencies within the respective Departments, such as the regional offices of the Public Health Service, from imposing new conditions on tribal contractors such as a requirement to conduct additional audits in excess of those required by the Self-Determination Act and the regulations promulgated thereunder.

It should be clear from the intent of the Indian Self-Determination Act that the administrative procedures and methods used by Federal agencies for their own internal operations should not be imposed on tribal contractors. Nor should the Secretary impose requirements on tribal contractors that are more stringent than those imposed on Federal agencies or on private contractors.

The Self-Determination Act enables Federal agencies to provide technical assistance to tribal contractors for the improved manage-

ment of tribal programs, in a noncoercive manner. For example, tribes have the right to develop procurement systems and procedures appropriate to their own organizational needs, for such purposes as central purchasing and for subcontracts. Federal agencies should not force tribes to use federal procurement systems for subcontracts, but should, at the request of the tribe, provide assistance to the tribe in developing and implementing their own procurement systems.

For mature contracts, reporting requirements are to consist of quarterly financial statements, an annual single-agency audit and a brief annual program report. These amendments are consistent with the philosophy that the Federal government should not intervene in the affairs of State, local or tribal governments except in instances where civil rights have been violated, or gross negligence or mismanagement of federal funds is indicated, as provided in Section 109 of the Act. The purpose of amending the law to include a definition of mature contracts is to decrease unnecessary contract compliance, reporting and monitoring requirements. The amendment provided in Section 104(a) of these amendments is intended to prevent Federal officials from imposing new reporting requirements on tribal contractors unless such requirements are promulgated by regulations consistent with the Administrative Procedures Act.

The Committee recognizes that there may be legitimate needs for information for statistical, research or evaluation purposes, and that these needs may be negotiated with tribes. Tribes may or may not consent to reports for such purposes. Unfortunately, for the past decade, there have been too many instances of reports being imposed on tribes by Federal officials in an arbitray and capricious manner. Too often, tribal officials have been threatened with termination of contract funds if they refuse to submit computer forms, statistical reports, "special" reports, lists of serial numbers of law enforcement vehicles operated by the tribe, certificates of Indian blood for students served by tribal education programs, and other such reports. While such information may be important and useful, there must be agreement between the Federal agency and the tribal contractor on the purposes of such reports. Tribal compliance or noncompliance with such reporting requirements is not to be used by the Federal agencies as the basis for withholding or terminating contract funds.

Section 104(b) requires the respective Secretaries to report to tribes on all staffing and expenditures of Burau of Indian Affairs and Indian Health Service programs operated directly by the Secretary in each respective area. The Indian Reorganization Act of 1934 requires the Secretary of Interior to "advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress".[21] The Bureau of Indian Affairs partially meets this requirement through its budget development system, currently called the "Indian Priority System" and previously called "Band Analysis", "Zero-Based Budget", and

[21] 25 U.S.C. 476.

the "Budget Formulation Process". In practice, however, it has been difficult for tribes and Federal officials to correlate projected budgets with actual expenditures and resources. Often, the base figures used in Bureau budget exercises are based not on actual expenditures, but on estimates based upon the President's proposed budget. Not knowing the actual amount of resources available for the operation of programs makes it difficult for tribes that are planning to enter into self-determination contracts to determine the amount of funds that would be available for tribal operation of the program.

Admittedly, the Bureau of Indian Affairs makes an attempt to at least involve tribal officials in the development of projected budgets. In many Service Areas, however, the Indian Health Service makes no attempt at all to cooperatively plan budgets and programs with affected tribes. Requiring Area Directors, Agency Superintendents and Service Unit Directors to report annually to tribes on staffing ceilings and filled positions, funding obligations and actual expenditures will provide a base of information which is necessary for tribes and Federal officials to jointly and cooperatively plan for the best use of those financial and staffing resources at the tribal and area levels.

Section 105. Carryover Funding.—Section 8 of the current law authorizes tribes to carry over from one fiscal year to the next fiscal year unobligated or unexpended funds under a self-determination contract. The amendment clarifies that when such funds are carried over from one year to the next, and if the funds are to be expended in the succeeding fiscal year for the purposes for which they were originally appropriated, contracted or granted, that no additional justification or documentation of such purposes need be provided by the tribal organization to the Federal agency as a condition of receiving or expending such funds.

TITLE II—INDIAN SELF-DETERMINATION ACT AMENDMENTS

The Indian Self-Determination Act is amended by consolidating provisions for contracts with the Secretary of the Interior and provisions for contracts with the Secretary of Health and Human Services into Section 201.

Section 201. Self-Determination Contracts.—Section 201 continues the direction in sections 102 and 103 in the existing law to the Secretary to enter into a self-determination contract with a tribal organization at the request of a tribe. The Committee amendment clarifies the procedure for contracting. The Committee amendment also clarifies the respective roles of the Federal Government and the tribes during the development and implementation of self-determination contracts.

The intent of the Committee in section 102 is to clarify that the authority for a tribal organization to enter into a self-determination contract with the Secretary is a resolution of the governing body of an Indian tribe or Alaska Native village. While this preserves and strengthens the control of tribes over the decision to contract or not to contract, it is not intended to allow Federal agencies to use the resolution process as an obstacle to requests to enter into contracts (see the discussion of the term "tribal organization",

above). A well-managed tribal organization will periodically report to and coordinate efforts with the tribes it serves.

This change in the law is not meant to change the existing practice of tribes that provide a one-time, open-ended resolution authorizing a tribal organization to request contracts from year to year. The guiding principle is that the tribal governing bodies should determine how frequently tribal organizations are reauthorized to enter into contracts. Similarly, tribal governments should make their own determinations about the frequency and nature of oversight of contracts with tribal organizations.

These amendments, while providing the stability of mature contracts, are not intended to decrease the ability of tribal governments to exercise oversight of self-determination contracts. This oversight includes the right of a tribal government to rescind support for a self-determination contract when the tribal organization no longer appropriately meets the needs of the tribe. Such authorization to contract and oversight of the contract by the tribal governing body should be conducted without coercion by the Federal agencies.

Section 201 restates current law which authorizes tribes to contract to operate programs authorized by the Johnson-O'Malley Act of 1934, the Snyder Act of 1921 and the Transfer Act of 1954. Restated in the amendments is important language regarding the contractibility of programs which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) and any Act subsequent thereto. The purpose of restating this language is to clarify that the Secretary is not to consider any program or portion thereof to be exempt from self-determination contracts. Tribes have the right to contract for BIA Agency functions, IHS Service Unit functions, and BIA and IHS Area Office functions, including program planning and statistical analysis, technical assistance, administrative support, financial management including third party health benefits billing, clinical support, training, contract health services administration, and other program and administrative functions. The tribes also have the right under the Indian Self-Determination Act to work with the Secretary to redesign BIA and IHS Area Office, Field Office, Agency and Service Unit functions to better meet the needs of the tribes served directly by such offices.

The Committee believes that in requiring the Secretary of the Interior to enter into a self-determination contract, at the request of an Indian tribe, to plan, conduct and administer programs or portions thereof administered by any agency within the Department of the Interior, the Act is intended to include, for example, programs of the Bureau of Reclamation or the United States Fish and Wildlife Service, for which funds are appropriated by the Congress for the benefit of such tribe.

The Committee has also included language to direct the Secretary to enter into contracts with tribal organizations to plan, conduct and administer any or all of the functions, authorities and responsibilities of the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended. The intent of the Committee is that administrative functions of the Indian

Health Service are contractible under the Indian Self-Determination Act.

The Committee intends for Section 102(a)(1)(iv) of the amended Act to ensure that the Secretary may enter into a contract with a tribal organization, at the request of an Indian tribe, to administer programs or portions thereof, for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior. Examples of such programs include Environmental Protection Agency programs administered by the Indian Health Service and Department of Education "Chapter I" and education of handicapped children programs administered by the Bureau of Indian Affairs.

Section 102 as amended further authorizes tribes to contract with the Secretary to operate any program, or any portion of any program, without regard to the organizational level that such program is operated within the Department of the Interior or the Department of Health and Human Services. Again, this emphasizes the intent that tribes are authorized to contract with the Secretary to operate headquarters, area office, field office, agency and service unit functions, program or portions of programs.

Section 201 of the Committee amendment revises current contract application procedures by eliminating some of the declination criteria including, specifically, clause (F) of sections 102(a) and 103(a) which allows either Secretary to decline a contract on the grounds that the contract proposals fail to contain "other necessary components of contract performance". The Committee amendment directs both secretaries to approve contract proposals within ninety days unless the Secretary provides a basis, as provided in the Act, for declining a contract. The burden of proof for declination is on the Secretary to clearly demonstrate that a tribe is unable to operate the proposed program or function. The intent of the Committee in retaining the declination criteria and the declination process is to insure that denials of requests for self-determination contracts are handled only through the declination process.

The current practice of Federal agencies that impose "threshold criteria" on a self-determination contract application is clearly inconsistent with the intent of the Indian Self-Determination Act. Furthermore, it is contrary to the intent of the Indian Self-Determination Act for a Federal agency simply to fail to enter into a contract without providing to the tribal organization a formal notice of declination that states the grounds for declination and provides an opportunity and procedures for an appeal hearing within sixty days of receipt of a proposal to contract. The ninety-day and the sixty-day time frames for approval or declination of the contract both begin simultaneously upon receipt of the proposal. Section 102 and 103 of the Indian Self-Determination Act now require that, whenever an application by a tribal organization is declined by the Bureau of Indian Affairs or the Indian Health Service, the Federal agency must provide the applicant with a hearing to contest. The intent of the Indian Self-Determination Act is to assure that a tribal organization receives a hearing "on the record" in accordance with the requirements of the Administrative Procedures Act.

This section clarifies that tribes are eligible to contract for any program or function operated by either Secretary for the benefit of tribes, regardless of whether such specific programs or functions are operated locally. For example, a tribe may need to conduct a natural resources planning and management program under a self-determination contract. The fact that natural resources planning and management is not operated locally by the Bureau of Indian Affairs agency office should not prevent the Secretary from entering into a contract with that tribe. Furthermore, the fact that the Secretary has decided to allocate funds to a local agency in a particular manner should not bar the tribe from contracting for functions, such as criminal investigation, for which funds have not been allocated to that particular agency.

The Committee intends for section 102(a)(2) as amended to authorize tribes to enter into contracts with the Secretary to carry out trust related functions. Clearly, the Secretary of the Interior continues to maintain a trust responsibility for tribal resources when the tribe operates a program under a self-determination contract. Section 102(a)(2) allows tribes to contract for trust functions including but not limited to real estate appraisals, soils inventories, water resources studies, lease permits, land use zoning studies, forestry management and fire suppression, minerals inventories, environmental quality assessments, archeological resource studies, fish and game studies, cadastral surveys, land title and records management, lease compliance, trust fund investment and accounting services, facilities maintenance and repair. The intent of the law is to enable tribes to improve the protection of trust resources by operating the technical functions relating to the trust responsibility while preserving the Federal Government's obligations as trustee for Indian lands and resources.

Under the Committee's amendment, the Secretary of the Interior remains responsible for the protection of Indian trust resources. The quality of that trust responsibility, however, is dependent upon the quality of the supportive documentation, research and analysis, options and recommendations. Indian tribes are most often the "front line of defense" in protecting tribal trust assets. Consequently, tribes often are in the best position to provide the technical services that will afford the best possible protection of trust resources by the Secretary.

The protection and management of tribal trust resources should be viewed as a joint effort of the tribe and the Secretary. If tribal contracting of trust-related functions is to be declined, the Secretary's burden of proof is to demonstrate that a tribal organization's operation of those functions will lead to inadequate protection of trust resources.

The Secretary is authorized by Section 102(a)(4) to allow tribes to consolidate two or more mature contracts into a single contract. This amendment simplifies contract administration, including authority for tribes to consolidate letter of credit functions and advance payment system functions, and authority for tribes to submit consolidated quarterly financial reports and a consolidated annual report, rather than having to unnecessarily duplicate reporting requirements. The Committee understands that tribes and the Secretary may want to consolidate funding for purposes of administra-

tive flexibility. The Secretary and the tribes should propose procedures to the Congress to allow tribes to reprogram funds within consolidated contracts to better address tribal priorities. This section does not prevent flexible financial administration within the bounds of generally accepted accounting standards and practices.

Section 201(b) maintains and strengthens the procedures for declining to enter into a self-determination contract. As discussed above, "threshold criteria" are not authorized by the Self-Determination Act. In addition, the practice of simply failing to enter into a contract, when the tribal organization has submitted an application for a self-determination contract, is contrary to the Act. The Secretary may decline to enter into a self-determination contract only if the Secretary utilizes the declination criteria and procedures outlined in Section 201, and provides the tribal organization with a statement of declination in writing within sixty days of the receipt of the application. The Secretary must inform a tribe in writing of its opportunity for a hearing. Such hearing should be a due process hearing "on the record" conducted in accordance with the requirements of the Administrative Procedures Act.

As originally enacted, the Self-Determination Act authorized either Secretary to require that tribal contractors to obtain liability insurance. The Act also precluded insurance carriers from asserting the tribe's sovereign immunity from suit.

In practice, the costs of such liability insurance have been taken from the amount of funds provided to the tribal contractor for direct program costs or for indirect costs. The Committee is concerned that tribal contractors have been forced to pay for liability insurance out of program funds, which in turn, has resulted in decreased levels of services for Indian beneficiaries.

It is clear that tribal contractors are carrying out federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function. Consequently, section 201(c) of the Committee amendment provides that, for purposes of the Federal Tort Claims Act, employees of Indian tribes carrying out self-determination contracts are considered to be employees of the Federal Government.

The Committee amendment does nothing to change the status of contract care physicians employed by the Indian Health Service. The Indian Health Service provides two types of health care services, one known as direct services and the other known as contract care services. Appropriations for contract care services are contained in a budget activity that is separate from the budget activity for direct care services, which include hospitals and clinics, dental services and mental health services. Under the contract care appropriation, the Indian Health Service enters into contracts with private physicians or other health care providers to serve eligible Indians. Such physicians are not employees of the United States; they are independent contractors. Under the Federal Tort Claims Act their acts of negligence cannot be imputed to the United States. Di-

rectly-provided Indian health care services are a different matter. Such services are provided by Indian Health Service employees.

A patient claiming an injury in connection with the provision of direct services is limited to the remedies available under the Federal Tort Claims Act in any action against the United States. This provision is intended to cover claims against a tribal contractor for acts or omissions that occurred prior to the bill's enactment but for which the statute of limitations has not yet expired. Under current law, the contractors are required to carry malpractice insurance coverage for such past claims. This so-called "tail liability" coverage is even more expensive than coverage for current claims.

When an Indian tribe enters into a self-determination contract, the tribal contractor likewise administers direct care and contract care programs. That is, the tribal contractor typically hires employees to provide a wide range of direct care services. In addition, the tribal contractor may administer a contract health care program and thus administer contracts with private health care providers. The Committee does not intend the extension of Federal Tort Claims Act protection to private physicians or other private health care providers who may be providing contract health care under a self-determination contract to a tribal organization. Consistent with the manner in which coverage is extended for providers of direct health care services, section 102(c)(2) of the Act, as amended by the Indian Self-Determination Act Amendments, would protect only the employees of a tribal organization, not those with whom the tribal organization may contract to provide contract care. Only direct health services would be under the protection of the Federal Tort Claims Act.

The Committee amendment is not intended to expand the liability of the Federal Government to include claims for violation of statutory obligations not otherwise required of tribes. For example, tribes are specifically exempted from the Fair Housing Act of 1968 and the Equal Employment Opportunity Act. The Committee amendment is not intended to impute liability upon the United States for actions of Indian tribes which, if undertaken by any other person or entity, may be contrary to these or other Federal Acts.

The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility. Under current law, a self-determination contract with a tribal organization operates to actually relieve the United States of the liability which it had under the Federal Tort Claims Act before the contract was executed. In its place, the tribe is required to waive its immunity from suit up to the policy limits of its insurance, and then to be subjected to litigation without any of the protective and very restrictive provisions which apply to litigation under the Federal Tort Claims Act. The Indian Self-Determination Act was never intended to operate as a means for the United States to avoid the liability it would otherwise have under the Federal Tort Claims Act. The amendment to the Act will not increase the Federal government's exposure under the Federal Tort Claims Act. On the contrary, the amendment will only maintain such exposure at the same level that was associated with the operation of direct health care service programs by the Federal government prior to the enactment of the Indian Self-Determination Act.

Section 202. Technical Assistance and Grants to Tribal Organizations.—Section 104 of the Indian Self-Determination Act is redesignated as section 103, and a new subsection 103(d) is added which directs the Secretary to provide technical assistance to tribes in the preparation of contract applications.

A new subsection 103(e) would authorize the Secretary to provide a grant to a tribe to obtain technical assistance in program planning and evaluation, and in the development of management systems, whether or not such technical assistance is available from a Federal agency. Technical assistance may be provided by sources chosen by the tribe. These sources may include other tribes, tribal organizations, local experts, state and county agencies, and other groups. It is apparent that many tribal organizations have greater technical capabilities in the areas of program planning and evaluation, and management systems development than the Bureau of Indian Affairs or the Indian Health Service. For too long, however, federal agencies have monopolized technical assistance funds and have used those resources to establish centralized offices for technical assistance which are inaccessible to most tribes, or have provided grants to organizations which are unfamiliar with the local needs and conditions of tribal governments.

The Committee amendment also enables tribes to obtain assistance from other tribes that possess expertise in certain areas, for example, fish and game management and enforcement. Furthermore, the amendment allows tribes to obtain technical assistance from private health providers in planning the financial management systems for clinics and hospitals. Not only will such interaction lead to improved program planning, it could also lead to improved intergovernmental cooperation when tribes obtain technical assistance from local government sources in such areas as zoning ordinances, environmental quality planning, and other technical areas.

The new Section 103(e)(2) would enable tribes to conduct functional analyses of operations and responsibilities and to develop reorganization plans for Federal agencies serving the tribes including Areas Offices, Field Offices, Agency Offices and Service Units. Obtaining a grant to conduct such planning, designing, monitoring and evaluation of Federal programs, while obviously helpful to such tribes, is not be a precondition for tribes to conduct such analyses or to develop such plans. A fundamental premise of the Self-Determination Act is that self-determination involves more than just contracting. Tribes also have the right not to contract. Instead, tribes may participate with Federal agencies in cooperative, joint planning efforts to determine the manner in which those Federal agencies may better deliver federally-operated services to such tribes.

The Committee is aware that in Fiscal Year 1987 the Bureau of Indian Affairs in Alaska unilaterally removed certain historic recipients of grants under section 103(a) (formerly section 104(a)) of the Indian Self-Determination Act, from further participation in

the self-determination grant program. This has particularly been the case in the Juneau Area. This action is contrary to the intent of the Congress, and the Committee intends that tribes and villages which in past years have participated in the program shall remain eligible to receive self-determination grants.

Section 203. Personnel.—Section 105 is redesignated as section 104. The authority to allow federal employees who transfer to tribal employment to retain civil service benefits is made permanent. The current law is updated to provide for Federal Employee Retirement System (FERS) benefits. It is not the intent of the Committee under section 203 to confer upon Federal employees who transfer to employment under a tribal organization an additional benefit of sick leave credited toward retirement not available to other FERS employees in the Federal government.

The Committee amendment will allow greater flexibility for tribal contractors who utilize federal employees under the Intergovernmental Personnel Act (IPA). Where an employee under an IPA placement leaves, the tribe and the Secretary may replace that employee with another willing to serve in the position, and may renegotiate the IPA agreement. Federal employees under IPA placements may be eligible for step and pay increases on the same basis as other federal employees.

In order to ease the burden on Indian preference employees who may be displaced as the result of contracting, the Committee amendment allows Indian preference employees who are under excepted service to be reclassified as competitive service personnel. The amendment will allow displaced federal employees to compete government-wide for jobs. Furthermore, financial assistance is authorized for Bureau of Indian Affairs and Indian Health Service employees who are displaced as the direct result of contracting.

Section 204. Administrative Provisions.—Section 106 of the Indian Self-Determination Act is redesignated as section 105. Subsection 105(a) is amended by providing that federal procurement laws and the system of federal acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations shall not apply to Indian self-determination contracts.

The Indian Self-Determination Act is amended to provide authority for mature contracts to become permanent contracts. The time frame for new contracts is there years, unless the appropriate Secretary determines and the tribe agree that a longer term would be desirable. The limited time frame for new contracts is appropriate for contracts for activitie which are not permanent in nature such as construction projects. The Committee intends that the time frame for mature contracts will be indefinite. The Committee included this specific language in section 104 at the suggestion of the Administration, to clarify that mature contracts would have no time limit. This change is consistent with the fact that tribal government functions such as law enforcement, social services and health services are permanent tribal government functions. Of course, mature contracts may be terminated by the Secretary for violations of the Indian Civil Rights Act of for mismanagement, as provided for in Section 109 of the Act. Mature contracts may also be terminated by tribal organizations through retrocession.

Section 204(d) authorizes the Secretary to begin using the calendar year as the annual timeframe for contracts and agreements under the Indian Self-Determination Act except where the Secretary and the tribal organization agree on a different period. Many tribal contractors have experienced considerable problems with cash flow at the beginning of the fiscal year due to the problem of delays in the enactment of annual appropriations legislation and the consequent delays in allocating funds to the Federal agencies and the tribes. Most of the problems occur during the first quarter of the Federal fiscal year, e.g., October through December. Many tribes have been forced by delays in placing contract awards on the letter of credit system to borrow from commercial banks in order to maintain program operations. Routinely, tribes have been unsuccessful in recovering interest costs necessitated from the Federal agencies. Section 105(b)(2) directs the Secretary to submit a report to the Congress within 90 days of enactment of these amendments on the amounts of additional obligational authority needed to implement this section in fiscal years 1988 and 1989.

Section 205 amends section 104(d) of the Act by designating such section as section 105(e) and by changing the time frame for retrocession of a contract under the Indian Self-Determination Act from one hundred and twenty days to one year from the date of the request, unless the Secretary and the tribal organization mutually agree to a different date.

The Self-Determination Act is amended in subsection 105(f) to allow the Secretary to transfer to tribes property purchased with contract or grant funds. This should simplify property inventory and reporting requirements.

Section 205. Contract Funding and Indirect Costs.—A new section 106 is added to the Act to clarify provisions for funding self-determination contracts, including indirect costs. This section protects contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for costs incurred by the Federal government. The protection of contract funding will provide year-to-year stability for tribal contractors, and will contribute to better tribal planning, management and service delivery.

It is apparent from the wording of the new section 106(a) that the Committee is strongly committed to the principle of assisting tribes to succeed in their efforts to plan, manage and operate programs and services under self-determination contracts. Actions by Federal agencies to reduce tribal contract funding to pay for Federal computer equipment acquisiton, contract monitoring, employee displacement, pay costs and retirement costs frustrate the intent of the Indian Self-Determination Act and are contrary to the purposes of the Act. The intent of these amendments is to protect and stabilize tribal programs by protecting and stabilizing the funds for those programs from inappropriate administrative reduction by Federal agencies.

The Bureau of Indian Affairs maintains that many of the reductions to tribal contract budgets result from tribes giving a low ranking to programs such as social services or self-determination grants on the "Indian Priority System." It appears from the testimony submitted to the Committee, however, that many of these reductions are made in direct contravention of tribal funding prior-

ities, and are implemented long after tribes have participated in the "Indian Priority System" rankings.

Section 106(a)(5) would prevent the Secretary from reducing funds for a self-determination contract, except in response to a reduction in appropriations enacted by the Congress. Such a reduction should be a proportional, across-the-board reduction. For example, if the Congress appropriates a funding reduction of 2 percent, the federal agencies should not impose reductions greater than 2 percent on tribal contractors, except at the request of tribal contractors. These amendments are intended to prevent Federal agencies from passing on the entire amount, or a disproportionate amount, of a reduction in Congressional appropriations, to tribal contracts in order to protect the base for Federally-operated functions.[22]

Furthermore, it appears that the BIA funded pay increases for agency employees and passed on the entire burden of the budget reductions to tribal contractors. In many BIA Agencies, tribal higher education funds were reduced and Agency executive direction funds were increased in spite of the fact that tribes, in their "Indian Priority System" rankings, had ranked higher education as their top priority and executive direction as the lowest priority.

The Committee believes that practices such as these call into question the validity of the "Indian Priority System". Section 106(a)(5) does not prevent or eliminate tribal input into the Bureau of Indian Affairs budget development system. However, that system will need to be reexamined in light of these amendments. Similarly, in fiscal year 1986 the Indian Health Service directed tribes in some areas to reduce tribal contract budgets by 5% in response to the Congressionally-imposed sequestrations, in spite of the fact that the Indian Health Service had a protected limit of a 2-percent sequestration under the Gramm-Rudman law. The intent of these amendments is to prevent such administrative reductions of tribal contract funds.

The Indian Health Service has expressed a concern that Section 106(a)(5) would prevent the service from reallocating fund in order to achieve equity. The Committee is concerned about the need to achieve equity. Clearly, an Indian patient served in a federally-operated facility should receive at least the same amount of care and services and an Indian patient served in a tribally-operated facility. However, the Committee is concerned about the manner in which the Indian Health Service has utilized the resource allocation methodology in fiscal year 1987. For example, in the Alaska Area, tribal contractors and IHS facilities were "tapped" for 2 percent of their funds. The area director redistributed all of the available resource allocation funds to three federal facilities in the Alaska Area and provided $312,000 to the Alaska area office for program management purposes. Such actions called into question the validity and purposes of the service unit resource allocation methodolo-

[22] In fiscal year 1986 for example, the Congress imposed a 4.3 percent sequestration of all Bureau of Indian Affairs programs, plus an across-the-board reduction in Interior appropriations of 0.06 percent. Even after the sequestrations and the across-the-board reductions were imposed, the Bureau of Indian Affairs has more funds in fiscal year 1986 than in fiscal year 1985 for vocational training and "all other social services". Nevertheless, the Bureau reduced funding for many tribal programs from 16 percent to 25 percent in response to the reduction orders.

gy. It is clear that the Indian Health Service needs to address questions about the equitable allocation of Indian Health Service resources. The amendment allows the Indian Health Service to present a plan to the Congress, for Congressional approval through the appropriations process, for the reallocation of resources to achieve equity.

The new Section 106(b) would require the Secretary of the Interior and the Secretary of Health and Human Services to annually submit to the Congress an accounting of the amounts of funds provided to tribes for direct and indirect costs for each program during the most recent fiscal year. The annual report shall include an accounting of any deficiency of funds needed to provide required indirect costs for all Indian Self-Determination contracts for the current fiscal year. These annual reports are needed by the Congress in order to provide reliable and objective data on which to base funding needs for indirect costs. These reports shall be provided to the Congress no later than March 15 of each year. The data requested on tribal indirect cost rates has already been collected by the President's Council on Integrity and Efficiency for its report entitled "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred." Therefore, providing this data on an annual basis will involve simply updating on an annual basis the data already collected and available. This data is needed to answer questions from the Congress and from the Federal agencies on the need for indirect costs and the types of expenditures of indirect cost funds. Furthermore, the Committee hopes that the Secretarial reporting activities related to assistance provided to tribes and requests from tribes for technical assistance will facilitate increased communication and coordination between the Department of Interior Office of Inspector General, the Bureau of Indian Affairs, the Indian Health Service and the tribes. It is further contemplated that such improved coordination and communication may lead to broader use of "provisional/fixed" rates and multiple rates, and innovations such as the negotiation of multiyear rates, or the negotiated lump-sum agreements recommended by the President's Council on Integrity and Efficiency.

Under the new Section 106(c) tribes will not be held liable for uncollectable indirect costs from agencies other than the Bureau of Indian Affairs or the Indian Health Service, for purposes of determining indirect cost rates in subsequent years. The intent of this provision is to alleviate the problem caused by the failure of Federal agencies other than the Bureau of Indian Affairs or Indian Health Service to pay in full their portion of the negotiated indirect costs associated with grants from those agencies.

The new section 106(d) provides that Indian tribes shall not be held liable for amounts of indebtedness to the Federal government attributable to theoretical underrecoveries and overrecoveries and actual underrecoveries incurred prior to fiscal year 1988. Clearly, it is not the intent of the Congress to penalize tribes for complicated problems that have been caused by situations beyond their control. It should be emphasized that no theoretical overrecovery and underrecovery problems identified by the Committee have been caused by poor management. Rather, the cause of these problems is the failure of federal agencies to pay their fair share of indirect

costs. Given the protections and remedies of these amendments, such forgiveness of underrecoveries and overrecoveries is limited to indebtedness incurred prior to fiscal year 1988.

The new Section 106(e) would provide a time limit of 365 days on disallowing contract costs after receipt of the annual single agency audit report. This time limitation of 365 days applies also to any required audit reports submitted by tribal organizations prior to enactment of these amendments. While it is important to review audit reports, it is not in the interests of tribes or the Federal agencies to disallow costs and enforce actions against tribes years after the submission of a final audit report. This provision is expected to result in more timely review of annual audit reports.

Section 106(f) provides that the Secretary of the Interior shall not remove or alter any program or portion thereof in the Indian Priority System except human to an Act of the Congress. This prohibition applies to any system that the Secretary may utilize to meet the responsibilities of the Secretary under section 476 of title 25 of the United States Code to advise the tribes of all appropriation estimates or Federal projects for the benefit of the tribes prior to submission of such estimates to the Office of Management and Budget and the Congress. The Secretary is directed to publish in the Federal Register a notice of intent at least one hundred and eighty days prior to the date of seeking such authority. The Federal Register notice shall provide a statement of the impact on base funding levels for each affected Agency and tribe.

The new Section 106(g) would require the Secretary to add indirect costs to the amount of funds provided for direct program costs associated with self-determination contracts for the initial year of tribal program operation, upon the request of the tribal contractor. Section 106(g) is intended to require the Secretary to provide indirect costs for each contract year in addition to the program funding which would have been available to the Secretary to operate a contracted program and to prohibit the practice which requires tribal contractors to aborb all or part of such indirect costs within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting. The combined amount of direct and indirect costs shall then be available for each subsequent year that the program remains continuously under contract. While the Committee has concerns about the changes in the methods of budgeting for and allocating indirect cost funds, whether those methods be the so-called "grandfather" approach, the single line-item indirect cost fund, or some other method, the Committee does not believe that it should determine the method of distribution. The "grandfather" approach and the "single fund" approach both have advantages and disadvantages from the perspective of Federal agency budgets and from the perspective of individual tribal contracts. It is the Committee's hope that the Department of the Interior Office of Inspector General, the Bureau of Indian Affairs and the Indian Health Service will coordinate their efforts with the tribes to develop the most effective method of distributing indirect cost funds. The Committee amendment will insure that, whatever method is used, the tribal contractor will realize the full amount of direct program costs and indirect costs to which the contractor is entitled. Furthermore, the Committee amendment is intended to insure that the funds needed are continuously available, unless the Congress reduces such funds by appropriations actions.

A new section 106(h) provides that for construction contracts, a tribe is entitled to the full amount of indirect costs based on the total amount of funding if the tribe conducts its own construction, including construction under the Housing Improvement Program. If the tribe subcontracts the construction, the tribe will be able to collect indirect costs only on the amount of funds used by the tribe to oversee the construction subcontract(s).

Section 206. Contract Appeals.—A new section 110 is added to the Indian Self-Determination Act. Section 110(a) confers upon the United States District Court original jurisdiction, concurrent with the Court of Claims, over civil actions or claims arising under the Self-Determination Act. Section 110(a) provides parties aggrieved by federal agency violations of the Self-Determination Act the right to seek injunctive relief in the United States District Courts. The provision also allows an aggrieved party to seek money damages in the Court of Claims or in the district court.

Section 110(d) allows a self-determination contractor to seek judicial review pursuant to the Contract Disputes Act of a decision of an agency contracting officer or of an agency board of contract appeals. Under this provision, a tribal contractor may secure relief in the United States District Courts, including orders that require the offending agency to pay amounts required by the plaintiff's contract. The Committee amendment leaves unchanged existing law allowing direct recourse to the United States Court of Claims for review of contracting officers' decisions.

The Committee amendment affords self-determination contractors the opportunity to secure injunctive relief against the Bureau of Indian Affairs or the Indian Health Service for violations of the Self-Determination Act (or the terms of contracts under the Act) rather than being put to the cost of having to file multiple, annual claims to recover contract damages resulting from such violations, while the same violations continue unchecked.

In *Appeals of Papago Indian Tribe of Arizona,* [23] the Interior Board of Contract Appeals ruled that contract disputes before the Board involving self-determination contracts were not subject to the Contract Disputes Act. The *Papago* decision extended an earlier ruling in *Busby School of the Northern Cheyenne Tribe* v. *United States* [24] that the Contract Disputes Act did not apply to self-determination contractors' claims before the Court of Claims. If given general application, these rulings may have the effect of rendering self-determination contractors who are prevailing parties in such proceedings ineligible to seek an award of legal fees under the Equal Access to Justice Act [25] under which "adversary adjudications" at the administrative level subject to the Act are defined in

[23] IBCA-1962 and 1966 (March 17, 1986).
[24] 8 Cl. Ct. 596 (1985).
[25] Public Law 96-481 (Act of August 1, 1980, 94 Stat. 183).

part by reference to proceedings under the Contract Disputes Act.[26]

Section 110(c), then, reinstates the law as it existed prior to the *Busby* and *Papago* decisions, placing self-determination contractors on an equal footing with other federal contractors by allowing them to make application for an award of legal fees under the Equal Access to Justice Act when they are the prevailing party in an agency board of contract appeals proceeding involving a contract under the Indian Self-Determination Act.

Section 110(c) also makes the Equal Access to Justice Act applicable to other administrative hearings and appeals procedures for resolutions of disputes within the Department of the Interior and the Department of Health and Human Services when those proceedings are invoked to enforce the Self-Determination Act or contract rights under the Act, whether the non-federal party involved in those proceedings is a self-determination contractor or is a member of the affected Indian tribe or community who is personally injured by agency action in violation of the Self-Determination Act or the terms of contracts entered into under that Act intended to benefit that community. Thus, under section 110(a), Bureau of Indian Affairs proceedings under 25 CFR, Part 2 or 25 CFR, Part 271.81 respecting contracts under the Self-Determination Act, and comparable Indian Health Service proceedings would be made subject to the Equal Access to Justice Act just as proceedings before the agency boards of contract appeals.

Section 110(c) does not change existing law allowing self-determination contractors who prevail in contract disputes in the United States Court of Claims to seek an award of legal fees under the Equal Access to Justice Act, nor to the existing law allowing non-contractor plaintiffs to seek such fees upon prevailing in the United States District Courts. Section 110(a) and (d) would make the same relief available to self-determination contractors who prevail in similar claims in the United States District Courts.

Section 110(c) also leaves unchanged certain provisions in the existing law concerning treatment of legal expenses by self-determination contractors. Under these provisions, contractors may treat legal expenses incurred in administrative proceedings within the Department of the Interior or the Department of Health and Human Services involving enforcement of self-determination contract rights as allowable costs incurred in the administration of those contracts.[27] Self-determination contractors may not use indirect costs, however, to pay for legal fees incurred in prosecuting claims for monetary relief against the Federal Government in court. This contrasts with the more stringent rules applicable to standard procurement contracts in which a profit factor is built

[26] *See* 5 U.S.C. 504(c)(2)(B). The 1985 amendment was made in part to overturn the decision in *Fidelity Construction Company* v. *United States*, 700 F.2d 1379 (Fed. Cir.), *cert den.* 104 S. Ct. 97 (1983), which had held that only agency administrative appeals and proceedings mandated by law were subject to the Equal Access to Justice Act, a ruling inconsistent with the original intent of the Congress in passing the Equal Access to Justice Act.

[27] See 25 CFR, Part 276, Appendix A, Part II, Paragraph B.16 (applicable to all self-determination contracts with the Bureau of Indian Affairs) and Circular A-22, Paragraph 34d (applicable to self-determination contracts with the Indian Health Service) or OASC-10, Attachment B (FMC 74-4), Paragraph B.16 (applicable to self-determination contracts with the Indian Health Service).

into the contract price (no profit is allowed on self-determination contract), in which no trust responsibility exists between the contracting parties (the federal government's trust responsibility tempers all of the ordinary contract rules as applied to self-determination contracts), and as to which a primary government objective is to receive the maximum amount of goods or services for the lowest cost (under section 106(h) of the Self-Determination Act, the Federal Government is required to fund self-determination contracts at the same level as would be available to the federal agency to operate the program absent the contract).

Section 110(d) subjects self-determination contracts to the Contract Disputes Act, thereby affording self-determination contractors the procedural protections now given other federal contractors by that Act. Among the most important of these is the requirement that agency contracting officers make prompt decisions on contract disputes. Under existing law, contracting officers administering self-determination contracts face no enforceable deadlines for making decisions on contract disputes and are in effect free to sit on such disputes indefinitely, which they frequently do. This is one of the problems the Contract Disputes Act was intended to cure. This amendment also provides to self-determination contractors the same favorable treatment as to interest on amounts in disputes which is now given to other federal contractors. Thus, under the Contract Disputes Act, computation of interest on the claims for a prevailing party begins at the time the dispute is filed with the contracting officer. Under contract disputes not covered by the Contract Disputes Act, such interests runs from the time the claim is filed with a reviewing Board of Contracting Appeals rather than from the time the claim is filed with the Contracting Officer. The *Busby* and *Papago* decisions took those protections away from self-determination contractors. This amendment restores those protections.

The proposed new section 110(e) would make the amendments at the new section 110(c) and section 110(d)(1) retroactive for a limited class of cases, to protect those self-determination contractors who were deprived of the protection of the Contract Disputes Act (and derivatively the Equal Access to Justice Act) by the *Papago* decision as to proceedings pending before the Interior Board of Contract Appeals involving Indian Self-Determination Act contracts as of March 17, 1986 (or subsequently), the date the Interior Board of Contract Appeals first applied the *Busby* ruling to such board proceedings in the *Papago* decision.

Self-determination contractors which are substantially prevailing parties in such proceedings which terminated between March 17, 1986 and the date of enactment of these amendments, are given a 30-day grace period to make application for an Equal Access to Justice Act fee award.

Comparable provisions were utilized to allow for limited retroactive effect when the 1985 Equal Access to Justice Act amendments were enacted to protect contractors adversely affected by the *Fidelity* decision.[28]

[28] Public Law 99-80 (Act of August 5, 1985, 99 Stat. 183, Section 7 (b) and (c)). See compiler's notes to 5 U.S.C. 504 as to effective date.

The provision for such limited retroactivity is appropriate to ensure that those Indian Self-Determination Act contractors who were adversely affected by the *Papago* ruling will be accorded treatment equal with that originally intended by the Congress and as provided for in this amendment. The same rationale gave rise to the limited retroactivity provisions provided in the 1985 Equal Access to Justice Act amendments.

The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations. Tribal contractors are denied access to injunctive relief to compel agency compliance with the law where the effect of any court order would be to require the Federal government to add funds to the plaintiff's contract.[29] Furthermore, tribal contractors are unable to recover legal fees under the Equal Access to Justice Act even when they prevail on contract disputes in agency administrative proceedings. Tribal contractors are obliged to utilize their limited indirect cost funds to pay for legal fees rather than to cover other essential administrative costs.

Not only does existing law make it virtually impossible for self-determination contractors to enforce their rights under the Act, but the Bureau of Indian Affiars has also taken to arguing that such contractors have no legal remedies at all by which to redress the Bureau's failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms. Thus, in a pending Interior Board of Contract Appeals proceeding, the Bureau has argued that even if the self-determination contractor was entitled to receive the amount of indirect costs generated by its indirect costs rate as approved by the Department of the Interior Office of Inspector General (the cognizant Audit Agency for self-determination contracts with the BIA), that the contractor could not recover the difference between the amount it was entitled to receive under the contract, and the amount the Bureau paid. That is, the contractor could not recover ordinary contract damages for the Bureau's breach in failing to fully fund the contract. The type of funding violation involved in that instance was not the product of a Congressional appropriation shortfall, but of a unilateral decision by the BIA to fund indirect costs for the contractor pursuant to a method other than that provided for in the contract and the applicable law. The rationale offered by the BIA for this argument was that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract. Clearly, this is an unacceptable argument.

[29] See *Alamo Navajo School Board, Inc., et. al.* v. *Andrus*, 664 F. 2d 229 (10th Cir. 1981).

To compound this problem, the Department of the Interior's auditors propose pursuant to the standard terms of the contractors' negoitiated indirect cost agreement, to treat the contractor as if it had collected from the BIA the entire amount of indirect costs to which it was entitled under the contract; and, on such assumption, since the contractor did not spend or incur costs at the contractually mandated level, to assume that those funds had been saved and to penalize the contractor in a future year by reducing its indirect costs by the amount of the contractors' presumed savings. This will have the effect of twice penalizing the contractor for the BIA's failure to fund the contractor's indirect costs at the level required by law and the contract terms. This argument reflects a total disregard for the intent of the Congress as expressed in the Indian Self-Determination Act, an abandonment of the BIA's trust obligations to tribal contractors, and amply illustrates the necessity of enacting the remedial measures provided in these amendments.

Section 207. Promulgation of Rules and Regulations.—The provisions for regulations in the Act are updated to require the Secretary of the Interior and the Secretary of Health and Human Services to promulgate self-determination contract regulations consistent with the intent of these amendments in Title 25 of the Code of Federal Regulations. The exemption of self-determination contracts from the federal acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations results in the need for the respective Secretaries to reissue Indian self-determination regulations. The Indian self-determination regulations currently contained in Title 25 and Title 41 of the Code of Federal Regulations shall be used as the starting point in developing new Indian self-determination regulations. The Committee intends that until new regulations are promulgated, the existing regulations, along with the amended Indian Self-Determination Act, shall form the basis of legal and regulatory authority for negotiating Indian self-determination contracts for fiscal year 1989. The new regulations shall be prepared with the active participation of Indian tribal governments and organizations. It is the intent of the Committee that the regulations currently contained in Title 41 of the Code of Federal Regulations, Section 14H-70, should be published in Title 25 of the Code of Federal Regulations, in a revised format consistent with these amendments. There are no programmatic reasons for having separate regulations for self-determination contracts with the Secretary of Health and Human Services in Title 42 of the Code of Federal Regulations. Therefore, a uniform and consistent set of regulations for all Indian self-determination contracts, including contracts with the Secretary of Health and Human Services, should be contained in Title 25 of the Code of Federal Regulations. The regulations regarding contracts under the Indian Self-Determination Act should be relatively simple, straightforward, and free of unnecessary requirements of procedures. The Committee expects the Secretary of the Interior and the Secretary of Health and Human Services to work closely with tribes in the initial drafting of these regulations, as well as in the subsequent refinement of proposed rules for publication. This section establishes a time-frame for promulgating regulations to implement the Act. The Committee intends for these amendments and regulations promulgated thereunder to become

effective prior to the beginning of the first Fiscal Year following enactment of this amendment.

Section 208. Reports.—Section 208 of the current law is redesignated as subsection 5(f) to consolidate and make consistent the reporting requirements. The Committee amendment reemphasizes the requirement to promulgate contract requirements consistent with the Administrative Procedures Act.

Section 209. Consolidated Contract Funding.—Section 209 of S. 1703 authorizes a demonstration project for consolidated funding for Indian tribes. Authority for consolidated funding contracts would expire three years after enactment of S. 1703. The authority to enter into a consolidated funding contract would only arise at the written request of a tribal governing body. The Committee intends for the arrangement between the Secretary of the Interior and a tribe would be a contractual one, to be embodied in a written agreement negotiated between the Secretary and the tribe requesting consolidated contract funding.

The amount of funding included in the consolidated contract would be at least the amount the tribe received from contracts under Public Law 93-638 with the Bureau of Indian Affairs (for all programs except ISEF). The amount of funding included in a consolidated funding contract would include funds provided for trust services for individual members of a tribe only to the extent that the tribe agreed to maintain trust services for its members.

A consolidated funding contract would be subject to other provisions on the Indian Self-Determination Act. Specifically, the tribe would submit a consolidated funding contract proposal to the Secretary for review. The Secretary then would review the proposal and approve it according to the declination criteria set forth in section 102 of the Act.

Furthermore, any disputes would be resolved by review in the United States District Court or, if claims for money damages and at the election of the tribe, in the U.S. Court of Claims. A tribe receiving funding pursuant to this section would be able to retrocede the contract and resume its eligibility for self-determination contracts pursuant to section 102. Any individual who willfully misapplies, steals, or obtains by fraud any money received by a tribe pursuant to a consolidated funding contract would of course be subject to criminal prosecution pursuant to section 6 of the Self-Determination Act.

Finally, the Committee amendment does not obligate any tribe receiving funding under section 209 to provide the same services and benefits as the Secretary would otherwise have provided. Likewise, the Secretary of the Interior is not obligated under the Committee amendment to provide services or benefits to a tribe or its members to the extent that funding is provided for such services or benefits to the tribe pursuant to section 209 of the Committee amendment. This provision is intended to allow a tribe maximum flexibility to use Federal funds to fashion programs for its members. It is not intended, as section 210 of the Committee amendment and section 111 of the Self-Determination Act make clear, to authorize or require the termination in any way of the existing trust responsibility of the United States with respect to Indian people.

CONCLUSION

As discussed earlier in this report, the Committee amendment is intended to facilitate the exercise by the Secretary of the trust responsibility in a manner that emphasizes cooperation with Indian tribes. For too long, the question of trust responsibility has been approached as an either/or proposition: either tribes have no freedom at all, or else the Federal Government has no responsibility. The correct approach to trust responsibility lies somewhere between these extremes, with the Federal Government responding positively to the conditions and capabilities of individual tribes. These amendments strengthen the ability of tribes to contract with the Secretary to perform trust-related functions, and to participate with the Secretary in trust responsibility decision-making as equal partners.

COST AND BUDGETARY CONSIDERATIONS

The cost estimates for S. 1703 as provided by the Congressional Budget Office are outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 2, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1703, the Indian Self-Determination and Education Assistance Act Amendments of 1987, as ordered reported by the Senate Select Committee on Indian Affairs on October 30, 1987. Enactment of this bill would increase costs to the federal government, but the magnitude of the increase cannot be estimated. Additional funding, however, would require appropriations. CBO expects that the budgets of state and local governments would not be affected by enactment of this legislation.

S. 1703 would make several changes to the Indian Self-Determination and Education Assistance Act of 1975, which allowed tribes to contract to administer Indian programs previously run by the federal government. Section 201 of the bill would require the Secretary of the Interior or the Secretary of Health and Human Services (HHS) to obtain liability insurance for tribes contracting with the federal government. Under current law, tribes must obtain their own liability insurance and the federal government may pay for it as an indirect cost component of administrative contract agreements. The federal share of tribal insurance costs, however, is unknown. To the extent that such insurance currently is not being paid for by the federal government, this provision would result in additional cost to the federal government.

The bill states that if the Secretary is unable to obtain liability insurance, tribal organizations having contracts would be covered under the Federal Tort Claims Act. The Federal Tort Claims Act protects employees of the federal government by providing that only the federal government can be sued for damages resulting from the performance of a federal employee. If these tribal organi-

zations were covered under the Federal Tort Claims Act, the federal government would not actually have to purchase insurance for the tribes. Rather, the provision would increase the federal government's liability and costs would be incurred only if suit were brought against the federal government. CBO has no basis to estimate the additional liability that would be taken on by the federal government or the additional cost that could be incurred by the Justice Department for defending more liability cases.

Section 201 also would expand the services for which tribal organizations could contract outside of the Departments of HHS and Interior. There is no basis to estimate the effect on the overall level of contracting and total contracting dollars that might be requested as a result of this expansion.

Section 202 of the bill would provide a broader range of technical assistance to tribes contracting with the federal government. Complete data currently is not collected on funding for technical assistance to tribes. Last year, the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) spent at least a total of $7 million for technical assistance. This figure includes grants to tribes for assistance, but does not include the cost of much of the federal agency staff time involved. Providing a broader range of assistance to tribes would increase costs. If the funding level were to double as a result of this provision, cost would be at least $14 million per year.

Section 203 of the bill would make changes in the treatment of certain federal personnel employed by tribal organizations. Under this bill, employees who leave federal service and work for tribal organizations would be allowed to retain benefits under the Federal Employees' Retirement System (FERS). As the bill is currently written, employees participating in FERS also would receive an additional benefit as the language would allow sick leave to be credited toward retirement. This benefit is not available to other FERS employees in the federal government. CBO expects no significant additional cost to the federal government would result through 1992 as a result of enactment of these personnel provisions.

The bill would provide severance pay and cash bonuses to certain employees whose positions are terminated because of a contract agreement. The amount of the cash bonus is not specified in the bill. Some 100 Intergovernmental Personnel Act (IPA) employees working for the IHS and the BIA were terminated in the last year. The number of terminations resulting from changing contract agreements is unknown, but is estimated to be a small subset of the total. Costs to the federal government of paying these employees some severance pay and cash bonuses is expected to be less than $1 million annually.

Section 205 of the bill would clarify congressional intent that contract support costs, or indirect costs, should be provided to tribes under administrative contract agreements. This section also would require the Secretary of HHS and the Secretary of the Interior to request separately funds for contract support costs. Although it is clearly the Committee's intent that additional appropriations be provided for indirect costs, section 205 provides no authority for additional appropriations. Under current law and through regulations, both the Indian Health Service and the

Bureau of Indian Affairs already have the authority to fund direct and indirect costs incurred by tribes. There is currently no maximum to the amount that can be provided to tribes under contract. CBO expects that this provision would result in no additional cost to the federal government. S. 1703 contains language stating that tribes are "entitled to contract" for programs. Because IHS and BIA activities are discretionary and must be funded through subsequent appropriations action, this language could have the effect of requiring contract costs to be met first and limiting funding for remaining activities within IHS and BIA.

Section 209 of the bill would create a three-year demonstration project in which tribal organizations could provide services not currently provided by the federal government. As many as ten tribal organizations would be given at least as much funding as they would have received through the contracting process to provide services. If the ten tribes chosen are among tribes currently contracting with the federal government, this funding simply would substitute for current funding and result in no additional cost. If, on the other hand, the demonstration includes new tribes and services, or if the funding provided is greater than the tribe would otherwise have received under the contracting process, costs to the federal government would increase. If ten new tribes were provided with $500,000 in each of the three years, costs would be $5 million in each fiscal year 1988 through 1990.

All other sections of the bill are expected to result in no significant additional cost to the federal government or to state and local governments.

Please call me or have your staff contact Carmela Dyer if you have further questions.

With best wishes,

Sincerely,

ROBERT F. HALE
(For Edward M. Gramlich, Acting Director).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the provisions of the bill.

The Committee believes that S. 1703 will have minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee requested a legislative report on S. 1703 from the Department of the Interior and the Department of Health and Human Services. The Committee has not received a legislative report on S. 1703 from the Department of the Interior or the Department of Health and Human Services. Therefore, the Committee has inserted in lieu of a legislative report the testimony on S. 1703 provided by the Department of the Interior and the Department of Health Services at the Committee hearing on October 2, 1987. The Committee has also included a letter from the Department of Justice regarding S. 1703.

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY—INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S. 1703, THE "INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987"—OCTOBER 2, 1987

Mr. Chairman and members of the Committee, I am pleased to present the views of the Department of the Interior on S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987".

We could only support S. 1703 if it were amended to address our concerns as detailed in this testimony. We plan to submit an alternative proposal for amending the act in the near future.

Before dealing with some of the specifics involved in tribal-BIA contracting I believe it is appropriate to step back for a moment to consider what we wish to accomplish. The enactment of the Indian Self-Determination Act in January of 1975 was the end result of President Nixon's July 1970 Message to the Congress on Indian Policy which called for tribes to be given the opportunity to assume responsibilities and control over programs operated for their benefit by the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS).

We now find ourselves in what sometimes seems to be a guagmire of conflicting laws, rules, regulations and policies trying to carry out what was a fairly straight forward and clear objective in President Nixon's Message, that is to transfer responsibility and funds at the tribes request to operate federally funded programs intended for their benefit.

Most of the problems are associated with the mechanism used in providing the tribes with the Federal funds. Apparently, in response to concerns that the turn over of programs and services to tribes could be followed by a cut off of the Federal funding, contracts were chosen as the mechanism for those turnovers. The reasoning apparently was that contracts are used in connection with a Federal agency's carrying out a Federal responsibility while grant agreements are associated with Federal aid in carrying out someone else's responsibilities and cooperative agreements are used in jointly carrying out a responsibility. Therefore, it apparently seemed to follow that the use of contracts provides a basis, or an additional basis, for continued Federal funding because it is clearer that Federal responsibilities are being carried out.

I do not believe that the use of the term "contract" provides any assurance against budget cuts or any guarantee of continued funding. It is notable that in the budgeting and appropriations process for BIA, no distinctions are made between contracted and non-contracted funds, nor is special consideration given to the degree to which a given program is contracted. However, the use of the contract mechanism has unintentionally caused the development of problems. Among the problems at least partially due to the contracting mechanism are the unproductive and time consuming annual renewal or recontracting process and the delays in the determination of contract amounts while final appropriation amounts are being determined and allocated in accordance with Appropriations and Conference Committee Reports.

Another problem is the BIA's need to monitor the contractor while the contract is being carried out because of the BIA's continuing responsibility to ensure compliance with detailed contract terms. To be able to do this the BIA may retain part of the budgeted funds for program operations that might otherwise be included in the contract amount.

Still another problem is indirect cost determinations, budgeting and funding for indirect costs, and the spiral of debt that can afflict tribes due to theoretical overrecoveries of costs. This problem is further complicated by tribal governments' dependence on the use of indirect cost funding to support more of a tribal government's expenses than the expenses the tribe incurs solely because of the contract.

One way of trying to deal with these problems is to continue to try to modify the Federal contracting mechanism to streamline it and make it more in line with the purpose intended. This is what S. 1703 is intended to do, and the attachment to my prepared statement provides our detailed comments on that bill. However, it is increasingly obvious that contracting is too unwieldy to promote true self-determination. For this reason I believe that a more basic change may be needed and that the time is appropriate to actively consider it. We are currently developing an extensive legislative proposal to fix what we view as the problems with Public Law 93-638. We plan to submit our proposal to the Congress within the next six weeks. We respectfully request that the Committee withhold action on S. 1703 until it has the chance to review our proposal.

I realize that a basic restructuring of Public Law 93-638 would be a tremendous undertaking, with actual implementation requiring several years, but I am convinced that our experience makes it clear that we have created too many barriers to true self-determination by relying on the mechanism of contracting. There must be incentives for tribal governments to run their own programs and for the BIA to transfer the programs through a sensible and manageable system. I do not believe that a few amendments to the existing law will solve the problems; it is time to consider a new process. We would be pleased to work with the Committee in consultation with Indian tribes, to develop legislative provisions along the lines I have outlined we will be proposing.

This concludes my prepared statement and I will be pleased to respond to the Committee's questions.

DEPARTMENT OF THE INTERIOR DETAILED COMMENTS ON S. 1703, THE "INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987"

1. We have no comments on section 101 of S. 1703 which provides the short title and a table of contents for the bill.

2. Section 102 modifies the declaration of policy now in section 3(b) (25 U.S.C. 450a(b)) of the Indian Self-Determination and Education Assistance Act (hereinafter referred to as "the Act") to clarify that the Federal responsibility is to "individual Indian tribes and to the Indian people as a whole" rather than to "the Indian people". It also adds "In accordance with this policy the United

States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." We have no objections.

3. Section 103 amends section 4 (25 U.S.C. 450b) of the Act to add eight definitions and change a definition.

The term "construction programs" is added and defined to mean "programs for the planning, design, construction, repair, improvement and expansion of buildings or facilities but not limited to, housing, sanitation, roads, schools, administration and facilities, irrigation and agricultural works and water conservation, flood control, or port facilities".

(a) The word "including" is apparently missing after "facilities" the first time it appears (page 3, line 13).

(b) The definition apparently extends to activities usually considered as operation and maintenance of facilities as distinguished from true construction and renovation. We believe that the ongoing operation and maintenance of facilities is and should be contractible under the Act.

(c) The definition is included because of a later amendment (page 7, line 2) to section 102 of the Act to expressly include "construction programs" as contractible under the Act. Although we support the concept of allowing tribes to contract for the planning, design, and construction of projects, we believe such contracting should be done as a business activity so the tribe could make a profit and manage the contract appropriately. Contracting for construction under Public Law 93-638 is really not appropriate since it is designed to enable tribes to operate on-going programs whereas construction projects for a given tribe are infrequent and limited in duration. Moreover, contracting construction under Public Law 93-638 with all the attendant complexities of indirect cost-negotiation and payment would inevitably result in cost inflation. This inflation would reduce the amount of construction that could be done to benefit Indian people.

4. Sections 103 also amends section 4 of the Act to provide definitions for the terms "contract costs", "contract funding base", "direct program costs", "indirect costs", and "indirect cost rate". These terms are dealt with in connection with the sections where the terms are use.

5. Section 103 also amends section 4 of the Act to define the term "mature contract" (page 4, line 19) to mean "a self-determination contract that has been continuously operated by an Indian tribe or tribal organization for three or more years, and for which there has been no significant and material audit exceptions in the annual financial audit of such Indian tribe or tribal organization".

This definition includes the first two of several uses in the bill of the phrase "Indian tribe or tribal organization". Section 4(c) (25 U.S.C. 450b(c)) defines the term "tribal organization" to include "the recognized governing body of any Indian tribe". Therefore, the phrase "Indian tribe or tribal organization" is redundant and the term "Indian tribe" need not be added when the term "tribal organization" is used. See also page 5, line 13; page 6, line 24; page 7, line 1; page 8, lines 1, 14 and 18; page 9, lines 1, 2, 4, and 9; page 11, lines 6 and 11; page 12, line 20; page 13, lines 8, 13, 15, and 21;

page 14, lines 3, 11, and 13; page 15, line 2; page 16, lines 16 and 23; page 17, lines 2, 7, 15, and 24; page 18, lines 4 and 24; and page 20, line 17.

6. Section 103 changes the definition of "Secretary" in section 4 of the Act to read "unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both". For clarity we recommend that the definition read as follows: " 'Secretary' unless otherwise designated, means the Secretary of Health and Human Services or the Secretary of the Interior, as appropriate in the context". This will avoid the possibility of questions as to whether the consolidated section 102 of the Act in section 201 of the bill can be interpreted as requiring one Secretary to contract with a tribal organization for the operation of an activity assigned by law to the other Secretary.

On page 5, line 4 word "it" should be inserted before "as".

7. Section 103 also amends section 4 of the Act by adding a definition of the term "self-determination contract" to mean "an intergovernmental contract entered into pursuant to this Act between an Indian tribe or tribal organization and an agency of the United States for the purpose of assuring Indian participation in the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided,* That no intergovernmental contract shall be construed to be a procurement contract".

(a) The definition uses the new and undefined term "intergovernmental contract" and the term is not used elsewhere in the bill. Under the Act as it now stands and as it would be amended by S. 1703, contract are to be entered into with "tribal organizations" which is defined to include other than governmental organizations including apparently even urban Indian organizations (see page 10, line 15 of the bill). Therefore the term "intergovernmental contract" is not appropriate unless the bill is amended as we recommend to limit contracting under the Act to tribal governments but permitting them to subcontract if they so choose. If that recommendation is accepted, the term "intergovernmental contract" or "intergovernmental self-determination contract" might be substituted for "self-determination contract".

(b) The definition refers to entering into contracts with "an agency of the United States" whereas under the Act and under S. 1703 the contracts are limited to those entered into by the "Secretary". We recommend that the definition be amended to conform to the authority in the Act.

(c) We strongly support the idea in the proviso that contracts under the Act are not procurement contracts, although we note that the proviso does not change the fact that retaining the contracting mechanism still requires funding with numerous strings attached.

8. Section 104 amends section 5 (25 U.S.C. 450c) of the Act to require the appropriate Secretary to have regulations for contract reporting requirements. Mature contracts (multi-year contracts) shall only be required to provide quarterly financial statements, an annual single-agency audit, and a brief program report.

We do not object to having regulations for contract reporting requirements and we strongly support minimizing reporting require-

ments. We note that the citation to the APA provision should be to section 553 of title 5, United States Code.

9. (a) Section 201 of S. 1703 restates section 102 of the Act by consolidating into one section the authority now in sections 102 (BIA) and 103 (IHS) (25 U.S.C. 450f and g). We have no objection to the consolidation of the section 102 and 103 provisions if the clarifying amendment in item 6 above to the definition of "Secretary" is made.

(b) We strongly object to the extension to "tribal organizations" of the right to require the Secretary to enter into a contract. (See page 6, line 24 and page 8, line 1.) This is a serious and counter productive weakening of tribal government authority. Under the Act as it now stands that right is reserved to Indian tribes acting through their tribal governments. Under the Act tribal governments determine which tribal organizations are to enter into the requested contracts with the Secretary. As we have indicated before, we believe that it is essential that the tribal governments have the authority and responsibility for the programs and services that are contracted or otherwise transferred from direct Federal operation. Otherwise, we risk confusion of roles and duplication of services.

(c) As amended by section 201, section 102(a)(1) otherwise tracks existing law providing for contracting to plan, conduct, and administer programs (or portions thereof) under the Johnson-O'Malley Act of 1934, the Snyder Act of 1921 "and any Act subsequent thereto", and the Indian Health Transfer Act of 1954 and adds express authority (which we have assumed existed under the Act) for contracting programs administered by the "Secretary" for which appropriations are made to other Federal agencies. It also expressly extends the Act to "any program, or portion thereof, for the benefit of Indians without regard to the agency or office of * * * the Department of the Interior within which it is performed." We have no objection to this extension. However, the provision includes authority for construction contracting and, as indicated in item 3(c) above, we strongly recommend that such contracting be authorized instead under the Buy Indian Act.

(d)(1) The amended section 102(a)(2) requires the Secretary to accept a "proposal" for a contract within 90 days of receipt unless the Secretary makes one of three findings. The three findings are the same as the three current declination criteria under the Act. We assume the "proposal" is the same as the "request" under section 102(a)(1). If so, the same term should be used in both instances. If not, the provisions should be clarified to indicate the relationship of a proposal to a request. We do not object to the 90 day requirement.

(2) The amended section 102(a)(2) omits the factors to be considered in arriving at a finding, i.e., whether there would be a deficiency in performance with respect to equipment, bookkeeping and accounting procedures, substantive knowledge of the program to be contracted, community support for the contract, adequately trained personnel, or other necessary components of contract performance. We have no objection to omitting these factors to be considered because we believe that the allowable finding provide adequate protections against improvident contracts. However, we do recommend

that an additional finding be added to clarify that requested contracts are subject to the availability of funds for the program or portion thereof involved and that the Secretary is not required to divert funds from BIA operated programs or portions thereof serving other Indians to funds the requested contract.

(f) Section 102(a)(3) on page 8, line 14 appears to be an unnecessary restatement of section 102(a)(1).

(g) We have no objection to the section 102(a)(4) provision allowing the consolidation of two or more mature contracts into a single contract.

(h)(1) Section 102(b) is based on the current section 102(b) of the Act except that it imposes a sixty day maximum period for action. It apparently allows the Secretary sixty days to notify a tribe of the reason for the Secretary declining to enter into a contact requested under section 102(a). The sixty days would seem to start running on the date the Secretary declines during the new limit of ninety days allowed in section 102(a)(2) described above.

(2) Also within that sixty days the Secretary is to provide assistance to the tribe to overcome the reasons for the declination. The ability to provide the assistance depends on the nature of the declination reason and the availability of appropriations to provide the assistance. We assume that it is not intended that our authority to provide the assistance expires at the end of the sixty days and we suggest that the provision be amended to require the initiation of assistance during the period.

(3) Finally, within the sixty days the Secretary is also to provide the tribe with a hearing and an opportunity for an appeal.

(i) The amended section 102(c)(1) on page 9, line 8 restates the current authority (see 25 U.S.C. 450f(c)) the Secretary has to require contracting tribes to carry liability insurance. It however modifies the current prohibition against an insurance carrier raising the tribe's defense of sovereign immunity to the extent of the insurance coverage by permitting the defense to be raised "for liability for interest prior to judgment or for punitive damages". We have no objection to this provision.

(j) We object to the Federal Tort Claims coverage under section 102(c)(2) of the bill, and defer to the Department of Justice to present the rationale.

10. Section 202 (Technical Assistance and Grants to Tribal Organizations) of the bill adds a new subsection (d) to the current section 104 (25 U.S.C. 450h) of the Act. The new provision requires the Secretary, on a non-reimbursable basis, to provide technical assistance to tribes and tribal organizations to develop and modify proposals to contract a program. Although we have no objections to this requirement we suggest it be clarified to state that it is subject to the availability of appropriations.

11. Section 203 (Personnel) amends the current section 105(e) (25 U.S.C. 450i(a)) of the Act to make permanent the authority to allow Federal employees who transfer to tribal employment to retain civil service benefits if the employee and the tribe so elect and the tribe agrees to pay the employers share of the costs of those benefits. While a reasonable extension of current law would not be objectionable we believe that it would be unwarranted to make this provision permanent at this time.

12. (a) Section 204 (Administrative Provisions) the current section 106(a) (25 U.S.C. 450j(a)) of the Act to exempt contracts under Public Law 93-638 from the Federal procurement law and Federal acquisition regulations. We strongly support such a provision. These contracts *are not* intended to be Federal procurement contracts.

(b) Section 204 restates the current section 106(c) (25 U.S.C. 450j(c)) to allow the use of multi-year contracts for 3 years in the case of new contracts and up to five years for mature conracts "unless the appropriate Secretary determines that a longer term would be advisable". As under current law, the amounts of the contracts would be subject to the availability of appropriations and could be renegotiated annually to reflect unforeseen circumstances. We support the idea of multi-year contracts.

(c) Section 204 also restates section 106(d) (25 U.S.C. 450j(d)) of the Act. The restatement omits our authority to amend contracts to increase amounts payable without having to find an increased benefit to the Federal Government. It also changes maximum period for the acceptance by the Secretary of a retrocession from 120 days to one year. We oppose the first of these changes because it may prevent us from providing necessary aid to a tribal contactor under the Act. We support the latter change because we need adequate time to budget and provide staff to take over a tribally run program. The one year lead time would allow for a more efficient transfer.

(d) Section 204 restates current section 106(e) (25 U.S.C. 450j(e)) to provide the Secretary authority to transfer title of excess Federal property and to acquire excess Federal property for donation if it can be used for a purpose for which a contract is authorized under the Act. We support this provision but recommend that the Act be further amended to require a tribe to return property used in connection with a program or portion thereof which the tribe retrocede to the Secretary or in case of a recession of the contract under section 109 (25 U.S.C. 450m) of the Act unless the Secretary declines the return of the property.

13. (a) Section 205 (Contract Funding and Indirect Costs) adds a new section 106 to the Act (the old section 106 having been redesignated as section 105) which incorporates the current section 106(h) (25 U.S.C. 450j(h) of the Act and new provisions. It requires the Secretary to provide funds for all "contract costs" incurred in connection with the contract but shall not be less than the Secretary would have provided for the Secretary's operation of the program. Any savings may be used for additional services under the contract. Funds provided for such contracts cannot be reduced (1) to provide funds for new contracts under the Act, (2) to provide funds for costs of the Federal agency including those for contract monitoring, ADP, technical assistance, or personnel costs such as costs for Federal employees displaced by the contract.

Under Section 106 (a)(5), funding could not be reduced unless there is a reduction in Congressional appropriations from the previous fiscal year for programs to be contracted. This provision would not be cost effective, as many programs are funded under the Indian Priority System (IPS), which is a budget line composed of numerous increases and decreases based upon tribal decisions.

Although the IPS portion of the budget may not show an overall decrease, many decreases may be included in instances where tribes have assigned a lower priority to programs and reduced funding accordingly. Under this provision of the proposed legislation, however, the Bureau would be required to maintain the same level of funding in such cases. Also, in some programs, in which tribal projects have been completed (such as facilities improvement and repair projects or minerals inventory surveys) additional funds should not be provided to the tribe, regardless of the amount of the appropriation. Given these circumstances, we must object to this provision.

We agree with the provision of not providing contract money for BIA monitoring of the contracts if we read the this to mean that the BIA should not be monitoring contracts. We believe we should be out of the day-to-day monitoring business and should be looking at a year end review to see if the services contracted for were provided. Tribes should be required to provide certification of their program audits and monthly financial reports showing expenditures. We do not believe a day-to-day monitoring of the contract is necessary for either the tribe or the BIA.

(b) Section 205 also requires in the new section 106(b) that the Secretary annually submit to the Congress detailed reports on the direct and indirect cost amounts provided and budgeted for contracts under the Act. The information required is not now compiled but could be in the future if we are allowed to proceed with our ADP and management information systems development. We would be pleased to work with the Committee's staff to develop a reporting requirement that we can comply with on a reasonable prompt basis without an undue diversion of resources from programs serving tribes and their members.

(c) Section 205 provides a new section 106(c) that holds tribes harmless for providing the difference in indirect cost rates actually provided and the amounts that would have been provided at 100 percent of their indirect cost rate in subsequent fiscal years for federal programs (other than BIA and IHS) that provide funding to the tribes.

Although we believe that tribes should be provided whatever indirect cost rate is provided to other contractors under various Federal programs and that those funds should be made available by the individual agencies, this issue is essentially one of what is referred to as "theoretical over-recovery". We do not believe that tribes should be penalized because of a theoretical over-recovery.

(d) Section 205 adds a new section 106(e) that requries the Secretary to give notice of any disallowance of costs within a year from receiving an audit report. An appeal plus hearing shall be provided. If notice is not given within one year, any right of action or other remedy relating to the disallowance is barred. We do not object to this provision but would like to work with the Committee's staff for clarification of exactly when the year begins.

(e) Section 205 adds a new section 106(f) that requires the Secretary to publish in the Federal Register a notice of intent to remove or alter any program in the Indian Priority System at least 90 days prior to removing or altering the program and to include a statement on the impact on funding levels for "each Agency and tribe

affected." This restriction would severely affect the Bureau's capability of making timely decisions which may be critical for the benefit of the tribes. For instance, removing the road maintenance program from the IPS will insure that roads are maintained consistently Bureau-wide, thereby meeting the standards required for obtaining badly needed Federal Highway Trust Fund dollars. The restrictions contained in this proposed bill will require the Bureau to undertake a long and cumbersome process in cases where timely decisions and flexibility is critical.

(f) Section 205 adds a new section 106(g) that requires the Secretary to add the indirect cost funding to the contract if requested by the tribal contractor. The combined amount shall be included in the contracting agency's budget. We would not object to a lump sum approach to determining appropriate contract support costs but disagree strongly with this provision.

Under Section 106 (g), contract support costs would in essense be "grandfathered" into the budget. This section provides that the indirect costs determined for tribal contracts would be added to the direct program funding amount and carried in the budget under the direct program line for each subsequent year the program remains contracted. The Bureau has implemented this method in the past, under Congressional direction, resulting in inequitable funding of these contract support costs from tribe to tribe.

14. (a) Section 206 (Contract Appeals) adds a new section 110(a) to the Act (the current section 110 being redesignated as section 111) that provides Federal district courts with original jurisdiction concurrent with the Court of Claims for claims arising under the Act or under contracts authorized by the Act. We recommend that the Committee's staff consult with the Department of Justice concerning this provision.

(b) Section 206 also adds a new section 110(b) prohibits the United States from unilaterally modifying contracts but also provides a means for doing so. We would be glad to work with the Committee's staff to clarify the intent of this provision.

(c) Section 206 also adds a new section 110(c) that provides for the Equal Access to Justice Act (the Act of October 1, 1980, 94 Stat. 2325) to apply to administrative appeals by Indian tribes and tribal organizations regarding Public Law 93-638 contracts. This would provide for the possible award of attorney fees in cases where the tribe prevails in the appeal. We object to this provision.

(d) Section 206 also adds a new section 110(d) that provides for the Contract Disputes Act to apply to Public Law 93-638 contracts. A recent court decision ruled that these contracts were not under the Contract Disputes Act. As stated above, if we do not view these contracts as procurement contracts, then they should not be subject to the Contract Disputes Act.

15. Section 207 (Savings Provisions) is the same as the current section 110 (25 U.S.C. 450n) of the Act. We have no objection to it.

16. Section 208 (Severability) is self explanatory. We have no objection to it.

STATEMENT BY EVERETT R. RHOADES, M.D., DIRECTOR, INDIAN HEALTH SERVICE, PUBLIC HEALTH SERVICE, ON S. 1703 THE INDIAN SELF-DETERMINATION AMENDMENTS OF 1987

Mr. Chairman and Members of the Committee: I am Dr. Everett R. Rhoades, and I am the Director of the Indian Health Service (IHS). I appreciate this opportunity to testify on S.1703, a bill to amend the Indian Self-Determinaton and Education Assistance Act of 1975 (Public Law 93-638). I am accompanied this morning by Mr. Douglas Sakiestewa, Director, Division of Grants and Procurement; Dr. Robert C. Birch, Acting Director, Division of Indian Resources Liaison; and Mr. Richard J. McCloskey, Director, Division of Legislation and Regulations.

IHS is the Federal agency charged with administering the principal health program for American Indians and Alaska Natives. At present, the IHS provides comprehensive health services to approximately 1,000,000 Indians and Alaska Native people. The goal of the IHS is to raise the health status of American Indian and Alaska Native people to the highest possible level. Its mission is threefold: (1) to provide or assure the availability of high quality comprehensive, accessible health services; (2) to provide increasing opportunities for Indians to manage and operate their own health programs; and, (3) to serve as a health advocate for Indian people.

Since the transfer of Indian health programs from the Department of the Interior to the Public Health Service in 1955, this comprehensive health delivery system has evolved into three modes of delivery. First, the direct health services delivery system, which is administered directly by IHS staff, provides services through the operation of 45 hospitals, 71 health centers, and several hundred smaller health stations and satellite clinics. The second mode is the tribal health delivery system, which is administered by tribes tribal organizations through contracts with the IHS, and which represents Indian self-determination.

These tribal organizations operate 6 hospitals and approximately 250 health clinics. As you know, the administration is implementing a comprehensive strategy for the next decade to expand opportunities for tribal operation of IHS hospitals and clinics. The third mode is the purchase of medical care by either IHS or tribes from providers serving the general population.

The primary method provided by Congress for the Indian people to exercise maximum participation in the management of these health systems is the Indian Self-Determination Act, Public Law 93-638. It provides tribes with an option to freely choose to either take over management of most Federal programs serving them or to retain Federal management of their programs. The tribes that choose not to take over management of their health programs from the IHS are not penalized for their decision. In our view, a tribal decision not to contract is equally an expression of Indian self-determination. In either case, a continuing Federal responsibility is required. These considerations are also consistent with our renewed commitment to advance self-determination in the operation of IHS hospitals and clinics.

In programs contracted to tribes under Public Law 93-638, the IHS continues its exercise of Federal responsibility for health care

by assuring achievement of objectives such as a high quality of care. The statutory option of a tribe to retrocede or the responsibility of the IHS to reassure programs where there are serious deficiencies, requires the IHS to maintain a continuing relationship with the tribal contractors and to maintain the capacity to reassume a program when either retrocession or rescission is utilized.

In addition, the IHS must maintain an appropriate structure and the resources to assure the delivery of the highest possible level of health care to tribes who choose not to contract for operation of IHS programs as well as to those who do.

I believe that the development of self-determination under Public Law 93-638 has been successful. This is not to say that it is either easy or without controversy or disagreements. That it is working is demonstrated by the fact that as of September 1987, IHS was administering 420 active Public Law 93-638 contracts. For fiscal year 1987, the Public Law 93-638 contract support provided by IHS is approximately $180 million for the Service Appropriation. For fiscal year 1987, Public Law 93-638 construction contracts, including fiscal year 1986 carryover, represents approximately $13 million of our construction appropriation as we work with tribal organizations on our new initiative, we expect to see these numbers grow rapidly in the coming years.

Tribal Health Program Management Costs

In the 12 years since the passage of Public Law 93-638, the IHS has made significant progress towards the IHS mission of providing increasing opportunities for tribes who choose to manage and operate their own health programs. When a tribe contracts a program under Public Law 93-638, tribal costs (both program and administrative) are funded from the total amount identified as available to IHS to support the contracted program.

Tribes, however, will have administrative costs over and above what it costs the IHS to adminiser the program at the service unit level. These can be referred to as tribal health program management costs. For example, the government is a self insurer, but if a tribe contracts an IHS function under Public Law 93-638, the tribe must purchase liability insurance (e.g. malpractice insurance). Tribes will also have other costs, e.g. legal services, additional data processing, financial management, personnel management, etc., all of which are allocable to the Public Law 93-638 contract program. In addition, we recognize that there are certain corporate costs which tribal contractors incur because of their operation of health programs, e.g. meetings of the health board, director's liability insurance, education and training of board members, and planning. These also must be accommodated. Collectively, these costs are often referred to as "indirect" costs. We believe that these justified costs should not be handled as "indirect" but as direct costs of self-determination, and we have devised resources allocation systems, described below, to do this.

In recognition of these additional administrative and executive direction costs, the House allowance for the fiscal year 1988 budget proposes an increase of $6,000,000 for "tribal contractor indirect costs short fall" and the Senate version calls for $3,000,000 for this

purpose. Both versions proposed to establish a $2.5 million Indian Self-Determination fund—as requested in the President's fiscal year 1988 budget—for the transitional costs of initial or expanded tribal contracts.

Allocation of Resources

As a result of 12 years' experience, the IHS and tribes have identified certain difficulties associated with the implementation of Public Law 93-638 and have, by working together, made significant progress in overcoming many of these difficulties. The IHS has aggressively pursued various administrative changes, and more are underway, to simplify and streamline the Public Law 93-638 contracting process and to ensure that resource allocation is both rational and equitable.

I would like to take this opportunity to tell you about some of these activities.

1. The IHS has carefully considered the information obtained in nearly 18 months of intensive tribal consultation including two pilot projects in which the Mississippi Band of Choctaw Indians and the Norton Sound Health Corporation helped in the initial development of improvements in resource allocation, two national IHS/tribal workshops (July 1986 in Reno and October 1986 in Tulsa) with nearly 300 participants in each, about 100 IHS/tribal meetings in the various IHS Areas, and a 120-day public comment period. As a result, the IHS issued its "Statement of Policy—Resource Allocation Methodology" on March 2, 1987. The IHS held a third national IHS/tribal workshop later that same month in Tulsa, referred to as Tulsa II, with about 400 participants, of which nearly 300 were Indian people. A major topic at the workshop was discussion of, and further orientation to, the Resource Allocation Methodology.

2. The purpose of the Statement of Policy is to establish a Resource Allocation Methodology (RAM) which the IHS will use to allocate its resources on a reasonable, rational, and equitable basis. The RAM will enable the IHS to evaluate IHS and tribally operated health programs on a relative scale according to need and performance to achieve a more rational and equitable distribution of IHS resources.

3. The IHS will use the RAM to:

   A. Allocate IHS resources reasonably, rationally, and equitably among IHS service programs. Our goal is to eliminate unreasonable disparities in service programs available to Indian people, and to promote efficient and effective use of resources appropriated for their health care.

   B. Assure that funding provided by IHS is determined on the same basis for both IHS and tribally operated health programs.

   C. Promote the IHS goal of raising the health status of Indian people to the highest possible level through improved management of resources.

4. The RAM consists of two related methodologies:

   A. The Area Resource Allocation Methodology (ARAM) for use by Headquarters to allocate IHS resources to the 12 Area

Offices. The Director, IHS will annually identify funds for distributions or redistribution by ARAM.

B. The Service Unit Resource Allocation Methodology (SURAM) for use by Area Offices to allocate their resources to IHS and tribally operated health programs with their respective Areas. Each Area Director will annually identify funds for distribution or redistribution by SURAM.

5. The IHS began its use of the RAM in allocating the FY 1987 Annual and Supplemental Appropriations. In estimating the funding level of Public Law 93-638 contracts for fiscal year 1988, the IHS will continue to work to refine the RAM as we learn from our experience with its application. In fact, five workgroups of IHS and tribal officials and currently involved is such efforts as a followup to the Tulsa II Workshop.

ADMINISTRATION OF PUBLIC LAW 93-638

The IHS is continuing its efforts to improve the Public Law 93-638 contracting process and to respond to what tribal officials have viewed as administrative restrictions and complex reporting requirements. As a major initial component of our self-determination initiative, we are working with other Departmental staff to identify all ingredients to self-determination and develop remedies. The Director of IHS and the Director of the Division of Grants and Procurement Management, Health Resources and Service Administration (HRSA) jointly issued on April 1, 1986, a memorandum to the IHS Area Directors describing proposed changes to "streamline" the Public Law 93-638 contracting process. This memorandum was shared with tribal officials and tribal Public Law 93-638 contractors for review and comment.

There has been further discussion among tribal, IHS, and HRSA officials of the proposed changes to improve the Public Law 93-638 contracting process and to revise the Sample Contract as a result of the IHS/tribal national workshop in Tulsa during October 1986. After considering the results of this intensive and continuing consultative process, the IHS issued, on March 6, 1987. Indian Self-Determination Memorandum (ISDM) 87-1 "Improvements in the Public Law 93-638 Contracting Process and Revision of the Public Law 93-638 Sample Contract Issued with ISDM 85-1".

The purpose of ISDM 87-1 is to describe the status of "simplification" of the Public Law 93-638 contracting process, and to revise the Sample Public Law 93-638 Cost Reimbursement Contract to further simplify Public Law 93-638 contract requirements.

Later, in March 1987, the IHS held the third national IHS/tribal workshop already described (Tulsa II). A major topic at the workshop was discussion and orientation to ISDM 87-1 which was followed by a workshop session in which IHS and tribal participants identified at least 36 additional recommendations and suggestions for further simplification of the Public Law 93-638 contracting process. A workgroup of IHS and tribal officials is currently working on these recommendations ans suggestions and will, as will the other four Tulsa II workgroups, provide me a final report of their conclusions and recommendations.

Based on recommendations made at the Tulsa II Workshop for development and communication of materials well in advance of these national workshops, our next national workshop is being planned during the Spring of 1988. This will provide sufficient time for IHS/tribal officials to work together in Area Workshops during the Winter of 1987-1988.

Another group of IHS and tribal officials is developing criteria for selecting among the three award instruments authorized in Public Law 93-638 contracts, grants, and cooperative agreements. A final report with recommendations will be submitted to me. The results will also be discussed at the next IHS/tribal national workshop.

The IHS and tribes have shown, especially over the past two years through these various Area meetings, national workshops, and day-to-day and other communications, that the tribal consultation process is both important to communication and understanding and essential to the effective conduct of a nationwide Indian health program respecting the principals of tribal sovereignty and the government-to-government relationship. Therefore, the IHS is working with tribal officials to develop an IHS policy on tribal consultation and will consider the information and concepts included in a recent policy paper on this subject developed by the National Indian Health Board.

The IHS is also studying the recommendations of the recent studies/reports on Indian Self-Determination activities developed by the National Indian Health Board, General Accounting Office, Office of Technology Assessment, and Public Health Service, as well as our own Descriptive Analysis of Tribal Health Page 10.

Programs in our continuing effort to establish a more positive environment for Indian Self-Determination in the IHS and to help Indian tribes succeed in their self-determination activities.

S. 1703

I would now like to turn to the specifics of S. 1703. The bill contains a number of provisions that are unclear but appear to be derived from concern with BIA procedures. Nevertheless, by the terms of the bill, these provisions would apply equally to IHS. Though I will mention at least one of these in what follows, they will be dealt with in a more detailed analysis of the bill which is underway. I would now like to discuss a number of major issues with S. 1703.

We applaud the goal to simplify and strengthen the self-determination process. As I have just mentioned, we have already undertaken numerous efforts to administratively do just that, consistent with our initiative for hospital and clinic operations. However, S. 1703 contains provisions that would hamper our efforts to equitably allocate resources, restrict IHS' management flexibility and provide unworkable and potentially harmful solutions to problems for which solutions have already been developed. For these reasons, we do not support the bill as currently drafted.

The first major issue concerns the various provisions which, when taken together, determine the level at which contracts must be funded. Section 4 of S. 1703 adds a definition of "Contract Costs"

which includes all direct and indirect costs "which are necessary and reasonable". Moreover, tribes and tribal organizations are (under proposed sec. 102(a)(3)) "entitled to contract" for an amount which "shall include all contract costs incurred," (proposed sec. 106(a)(1)) but "not less than * * * otherwise provided for direct operation of the programs * * *" (Proposed sec. 106(a)(4)). It is possible that these costs would be more than the IHS would have available for the program's direct operation.

Since the contractor is "entitled" to these costs, the IHS would be required to obtain the funds from elsewhere in the IHS system. The problem is compounded in that proposed sections 106(a)(2), (3), (5), (6) and (7) further "protects" tribal contractors' first year base funding (direct and indirect) from reduction in future years from anything other than a reduction in subsequent appropriations. This creates a "first come first served" system with the risk of fund reductions being borne by those tribes which have chosen not to contract.

These interrelated provisions, combined with the definitions proposed in section 4, appear to provide tribal contractors with an entitlement to all costs reflected in the contract, direct as well as indirect, and established as a funding base for future years whatever can be justified as "necessary and reasonable" in the first year without regard to what funds IHS would have spent on the program, changes in program needs, or efforts to equitably distribute IHS resources. Moreover, permitting the base funding of a contract to be reduced only when there is a reduction in the appropriation would preclude the use of the Resource Allocation Methodology (RAM) when appropriations are constant from one year to the next.

We would support changes in the bill that would allow a small reduction in contract funding to reflect reductions in program needs, or efforts to achieve equity among IHS service units. Such a change would allow IHS to pursue equitable distribution of funding while providing relative stability for contract funding. We would be willing to work with the Committee in devising language to that end.

As explained above, our allocation system takes into account Tribal Health Program Management costs in allocating funds on a reasonable, rational, and equitable basis between all IHS operated and contracted programs. The purpose of our allocation system is to fund such costs based upon comparable standards of need. We have been directed to do this by both the courts and the Congress including this Committee's own bill to extend the Indian Health Care Improvement Act (see section 201(i) of S. 129).

In the case of relatively constant appropriations, S. 1703 provisions would injure those tribes that choose not to contract by reducing the funds available for IHS direct services while 638 contracts are funded at the same level.

The court, in *Rincon Band of Mission Indians* v. *Harris*, 618 F.2d 569 (1980), ordered the IHS to develop a system to rationally allocate its funds, noting that:

> A system that allocates funds to programs merely because the programs received funds the previous year, regardless of whether the programs are ineffective, unnecessary or obsolete is not rationally aimed at an equitable division of funds.

We are opposed to Section 205 of the bill which would institutionalize precisely the problem cited by the *Rincon* court by making the previous years' base funding automatically available for tribal contractors under Public Law 93-638, while placing at risk those tribes exercising their self-determination option to receive health services delivered by the IHS.

During a period of relatively constant annual appropriations, the overall effect of this bill would be to negate the RAM and prevent IHS from going forward with current attempts, with tribal consultation, to allocate resources on an equitable basis.

Another issue is the extension of Federal Tort Claims Act coverage. The Department opposes that part of Section 201 which would extend Federal Tort Claims Act coverage to Public Law 93-638 tribal contractors. Buy Indian contractors, and urban Indian organizations. This provision would have wide-ranging adverse ramifications as a precedent for other government contractors. Nevertheless, we are aware of and are equally concerned about the crisis in rising costs of medical malpractice insurance, a problem which is by no means unique to Indian contractors. In order to address this problem, this Department will seek additional funds in the development of next years' budget to specifically address tribal malpractice costs.

Section 201 also directs the Secretary to enter into contracts with tribes or tribal organizations. It is not clear what is intended by this language change. On its face it appears to open up a whole new category of self-determination contractors who are not tribes and who will not be required to get the approval of tribes.

Proposed section 106(g) which directs that the combined contract amount be carried in the contracting agency's budget at the specific budget location of the contracted program, appears directed at the Department of the Interior (DOI) budget procedures. The Department of Health and Human Services does not budget in the manner described. However, the provision would apply to both Departments.

We are also opposed to the provision in section 205 forgiving indebtedness of tribes who have failed to properly account for their funds. This is unfair to those tribes who have done their accounting and invoicing correctly and have incurred no such debts. It is also a disincentive for tribes to properly manage their programs. Existing cost principles are fair and adequate.

Mr. Chairman, that concludes my opening remarks. At this time I will be happy to answer my questions the Committee may have.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, October 27, 1987.

Hon. DANIEL K. INOUYE,
Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR SENATOR INOUYE: We recently have reviewed S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987." We believe that the bill would set a highly undesirable precedent by having the United States accept responsibility for the tortious conduct of certain contractors of Indian tribes. We also are concerned that the proposed amendments do not adequately ensure tribal compliance with the Indian Civil Rights Act in the course of administering self-determination contracts. These issues are discussed in detail below.

Section 202(c)(2)(A) of S. 1703 provides that contract medical and dental personnel providing health services to the Indian tribes are to be considered employees of the Public Health Service for purposes of claims for personal injury or death arising out of the performance of duties which are within the scope of their employment agreements. In other words, under the provisions of the Federal Tort Claims Act (FTCA), the United States is to assume responsibility for the medical malpractice of certain physicians employed by contract with the Indian tribes.

Similar efforts to obtain protection from personal liability for Indian tribe contractors have been included in various pieces of legislation over the last few years. For example, H.R. 2712 and H.R. 1223 in the 100th Congress, and H.R. 5234 in the 99th Congress all would have achieved the same result as section 202(c)(2)(A) of S. 1703. Because of the broad-ranging adverse ramifications of this troublesome precedent, the Department of Justice consistently has opposed these efforts in the past. We are equally opposed to these provisions in S. 1703.

Under the FTCA, the United States accepts limited responsibility for the actions of those persons with whom it has a "master-servant" relationship, and over whom it can exert control, i.e., its employees. Neither of these relationships generally exists between the United States and its contractors. This is no less true with contractors who provide services, such as medical care, instead of goods. And in this case, the relationship is even more tenuous because the pertinent physicians are contractors of the Indian tribes, and not the United States.

The United States regularly relies upon the use of contract physicians. For example, both the Veterans Administration and the Department of Defense use contract physicians in order to fulfill their respective obligations to provide health care to current and former military members and their families. But physicians who merely contract with, but are not employees of, the United States remain individually responsible for their medical negligence. See *Lurch* v. *United States,* 719 F.2d 333 (10th Cir. 1983).

This is not mere happenstance. The FTCA excluded government contractors from the persons covered by its assumption of liability precisely because there generally was no ability to supervise or

control the day-to-day operations of such individuals. See *United States* v. *Orleans,* 425 U.S. 807 (1976); *Logue* v. *United States,* 412 U.S. 521 (1972). To relieve contractors from responsibility for their conduct without being able to control that conduct completely defeats the deterrent value of the fault-based tort compensation system. Such a course of conduct is both fiscally unwise and potentially counterproductive to improved health care among the Indian tribes.

It is our understanding that section 202(c)(1)(A) is designed to forestall a projected difficulty in obtaining qualified medical personnel to provide health services to the Indian tribes in the face of rising medical malpractice insurance premiums. But the crisis in medical malpractice insurance is by no means isolated. Health care professionals across the country, both public and private, recently have experienced exponential increases in their liability insurance premiums. Some have had their coverage canceled altogether. This is the inevitable result of a lottery-like liability climate which has produced skyrocketing average damage awards and an ever increasing number of malpractice lawsuits. We understand and are fully sympathetic to the frustration which this crisis has created in the medical community.

But numerous government contractors could make equally compelling arguments that their situations deserve the same special consideration which S. 1703 would provide to tribal organizations and the physicians with whom they contract. The crisis in affordable and available liability insurance has affected all manner of manufacturers and providers of goods and services. It would be highly inequitable to provide FTCA protection from liability to contractors with the Indian tribes while those who directly contract with the United States receive no similar assurance.

If anything, such a distinction runs directly counter to the fundamental concept of Indian self-determination. It is indeed paradoxical to endorse the notion that the Indian tribes should be self-governing and in control of their welfare, while at the same time paternalistically relieving them and their contractors of responsibility for their actions.

It should be noted that we are willing and ready to assist in achieving civil justice reform which would help solve the liability problems of these particular physicians. In that regard, last year the Administration submitted to the Congress a bill which would reform and limit the liability of federal government contractors. See The Government Contractor Liability Reform Act of 1986 (S. 2441, 99th Cong. 2d Sess.). The Department would support—and would be pleased to work with the Congress on—similar legislation for this particular class of Indian tribe contractors. We believe that such legislation would substantially defuse many of the insurance problems and liability concerns that have led to these indemnification requests.

Further, the proposed amendments fail to assure tribal compliance with the Indian Civil Rights Act (ICRA), 25 U.S.C. §1301 et seq. Recently, we have received a number of complaints alleging unfairness and discrimination in tribal programs funded through federal contracts or grants. The ICRA was enacted to limit tribes in many of the same ways as the Bill of Rights and the 14th Amend-

ment limit federal and state governments. Compliance is critical because the Constitution and many federal civil rights statutes do not apply to Indian tribes. See, e.g., *Talton* v. *Mayes,* 163 U.S. 376 (1896) (Since Indian tribes are neither federal instrumentalities nor subdivisions of states, they remain largely beyond the Constitution's scope).

Testimony before the Commission on Civil Rights, in hearings held recently in Flagstaff, Arizona, and Rapid City, South Dakota, provides substantial evidence of ICRA non-compliance on the part of tribes in administering federally-funded programs such as law enforcement and tribal courts. In addition, in a November 1984 Report, the Presidential Commission on Indian Reservation Economies found that "[a]ccess to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered unfair by many Indians." Id. at 36. Such criticism finds substantial support in federal court decisions. For example, in *Shortbull* v. *Looking Elk,* 677 F.2d 645, 650 (8th Cir. 1982), a panel of the Eight Circuit Court of Appeals noted that:

> because of [a specific tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act.

In order to assure full tribal compliance with the ICRA in all contracts or grants administered pursuant to this title, we suggest adding the following language to S. 1703:

> On page 20, between lines 23 and 24, add the following new Section 207, and renumber succeeding sections accordingly:
>
> "SEC. 207. Compliance with the Indian Civil Rights Act.
>
> "Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975 88 Stat. 2203, as amended) is further amended by adding the following new section 112:
>
> "SEC. 112. (a) Any program or activity receiving federal financial assistance from the Secretary of the Interior or from the Secretary of Health and Human Services pursuant to this Title shall be administered in compliance with the Indian Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968 82 Stat. 77).
>
> "(b) Federal district courts shall have jurisdiction of civil actions alleging the failure of programs or activities funded by this Act to comply with § 202 of Title II of the Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968, 82 Stat. 77).
>
> "(c) Any aggrieved person, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in the appropriate federal district court for equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with subparagraphs (a) and (b) above. Tribal sovereign immunity shall not constitute a defense to such an action."

While we continue to support the important policy goal of Indian self-determination, we find equally important the principles of fairness and equality which underlie the ICRA. See, e.g., *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978)[16]("[a] central purpose of the ICRA was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans' and thereby to 'protect individual Indians from the arbitrary and unjust action of tribal governments' ". Id. at 61, *quoting* S. Rept. No. 81, 90th Cong. 1st Sess., 5-6 (1967)). Without the additional language we suggest above, tribal programs administered with federal funds may not fully comply with the ICRA.

Several other provisions of S. 1703 also are troublesome. For example, section 206 would extend the coverage of the Contract Disputes Act to self-determination contracts. Whether this is desirable is subject to debate. Regardless of the wisdom of this decision, however, the Contract Disputes Act has specific provisions which govern the methods by which judicial review of a contracting officer's decision can be obtained. An adverse contracting officer's decision may be appealed to an agency Board of Contract Appeals (41 U.S.C. 606) and, thereafter, a dissatisfied contractor may seek further review in the United States Court of Appeals for the Federal Circuit (41 U.S.C. 607(g)). In the alternative, a disappointed contractor may challenge an adverse contracting officer's decision directly in the United States Claims Court (41 US.C. 609).

Under the Act, however, Federal district courts and the "Court of Claims" (sic) are given complete concurrent jurisdiction over any civil action arising under self-determination contracts. This raises an obvious internal inconsistency. It is also inconsistent with section 1346(a)(2), of title 28, which allows other than Contract Disputes Act contract claims to be pursued in the district court only when the amount in controversy is less than $10,000.

Also, section 206 makes the Equal Access to Justice Act (28 U.S.C. 2412(d)) applicable to administrative appeals in self-determination contract cases. Its not clear why this is necessary or what its effect would be. While the Contract Disputes Act has no independent provison for the award of attorney fees, persons who successfully challenge an adverse contracting officer's decision may already avail themselves of the Equal Access to Justices Act, assuming they otherwise meet the eligibility requirements (28 U.S.C. 2412(d)(2)(E)). As a result, this part of section 206 seems superfluous.

Based upon the foregoing, the Department must express its strong opposition to S. 1703 in its current form. The Office of Management and Budget has advised this Department that there is no

16. 98 S.Ct. 1670, 56 L.Ed.2d 106.

[page 63]

objection to the submission of this report from the standpoint of the Administration's program.

Sincerely.

JOHN R. BOLTON,
Assistant Attorney General.

[page 64]

ADDITIONAL VIEWS OF MR. EVANS

The Indian Self-Determination Act Amendments of 1987 represent a profound and thorough reexamination of one of the most important and successful pieces of legislation affecting Indian people in our Nation's history. Consequently, it is perfectly appropriate that the bill was developed with the active participation of tribal leaders from tribes throughout the country. These are the people who will implement this bill. They are the ones who will rejoice in its strengths. They are also the ones who will struggle with its weaknesses.

I know that tribal leaders generally are pleased with our effort. I am grateful to them for their efforts and for their confidence. I am also aware that many are concerned about a provision in the bill to allow, on a test basis, for tribes to consolidate funding they receive from the Bureau of Indian Affairs and to fashion programs these tribes believe are best suited for their members.

The essence of self-determination is that Indian tribes, as local governments, are in the best position to determine the needs of their constituents. Consolidated funding may represent the logical culmination of this policy. Indian tribal leaders should discuss consolidated funding thoroughly. If they determine that this process will not serve their needs any better than more conventional self-determination contracts or direct program services from the Bureau of Indian Affairs, they should not request a consolidated funding contract. Those who answer in the affirmative, however, should be given the opportunity to try. Their belief may be wrong. If so, the Act allows them to retrocede a consolidated funding contract as they can any other contract entered into under this Act. In any event, authority for consolidated contract funding expires three years after its enactment.

I look forward to working with tribal leaders and members of the Committee to develop improvements to this provision. Specifically, I believe consolidated contract funding should, if desired by a tribe, include the amount of funding provided for the benefit of such tribe and its members through programs operated directly by the Bureau of Indian Affairs. Furthermore, since some tribal leaders are concerned that they might be coerced into requesting a consolidated funding contract, the amendment should include by name only those tribes who believe they can negotiate a satisfactory agreement with the Secretary of the Interior. I believe the Committee also should consider specifying declination criteria similar to those contained in section 102 of the Self-Determination Act. Finally, I remain unconvinced that a limitation on the Secretary's obligation to provide services is any more necessary here than it is for other self-determination contracts.

These are just examples of changes that the Committee should consider before final passage of this Act. I urge those who are con-

[page 65]

cerned about this provision to work with the Committee to improve it. If it is not included in this bill, the consolidated funding concept is unlikely to be tested. The result will be that Indian tribes expressing a desire to fashion their own programs will not be allowed to do so. It will not be because they chose not to or because they failed in their efforts. Rather, it will be because they were never given an opportunity to try.

For many tribes, the Indian Self-Determination Act is of limited value. Some tribes are too small to administer their own programs. These tribes receive services from the Bureau of Indian Affairs through multi-tribe agencies. Two of these agencies, the Puget Sound Agency and the Olympic Peninsula Agency, are located in my home state of Washington.

Two tribes in western Washington, the Lummi Tribe and the Quinault Nation, are large enough and sophisticated enough to assume the administration of federal program which benefit their members. Yet services provided to them are shared with other smaller tribes in their respective agencies. Nevertheless, I believe they should be allowed to use federal money provided for the benefit of their members to fashion programs they determine are best suited for their needs. I am aware that, if they chose to do so, institutional adjustments will be needed to offset any negative impacts their decision may have on other tribes within the agencies that serve them. In any event, I remain committed to working with these tribes, and with their neighbors, to develop better ways for them to provide services to the Indian people they serve.

DANIEL J. EVANS.

* * * * *

TAB 5

Calendar No. 412

106TH CONGRESS, *1st Session* | SENATE | REPORT 106–221

AMENDING THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT TO PROVIDE FOR FURTHER SELF-GOVERNANCE BY INDIAN TRIBES, AND FOR OTHER PURPOSES

NOVEMBER 9, 1999.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 979]

The Committee on Indian Affairs, to which was referred the bill, S. 979, to amend the Indian Self-Determination and Education Assistance Act to provide for further self-governance by Indian tribes, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 979, the Tribal Self-Governance Amendments of 1999, is to create two new titles in the 1975 Self-Determination and Education Assistance Act ("ISDEA" or "the Act"), in order to make permanent the Self-Governance Demonstration Project for Indian Health Service (IHS) programs with the Department of Health and Human Services (HHS), and to establish a demonstration project for non-IHS services within the HHS after a feasibility study has been undertaken to identify which, if any, non-IHS programs within the HHS should be subject to self-governance.

BACKGROUND

In 1970, President Nixon delivered his now-famous "Message to Congress on Indian Affairs" in which he laid the foundation for a change in federal Indian policy for termination and assimilation to Indian self-determination. The ISDEA was enacted in 1975 as an

outgrowth of this policy and continues to be one of the guiding tenets of federal Indian policy.

As enacted, the ISDEA authorizes the Secretary of the Department of the Interior to contract with Indian tribes for the provision of various services and programs that would otherwise be performed by the Department with the tribes acting as end-line service providers to their citizens.

Building on the successes of the original Act, in 1988 Congress amended the Act and created the Self-Governance Demonstration Project in the DHHS. The Demonstration Project authorizes tribes to administer health care programs and enables participating tribes to redesign programs and reallocate funds among the different programs they operate. Program design and implementation flexibility provide some of the major benefits to participating tribes.

In 1994, Congress enacted the Tribal Self-Governance Act, Pub. L. 103–413, which made Self-Governance permanent with regard to the Interior Department. The IHS Self-Governance Project continues to operate as a demonstration project. S. 979 would make the Demonstration Project in the HHS permanent and expand the program to other, non-IHS programs within the HHS, but only after a feasibility study is conducted to determine whether other non-IHS programs should be brought into the Act's scope.

HEALTH CARE DELIVERY IN NATIVE COMMUNITIES

As of FY1999 there were 557 federally recognized Indian tribes in the United States. Of those, 146 tribes were provided health care services directly by the Indian Health Service (IHS); and 431 were either contracting or compacting tribes under the ISDEA. Tribal participation in contracting or compacting is strictly voluntary and is carried out through a negotiation conducted between a federal agency and tribal representatives.

Charged with delivering health care to 1.3 million American Indians and Alaska Natives (AI/AN), in FY1999, the IHS budget was $2.24 billion. The IHS delivered these services through 150 service units composed of 543 direct health care delivery facilities, 49 hospitals, 209 health centers, 6 school health centers, and 279 health stations, satellite clinics, and Alaska village clinics.

1. Self-Governance Compacting. In FY1999, the IHS negotiated 42 self-governance compacts with 254 tribes involving the transfer of $508 million to 213 tribes in Alaska and 41 tribes in the lower 48 states. In FY2000, it is projected that $564 million will be transferred to tribes pursuant to 57 compacts. Self-governance tribes receive 42% of the IHS budget in 12 hospitals, 149 health centers, 3 school health centers, and 233 health stations and Alaska Native village clinics.

Since 1993, there has been a reduction in IHS Headquarters Staff (−57% to 406) and IHS Area Office Staff (−55% to 1,213), but there has also been an increase in IHS Service Unit Staff (+10% to 12,963). In addition to staff reassignments and reductions due to cuts in administrative funding, the transfer of Area Office functions and funding to tribes under Self-Governance has helped re-shape health care delivery in Indian country.

2. IHS-Provided Health Care. Participation under the Act is voluntary and tribes that have elected to retain federal administration

of their health services collectively receive some 58% of the IHS budget in 37 hospitals, 60 health centers, 3 school health centers and 46 health stations.

3. Urban Indian Care. Various health care and referral services are provided to Native people in off-reservation settings through 34 urban Indian health care programs authorized by the Indian Health Care Improvement Act (Pub. L. 94–437). Approximately 150,000 American Indians utilize urban Indian health care program services because they are not able to access hospitals, health clinics or contract health services administered by the IHS or tribal providers either because they fail to meet IHS eligibility criteria or reside outside IHS or tribal service areas.

4. The Impact of Self-Governance on Indian Health Care. Because self-governance transfers programming and budgeting authority for health programs from the federal government to tribal governments, participating tribes have benefitted from the flexibility inherent in the program that enables them to tailor the programs to local needs. Participating tribes report that self-governance has had a significant and positive impact on the health and well-being of their members.

Significant improvements are reported in program administration as well as in the quality, quantity and accessibility of services provided to health care recipients resulting in a more efficient use of federal funds. A 1998 study by the National Indian Health Board (NIHB)[1] reported that improved health goes hand in hand with tribal contracting and compacting for health care services.

The ISDEA authorizes Indian tribes and tribal organizations to contract for the administration and operation of certain federal programs which provide services to Indian tribes and their members. Subsequent amendments to the ISDEA created Title III of the Act which provided for a Self-Governance Demonstration Project that allows for large-scale tribal Self-Governance compacts and funding agreements on a "demonstration" basis.

The new title V created by S. 979 would make this contracting by tribes permanent authority for programs contracted for within the Indian Health Service (IHS). Thus, Indian tribes and tribal organizations would be able to contract for the operation, control, and redesign of various IHS activities on a permanent basis. In short, what was a demonstration project would become a permanent IHS Self-Governance program.

Under the terms of S. 979, Indian tribes or tribal organizations which have already contracted for IHS activities would have the option of continuing under the provisions of their existing contracts or, alternatively, could negotiate under the authority provided by S. 979. Mirroring existing law, the bill authorizes an additional 50 new tribes each year to enter into self governance compacts.

The amendments contained in S. 979 continue the requirements of the existing Self-Governance law which requires that before any tribe or organization can enter the Self-Governance program they must fulfill certain criteria—that the tribe have experience in government contracting, a record of clean audits, and a demonstrated

[1] See attached Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management, 1998.

management capability—in order to exercise the right to compact for the operation of IHS functions, including the funds necessary to run them.

S. 979 also adds a new title VI to the Act which authorizes a feasibility study regarding the execution of tribal Self-Governance compacts and funding agreements of Indian-related programs outside the IHS but within the Department of Health and Human Services on a demonstration project basis.

The Self-Governance program recognizes that Indian tribes care for the health, safety, and welfare of their own members as well as that of non-Indians who either live on their reservations or conduct business with the tribes and are thus committed to safe and fair working conditions and practices.

LEGISLATIVE HISTORY

S. 979, the Tribal Self Governance Amendments of 1999, was introduced on May 6, 1999 by Chairman Campbell, for himself and for Senator McCain. Senator Inhofe was added as cosponsor on July 19, 1999. S. 979 was referred to the Committee on Indian Affairs, where a hearing was held on July 19, 1999.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On October 27, 1999 the Committee on Indian Affairs, in an open business session, adopted an amendment in the nature of a substitute to S. 979 by a unanimous vote of the members present and ordered the substitute amendment reported favorably to the Senate.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section sets forth the short title, "The Tribal Self-Governance Amendments of 1999."

Section 2. Findings

This section sets forth the findings of Congress which reaffirm the inherent sovereignty of Indian tribes and the unique government-to-government relationship between the United States and Indian tribes. The findings make clear that while progress has been made, the federal bureaucracy has eroded tribal self-governance. The findings state that the federal government has failed to fully meet its trust responsibility and to satisfy its obligations under treaties and other laws. The findings explain that Congress has reviewed the tribal self-governance demonstration project and concluded that self-governance is an effective mechanism to implement and strengthen the federal policy of government-to-government relations with Indian tribes by transferring to Indian tribes full control and funding for federal programs, functions, services, or activities, or portions thereof.

Section 3. Declaration of policy

This section provides that it is Congress' policy to permanently establish and implement tribal self-governance within the Depart-

ment of Health and Human Services with the full cooperation of its agencies. Among the key policy objectives Congress seeks to achieve through the self-governance program are to (1) maintain and continue the United States' unique relationship with Indian tribes; (2) allow Indian tribes the flexibility to choose whether they wish to participate in self-governance; (3) ensure the continuation and fulfillment of the United States' trust responsibility and other responsibilities towards Indian tribes that are contained in treaties and other laws; (4) permit a transition to tribal control and authority over programs, functions, services, or activities, (or portions thereof); and (5) encourage and provide a corresponding parallel reduction in the federal bureaucracy.

Section 4. Tribal self governance

This section sets out the substantive provisions of the Self-Governance program within the Indian Health Service and authorizes a feasibility study of the applicability of Self-Governance to other HHS agencies by adding Titles V and VI to the Indian Self-Determination and Education Assistance Act of 1975, as amended.

Section 501. Establishment

This section directs the Secretary of HHS to establish a permanent Tribal Self-Governance Program in the Indian Health Service.

Section 502. Definitions

Subsection (a)(1) defines the term "construction project". The Committee does not intend this legislation to preclude agreements between self-governance tribes and the Indian Health Service for carrying out sanitary facilities construction projects pursuant to a "Project Funding Agreement" or "Memorandum of Agreement" executed as an addendum of a Title V Annual Funding Agreement as authorized by Section 7(a)(3) of Pub. L. 86–121, 73 Stat. 267 (42 U.S.C. § 2004(a)).

Subsection (a)(2) provides that a "construction project agreement" is one between the Secretary and the Indian tribe that, at a minimum, establishes start and completion dates, scope of work and standards, identifies party responsibilities, addresses environmental considerations, identifies the owner and maintenance entity of the proposed work, provides a budget, provides a payment process, and establishes a duration of the construction project agreement.

Subsection (a)(3) defines "inherent federal functions" as those functions which cannot be legally delegated to Indian tribes. This definition states the obvious. Inherent federal functions are functions which the Executive Branch cannot by law delegate to other branches of government, or non-governmental entities. The Committee's definition is consistent with the Department of the Interior Solicitor's Memorandum of May 17, 1996 entitled "Inherently Federal Functions under the Tribal Self-Governance Act of 1994."

The Committee's definition is expressly intended to provide flexibility so as to allow the Secretary and the tribes to come to agreement on which functions are inherently federal on a case-by-case basis. It is important to note that, in the tribal procurement context, there is another factor the Committee has considered. When

the federal government "restores" tribal governmental powers and functions that are inherent in tribes' governmental status such as those possessed by tribes before the establishment of the federal Indian bureaucracy, the scope of this restored authority is broader than in the transfer of federal governmental powers to private or other governmental entities.

Subsection (a)(4) defines "inter-tribal consortium". The Committee notes that during the Title III Demonstration Project the IHS authorized inter-tribal consortia, such as the co-signers to the Alaska Tribal Health Compact, to participate in the Project and that participation has experienced great success. The definition of "inter-tribal consortium" is intended to include "tribal organizations" as that term is defined in Section 4(l) of the Indian Self-Determination Act, Pub.L. No. 93-638. This would include consortia such as those involved in the Alaska Tribal Health Consortium. It is the Committee's intent that inter-tribal consortia and tribal organizations shall count as one tribe for purposes of the 50-tribe-per-year-limitation contained in section 503 (a).

Subsection (a)(5) defines "gross mismanagement". The inclusion of this term is intended to govern one of the criteria that the Secretary is to consider in the reassumption of a tribally-operated program. The Secretary will be given the authority to reassume programs that pose an imminent endangerment to the public health where the danger arises out of a compact or funding agreement violation.

The Committee believes that the inclusion of a performance standard, in this case gross mismanagement, is also an appropriate grounds for reassumption. Gross mismanagement is defined as a significant, clear, and convincing violation of compact, funding agreement, regulatory or statutory requirements related to the transfer of Self-Governance funds to the tribe that results in a significant reduction of funds to the tribe's Self-Governance program. The Committee's definition of gross mismanagement is narrowly tailored and will require a high degree of proof by the Secretary. The Committee is will aware of tribal concerns and agrees that the inclusion of this performance standard must not be utilized by the Secretary in such a manner as to needlessly impose monitoring and auditing requirements that hinder the efficient operation of tribal programs. Requiring intrusive and over burdensome monitoring and auditing activities are antithetical to the goals of Self-Governance and the intent of the Committee.

Subsection (a)(6) defines "tribal shares". This definition is consistent with the Title IV Rulemaking Committee's determination that residual funds are those "necessary to carry out the inherently federal functions that must be performed by federal officials if all tribes assume responsibilities for all BIA programs." Fed. Reg. Vol. 63, No. 29, 7325, (Fed. 12, 1998) (Proposed Rule, 25 CFR Sec. 1000.91). All funds appropriated under the Indian Self-Determination and Education Assistance Act are either tribal shares or Agency residual.

Subsection (a)(7) defines "Secretary" as the Secretary of the Department of Health and Human Services.

Subsection (a)(8) defines "Self-Governance" as the program established under this title.

Section (b) defines "Indian Tribe". This definition enables and Indian tribe to authorize another Indian tribe, inter-tribal consortium or tribal organization to participate in self-governance on its behalf. The authorized Indian Tribe, inter-consortium or tribal organization may exercise the authorizing Indian tribe's rights as specified by Tribe resolution.

Section 503. Selection of participating tribes

This section describes the eligibility criteria that must be satisfied by any Indian tribe interested in participating in the Self-Governance program.

(a) Continuing Participation. All tribes presently participating in the Tribal Self-Governance Demonstration Project under Title III of the Indian Self-Determination Act may elect to participate in the permanent Self-Governance program. Tribes must do so through tribal resolution. Tribes may also choose to "roll over" and renegotiate their compacts under the authority provided by S. 979.

(b) Additional Participants. (1) This section allows an additional 50 tribes a year to participate in self-governance program.

(2) This section authorizes an Indian tribe that chooses to withdraw from an inter-tribal consortium or tribal organization to participate in self-governance provided that the tribe independently meets the eligibility criteria in Title V. Tribes and tribal organizations that withdraw from tribal organizations and inter-tribal consortia under this section shall be entitled to participate in the permanent program under section 503 (b) (2) and such participation shall not be counted against the 50 tribe a year limitation contained in section 503 (a).

(c) Applicant Pool. The eligibility criteria for self-governance tribes are the same as those that apply under Title IV. To participate, an Indian tribe must successfully complete a planning phase, must request participation in the program through a resolution or official action of the governing body, and must have demonstrated financial stability and financial management capability for the past three years. Proof of no material audit exceptions in the tribe's self determination contracts or Self Governance funding agreements is conclusive proof of such qualification. The Committee notes that the financial examination addressed in subsection 503(c)(3) refers solely to funds managed by the tribe under Title I and Title IV of the Indian Self-Determination Act. The bill has been deliberately crafted to make clear that a tribe's activities in other economic endeavors are not to be the subject of the Section 503(c) examination. Similarly, the "budgetary research" referred to in section 503(d)(1) of the bill requires a tribe to research only budgetary issues related to the administration of the programs the tribe anticipates transferring to tribal operation under Self-Governance.

(d) Planning Phase. Every Indian tribe interested in participating in the self-governance program shall complete a planning phase prior to participating in the program. The planning phase is to include legal and budgetary research and internal tribal government planning and organizational preparation. The planning phase is to be completed to the satisfaction of the tribe.

(e) Grants. Subject to available appropriations, any Indian tribe interested in participating in self-governance is eligible to receive

a grant to plan for participation in the program or to negotiate the terms of a compact and funding agreement.

(f) Receipt of Grant not Required. This section provides that receipt of a grant from HHS is not required to participate in the permanent self-governance program.

Section 504. Compacts

This section authorizes Indian tribes to negotiate compacts with the Secretary and identifies generally the contents of compacts. While the compact process was not specifically part of prior legislative enactment, the committee understands that compacts have developed as an integral part of the Self Governance program. The committee believes that compacts serve an important and necessary function in establishing government-to-government relations, which is noted earlier, is the keystone of modern federal Indian policy.

(a) Compact Required. The Secretary is required to negotiate and enter into a written compact consistent with the trust responsibility, treaty obligations and the government-to-government relationship between the United States and each participating tribe.

(b) Contents. This section requires that compacts state the terms of the government-to-government relationship between the Indian tribe and the United States. Compacts may only be amended by agreement of both parties.

(c) Existing Compacts. Upon enactment of Title V, Indian tribes have the option of retaining their existing compacts, or any portion of the compacts that are not inconsistent with the provisions of Title V.

(d) Term and Effective Date. The date of approval and execution by the Indian Tribe is generally the effective date of a compact, unless otherwise agreed to by the parties. A compact will remain in effect as long as permitted by federal law or until terminated by written agreement of the parties, or by retrocession or reassumption.

Section 505. Funding agreements

This section authorizes Indian tribes to negotiate funding agreements with the Secretary and identifies generally the contents of those agreements.

(a) Funding Agreement Required. The Secretary is required to negotiate and enter into a written funding agreement consistent with the trust responsibility, treaty obligations and the government-to-government relationship between the United States and each participating tribe.

(b) Contents. An Indian tribe may include in a funding agreement all programs, functions, services, or activities, (or portions thereof) that it is authorized to carry out under Title I of the Act. Funding agreements may, at the option of the Indian tribe, authorize the Tribe to plan and carry-out all programs, functions, services, or activities, (or portion thereof) administered by the IHS that are carried out for the benefit of Indians because of their status as Indians or where Indian tribes or Indian beneficiaries are the primary or significant beneficiaries, as set forth in statutes. For each program, function, service, or activity (or portion thereof) included

in a funding agreement, an Indian tribe is entitled to receive its full tribal share of funding, including funding for all local, field, service unit, area, regional, and central/headquarters or national office locations. Available funding includes the Indian tribe's share of discretionary IHS competitive grants but not statutorily mandated competitive grants.

The Committee is concerned with the reluctance of the Indian Health Service to include all available federal health funding in self governance funding agreements. We note, as an example, the refusal of the IHS to so include the Diabetes Prevention Initiative funding. As a result, funding was delayed and undue administrative requirements diverted resources from direct services. This section is intended to directly remedy this situation.

The Committee has received ample testimony demonstrating the benefits of self governance. In 1998, the National Indian Health Board released it's "National Study on Self-Determination and Self-Governance," providing empirical evidence that self-governance leads to more efficient management of tribal health service delivery, especially preventive services. This study consistently observed an overall improvement in quality of care when tribes operate their own Health Care systems. Less than full funding of agreements will result in less than maximum use of federal resources to address the health care in Indian country. Accordingly, this section is to be interpreted broadly by affording a presumption in favor of including in a tribe's self-governance funding agreement any federal funding administered by that Agency.

(c) Inclusion in Compact or Funding Agreement. The eligibility of Indian tribes does not need to be specifically identified in authorizing legislation for a program to be eligible for inclusion in a compact or funding agreement.

(d) Funding Agreement Terms. Each funding agreement should generally set out the programs, functions, services, or activities, (or portions thereof) to be performed by the Indian tribe, the general budget category assigned to each program, function, service, or activity (or portion thereof), the funds to be transferred, the time and method of payment and other provisions that the parties agree to.

(e) Subsequent Funding Agreements. Each funding agreement remains in full force and effect unless the Secretary receives notice from the Indian tribe that it will no longer operate one or more of the programs, functions, services, or activities, (or portions thereof) included in the funding agreement or until a new funding agreement is executed by the parties.

The Committee is concerned with reports that the IHS has been able to use the annual negotiations provisions of Section 303(a) of the Act to obtain an unfair bargaining advantage during negotiations by threatening to suspend application of the Act to a tribe if it does not sign an Annual funding agreement. This subsection is meant to facilitate negotiation between the tribes and the Indian Health Service on a true government-to-government basis. The Committee believes the retroactive provision is fair because this assures that no act or omission of the federal government endangers the health and welfare of tribal members.

(f) Existing Funding Agreements. Upon enactment of Title V, Indian tribes may either retain their existing annual funding agree-

ments, or any portion thereof, that do not conflict with provisions of Title V, or negotiate new funding agreements that conform to Title V.

(g) Stable Base Funding. An Indian tribe may include a stable base budget in its funding agreement. A stable base budget contains the tribe's recurring funding amounts and provides for transfer of the funds in a predictable and consistent manner over a specific period of time. Adjustments are made annually only if there are changes in the level of funds appropriated by Congress. Nonrecurring funds are not included and must be negotiated on an annual basis. The Committee intends this section to codify the existing Agency policy guidance on stable base funding.

Section 506. General provisions

(a) Applicability. The provisions in this section may, at a tribe's option, be included in a Compact or funding agreement negotiated under Title V.

(b) Conflicts of Interest. Indian tribes are to assure that internal measures are in place to address conflicts of interest in the administration of programs, functions, services, or activities, (or portions thereof).

(c) Audits. The single Agency Audit Act applies to title V funding agreements. Indian tribes are required to apply cost principles set out in applicable OMB Circulars, as modified by section 106 of Title I or by any exemptions that may be applicable to future OMB Circulars. No other audit or accounting standards are required. Claims against Indian tribes by the federal government based on any audit of funds received under a Title V funding agreement are subject to the provisions of section 106(f) of Title I.

Records. An Indian tribe's records are not considered federal records for purposes of the Federal Privacy Act, unless otherwise stated in the compact or funding agreement. Indian tribes are required to maintain a record keeping system and, upon reasonable advance request, provide the Secretary with reasonable access to records to enable HHS to meet it minimum legal record keeping requirements under the Federal Records Act.

(e) Redesign and Consolidation. An Indian tribe may redesign or consolidate programs, functions, services, or activities, (or portions thereof) and reallocate or redirect funds in any way the Indian tribe considers to be in the best interest of the Indian community. Any redesign or consolidation, however, must not have the effect of unfairly denying eligibility to people otherwise eligible to be served under federal law.

(f) Retrocession. An Indian tribe may fully or partially retrocede back to the Secretary any program, function, service, or activity (or portion thereof) included in a compact or funding agreement. A retrocession request becomes effective within the time frame specified in the compact or funding agreement, one year from the date the request was made, the date the funding agreement expires, or any date mutually agreed to by the parties, whichever occurs first.

(g) Withdrawal. An Indian tribe that participates in self-governance through an inter-tribal consortium or tribal organization can withdraw from the consortium or organization. The withdrawal becomes effective within the time frame set out in the tribe's author-

izing resolution. If a time frame is not specified, withdrawal becomes effective one year from the submission of the request or on the date the funding agreement expires, whichever occurs first. An alternative date can be agreed to by the parties, including the Secretary.

When an Indian tribe withdraws from an inter-tribal consortium or tribal organization and wishes to enter into a Title I contract or Title V agreement on its own, it is entitled to receive its share of funds supporting the program, function, service, or activity, (or portion thereof) that it will carry out under its new status The funds must be removed from the funding agreement of the participating organization or inter-tribal consortium and included in the withdrawing tribe's agreement or contract. If the withdrawing tribe is to receive services directly from the Secretary, the tribe's share of funds must be removed from the funding agreement of the participating organization or inter-tribal consortium and retained by the Secretary to provide services. Finally, an Indian tribe that chooses to terminate its participation in the self-governance program may, at its option, carry out programs, functions, services, or activities, (or portions thereof) in a Title I contract or Self-Governance funding agreement and retain its mature contractor status.

(h) Nonduplication. This section provides that a tribe operating programs under a Self-Governance compact may not contract under Title I (a "638 contract") for the same programs.

Section 507. Provisions relating to the secretary

This section sets out mandatory and non-mandatory provisions relating to the Secretary's obligations.

(a) Mandatory Provisions.

(1) Health Status Reports. To the extent that the data is not otherwise available to the Secretary, compacts and funding agreements must include a provision requiring the Indian tribe to report data on health status and service delivery. The Secretary is to use this data in the Secretary's annual reports to congress. The Secretary is required to provide funding to an Indian tribe to compile such data. Reporting requirements can only impose minimal burdens on an Indian tribe and may only be imposed if they are contained in regulations developed under negotiated rulemaking.

(2) Reassumption. Compacts or funding agreements must include a provision authorizing the Secretary to reassume a program, function, service, or activity, (or portion thereof) if the Secretary makes a finding of imminent endangerment of the public health caused by the Indian tribe's failure to carry out the compact or funding agreement or gross mismanagement that causes a significant reduction in available funding. The Secretary is required to provide the Indian tribe with notice of a finding and a hearing on the record. The Indian tribe may take action to correct the problem identified in the notice. The Secretary has the burden at the hearing of demonstrating by clear and convincing evidence the validity of the grounds for reassumption. In cases where the Secretary finds imminent substantial and irreparable endangerment of the public health caused by the tribe's failure to carry out the compact or funding agreement, the Secretary may immediately reassume the

program but is required to provide the tribe with a hearing on the record within ten days after reassumption.

(b) Final offer. If the parties cannot agree on the terms of a compact or funding agreement, the Indian tribe may submit a final offer to the Secretary. The Secretary has 45 days to determine if the offer will be accepted or rejected. The 45 days can be extended by the Indian tribe. If the Secretary takes no action the offer is deemed accepted by the Secretary.

(c) Rejection of Final Offers. This provision describes the only circumstances under which the Secretary may reject an Indian tribe's final offer.

A rejection requires written notice to the Indian tribe within 45 days of receipt with specific findings that clearly demonstrate or are supported by controlling legal authority that: (1) the amount of funds proposed exceeds the funding level that the Indian tribe is entitled to: (2) the program, function, service, or activity (or portion thereof) that is the subject of the offer is an inherent federal function that only can be carried out by the Secretary; (3) the applicant is not eligible to participate in self-governance; or (4) the Indian tribe cannot carry out the program, function, service or activity, (or portion thereof) without a significant danger or risk to the public health. The Committee believes the fourth provision appropriately balances the Secretary's trust responsibility to assure the delivery of health care services to Indian beneficiaries, with the equally important goal of fostering maximum tribal self-determination in the administration of health care programs transferred under Title V. The Committee has included the requirement of a "specific finding" to avoid rejections which merely state conclusory statements that provide no analysis or determination of facts supporting the rejection.

The Secretary must also offer assistance to the Indian tribe to overcome the stated objections, and must provide the Indian tribe with an opportunity to appeal the rejection and have a hearing on the record. In any hearing the Indian tribe has the right to engage in full discovery. The Indian tribe also has the option of proceeding directly to federal district court under section 110 of Title I of the Act in lieu of an administrative hearing.

The Secretary may only reject these portions of a "final offer" that are supported by the findings and must agree to all severable portions of a "final offer" which do not justify a rejection. By entering into a partial compact or funding agreement the Indian tribe does not waive its right to appeal the Secretary's decision for the rejected portions of the offer.

(d) Burden of Proof. The Secretary has the burden of demonstrating by clear and convincing evidence the validity of a rejection of a final offer in any hearing, appeal or civil action. A decision relating to an appeal within the Department is considered a final agency action if it was made by an administrative judge or by an official of the Department whose position is at a higher level than the level of the departmental agency in which the decision that is the subject of the appeal was made.

(e) Good Faith. The Secretary is required to negotiate in good faith and carry out his discretion under title V in a manner that maximizes the implementation of self-governance.

(f) Reduction of Secretarial Responsibilities. Any savings in the Department's administrative costs that result from the transfer of programs, functions, services, or activities, (or portions thereof) to Indian tribes in self-governance agreements that are not otherwise transferred to Indian tribes under Title V must be made available to Indian tribes for inclusion in their compacts of funding agreements. The Committee has consistently indicated that Self Governance should achieve reductions in federal bureaucracy and create resultant cost savings. This subsection makes clear that such savings are for the benefit of the Indian tribes. Savings are not to be utilized for other agency purposes, but rather are to be provided as additional funds or services to all tribes, inter-tribal consortia, and tribal organizations in a fair and equitable manner.

(g) Trust Responsibility. The Secretary is prohibited from waiving, modifying or diminishing the trust responsibilities or other responsibilities as established in treaties, executive orders or other laws and court decisions of the United States to Indian tribes and individual Indians. The Committee reaffirms that the protection of the federal trust responsibility to Indian tribes and individuals is a key element of Self Governance. The ultimate and legal responsibility for the management and preservation of trust resources resides with the United States as Trustee. The Committee believes that health care is a trust resource consistent with federal court decisions. This subsection continues the practice of permitting substantial tribal management of its trust resources provided that tribal activities do not replace the trustee's specific legal responsibilities. Section 507 (a)(2) (reassumption) with its concept of imminent endangerment of the public health provides guidance in defining the Secretary trust obligation in the health context.

(h) Decisionmaker. Final agency action is a decision by either an official from the Department at any higher organizational level than the initial decision maker or an administrative law judge. Subparagraph (h)(2) is included to assure that the persons deciding an administrative appeal are not the same individuals who made the initial decision to reject a tribe's "final offer."

Section 508. Transfer of funds

(a) In General. The Secretary is required to transfer all funds provided for in a funding agreement, pursuant to Section 509(c) below. Funds are also required to be provided for periods covered by continuing resolutions adopted by Congress, to the extent permitted by such resolutions. When a funding agreement requires that funds be transferred at the beginning of the fiscal year, the transfer is to be made within 10 days after the Office of Management and Budget apportions the funds, unless the funding agreement provides otherwise.

(b) Multi-Year Funding. The Secretary is authorized to negotiate multi-year funding agreements.

(c) Amount of Funding. The Secretary is required to provide an Indian tribe with the same funding for a program, function, service, or activity (or portion thereof) under self-governance that the tribe would have received under Title I. This includes all Secretarial resources that support the transferred program, and all contract support costs (including indirect costs) that are not available from the

Secretary but are reasonably necessary to operate the program. The bill requires that the transfer of funds occur along with the transfer of the program. Thus the bill states that "the Secretary shall provide" the funds specified, and the Secretary is not authorized to phase-in funds in any manner that is not voluntarily agreed to by a Self-Governance tribe.

(d) Prohibitions. The Secretary is specifically prohibited from withholding, refusing to transfer or reducing any portion of an Indian tribe's full share of funds during a Compact or funding agreement year, or for a period of years. The Committee is aware that for the first twenty-one years of administration of the Indian Self-Determination Act, the Department had never taken the position that it has the discretion to delay funding for any program transferred under the Act absent tribal consent. However, a 1996 IHS circular purported to do just that. Since this circular was issued, several Area offices have refused to turn over substantial program funds to tribal operation. In one instance both an Area office and Headquarters refused to transfer portions of programs for several years, and with respect to several Headquarters functions the IHS refused to transfer the functions altogether. A recent Oregon Federal district court decision declared the Indian Health Service's actions in these instances illegal and the Committee agrees.

Additionally, funds that an Indian tribe is entitled to receive may not be reduced to make funds available to the Secretary for monitoring or administration; may not be used to pay for federal functions (such as pay costs or retirement benefits); and, may not be used to pay costs associated with federal personnel displaced by self-governance or Title I contracting.

In subsequent years, funds may only be reduced in very limited circumstances: if Congress reduces the amount available from the prior year's appropriation; if there is a directive in the statement of managers which accompanies an appropriation; if the Indian tribe agrees; if there is a change in the amount of pass-through funds; or, if the project contained in the funding agreement has been completed.

(e) Other Resources. If an Indian tribe elects to carry out a compact or funding agreement using federal personnel, supplies, supply sources or other resources that the Secretary has available under procurement contracts, the Secretary is required to acquire and transfer the personnel, supplies or resources to the Indian tribe.

(f) Reimbursement to Indian Health Service. The Indian Health Service is authorized to provide goods and services to tribes on a reimbursable basis. Reimbursements are to be credited to the same or subsequent appropriation account which provided the initial funding. The Secretary is authorized to receive and retain the reimbursed amounts until expended without remitting them to the Treasury.

(g) Prompt Payment Act. This subsection makes the Prompt Payment Act (31 U.S.C. Chapter 39) applicable to the transfer of all funds due to a tribe under a compact or funding agreement. The first annual or semi-annual transfer due under a funding agreement must be made within 10 calendar days of the date the Office of Management and Budget apportions the appropriations for that fiscal year. Under this section, the Secretary is obligated to pay in-

terest to a Self-Governance tribe, as calculated under the Prompt Payment Act, for any late payment under a funding agreement.

(h) Interest or Other Income on Transfers. An Indian tribe may retain interest earned or other income realized on funds transferred under a Compact or funding agreement. Interest earned must not reduce the amount of funds the tribe is entitled to receive during the year the interest was earned or in subsequent years. An Indian tribe may invest funds received in a funding agreement as it wishes, provided it follows the "prudent investment standard", a commonly utilized fiduciary standard, that the Committee believes is sufficiently stringent to ensure that funds are invested wisely and safely yet provide a reasonable yield on investment.

Eligible investments under the prudent investment standard may include the following: (1) cash and cash equivalents (including bank checking accounts, savings accounts, and brokerage account free cash balances that carry a quality rating A1 P1, or AA or higher), (2) money market accounts with an A rating or higher, (3) certificates of deposit where the amounts qualify for insurance ($100,000 or less) or where the issuing bank has delivered a specific assignment, (4) bank repossession certificates where the amounts qualify for insurance ($100,000 or less) or where the issuing bank has delivered a specific assignment, (5) U.S. Government or Agency Securities, (6) commercial paper rated A1 P1 at time of purchase and which cannot exceed 10% of portfolio at time of purchase with any one issuer (short term paper—under 90 days—may be treated as a cash equivalent, (7) auction rate preferred instruments that are issued by substantial issuers, are rated AA or better, and may be utilized with auction maturities of 28 to 90 days, (8) corporate bonds of U.S. corporations that have Moody's, Standard and Poor's, or Fitch's rating of A or equivalent and where no more than 10% of the portfolio at time of purchase is invested in the securities of any one issuer, (9) dollar denominated short term bonds of the G7 Nations or World Bank only if the yields exceed those of U.S. instruments of equivalent maturity and quality, and where no more than 25% of portfolio at time of purchase is invested in this asset category, (10) properly registered short term no-load government or corporate bond mutual funds with a safety rating and average fund quality of A or higher, which demonstrate low volatility, and where no more than 25% of portfolio at time of purchase is invested in any one fund.

(i) Carryover of Funds. All funds paid to an Indian tribe under a compact or funding agreement are "no year" funds and may be spent in the year they are received or in any future fiscal year. Carryover funds are not to reduce the amount of funds that the tribe may receive in subsequent years.

(j) Program Income. All program income (including Medicare/Medicaid) reimbursements earned by an Indian tribe is supplemental to the funding that is included in its funding agreement. The Secretary may not reduce the amount of funds that the Indian tribe may receive under its funding agreement for future fiscal years. The Indian tribe may retain such income and spend it either in the current or future years.

(k) Limitation of Costs. An Indian tribe is not required to continue performance of a Program, function, service, or activity (or

portion thereof) included in a funding agreement if doing so requires more funds than were provided under the funding agreement. If an Indian tribe believes that the amount of funds transferred is not enough to carry out a program, function, service, or activity, (or portion thereof) for the full year, the Indian tribe may so notify the Secretary. If the Secretary does not supply additional funds the tribe may suspend performance of the program, function, service, or activity (or portion thereof) until additional funds are provided.

Section 509. Construction projects

(a) In General. Indian tribes are authorized to conduct construction projects authorized under this section. The tribes are to assume full responsibility for the projects, including responsibility for enforcement and compliance with all relevant federal laws, including the National Historic Preservation Act of 1966 and the National Environmental Policy Act of 1969. A tribe undertaking a construction project must designate a certifying officer to represent the tribe and accept federal court jurisdiction for purposes of the enforcement of federal environmental laws.

(b) Negotiations. This subsection provides that negotiation of construction projects are negotiated pursuant to section 105(m) of the Act and construction project agreements included in the funding agreement as an addendum.

(c) Codes and Standards. The tribe and the IHS must agree to standards and codes for the construction project. The agreement is to conform with nationally accepted standards for comparable projects.

(d) Responsibility for Completion. This subsection provides that the Indian tribe must assume responsibility for the successful completion of the project according to the terms of the construction project agreement.

(e) Funding. This subsection provides that funding of construction projects will be through advance payments, on either an annual or semi-annual basis. Payment amounts will be determined by project schedules, work already completed, and the amount of funds already expended. Flexibility in payment schedules will be maintained by the IHS through contingency funds to take account of exigent circumstances such as weather and supply.

(f) Approval. This subsection allows the Secretary to have at least one opportunity to approve tribal project planning and design documents or significant amendments to the original scope of work before construction. The tribe is to provide at least semiannual progress and financial reports to the Secretary. The Secretary is allowed to conduct semiannual site visits or on another basis if agreed to by the tribe.

(g) Wages. This subsection mirrors section 7(a) of the Indian Self-Determination and Education Assistance Act which incorporates federal Davis-Bacon Act wage protections for workers.

(h) Application of Other Laws. This subsection provides that provisions of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations, and other federal procurement laws and regulations do not apply to construction projects, unless agreed to by the participating tribe.

Section 510. Federal procurement laws and program regulations

This section provides that unless otherwise agreed to by the parties, compacts and funding agreements are not subject to federal contracting or cooperative agreement laws and regulations (including executive orders) unless those laws expressly apply to Indian tribes. Compacts and funding agreements are also not subject to program regulations that apply to the Secretary's operations.

Section 511. Civil actions

(a) Contract Defined. The Committee intends that Section 110 of Title I of the Act, which grants tribes access to federal district court to challenge a decision by the Secretary, shall apply to this title.

(b) Applicability of Certain Laws. This subsection provides that Department of Interior approval of tribal contracts (25 U.S.C. 81) and section 16 of the Indian Reorganization Act (25 U.S.C. 476) shall not apply to attorney and other professional contracts with Self-Governance tribes.

Section 512. Facilitation

(a) Secretarial Interpretation. This section requires the Secretary to interpret all executive orders, regulations and federal laws in a manner that will facilitate the inclusion of programs, functions, services, or activities, (or portions thereof) and funds associated therewith under Title V, implementation of Title V compacts and funding agreements, and the achievement of tribal health goals and objectives where they are not inconsistent with federal law. This section reinforces the Secretary's obligation not merely to provide health care services to Native American tribes, but to facilitate the efforts of tribes to manage those programs for the maximum benefit of their communities.

(b) Regulation Waiver. An Indian tribe participating in the Self-governance program under title V may seek a waiver of an applicable Indian Self-Determination Act regulation by submitting a written waiver request to the Secretary. The Secretary has 90 days to respond and a failure to act within that period is deemed an approval of the request by operation of law. Action on a waiver request is final for the Department. Denials may be made upon a specific finding that the waiver is prohibited by federal law.

(c) Access to Federal Property. This subsection addresses tribal use of federal buildings, hospitals and other facilities, as well as the transfer to tribes of title to excess personal or real property. At the request of an Indian tribe the Secretary is required to permit the Indian tribe to use government-owned real or personal property under the Secretary's jurisdiction under such terms as the parties may agree to.

The Secretary is required to donate title to personal or real property that is excess to the needs of any federal agency or the General Services Administration as long as the Secretary has determined that the property is appropriate for any purpose for which a compact is authorized, irrespective of whether a tribe is in fact administering a particular program that matches that purpose. For instance, if a tribe is not administering a mental health program under its IHS compact or funding agreement, but is administering

a mental health program under other authority or funding agreement, the Secretary may nonetheless acquire excess or surplus property and donate such property to the tribe so long as the Secretary determines that the tribe will be using the property to administer mental health services.

Title to property furnished by the government or purchased with funds received under a compact or funding agreement vests in the Indian tribe if it so chooses. Such property also remains eligible for replacement, maintenance or improvement on the same terms as if the United States had title to it. Any property that is worth $5,000 or more at the time of a retrocession, withdrawal or reassumption may revert back to the United States at the option of the Secretary.

(d) Matching or Cost-Participation Requirement. Funds transferred under compacts and funding agreements are to be considered non-federal funds for purposes of meeting matching or cost participation requirements under federal or non-federal programs.

(e) State Facilitation. This section encourages and authorizes States to enter agreements with tribes supplementing and facilitating Title V and other federal laws that benefit Indians and Indian tribes, for example, welfare reform. it is designed to provide federal authority so as to remove equal protection objections where states enter into special arrangements with tribes.

The Committee wants to foster enlightened and productive partnerships between state and local governments, on the one hand, and Indian tribes on the other; and, the Committee wants to be sure that states are authorized by the federal government to undertake such initiatives, as a delegation of the federal government's constitutional authority to deal with Indian tribes as political entities, irrespective of any limitations which have from time to time been argued might otherwise exist with respect to state action under either state constitutional provisions or other provisions of the Constitution. Many state and tribal governments have undertaken positive initiatives both in health care issues and in natural resource management, and it is the Committee's strong desire to fully support, authorize and encourage such cooperative efforts.

(f) Rules of Construction. Provisions in this title and in compacts and funding agreements shall be liberally construed and ambiguities decided for the benefit of the Indian tribe participating in the program.

Section 513. Budget request

(a) The President is required to annually identify in his/her budget all funds needed to fully fund all Title V compacts and funding agreements. These funds are to be apportioned to the Indian Health Service and will then be transferred to the Office of Tribal Self-Governance. The IHS may not thereafter reduce the funds a tribe is otherwise entitled to receive whether or not such funds have been apportioned to the Office of Tribal Self-Governance.

The Committee has been made aware that the current system for payment and approval of funding and amendments for annual funding agreements for self-governance demonstration tribes is inefficient and time consuming. In addition, by leaving authority and

responsibility for distributions to Area Offices, there have been reported instances of excessive and unwarranted assertion of authority by Area Offices over self governance tribes. This includes Area Offices retaining shares of funds not authorized to be retained by the tribe's annual funding agreement. The Committee concludes that by requiring a report on self-governance expenditures, and by moving all self-governance funding onto a single line, the Congress will be able to achieve the following ends: more accurately gauge the amount of funding flowing directly to tribes through participation in self governance; generate savings through decreasing the bureaucratic burden on the payment and approval process in the Indian Health Service; expedite the transferal of funding to tribal operating units; and, aid in the implementation of true government-to-government relations and tribal self determination.

(b) The budget must identify the present level of need and any shortfalls in funding for every Indian tribe in the United States that receives services directly from the Secretary, through a Title I contract or in a Title V compact and funding agreement.

Section 514. Reports

(a) Annual Report. The Secretary is required to submit to Congress on January 1 of every year a written report on the Self-Governance program. The report is to include the level of need presently funded or unfunded for every Indian tribe in the United States that receives services directly from the Secretary, through a Title I contract or in a Title V compact and funding agreement. The Secretary may not impose reporting requirements on Indian tribes unless specified in Title V.

(b) Contents. The Secretary's report must identify: (1) the costs and benefits of self-governance; (2) all funds related to the Secretary's provision of services and benefits to self-governance tribes and their members; (3) all funds transferred to self-governance tribes and the corresponding reduction in the federal bureaucracy; (4) the funding formula for individual tribal shares; (5) the amount expended by the Secretary during the preceding fiscal year to carry out inherent federal functions; and (6) contain a description of the method used to determine tribal shares. The Secretary's report must be distributed to Indian tribes for comment no less than 30 days prior to its submission to Congress and include the separate views of Indian tribes.

(c) Report on IHS Funds. This section requires the Secretary to consult with Indian tribes and report, within 180 days after this title is enacted, on funding formulae used to determine tribal shares of funds controlled by IHS. The formulae are to become a part of the annual report to Congress discussed above in Section 514(d). This provision is not intended to relieve HHS from its obligation under Title V to make all funds controlled by the central office, national, headquarters or regional offices available to Indian tribes. This provision is also not intended to require reopening funding formulae that are already being used by HHS to distribute funds to Indian tribes. Any new formulae or revision of existing formulae should be determined only after significant regional and national tribal consultation.

Section 515. Declaimers

(a) No Funding Reduction. This provision states that nothing in Title V shall be interpreted to limit or reduce the funding for any program, project or activity that any other Indian tribe may receive under Title I or other applicable federal laws. A tribe that alleges that a compact or funding agreement violates this section may rely on section 110 of the Act to seek judicial review of the allegation.

(b) Federal Trust and Treaty Responsibilities. This section clarifies that the trust responsibility of the United States to Indian tribes and individual Indians which exists under treaties, Executive Orders, laws and court decisions shall not be reduced by any provision of Title V.

(c) Tribal Employment. This provision excludes Indian tribes carrying out responsibilities under a compact or funding agreement from falling under the definition of "employer" as that term is used in the National Labor Relations Act.

(d) Obligations of the United States. The IHS is prohibited from billing, or requiring Indian tribes from billing, individual Indians who have the economic means to pay for services. For many years the Interior and Related Agencies appropriations bills included language that prohibited the Indian Health Service, without explicit direction from Congress, from billing or charging Indians who have the economic means to pay. In 1997 the language was removed from the appropriation bills and it has not been included since. This section reflects the Committee's intent that the IHS is prohibited from billing Indians for services, and is further prohibited from requiring any Indian tribe to do so.

Section 516. Application of other sections of the Act

(a) This section expressly incorporates a number of provisions from other areas of the Indian Self-Determination and Education Assistance Act into Title V. These sections include: 5(b) (access for three years to tribal records), 6 (setting out penalties that apply if an individual embezzles or otherwise misappropriates funds under Title V); 7 (federal Davis-Bacon Act wage and labor standards and Indian preference requirements); 102(c) and (d) (relating to Federal Tort Claims Act coverage); 104 (relating to the right to use federal personnel to carry out responsibilities in a compact or funding agreement); 105(k) (access to federal supplies); 111 (clarifying that Title V shall have no impact on existing sovereign immunity and the United States' trust responsibility); and section 314 Public Law No. 101–512 (coverage under the Federal Tort Claims Act).

(b) At the request of an Indian tribe, other provisions of Title I of the Indian Self-Determination Act which do not conflict with provisions in Title V may be incorporated into a compact or funding agreement. If incorporation is requested during negotiations it will be considered effective immediately.

Section 517. Regulations

This section gives the Secretary limited authority to promulgate regulations implementing Title V.

(a) In General. The Secretary is required to initiate procedures to negotiate and promulgate regulations necessary to carry out Title V within 90 days of enactment of Title V. The procedures

must be developed under the Federal Advisory Committee Act. The Secretary is required to publish proposed regulations no later than one year after the date of enactment of Title V. The authority to promulgate final regulations under Title V expires 21 months after enactment. The Committee is aware of the success of the Title I negotiated rulemaking and believes that one reason for its success is a similar limitation of rulemaking authority contained in section 107(a) of the Indian Self-Determination Act, which this section is modeled after.

(b) Committee. This provision requires that a negotiated rulemaking committee made up of federal and tribal government members be formed in accordance with the Negotiated Rulemaking Act. A majority of the tribal committee members must be representatives of and must have been nominated by Indian tribes with Title V compacts and funding agreements. The committee will confer with and allow representatives of Indian tribes, inter-tribal consortiums, tribal organizations and individual tribal members to actively participate in the rulemaking process.

(c) Adaptation of Procedures. The negotiated rulemaking procedures may be modified by the Secretary to ensure that the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes is accommodated.

(d) Effect. The effect of Title V shall not be limited if regulations are not published.

(e) Effect of Circulars, Policies, Manuals, Guidances and Rules. Unless an Indian tribe agrees otherwise in a Compact or funding agreement, no agency circulars, policies, manuals, guidances program regulations or rules adopted by the IHS apply to the tribe.

Section 518. Appeals

In any appeal (including civil actions) involving a decision by the Secretary under Title V, the Secretary carries the burden of proof. To satisfy this burden the Secretary must establish by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions an policies of Title V.

Section 519. Authorization of appropriations

This section authorizes Congress to appropriate such funds as are necessary to carry out Title V.

The Committee is aware of and concerned with the many lawsuits that have been filed against the United States for failure to pay full contract support costs to tribal contractors under the Act. Amounts appropriated in recent years for contract support have failed to keep pace with the demand as tribes assume greater responsibility for health care services. The result has been the filing of several lawsuits with significant liability for the United States.

At the same time, the Committee is concerned with the moratorium that has been placed on any new or expanded contracts or compacts—effectively frustrating the purpose of the Act and stopping Indian self determination in its tracks. Because of these factors, the amendment in the nature of a substitute contained a provision that lifts the moratorium for new or expanded contracts and

compacts, but conditions the Secretary's ability to enter such agreements on two eventualities: (1) the availability of sufficient appropriations for such new agreements; and (2) a determination by the IHS that the level of contract support cost funding for existing contractors will not be diminished as a result of any new or expanded contract or compact.

Section 601. Demonstration project feasibility

This provision requires an 18 month study to determine the feasibility of creating a Tribal Self-Governance Demonstration Project for other agencies, programs and services in the Department of Health and Human Services.

(a) Study. This subsection authorizes the feasibility study.

(b) Considerations. This subsection requires the Secretary to consider (1) the effects of a Demonstration Project on specific programs and beneficiaries, (2) statutory, regulatory or other impediments, (3) strategies for implementing the Demonstration Project, (4) associated costs or savings, (5) methods to assure Demonstration Project quality and accountability, and (6) such other issues that may be raised during the consultation process.

Report. This subsection provides that the Secretary is to submit a report to Congress on the results of the study, which programs and agencies are feasible to be included in a Demonstration Project, which programs would not require statutory changes or regulatory waivers, a list of legislative recommendations for programs that are feasible but which would require statutory changes, and any separate views of Indian tribes or other entities involved in the consultation process.

The Committee has deferred to the Secretary's request not to provide for a demonstration or pilot project component to the Feasibility Study to determine how to best apply Self-Governance to agencies other than the Indian Health Service within HHS. The Secretary has pledged to work in a cooperative spirit with the Indian tribes to quickly identify those programs outside the IHS that are suitable for Self-Governance. The Committee believes that there are agencies and programs outside of the IHS that should be ready to participate in the Self-Governance program at the conclusion of the study and anticipates the introduction of legislation at that time to authorize such participation.

Section 602. Consultation

(a) Study Protocol. This provision requires the Secretary to consult with Indian tribes to determine a protocol for conducting the study. The protocol shall require that the government-to-government relationship between the United States and the Indian tribes forms the basis for the study, that consultations are jointly conducted by the tribes and the Secretary, and that the consultation process allows for input from Indian tribes and other entities who wish to comment.

(b) Conducting Study. This provision requires that when the Secretary conducts the study, the Secretary is to consult with Indian tribes, states, counties, municipalities, program beneficiaries, and interested public interest groups.

Section 603. Definitions

(a) This subsection is intended to incorporate into Title VI the definitions used in Title V.

(b) This subsection defines "agency" to mean any agency in the Department of Health and Human Services other than the Indian Health Service.

Section 604. Authorization of appropriations

This section authorizes the appropriation of such sums as necessary for fiscal years 2000 and 2001 in order to carry out Title VI.

Section 5. Amendments clarifying civil proceedings.

(a) This provision amends section 102(e)(1) of the Act to clarify that the Secretary has the burden of proof in any civil action pursuant to section 110(a).

(b) The provision provides that the amendment to sections 102(e)(1) set out in subsection (a) shall apply to any proceeding commenced after October 25, 1994.

Section 6. Speedy acquisition of goods and services

This section requires the Secretary to enter into agreements for the acquisition of goods and services for tribes, including pharmaceuticals at the best price and in as fast a manner as is possible, similar to those obtained by agreement by the Veterans Administration.

Section 7. Patient records

This section provides that Indian patient records may be deemed to be federal records under the Federal Records Acts in order to allow tribes to store patient records in the Federal Records Center.

Section 8. Repeals

This section repeals Title III of the Indian Self-Determination and Education Assistance Act which authorizes the Demonstration Project replaced by this Act.

Section 9. Savings provision

This section provides that funds already appropriated for Title III of the Indian Self-Determination and Education Assistance Act shall remain available for use under the new Title V.

Section 10. Effective date

This section provides that the Act shall take effect on the date of enactment.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

The cost estimate for S. 979 as calculated by the Congressional Budget Office is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 9, 1999.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 979, the Tribal Self-Governance Amendments of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dorothy Rosenbaum.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 979—Tribal Self-Governance Amendments of 1999

CBO estimates that implementing S. 979 would cost less than $500,000 in each of fiscal years 2000 through 2004, assuming appropriation of the necessary funds. Because enacting the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. The legislation contains no intergovernmental or new private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 979 would amend the Indian Self-Determination and Education Assistance Act to establish a permanent tribal self-governance program within the Indian Health Service (IHS). Under existing demonstration authority, the IHS and tribes enter into funding agreements whereby a tribe assumes administrative and programmatic duties that were previously performed by the Federal Government. Because the current demonstration authority does not end until 2006, and because the provisions of the new permanent program would not be significantly different from those governing the demonstration program, CBO estimates that establishing a permanent program would have no federal budgetary impact during fiscal years 2000 through 2004. Under the existing demonstration program, the IHS may select 30 new tribes each year to participate. S. 979 would raise that number to 50. Because in recent years fewer than 10 new tribes each year have become eligible to participate, CBO expects that the change in law would have no effect on participation.

S. 979 would authorize appropriations for fiscal years 2000 and 2001 for the IHS to conduct a study and report to the Congress on the feasibility of a demonstration project that would expand self-governance compacts to include programs operated by other agencies of the Department of Health and Human Services (HHS). CBO estimates that this study would cost less than $250,000. In addition, the bill would require the Secretary of HHS to submit an annual report on the implementation of the Indian Self-Determination and Education Assistance Act, with an emphasis on contract support costs. Because the Secretary already prepares this report

each year, CBO estimates that the requirement would not result in additional costs.

S. 979 would allow Indian tribes to store their patient records at Federal Records Centers. CBO expects that very few tribes would take advantage of this option and that increased costs to the Federal Records Centers would be less than $500,000 in each of fiscal years 2000 through 2004.

Finally, S. 979 would give Indian tribes carrying out self-governance contracts the same right as the United States under the Medical Care Recovery Act (42 U.S.C. 2651) to recover from liable third parties the reasonable value of care the tribe provided. The bill also specifies that amounts recovered under that authority would be retained by the tribe (an authority that exists in current law under section 207(a) of the Indian Health Care Improvement Act). CBO assumes that any additional amounts the tribes recover and the related spending of these amounts would not be considered part of the federal budget.

The CBO staff contact is Dorothy Rosenbaum. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing rules of the Senate requires that each report accompanying a bill evaluate the regulatory paperwork impact that would be incurred in implementing the legislation. The Committee has concluded that enactment of S. 979 will create only de minimis regulatory or paper work burdens.

EXECUTIVE COMMUNICATIONS

At the hearing on S. 979 on July 19, 1999, Mr. Michael Lincoln, Deputy Director of the Indian Health Service (IHS) appeared and testified before the Committee in support of S. 979. The statement of Mr. Lincoln follows:

STATEMENT OF THE INDIAN HEALTH SERVICE

Mr. Chairman and Members of the Committee: Good morning. I am Michael E. Lincoln, Deputy Director, Indian Health Service (IHS). Accompanying me today is Paula K. Williams, Director, Office of Tribal Self-Governance, and Douglas Black, Director, Office of Tribal Programs. We are pleased to be here today to discuss S. 979, the "Tribal Self-Governance Amendments of 1999."

The IHS goal is to raise the health status of American Indians and Alaska Natives (AI/ANs) to the highest possible level. The mission is to provide a comprehensive health services delivery system for AI/ANs with opportunity for maximum Tribal involvement in developing and managing programs to meet their health needs. The provision of Federal health services to American Indians and Alaska Natives is based upon a special government-to-government relationship between Indian tribes and the United States, which has been reaffirmed throughout the history of this Nation by all three branches of this Nation's

government. In 1994, the President issued an Executive Memorandum directing all Federal Departments and Agencies to implement policies and procedures for consulting with Indian Tribes on matters that affect Indian people.

The IHS Self-Governance Demonstration Project (SGDP) was authorized in October 1992 pursuant to Public Law 102–573, the Indian Health Amendments of 1992. In May 1993, IHS began its first compact negotiations with tribes under the demonstration authority. Since that time, the Agency has entered into 42 Self-Governance (SG) Compacts and 59 Annual Funding Agreements (AFA) through Fiscal Year (FY) 1998. These compacts transfer approximately $549 million to 216 tribes in Alaska and 43 tribes in the lower 48 states participating in the SGDP. These negotiated agreements transfer the funding associated with programs, functions, services and activities assumed by the tribes, from Area and Headquarters budgets to those tribes.

The 259 tribes participating in this project constitute 46.5% of the federally recognized tribes and they collectively serve over 32% of the total IHS users. This Project has provided Tribal Governments the needed local control of their health programs and allows Tribal leadership to implement aggressive and successful health promotion and disease prevention initiatives which are truly responsive to the health needs of their service population. Local control has also provided more ownership by local leadership which has resulted in significant improvements in the quality and quantity of health services. Tribes have been able to increase the number of physicians and clinic sites to make health care more accessible to the people. Some have implemented special services to address the unique needs of the elderly. The Mississippi Band of Choctaw Indians Health Center's Radiology Department has been awarded the Nashville Area Radiology Technologist of the Year Award for two consecutive years. In addition, their Health Center's Women's Wellness Center and Choctaw Community Integrated Service System has been recognized by the Department of Health and Human Services, Maternal and Children's Health Bureau, as a "model" for State Health Departments nationwide. And, most impressive, tribally operated health facilities are scoring higher in their accreditation reviews than they did under Agency administration. For example, the Chippewa Cree Health Center and laboratory each scored a perfect 100 points and their Chemical Dependency Center scored 98 points in the accreditation review conducted by the Joint Commission on Accreditation of Health Care Organizations.

The Self-Governance Demonstration Project has been a success. We do need to continue to assess the impact of continued transfers of funds upon the Agency's ability to carry out its residual functions and to continue providing direct health services to tribes who choose not to contract

or compact. The Agency is taking steps to downsize and reorganize in order to free up resources for transfer to tribes, but these efforts could be out paced by increased compacting and certain provisions of this bill.

The challenge before the Tribes, Indian health programs, the IHS and the Congress is to retain the applied expertise of the Indian Health Service in core public health functions that are critical to elevating the health status of American Indians/Alaska Natives and reducing the disparity in the health status of AI/ANs compared with the general population. We, who are involved in Indian Health care, must deal with a changing external environment with new demands, new needs, and new priorities. The Indian Health Service supports the spirit and intent of the Tribal Self-Governance Amendments. S. 979 is consistent with our goal of providing maximum participation of tribes in the development and management of Indian health programs.

In the 105th Congress, the Department closely worked with Congress and the tribes on H.R. 1833, the predecessor legislation to S. 979 and H.R. 1167. Agreement was reached on many points, as was reflected in the version of H.R. 1833 that passed the House on October 5, 1998. The Department testified favorably on H.R. 1833 before this Committee after it passed the House and, with a few exceptions, supported the bill. We would like to highlight for you our major concerns with certain provisions contained in S. 979. In fact, some were concerns we raised with H.R. 1833 last year and again appear in S. 979. While these represent our significant concerns, we acknowledge that there has been a great deal of hard work and a spirit of compromise on the part of all parties that brought us this far. In this same manner, we believe that we will continue to move forward.

Proposed sec. 512(b)—Facilitation: regulation waiver

S. 979 appears to have inadvertently dropped the language "promulgated under this act," from Section 512(b)(1), the effect of which is that the applicability of the provision becomes overly broad applying to regulations promulgated by HHS as well as other Departments thereby creating the potential for unforeseen consequences outside of HHS' control. As a result of this omission, we have serious concerns with Section 512(b)(1), particularly in the context of language found in the next paragraph, (b) (2), which specifies that the Secretary shall only deny a waiver if it is otherwise prohibited by Federal law. Taken together, these two provisions are a significant concern.

Title VI, Section 5—Amendments clarifying civil proceedings

Last year, H.R. 1833 contained a de novo standard of judicial review which would have retroactively overruled judicial determinations applying the Administrative Proce-

dures Act (APA) standard of review in ISDA cases. After negotiations with Tribal representatives, the House Committee on Resources and Administration Officials, the de novo provision was removed. We appreciate that this provision has remained out of the current House and Senate bills. However, we continue to have concerns about the remaining section concerning judicial proceedings. As this provision is currently drafted, its impact extends well beyond the scope of self-governance affecting any litigation that is currently on-going between tribes and HHS or the Department of the Interior. It would change the burden of proof in favor of the tribes in the middle of such litigation. This change would be in addition to the change effected by Section 507(d) of the bill, which already increases the Secretary's burden of proof to "clear and convincing evidence" prospectively for litigation involving self-governance funding agreements. It is important that the legislation remain litigation neutral. The entire Section 6 in Title VI contained in S. 979 should be removed.

Title V, Section 516—Application of other sections of the Act

The proposed section 516 of the new Title V seems to make an inadvertent drafting error which makes it unclear whether funding is subject to the availability of appropriations or is an entitlement irrespective of the funding level of appropriations. We believe that this issue is easily resolved and we will work with Committee staff to address this error. We also will continue to work with the tribes and the Authorizing and Appropriations Committee to address the ever-growing contract support funding within the annual appropriations. In doing so, we will work collectively to ensure that funding for contract support costs will not adversely affect funding for other IHS programs, including services delivered to non-contracting and non-compacting tribes.

Title V, Section 505—Funding agreements

Section 505 establishes the scope of IHS programs, services, functions and activities (PFSAs) that are subject to self-governance funding agreements. Last year, Title VI was added to H.R. 1833 to address the Administration's concerns about moving too quickly to include non-IHS PFSAs without first determining whether other Department of Health and Human Services (HHS) programs should be brought within the scope of this self-governance legislation. Hence, Title VI was added to H.R. 1833, and also is included in both S. 979 and H.R. 1167 to authorize a study to asses the feasibility of expanding the scope of this legislation to other HHS programs. We believe that the two provisions of Section 505, (F) and (G), would expand the scope of the PFSAs subject to funding agreements under this legislation to programs outside the IHS, even while the Title VI study is underway. We believe that

before any potential expansion of the scope of self-governance funding agreements is authorized, the study authorized in Title VI should be completed and the results analyzed. We will work with you to make sure that different provisions of the bill work together.

In general, we will be happy to work with the Committee to address any of the concerns we have raised as well as any others that may arise. We note that other Feral Departments may have concerns about S. 979. For example, we have been advised by the Department of the Interior that it has serious concerns regarding the definition of the term "inherent Federal functions", and recommends that the term not be defined in the bill. It is our understanding that the Department of the Interior plans to send a letter to the Committee setting forth its concerns in greater detail.

I want to express my appreciation to the Title V Tribal Workgroup and to commend their cooperative spirit in working with the IHS and other components of the Department in the evolution of S. 979. The version of S. 979 that we are discussing today is the result of many in-depth discussions and a great deal of analysis.

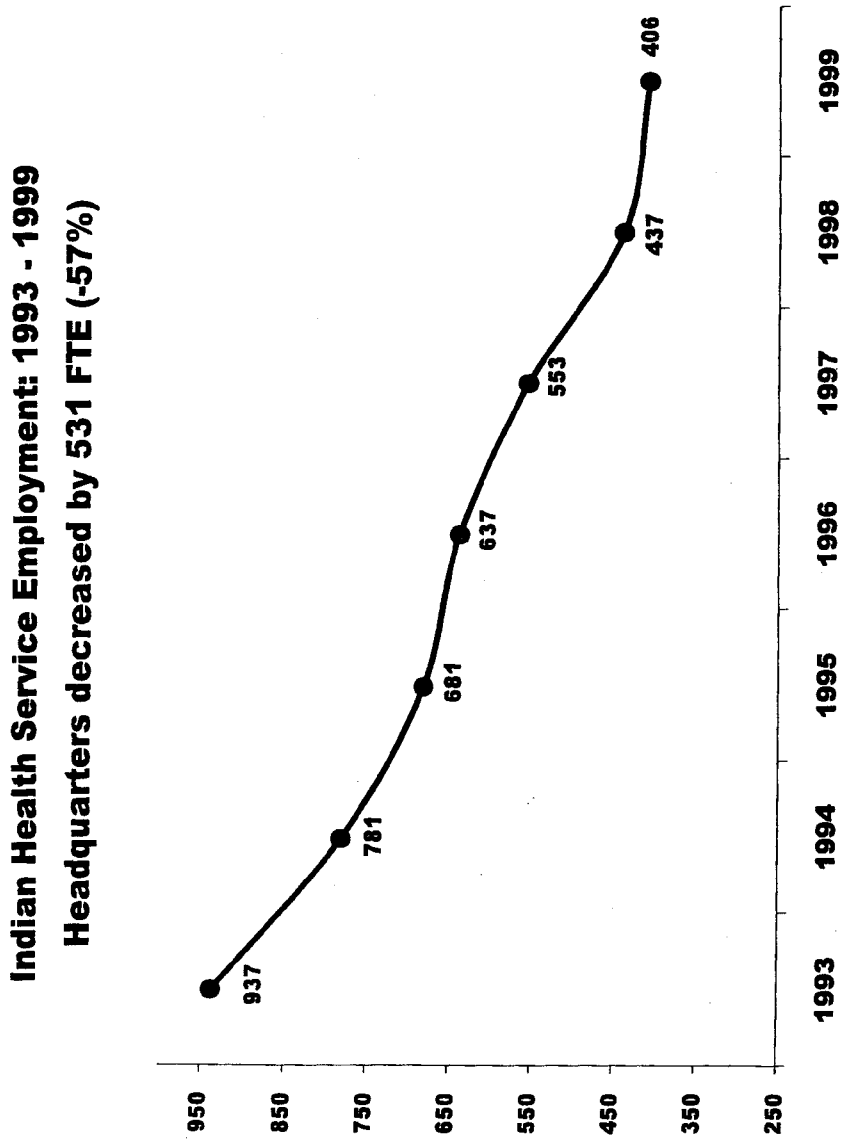
We are pleased to note that the IHS and tribal representatives have successfully negotiated provisions in the bill for tribal assumption of construction projects. The negotiated provisions of the bill authorize a specific process for tribes to elect to carry out construction of health and sanitation facilities as a self-governance activity.

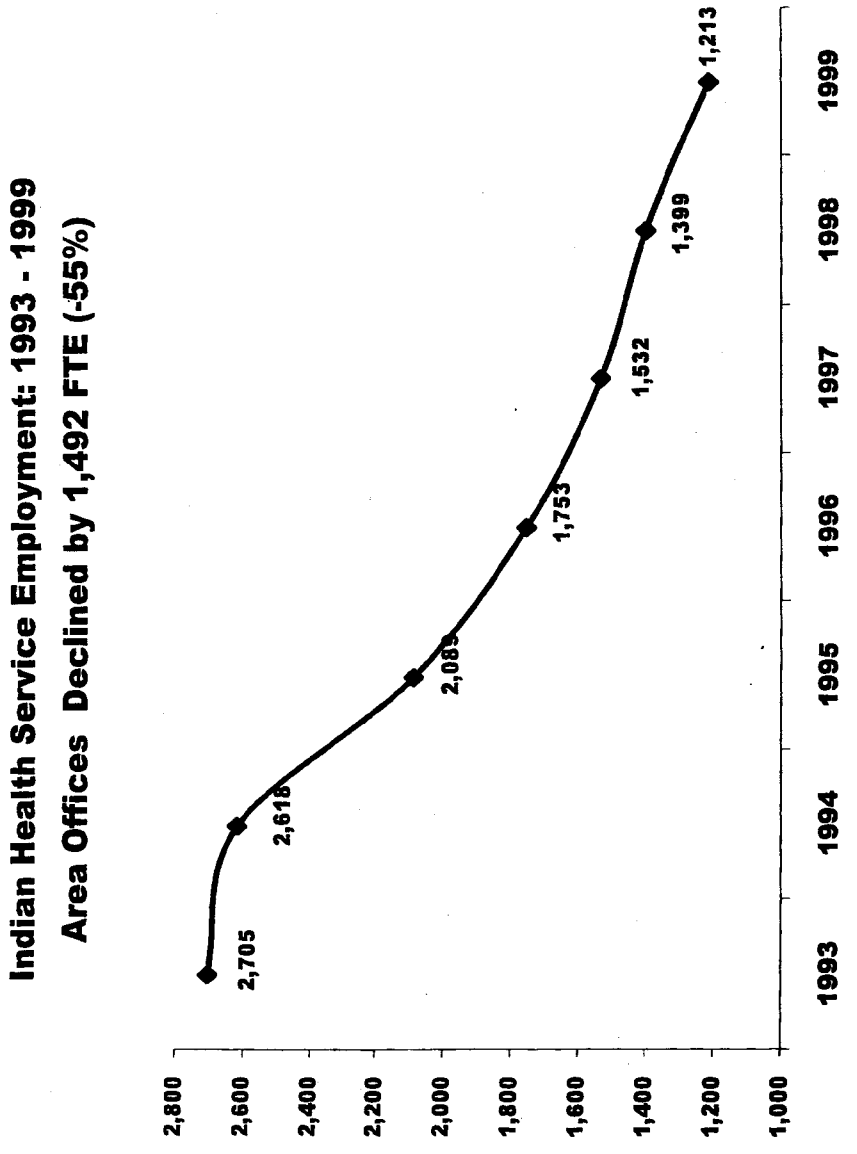
Competitive grant programs such as the Indian Health Professions Scholarships and the Tribal Management Grant Program have been established for specific public purposes. Likewise, the Department and IHS have agency-wide initiatives that address national concerns and are carried out under general grant authorities from general agency funds. All competitive grant programs, including those that support national needs and benefit all Tribes, should be exempted from Tribal shares. We believe that this bill sufficiently addresses our concerns in this area.

In conclusion, we support making self-governance authority permanent within the IHS so long as these changes continue to allow the Department and the IHS to perform its inherent functions and to maintain its trust responsibility to all Tribes. We also support exploring the expansion of self-governance demonstration authority to non-IHS programs of the Department, but only after consultation with all stakeholders and more specific guidance from Congress.

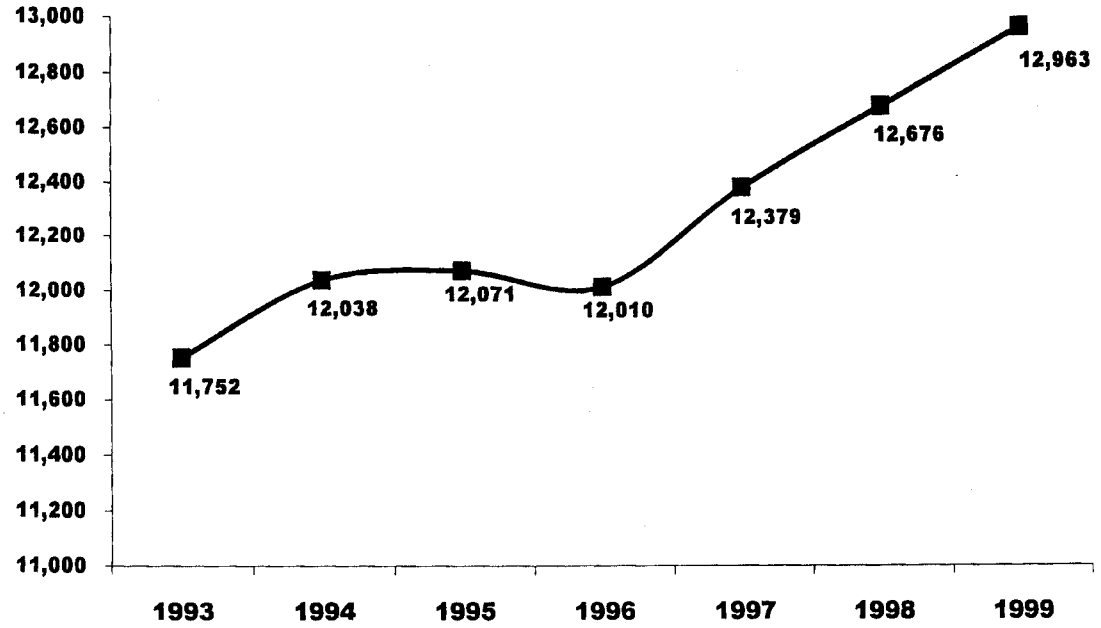
I commend you for your commitment to rights of the Nation's Indian Tribes and to providing them opportunities to administer those federal programs affecting the health and welfare of their people. The Indian Health Service and the Department of Health and Human Services stand ready to work collaboratively with this Committee, the Congress, and the Tribes to ensure that such efforts are successful.

Mr. Chairman, this concludes my statement. We will be pleased to answer any questions that you may have. Thank you.


Indian Health Service Employment: 1993 - 1999
Headquarters decreased by 531 FTE (-57%)
950
850
750
650
550
450
350
250
1993
1994
1995
1996
1997
1998
1999
937
781
681
637
553
437
406


Indian Health Service Employment: 1993 - 1999
Area Offices Declined by 1,492 FTE (-55%)
2,800
2,600
2,400
2,200
2,000
1,800
1,600
1,400
1,200
1,000
1993
1994
1995
1996
1997
1998
1999
2,705
2,618
2,089
1,753
1,532
1,399
1,213

Indian Health Service Employment: 1993 - 1999
Service Units increased by 1,211 FTE (+10%)



IHS FTE: Area, Service Unit, HQ, & Total

	1993	1994	1995	1996	1997	1998	1999
Area Offices	2,705	2,618	2,089	1,753	1,532	1,399	1,213
Service Units	11,752	12,038	12,071	12,010	12,379	12,676	12,963
Headquarters	937	781	681	637	553	437	406
TOTAL	15,441	15,511	14,865	14,422	14,464	14,512	14,582

HEADQUARTERS:

Total percentage decline of 57%

Many function were streamlined, consolidated or reassigned to the field

FTE reductions at Headquarters are a result of combined trends listed below for the Areas

AREAS:

Total percentage decline of 55%.

No Area Office was closed but most downsized substantially.

Total percentage decline of 55%.

FTE reductions are a result of several trends acting together and include:

Transfer of area functions and dollars to tribes under self governance

Reassignment of staff and functions to service units

Reductions due to cuts in administrative funding

SERVICE UNITS:

Federal employment in the Indian Health Service units increased by 10% during a period in which over all Indian Health Service employment decreased.

Reflects agency concentration of effort, resources, manpower in health delivery rather than administration.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes to existing law made by the bill are required to be set out in the accompanying Committee report. The Committee finds that enactment of S. 979 will result in the following changes in existing law. The matter to be deleted is indicated in brackets **[]** and bold face type. The matter to be inserted is indicated in italic.

1. Section 102(e)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f(e)(1)) is amended as follows:

(e)(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) *or any civil action conducted pursuant to section 110(a)* of this section, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

2. Section 105 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j) is amended as follows:

(k) For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this subchapter shall be **[**deemed an executive agency**]** *deemed an executive agency and part of the Indian Health Service* when carrying out such contract, grant, or agreement and the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access. *At the request of an Indian tribe, the Secretary shall enter into an agreement for the acquisition, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or any other Federal law, including acquisitions from prime vendors. All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements.*

* * * * * * *

(o) At the option of a tribe or tribal organization, patient records may be deemed to be Federal records under the Federal Records Act of 1950 for the limited purposes of making such records eligible for storage by Federal Records Centers to the same extent and in the same manner as other Department of Health and Human Services patient records. Patient records that are deemed to be Federal records under the Federal Records Act of 1950 pursuant to this subsection shall not be considered Federal records for the purposes of chapter 5 of title 5, United States Code.

* * * * * * *

(p)(1) All funds recovered under 42 U.S.C. 2651 associated with health care provided by a tribally-administered facility or program of the Indian Health Service, whether provided before or after the facility's or program's transfer to tribal administration, shall be

credited to the account of the facility or program providing the service and shall be available without fiscal year limitation.

(2) For purposes of 42 U.S.C. 2651, a tribe or tribal organization carrying out a contract, compact, grant or cooperative agreement pursuant to this Act shall be deemed to be the United States and shall have the same right to recover as the United States for the reasonable value of past or future care and treatment provided under such contract, compact, grant, or cooperative agreement. Nothing herein shall be construed to affect a tribe's or tribal organization's right to recover under any other applicable federal, state or tribal law.

3. Section 106 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j–1) is amended:

(c) The Secretary shall provide an annual report in writing on or before May 15 of each year to the Congress on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the current fiscal year;

(3) the indirect costs rate and type of rate for each tribal organization negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect costs pools; and

(6) an accounting of any deficiency of funds needed to maintain the preexisting level of services to any tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 105(d).

* * * * * * *

(d)[(c)] Treatment in shortfalls in indirect cost recoveries.

* * * * * * *

(e)[(d)] Liability for indebtedness incurred before fiscal year 1992.

* * * * * * *

(f)[(e)] Limitation on remedies relating to cost disallowances.

* * * * * * *

(g)[(f)] Addition to contract of full amount contractor entitled.

* * * * * * *

(h)[(g)] Indirect costs for contracts for construction projects.

* * * * * * *

(i)[(h)] Indian Health Service and Bureau of Indian Affairs budget consultations.

* * * * * * *

(j)[(i)] Use of funds for matching or cost participation requirements.

* * * * * * *

(k)[(j)] Allowable uses of funds without approval of Secretary.

* * * * * * *

(l)[(k)] Suspension, withholding, or delay in payment of funds.

* * * * * * *

(m)[(l)] Use of program income earned.

* * * * * * *

(n)[(m)] Reduction of administrative and other responsibilities of Secretary; use of savings.

* * * * * * *

(o)[(n)] Rebudgeting by tribal organization.

4. Title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f note) is hereby repealed.

[TITLE III—TRIBAL SELF-GOVERNANCE DEMONSTRATION PROJECT

SEC. 301. The Secretary of the Interior and the Secretary of Health and Human Services (hereafter in this title referred to as the "Secretaries") each shall, for a period not to exceed 18 years following enactment of this title (Oct. 5, 1988), conduct a research and demonstration project to be known as the Tribal Self-Governance Project according to the provisions of this title.

SEC. 302. (a) For each fiscal year, the Secretaries shall select thirty tribes to participate in the demonstration project as follows:

(1) a tribe that successfully completes a Self-Governance Planning Grant, authorized by Conference Report 100–498 to accompany H.J. Res. 395, One Hundredth Congress, first session (Pub. L. 100–202) shall be selected to participate in the demonstration project; and

(2) the Secretaries shall select, in such a manner as to achieve geographic representation, the remaining tribal participants from the pool of qualified applicants. In order to be in the pool of qualified applicants—

(A) the governing body of the tribe shall request participation in the demonstration project;

(B) such tribe shall have operated two or more mature contracts; and

(C) such tribe shall have demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by such tribe having no significant and material audit exceptions in the required annual audit of such tribe's self-determination contracts.

SEC. 303. (a) The Secretaries is (sic) directed to negotiate, and to enter into, an annual written funding agreement with the governing body of a participating tribal government that successfully completes its Self-Governance Planning Grant. Such annual written funding agreement—

(1) shall authorize the tribe to plan, conduct, consolidate, and administer programs, services and functions of the Depart-

ment of the Interior and the Indian Health Service of the Department of Health and Human Services that are otherwise available to Indian tribes or Indians, including but not limited to the Act of April 16, 1934 (48 Stat. 596) (25 U.S.C. 452 et seq.), as amended, and the Act of November 2, 1921 (42 Stat. 208) (25 U.S.C. 13).

(2) subject to the terms of the written agreement authorized by this title, shall authorize the tribe to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions or services;

(3) shall not include funds provided pursuant to the Tribally Controlled Community College Assistance Act (Public Law 95–471) (25 U.S.C. 1801 et seq.), for elementary and secondary schools under the Indian School Equalization Formula pursuant to title XI of the Education Amendments of 1978 (Public Law 95–561, as amended) (25 U.S.C. 2001 et seq.), or for either the Flathead Agency Irrigation Division or the Flathead Agency Power Division: *Provided,* That nothing in this section shall affect the contractability of such divisions under section 102 of this Act (25 U.S.C. 450f);

(4) shall specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretaries pursuant to this agreement;

(5) shall specify the authority of the tribe and the Secretaries, and the procedures to be used, to reallocate funds or modify budget allocations within any project year;

(6) shall, except as provided in paragraphs (1) and (2), provide for payment by the Secretaries to the tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act (Pub. L. 93–638, see Short Title note under section 450 of this title), including direct program costs and indirect costs, and for any funds which are specifically related to the provision by the Secretaries of services and benefits to the tribe and its members: *Provided,* however, That funds for trust services to individual Indians are available under this written agreement only to the extent that the same services which would have been provided by the Secretaries are provided to individual Indians by the tribe:

(7) shall not allow the Secretaries to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exists under treaties, Executive Orders and Acts of Congress;

(8) shall allow for retrocession of programs or portions thereof pursuant to section 105(e) of this Act (25 U.S.C. 450j(e)); and

(9) shall be submitted by the Secretaries ninety days in advance of the proposed effective date of the agreement to each tribe which is served by the agency which is serving the tribe which is a party to the funding agreement and to the Congress for review by the Committee on Indian Affairs of the Senate and the Committee on Natural Resources (now Committee on Resources) of the House of Representatives.

(b) For the year for which, and to the extent to which, funding is provided to a tribe pursuant to this title, such tribe—

(1) shall not be entitled to contract with the Secretaries for such funds under section 102 (25 U.S.C. 450f), except that such tribe shall be eligible for new programs on the same basis as other tribes; and

(2) shall be responsible for the administration of programs, services and activities pursuant to agreements under this title.

(c) At the request of the governing body of the tribe and under the terms of an agreement pursuant to subsectoin (a), the Secretaries shall provide funding to such tribe to implement the agreement.

(d) For the purpose of section 110 of this Act (25 U.S.C. 450m–1) the term "contract" shall also include agreements authorized by this title; except that for the term of the authorized agreements under this title; the provisions of 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 attorney and other professional contracts by participating Indian tribal governments operating under the provisions of this title.

(e) To the extent feasible, the Secretaries shall interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title.

(f) To the extent feasible, the Secretaries shall interpret Federal laws and regulations in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements authorized by this title.

SEC. 304. The Secretaries shall identify, in the President's annual budget request to the Congress, any funds proposed to be included in the Tribal Self-Governance Project. The use of funds pursuant to this title shall be subject to specific directives or limitations as may be included in applicable appropriations Acts.

SEC. 305. The Secretaries shall submit to the Congress a written report on July 1 and January 1 of each of the five years following the date of enactment of this title (Oct. 5, 1988) on the relative costs and benefits of the Tribal Self-Governance Project. Such report shall be based on mutually determined baseline measurements jointly developed by the Secretaries and participating tribes, and shall separately include the views of the tribes.

SEC. 306. Nothing in this title 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 102 (25 U.S.C. 450f) or any other applicable Federal law and the provisions of section 110 of this Act (25 U.S.C. 450m-1) shall be available to any tribe or Indian organization which alleges that a funding agreement is in violation of this section.

SEC. 307. For the purpose of providing planning and negotiation grants to the ten tribes added by section 3 of the Tribal Self-Governance Demonstration Project Act to the number of tribes set forth by section 302 of the Act (as in effect before the date of enactment of this section (Dec. 4, 1991)), there is authorized to be appropriated $700,000.

SEC. 308. (a) The Secretary of Health and Human Services, in consultation with the Secretary of the Interior and Indian tribal

governments participating in the demonstration project under this title, shall conduct a study for the purpose of determining the feasibility of extending the demonstration project under this title to the activities, programs, functions, and services of the Indian Health Service. The Secretary shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act (Dec. 4, 1991).

(b) The Secretary of Health and Human Services may establish within the Indian Health Service an office of self-governance to be responsible for coordinating the activities necessary to carry out the study required under subsection (a).

SEC. 309. The Secretary of the Interior shall conduct a study for the purpose of determining the feasibility of including in the demonstration project under this title those programs and activities excluded under section 303(a)(3). The Secretary of the Interior shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act (Dec. 4, 1991).

SEC. 310. For the purposes of providing one year planning and negotiations grants to the Indian tribes identified by section 302, with respect to the programs, activities, functions, or services of the Indian Health Service, there are authorized to be appropriated such sums as may be necessary to carry out such purposes. Upon completion of an authorized planning activity or a comparable planning activity by a tribe, the Secretary is authorized to negotiate and implement a Compact of Self-Governance and Annual Funding Agreement with such tribe.]

5. The Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) is amended by adding at the end:

TITLE V—TRIBAL SELF-GOVERNANCE

SEC. 501. DEFINITIONS.

(a) IN GENERAL.—In this title:

(1) CONSTRUCTION PROJECT.—The term "construction project"—

(A) means an organized noncontinuous 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 4(m), that may otherwise be included in a funding agreement under this title.

(2) CONSTRUCTION PROJECT AGREEMENT.—The term "construction project agreement" means a negotiated agreement between the Secretary and an Indian tribe, that at a minimum—

(A) establishes project phase start and completion dates;

(B) defines a specific scope of work and standards by which it will be accomplished;

(C) identifies the responsibilities of the Indian tribe and the Secretary;

(D) addresses environmental considerations;

(E) identifies the owner and operations and maintenance entity of the proposed work;

(F) provides a budget;

(G) provides a payment process; and

(H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

(3) GROSS MISMANAGEMENT.—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

(4) INHERENT FEDERAL FUNCTIONS.—The term "inherent Federal functions' means those Federal functions which cannot legally be delegated to Indian tribes.

(5) INTER-TRIBAL CONSORTIUM.—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, including tribal organizations.

(6) SECRETARY.—The term "Secretary" means the Secretary of Health and Human Services.

(7) SELF-GOVERNANCE.—The term "self-governance" means the program of self-governance established under section 502.

(8) TRIBAL SHARE.—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.

(b) INDIAN TRIBE.—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 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 or in this title). In such event, the term "Indian tribe" as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

SEC. 502. ESTABLISHMENT.

The Secretary of Health and Human Services shall establish and carry out a program within the Indian Health Service of the Department of Health and Human Services to be known as the "Tribal Self-Governance Program" in accordance with this title.

SEC. 503. SELECTION OF PARTICIPATING INDIAN TRIBES.

(A) CONTINUING PARTICIPATION.—Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title may elect to participate in self-governance under this title under existing authority as reflected in tribal resolution.

(b) ADDITIONAL PARTICIPANTS.—

(1) IN GENERAL.—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.

(2) TREATMENT OF CERTAIN INDIAN TRIBES.—

(A) IN GENERAL.—An Indian tribe that has withdraw 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 Indian tribe meets the eligibility criteria specified in subsection (c).

(B) EFFECT OF WITHDRAWAL.—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.

(C) PARTICIPATION IN SELF-GOVERNANCE.—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.

(c) APPLICANT POOL.—

(1) IN GENERAL.—The qualified applicant pool for 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.

(2) CRITERIA FOR DETERMINING FINANCIAL STABILITY AND FINANCIAL MANAGEMENT CAPACITY.—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.

(d) PLANNING PHASE.—Each Indian tribe seeking participation in self-governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian tribe and shall include—

(1) legal and budgetary research; and

(2) internal tribal government planning and organizational preparation relating to the administration of health care programs.

(e) GRANTS.—Subject to the availability of appropriations, any Indian tribe meeting the requirements of paragraphs (1)(B) and (C) of subsection (c) shall be eligible for grants—

(1) to plan for participating in self-governance; and

(2) to negotiate the terms of participation by the Indian tribe or tribal organization in self-governance, as set forth in a compact and a funding agreement.

(f) RECEIPT OF GRANT NOT REQUIRED.—Receipt of a grant under subsection (e) shall not be a requirement of participation in self-governance.

SEC. 504. COMPACTS.

(a) COMPACT REQUIRED.—The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) CONTENTS.—Each compact required under subsection (a) 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.

(c) EXISTING COMPACTS.—An Indian tribe participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title shall have the option at any time after the date of enactment of this title to—

(1) retain the Tribal Self-Governance Demonstration Project compact of that Indian tribe (in whole or in part) to the extent that the provisions of that compact are not directly contrary to any express provision of this title; or

(2) instead of retaining a compact or portion thereof under paragraph (1), negotiate a new compact in a manner consistent with the requirements of this title.

(d) TERM AND EFFECTIVE DATE.—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.

SEC. 505. FUNDING AGREEMENTS.

(a) FUNDING AGREEMENT REQUIRED.—The Secretary shall negotiate and enter into a written funding agreement with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) CONTENTS.—

(1) IN GENERAL.—Each funding agreement required 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, 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 (or of such other agency) within which the program, service, function, or activity (or portion thereof) is performed.

(2) INCLUSION OF CERTAIN PROGRAMS, SERVICES, FUNCTIONS, AND ACTIVITIES.—Such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, activities (or portions thereof), including grants (which may be added to a funding agreement after award of such 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 grants (which may be added to a funding agreement after award of such grants) and all local, field, service unit, area, regional, and central headquarters or national office functions administered under the authority of—

(A) the Act of November 2, 1921 (42 Stat. 208, chapter 115; 25 U.S.C. 13);

(B) the Act of April 16, 1934 (48 Stat. 596, chapter 147; 25 U.S.C. 452 et seq.);

(C) the Act of August 5, 1954 (68 Stat. 674, chapter 658);

(D) the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.);

(E) The Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2401 et seq.);

(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).

(c) INCLUSION IN COMPACT OR FUNDING AGREEMENT.—It shall not be a requirement that an Indian tribe or Indians be identified in the authorizing statute for a program or element of a program to be eligible for inclusion in a compact or funding agreement under this title.

(d) FUNDING AGREEMENT TERMS.—Each funding agreement under this title shall set forth—

(1) terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered; and

(2) for the items identified in paragraph (1)—

(A) the general budget category assigned;

(B) the funds to be provided, including those funds to be provided on a recurring basis;

(C) the time and method of transfer of the funds;

(D) the responsibilities of the Secretary; and

(E) any other provision with respect to which the Indian tribe and the Secretary agree.

(e) SUBSEQUENT FUNDING AGREEMENTS.—Absent notification from an Indian tribe that is withdrawing or retroceding the oper-

ation of 1 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.

(f) EXISTING FUNDING AGREEMENTS.—Each Indian tribe participating in the Tribal Self-Governance Demonstration Project established under title III on the date of enactment of this title shall have the option at any time thereafter to—

(1) retain the Tribal Self-Governance Demonstration Project funding agreement of that Indian tribe (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title; or

(2) instead of retaining a funding agreement or portion thereof under paragraph (1), negotiate a new funding agreement in a manner consistent with the requirements of this title.

(g) STABLE BASE FUNDING.—At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under section 106(a)) 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-sub activity excluding earmarks.

SEC. 506. GENERAL PROVISIONS.

(a) APPLICABILITY.—The provisions of this section shall apply to compacts and funding agreements negotiated under this title and an Indian tribe may, at its option, include provisions that reflect such requirements in a compact or funding agreement.

(b) CONFLICTS OF INTEREST.—Indian tribes participating in self-governance under this title 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).

(c) AUDITS.—

(1) SINGLE AGENCY AUDIT ACT.—The provisions of chapter 75 of title 31, United States Code, requiring a single agency audit report shall apply to funding agreements under this title.

(2) COST PRINCIPLES.—An Indian tribe shall apply cost principles under the applicable Office of Management and Budget Circular, except as modified by section 106, or by any exemptions to applicable Office of Management and Budget Circulars subsequently granted by the Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f).

(d) RECORDS.—

(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, United States Code.

(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, United States Code.

(e) REDESIGN AND CONSOLIDATION.—An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 505 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 Federal law.

(f) RETROCESSION.—An Indian tribe may retrocede, fully or partially, to the Secretary programs, services, functions, or activities (or portions thereof) included in the compact or funding agreement. Unless the Indian tribe rescinds the request for retrocession, such retrocession will become effective within the timeframe specified by the parties in the compact of funding agreement. In the absence of such a specification, such retrocession shall become effective on—

(1) the earlier of—

(A) 1 year after the date of submission of such request; or

(B) the date on which the funding agreement expires; or

(2) such date as may be mutually agreed upon by the Secretary and the Indian tribe.

(g) WITHDRAWAL.—

(1) PROCESS.—

(A) IN GENERAL.—An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact of funding agreement.

(B) EFFECTIVE DATE.—The withdrawal referred to in subparagraph (A) shall become effective within the timeframe specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific timeframe set forth in the resolution, such withdrawal shall become effective on—

(i) the earlier of—

(I) 1 year after the date of submission of such request; or

(II) the date on which the funding agreement expires; or

(ii) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.

(2) DISTRIBUTION OF FUNDS.—When 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—

(A) the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions or activities (or portions thereof) 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 in the funding agreement of the inter-tribal consortium or tribal organization); and

(B) the funds referred to in subparagraph (A) shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, on the condition that the provisions of sections 102 and 105(i), as appropriate, shall apply to that withdrawing Indian tribe.

(3) REGAINING MATURE CONTRACT STATUS.—If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) 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.

(h) NONDUPLICATION.—For the period for which, and to the extent to which, funding is provided under this title or under the compact of funding agreement, the Indian tribe shall not be entitled to contract with the Secretary for such funds under section 102, except that such Indian tribe shall be eligible for new programs on the same basis as other Indian tribes.

SEC. 507. PROVISIONS RELATING TO THE SECRETARY.

(a) MANDATORY PROVISIONS.—

(1) HEALTH STATUS REPORTS.—Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision that requires the Indian tribe to report on health status and service delivery—

(A) to the extent such data is not otherwise available to the Secretary and specific funds for this purpose are provided by the Secretary under the funding agreement; and

(B) if such reporting shall impose minimal burdens on the participating Indian tribe and such requirements are promulgated under section 517.

(2) REASSUMPTION.—

(A) 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 funding 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.

(B) PROHIBITION.—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.

(C) EXCEPTION.—

(i) IN GENERAL.—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.

(ii) REASSUMPTION.—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.

(D) HEARINGS.—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.

(b) FINAL OFFER.—In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

(c) REJECTION OF FINAL OFFERS.—

(1) IN GENERAL.—If the Secretary rejects an offer made under subsection (b)(or 1 or more provisions or funding levels in such offer), the Secretary shall provide—

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

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

(ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

(iv) the Indian tribe is not eligible to participate in self-governance under section 503;

(B) technical assistance to overcome the objections stated in the notification required by subparagraph (A);

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

(D) the Indian tribe with the option of entering into the severable portions of a final proposed compact of funding agreement, or provision thereof, (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

(2) EFFECT OF EXERCISING CERTAIN OPTION.—If an Indian tribe exercises the option specified in paragraph (1)(D), that Indian tribe shall retain the right to appeal the Secretary's rejection under this section, and subparagraphs (A), (B), and (C) of that paragraph shall only apply to that portion of the proposed final compact, funding agreement, or provision thereof that was rejected by the Secretary.

(d) BURDEN OF PROOF.—With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b).

(e) GOOD FAITH.—In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this title in a manner that maximizes the policy of tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 1999.

(f) SAVINGS.—To the extent that programs, functions, services, or activities (or portions thereof) carried out by Indian tribes under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 508(c), the Secretary shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provi-

sion of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(g) TRUST RESPONSIBILITY.—The Secretary is prohibited from waving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(h) DECISIONMAKER.—A decision that constitutes final agency action and relates to an appeal within the Department of Health and Human Services conducted under subsection (c) shall be made either—

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

(2) by an administrative judge.

SEC. 508. TRANSFER OF FUNDS.

(a) IN GENERAL.—Pursuant to the terms of any compact or funding agreement entered into under this title, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

(b) MULTIYEAR FUNDING.—The Secretary is authorized and may employ, upon tribal request, multiyear funding agreements. References in this title to funding agreements shall include such multiyear funding agreements.

(c) AMOUNT OF FUNDING.—The Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) and amounts for contract support costs specified under section 106(a)(2), (3), (5), and (6), including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

(d) PROHIBITIONS.—

(1) IN GENERAL.—Except as provided in paragraph (2), the Secretary is expressly prohibited from—

(A) failing or refusing to transfer to an Indian tribe is full share of any central, headquarters, regional, area, or service unit office or other funds due under this Act, except as required by Federal law;

(B) withholding portions of such funds for transfer over a period of years; and

(C) reducing the amount of funds required herein—

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

(ii) in subsequent years, except pursuant to—

(I) a reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(II) a congressional directive in legislation or accompanying report;

(III) a tribal authorization;

(IV) a change in the amount of pass-through funds subject to the terms of the funding agreement; or

(V) completion of a project, activity, or program for which such funds were provided;

(iii) to pay for Federal functions, including Federal pay costs. Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this Act; or

(iv) to pay for costs of Federal personnel displaced by self-determination contracts under this Act or self-governance;

(2) EXCEPTION.—The funds described in paragraph (1)(C) may be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)(2).

(e) OTHER RESOURCES.—In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of interagency motor pool vehicles) or other Federal resources (including supplies, services, and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), the Secretary shall acquire and transfer such personnel, supplies, or resources to the Indian tribe.

(f) REIMBURSEMENT TO INDIAN HEALTH SERVICE.—With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service is authorized to provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment. The reimbursements received from those goods and services, along with the funds received from the Indian tribe pursuant to this title, may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

(g) PROMPT PAYMENT ACT.—Chapter 39 of title 31, United States Code, shall apply to the transfer of funds due under a compact or funding agreement authorized under this title.

(h) INTEREST OR OTHER INCOME ON TRANSFERS.—An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds, the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year.

Funds transferred under this title shall be managed using the prudent investment standard.

(i) CARRYOVER OF FUNDS.—All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from 1 year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

(j) PROGRAM INCOME.—All medicare, medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for medicare and medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

(k) LIMITATION OF COSTS.—All Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

SEC. 509. CONSTRUCTION PROJECTS.

(a) IN GENERAL.—Indian tribes participating in tribal self-governance may carry out construction projects under this title 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 or 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 purposes of enforcement of the responsibilities of the responsible Federal official under such environmental laws.

(b) NEGOTIATIONS.—Construction project proposals shall be negotiated pursuant to the statutory process in section 105(m) and resulting construction project agreements shall be incorporated into funding agreements as addenda.

(c) CODES AND STANDARDS.—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.

(d) RESPONSIBILITY FOR COMPLETION.—the Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the negotiated construction project agreement.

(e) FUNDING.—Funding for construction projects carried out under this title shall be included in funding agreements as annual advance payments, with semiannual payments at the option of the Indian tribe. Annual advance and semiannual payment amounts shall be determined based on mutually agreeable project schedules reflecting work to be accomplished within the advance payment period, work accomplished and funds expended in previous payment periods, and the total prior payments. The Secretary shall include associated project contingency funds with each advance payment installment. The Indian tribe shall be responsible for the management of the contingency funds included in funding agreements.

(f) APPROVAL.—The Secretary shall have at least 1 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. The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually. The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

(g) WAGES.—All laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair, including painting or decorating of a building or other facilities in connection with construction projects undertaken by self-governance Indian tribes under this Act, shall be paid wages at not less than those prevailing wages on similar construction in the locality as determined by the Indian tribe.

(h) APPLICATION OF OTHER LAW.—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 title.

SEC. 510. FEDERAL PROCUREMENT LAWS AND REGULATIONS.

Notwithstanding any other provision of law, unless expressly agreed to by the participating Indian tribe, the compacts and funding agreements entered into under this title shall not be subject to Federal contracting or cooperative agreement laws and regulations (including Executive orders and the regulations relating to procurement issued by the Secretary), except to the extent that such laws expressly apply to Indian tribes.

SEC. 511. CIVIL ACTIONS.

(a) CONTRACT DEFINED.—For the purposes of section 110, the term "contract" shall include compacts and funding agreements entered into under this title.

(b) APPLICABILITY OF CERTAIN LAWS.—Section 2103 of the Revised Statutes (25 U.S.C. 81) and section 16 of the Act of June 18, 1934 (48 Stat. 987; chapter 576; 25 U.S.C. 476), shall not apply to attor-

ney and other professional contracts entered into by Indian tribes participating in self-governance under this title.

(c) REFERENCES.—All references in this Act to section 1 of the Act of June 26, 1936 (49 Stat. 1967; chapter 831) are hereby deemed to include the first section of the Act of July 3, 1952 (66 Stat. 323, chapter 549; 25 U.S.C. 82a).

SEC. 512. FACILITATION.

(a) SECRETARIAL INTERPRETATION.—Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders and regulations in a manner that will facilitate—

(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section;

(2) the implementation of compacts and funding agreements entered into under this title; and

(3) the achievement of tribal health goals and objectives.

(b) REGULATION WAIVER.—

(1) IN GENERAL.—An Indian tribe may submit a written request to waive application of a regulation promulgated under section 517 or the authorities specified in section 505(b) for a compact or funding agreement entered into with the Indian Health Service under this title, to the Secretary identifying the applicable Federal regulation sought to be waived and the basis for the request.

(2) APPROVAL.—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 title, 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.

(c) ACCESS TO FEDERAL PROPERTY.—In connection with any compact or funding agreement executed pursuant to this title or an agreement negotiated under the Tribal Self-Governance Demonstration Project established under title III, as in effect before the enactment of the Tribal Self-Governance Amendments of 1999, upon the request of an Indian tribe, the Secretary—

(1) shall permit an Indian tribe to use existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the Indian tribe for their use and maintenance;

(2) may donate to an Indian tribe title to any personal or real property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—

(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or

funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;

(B) if property described in subparagraph (A) has a value in excess of $5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Department of Health and Human Services; and

(C) all property referred to in subparagraph (A) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States; and

(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appropriate for use by the Indian tribe for any purpose for which a compact or funding agreement is authorized under this title.

(d) MATCHING OR COST-PARTICIPATION REQUIREMENT.—All funds provided under compacts, funding agreements, or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

(e) STATE FACILITATION.—States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this title and other Federal laws benefitting Indians and Indian tribes.

(f) RULES OF CONSTRUCTION.—Each provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

SEC. 513. BUDGET REQUEST.

(a) IN GENERAL.—

(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, 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 505.

(2) RULE OF CONSTRUCTION.—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 Office of Tribal Self-Governance under this section.

(b) PRESENT FUNDING; SHORTFALLS.—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 title.

SEC. 514. REPORTS.

(a) ANNUAL REPORT.—

(1) IN GENERAL.—Not later than January 1 of each year after the date of enactment of the Tribal Self-Governance Amendments of 1999, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of this title.

(2) ANALYSIS.—The report under paragraph (1) shall include a detailed analysis of the level of need being presently funded or unfunded for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compact the level of need by being presently funded or unfunded for each Indian tribe, either directly by the Secretary, under self-determination contract under title I, or under compacts and funding agreements authorized under this Act. In compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on participating Indian tribes or tribal organizations, not otherwise provided in this Act.

(b) CONTENTS.—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 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;

(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.

(c) REPORT ON FUND DISTRIBUTION METHOD.—Not later than 180 days after the date of enactment of the Tribal Self-Governance

Amendments of 1999, the Secretary shall, after consultation with Indian tribes, submit a written report to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate which describes the method or methods 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.

SEC. 515. DISCLAIMERS.

(a) NO FUNDING REDUCTION.—Nothing in this title 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 Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 110.

(b) FEDERAL TRUST AND TREATY RESPONSIBILITIES.—Nothing in this Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(c) TRIBAL EMPLOYMENT.—For purposes of section 2(2) of the Act of July 5, 1935 (49 Stat. 450, chapter 372) (commonly known as the 'National Labor Relations Act'), an Indian tribe carrying out a self-determination contract, compact, annual funding agreement, grant, or cooperative agreement under this Act shall not be considered an employer.

(d) OBLIGATIONS OF THE UNITED STATES.—The Indian Health Service under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Indian tribe to do so.

SEC. 516. APPLICATION OF OTHER SECTIONS OF THE ACT.

(a) MANDATORY APPLICATION.—All provisions of sections 5(b), 6, 7, 102 (c) and (d), 104, 105 (k) and (l), 106 (a) through (k), and 111 of this Act and section 314 of Public Law 101–512 (coverage under chapter 171 of title 28, United States Code, commonly known as the 'Federal Tort Claims Act'), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.

(b) DISCRETIONARY APPLICATION.—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 title, shall be made a part of a funding agreement or compact entered into under this title. 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 title. 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.

SEC. 517. REGULATIONS.

(a) IN GENERAL.—

(1) PROMULGATION.—Not later than 90 days after the date of enactment of the Tribal Self-Governance Amendments of 1999,

the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title.

(2) PUBLICATION OF PROPOSED REGULATIONS.—Proposed regulations to implement this title shall be published in the Federal Register by the Secretary no later than 1 year after the date of enactment of the Tribal Self-Governance Amendments of 1999.

(3) EXPIRATION OF AUTHORITY.—The authority to promulgate regulations under paragraph (1) shall expire 21 months after the date of enactment of the Tribal Self-Governance Amendments of 1999.

(b) COMMITTEE.—

(1) IN GENERAL.—A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives,, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this Act.

(2) REQUIREMENTS.—The committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

(c) ADAPTATION OF PROCEDURES.—The Secretary of Health and Human Services shall adopt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes.

(d) EFFECT.—The lack of promulgated regulations shall not limit the effect of this title.

(e) EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, AND RULES.—Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, program regulation or rule adopted by the Indian Health Service, except for the eligibility provisions of section 105(g) and regulations promulgated under section 517.

SEC. 518. APPEALS.

In any appeal (including civil actions) involving decisions made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—

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

(2) that the decision is fully consistent with provisions and policies of this title.

SEC. 519. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—There are authorized to be appropriated such sums as may be necessary to carry out this title.

(b) ASSUMPTION OF NEW OR EXPANDED PROGRAMS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, in fiscal year 2000 the Secretary may enter into contracts, compacts or annual funding agreements with an Indian tribe or tribal organization to operate a new or expanded program, service, function or activity of the Indian Health Service pursuant

to the Indian Self-Determination and Education Assistance Act, P.L. 93–638, as amended (25 U.S.C. 450 et seq.) only if—

(A) and to the extent sufficient contract support costs are appropriated and are specifically earmarked for the assumption of new or expanded programs, functions, services or activities; and

(B) the Indian Health Service determines that the percentage of contract support costs provided to existing contractors will not be reduced as a result of the assumption of any new or expanded programs, functions, services or activities under this title.

(2) Nothing in this section shall be construed to affect the allocation of funds other than contract support cost funds.

2. The Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) is amended by adding at the end the following:

TITLE VI—TRIBAL SELF-GOVERNANCE—DEPARTMENT OF HEALTH AND HUMAN SERVICES

SEC. 601. DEFINITIONS.

(a) IN GENERAL.—In this title, the Secretary may apply the definitions contained in title V.

(b) OTHER DEFINITIONS.—In this title:

(1) AGENCY.—The term "agency" means any agency or other organizational unit of the Department of Health and Human Services, other than the Indian Health Service.

(2) SECRETARY.—The term "Secretary" means the Secretary of Health and Human Services.

SEC. 602. DEMONSTRATION PROJECT FEASIBILITY.

(a) STUDY.—The Secretary shall conduct a study to determine the feasibility of a tribal self-governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of the agency.

(b) CONSIDERATIONS.—In conducting the study, the Secretary shall consider—

(1) the probable effects on specific programs and program beneficiaries of such a demonstration project;

(2) statutory, regulatory, or other impediments to implementation of such a demonstration project;

(3) strategies for implementing such a demonstration project;

(4) probable costs or savings associated with such a demonstration project;

(5) methods to assure quality and accountability in such a demonstration project; and

(6) such other issues that may be determined by the Secretary or developed through consultation pursuant to section 603.

(c) REPORT.—Not later than 18 months after the date of enactment of this title, the Secretary shall submit a report to the Committee on Indian Affairs of the Senate an the Committee on Resources of the House of Representatives. The report shall contain—

(1) the results of the study under this section;

(2) a list of programs, services, functions, and activities (or portions thereof) within each agency with respect to which it

would be feasible to include in a tribal self-governance demonstration project;

(3) a list of programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) that could be included in a tribal self-governance demonstration project without amending statutes, or waiving regulations that the Secretary may not waive;

(4) a list of legislative actions required in order to include those programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) but not included in the list provided pursuant to paragraph (3) in a tribal self-governance demonstration project; and

(5) any separate views of tribes and other entities consulted pursuant to section 603 related to the information provided pursuant to paragraphs (1) through (4).

SEC. 603. CONSULTATION.

(a) STUDY PROTOCOL.—

(1) CONSULTATION WITH INDIAN TRIBES.—The Secretary shall consult with Indian tribes to determine a protocol for consultation under subsection (b) prior to consultation under such subsection with the other entities described in such subsection.

(2) REQUIREMENTS FOR PROTOCOL.—The protocol shall require, at a minimum, that—

(A) the government-to-government relationship with Indian tribes forms the basis for the consultation process;

(B) the Indian tribes and the Secretary jointly conduct the consultations required by this section; and

(C) the consultation process allows for separate and direct recommendations from the Indian tribes and other entities described in subsection (b).

(b) CONDUCTING STUDY.—In conducting the study under this title, the Secretary shall consult with Indian tribes, State, counties, municipalities, program beneficiaries, and interested public interest groups, and may consult with other entities as appropriate.

SEC. 604 AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for fiscal years 2000 and 2001 such sums as may be necessary to carry out this title. Such sums shall remain available until expended.

TAB 6

106TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 106–477

TRIBAL SELF-GOVERNANCE AMENDMENTS OF 1999

NOVEMBER 17, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 1167]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 1167) to amend the Indian Self-Determination and Education Assistance Act to provide for further self-governance by Indian tribes, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tribal Self-Governance Amendments of 1999".

SEC. 2. FINDINGS.

Congress finds that—

(1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes;

(3) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs;

(4) the Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C.

450f note) was designed to improve and perpetuate the government-to-government relationship between Indian tribes and the United States and to strengthen tribal control over Federal funding and program management;

(5) although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to tribal governments, upon tribal request, over decision making for Federal programs, services, functions, and activities (or portions thereof)—

(A) is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian tribes; and

(B) strengthens the Federal policy of Indian self-determination.

SEC. 3. DECLARATION OF POLICY.

It is the policy of Congress to—

(1) permanently establish and implement tribal self-governance within the Department of Health and Human Services;

(2) call for full cooperation from the Department of Health and Human Services and its constituent agencies in the implementation of tribal self-governance—

(A) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;

(B) to permit each Indian tribe to choose the extent of its participation in self-governance in accordance with the provisions of the Indian Self-Determination and Education Assistance Act relating to the provision of Federal services to Indian tribes;

(C) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals;

(D) to affirm and enable the United States to fulfill its obligations to the Indian tribes under treaties and other laws;

(E) to strengthen the government-to-government relationship between the United States and Indian tribes through direct and meaningful consultation with all tribes;

(F) to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of the individual tribal communities;

(G) to provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portions thereof) are assumed by Indian tribes;

(H) to encourage the Secretary to identify all programs, services, functions, and activities (or portions thereof) of the Department of Health and Human Services that may be managed by an Indian tribe under this Act and to assist Indian tribes in assuming responsibility for such programs, services, functions, and activities (or portions thereof); and

(I) to provide Indian tribes with the earliest opportunity to administer programs, services, functions, and activities (or portions thereof) from throughout the Department of Health and Human Services.

SEC. 4. TRIBAL SELF-GOVERNANCE.

The Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) is amended by adding at the end the following new titles:

"TITLE V—TRIBAL SELF-GOVERNANCE

"SEC. 501. ESTABLISHMENT.

"The Secretary of Health and Human Services shall establish and carry out a program within the Indian Health Service of the Department of Health and Human Services to be known as the 'Tribal Self-Governance Program' in accordance with this title.

"SEC. 502. DEFINITIONS.

"(a) IN GENERAL.—For purposes of this title—

"(1) the term 'construction project' means an organized noncontinuous 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. The term 'construction project' does not mean construction program administration and activities described in paragraphs (1) through (3) of section 4(m), which may otherwise be included in a funding agreement under this title;

"(2) the term 'construction project agreement' means a negotiated agreement between the Secretary and an Indian tribe which at a minimum—

"(A) establishes project phase start and completion dates;

"(B) defines a specific scope of work and standards by which it will be accomplished;

"(C) identifies the responsibilities of the Indian tribe and the Secretary;

"(D) addresses environmental considerations;

"(E) identifies the owner and operations/maintenance entity of the proposed work;

"(F) provides a budget;

"(G) provides a payment process; and

"(H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years;

"(3) the term 'inherent Federal functions' means those Federal functions which cannot legally be delegated to Indian tribes;

"(4) 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, but not limited to, a tribal organization;

"(5) the term 'gross mismanagement' means a significant, clear, and convincing violation of compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to a 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;

"(6) the term 'tribal shares' 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;

"(7) the term 'Secretary' means the Secretary of Health and Human Services; and

"(8) the term 'self-governance' means the program established pursuant to section 501.

"(b) INDIAN TRIBE.—Where 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 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 or in this title). In such event, the term 'Indian tribe' as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

"SEC. 503. SELECTION OF PARTICIPATING INDIAN TRIBES.

"(a) CONTINUING PARTICIPATION.—Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title may elect to participate in self-governance under this title under existing authority as reflected in tribal resolutions.

"(b) ADDITIONAL PARTICIPANTS.—

"(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.

"(2)(A) 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 Indian tribe meets the eligibility criteria specified in subsection (c).

"(B) If an Indian tribe has withdrawn from participation in an inter-tribal consortium or tribal organization, it shall be entitled to its tribal share of funds supporting those programs, services, functions, and activities (or portions thereof) that it will be carrying out under its compact and funding agreement.

"(C) 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.

"(c) APPLICANT POOL.—The qualified applicant pool for self-governance shall consist of each Indian tribe that—

"(1) successfully completes the planning phase described in subsection (d);

"(2) has requested participation in self-governance by resolution or other official action by the governing body (or bodies) of the Indian tribe or tribes to be served; and

"(3) has demonstrated, for the previous 3 fiscal years, financial stability and financial management capability.

Evidence that during such years the 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 shall be conclusive evidence of the required stability and capability for the purposes of this subsection.

"(d) PLANNING PHASE.—Each Indian tribe seeking participation in self-governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian tribe and shall include—

"(1) legal and budgetary research; and

"(2) internal tribal government planning and organizational preparation relating to the administration of health care programs.

"(e) GRANTS.—Subject to the availability of appropriations, any Indian tribe meeting the requirements of paragraphs (2) and (3) of subsection (c) shall be eligible for grants—

"(1) to plan for participation in self-governance; and

"(2) to negotiate the terms of participation by the Indian tribe or tribal organization in self-governance, as set forth in a compact and a funding agreement.

"(f) RECEIPT OF GRANT NOT REQUIRED.—Receipt of a grant under subsection (e) shall not be a requirement of participation in self-governance.

"SEC. 504. COMPACTS.

"(a) COMPACT REQUIRED.—The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

"(b) CONTENTS.—Each compact required under subsection (a) 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.

"(c) EXISTING COMPACTS.—An Indian tribe participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title shall have the option at any time thereafter to—

"(1) retain its Tribal Self-Governance Demonstration Project compact (in whole or in part) to the extent the provisions of such compact are not directly contrary to any express provision of this title, or

"(2) negotiate in lieu thereof (in whole or in part) a new compact in conformity with this title.

"(d) TERM AND EFFECTIVE DATE.—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.

"SEC. 505. FUNDING AGREEMENTS.

"(a) FUNDING AGREEMENT REQUIRED.—The Secretary shall negotiate and enter into a written funding agreement with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

"(b) CONTENTS.—Each funding agreement required 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, including tribal shares of 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. Such programs, services, functions, or activities (or portions thereof) include all pro-

grams, services, functions, activities (or portions thereof) where Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and grants (which may be added to a funding agreement after award of such grants) and all local, field, service unit, area, regional, and central headquarters or national office functions administered under the authority of—

"(1) the Act of November 2, 1921 (25 U.S.C. 13);

"(2) the Act of April 16, 1934 (25 U.S.C. 452 et seq.);

"(3) the Act of August 5, 1954 (68 Stat. 674);

"(4) the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.);

"(5) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2401 et seq.);

"(6) any other Act of Congress authorizing agencies of the Department of Health and Human Services to administer, carry out, or provide financial assistance to such programs, functions, or activities (or portions thereof) described in this section; or

"(7) any other Act of Congress authorizing such programs, functions, or activities (or portions thereof) under which appropriations are made to agencies other than agencies within the Department of Health and Human services when the Secretary administers such programs, functions, or activities (or portions thereof).

"(c) INCLUSION IN COMPACT OR FUNDING AGREEMENT.—Indian tribes or Indians need not be identified in the authorizing statute for a program or element of a program to be eligible for inclusion in a compact or funding agreement under this title.

"(d) FUNDING AGREEMENT TERMS.—Each funding agreement shall set forth terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered, the general budget category assigned, the funds to be provided, including those to be provided on a recurring basis, the time and method of transfer of the funds, the responsibilities of the Secretary, and any other provisions to which the Indian tribe and the Secretary agree.

"(e) SUBSEQUENT FUNDING AGREEMENTS.—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.

"(f) EXISTING FUNDING AGREEMENTS.—Each Indian tribe participating in the Tribal Self-Governance Demonstration Project established under title III on the date of enactment of this title shall have the option at any time thereafter to—

"(1) retain its Tribal Self-Governance Demonstration Project funding agreement (in whole or in part) to the extent the provisions of such funding agreement are not directly contrary to any express provision of this title; or

"(2) adopt in lieu thereof (in whole or in part) a new funding agreement in conformity with this title.

"(g) STABLE BASE FUNDING.—At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under section 106(a) of the Act) 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-sub activity excluding earmarks.

"SEC. 506. GENERAL PROVISIONS.

"(a) APPLICABILITY.—The provisions of this section shall apply to compacts and funding agreements negotiated under this title and an Indian tribe may, at its option, include provisions that reflect such requirements in a compact or funding agreement.

"(b) CONFLICTS OF INTEREST.—Indian tribes participating in self-governance under this title 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).

"(c) AUDITS.—

"(1) SINGLE AGENCY AUDIT ACT.—The provisions of chapter 75 of title 31, United States Code, requiring a single agency audit report shall apply to funding agreements under this title.

"(2) COST PRINCIPLES.—An Indian tribe shall apply cost principles under the applicable Office of Management and Budget Circular, except as modified by section 106 or other provisions of law, or by any exemptions to applicable Office

of Management and Budget Circulars subsequently granted by Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f).

"(d) RECORDS.—

"(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, United States Code.

"(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, United States Code.

"(e) REDESIGN AND CONSOLIDATION.—An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 505 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 Federal law.

"(f) RETROCESSION.—An Indian tribe may retrocede, fully or partially, to the Secretary programs, services, functions, or activities (or portions thereof) included in the compact or funding agreement. Unless the Indian tribe rescinds the request for retrocession, such retrocession will become effective within the time frame specified by the parties in the compact or funding agreement. In the absence of such a specification, such retrocession shall become effective on—

"(1) the earlier of—

"(A) one year from the date of submission of such request; or

"(B) the date on which the funding agreement expires; or

"(2) such date as may be mutually agreed by the Secretary and the Indian tribe.

"(g) WITHDRAWAL.—

"(1) PROCESS.—An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact or funding agreement. Such withdrawal shall become effective within the time frame specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal shall become effective on—

"(A) the earlier of—

"(i) one year from the date of submission of such request; or

"(ii) the date on which the funding agreement expires; or

"(B) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.

"(2) DISTRIBUTION OF FUNDS.—When 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 or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activities (or portions thereof) which it 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 in the funding agreement of the inter-tribal consortium or tribal organization), and such funds shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, provided that the provisions of sections 102 and 105(i), as appropriate, shall apply to such withdrawing Indian tribe.

"(3) REGAINING MATURE CONTRACT STATUS.—If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) 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.

"(h) NONDUPLICATION.—For the period for which, and to the extent to which, funding is provided under this title or under the compact or funding agreement, the Indian tribe shall not be entitled to contract with the Secretary for such funds under section 102, except that such Indian tribe shall be eligible for new programs on the same basis as other Indian tribes.

"SEC. 507. PROVISIONS RELATING TO THE SECRETARY.

"(a) MANDATORY PROVISIONS.—

"(1) HEALTH STATUS REPORTS.—Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision that requires the Indian tribe to report on health status and service delivery—

"(A) to the extent such data is not otherwise available to the Secretary and specific funds for this purpose are provided by the Secretary under the funding agreement; and

"(B) if such reporting shall impose minimal burdens on the participating Indian tribe and such requirements are promulgated under section 517.

"(2) REASSUMPTION—(A) Compacts and 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.

"(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.

"(C) Notwithstanding subparagraph (B), the Secretary may, upon written notification to the tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding 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. If the Secretary reassumes operation of a program, service, function, or activity (or portion thereof) under this subparagraph, the Secretary shall provide the tribe with a hearing on the record not later than 10 days after such reassumption.

"(D) 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.

"(b) FINAL OFFER.—In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

"(c) REJECTION OF FINAL OFFERS.—If the Secretary rejects an offer made under subsection (b) (or one or more provisions or funding levels in such offer), the Secretary shall provide—

"(1) a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that—

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

"(B) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

"(C) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

"(D) the tribe is not eligible to participate in self-governance under section 503;

"(2) technical assistance to overcome the objections stated in the notification required by paragraph (1);

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

"(4) the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions. If an Indian tribe exercises the option specified herein, it shall retain the right to appeal the Secretary's rejection under this section, and paragraphs (1), (2), and (3) shall only apply to that portion of the proposed final compact, funding agreement or provision thereof that was rejected by the Secretary.

"(d) BURDEN OF PROOF.—With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b).

"(e) GOOD FAITH.—In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this title in a manner that maximizes the policy of tribal self-governance, consistent with section 3.

"(f) SAVINGS.—To the extent that programs, functions, services, or activities (or portions thereof) carried out by Indian tribes under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 508(c), the Secretary shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

"(g) TRUST RESPONSIBILITY.—The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

"(h) DECISIONMAKER.—A decision that constitutes final agency action and relates to an appeal within the Department of Health and Human Services conducted under subsection (c) shall be made either—

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

"(2) by an administrative judge.

"SEC. 508. TRANSFER OF FUNDS.

"(a) IN GENERAL.—Pursuant to the terms of any compact or funding agreement entered into under this title, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

"(b) MULTIYEAR FUNDING.—The Secretary is hereby authorized to employ, upon tribal request, multiyear funding agreements, and references in this title to funding agreements shall include such multiyear agreements.

"(c) AMOUNT OF FUNDING.—The Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) and amounts for contract support costs specified under sections 106(a)(2), (a)(3), (a)(5), and (a)(6), including any funds that are specifically or functionally related to

the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

"(d) PROHIBITIONS.—The Secretary is expressly prohibited from—

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

"(2) withholding portions of such funds for transfer over a period of years; and

"(3) reducing the amount of funds required herein—

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

"(B) in subsequent years, except pursuant to—

"(i) a reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

"(ii) a congressional directive in legislation or accompanying report;

"(iii) a tribal authorization;

"(iv) a change in the amount of pass-through funds subject to the terms of the funding agreement; or

"(v) completion of a project, activity, or program for which such funds were provided;

"(C) to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this Act; or

"(D) to pay for costs of Federal personnel displaced by self-determination contracts under this Act or self-governance;

except that such funds may be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)(2).

"(e) OTHER RESOURCES.—In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of interagency motor pool vehicles) or other Federal resources (including supplies, services, and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), the Secretary is authorized to transfer such personnel, supplies, or resources to the Indian tribe.

"(f) REIMBURSEMENT TO INDIAN HEALTH SERVICE.—With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service is authorized to provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment, and the reimbursements received therefrom, along with the funds received from the Indian tribe pursuant to this title, may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

"(g) PROMPT PAYMENT ACT.—Chapter 39 of title 31, United States Code, shall apply to the transfer of funds due under a compact or funding agreement authorized under this title.

"(h) INTEREST OR OTHER INCOME ON TRANSFERS.—An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this Act shall be managed using the prudent investment standard.

"(i) CARRYOVER OF FUNDS.—All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from one year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

"(j) PROGRAM INCOME.—All medicare, medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement and the Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for medicare and medicaid receipts, and such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

"(k) LIMITATION OF COSTS.—An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

"SEC. 509. CONSTRUCTION PROJECTS.

"(a) IN GENERAL.—Indian tribes participating in tribal self-governance may carry out construction projects under this title if they elect to assume all Federal responsibilities under the National Environmental Policy Act of 1969, the Historic Preservation Act, 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 of the responsible Federal official under such environmental laws.

"(b) NEGOTIATIONS.—Construction project proposals shall be negotiated pursuant to the statutory process in section 105(m) and resulting construction project agreements shall be incorporated into funding agreements as addenda.

"(c) CODES AND STANDARDS.—The Indian tribe and the Secretary shall agree upon and specify appropriate buildings codes and architectural/engineering standards (including health and safety) which shall be in conformity with nationally recognized standards for comparable projects.

"(d) RESPONSIBILITY FOR COMPLETION.—The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the negotiated construction project agreement.

"(e) FUNDING.—Funding for construction projects carried out under this title shall be included in funding agreements as annual advance payments, with semiannual payments at the option of the Indian tribe. Annual advance and semiannual payment amounts shall be determined based on mutually agreeable project schedules reflecting work to be accomplished within the advance payment period, work accomplished and funds expended in previous payment periods, and the total prior payments. The Secretary shall include associated project contingency funds with each advance payment installment. The Indian tribe shall be responsible for the management of the contingency funds included in funding agreements.

"(f) APPROVAL.—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. The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually. The Secretary may conduct on-site project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

"(g) WAGES.—All laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair, including painting or decorating of building or other facilities in connection with construction projects undertaken by self-governance Indian tribes under this Act, shall be paid wages at not less than those prevailing wages on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494). With respect to construction, alteration, or repair work to which the Act of March 3, 1921, is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14, of 1950, and section 2 of the Act of June 13, 1934 (48 Stat. 948).

"(h) APPLICATION OF OTHER LAWS.—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 title.

"SEC. 510. FEDERAL PROCUREMENT LAWS AND REGULATIONS.

"Notwithstanding any other provision of law, unless expressly agreed to by the participating Indian tribe, the compacts and funding agreements entered into under this title shall not be subject to Federal contracting or cooperative agreement laws and regulations (including Executive orders and the regulations relating to procure-

ment issued by the Secretary), except to the extent that such laws expressly apply to Indian tribes.

"SEC. 511. CIVIL ACTIONS.

"(a) CONTRACT DEFINED.—For the purposes of section 110, the term 'contract' shall include compacts and funding agreements entered into under this title.

"(b) APPLICABILITY OF CERTAIN LAWS.—Section 2103 of the Revised Statutes of the United States Code (25 U.S.C. 81) and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts entered into by Indian tribes participating in self-governance under this title.

"(c) REFERENCES.—All references in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) to section 1 of the Act of June 26, 1936 (25 U.S.C. 81) are hereby deemed to include section 1 of the Act of July 3, 1952 (25 U.S.C. 82a).

"SEC. 512. FACILITATION.

"(a) SECRETARIAL INTERPRETATION.—Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders and regulations in a manner that will facilitate—

"(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section;

"(2) the implementation of compacts and funding agreements entered into under this title; and

"(3) the achievement of tribal health goals and objectives.

"(b) REGULATION WAIVER.—

"(1) An Indian tribe may submit a written request to waive application of a regulation promulgated under this Act for a compact or funding agreement entered into with the Indian Health Service under this title, to the Secretary identifying the applicable Federal regulation under this Act 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 under this Act for a compact or funding agreement entered into under this title, 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.

"(c) ACCESS TO FEDERAL PROPERTY.—In connection with any compact or funding agreement executed pursuant to this title or an agreement negotiated under the Tribal Self-Governance Demonstration Project established under title III, as in effect before the enactment of the Tribal Self-Governance Amendments of 1999, upon the request of an Indian tribe, the Secretary—

"(1) shall permit an Indian tribe to use existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the tribe for their use and maintenance;

"(2) may donate to an Indian tribe title to any personal or real property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—

"(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;

"(B) if property described in subparagraph (A) has a value in excess of $5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Department of Health and Human Services; and

"(C) all property referred to in subparagraph (A) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States; and

"(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appro-

priate for use by the Indian tribe for any purpose for which a compact or funding agreement is authorized under this title.

"(d) MATCHING OR COST-PARTICIPATION REQUIREMENT.—All funds provided under compacts, funding agreements, or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

"(e) STATE FACILITATION.—States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this title and other Federal laws benefiting Indians and Indian tribes.

"(f) RULES OF CONSTRUCTION.—Each provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

"SEC. 513. BUDGET REQUEST.

"(a) IN GENERAL.—The President shall identify in the annual budget request submitted to the Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title, 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 505. Nothing in this provision 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 made available to the Office of Tribal Self-Governance under this section.

"(b) PRESENT FUNDING; SHORTFALLS.—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, under self-determination contracts, or under compacts and funding agreements authorized under this title.

"SEC. 514. REPORTS.

"(a) ANNUAL REPORT.—Not later than January 1 of each year after the date of the enactment of this title, the Secretary shall submit to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate a written report regarding the administration of this title. Such report shall include a detailed analysis of the level of need being presently funded or unfunded for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this Act. In compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on participating Indian tribes or tribal organizations, not otherwise provided in this Act.

"(b) CONTENTS.—The report shall be compiled from information contained in funding agreements, annual audit reports, and Secretarial data regarding the disposition of Federal funds and 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 Indian tribes and their members;

"(3) identify the funds transferred to each self-governance Indian tribe and the corresponding reduction in the Federal bureaucracy;

"(4) identify the funding formula for individual tribal shares of all headquarters funds, together with the comments of affected Indian tribes or tribal organizations, developed under subsection (c);

"(5) identify amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location;

"(6) 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;

"(7) prior to being submitted to Congress, be distributed to the Indian tribes for comment, such comment period to be for no less than 30 days; and

"(8) include the separate views and comments of the Indian tribes or tribal organizations.

"(c) REPORT ON FUND DISTRIBUTION METHOD.—Not later than 180 days after the date of enactment of this title, the Secretary shall, after consultation with Indian

tribes, submit a written report to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate which describes the method or methods 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.

"SEC. 515. DISCLAIMERS.

"(a) NO FUNDING REDUCTION.—Nothing in this title 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 Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 110.

"(b) FEDERAL TRUST AND TREATY RESPONSIBILITIES.—Nothing in this Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

"(c) TRIBAL EMPLOYMENT.—For purposes of section 2(2) of the Act of July 5, 1935 (49 Stat. 450, chapter 372) (commonly known as the National Labor Relations Act), an Indian tribe carrying out a self-determination contract, compact, annual funding agreement, grant, or cooperative agreement under this Act shall not be considered an employer.

"(d) OBLIGATIONS OF THE UNITED STATES.—The Indian Health Service under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Indian tribe to do so.

"SEC. 516. APPLICATION OF OTHER SECTIONS OF THE ACT.

"(a) MANDATORY APPLICATION.—All provisions of sections 5(b), 6, 7, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act and section 314 of Public Law 101–512 (coverage under the Federal Tort Claims Act), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.

"(b) DISCRETIONARY APPLICATION.—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 title, shall be made a part of a funding agreement or compact entered into under this title. 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 title. 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.

"SEC. 517. REGULATIONS.

"(a) IN GENERAL.—

"(1) Not later than 90 days after the date of enactment of this title, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title.

"(2) Proposed regulations to implement this title shall be published in the Federal Register by the Secretary no later than 1 year after the date of enactment of this title.

"(3) The authority to promulgate regulations under this title shall expire 21 months after the date of enactment of this title.

"(b) COMMITTEE.—A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this Act, and the Committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

"(c) ADAPTATION OF PROCEDURES.—The Secretary shall adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes.

"(d) EFFECT.—The lack of promulgated regulations shall not limit the effect of this title.

"(e) EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, AND RULES.—Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular,

policy, manual, guidance, or rule adopted by the Indian Health Service, except for the eligibility provisions of section 105(g).

"SEC. 518. APPEALS.

"In any appeal (including civil actions) involving decisions made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—

"(1) the validity of the grounds for the decision made; and

"(2) the decision is fully consistent with provisions and policies of this title.

"SEC. 519. AUTHORIZATION OF APPROPRIATIONS.

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

"TITLE VI—TRIBAL SELF-GOVERNANCE—DEPARTMENT OF HEALTH AND HUMAN SERVICES

"SEC. 601. DEMONSTRATION PROJECT FEASIBILITY.

"(a) STUDY.—The Secretary shall conduct a study to determine the feasibility of a Tribal Self-Governance Demonstration Project for appropriate programs, services, functions, and activities (or portions thereof) of the agency.

"(b) CONSIDERATIONS.—When conducting the study, the Secretary shall consider—

"(1) the probable effects on specific programs and program beneficiaries of such a demonstration project;

"(2) statutory, regulatory, or other impediments to implementation of such a demonstration project;

"(3) strategies for implementing such a demonstration project;

"(4) probable costs or savings associated with such a demonstration project;

"(5) methods to assure quality and accountability in such a demonstration project; and

"(6) such other issues that may be determined by the Secretary or developed through consultation pursuant to section 602.

"(c) REPORT.—Not later than 18 months after the enactment of this title, the Secretary shall submit a report to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate. The report shall contain—

"(1) the results of the study;

"(2) a list of programs, services, functions, and activities (or portions thereof) within the agency which it would be feasible to include in a Tribal Self-Governance Demonstration Project;

"(3) a list of programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) which could be included in a Tribal Self-Governance Demonstration Project without amending statutes, or waiving regulations that the Secretary may not waive;

"(4) a list of legislative actions required in order to include those programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) but not included in the list provided pursuant to paragraph (3) in a Tribal Self-Governance Demonstration Project; and

"(5) any separate views of tribes and other entities consulted pursuant to section 602 related to the information provided pursuant to paragraph (1) through (4).

"SEC. 602. CONSULTATION.

"(a) STUDY PROTOCOL.—

"(1) CONSULTATION WITH INDIAN TRIBES.—The Secretary shall consult with Indian tribes to determine a protocol for consultation under subsection (b) prior to consultation under such subsection with the other entities described in such subsection. The protocol shall require, at a minimum, that—

"(A) the government-to-government relationship with Indian tribes forms the basis for the consultation process;

"(B) the Indian tribes and the Secretary jointly conduct the consultations required by this section; and

"(C) the consultation process allow for separate and direct recommendations from the Indian tribes and other entities described in subsection (b).

"(2) OPPORTUNITY FOR PUBLIC COMMENT.—In determining the protocol described in paragraph (1), the Secretary shall publish the proposed protocol and allow a period of not less than 30 days for comment by entities described in subsection (b) and other interested individuals, and shall take comments received into account in determining the final protocol.

"(b) CONDUCTING STUDY.—In conducting the study under this title, the Secretary shall consult with Indian tribes, States, counties, municipalities, program beneficiaries, and interested public interest groups, and may consult with other entities as appropriate.

"SEC. 603. DEFINITIONS.

"(a) IN GENERAL.—For purposes of this title, the Secretary may use definitions provided in title V.

"(b) AGENCY.—For purposes of this title, the term 'agency' shall mean any agency or other organizational unit of the Department of Health and Human Services, other than the Indian Health Service.

"SEC. 604. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated for fiscal years 2000 and 2001 such sums as may be necessary to carry out this title. Such sums shall remain available until expended.".

SEC. 5. AMENDMENTS CLARIFYING CIVIL PROCEEDINGS.

(a) BURDEN OF PROOF IN DISTRICT COURT ACTIONS.—Section 102(e)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f(e)(1)) is amended by inserting after "subsection (b)(3)" the following: "or any civil action conducted pursuant to section 110(a)".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to any proceedings commenced after October 25, 1994.

SEC. 6. SPEEDY ACQUISITION OF GOODS, SERVICES, OR SUPPLIES.

Section 105(k) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(k)) is amended—

(1) by striking "carrying out a contract" and all that follows through "shall be eligible" and inserting the following: "or Indian tribe shall be deemed an executive agency and a part of the Indian Health Service, and the employees of the tribal organization or the Indian tribe, as the case may be, shall be eligible"; and

(2) by adding at the end thereof the following: "At the request of an Indian tribe, the Secretary shall enter into an agreement for the acquisition, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or any other Federal law, including acquisitions from prime vendors. All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements.

SEC. 7. PATIENT RECORDS.

Section 105 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j) is amended by adding at the end the following new subsection:

"(o) At the option of a tribe or tribal organization, patient records may be deemed to be Federal records under the Federal Records Act of 1950 for the limited purposes of making such records eligible for storage by Federal Records Centers to the same extent and in the same manner as other Department of Health and Human Services patient records. Patient records that are deemed to be Federal records under the Federal Records Act of 1950 pursuant to this subsection shall not be considered Federal records for the purposes of chapter 5 of title 5, United States Code.".

SEC. 8. REPEAL.

Title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f note) is hereby repealed.

SEC. 9. SAVINGS PROVISION.

Funds appropriated for title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f note) shall be available for use under title V of such Act.

SEC. 10. EFFECTIVE DATE.

Except as otherwise provided, the provisions of this Act shall take effect on the date of the enactment of this Act.

PURPOSE OF THE BILL

The purpose of H.R. 1167 is to amend the Indian Self-Determination and Education Assistance Act to provide for further self-governance by Indian tribes, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 1167 would create a new title in the 1975 Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.). The 1975 Act allows Indian tribes to contract for or take over the administration and operation of certain federal programs which provide services to Indian tribes. Title III of the Act establishes a Self-Governance Demonstration Project that allows for large-scale tribal self-governance compacts and funding agreements on a "demonstration" basis. To date, 42 separate compacts, representing 57 individual funding agreements with tribes, have already been negotiated.

The new title created by H.R. 1167 would make this authority permanent for programs contracted for within the Indian Health Service (IHS). Under H.R. 1167, Indian and Alaska Native tribes would be able to contract for the operation, control, and redesign of various IHS activities on a permanent basis. In short, what was a demonstration project would become a permanent IHS Self-Governance program. Pursuant to H.R. 1167, tribes which have already contracted for IHS activities would continue under the provisions of their contracts while an additional 50 new tribes would be selected each year to enter into contracts.

H.R. 1167 also allows for a feasibility study regarding the execution of tribal Self-Governance compacts and funding agreements for Indian-related programs outside the IHS but within the Department of Health and Human Services on a demonstration project basis.

COMMITTEE ACTION

H.R. 1167 was introduced on March 17, 1999, by Congressman George Miller (D–CA) and was cosponsored by Congressman Don Young (R–AK). The bill was referred to the Committee on Resources. On June 9, 1999, the Full Committee on Resources met to consider H.R. 1833. Mr. Miller offered an amendment in the nature of a substitute. The amendment inserted the phrase "regulations relating to procurement issued by the Secretary" into Section 510 to clarify that the section is only referring to procurement regulations. The amendment also clarified that Indian tribes administering their own health programs are eligible to receive reduced rate pharmaceuticals and that patient records are not subject to the Freedom of Information Act. The amendment was adopted by voice vote. The bill as amended was then ordered favorably reported to the House of Representative by voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This provision sets forth the short title, the Tribal Self-Governance Act Amendments of 1999.

Section 2. Findings

This provision sets forth the findings of Congress which, among other things, reaffirm the sovereignty of Indian tribes and the unique government-to-government relationship between the United States and Indian tribes. The findings make clear that the federal government has failed to fully meet its trust responsibility and to satisfy its obligations under treaties and other laws. The findings also explain that Congress has concluded that self-governance is an effective mechanism to implement and strengthen the federal policy of government-to-government relations with Indian tribes by transferring to Indian tribes full control and funding for federal programs, functions, services, or activities, or portions thereof.

Throughout this bill, but particularly in the Findings and Declaration of Policy sections, the phrase "under treaties" is used in describing the United States' trust obligation to Indian tribes and individuals. This provision is intended to explain that much of the federal-Indian relationship is predicated on a government-to-government relationship as reflected in the treaties, which are contractual relationships between governments. Treaties are a significant part of the legal relationship between Indian tribes and the United States. Self-governance, by its use of compacts, another traditional contracting device used between governments, is designed to honor the government-to-government relationship and remind the parties to these agreements of the historical basis for their relationship.

Section 3. Declaration of policy

This section states Congress' policy to permanently establish and implement Tribal self-governance within the Department of Health and Human Services with the full cooperation of its agencies. Among the key policy objectives Congress seeks to achieve through the self-governance program are to: (1) maintain and continue the United States' unique relationship with Indian tribes; (2) allow Indian tribes the flexibility to choose whether they wish to participate in self-governance; (3) ensure the continuation and fulfillment of the United States' trust responsibility and other responsibilities towards Indian tribes that are contained in treaties and other laws; (4) permit a transition to tribal control and authority over programs, functions, services, or activities (or portions thereof); and (5) provide a corresponding parallel reduction in the federal bureaucracy.

Section 4. Tribal self governance

This section sets out the substantive provisions of the Self-Governance program in the Indian Health Service (HHS), added as a new Title V of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.). The following description refers to the new sections of Title V:

Section 501. Establishment

This provision directs the Secretary of HHS to establish a permanent Tribal Self-Governance Program in the Indian Health Service.

Section 502. Definitions

Subsection (a)(1) defines "construction project" as an undertaking described in a "construction project agreement."

Subsection (a)(2) defines "construction project agreement" as a negotiated agreement which includes at a minimum: start and completion of dates; scope of work; party responsibilities; environmental considerations; identifies owner and operations/maintenance entity; a budget; payment process; and duration of the agreement.

Subsection (a)(3) defines "inherent federal functions". Inherent federal functions are functions which the Executive Branch cannot by law delegate to other branches of governments, or to non-governmental entities. This definition is consistent with the Department of the Interior Solicitor's Memorandum of May 17, 1996, entitled "Inherently Federal Functions under the Tribal Self-Governance Act of 1994." It is the Committee's understanding that this definition recognizes that there are differences between departmental and agency functions and those may be analyzed on a case-by-case basis. It is important to note that, in the tribal procurement context, there is another factor the Committee has considered—when the federal government is returning tribal governmental powers and functions that are inherent in tribal governmental status (such as those possessed by tribes before the establishment of the federal Indian bureaucracy), the scope of allowable transfers is broader than in the transfer of federal governmental powers to private or other governmental entities.

Subsection (a)(4) defines "inter-tribal consortium". The Committee notes that during the Title III Demonstration Project, the IHS authorized intertribal consortia, such as the co-signers to the Alaska Tribal Health Compact, to participate in the Project and that participation has had great success. The definition of "inter-tribal consortium" is intended to include "tribal organizations" as that term is defined in Section 4(l) of the Indian Self-Determination Act, Public Law 93–638. This would include consortia such as those involved in the Alaska Tribal Health Consortium. It is the Committee's intent that inter-tribal consortia and tribal organizations shall count as one tribe for purposes of the 50 tribe per year limitation contained in new Section 503(a).

Subsection (a)(5) provides a definition of "gross mismanagement." The Committee has added this definition pursuant to the Department's request and tribal agreement. The inclusion of this term is to govern one of the criteria that the Secretary is to consider in the reassumption of a tribally-operated program. The Secretary will be given the authority to reassume programs that imminently endanger the public health where the danger arises out of a compact or funding agreement violation. The Committee believes that the inclusion of a performance standard, in this case gross mismanagement, is also an appropriate grounds for reassumption. Gross mismanagement is defined as a significant, clear, and convincing violation of compact, funding agreement, regulatory or statutory requirements related to the transfer of self-governance funds to the tribe that results in a significant reduction of funds to the tribe's self-governance program. The Committee's definition of gross mismanagement is narrowly tailored and will require a high degree of

proof by the Secretary. The Committee is well aware of tribal concerns and agrees that the inclusion of this performance standard must not be utilized by the Secretary in such a manner as to needlessly impose monitoring and auditing requirements that hinder the efficient operation of tribal programs. Intrusive and overburdensome monitoring and auditing activities are antithetical to the goals of self-governance.

Subsection (a)(6) defines "tribal shares". This definition is consistent with the Title IV rule-making committee's determination that residual funds are those "necessary to carry out the inherently federal functions that must be performed by federal officials if all tribes assume responsibilities for all BIA programs." 63 Fed. Reg. 7235, (Feb. 12, 1998) (Proposed Rule, 25 CFR 1000.91). All funds appropriated under the Indian Self-Determination and Education Assistance Act are either tribal shares or agency residual.

Subsection (a)(7) defines "Secretary" as the Secretary of Health and Human Services.

Subsection (a)(8) defines "self-governance" as the program established under this title.

Section (b) defines "Indian tribe". This definition enables an Indian tribe to authorize another Indian tribe, inter-tribal consortium or tribal organization to participate in self-governance on its behalf. The authorized Indian tribe, inter-tribal consortium or tribal organization may exercise the authorizing Indian tribe's rights as specified by tribal resolution.

Section 503. Selection of participating indian tribes

This section describes the eligibility criteria that must be satisfied by any Indian tribe interested in participating in the self-governance program.

(a) Continuing Participation. All tribes presently participating in the Tribal Self-Governance Demonstration Project under Title III of the Indian Self-Determination and Education Assistance Act may elect to participate in the permanent self-governance program. Tribes must do so through tribal resolution.

(b) Additional Participants. (1) This section allows an additional 50 tribes a year to participate in self-governance. (2) This section allows an Indian tribe that chooses to withdraw from an inter-tribal consortium or tribal organization to participate in self-governance provided it independently meets the eligibility criteria in new Title V. Tribes and tribal organizations that withdraw from tribal organizations and inter-tribal consortia under this section shall be entitled to participate in the permanent program under Section 503 (b)(2) and such participation shall not be counted against the 50 tribe a year limitation contained in Section 503(a).

(c) Applicant Pool. The eligibility criteria for self-governance tribes are the same as those that applied under Title IV, the permanent Department of the Interior Self-Governance Program. To participate, an Indian tribe must successfully complete a planning phase, must request participation in the program through a resolution or official action of the governing body, and must have demonstrated financial stability and financial management capability for the past three years. Proof of no material audit exceptions in the tribe's self determination contracts or self-governance funding

agreements is conclusive proof of such qualification. The Committee notes that the financial examination addressed in Subsection 503(c)(3) refers solely to funds managed by the tribe under Title I and Title IV of the Indian Self-Determination and Education Assistance Act. The bill has been deliberately crafted to make clear that a tribe's activities in other economic endeavors are not subject of the Section 503(c) examination. Similarly, the "budgetary research" referred to in Section 503(d)(1) of the bill requires a tribe to research only budgetary issues related to the administration of the programs the tribe anticipates transferring to tribal operation under self-governance.

(d) Planning Phase. Every Indian tribe interested in participating in self-governance shall complete a planning phase prior to participating in the program. The planning phase is to include legal and budgetary research and internal tribal government planning and organizational preparation. The planning phase is to be completed to the satisfaction of the tribe.

(e) Grants. Subject to available appropriations, any Indian tribe interested in participating in self-governance is eligible to receive a grant to plan for participation in the program or to negotiate the terms of a Compact and funding agreement.

(f) Receipt of Grant not Required. This section provides that receipt of a grant from HHS is not required to participate in the permanent program.

Section 504. Compacts

This section authorizes Indian tribes to negotiate Compacts with the Secretary and identifies generally the contents of Compacts. While the Compact process was not specifically part of prior legislative enactment, the Committee understands that Compacts have developed as an integral part of self-governance. The Committee believes that Compacts serve an important and necessary function in establishing government-to-government relations, which as noted earlier, is the keystone of modern federal Indian policy.

(a) Compact Required. The Secretary is required to negotiate and enter into a written Compact consistent with the trust responsibility, treaty obligations and the government-to-government relationship between the United States and each participating tribe.

(b) Contents. This subsection requires that Compacts state the terms of the government-to-government relationship between the Indian tribe and the United States. Compacts may only be amended by agreement of both parties.

(c) Existing Compacts. On enactment of Title V, Indian tribes have the option of retaining their existing Compacts, or any portion of the Compacts that do not contradict the provisions of Title V.

(d) Term and Effective Date. The date of approval and execution by the Indian tribe is generally the effective date of a Compact, unless otherwise agreed to by the parties. A Compact will remain in effect as long as permitted by federal law or until terminated by written agreement of the parties, or by retrocession or reassumption.

Section 505. Funding agreements

This section authorizes Indian tribes to negotiate funding agreements with the Secretary and generally identifies the contents of those agreements.

(a) Funding Agreement Required. The Secretary is required to negotiate and enter into a written funding agreement consistent with the trust responsibility, treaty obligations and the government-to-government relationship between the United States and each participating tribe.

(b) Contents. An Indian tribe may include in an funding agreement all programs, functions, services, or activities, (or portions thereof) that it is authorized to carry out under Title I of the Indian Self-Determination and Education Assistance Act. Funding agreements may, at the option of the Indian tribe, authorize the tribe to plan and carry-out all programs, functions, services, or activities, (or portion thereof) administered by the Indian Health Service (IHS) that are carried out for the benefit of Indians because of their status as Indians or where Indian tribes or Indian beneficiaries are the primary or significant beneficiaries, as set forth in statutes. For each program, function, service, or activity (or portion thereof) included in a funding agreement, an Indian tribe is entitled to receive its full tribal share of funding, including funding for all local, field, service unit, area, regional, and central/headquarters or national office locations. Available funding includes the Indian tribe's share of discretionary IHS competitive grants but not statutorily mandated competitive grants.

The Committee is concerned with the reluctance of the IHS to include all available federal health funding in self governance funding agreements. We note, as an example, the refusal of the IHS to so include the Diabetes Prevention Initiative funding. As a result, funding was delayed and undue administrative requirements diverted resources from direct services. This section is intended to directly remedy this situation.

The Committee has received ample testimony showing the benefits of self governance. In 1998, the National Indian Health Board recently released its' "National Study on Self-Determination and Self-Governance," providing empirical evidence that self-governance leads to more efficient management of tribal health service delivery, especially preventive services. This study consistently observed an overall improvement in quality of care when tribes operate their own health care systems. Less than full funding agreements will result in less than maximum use of federal resources to address the health care in Indian country. Accordingly, this section is to be interpreted broadly by affording a presumption in favor of including in a tribe's self-governance funding agreement any federal funding administered by that agency.

(c) Inclusion in Compact or Funding Agreement. Indians do not need to be specifically identified in authorizing legislation for a program to be eligible for inclusion in a Compact or funding agreement.

(d) Funding Agreement Terms. Each funding agreement should generally set out the programs, functions, services, or activities, (or portions thereof) to be performed by the Indian tribe, the general budget category assigned to each program, function, service, or ac-

tivity (or portion thereof), the funds to be transferred, the time and method of payment and other provisions that the parties agree to.

(e) Subsequent Funding Agreements. Each funding agreement remains in full force and effect unless the Secretary receives notice from the Indian tribe that it will no longer operate one or more of the programs, functions, services, or activities, (or portions thereof) included in the funding agreement or until a new funding agreement is executed by the parties.

The Committee is concerned with reports that the IHS has been able to use the annual negotiations provisions of Section 303(a) of the Indian Self-Determination and Education Assistance Act to obtain an unfair bargaining advantage during negotiations by threatening to suspend application of the Act to a tribe if it does not sign an annual funding agreement. This subsection is meant to facilitate negotiation between the tribes and the IHS on a true government-to-government basis. The Committee believes the provision is fair because this assures that no act or omission of the federal government endangers the health and welfare of tribal members.

(f) Existing Funding Agreements. Upon enactment of Title V, tribes may either retain their existing annual funding agreements, or any portion thereof, that do not conflict with provisions of Title V, or negotiate new funding agreements that conform to Title V.

(g) Stable Base Funding. An Indian tribe may include a stable base budget in its funding agreement. A stable base budget contains the tribe's recurring funding amounts and provides for transfer of the funds in a predictable and consistent manner over a specific period of time. Adjustments are made annually only if there are changes in the level of funds appropriated by Congress. Nonrecurring funds are not included and must be negotiated on an annual basis. The Committee intends this section to codify the existing agency policy guidance on stable base funding.

Section 506. General provisions.

(a) Applicability. The provisions in this section may, at the tribe's option, be included in a Compact or funding agreement.

(b) Conflicts of Interest. Indian tribes are to assure that internal measures are in place to address conflicts of interest in the administration of programs, functions, services, or activities (or portions thereof).

(c) Audits. The Single Agency Audit Act applies to Title V funding agreements. Indian tribes are required to apply cost principles set out in applicable Office of Management and Budget (OMB) Circulars, as modified by Section 106 of the Indian Self-Determination and Education Assistance Act or by any exemptions that may be applicable to future OMB Circulars. No other audit or accounting standards are required. Claims against Indian tribes by the federal government based on any audit of funds received under a Title V funding agreement are subject to the provisions of Section 106(f) of the Act.

(d) Records. An Indian tribe's records are not considered federal records for purposes of the Federal Privacy Act, unless otherwise stated in the Compact or funding agreement. Indian tribes are required to maintain a record keeping system and, upon reasonable advance request, provide the Secretary with reasonable access to

records to enable HHS to meet its minimum legal record keeping requirements under the Federal Records Act.

(e) Redesign and Consolidation. An Indian tribe may redesign or consolidate programs, functions, services, or activities, (or portions thereof) and reallocate or redirect funds in any way the Indian tribe considers to be in the best interest of the Indian community being served.

(f) Retrocession. An Indian tribe may retrocede fully or partially back to the Secretary any program, function, service, or activity (or portion thereof) included in a Compact or funding agreement. A retrocession request becomes effective within the time frame specified in the Compact or funding agreement, one year from the date the request was made, the date the funding agreement expires, or any date mutually agreed to by the parties, whichever occurs first.

(g) Withdrawal. An Indian tribe that participates in self-governance through an inter-tribal consortium or tribal organization can withdraw from the consortium or organization. The withdrawal becomes effective within the timeframe set out in the tribe's authorizing resolution. If a timeframe is not specified, withdrawal becomes effective one year from the submission of the request or on the date the funding agreement expires, whichever occurs first. An alternative date can be agreed to by the parties, including the Secretary.

When an Indian tribe withdraws from an inter-tribal consortium or tribal organization and wishes to enter into a Title I contract or Title V agreement on its own, it is entitled to receive its share of funds supporting the program, function, service, or activity, (or portion thereof) that it will carry out under its new status. The funds must be removed from the funding agreement of the participating organization or inter-tribal consortium and included in the withdrawing tribe's agreement or contract. If the withdrawing tribe is to receive services directly from the Secretary, the tribe's share of funds must be removed from the funding agreement of the participating organization or inter-tribal consortium and retained by the Secretary to provide services. Finally, an Indian tribe that chooses to terminate its participation in the self-governance program may, at its option, carry out programs, functions, services, or activities, (or portions thereof) in a Title I contractor agreement or self-governance funding agreement and retain its mature contractor status.

(h) Nonduplication. This section provides that a tribe operating under a self-governance Compact may not contract under Title I agreement (a "638 contract") for the same programs.

Section 507. Provisions relating to the Secretary

This section sets out mandatory and non-mandatory provisions relating to the Secretary's obligations.

(a) Mandatory Provisions.

(1) Health Status Reports. To the extent that the data is not otherwise available to the Secretary, Compacts and funding agreements must include a provision requiring the Indian tribe to report data on health status and service delivery. The Secretary is to use this data in her annual reports to Congress. The Secretary is required to provide funding to the Indian tribe to compile such data. Reporting requirements can only impose minimal burdens on the

Indian tribe and may only be imposed if they are contained in regulations developed under negotiated rulemaking.

(2) Reassumption. Compacts and funding agreements must include a provision authorizing the Secretary to reassume a program, function, service, or activity, (or portion thereof) if the Secretary makes a finding of imminent endangerment of the public health caused by the Indian tribe's failure to carry out the Compact or funding agreement of gross mismanagement that causes a significant reduction in available funding. The Secretary is required to provide the Indian tribe with notice of a finding. The Indian tribe may take action to correct the problem identified in the notice. The Secretary has the burden at the hearing of demonstrating by clear and convincing evidence the validity of the grounds for reassumption. In cases where the Secretary finds imminent substantial and irreparable endangerment of the public health caused by the tribe's failure to carry out the Compact or funding agreement, the Secretary may immediately reassume the program but is required to provide the tribe with a hearing on the record within ten days after reassumption.

(b) Final Offer. If the parties cannot agree on the terms of a Compact or funding agreement, the Indian tribe may submit a final offer to the Secretary. The Secretary has 45 days to determine if the offer will be accepted or rejected. The 45 days can be extended by the Indian tribe. If the Secretary takes no action the offer is deemed accepted by the Secretary.

(c) Rejection of Final Offers. This provision describes the only circumstances under which the Secretary may reject an Indian tribe's final offer. A rejection requires written notice to the Indian tribe within 45 days of receipt with specific findings that clearly demonstrate or are supported by controlling legal authority that: (1) the amount of funds proposed exceeds the funding level that the Indian tribe is entitled to; (2) the program, function, service, or activity (or portion thereof) that is the subject of the offer is an inherent federal function that only can be carried out by the Secretary; (3) the applicant is not eligible to participate in self-governance; or (4) the Indian tribe cannot carry out the program, function, service or activity, (or portion thereof) without a significant danger or risk to the public health. The Committee believes the fourth provision appropriately balances the Secretary's trust responsibility to assure the delivery of health care services to Indian beneficiaries, with the equally important goal of fostering maximum tribal self-determination in the administration of health care programs transferred under Title V. The Committee has included the requirement of a "specific finding" is included to avoid rejections which merely state conclusory statements that offer no analysis and determination of facts supporting the rejection.

The Secretary must also offer assistance to the Indian tribe to overcome the stated objections, and must provide the Indian tribe with an opportunity to appeal the rejection and have a hearing on the record. In any hearing the Indian tribe has the right to engage in full discovery. The Indian tribe also has the option to proceed directly to federal district court under Section 110 the Indian Self-Determination and Education Assistance Act.

The Secretary may only reject those portions of a "final offer" that are supported by the findings and must agree to all severable portions of a "final offer" which do not justify a rejection. By entering into a partial Compact or funding agreement the Indian tribe does not waive its right to appeal the Secretary's decision for the rejected portions of the offer.

(d) Burden of Proof. The Secretary has the burden of demonstrating by clear and convincing evidence the validity of a rejection of a final offer in any hearing, appeal or civil action. A decision relating to an appeal within HHS is considered a final agency action if it was made by an administrative judge or by an official of HHS whose position is at a higher level than the level of the departmental agency in which the decision that is the subject of the appeal was made.

(e) Good Faith. The Secretary is required to negotiate in good faith and carry out his discretion under Title V in a manner that maximizes the implementation of self-governance.

(f) Savings. Any savings in the Department's administrative costs that result from the transfer of programs, functions, services, or activities, (or portions thereof) to Indian tribes in self-governance agreements that are not otherwise transferred to Indian tribes under Title V must be made available to Indian tribes for inclusion in their Compacts or funding agreements. We have consistently indicated that self governance should achieve reductions in federal bureaucracy and create resultant cost savings. This subsection makes clear that such savings are for the benefit of the Indian tribes. Savings are not to be utilized for other agency purposes, but rather are to be provided as additional funds or services to all tribes, inter-tribal consortia, and tribal organizations in a fair and equitable manner.

(g) Trust Responsibility. The Secretary is prohibited from waiving, modifying or diminishing the trust responsibilities or other responsibilities as reflected in treaties, executive orders or other laws and court decisions of the United States to Indian tribes and individual Indians. The Committee reaffirms that the protection of the federal trust responsibility to Indian tribes and individuals is a key element of self-governance. The ultimate and legal responsibility for the management and preservation of trust resources resides with the United States as Trustee. The Committee believes that health care is a trust resource consistent with federal court decisions. This subsection continues the practice of permitting substantial tribal management of its trust resources provided that tribal activities do not replace the trustee's specific legal responsibilities. Section 506(a)(2) (reassumption) with its concept of imminent endangerment of the public health provides guidance in defining the Secretary's trust obligation in the health context.

(h) Decisionmaker. Final agency action is a decision by either an official from the Department at any higher organizational level than the initial decision maker or an administrative law judge. Subparagraph (h)(2) is included to assure that the persons deciding an administrative appeal are not the same individuals who made the initial decision to reject a tribe's "final offer."

Section 508. Transfer of funds

(a) In General. The Secretary is required to transfer all funds provided for in a funding agreement, pursuant to Section 508(c) below. Funds are also required to be provided for periods covered by continuing resolutions adopted by Congress, to the extent permitted by such resolutions. When a funding agreement requires that funds be transferred at the beginning of the fiscal year, the transfer are to be made within 10 days after the Office of Management and Budget apportions the funds, unless the funding agreement states otherwise.

(b) Multi-Year Funding. The Secretary is authorized to negotiate multi-year funding agreements.

(c) Amount of Funding. The Secretary is required to provide an Indian tribe the same funding for a program, function, service, or activity, (or portion thereof) under self-governance that the tribe would have received under Title I. This includes all Secretarial resources that support the transferred program, and all contract support costs (including indirect costs) that are not available from the Secretary but are reasonably necessary to operate the program. The bill requires that the transfer of funds occur along with the transfer of the program. Thus the bill states that "the Secretary shall provide" the funds specified, and the Secretary is not authorized to phase-in funds in any manner that is not voluntarily agreed to by self-governance tribe.

(d) Prohibition. The Secretary is specifically prohibited from withholding, refusing to transfer or reducing any portion of an Indian tribe's full share of funds during a Compact or funding agreement year, or for a period of years. The Committee is aware that for the first 21 years of administration of the Indian Self-Determination and Education Assistance Act, the Department had never taken the position that it has the discretion to delay funding for any program transferred under the Act absent tribal consent. However, a 1996 IHS circular purported to do just that. Since this circular was issued, several area offices have refused to turn over substantial program funds to tribal operation. In one instance both an area office and headquarters refused to transfer portions of programs for several years, and with respect to several headquarters functions the IHS refused to transfer the functions altogether. A recent Oregon federal district court decision declared IHS's actions in these instances illegal and the Committee agrees.

Additionally, funds that an Indian tribe is entitled to receive may not be reduced to make funds available to the Secretary for monitoring or administration; may not be used to pay for federal functions (such as pay costs or retirement benefits), and may not be used to pay costs associated with federal personnel displaced by self-governance or Title I contracting.

In subsequent years, funds may only be reduced in very limited circumstances: if Congress reduces the amount available from the prior year's appropriation; if there is a directive in the statement of managers which accompanies an appropriation; if the Indian tribe agrees; if there is a change in the amount of pass-through funds; or if the project contained in the funding agreement has been completed.

(e) Other Resources. If an Indian tribe elects to carry out a Compact or funding agreement using federal personnel, supplies, supply sources or other resources that the Secretary has available under procurement contracts, the Secretary is required to acquire and transfer the personnel, supplies or resources to the Indian tribe.

(f) Reimbursement to Indian Health Service. The IHS is authorized on a reimbursable basis to provide goods and services to tribes. Reimbursements are to be credited to the same or subsequent appropriation account which provided the initial funding. The Secretary is authorized to receive and retain the reimbursed amounts until expended without remitting them to the Treasury.

(g) Prompt Payment Act. This section makes the Prompt Payment Act (31 U.S.C. Chapter 39) applicable to the transfer of all funds due to a tribe under a Compact or funding agreement. The first annual or semi-annual transfer due under a funding agreement must be made within 10 calendar days of the date the Office of Management and Budget apportions the appropriations for that fiscal year. Under this section, the Secretary is obligated to pay to a self-governance tribe interest, as calculated under the Prompt Payment Act, for any late payment under a funding agreement.

(h) Interest or Other Income on Transfers. An Indian tribe may retain interest earned or other income on funds transferred under a Compact or funding agreement. Interest earned must not reduce the amount of funds the tribe is entitled to receive during the year the interest was earned or in subsequent years. An Indian tribe may invest funds received in a funding agreement as it wishes, provided it follows the "prudent investment standard."

(i) Carryover of Funds. All funds paid to an Indian tribe under a Compact or funding agreement are "no year" funds and may be spent in the year they are received or in any future fiscal year. Carryover funds are not to reduce the amount of funds that the tribe may receive in subsequent years.

(j) Program Income. All program income (including Medicare/Medicaid) earned by an Indian tribe is supplemental to the funding that is included in its funding agreement. The Secretary may not reduce the amount of funds that the Indian tribe may receive under its funding agreement for future fiscal years. The Indian tribe may retain such income and spend it either in the current or future years.

(k) Limitation of Costs. An Indian tribe is not required to continue performance of a program, function, service, or activity (or portion thereof) included in a funding agreement if doing so requires more funds than were provided under the funding agreement. If an Indian tribe believes that the amount of funds transferred is not enough to carry out a program, function, service, or activity (or portion thereof) for the full year, the Indian tribe may so notify the Secretary. If the Secretary does not supply additional funds the tribe may suspend performance of the program, function, service, or activity (or portion thereof) until additional funds are provided.

Section 509. Construction projects

(a) In General. Indian tribes are authorized to conduct construction projects authorized under this section. The tribes are to as-

sume full responsibility for the projects, including responsibility for enforcement and compliance with all relevant federal laws, including the National Historic Preservation Act of 1966 and the National Environmental Policy Act of 1969.

The Committee intends to allow tribes to include the maximum available project responsibilities, including environmental compliance responsibilities and associated funding in their construction project agreements. However, the Committee recognizes that due to individual circumstances, this may not always be possible. The Committee intends that tribes may "buy back" project related services in their construction project agreement, including design and construction engineering and environmental compliance services from the IHS in accordance with Section 508(f), subject to the availability of the IHS' capacity to conduct the work.

(b) Negotiations. Negotiation of construction projects are negotiated pursuant to Section 105(m) of the Indian Self-Determination and Education Assistance Act and construction project agreements included in the funding agreement as an addendum.

(c) Codes and Standards. Tribes and the IHS will agree to standards and codes for the construction project. The agreement will be in conformity with nationally accepted standards for comparable projects.

(d) Responsibility for Completion. Payments for construction projects will be on an annual or semi-annual basis, at the option of the tribe. Flexibility in payment schedules will be maintained by the IHS through contingency funds to take account of exigent circumstances such as weather and supply.

(e) Funding. The reporting requirements in this section are not to be read as requiring any more than the tribe sharing with the Secretary such information as is otherwise required to be compiled under the normal and customary course of a construction project under the standards prescribed in Section 509(c). Further, this section does not provide for nor contemplate any additional administrative or financial reporting or record-keeping requirements on a tribe beyond the standards otherwise applicable under this Title.

(f) Approval. This section provides the Secretary at least one opportunity to approve project planning and design documents prepared by an Indian tribe. The tribe shall also provide the Secretary with project progress and financial reports as specified. The Secretary may conduct on-site project oversight visits as specified.

(g) Wages. This section sets forth the standards for wages paid in connection with the projects funded under this section.

(h) Application of Other Laws. This section clarifies the application of certain other federal laws and regulations to Indian tribes under Title V.

Section 510. Federal procurement laws and program regulations.

Unless otherwise agreed to by the parties, Compacts and funding agreements are not subject to federal contracting or cooperative agreement laws and regulations (including executive orders) unless those laws expressly apply to Indian tribes. Compacts and funding agreements are also not subject to program regulations that apply to the Secretary's operations.

Section 511. Civil actions

The Committee intends that Section 110 the Indian Self-Determination and Education Assistance Act, which provides tribes access to Federal District Court to challenge a decision by the Secretary, shall apply to compacts and funding agreements in this Title.

Section 512. Facilitation

(a) Secretarial Interpretation. This section requires the Secretary to interpret all executive orders, regulations and federal laws in a manner that will facilitate the inclusion of programs, functions, services, or activities (or portions thereof) and funds associated therewith under Title V, implementation of Title V Compacts and funding agreements, and the achievement of tribal health goals and objectives where they are not inconsistent with federal law. This section reinforces the Secretary's obligation not merely to provide health care services to Native American tribes, but to facilitate the efforts of tribes to manage those programs for the maximum benefit of their communities.

(b) Regulation Waiver. An Indian tribe may seek a waiver of any applicable federal regulation issued under the Indian Self-Determination and Education Assistance Act, as amended, by submitting a written waiver request to the Secretary. The Secretary has 90 days to respond and a failure to act within that period is deemed an approval of the request by operation of law. Action on a waiver request is final for the Department. Denials may only be made on a specific finding that the waiver is prohibited by federal law. No action within the 90 day period by the Secretary is deemed an approval. Although the waiver procedures do not apply to other departmental regulations, this section makes clear that tribes are not subject to departmental program regulations that govern how the Department administers a particular program. Rather, tribes are expected to carry out transferred health care programs pursuant to tribal rules and regulations. The only exception is where a particular program requirement is set forth in statute, in which case a tribe must comply with the statutory limitation or mandate.

(c) Access to Federal Property. This subsection addresses tribal use of federal buildings, hospitals and other facilities, as well as the transfer to tribes of title to excess personal or real property. At the request of an Indian tribe the Secretary is required to permit the Indian tribe to use government-owned real or personal property under the Secretary's jurisdiction under such terms as the parties may agree to.

The Secretary is required to donate title to personal or real property that is excess to the needs of any agency or the General Services Administration as long as the Secretary has determined that the property is appropriate for any purpose for which a compact is authorized, irrespective of whether a tribe is in fact administering a particular program that matches that purpose. For instance, if a tribe is not administering a mental health program under its IHS compact or funding agreement, the Secretary may nonetheless acquire excess or surplus property and donate such property to the tribe so long as the Secretary determines that the tribe will be using the property to administer mental health services.

Title to property furnished by the government or purchased with funds received under a Compact or funding agreement vests in the Indian tribe if it so chooses. Such property also remains eligible for replacement, maintenance or improvement on the same terms as if the United States had title to it. Any property that is worth $5,000 or more at the time of a retrocession, withdrawal or reassumption may revert back to the United States at the option of the Secretary.

(d) Matching or Cost-Participation Requirement. Funds transferred under Compacts and funding agreements are to be considered non-federal funds for purposes of meeting matching or cost participation requirements under federal or non-federal programs.

(e) State Facilitation. This section encourages and authorizes States to enter agreements with tribes supplementing and facilitating Title V and other federal laws that benefit Indians and Indian tribes, e.g., Welfare Reform. It is designed to provide federal authority so as to remove potential equal protection objections where states enter into special arrangements with tribes.

The Committee wants to foster enlightened and productive partnerships between State and local governments, on the one hand, and Indian tribes on the other; and, the Committee wants to be sure that States are authorized by the federal government to undertake such initiatives, as part of the federal government's constitutional authority to deal with Indian tribes as political entities, irrespective of any limitations which have from time to time been argued might otherwise exist with respect to State action under either State constitutional provisions or other provisions of the Constitution. Many State and tribal governments have undertaken positive initiatives both in health care issues and in natural resource management, and it is the Committee's strong desire to fully support, authorize and encourage such cooperative efforts.

(f) Rules of Construction. Provisions in this Title and in Compacts and funding agreements shall be liberally construed and ambiguities decided for the benefit of the Indian tribe participating in the program.

Section 513. Budget request

(a) In General. The President is required to annually identify in his/her budget all funds needed to fully fund all Title V Compacts and funding agreements. These funds are to be apportioned to the IHS Office of Tribal Self-Governance. The IHS may not thereafter reduce the funds a tribe is otherwise entitled to receive whether or not such funds have been apportioned to the Office of Tribal Self-Governance.

The Committee has been made aware that the current system for payment and approval of funding and amendments for annual funding agreements for self-governance demonstration tribes is inefficient and time consuming. In addition, by leaving authority and responsibility for distributions to area offices, there have been reported instances of excessive and unwarranted assertion of authority by area offices over self governance tribes. This includes area offices retaining shares of funds not authorized to be retained by the tribe's annual funding agreement. The Committee concludes that by requiring a report on self-governance expenditures, and by

moving all self-governance funding onto a single line, the Congress will be able to achieve the following ends: more accurately gauge the amount of funding flowing directly to tribes through participation in self governance; generate savings through decreasing the bureaucratic burden on the payment and approval process in the IHS; expedite the transferal of funding to tribal operating units; and aid in the implementation of true government to government relations and tribal self determination.

(b) Present Funding; Shortfalls. The budget must identify the present level of need and any shortfalls in funding for every Indian tribe in the United States that receives services directly from the Secretary, through a Title I contract or in a Title V Compact and funding agreement.

Section 514. Reports

(a) Annual Report. The Secretary is required to submit to Congress on January 1 of every year a written report on the Self-Governance program. The report is to include the level of need presently funded or unfunded for every Indian tribe in the United States that receives services directly from the Secretary, through a Title I contract or in a Title V Compact and funding agreement.

(b) Contents. The Secretary's report must identify: the costs and benefits of self-governance; all funds related to the Secretary's provision of services and benefits to self-governance tribes and their members; all funds transferred to self-governance tribes and the corresponding reduction in the federal bureaucracy; the funding formula for individual tribal shares; and the amount expended by the Secretary during the preceding fiscal year to carry out inherent federal functions.

The Secretary's report must, at the request of any Indian tribe, include comments from the tribe. The report must be distributed to all Indian tribes for comment no less than 30 days prior to its submission to Congress. Finally, the Secretary may not impose reporting requirements on Indian tribes unless specified in Title V.

(c) Report on Fund Distribution Method. This section requires the Secretary to consult with Indian tribes and report, within 180 days after Title V is enacted, on funding formulae used to determine tribal shares of funds controlled by IHS. The formulae are to become a part of the annual report to Congress discussed above in Section 514(a). This provision is not intended to relieve HHS from its obligation under Title V to make all funds controlled by the central office, national, headquarters or regional offices available to Indian tribes. This provision is also not intended to require reopening funding formulae that are already being used by HHS to distribute funds to Indian tribes. Any new formulae or revision of existing formulae should be determined only after significant regional and national tribal consultation.

Section 515. Disclaimers

(a) No Funding Reduction. This provision states that nothing in Title V shall be interpreted to limit or reduce the funding for any program, project or activity that any other Indian tribe may receive under Title I or other applicable federal laws. A tribe that alleges that a Compact or funding agreement violates this section may rely

on Section 110 of the Indian Self-Determination and Education Assistance Act to seek judicial review of the allegation.

(b) Federal Trust and Treaty Responsibilities. This section clarifies that the trust responsibility of the United States to Indian tribes and individual Indians which exists under treaties, Executive Orders, laws and court decisions shall not be reduced by any provision of Title V.

(c) Tribal Employment. This provision excludes Indian tribes carrying out responsibilities under a Compact or funding agreement from falling under the definition of "employer" as that term is used in the National Labor Regulations Act.

(d) Obligations of the United States. The IHS is prohibited from billing, or requiring Indian tribes from billing, individual Indians who have the economic means to pay for services. For many years the Interior and Related Agencies Appropriations Bills included language that prohibited the IHS, without explicit direction from Congress, from billing or charging Indians who have the economic means to pay. In 1997 the language was removed from the appropriation laws and it has not been included since. This section reflects the Committee's intent that the IHS is prohibited from billing Indians for services, and is further prohibited from requiring any Indian tribe to do so.

Section 516. Application of other sections of the act

(a) Mandatory Application. This section incorporates a number of sections from Title I of the Indian Self-Determination and Education Assistance Act and makes them applicable to Title V. These sections include: 6 (setting out penalties that apply if an individual embezzles or otherwise misappropriates funds under Title V); 7 (Davis-Bacon wage and labor standards and Indian preference requirements); 102(c)–(d) (relating to Federal Tort Claims Act coverage); 104 (relating to the right to use federal personnel to carry out responsibilities in a Compact or funding agreement); 105(k) (access to federal supplies); 111 (clarifying that Title V shall have no impact on existing sovereign immunity and the United States' trust responsibility); and section 314 from Public Law 101–512, as amended (relating to Federal Tort Claims Act coverage).

(b) Discretionary Application. At the request of an Indian tribe, other provisions of Title I of the Indian Self-Determination and Education Assistance Act which do not conflict with provisions in Title V may be incorporated into a Compact or funding agreement. If incorporation is requested during negotiations it will be considered effective immediately.

Section 517. Regulations

This section gives the Secretary limited authority to promulgate regulations implementing Title V.

(a) In General. The Secretary is required to initiate procedures to negotiate and promulgate regulations necessary to carry out Title V within 90 days of enactment of Title V. The procedures must be developed under the Federal Advisory Committee Act. The Secretary is required to publish proposed regulations no later than one year after the date of enactment of Title V. The authority to promulgate final regulations under Title V expires 21 months after

enactment. The Committee is aware of the success of the Title I negotiated rulemaking and believes that one reason for its success is a similar limitation of rulemaking authority contained in section 1070(a) of the Indian Self-Determination Act, which this section is modeled after.

(b) Committee. This provision requires that a negotiated rulemaking committee made up of federal and tribal government members be formed in accordance with the Negotiated Rulemaking Act. A majority of the tribal committee members must be representatives of and must have been nominated by Indian tribes with Title V Compacts and funding agreements. The committee will confer with and allow representatives of Indian tribes, inter-tribal consortiums, tribal organizations and individual tribal members to actively participate in the rulemaking process.

(c) Adaptation of Procedures. The negotiated rulemaking procedures may be modified by the Secretary to ensure that the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes is accommodated.

(d) Effect. The effect of Title V shall not be limited if regulations are not published.

(e) Effect of Circulars, Policies, Manuals, Guidances and Rules. Unless an Indian tribe agrees otherwise in a Compact or funding agreement, no agency circulars, policies, manuals, guidances or rules adopted by the IHS apply to the tribe, except as specified.

Section 518. Appeals

In any appeal (including civil actions) involving a decision by the Secretary under Title V, the Secretary carries the burden of proof. To satisfy this burden the Secretary must establish by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of Title V.

Section 519. Authorization of appropriations

This section authorizes Congress to appropriate such funds as are necessary to carry out Title V.

TITLE VI—TRIBAL SELF-GOVERNANCE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

This new Title to sets out the requirements of a feasibility study in the Department of Health and Human Services.

Section 601. Demonstration project feasibility

This section requires the Secretary to conduct a feasibility study to determine whether non-IHS programs in HHS are appropriate for a tribal self-governance demonstration project. The Secretary shall consider the probable effects on specific programs and beneficiaries; statutory or other impediments; costs and/or savings; assurance of quality in such a demonstration project; and other issues. The Secretary's report is required no later than 18 months from the enactment of this Act.

Section 602. Consultation

This section requires the Secretary to consult with Indian tribes to develop a consultation protocol. The government-to-government relationship between the tribes and the federal government will be an important part of the protocol. Consultation will be conducted jointly by the Secretary and the tribes. States, counties, municipalities, program beneficiaries and Indian tribes will be part of the consultation process.

Section 603. Definitions

This section provides definitions used under this new Title which are to be the same as those under Title V, except the definition of "agency" which means a unit of HHS other than IHS.

Section 604. Authorization of appropriations

This section authorizes such sums as may be necessary to carry out the feasibility study.

Section 5. Amendments clarifying civil proceedings

(a) Burden of Proof to District Court Actions. This provision amends Section 102(e)(1) of the Indian Self-Determination and Education Assistance Act to clarify that the Secretary has the burden of proof in any civil action pursuant to Section 110(a).

Earlier versions of this legislation stated a confirmation that the district courts were able to conduct a de novo review of claims arising under section 110 of the Indian Self-Determination and Education Assistance Act. Section 110 provides tribes and tribal contractors with the right to pursue civil claims over tribal contracts, compacts, and funding agreements in the federal district courts. Congress provided tribes with this relief to assure that tribes had a strong, effective, and immediate means to obtain agency compliance with the Act's requirements. The federal courts, however, have given opposing interpretations over whether this section vests courts with de novo review authority. Legislative history arising under the 1994 Indian Self-Determination Act Amendments indicates that this section gave district courts original jurisdiction over any civil action or claim against the appropriate Secretary, without prior exhaustion of an administrative remedy. As noted at the time, this direct access to the district court was required to assure a strong, effective, and immediate means to obtain agency compliance with the Act's contracting requirements. Since the amendment, at least two district court have declined to afford tribal contractors the intended de novo review and full discovery on their claims, effectively requiring tribal plaintiffs to go through an administrative appeal first to obtain discovery from the agency. This result is contrary to the clear purpose of the 1994 amendments, and defeats the broad self-determination and contracting policies underlying the Act. To cure confirmed agency inclinations to block, delay, or minimize tribal contracting and funding, it is essential for the district courts to actively adjudicate de novo contracting and funding issues based on full discovery regarding agency budget and accounting practices, program and staffing decisions, and assertions of non-contractibility. Because the Act requires the agencies to divest themselves of programs, staff, and funding at tribal re-

quest, the courts should not give Administrative Procedure Act-type deference to agency decisionmaking.

The Committee's elimination of the de novo clarifying provision from this bill is not intended in any way to send a signal to the courts or the Administration that de novo review was not intended in the first place. Rather, elimination of this provision is simply intended to let litigation between the tribes and the Administration continue on, and for the courts to ultimately decide this matter against the background of the clear legislative history of the 1994 amendments.

(b) Effective Date. The provisions of subsection (a) shall apply to any proceeding commenced after October 25, 1994.

Section 6. Speedy acquisition of goods and services

This section requires the Secretary to enter into agreements for acquisition of goods and services for tribes, including pharmaceuticals at the best price and in as fast a manner as is possible, similar to those obtained by agreement by the Veterans Administration.

Section 7. Patent records

Patent records may be deemed to be federal records for storage purposes by the Federal Records Center.

Section 8. Repeal

This section repeals Title III of the Indian Self-Determination and Education Assistance Act effective on the date of enactment.

Section 9. Savings provisions

Funds appropriated under Title III shall be available for use under Title V.

Section 10. Effective date

This section provides that the provisions of H.R. 1167 shall take effect on the date of the enactment, except as otherwise provided.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact H.R. 1167.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill pre-

pared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. Government Reform Oversight Findings. Under clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform on this bill.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 27, 1999.

Hon. DON YOUNG,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1167, the Tribal Self-Governance Amendments of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dorothy Rosenbaum.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 1167—Tribal Self-Governance Amendments of 1999

CBO estimates that H.R. 1167 would increase authorizations of appropriations by less than $500,000 in each of fiscal years 2000 through 2004. Because enacting the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. The legislation contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

H.R. 1167 would amend the Indian Self-Determination and Education Assistance Act to establish a permanent tribal self-governance program with the Indian Health Service (IHS). Under existing demonstration authority, the IHS and tribes enter into funding agreements whereby a tribe assumes administrative and programmatic duties that were previously performed by the federal government. Because the current demonstration authority does not end until 2006, and because the provisions of the new permanent program would not be significantly different from current law, CBO estimates that establishing a permanent program would have no federal budgetary impact over fiscal years 1999 to 2004. Under the existing demonstration program, IHS may select 30 new tribes

each year to participate. Under the bill, the number would be raised to 50. Because in recent years fewer than 10 new tribes each year have become eligible to participate, CBO assumes that this change in law would have no effect.

H.R. 1167 would authorize appropriations for fiscal years 2000 and 2001 for the IHS to conduct a study and report to Congress on the feasibility of a demonstration project that would expand self-governance compacts to include programs operated by agencies of the Department of Health and Human Services other than the IHS. CBO estimates that this study would cost less than $250,000.

H.R. 1167 would allow Indian tribes to store their patient records at Federal Records Centers. CBO assumes that very few tribes would take advantage of this option and that increased costs to the Federal Records Centers would be less than $500,000 in each of fiscal years 2000 through 2004.

The CBO staff contact for this estimate is Dorothy Rosenbaum. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

* * * * * * *

TITLE I—INDIAN SELF-DETERMINATION ACT

* * * * * * *

SEC. 102. (a)(1) * * *

* * * * * * *

(e)(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) *or any civil action conducted pursuant to section 110(a)*, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

* * * * * * *

SEC. 105. (a)(1) * * *

* * * * * * *

(k) For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and

other transportation providers), a tribal organization [carrying out a contract, grant, or cooperative agreement under this Act shall be deemed an executive agency when carrying out such contract, grant, or agreement and the employees of the tribal organization shall be eligible] *or Indian tribe shall be deemed an executive agency and a part of the Indian Health Service, and the employees of the tribal organization or the Indian tribe, as the case may be, shall be eligible* to have access to such sources of supply on the same basis as employees of an executive agency have such access. *At the request of an Indian tribe, the Secretary shall enter into an agreement for the acquisition, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or any other Federal law, including acquisitions from prime vendors. All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements.*

* * * * * * *

(o) At the option of a tribe or tribal organization, patient records may be deemed to be Federal records under the Federal Records Act of 1950 for the limited purposes of making such records eligible for storage by Federal Records Centers to the same extent and in the same manner as other Department of Health and Human Services patient records. Patient records that are deemed to be Federal records under the Federal Records Act of 1950 pursuant to this subsection shall not be considered Federal records for the purposes of chapter 5 of title 5, United States Code.

* * * * * * *

[TITLE III—TRIBAL SELF-GOVERNANCE DEMONSTRATION PROJECT

[SEC. 301. The Secretary of the Interior and the Secretary of Health and Human Services (hereafter in this title referred to as the "Secretaries") each shall, for a period not to exceed 18 years following enactment of this title, conduct a research and demonstration project to be known as the Tribal Self-Governance Project according to the provisions of this title.

[SEC. 302. (a) For each fiscal year, the Secretaries shall select thirty tribes to participate in the demonstration project, as follows:

[(1) a tribe that successfully completes a Self-Governance Planning Grant, authorized by Conference Report 100–498 to accompany H.J. Res. 395, One Hundredth Congress, first session shall be selected to participate in the demonstration project; and

[(2) the Secretaries shall select, in such a manner as to achieve geographic representation, the remaining tribal participants from the pool of qualified applicants. In order to be in the pool of qualified applicants—

[(A) the governing body of the tribe shall request participation in the demonstration project;

[(B) such tribe shall have operated two or more mature contracts; and

[(C) such tribe shall have demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by such tribe having no significant and material audit exceptions in the required annual audit of such tribe's self-determination contracts.

[SEC. 303. (a) The Secretaries is directed to negotiate, and to enter into, an annual written funding agreement with the governing body of a participating tribal government that successfully completes its Self-Governance Planning Grant. Such annual written funding agreement—

[(1) shall authorize the tribe to plan, conduct, consolidate, and administer programs, services and functions of the Department of the Interior and the Indian Health Service of the Department of Health and Human Services that are otherwise available to Indian tribes or Indians, including but not limited to, the Act of April 16, 1934 (48 Stat. 596), as amended, and the Act of November 2, 1921 (42 Stat. 208);

[(2) subject to the terms of the written agreement authorized by this title, shall authorize the tribe to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions or services;

[(3) shall not include funds provided pursuant to the Tribally Controlled Community College Assistance Act (Public Law 95–471), for elementary and secondary schools under the Indian School Equalization Formula pursuant to title XI of the Education Amendments of 1978 (Public Law 95–561, as amended), or for either the Flathead Agency Irrigation Division or the Flathead Agency Power Division: *Provided,* That nothing in this section shall affect the contractability of such divisions under section 102 of this Act;

[(4) shall specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretaries pursuant to this agreement;

[(5) shall specify the authority of the tribe and the Secretaries, and the procedures to be used, to reallocate funds or modify budget allocations within any project year;

[(6) shall, except as provided in paragraphs (1) and (2), provide for payment by the Secretaries to the tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs and indirect costs, and for any funds which are specifically related to the provision by the Secretaries of services and benefits to the tribe and its members: *Provided, however,* That funds for trust services to individual Indians are available under this written agreement only to the extent that the same services which would have been provided by the Secretaries are provided to individual Indians by the tribe;

[(7) shall not allow the Secretaries to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exists under treaties, Executive orders, and Acts of Congress;

[(8) shall allow for retrocession of programs or portions thereof pursuant to section 105(e) of this Act; and

[(9) shall be submitted by the Secretaries ninety days in advance of the proposed effective date of the agreement to each tribe which is served by the agency which is serving the tribe which is a party to the funding agreement and to the Congress for review by the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives.

[(b) For the year for which, and to the extent to which, funding is provided to a tribe pursuant to this title, such tribe—

[(1) shall not be entitled to contract with the Secretaries for such funds under section 102, except that such tribe shall be eligible for new programs on the same basis as other tribes; and

[(2) shall be responsible for the administration of programs, services and activities pursuant to agreements under this title.

[(c) At the request of the governing body of the tribe and under the terms of an agreement pursuant to subsection (a), the Secretaries shall provide funding to such tribe to implement the agreement.

[(d) For the purpose of section 110 of this Act the term "contract" shall also include agreements authorized by this title except that for the term of the authorized agreements under this title, the provisions of 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 attorney and other professional contracts by participating Indian tribal governments operating under the provisions of this title.

[(e) To the extent feasible, the Secretaries shall interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title.

[(f) To the extent feasible, the Secretaries shall interpret Federal laws and regulations in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements authorized by this title.

[SEC. 304. The Secretaries shall identify, in the President's annual budget request to the Congress, any funds proposed to be included in the Tribal Self-Governance Project. The use of funds pursuant to this title shall be subject to specific directives or limitations as may be included in applicable appropriations Acts.

[SEC. 305. The Secretaries shall submit to the Congress a written report on July 1 and January 1 of each of the five years following the date of enactment of this title on the relative costs and benefits of the Tribal Self-Governance Project. Such report shall be based on mutually determined baseline measurements jointly developed by the Secretaries and participating tribes, and shall separately include the views of the tribes.

[SEC. 306. Nothing in this title 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 102 or any other applicable Federal law and the provisions of section 110 of this Act shall be available to any tribe or Indian organi-

zation which alleges that a funding agreement is in violation of this section.

[SEC. 307. For the purpose of providing planning and negotiation grants to the ten tribes added by section 3 of the Tribal Self-Governance Demonstration Project Act to the number of tribes set forth by section 302 of this Act (as in effect before the date of enactment of this section), there is authorized to be appropriated $700,000.

[SEC. 308. (a) The Secretary of Health and Human Services, in consultation with the Secretary of the Interior and Indian tribal governments participating in the demonstration project under this title, shall conduct a study for the purpose of determining the feasibility of extending the demonstration project under this title to the activities, programs, functions, and services of the Indian Health Service. The Secretary shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act.

[(b) The Secretary of Health and Human Services may establish within the Indian Health Service an office of self-governance to be responsible for coordinating the activities necessary to carry out the study required under subsection (a).

[SEC. 309. The Secretary of the Interior shall conduct a study for the purpose of determining the feasibility of including in the demonstration project under this title those programs and activities excluded under section 303(a)(3). The Secretary of the Interior shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act.

[SEC. 310. For the purposes of providing one year planning and negotiations grants to the Indian tribes identified by section 302, with respect to the programs, activities, functions, or services of the Indian Health Service, there are authorized to be appropriated such sums as may be necessary to carry out such purposes. Upon completion of an authorized planning activity or a comparable planning activity by a tribe, the Secretary is authorized to negotiate and implement a Compact of Self-Governance and Annual Funding Agreement with such tribe.]

* * * * * * *

TITLE V—TRIBAL SELF-GOVERNANCE

SEC. 501. ESTABLISHMENT.

The Secretary of Health and Human Services shall establish and carry out a program within the Indian Health Service of the Department of Health and Human Services to be known as the "Tribal Self-Governance Program" in accordance with this title.

SEC. 502. DEFINITIONS.

(a) IN GENERAL.—For purposes of this title—

(1) the term "construction project" means an organized noncontinuous 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. The term "construction project" does not mean construction program administration and activities described in paragraphs (1) through (3) of section 4(m), which may otherwise be included in a funding agreement under this title;

(2) the term "construction project agreement" means a negotiated agreement between the Secretary and an Indian tribe which at a minimum—

(A) establishes project phase start and completion dates;

(B) defines a specific scope of work and standards by which it will be accomplished;

(C) identifies the responsibilities of the Indian tribe and the Secretary;

(D) addresses environmental considerations;

(E) identifies the owner and operations/maintenance entity of the proposed work;

(F) provides a budget;

(G) provides a payment process; and

(H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years;

(3) the term "inherent Federal functions" means those Federal functions which cannot legally be delegated to Indian tribes;

(4) 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, but not limited to, a tribal organization;

(5) the term "gross mismanagement" means a significant, clear, and convincing violation of compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to a 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;

(6) the term "tribal shares" 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;

(7) the term "Secretary" means the Secretary of Health and Human Services; and

(8) the term "self-governance" means the program established pursuant to section 501.

(b) INDIAN TRIBE.—Where 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 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 or in this title). In such event, the term "Indian tribe" as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

SEC. 503. SELECTION OF PARTICIPATING INDIAN TRIBES.

(a) CONTINUING PARTICIPATION.—Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title may elect to participate in self-governance under this title under existing authority as reflected in tribal resolutions.

(b) ADDITIONAL PARTICIPANTS.—

(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.

(2)(A) 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 Indian tribe meets the eligibility criteria specified in subsection (c).

(B) If an Indian tribe has withdrawn from participation in an inter-tribal consortium or tribal organization, it shall be entitled to its tribal share of funds supporting those programs, services, functions, and activities (or portions thereof) that it will be carrying out under its compact and funding agreement.

(C) 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.

(c) APPLICANT POOL.—The qualified applicant pool for self-governance shall consist of each Indian tribe that—

(1) successfully completes the planning phase described in subsection (d);

(2) has requested participation in self-governance by resolution or other official action by the governing body (or bodies) of the Indian tribe or tribes to be served; and

(3) has demonstrated, for the previous 3 fiscal years, financial stability and financial management capability.

Evidence that during such years the 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 shall be conclusive evidence of the required stability and capability for the purposes of this subsection.

(d) PLANNING PHASE.—Each Indian tribe seeking participation in self-governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian tribe and shall include—

(1) legal and budgetary research; and

(2) internal tribal government planning and organizational preparation relating to the administration of health care programs.

(e) GRANTS.—Subject to the availability of appropriations, any Indian tribe meeting the requirements of paragraphs (2) and (3) of subsection (c) shall be eligible for grants—

(1) to plan for participation in self-governance; and

(2) to negotiate the terms of participation by the Indian tribe or tribal organization in self-governance, as set forth in a compact and a funding agreement.

(f) RECEIPT OF GRANT NOT REQUIRED.—Receipt of a grant under subsection (e) shall not be a requirement of participation in self-governance.

SEC. 504. COMPACTS.

(a) COMPACT REQUIRED.—The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) CONTENTS.—Each compact required under subsection (a) 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.

(c) EXISTING COMPACTS.—An Indian tribe participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title shall have the option at any time thereafter to—

(1) retain its Tribal Self-Governance Demonstration Project compact (in whole or in part) to the extent the provisions of such compact are not directly contrary to any express provision of this title, or

(2) negotiate in lieu thereof (in whole or in part) a new compact in conformity with this title.

(d) TERM AND EFFECTIVE DATE.—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.

SEC. 505. FUNDING AGREEMENTS.

(a) FUNDING AGREEMENT REQUIRED.—The Secretary shall negotiate and enter into a written funding agreement with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) CONTENTS.—Each funding agreement required 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, including tribal shares of 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. Such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, activities (or portions thereof) where Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and grants (which may be added to a funding agreement after award of such grants) and

all local, field, service unit, area, regional, and central headquarters or national office functions administered under the authority of—

(1) the Act of November 2, 1921 (25 U.S.C. 13);

(2) the Act of April 16, 1934 (25 U.S.C. 452 et seq.);

(3) the Act of August 5, 1954 (68 Stat. 674);

(4) the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.);

(5) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2401 et seq.);

(6) any other Act of Congress authorizing agencies of the Department of Health and Human Services to administer, carry out, or provide financial assistance to such programs, functions, or activities (or portions thereof) described in this section; or

(7) any other Act of Congress authorizing such programs, functions, or activities (or portions thereof) under which appropriations are made to agencies other than agencies within the Department of Health and Human services when the Secretary administers such programs, functions, or activities (or portions thereof).

(c) INCLUSION IN COMPACT OR FUNDING AGREEMENT.—Indian tribes or Indians need not be identified in the authorizing statute for a program or element of a program to be eligible for inclusion in a compact or funding agreement under this title.

(d) FUNDING AGREEMENT TERMS.—Each funding agreement shall set forth terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered, the general budget category assigned, the funds to be provided, including those to be provided on a recurring basis, the time and method of transfer of the funds, the responsibilities of the Secretary, and any other provisions to which the Indian tribe and the Secretary agree.

(e) SUBSEQUENT FUNDING AGREEMENTS.—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.

(f) EXISTING FUNDING AGREEMENTS.—Each Indian tribe participating in the Tribal Self-Governance Demonstration Project established under title III on the date of enactment of this title shall have the option at any time thereafter to—

(1) retain its Tribal Self-Governance Demonstration Project funding agreement (in whole or in part) to the extent the provisions of such funding agreement are not directly contrary to any express provision of this title; or

(2) adopt in lieu thereof (in whole or in part) a new funding agreement in conformity with this title.

(g) STABLE BASE FUNDING.—At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under section 106(a) of the Act) 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-sub activity excluding earmarks.

SEC. 506. GENERAL PROVISIONS.

(a) APPLICABILITY.—The provisions of this section shall apply to compacts and funding agreements negotiated under this title and an Indian tribe may, at its option, include provisions that reflect such requirements in a compact or funding agreement.

(b) CONFLICTS OF INTEREST.—Indian tribes participating in self-governance under this title 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).

(c) AUDITS.—

(1) SINGLE AGENCY AUDIT ACT.—The provisions of chapter 75 of title 31, United States Code, requiring a single agency audit report shall apply to funding agreements under this title.

(2) COST PRINCIPLES.—An Indian tribe shall apply cost principles under the applicable Office of Management and Budget Circular, except as modified by section 106 or other provisions of law, or by any exemptions to applicable Office of Management and Budget Circulars subsequently granted by Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f).

(d) RECORDS.—

(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, United States Code.

(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, United States Code.

(e) REDESIGN AND CONSOLIDATION.—An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 505 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 Federal law.

(f) RETROCESSION.—An Indian tribe may retrocede, fully or partially, to the Secretary programs, services, functions, or activities (or portions thereof) included in the compact or funding agreement. Unless the Indian tribe rescinds the request for retrocession, such ret-

rocession will become effective within the time frame specified by the parties in the compact or funding agreement. In the absence of such a specification, such retrocession shall become effective on—

(1) the earlier of—

(A) one year from the date of submission of such request; or

(B) the date on which the funding agreement expires; or

(2) such date as may be mutually agreed by the Secretary and the Indian tribe.

(g) WITHDRAWAL.—

(1) PROCESS.—An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact or funding agreement. Such withdrawal shall become effective within the time frame specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal shall become effective on—

(A) the earlier of—

(i) one year from the date of submission of such request; or

(ii) the date on which the funding agreement expires; or

(B) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.

(2) DISTRIBUTION OF FUNDS.—When 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 or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activities (or portions thereof) which it 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 in the funding agreement of the inter-tribal consortium or tribal organization), and such funds shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, provided that the provisions of sections 102 and 105(i), as appropriate, shall apply to such withdrawing Indian tribe.

(3) REGAINING MATURE CONTRACT STATUS.—If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) 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.

(h) NONDUPLICATION.—For the period for which, and to the extent to which, funding is provided under this title or under the compact or funding agreement, the Indian tribe shall not be entitled to contract with the Secretary for such funds under section 102, except that such Indian tribe shall be eligible for new programs on the same basis as other Indian tribes.

SEC. 507. PROVISIONS RELATING TO THE SECRETARY.

(a) MANDATORY PROVISIONS.—

(1) HEALTH STATUS REPORTS.—Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision that requires the Indian tribe to report on health status and service delivery—

(A) to the extent such data is not otherwise available to the Secretary and specific funds for this purpose are provided by the Secretary under the funding agreement; and

(B) if such reporting shall impose minimal burdens on the participating Indian tribe and such requirements are promulgated under section 517.

(2) REASSUMPTION—(A) Compacts and 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.

(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.

(C) Notwithstanding subparagraph (B), the Secretary may, upon written notification to the tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding 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. If the Secretary reassumes operation of a program, service, function, or activity (or portion thereof) under this subparagraph, the Secretary shall provide the tribe with a hearing on the record not later than 10 days after such reassumption.

(D) 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 dem-

onstrating by clear and convincing evidence the validity of the grounds for the reassumption.

(b) FINAL OFFER.—In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

(c) REJECTION OF FINAL OFFERS.—If the Secretary rejects an offer made under subsection (b) (or one or more provisions or funding levels in such offer), the Secretary shall provide—

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

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

(B) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(C) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

(D) the tribe is not eligible to participate in self-governance under section 503;

(2) technical assistance to overcome the objections stated in the notification required by paragraph (1);

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

(4) the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions. If an Indian tribe exercises the option specified herein, it shall retain the right to appeal the Secretary's rejection under this section, and paragraphs (1), (2), and (3) shall only apply to that portion of the proposed final compact, funding agreement or provision thereof that was rejected by the Secretary.

(d) BURDEN OF PROOF.—With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b).

(e) GOOD FAITH.—In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this title in a manner that maximizes the policy of tribal self-governance, consistent with section 3.

(f) SAVINGS.—To the extent that programs, functions, services, or activities (or portions thereof) carried out by Indian tribes under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 508(c), the Secretary shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(g) TRUST RESPONSIBILITY.—The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(h) DECISIONMAKER.—A decision that constitutes final agency action and relates to an appeal within the Department of Health and Human Services conducted under subsection (c) shall be made either—

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

(2) by an administrative judge.

SEC. 508. TRANSFER OF FUNDS.

(a) IN GENERAL.—Pursuant to the terms of any compact or funding agreement entered into under this title, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

(b) MULTIYEAR FUNDING.—The Secretary is hereby authorized to employ, upon tribal request, multiyear funding agreements, and references in this title to funding agreements shall include such multiyear agreements.

(c) AMOUNT OF FUNDING.—The Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) and amounts for contract support costs specified under sections 106(a)(2), (a)(3), (a)(5), and (a)(6), including any funds that are spe-

cifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

(d) PROHIBITIONS.—The Secretary is expressly prohibited from—

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

(2) withholding portions of such funds for transfer over a period of years; and

(3) reducing the amount of funds required herein—

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

(B) in subsequent years, except pursuant to—

(i) a reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(ii) a congressional directive in legislation or accompanying report;

(iii) a tribal authorization;

(iv) a change in the amount of pass-through funds subject to the terms of the funding agreement; or

(v) completion of a project, activity, or program for which such funds were provided;

(C) to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this Act; or

(D) to pay for costs of Federal personnel displaced by self-determination contracts under this Act or self-governance;

except that such funds may be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)(2).

(e) OTHER RESOURCES.—In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of interagency motor pool vehicles) or other Federal resources (including supplies, services, and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), the Secretary is authorized to transfer such personnel, supplies, or resources to the Indian tribe.

(f) REIMBURSEMENT TO INDIAN HEALTH SERVICE.—With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service is authorized to provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment, and the reimbursements received therefrom, along with the funds received from the Indian tribe pursuant to this title, may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

(g) PROMPT PAYMENT ACT.—Chapter 39 of title 31, United States Code, shall apply to the transfer of funds due under a compact or funding agreement authorized under this title.

(h) INTEREST OR OTHER INCOME ON TRANSFERS.—An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this Act shall be managed using the prudent investment standard.

(i) CARRYOVER OF FUNDS.—All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from one year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

(j) PROGRAM INCOME.—All medicare, medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement and the Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for medicare and medicaid receipts, and such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

(k) LIMITATION OF COSTS.—An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

SEC. 509. CONSTRUCTION PROJECTS.

(a) IN GENERAL.—Indian tribes participating in tribal self-governance may carry out construction projects under this title if they elect to assume all Federal responsibilities under the National Environmental Policy Act of 1969, the Historic Preservation Act, 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 of the responsible Federal official under such environmental laws.

(b) NEGOTIATIONS.—Construction project proposals shall be negotiated pursuant to the statutory process in section 105(m) and re-

sulting construction project agreements shall be incorporated into funding agreements as addenda.

(c) CODES AND STANDARDS.—The Indian tribe and the Secretary shall agree upon and specify appropriate buildings codes and architectural/engineering standards (including health and safety) which shall be in conformity with nationally recognized standards for comparable projects.

(d) RESPONSIBILITY FOR COMPLETION.—The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the negotiated construction project agreement.

(e) FUNDING.—Funding for construction projects carried out under this title shall be included in funding agreements as annual advance payments, with semiannual payments at the option of the Indian tribe. Annual advance and semiannual payment amounts shall be determined based on mutually agreeable project schedules reflecting work to be accomplished within the advance payment period, work accomplished and funds expended in previous payment periods, and the total prior payments. The Secretary shall include associated project contingency funds with each advance payment installment. The Indian tribe shall be responsible for the management of the contingency funds included in funding agreements.

(f) APPROVAL.—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. The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually. The Secretary may conduct on-site project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

(g) WAGES.—All laborers and mechanics employed by contractors and subcontractors in the construction, alteration, or repair, including painting or decorating of building or other facilities in connection with construction projects undertaken by self-governance Indian tribes under this Act, shall be paid wages at not less than those prevailing wages on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494). With respect to construction, alteration, or repair work to which the Act of March 3, 1921, is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14, of 1950, and section 2 of the Act of June 13, 1934 (48 Stat. 948).

(h) APPLICATION OF OTHER LAWS.—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 title.

SEC. 510. FEDERAL PROCUREMENT LAWS AND REGULATIONS.

Notwithstanding any other provision of law, unless expressly agreed to by the participating Indian tribe, the compacts and fund-

ing agreements entered into under this title shall not be subject to Federal contracting or cooperative agreement laws and regulations (including Executive orders and the regulations relating to procurement issued by the Secretary), except to the extent that such laws expressly apply to Indian tribes.

SEC. 511. CIVIL ACTIONS.

(a) CONTRACT DEFINED.—For the purposes of section 110, the term "contract" shall include compacts and funding agreements entered into under this title.

(b) APPLICABILITY OF CERTAIN LAWS.—Section 2103 of the Revised Statutes of the United States Code (25 U.S.C. 81) and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts entered into by Indian tribes participating in self-governance under this title.

(c) REFERENCES.—All references in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) to section 1 of the Act of June 26, 1936 (25 U.S.C. 81) are hereby deemed to include section 1 of the Act of July 3, 1952 (25 U.S.C. 82a).

SEC. 512. FACILITATION.

(a) SECRETARIAL INTERPRETATION.—Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders and regulations in a manner that will facilitate—

(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section;

(2) the implementation of compacts and funding agreements entered into under this title; and

(3) the achievement of tribal health goals and objectives.

(b) REGULATION WAIVER.—

(1) An Indian tribe may submit a written request to waive application of a regulation promulgated under this Act for a compact or funding agreement entered into with the Indian Health Service under this title, to the Secretary identifying the applicable Federal regulation under this Act 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 under this Act for a compact or funding agreement entered into under this title, 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.

(c) ACCESS TO FEDERAL PROPERTY.—In connection with any compact or funding agreement executed pursuant to this title or an agreement negotiated under the Tribal Self-Governance Demonstration Project established under title III, as in effect before the enactment of the Tribal Self-Governance Amendments of 1999, upon the request of an Indian tribe, the Secretary—

(1) shall permit an Indian tribe to use existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the tribe for their use and maintenance;

(2) may donate to an Indian tribe title to any personal or real property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—

(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;

(B) if property described in subparagraph (A) has a value in excess of $5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Department of Health and Human Services; and

(C) all property referred to in subparagraph (A) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States; and

(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appropriate for use by the Indian tribe for any purpose for which a compact or funding agreement is authorized under this title.

(d) MATCHING OR COST-PARTICIPATION REQUIREMENT.—All funds provided under compacts, funding agreements, or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

(e) STATE FACILITATION.—States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this title and other Federal laws benefiting Indians and Indian tribes.

(f) RULES OF CONSTRUCTION.—Each provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

SEC. 513. BUDGET REQUEST.

(a) IN GENERAL.—The President shall identify in the annual budget request submitted to the Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title, 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 505.

Nothing in this provision 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 made available to the Office of Tribal Self-Governance under this section.

(b) PRESENT FUNDING; SHORTFALLS.—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, under self-determination contracts, or under compacts and funding agreements authorized under this title.

SEC. 514. REPORTS.

(a) ANNUAL REPORT.—Not later than January 1 of each year after the date of the enactment of this title, the Secretary shall submit to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate a written report regarding the administration of this title. Such report shall include a detailed analysis of the level of need being presently funded or unfunded for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this Act. In compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on participating Indian tribes or tribal organizations, not otherwise provided in this Act.

(b) CONTENTS.—The report shall be compiled from information contained in funding agreements, annual audit reports, and Secretarial data regarding the disposition of Federal funds and 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 Indian tribes and their members;

(3) identify the funds transferred to each self-governance Indian tribe and the corresponding reduction in the Federal bureaucracy;

(4) identify the funding formula for individual tribal shares of all headquarters funds, together with the comments of affected Indian tribes or tribal organizations, developed under subsection (c);

(5) identify amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location;

(6) 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;

(7) prior to being submitted to Congress, be distributed to the Indian tribes for comment, such comment period to be for no less than 30 days; and

(8) include the separate views and comments of the Indian tribes or tribal organizations.

(c) REPORT ON FUND DISTRIBUTION METHOD.—Not later than 180 days after the date of enactment of this title, the Secretary shall,

after consultation with Indian tribes, submit a written report to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate which describes the method or methods 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.

SEC. 515. DISCLAIMERS.

(a) NO FUNDING REDUCTION.—Nothing in this title 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 Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 110.

(b) FEDERAL TRUST AND TREATY RESPONSIBILITIES.—Nothing in this Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(c) TRIBAL EMPLOYMENT.—For purposes of section 2(2) of the Act of July 5, 1935 (49 Stat. 450, chapter 372) (commonly known as the National Labor Relations Act), an Indian tribe carrying out a self-determination contract, compact, annual funding agreement, grant, or cooperative agreement under this Act shall not be considered an employer.

(d) OBLIGATIONS OF THE UNITED STATES.—The Indian Health Service under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Indian tribe to do so.

SEC. 516. APPLICATION OF OTHER SECTIONS OF THE ACT.

(a) MANDATORY APPLICATION.—All provisions of sections 5(b), 6, 7, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act and section 314 of Public Law 101–512 (coverage under the Federal Tort Claims Act), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.

(b) DISCRETIONARY APPLICATION.—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 title, shall be made a part of a funding agreement or compact entered into under this title. 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 title. 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.

SEC. 517. REGULATIONS.

(a) IN GENERAL.—

(1) Not later than 90 days after the date of enactment of this title, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and

promulgate such regulations as are necessary to carry out this title.

(2) Proposed regulations to implement this title shall be published in the Federal Register by the Secretary no later than 1 year after the date of enactment of this title.

(3) The authority to promulgate regulations under this title shall expire 21 months after the date of enactment of this title.

(b) COMMITTEE.—A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this Act, and the Committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

(c) ADAPTATION OF PROCEDURES.—The Secretary shall adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes.

(d) EFFECT.—The lack of promulgated regulations shall not limit the effect of this title.

(e) EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, AND RULES.—Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Indian Health Service, except for the eligibility provisions of section 105(g).

SEC. 518. APPEALS.

In any appeal (including civil actions) involving decisions made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—

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

(2) the decision is fully consistent with provisions and policies of this title.

SEC. 519. AUTHORIZATION OF APPROPRIATIONS.

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

TITLE VI—TRIBAL SELF-GOVERNANCE—DEPARTMENT OF HEALTH AND HUMAN SERVICES

SEC. 601. DEMONSTRATION PROJECT FEASIBILITY.

(a) STUDY.—The Secretary shall conduct a study to determine the feasibility a Tribal Self-Governance Demonstration Project for appropriate programs, services, functions, and activities (or portions thereof) of the agency.

(b) CONSIDERATIONS.—When conducting the study, the Secretary shall consider—

(1) the probable effects on specific programs and program beneficiaries of such a demonstration project;

(2) statutory, regulatory, or other impediments to implementation of such a demonstration project;

(3) strategies for implementing such a demonstration project;

(4) probable costs or savings associated with such a demonstration project;

(5) methods to assure quality and accountability in such a demonstration project; and

(6) such other issues that may be determined by the Secretary or developed through consultation pursuant to section 602.

(c) REPORT.—Not later than 18 months after the enactment of this title, the Secretary shall submit a report to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate. The report shall contain—

(1) the results of the study;

(2) a list of programs, services, functions, and activities (or portions thereof) within the agency which it would be feasible to include in a Tribal Self-Governance Demonstration Project;

(3) a list of programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) which could be included in a Tribal Self-Governance Demonstration Project without amending statutes, or waiving regulations that the Secretary may not waive;

(4) a list of legislative actions required in order to include those programs, services, functions, and activities (or portions thereof) included in the list provided pursuant to paragraph (2) but not included in the list provided pursuant to paragraph (3) in a Tribal Self-Governance Demonstration Project; and

(5) any separate views of tribes and other entities consulted pursuant to section 602 related to the information provided pursuant to paragraph (1) through (4).

SEC. 602. CONSULTATION.

(a) STUDY PROTOCOL.—

(1) CONSULTATION WITH INDIAN TRIBES.—The Secretary shall consult with Indian tribes to determine a protocol for consultation under subsection (b) prior to consultation under such subsection with the other entities described in such subsection. The protocol shall require, at a minimum, that—

(A) the government-to-government relationship with Indian tribes forms the basis for the consultation process;

(B) the Indian tribes and the Secretary jointly conduct the consultations required by this section; and

(C) the consultation process allow for separate and direct recommendations from the Indian tribes and other entities described in subsection (b).

(2) OPPORTUNITY FOR PUBLIC COMMENT.—In determining the protocol described in paragraph (1), the Secretary shall publish the proposed protocol and allow a period of not less than 30 days for comment by entities described in subsection (b) and other interested individuals, and shall take comments received into account in determining the final protocol.

(b) CONDUCTING STUDY.—In conducting the study under this title, the Secretary shall consult with Indian tribes, States, counties, municipalities, program beneficiaries, and interested public interest groups, and may consult with other entities as appropriate.

SEC. 603. DEFINITIONS.

(a) IN GENERAL.—For purposes of this title, the Secretary may use definitions provided in title V.

(b) AGENCY.—For purposes of this title, the term "agency" shall mean any agency or other organizational unit of the Department of Health and Human Services, other than the Indian Health Service.

SEC. 604. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for fiscal years 2000 and 2001 such sums as may be necessary to carry out this title. Such sums shall remain available until expended.

ADDITIONAL VIEWS BY HON. GEORGE MILLER

The nature of Self-Governance is rooted in the inherent sovereignty of American Indian and Alaska Native tribes. From the founding of this nation, Indian tribes and Alaska Native villages have been recognized as "distinct, independent, political communities" exercising powers of self-government, not by virtue of any delegation of powers from the federal government, but rather by virtue of their own innate sovereignty. See *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832). See also *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 55 (1978). The tribes' sovereignty predates the founding of the United States and its Constitution and forms the backdrop against which the United States has continually entered into relations with Indian tribes and Native villages.

The present model of tribal Self-Governance arose out of the federal policy of Indian Self-Determination. The modern Self-Determination era began as Congress and contemporary Administrations ended the dubious experiment of Termination which was intended to end the federal trust responsibility to Native Americans.

The centerpiece of the Termination policy, House Concurrent Resolution 108, stated that "Indian Tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians." H. Con. Res. 108, 83rd Cong., 1st Sess. (1953). While the intent of this legislation was to free the Indians from federal rule, it also destroyed all protection and benefits they received from the government. The same year, Congress enacted Public Law 280 which further eroded tribal sovereignty by transferring criminal jurisdiction from the federal government and the tribes to the state governments.

As a policy, Termination was a disaster. Recognizing this, President Kennedy campaigned in 1960 promising the Indian tribes that:

> There would be no change in treaty or contractual relationships without the consent of the tribes concerned. There would be protection of the Indian land base, credit assistance, and encouragement of tribal planning for economic development.

Francis Paul Prucha, The Great Father, 1087 (1984). Reservations were also included in many of the "Great Society" programs of the late 1960s, bringing a much-needed infusion of federal dollars onto many reservations. In 1968, President Lyndon B. Johnson delivered a message to Congress that stressed:

> [A] policy of maximum choice for the American Indian: a policy expressed programs of self-help, self-development, self-determination. * * * The greatest hope for Indian progress lies in the emergence of Indian leadership and

> initiative in solving Indian problems. Indians must have a voice in making the plans and decisions in programs which are important to their daily life.

Message from the President, March 6, 1968, Weekly Compilation of Presidential Documents, vol. IV, No. 10, Wash. D.C., U.S. Gov. Printing Office.

President Richard Nixon's 1970 "Special Message on Indian Affairs" also called for increased tribal self-determination.

> This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. * * *

Special Message to the Congress, Pub. Papers, 564, 567 (1970). Together, these messages sparked Congress to work on legislation that laid the foundation for modern federal Indian policy for the remainder of this century. And so, five years later, Congress enacted one of the most profound and powerful pieces of Indian legislation in this Nation's history.

In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93–638. This legislation gave Indian tribes and Alaska Native villages the right to assume responsibility for the administration of federal programs which benefitted Indians. In addition to assuming the authority to make operating and administrative decisions regarding the way these federal programs would be run, tribe that chose to enter into Indian Self-Determination Act (or "638") contracts were given the right to receive the federal funds that the agencies—generally the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS)—would have ordinarily received for those programs. Unlike former policy, the Indian Self-Determination Act did not relieve the government of their trust responsibilities to the tribes.

Congress enacted the Indian Self-Determination Act believed it that (1) Indian tribes, having greater knowledge about and a greater stake in the outcome of these federal programs, would run BIA and IHS programs better and thus provide better services to their members, (2) the direct responsibility for running these programs would enhance and strengthen tribal governments, and (3) Indian tribes could make more efficient use of federal dollars than the existing federal bureaucracy, thus delivering more services than in the past.

However, Indian Self-Determination Act or "638" contracts required volumes of paperwork to be filed as a means to supervise the tribes' activities. If a tribe wanted to operate more than one program, it would have to exercise an additional 638 contract which required a separate approval process. Though the Act was intended to decrease Federal involvement in the daily lives of reservation Indians, its specific performance and reporting requirements allowed BIA to remain a pervasive force in Indian affairs.

At the time of its enactment, the 638 contract program did not allow tribes to move funds between programs to adapt to changing and unforeseen circumstances during a funding period. Thus, the tribes' powers to design or adapt programs according to tribal needs remained restricted.

The inflexibility of 638 contracts also created problems with cash flow. Payments were made to tribes on a cost-reimbursement basis, often many months after the tribe might have incurred major expenses. The tribes' main complaint, however, was that the 638 contract process made tribal staff primarily accountable to and measured by, not their own tribal councils but BIA employees at the Agency, Area and Central Offices. They had to follow strict federal laws, rules and regulations that were often of little relevance to day-to-day existence on an Indian reservation. If trust assets were involved, the BIA had to concur in any decisions made.

Thus, while the Indian Self-Determination Act was, and is, still acknowledged as a watershed moment in the history of tribal self-governance, by the mid-1980's many tribal leaders agreed that it was time for even greater change. The federal bureaucracy devoted to 638 program oversight had simply grown out of control and the percentage of federal dollars allocated for Indian programs actually spent on the reservation was still far too small.

To address these concerns, the Indian tribes asked Congress to consider amendments to the Self-Determination Act. During the fall of 1987, a series of articles appeared in the Arizona Republic entitled "Fraud in Indian Country," that detailed a egregious history of waste and mismanagement within the BIA. These articles spurred House Appropriations Subcommittee on Interior and Related Agencies Chairman Sidney Yates (D–IL) to conduct an oversight hearing on these alleged abuses.

At the hearing, Department of Interior officials proposed that funds appropriated to the Bureau of Indian Affairs be turned over to the tribes to let them manage their own affairs in an attempt to address these charges. But, the officials testified, by accepting the federal funds, the tribes would release the federal government from its trust responsibility. Many disagreed with this quid pro quo, but supported the concept of removing BIA middlemen from the funding process. With Chairman Yates' encouragement, tribal representatives met with the Secretary of the Interior and other Department officials the very next day to further hash out this concept. By mid-December of 1987, ten tribes had agreed to test the Department's proposal. Out of this proposal that the Tribal Self-Governance Demonstration Project was born.

In 1988 Congress enacted Pub. L. No. 100–472 which created Title III of the Indian Self-Determination Act which authorized the Secretary of Interior to negotiate Self-Governance compacts with up to twenty tribes. These tribes, for the first time, would be able to "plan, conduct, consolidate, and administer programs, services, and functions" heretofore performed by Interior officials. The Act required that these programs be "otherwise available to Indian tribes or Indians," but within these parameters the tribes were authorized to redesign programs and reallocated funding according to terms negotiated in the compacts. Tribes would be able to prioritize spending on a systemic level, dramatically reducing the Federal

role in the tribal decision-making process. But perhaps the biggest difference between the "638" contract process and the Self-Governance program is that instead of funds coming from multiple contracts there would be one grant with a single Annual Funding Agreement.

The original ten tribes that agreed to participate in the demonstration project were the Confederated Salish and Kootenai Tribes, Hoopa Tribe, Jamestown S'Klallam Tribe, Lummi Nation, Mescalero Apache Tribe, Mille Lacs Band of Ojibwe, Quinault Indian Nation, Red Lake Chippewa Tribe, Rosebud Sioux Tribe, and Tlingit and Haida Central Council.

In 1991 Congress passed Pub. L. No. 102–184, "The Tribal Self-Governance Demonstration Project Act", which extended the Project for three more years and increased the number of Tribes participating to thirty. The bill required the new tribes participating to complete a one-year planning period before they could negotiate a Compact and Annual Funding Agreement. In 1991, the Interior Department established the Office of Self-Governance within the Office of the Assistant Secretary, Indian Affairs.

The 1991 law also directed the IHS to conduct a feasibility study to examine the expansion of the Self-Governance project to IHS programs and services. The law also authorized the Secretary of Health and Human Services to establish an Office of Self-Governance in the IHS.

In 1992, Congress amended section 314 of the Indian Health Care Improvement Act to allow the Secretary of Health and Human Services to negotiate Self-Governance compacts and annual funding agreements under Title III of the Indian Self-Determination Act with Indian tribes. Pub. L. No. 102–573, sec. 814. The Self-Governance Demonstration Project proved to be a success both in the Interior Department and the Department of Health and Human Services.

In 1994, Congress responded by passing the "Tribal Self-Governance Act of 1994" as part of the Indian Self-Determination Act Amendments, Pub. L. No. 103–413. The Tribal Self-Governance Act, contained in Title IV of the Indian Self-Determination Act, permanently established the Self-Governance program within the Department of Interior and thus solidifying the Federal government goals of negotiating with Indian Tribes and Alaska Native villages on a government-to-government basis while retaining the federal trust relationship. The Tribal Self-Governance Act allowed Self-Governance tribes to compact all programs and services that tribes could contract under Title I of the Indian Self-Determination Act. The Act required an "orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual tribal communities." The Act also clarified the requirements and obligations of tribes entering the Self-Governance process.

Tribes entering the Self-Governance program had to meet four eligibility requirements. First, the tribe (or tribes in the case of a consortium) must be federally recognized. Second, the tribe must document, with an official action of the tribal governing body, a for-

mal request to enter negotiations with the Department of Interior. In the case of a consortium of tribes, the governing body of each participating tribe must authorize participation by an official action of the tribal governing body. Third, the tribe must demonstrate financial stability and financial management capability as evidenced by the tribe having no material audit exceptions in the required annual audit of the tribe's 638 contracts. Fourth, the tribe must have successfully completed a planning phase, requiring the submission of a final planning report which demonstrates that the tribe has conducted legal and budgetary research and internal tribal government and organizational planning.

The 1994 Act then authorized the Secretary of Interior to negotiate annual funding agreements with eligible tribes in a manner consistent with the federal trust responsibility. The agreements authorize a tribe to:

> * * * plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of 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. * * *

The 1994 Act's inclusion of "agency, area, and central office functions," on contrast to Title III, means that with each new Self-Governance tribe, the resources of the various branches of the BIA delivering services to that tribe will shrink. To facilitate this transfer, the Act specifically lists all applicable activities for which tribes and the BIA receive corresponding funding.

Under the 1994 Act, annual funding agreements include what the tribe would have received if the sum total of its 638 contracts were added up, in addition to Area and Central Office funds and other Interior Programs. The process for review and award of Self-Governance compacts and annual funding agreements is streamlined when compared to 638 contracts. Once an agreement is negotiated, the Secretary submits it to the other Indian tribes served by the BIA and the two Congressional Committees of jurisdiction. Tribes may obtain their funding in either annual or semi-annual installments.

The Indian tribes and the Administration agree that it is now time to take the next logical step forward in the Self-Governance process and make the Self-Governance program permanent within the Department of Health and Human Services.

The Tribal Self-Governance Amendments of 1999 establish a permanent Self-Governance Program within the Department of Health and Human Services under which American Indian and Alaska Native tribes may enter into compacts with the Secretary for the direct operation, control, and redesign of Indian Health Service (IHS) activities. A limited number of Indian tribes have had a similar right on a demonstration project basis since 1992 under Title III of the Indian Self-Determination and Education Assistance Act. All Indian tribes have enjoyed a similar but lesser right to contract and operate individual IHS programs and functions under Title I

of the Indian Self-Determination Act since 1975 (so-called "638 contracting").

In brief, the legislation would expand the number of tribes eligible to participate in Self-Governance, make it a permanent within the IHS and authorize the Secretary of Health and Human Services to conduct a feasibility study for the execution of Self-Governance compacts with Indian tribes for programs outside of the IHS. The 1998 amendments incorporate a number of federal contracting laws and regulations that have worked well for Indian tribes and the Department in the past.

The legislation is modeled on the existing permanent Self-Governance legislation for Interior Department programs contained in Title IV of the Indian Self-Determination Act. The legislation reflects years of negotiations among Indian tribes, Alaska Native villages, the Indian Health Service, and the Department of Health and Human Services.

The 1999 amendments give Indian tribes who meet certain criteria the right to take over the operation of IHS functions, including the funds necessary to run them. The 1999 amendments continue the principle focus of the Self-Governance program: to remove needless and sometimes harmful layers of federal bureaucracy that dictate Indian affairs. By giving tribes direct control over federal programs run for their benefit and making them directly accountable to their members, Congress has enabled Indian tribes to run programs more efficiently and more innovatively than federal officials have in the past. And, allowing tribes to run these programs furthers the Congressional policy of strengthening and promoting tribal governments.

Self-Governance recognizes that Indian tribes care for the health, safety, and welfare of their own members as well as that of non-Indians who either live on their reservations or conduct business with the tribes and are thus committed to safe and fair working conditions and practices.

Sometimes we need to look to the past in order to understand our proper relationship with Indian tribes. More than two centuries ago, Congress set forth what should be our guiding principles. In 1789, Congress passed the Northwest Ordinance, a set of seven articles intended to govern the addition of new states to the Union. These articles served as a compact between the people and the States, and were "to forever remain unalterable, unless by common consent." Act of Aug. 7, 1789, ch. 13, 1 Stat. 50, 52. Article Three set forth the Nation's policy towards Indian tribes:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken away from them without their consent * * * but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them. * * *

The Founders carefully and wisely chose these principles to govern the conduct of this Nation in its dealing with American Indian tribes. Over the years, these principles have often been forgotten. Self-Government is but one of many ways to honor these principles.

Two hundred years later, Justice Thurgood Marshall delivered a unanimous Supreme Court decision in 1983 stating that,

> Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development".

New Mexico v. *Mescalero Apache Tribe,* 462 U.S. 324, 334–35, quoting *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143 (1980). See also *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians,* 471 U.S. 845, 856 (1985) (concluding that "[o]ur cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

If we are to adhere and remain faithful to the principles that our Founders set forth—the principles of good faith, consent, justice and humanity—then we must continue to promote tribal self-government.

GEORGE MILLER.

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