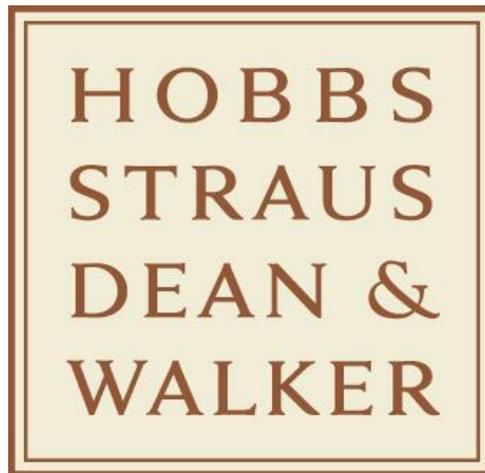


***INDIAN SELF-DETERMINATION
AND
EDUCATION ASSISTANCE ACT***

**P.L. 93-638, as amended,
as renumbered**



**Prepared by
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PUBLIC LAW 93-638, AS AMENDED
INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Compiled by Hobbs, Straus, Dean & Walker, LLP Law Offices
October 2020

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This document is a compilation by Hobbs, Straus, Dean & Walker, LLP of laws that constitute, amend, or modify the Indian Self-Determination and Education Assistance Act as of the enactment of the PROGRESS for Indian Tribes Act, S. 209 (2020).

Pub. L. No. 93-638, as amended by
Pub. L. No. 100-202, Pub. L. No. 100-446,
Pub. L. No. 100-472, Pub. L. No. 100-581,
Pub. L. No. 101-301, Pub. L. No. 101-644,
Pub. L. No. 102-184, Pub. L. No. 102-573,
Pub. L. No. 103-413, Pub. L. No. 103-435,
Pub. L. No. 104-109, Pub. L. No. 104-133,
Pub. L. No. 104-208, Pub. L. No. 105-83,
Pub. L. No. 105-277, Pub. L. No. 105-362,
Pub. L. No. 106-113, Pub. L. No. 106-260,
Pub. L. No. 106-291, Pub. L. No. 106-586
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Pub. L. No. 111-322, Pub. L. No. 112-74,
Pub. L. No. 112-175, Pub. L. No. 113-76,
Pub. L. No. 114-113, Pub. L. No. 115-31,
Pub. L. No. 115-141, & Pub. L. No. 116-94.

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, That this Act may be cited as the “Indian Self-Determination and Education Assistance Act”.

Sec. 2. CONGRESSIONAL FINDINGS [25 U.S.C. § 5301]

(a) 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) 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.

Sec. 3. DECLARATION OF POLICY [25 U.S.C. § 5302]¹

(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

1 *Public Law 103-435, codified at 25 U.S.C. § 5303, permanently amended the Act to provide for the use of 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. § 5301 et seq.).

programs and services.² 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.

TRIBAL AND FEDERAL ADVISORY COMMITTEES [25 U.S.C. § 5303]

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).

Sec 4. DEFINITIONS [25 U.S.C. § 5304]

For the 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” or “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 USC §§ 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;

² See Executive Order no. 13084.

(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, 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 entered into under title I (or a grant or cooperative agreement used under section 9) between a Tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services that are otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law, subject to the condition that, except as provided in section 105(a)(3), no contract entered into under title I (or grant or cooperative agreement used under section 9) shall be—

- (1) considered to be a procurement contract; or
- (2) except as provided in section 107(a)(1), subject to any Federal procurement law (including regulations);

(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 not such officer or agency, an officer or agency designated by the Governor or by State law;

(l) **“Tribal organization” or “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 [25 U.S.C. § 5305]

(a) (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, and a brief annual program report.

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after the retention period for the report that is submitted to the Secretary under subsection (a) 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. The retention period shall be defined in regulations promulgated by the Secretary pursuant to section 413.

(c) 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) Except as provided in section 8 or 106(a)(3) of this Act, 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) 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) (1) For each fiscal year during which an Indian tribal organization receives or

expends funds pursuant to a contract entered into, or a grant made, under this Act, if the Indian Tribal organization expends \$500,000 or more in Federal awards during such fiscal year³ 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.

(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.

Sec. 6. PENALTIES [25 U.S.C. § 5306]

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, 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. § 5307]

(a) 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. With respect to construction, alteration, or repair work to which the Act of March 3, 1921⁴ 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) and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. § 276c).

(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, 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--

3 *Per the PROGRESS for Indian Tribes Act, S. 209 (2020), Title II, Sec. 201(c), this requirement “shall not take effect until 14 months after the date of enactment this Act.” This date is December 21, 2021.*

4 *Reads so in original Act. Probably should read “1931.”*

(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).

(c) Notwithstanding subsections (a) and (b) of this section, 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 OF FUNDS [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), 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. § 5308]

The provisions of this Act shall not be subject to the requirements of chapter 63 of title 31, United States Code: *Provided*, That a grant agreement or a 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.

USE OF EXCESS FUNDS [25 U.S.C. § 5309]

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.

INVESTMENT OF ADVANCE PAYMENTS; RESTRICTIONS [25 U.S.C. § 5310]

Advance payments made by the Department of the Interior to Indian tribes, tribal organizations, and tribal consortia pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.) or the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2501 et seq.) may hereafter [On and after December 8, 2004] be invested by the Indian tribe, tribal organization, or consortium before such funds are expended for the purposes of the grant, compact, or annual funding agreement so long as

such funds are--

(1) invested by the Indian tribe, tribal organization, or consortium only in obligations of the United States, or in obligations or securities that are guaranteed or insured by the United States, or mutual (or other) funds registered with the Securities and Exchange Commission and which only invest in obligations of the United States or securities that are guaranteed or insured by the United States; or

(2) deposited only into accounts that are insured by an agency or instrumentality of the United States, or are fully collateralized to ensure protection of the funds, even in the event of a bank failure.

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. § 5321]

(a) (1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution,⁵ 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--

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), 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), 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), 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.⁶

(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

5 *With regard to health programs in Alaska, Public Law 105-83, Section 325; Pub. L. No. 106-260, Section 12; Pub. L. No. 105-277, Section 351; Pub. L. No. 111-88, Section 419; Pub. L. No. 107-20, Section 2609; Pub. L. No. 112-74, Section 435, Pub. L. No. 113-76, and Pub. L. No. 115-141, Section 428 have substantively modified tribal rights to enter ISDEAA agreements. See endnote 1. 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. No. 105-143, as amended. See endnote 1.*

6 *Public Law 115-141 prohibits the BIA from distributing FY 2018 central office funds or pooled overhead funds in ISDEAA agreements. See endnote 2.*

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;
- (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); 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,⁷ 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 contract 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),

⁷ Reads so in original Act. Probably should read "paragraph."

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). 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) 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,
- (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).

(c) (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.⁸

(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)), 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) For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42

8 *See endnote 10.*

U.S.C. § 233 (a)), as amended by section 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 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 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 service 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) (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).

(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.

(f) **GOOD FAITH REQUIREMENT.**—In the negotiation of contracts and funding agreements, the Secretary shall—

(1) at all times negotiate in good faith to maximize implementation of the self-determination policy; and

(2) carry out this Act in a manner that maximizes the policy of Tribal self-determination, in a manner consistent with—

- (A) the purposes specified in section 3; and
- (B) the PROGRESS for Indian Tribes Act.

(g) **RULE OF CONSTRUCTION.**—Subject to section 101(a) of the PROGRESS for Indian Tribes Act,⁹ each provision of this Act and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.

Sec. 103. GRANTS TO INDIAN TRIBAL ORGANIZATIONS [25 U.S.C. § 5322]

(a) 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

9 *Sec. 101(a) of the PROGRESS for Indian Tribes Act, S. 209 (2020), reads as follows:*

Sec. 101. TRIBAL SELF-GOVERNANCE.

(a) EFFECT OF PROVISIONS.—Nothing in this Act, or the amendments made by this Act, shall be construed—

(1) to modify, limit, expand, or otherwise affect—

(A) the authority of the Secretary of the Interior, as provided for under the Indian Self-Determination and Education Assistance Act (as in effect on the day before the date of enactment of this Act), regarding—

(i) the inclusion of any non-BIA program (as defined in section 401 of the Indian Self-Determination and Education Assistance Act) in a self-determination contract or funding agreement under section 403(c) of such Act (as so in effect); or

(ii) the implementation of any contract or agreement described in clause (i) that is in effect on the day described in subparagraph (A);

(B) the meaning, application, or effect of any Tribal water rights settlement, including the performance required of a party thereto or any payment or funding obligation thereunder;

(C) the authority, jurisdiction, or responsibility of a State to manage, control, or regulate fish and wildlife under State law (including regulations) on land or water in the State, including Federal public land;

(D) except for the authority provided to the Secretary as described in subparagraph (A), the applicability or effect of any Federal law related to the protection or management of fish or wildlife; or

(E) any treaty-reserved right or other right of any Indian Tribe as recognized by any other means, including treaties or agreements with the United States, Executive orders, statutes, regulations, or case law; or

(2) to authorize any provision of a contract or agreement that is not consistent with the terms of a Tribal water rights settlement.

Stat. 208), 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 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) 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 the Interior may (upon request of the tribe) acquire such land in trust for the tribe.

(b) The Secretary of Health and Human Services may, in accordance with regulations adopted pursuant to section 107 of this Act, 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 of this Act.

(c) 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) 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; 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.

(e) 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

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

Sec. 104. PERSONNEL [25 U.S.C. § 5323]

(a)¹⁰ Section 3371(2) of chapter 33 of title 5, United States Code, is amended (1) by deleting the word “and” immediately after the semicolon in clause (A); (2) by deleting the period at the end of clause (B) and inserting in lieu thereof a semicolon and the word “and”; and (3) by adding at the end thereof the following new clause:

“(C) 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), 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(m) of the Indian Self-Determination and Education Assistance Act.”

(b) The Act of August 5, 1954 (68 Stat. 674), as amended is further amended by adding a new section 8 after section 7 of the Act, as follows:

“Sec. 8. In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended, 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 and 103 of the Indian Self-Determination and Education Assistance Act”.

(c) Paragraph (2) of subsection (a) of section 6 of the Military Selective Service Act of 1967 (81 Stat. 100), as amended, is amended by inserting after the words “Environmental Science Services Administration” the words “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”.

(d) Section 502 of the Intergovernmental Personnel Act of 1970 (84 Stat. 1909, 1925) is amended--

(1) by deleting the word “and” after paragraph (3);

(2) by deleting the period after paragraph (4) and inserting in lieu thereof a semicolon and the word “and”; and

(3) by adding at the end thereof the following new paragraph: “(5) Notwithstanding the population requirements of section 203(a) and 303(c) of this Act, a ‘local government’ and a ‘general local government’ also mean the

10 *Subsections (a) to (d) of section 104 of Pub. L. No. 93-638 are codified in Section 3371 of Title 5.*

recognized governing body of an Indian tribe, band, pueblo, or other organized group or community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which performs substantial governmental functions. The requirements of sections 203(c) and 303(d) of this Act, 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.”

(e) 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) 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, 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 this 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, 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, 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, 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.

(4) To retain coverage, rights, and benefits under chapter 87 (“Life Insurance”) of Title 5, United States Code, 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 or Title 5, United States Code.

(f) 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) 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) 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) 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.¹¹

(j) Anything in sections 205 and 207 of title 18, United States Code, to the contrary notwithstanding—

(1) an officer or employee of the United States assigned to a tribal organization (as defined in section 4(1)) or an inter-tribal consortium (as defined in section 501), as authorized under section 3372 of title 5, United States Code, or section 2072 of the Revised Statutes (25 U.S.C. 48) may act as agent or attorney for, and appear on behalf of, such tribal organization or inter-tribal consortium in connection with any tribal matter related to a tribal governmental activity or Federal Indian program or service pending before any department, agency, court, or commission, including any matter in which the United States is a party or has a direct or substantial interest: *Provided*, That such officer or employee must advise in writing the head of the department, agency, court, or

11 *See Executive Order No. 11899.*

commission with which the officer or employee is dealing or appearing on behalf of the tribal organization or inter-tribal consortium of any personal and substantial involvement with the matter involved; and

(2) a former officer or employee of the United States who is carrying out official duties as an employee or as an elected or appointed official of a tribal organization (as defined in section 4(1)) or inter-tribal consortium (as defined in section 501) may act as agent or attorney for, and appear on behalf of, such tribal organization or intra-tribal consortium in connection with any matter related to a tribal governmental activity or Federal Indian program or service 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 such former officer or employee must advise in writing the head of the department, agency, court, or commission with which the former officer or employee is dealing or appearing on behalf of the tribal organization or inter-tribal consortium of any personal and substantial involvement that he or she may have had as an officer or employee of the United States in connection with the matter involved.

(k)¹² Section 3372(a) of Title 5, United States Code, is further amended to add the following to the end thereof: “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.”

(l) Section 3372 of title 5, United States Code, is further amended by adding a new subsection (d) as follows:

“(d) Where the employee is assigned to a tribal organization, the employee shall be eligible for promotions, periodic step-increases, additional step-increases, merit pay, and cash awards, as defined in chapter 53 and 54 of this title, on the same basis as other Federal employees.”

(m) The status of an Indian (as defined in section 19 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 5129)) 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. § 5116), 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.

12 *Subsections (k) and (l) of subsection 104 of Pub. L. No. 93-638 are codified in section 3372 of title 5.*

Sec. 105. ADMINISTRATIVE PROVISIONS [25 U.S.C. § 5324]

(a) (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 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. § 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).
- (V) Section 13 of the Act of Oct. 3, 1944 (58 Stat. 770; chapter 479). (50 USCS Appx. § 1622)
- (VI) Chapters 21, 25, 27, 29, and 31 of Title 44, United States Code.
- (VII) Section 2 of the Act of June 13, 1934 (48 Stat 948, chapter 483).
- (VIII) Sections 1 through 12 of the Act of June 30, 1936 (49 Stat. 2036 et seq. chapter 881)

- (IX) The Service Control Act of 1965 [sic]¹³ (41 U.S.C. § 351 et seq.).
- (X) The Small Business Act (15 U.S.C. § 631 et seq.).
- (XI) Executive Order Nos. 12138, 11246, 11701 and 11758.

(b) Payments of any grants or under any contracts pursuant to sections 102 and 103 may be made in advance¹⁴ 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) (1) A self-determination contract shall be--
- (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) (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) If an Indian tribe, or a tribal organization authorized by a tribe, requests retrocession

13 *The reference to “The Service Control Act of 1965” appears to be a typographical error. The title of the Act codified at 41 U.S.C. § 351 et seq. is “The Service Contract Act of 1965.”*

14 *Public Law 115-141 limits the ability of tribes, tribal organizations and consortia to invest ISDEAA funds. See endnote 3.*

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) In connection with any self-determination contract or grant made pursuant to section 102 or 103 of this Act, 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) The contracts authorized under section 102 of this Act and grants pursuant to section 103 of this Act 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) Contracts and grants with tribal organizations pursuant to sections 102 and 103 of this Act 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) (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.

(j) 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.

(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 and part of the IHS 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) (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) (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; and

(B) section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (104 Stat. 1959).

(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), 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 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, 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).

(4) (A) Subject to subparagraph (B), in funding a fixed-price construction

contract pursuant to section 106(a), the Secretary shall provide 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 costs¹⁵:

(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 (including providing opportunity for an appeal pursuant to section 102(b)).

(n) 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 costs of comparable private rental housing in the nearest established community with a year-round population of 1,500 or more individuals.

15 *For construction projects whose actual cost is less than the estimated cost, the Secretary shall determine how to use the excess funds after consulting with the tribes. See 25 U.S.C. § 5309.*

(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.

(p) INTERPRETATION BY SECRETARY.—Except as otherwise provided by law, the Secretary shall interpret all Federal laws (including regulations) and Executive orders in a manner that facilitates, to the maximum extent practicable—

(1) the inclusion in self-determination contracts and funding agreements of—

(A) applicable programs, services, functions, and activities (or portions thereof); and

(B) funds associated with those programs, services, functions, and activities;

(2) the implementation of self-determination contracts and funding agreements;

and

(3) the achievement of Tribal health objectives.

(q) (1) TECHNICAL ASSISTANCE FOR INTERNAL CONTROLS.—In considering proposals for, amendments to, or in the course of, a contract under this title and compacts under titles IV and V of this Act, if the Secretary determines that the Indian Tribe lacks adequate internal controls necessary to manage the contracted program or programs, the Secretary shall, as soon as practicable, provide the necessary technical assistance to assist the Indian Tribe in developing adequate internal controls. As part of that technical assistance, the Secretary and the Tribe shall develop a plan for assessing the subsequent effectiveness of such technical assistance. The inability of the Secretary to provide technical assistance or lack of a plan under this subsection shall not result in the reassumption of an existing agreement, contract, or compact, or declination or rejection of a new agreement, contract, or compact.

(2) The Secretary shall prepare a report to be included in the information required for the reports under sections 412(b)(2)(A) and 514(b)(2)(A). The Secretary shall include in this report, in the aggregate, a description of the internal controls that were inadequate, the technical assistance provided, and a description of Secretarial actions taken to address any remaining inadequate internal controls after the provision of technical assistance and implementation of the plan required by paragraph (1).

Sec. 106. CONTRACT FUNDING [25 U.S.C. § 5325]

(a) (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 contractible, is operated.¹⁶

(2) There shall be added to the amount required by paragraph (1) contract support costs¹⁷ 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 incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense 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) In calculating the reimbursement rate for expenses described in subparagraph (A)(ii), not less than 50 percent of the expenses described in subparagraph (A)(ii) that are incurred by the governing body of an Indian Tribe or Tribal organization relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable.

(C) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to

16 *Pub. L. No. 115-141, Division G, Title I, Sec. 105, gives the Secretary of the Interior the authority to redistribute Tribal Priority Allocations. See endnote 6. Pub. L. No. 115-141 gives tribes the right to return funds to the Bureau of Indian Affairs with no diminishment of federal trust responsibility or limitation on right to appropriations. See endnote 7. Pub. L. No. 107-20 also limits Tribal Priority Allocations in Alaska. See endnote 8.*

17 *Pub. L. No. 115-141, Consolidated Appropriations Act, 2018, Division G, provides contract support funds for the IHS and the BIA at "such sums as may be necessary". See endnote 4.*

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)¹⁸ 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.

(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) 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

18 *For construction projects whose actual cost is less than the estimated cost, the Secretary shall determine how to use the excess funds after consulting with the tribes. See 25 U.S.C. § 5309.*

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).

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.¹⁹

(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).

(d) (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 costs rate, and such shortfall is the result of lack of full indirect costs 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 costs 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) Indian tribes and tribal organizations shall not be held liable for amounts of

19 *Pub. L. No. 115-141, Division G, Title I, Sec. 105 gives the Secretary of the Interior the authority to redistribute Tribal Priority Allocations. See endnote 6. Pub. L. No. 115-141 also gives tribes the right to return funds to the Bureau of Indian Affairs with no diminishment of federal trust responsibility or limitation on right to appropriations. See endnote 7.*

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) 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 [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. 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, 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. § 5123).

(g) 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 subsection (a) of this section, 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) 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) 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) 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) 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) (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) 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) 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) of this section, 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) 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.

PERMISSIBLE USE OF IHS CONTRACT SUPPORT [25 U.S.C. § 5326]²⁰

Heretofore and hereafter and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act 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 and Education Assistance 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.

PERMISSIBLE USE OF DOI CONTRACT SUPPORT [25 U.S.C. § 5327]

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 [on and after November 29, 1999] funds appropriated in this title 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.

Sec. 107. PROMULGATION OF RULES AND REGULATIONS [25 U.S.C. § 5328]

(a) (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

20 *See endnote 4.*

Services may promulgate regulations under this Act relating to chapter 171 of Title 28, 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, property donation procedures arising under section 105(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 October 25, 1994.

(b) The provisions of this Act shall supersede any conflicting provisions of law (including any conflicting regulations) in effect on the day before October 25, 1994, and the Secretary is authorized to repeal any regulation inconsistent with the provisions of this Act.

(c) 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) (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.²¹

21 25 U.S.C. § 5303 authorizes the Secretary of the Interior and the Secretary of Health and Human Services to jointly establish and fund advisory committees and

(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, 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 October 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) 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.

Sec. 108. CONTRACT OR GRANT SPECIFICATIONS [25 U.S.C. § 5329]

(a) 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

advisory bodies composed of tribal members or tribal members and federal representatives to ensure tribal participation in implementation of the Act.

(2) subject to subsections (a) and (b) of section 102, contain such other provisions as are agreed to by the parties.

(b) 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, United States Code.

(c) 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 and 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. § 5301 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. § 5301 et seq.) are incorporated in this agreement.

(2) **PURPOSE.--**Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 5301 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and following related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under section 102(a) of such Act, 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. § 5324(c)(1)), the term of this contract shall be _____ years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. § 5324(d)), 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. § 5325).

(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.--Payment 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, 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.²²

(ii) METHOD OF QUARTERLY PAYMENT.--If quarterly

22 *Public Law 111-8 limits the ability of tribes, tribal organizations and consortia to invest ISDEAA funds. See endnote 3. Also, Section 311 of Pub. L. No. 105-83 involves the allowable payment dates for quarterly ISDEAA payments. See endnote 5.*

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. Notwithstanding Public Law 103-413, quarterly payments of funds to tribes and tribal organizations under annual funding agreements pursuant to section 108 of Public Law 93-638, as amended, beginning in fiscal year 1998 and thereafter, may be made on the first business day following the first day of a fiscal quarter.²³

(iii) **APPLICABILITY.**--Chapter 39 of title 31, 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, 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 two performance monitoring visits 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

²³ Section 311 of Pub. L. No. 105-83 involves the allowable payment dates for quarterly ISDEAA payments. *See endnote 5.*

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. § 5324(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 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.--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. § 5301 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.²⁴

(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. § 5331), 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, United States Code.

24 *Department of the Interior regulations require that tribes and tribal organizations contracting to provide law enforcement services meet the standards set forth in chapter 68 of the Bureau of Indian Affairs Manual (BIAM) and the Law Enforcement Handbook. The regulations may not be effective in their attempted application to law enforcement services operated by tribes, since they were not promulgated under negotiated rulemaking as required by Section 107 of the ISDEAA. See endnote 11. The Department of Interior regulations covering social services also purport to cover such programs administered by tribes under self-determination contracts, and these regulations, too, were not promulgated under section 107 of the Act.*

(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. § 5324(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. § 5325(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. § 5123), 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) 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 responsibilities.

(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), 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 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) subject to subsections (a) and (b) of section 102 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321), 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. REASSUMPTION OF PROGRAMS [25 U.S.C. § 5330]

Each contract or grant agreement entered into pursuant to sections 102, 103, and 104 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 interest in such lands, and (ii) such threat arises from the failure of the contractor to fulfill the requirements of the contract. In such 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).

Sec. 110. APPEALS, NO UNILATERAL REVISION [25 U.S.C. § 5331]

(a) 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) or to compel the Secretary to award and fund an approved self-determination contract).

(b) The Secretary shall not revise or amend a self-determination contract with a tribal

organization without the tribal organization's consent.

(c) The Equal Access to Justice Act (Public²⁵ Law 96-481, Act of October 1,²⁶ 1980; 92 Stat. 2325, as amended), 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 by tribal organizations regarding self-determination contracts.

(d) The Contract Disputes Act (Public Law 95-563), Act of November 1, 1978; 92 Stat. 2383, as amended) 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).²⁷

(e) 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 disposed of before these amendments [enacted October 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.

Sec. 111. EFFECT ON EXISTING RIGHTS [25 U.S.C. § 5332]

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.²⁸

25 *Reads so in original. Probably should be "Public."*

26 *Read so in original. Probably should be "2."*

27 *Section 847 of the National Defense Authorization Act for Fiscal Year 2006 abolished the Interior Board of Contract Appeals—along with every other contract appeals board except for those of the Armed Services, the Postal Service, and the Tennessee Valley Administration—and established in their place the Civilian Board of Contract Appeals (CBCA). Pub. L. No. 109-163 § 847, 119 Stat. 3136, 3391 (Jan. 6, 2006). The statute provides that any reference in the laws of the United States to contract appeals boards other than the three listed above "shall be treated as referring to the Civilian Board of Contract Appeals." Id. § 847(e). Thus post-contract administrative appeals under Section 110 are now heard by the CBCA.*

28 *See endnote 7 regarding tribal return of appropriations.*

TITLE III
TRIBAL SELF-GOVERNANCE DEMONSTRATION PROJECT
[25 U.S.C. § 5321 note]²⁹

Section 10 of Pub. L. No. 106-260, the Tribal Self-Governance Amendments of 2000, repealed Title III and enacted Titles V and VI. See below.

29 *Section 11 of the Tribal Self-Governance Amendments of 2000 (25 U.S.C. § 5321) states that “funds appropriated for title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321 note) shall be available for use under title V of such Act.”*

TITLE IV--TRIBAL SELF-GOVERNANCE

A bill to specify the terms of contracts entered into by the United States and Indian tribal organizations under the Indian Self-Determination and Education Assistance Act and to provide for tribal Self-Governance, and for other purposes.

Sec. 401. DEFINITIONS [25 U.S.C. § 5361]

In this title:

(1) **COMPACT.**—The term ‘compact’ means a self-governance compact entered into under section 404.

(2) **CONSTRUCTION PROGRAM; CONSTRUCTION PROJECT.**— The term ‘construction program’ or ‘construction project’ means a Tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems, or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control, transportation, or port facilities, or for other Tribal purposes.

(3) **DEPARTMENT.**—The term ‘Department’ means the Department of the Interior.

(4) **FUNDING AGREEMENT.**—The term ‘funding agreement’ means a funding agreement entered into under section 403.

(5) **GROSS MISMANAGEMENT.**—The term ‘gross mismanagement’ means a significant violation, shown by a preponderance of the evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds for a program administered by an Indian Tribe under a compact or funding agreement.

(6) **INHERENT FEDERAL FUNCTION.**—The term ‘inherent Federal function’ means a Federal function that may not legally be delegated to an Indian Tribe.

(7) **NON-BIA PROGRAM.**—The term ‘non-BIA program’ means all or a portion of a program, function, service, or activity that is administered by any bureau, service, office, or agency of the Department of the Interior other than—

(A) the Bureau of Indian Affairs;

(B) the Office of the Assistant Secretary for Indian Affairs; or

(C) the Office of the Special Trustee for American Indians.

(8) **PROGRAM.**—The term ‘program’ means any program, function, service, or activity (or portion thereof) within the Department that is included in a funding agreement.

(9) **SECRETARY.**—The term ‘Secretary’ means the Secretary of the Interior.

(10) **SELF-DETERMINATION CONTRACT.**—The term ‘self-determination contract’ means a self-determination contract entered into under section 102.

(11) **SELF-GOVERNANCE.**—The term ‘self-governance’ means the Tribal Self-Governance Program established under section 402.

(12) **TRIBAL SHARE.**—The term ‘Tribal share’ means the portion of all funds and resources of an Indian Tribe that—

(A) support any program within the Bureau of Indian Affairs, the Office of the Special Trustee for American Indians, or the Office of the Assistant Secretary

for Indian Affairs; and

(B) are not required by the Secretary for the performance of an inherent Federal function.

(13) TRIBAL WATER RIGHTS SETTLEMENT.—The term ‘Tribal water rights settlement’ means any settlement, compact, or other agreement expressly ratified or approved by an Act of Congress that—

(A) includes an Indian Tribe and the United States as parties; and

(B) quantifies or otherwise defines any water right of the Indian Tribe.

Sec. 402. TRIBAL SELF-GOVERNANCE PROGRAM [25 U.S.C. § 5362]

(a) ESTABLISHMENT.—The Secretary shall establish and carry out a program within the Department to be known as the ‘Tribal Self-Governance Program’.

(b) SELECTION OF PARTICIPATING INDIAN TRIBES.—

(1) IN GENERAL.—

(A) **ELIGIBILITY.**—The Secretary, acting through the Director of the Office of Self-Governance, may select not more than 50 new Indian Tribes per year from those tribes eligible under subsection (c) to participate in self-governance.

(B) **JOINT PARTICIPATION.**—On the request of each participating Indian Tribe, 2 or more otherwise eligible Indian Tribes may be treated as a single Indian Tribe for the purpose of participating in self-governance.

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

(3) JOINT PARTICIPATION AS ORGANIZATION.—Two or more Indian Tribes that are not otherwise eligible under subsection (c) may be treated as a single Indian Tribe for the purpose of participating in self-governance as a Tribal organization if—

(A) each Indian Tribe so requests; and

(B) the Tribal organization itself, or at least one of the Indian Tribes participating in the Tribal organization, is eligible under subsection (c).

(4) TRIBAL WITHDRAWAL FROM A TRIBAL ORGANIZATION.—

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

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

(C) **PARTICIPATION IN SELF-GOVERNANCE.**—The withdrawal of an Indian Tribe from a Tribal organization shall not affect the eligibility of the Tribal organization to participate in self-governance on behalf of one or more

other Indian Tribes, if the Tribal organization still qualifies under subsection (c).

(D) WITHDRAWAL PROCESS.—

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

(ii) NOTIFICATION.—The Indian Tribe shall provide a copy of the Tribal resolution described in clause (i) to the Secretary.

(iii) EFFECTIVE DATE.—

(I) IN GENERAL.—A withdrawal under clause (i) shall become effective on the date that is specified in the Tribal resolution and mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the Tribal organization that signed the compact and funding agreement on behalf of the withdrawing Indian Tribe or Tribal organization.

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

(aa) the earlier of—

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

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

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

(E) DISTRIBUTION OF FUNDS.—If an Indian Tribe or Tribal organization eligible to enter into a self-determination contract or a compact or funding agreement fully or partially withdraws from a participating Tribal organization, the withdrawing Indian Tribe—

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

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

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

(ii) may elect not to enter into a self-determination contract or

compact, in which case all unexpended funds and resources associated with the withdrawing Indian Tribe's returned programs (calculated on the same basis as the funds were initially allocated to the funding agreement of the Tribal organization) shall be returned by the Tribal organization to the Secretary for operation of the programs included in the withdrawal.

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

(c) ELIGIBILITY.—To be eligible to participate in self-governance, an Indian Tribe shall—

- (1)** successfully complete the planning phase described in subsection (d);
- (2)** request participation in self-governance by resolution or other official action by the Tribal governing body; and
- (3)** demonstrate, for the 3 fiscal years preceding the date on which the Indian Tribe requests participation, financial stability and financial management capability as evidenced by the Indian Tribe having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency.

(d) PLANNING PHASE.—

(1) IN GENERAL.—An Indian Tribe seeking to begin participation in self-governance shall complete a planning phase as provided in this subsection.

- (2) ACTIVITIES.**—The planning phase shall—
- (A)** be conducted to the satisfaction of the Indian Tribe; and
 - (B)** include—
 - (i)** legal and budgetary research; and
 - (ii)** internal Tribal government planning, training, and organizational preparation.

(e) GRANTS.—

(1) IN GENERAL.—Subject to the availability of appropriations, an Indian Tribe or Tribal organization that meets the requirements of paragraphs (2) and (3) of subsection (c) shall be eligible for grants—

- (A)** to plan for participation in self-governance; and
 - (B)** 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.
- (2) RECEIPT OF GRANT NOT REQUIRED.**—Receipt of a grant under paragraph (1) shall not be a requirement of participation in self-governance.

Sec. 403. FUNDING AGREEMENTS [25 U.S.C. § 5363]

(a) **AUTHORIZATION.**— The Secretary shall, on the request of any Indian Tribe or Tribal organization, negotiate and enter into a written funding agreement with the governing body of the Indian Tribe or the Tribal organization in a manner consistent with—

- (1) the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian Tribes and the United States; and
- (2) subsection (b).

(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, the Office of the Assistant Secretary for Indian Affairs, and the Office of the Special Trustee for American Indians, without regard to the agency or office of that Bureau or those Offices within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office³⁰ functions in accordance with subsection (g)(3), and including—

(A) any program, service, function, and activity, or portion thereof, administered under the authority of--

- (i) the Act of April 16, 1934 (25 U.S.C. § 5342 et seq.); and
- (ii) the Act of November 2, 1921 (25 U.S.C. § 13);

(B) 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; and

(C) any other program, service, function, or activity (or portion thereof) that is provided through the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, or the Office of the Special Trustee for American Indians with respect to which Indian Tribes or Indians are primary or significant beneficiaries;

(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 412(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; and

(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,

30 *Public Law 115-141 prohibits the BIA from distributing FY 2018 central office funds or pooled overhead funds in ISDEAA agreements. See endnote 2.*

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.

(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 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.³¹

(2) In all construction projects performed pursuant to this title, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements.

(f) **SUBMISSION.**

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 each Indian tribe that is served by the Agency that is serving the tribe that is a party to the funding agreement.

(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 and title III of this Act shall provide for advance payments to the tribes in the form of annual or semi-annual

31 *For construction projects whose actual cost is less than the estimated cost, the Secretary shall determine how to use the excess funds after consulting with the tribes. See 25 U.S.C. § 5309.*

installments at the discretion of the tribes.³²

(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 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,³³ including amounts for direct program and contract support costs³⁴ 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 member, 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, the term ‘contract’ shall include agreements entered into under this title.

(2) For the period that an agreement entered into under this title 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. § 5123), and the Act of July 3, 1952 (25 U.S.C. § 82a), shall not apply to attorney or other professional contracts by Indian tribal governments participating in Self-Governance under this title.

(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.

32 *Public Law 111-8 limits the ability of tribes, tribal organizations and consortia to invest ISDEAA funds. See endnote 3. Section 311 of Pub. L. No. 105-83 involves the allowable payment dates for quarterly ISDEAA payments. See endnote 5.*

33 *Pub. L. No. 115-141, Division G, Title I, Sec. 105 gives the Secretary of the Interior the authority to redistribute Tribal Priority Allocations. See endnote 6. Pub. L. No. 107-20 also limits Tribal Priority Allocations in Alaska. See endnote 8.*

34 *Pub. L. No. 115-141, Division G, by reference adopts section 405 of Pub. L. No. 113-235 which states that the amount of contract support costs “available” for ISDEAA agreements for fiscal years 1994 through 2014 are only those “amounts appropriated to or otherwise designated in committee reports” for the appropriations acts for those years. See endnote 4.*

(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 412(c) 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).

(l) **INCORPORATE SELF-DETERMINATION PROVISIONS.**

At the option of a participating tribe or tribes, any or all of the provisions of title I of this Act shall be made part of an agreement entered into under title III of this Act or this title. The Secretary is obligated to include such provisions at the option of the participating tribe or tribes. If such provision is incorporated it shall have the same force and effect as if set out in full in title III or this title.

(m) **OTHER PROVISIONS.—**

(1) **EXCLUDED FUNDING.**—A funding agreement shall not authorize an Indian Tribe to plan, conduct, administer, or receive Tribal share funding under any program that—

(A) is provided under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.); or

(B) is provided for elementary and secondary schools under the formula developed under section 1127 of the Education Amendments of 1978 (25 U.S.C. 2007).

(2) **SERVICES, FUNCTIONS, AND RESPONSIBILITIES.**—A funding agreement shall specify—

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

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

(C) the responsibilities of the Indian Tribe and the Secretary under the

funding agreement.

(3) BASE BUDGET.—

(A) IN GENERAL.—A funding agreement shall, at the option of the Indian Tribe, provide for a stable base budget specifying the recurring funds (which may include funds available under section 106(a)) to be transferred to the Indian Tribe, for such period as the Indian Tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations.

(B) LIMITATIONS.—Notwithstanding subparagraph (A), a funding agreement shall not specify funding associated with a program described in subsection (b)(2) or (c) unless the Secretary agrees.

(4) NO WAIVER OF TRUST RESPONSIBILITY.—A funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United that exists under treaties, Executive orders, court decisions, and other laws.

(n) AMENDMENT.—The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian Tribe, unless such terms are required by Federal law.

(o) EFFECTIVE DATE.—A funding agreement shall become effective on the date specified in the funding agreement.

(p) EXISTING AND SUBSEQUENT FUNDING AGREEMENTS.—

(1) SUBSEQUENT FUNDING AGREEMENTS.—Absent notification from an Indian Tribe that the Indian Tribe is withdrawing or retroceding the operation of one or more programs identified in a funding agreement, or unless otherwise agreed to by the parties to the funding agreement or by the nature of any noncontinuing program, service, function, or activity contained in a funding agreement—

(A) a funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, with funding paid annually for each fiscal year the agreement is in effect; and

(B) the term of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement for the purposes of calculating the amount of funding to which the Indian Tribe is entitled.

(2) DISPUTES.—Disputes over the implementation of paragraph (1)(A) shall be subject to section 406(c).

(3) EXISTING FUNDING AGREEMENTS.—An Indian Tribe that was participating in self-governance under this title on the date of enactment of the PROGRESS for Indian Tribes Act³⁵ shall have the option at any time after that date—

(A) to retain its existing funding agreement (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title; or

(B) to negotiate a new funding agreement in a manner consistent with this

35 *The date of enactment is October 21, 2020.*

title.

(4) **MULTIYEAR FUNDING AGREEMENTS.**—An Indian Tribe may, at the discretion of the Indian Tribe, negotiate with the Secretary for a funding agreement with a term that exceeds 1 year.

SEC. 404. COMPACTS [25 U.S.C. § 5364]

(a) **IN GENERAL.**—The Secretary shall negotiate and enter into a written compact with each Indian Tribe participating in self-governance in a manner consistent with the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian Tribes and the United States.

(b) **CONTENTS.**—A compact under subsection (a) shall—

- (1) specify and affirm the general terms of the government-to-government relationship between the Indian Tribe and the Secretary; and
- (2) include such terms as the parties intend shall control during the term of the compact.

(c) **AMENDMENT.**—A compact under subsection (a) may be amended only by agreement of the parties.

(d) **EFFECTIVE DATE.**—The effective date of a compact under subsection (a) shall be—

- (1) the date of the execution of the compact by the parties; or
- (2) such date as is mutually agreed upon by the parties.

(e) **DURATION.**—A compact under subsection (a) shall remain in effect—

- (1) for so long as permitted by Federal law; or
- (2) until termination by written agreement, retrocession, or reassumption.

(f) **EXISTING COMPACTS.**—An Indian Tribe participating in self-governance under this title, as in effect on the date of enactment of the PROGRESS for Indian Tribes Act,³⁶ shall have the option at any time after that date—

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

Sec. 405. GENERAL PROVISIONS [25 U.S.C. § 5365]

(a) **APPLICABILITY.**—An Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this title.

(b) **CONFLICTS OF INTEREST.**—An Indian Tribe participating in self-governance shall ensure that internal measures are in place to address, pursuant to Tribal law and procedures, conflicts of interest in the administration of programs.

36 *The date of enactment is October 21, 2020.*

(c) **AUDITS.**—

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

(2) **COST PRINCIPLES.**—An Indian Tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by—

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

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

(3) **FEDERAL CLAIMS.**—Any claim by the Federal Government against an Indian Tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to section 106(f).

(d) **REDESIGN AND CONSOLIDATION.**—Except as provided in section 407, an Indian Tribe may redesign or consolidate programs, or reallocate funds for programs, in a compact or funding agreement in any manner that the Indian Tribe determines to be in the best interest of the Indian community being served—

(1) so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law; and

(2) except that, with respect to the reallocation, consolidation, and redesign of programs described in subsection (b)(2) or (c) of section 403, a joint agreement between the Secretary and the Indian Tribe shall be required.

(e) **RETROCESSION.**—

(1) **IN GENERAL.**—An Indian Tribe may fully or partially retrocede to the Secretary any program under a compact or funding agreement.

(2) **EFFECTIVE DATE.**—

(A) **AGREEMENT.**—Unless an Indian Tribe rescinds a request for retrocession under paragraph (1), the retrocession shall become effective on the date specified by the parties in the compact or funding agreement.

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

(i) the earlier of—

(I) 1 year after the date on which the request is submitted;

and

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

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

(f) **NONDUPLICATION.**—A funding agreement shall provide that, for the period for which, and to the extent to which, funding is provided to an Indian Tribe under this title, the Indian Tribe—

(1) shall not be entitled to contract with the Secretary for funds under section 102, except that the Indian Tribe shall be eligible for new programs on the same basis as other

Indian Tribes; and

(2) shall be responsible for the administration of programs in accordance with the compact or funding agreement.

(g) RECORDS.—

(1) IN GENERAL.—Unless an Indian Tribe specifies otherwise in the compact or funding agreement, records of an Indian Tribe shall not be considered to be Federal records for purposes of chapter 5 of title 5, United States Code.

(2) RECORDKEEPING SYSTEM.—An Indian Tribe shall—

(A) maintain a recordkeeping system; and

(B) on a notice period of not less than 30 days, provide the Secretary with reasonable access to the records to enable the Department to meet the requirements of sections 3101 through 3106 of title 44, United States Code.

Sec. 406. PROVISIONS RELATING TO THE SECRETARY [25 U.S.C. § 5366]

(a) TRUST EVALUATIONS.—A funding agreement shall include a provision to monitor the performance of trust functions by the Indian Tribe through the annual trust evaluation.

(b) REASSUMPTION.—

(1) IN GENERAL.—A compact or funding agreement shall include provisions for the Secretary to reassume a program and associated funding if there is a specific finding relating to that program of—

(A) imminent jeopardy to a trust asset, a natural resource, or public health and safety that—

(i) is caused by an act or omission of the Indian Tribe; and

(ii) arises out of a failure to carry out the compact or funding agreement; or

(B) gross mismanagement with respect to funds transferred to an Indian Tribe under a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.

(2) PROHIBITION.—The Secretary shall not reassume operation of a program, in whole or part, unless—

(A) the Secretary first provides written notice and a hearing on the record to the Indian Tribe; and

(B) the Indian Tribe does not take corrective action to remedy the mismanagement of the funds or programs, or the imminent jeopardy to a trust asset, natural resource, or public health and safety.

(3) EXCEPTION.—

(A) IN GENERAL.—Notwithstanding paragraph (2), the Secretary may, on written notice to the Indian Tribe, immediately reassume operation of a program if—

(i) the Secretary makes a finding of imminent and substantial jeopardy and irreparable harm to a trust asset, a natural resource, or the public health and safety caused by an act or omission of the Indian Tribe; and

(ii) the imminent and substantial jeopardy and irreparable harm to the trust asset, natural resource, or public health and safety arises out of a failure by the Indian Tribe to carry out the terms of an applicable compact or funding agreement.

(B) REASSUMPTION.—If the Secretary reassumes operation of a program under subparagraph (A), the Secretary shall provide the Indian Tribe with a hearing on the record not later than 10 days after the date of reassumption.

(c) INABILITY TO AGREE ON COMPACT OR FUNDING AGREEMENT.—

(1) FINAL OFFER.—If 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.

(2) DETERMINATION.—Not more than 60 days after the date of receipt of a final offer by one or more of the officials designated pursuant to paragraph (4), the Secretary shall review and make a determination with respect to the final offer, except that the 60-day period may be extended for up to 30 days for circumstances beyond the control of the Secretary, upon written request by the Secretary to the Indian tribe.

(3) EXTENSIONS.—The deadline described in paragraph (2) may be extended for any length of time, as agreed upon by both the Indian Tribe and the Secretary.

(4) DESIGNATED OFFICIALS.—

(A) IN GENERAL.—The Secretary shall designate one or more appropriate officials in the Department to receive a copy of the final offer described in paragraph (1).

(B) NO DESIGNATION.—If no official is designated, the Director of the Office of the Executive Secretariat and Regulatory Affairs shall be the designated official.

(5) NO TIMELY DETERMINATION.—If the Secretary fails to make a determination with respect to a final offer within the period specified in paragraph (2), including any extension agreed to under paragraph (3), the Secretary shall be deemed to have agreed to the offer, except that with respect to any compact or funding agreement provision concerning a program described under section 403(c), the Secretary shall be deemed to have rejected the offer with respect to such provision and the terms of clauses (ii) through (iv) of paragraphs (6)(A) shall apply.

(6) REJECTION OF FINAL OFFER.—

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

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

(I) the amount of funds proposed in the final offer exceeds the applicable funding level as determined under section 106(a)(1);

(II) the program that is the subject of the final offer is an inherent Federal function or is subject to the discretion of the Secretary under section 403(c);

(III) the Indian Tribe cannot carry out the program in a manner that would not result in significant danger or risk to the

public health or safety, to natural resources, or to trust resources;

(IV) the Indian Tribe is not eligible to participate in self-governance under section 402(c);

(V) the funding agreement would violate a Federal statute or regulation; or

(VI) with respect to a program or portion of a program included in a final offer pursuant to section 403(b)(2), the program or the portion of the program is not otherwise available to Indian Tribes or Indians under section 102(a)(1)(E);

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

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

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

(B) EFFECT OF EXERCISING CERTAIN OPTION.—If an Indian Tribe exercises the option specified in subparagraph (A)(iv)—

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

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

(d) BURDEN OF PROOF.—In any administrative action, hearing, appeal, or civil action brought under this section, the Secretary shall have the burden of proof—

(1) of demonstrating, by a preponderance of the evidence, the validity of the grounds for a reassumption under subsection (b); and

(2) of clearly demonstrating the validity of the grounds for rejecting a final offer made under subsection (c).

(e) GOOD FAITH.—

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

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

(f) SAVINGS.—

(1) **IN GENERAL.**—To the extent that programs carried out for the benefit of Indian Tribes and Tribal organizations under this title reduce the administrative or other

responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 408(c), except for funding agreements entered into for programs under section 403(c), the Secretary shall make such savings available to the Indian Tribes or Tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(2) DISCRETIONARY PROGRAMS OF SPECIAL SIGNIFICANCE.— For any savings generated as a result of the assumption of a program by an Indian Tribe under section 403(c), such savings shall be made available to that Indian Tribe.

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

(h) DECISION MAKER.—A decision that constitutes final agency action and relates to an appeal within the Department conducted under subsection (c)(6)(A)(iii) may be made by—

(1) 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) an administrative law judge.

(i) RULES OF CONSTRUCTION.—Subject to section 101(a) of the PROGRESS for Indian Tribes Act,³⁷ 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. 407. CONSTRUCTION PROGRAMS AND PROJECTS [25 U.S.C. § 5367]

(a) IN GENERAL.—Indian Tribes participating in Tribal self-governance may carry out any construction project included in a compact or funding agreement under this title.

(b) TRIBAL OPTION TO CARRY OUT CERTAIN FEDERAL ENVIRONMENTAL ACTIVITIES.—In carrying out a construction project under this title, an Indian Tribe may, subject to the agreement of the Secretary, elect to assume some Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle III of title 54, United States Code, and related provisions of other law and regulations that would apply if the Secretary were to undertake a construction project, by adopting a resolution—

(1) designating a certifying Tribal officer to represent the Indian Tribe and to assume the status of a responsible Federal official under those Acts, laws, or regulations; and

37 *See footnote 9.*

(2) accepting the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer assuming the status of a responsible Federal official under those Acts, laws, or regulations.

(c) **SAVINGS CLAUSE.**—Notwithstanding subsection (b), nothing in this section authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle III of title 54, United States Code, and other related provisions of law that are inherent Federal functions.

(d) **CODES AND STANDARDS.**—In carrying out a construction project under this title, an Indian Tribe shall—

(1) adhere to applicable Federal, State, local, and Tribal building codes, architectural and engineering standards, and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and

(2) use only architects and engineers who—

(A) are licensed to practice in the State in which the facility will be built;

and

(B) certify that—

(i) they are qualified to perform the work required by the specific construction involved; and

(ii) upon completion of design, the plans and specifications meet or exceed the applicable construction and safety codes.

(e) **TRIBAL ACCOUNTABILITY.**—

(1) **IN GENERAL.**—In carrying out a construction project under this title, an Indian Tribe shall assume responsibility for the successful completion of the construction project and of a facility that is usable for the purpose for which the Indian Tribe received funding.

(2) **REQUIREMENTS.**—For each construction project carried out by an Indian Tribe under this title, the Indian Tribe and the Secretary shall negotiate a provision to be included in the funding agreement that identifies—

(A) the approximate start and completion dates for the project, which may extend over a period of one or more years;

(B) a general description of the project, including the scope of work, references to design criteria, and other terms and conditions;

(C) the responsibilities of the Indian Tribe and the Secretary for the project;

(D) how project-related environmental considerations will be addressed;

(E) the amount of funds provided for the project;

(F) the obligations of the Indian Tribe to comply with the codes referenced in subsection (d)(1) and applicable Federal laws and regulations;

(G) the agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction; and

(H) the agreement of the Secretary to issue a certificate of occupancy, if

requested by the Indian Tribe, based upon the review and verification by the Secretary, to the satisfaction of the Secretary, that the Indian Tribe has secured upon completion the review and approval of the plans and specifications, sufficiency of design, life safety, and code compliance by qualified, licensed, and independent architects and engineers.

(f) FUNDING.—

(1) IN GENERAL.—Funding appropriated for construction projects carried out under this title shall be included in funding agreements as annual or semiannual advance payments at the option of the Indian Tribe.

(2) ADVANCE PAYMENTS.—The Secretary shall include all associated project contingency funds with each advance payment, and the Indian Tribe shall be responsible for the management of such contingency funds.

(g) NEGOTIATIONS.—At the option of the Indian Tribe, construction project funding proposals shall be negotiated pursuant to the statutory process in section 105, and any resulting construction project agreement shall be incorporated into the funding agreement as addenda.

(h) FEDERAL REVIEW AND VERIFICATION.—

(1) IN GENERAL.—On a schedule negotiated by the Secretary and the Indian Tribe—

(A) the Secretary shall review and verify, to the satisfaction of the Secretary, that project planning and design documents prepared by the Indian Tribe in advance of initial construction are in conformity with the obligations of the Indian Tribe under subsection (d); and

(B) before the project planning and design documents are implemented, the Secretary shall review and verify to the satisfaction of the Secretary that subsequent document amendments which result in a significant change in construction are in conformity with the obligations of the Indian Tribe under subsection (d).

(2) REPORTS.—The Indian Tribe shall provide the Secretary with project progress and financial reports not less than semiannually.

(3) OVERSIGHT VISITS.—The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian Tribe.

(i) APPLICATION OF OTHER LAWS.—Unless otherwise agreed to by the Indian Tribe and except as otherwise provided in this Act, no provision of title 41, United States Code, the Federal Acquisition Regulation, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project carried out under this title.

(j) FUTURE FUNDING.—Upon completion of a facility constructed under this title, the Secretary shall include the facility among those eligible for annual operation and maintenance funding support comparable to that provided for similar facilities funded by

the Department as annual appropriations are available and to the extent that the facility size and complexity and other factors do not exceed the funding formula criteria for comparable buildings.

Sec. 408. PAYMENT [25 U.S.C. § 5368]

(a) **IN GENERAL.**—At the request of the governing body of an Indian Tribe and under the terms of an applicable funding agreement, the Secretary shall provide funding to the Indian Tribe to carry out the funding agreement.

(b) **ADVANCE ANNUAL PAYMENT.**—At the option of the Indian Tribe, a funding agreement shall provide for an advance annual payment to an Indian Tribe.

(c) **AMOUNT.**—

(1) **IN GENERAL.**—Subject to subsection (e) and sections 403 and 405, the Secretary shall provide funds to the Indian Tribe under a funding agreement for programs in an amount that is equal to the amount that the Indian Tribe would have been entitled to receive under contracts and grants under this Act (including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members) without regard to the organization level within the Department at which the programs are carried out.

(2) **SAVINGS CLAUSE.**—Nothing in this section reduces programs, services, or funds of, or provided to, another Indian Tribe.

(d) **TIMING.**—

(1) **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 resolution.

(2) **TRANSFERS.**—Not later than 1 year after the date of enactment of the PROGRESS for Indian Tribes Act,³⁸ in any instance in which 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.

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

(f) **MULTIYEAR FUNDING.**—A funding agreement may provide for multiyear

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funding.

(g) LIMITATIONS ON AUTHORITY OF THE SECRETARY.—The Secretary shall not—

(1) fail to transfer to an Indian Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under this title for programs eligible under paragraph (1) or (2) of section 403(b), except as required by Federal law;

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

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

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

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

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

(ii) a congressional directive in legislation or an 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 an activity under a program for which the funds were provided;

(C) to pay for Federal functions, including—

(i) Federal pay costs;

(ii) Federal employee retirement benefits;

(iii) automated data processing;

(iv) technical assistance; and

(v) monitoring of activities under this title; or

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

(h) FEDERAL RESOURCES.—If 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, as soon as practicable, acquire and transfer such personnel, supplies, or resources to the Indian Tribe under this title.

(i) 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.

(j) INTEREST OR OTHER INCOME.—

(1) IN GENERAL.—An Indian Tribe may retain interest or income earned on any funds paid under a compact or funding agreement to carry out governmental

purposes.

(2) NO EFFECT ON OTHER AMOUNTS.—The retention of interest or income under paragraph (1) shall not diminish the amount of funds an Indian Tribe is entitled to receive under a funding agreement in the year the interest or income is earned or in any subsequent fiscal year.

(3) INVESTMENT STANDARD.—Funds transferred under this title shall be managed by the Indian Tribe using the prudent investment standard, provided that the Secretary shall not be liable for any investment losses of funds managed by the Indian Tribe that are not otherwise guaranteed or insured by the Federal Government.

(k) CARRYOVER OF FUNDS.—

(1) IN GENERAL.—Notwithstanding any provision of an appropriations Act, all funds paid to an Indian Tribe in accordance with a compact or funding agreement shall remain available until expended.

(2) EFFECT OF CARRYOVER.—If an Indian Tribe elects to carry over funding from one year to the next, the carryover shall not diminish the amount of funds the Indian Tribe is entitled to receive under a funding agreement in that fiscal year or any subsequent fiscal year.

(l) LIMITATION OF COSTS.—

(1) IN GENERAL.—An Indian Tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement.

(2) NOTICE OF INSUFFICIENCY.—If at any time the Indian Tribe has reason to believe that the total amount provided for a specific activity under a compact or funding agreement is insufficient, the Indian Tribe shall provide reasonable notice of such insufficiency to the Secretary.

(3) SUSPENSION OF PERFORMANCE.—If, after notice under paragraph (2), the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian Tribe may suspend performance of the activity until such time as additional funds are transferred.

(4) SAVINGS CLAUSE.—Nothing in this section reduces any programs, services, or funds of, or provided to, another Indian Tribe.

(m) DISTRIBUTION OF FUNDS.—The Office of Self-Governance shall be responsible for distribution of all Bureau of Indian Affairs funds provided under this title unless otherwise agreed by the parties to an applicable funding agreement.

(n) APPLICABILITY.—Notwithstanding any other provision of this section, section 101(a) of the PROGRESS for Indian Tribes Act³⁹ applies to subsections (a) through (m).

39 *See footnote 9.*

Sec. 409. FACILITATION

(a) **IN GENERAL.**—Except as otherwise provided by law (including section 101(a) of the PROGRESS for Indian Tribes Act),⁴⁰ the Secretary shall interpret each Federal law and regulation in a manner that facilitates—

- (1) the inclusion of programs in funding agreements; and
- (2) the implementation of funding agreements.

(b) **REGULATION WAIVER.**—

(1) **REQUEST.**—An Indian Tribe may submit to the Secretary a written request for a waiver of applicability of a Federal regulation, including—

- (A) an identification of the specific text in the regulation sought to be waived; and
- (B) the basis for the request.

(2) **DETERMINATION BY THE SECRETARY.**—Not later than 120 days after receipt by the Secretary and the designated officials under paragraph (4) of a request under paragraph (1), the Secretary shall approve or deny the requested waiver in writing to the Indian Tribe.

(3) **EXTENSIONS.**—The deadline described in paragraph (2) may be extended for any length of time, as agreed upon by both the Indian Tribe and the Secretary.

(4) **DESIGNATED OFFICIALS.**—The Secretary shall designate one or more appropriate officials in the Department to receive a copy of the waiver request described in paragraph (1).

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

(6) **FAILURE TO MAKE DETERMINATION.**—If the Secretary fails to make a determination with respect to a waiver request within the period specified in paragraph (2) (including any extension agreed to under paragraph (3)), the Secretary shall be deemed to have agreed to the request, except that for a waiver request relating to programs eligible under section 403(b)(2) or section 403(c), the Secretary shall be deemed to have denied the request.

(7) **FINALITY.**—A decision of the Secretary under this section shall be final for the Department.

Sec. 410. DISCRETIONARY APPLICATION OF OTHER SECTIONS

(a) **IN GENERAL.**—Except as otherwise provided in section 201(d) of the PROGRESS for Indian Tribes Act, at the option of a participating Indian Tribe or Indian Tribes, any of the provisions of title I may be incorporated in any compact or funding agreement under this title. The inclusion of any such provision shall be subject to, and shall not conflict with, section 101(a)⁴¹ of such Act.

(b) **EFFECT.**—Each incorporated provision under subsection (a) shall—

40 *See footnote 9.*

41 *See footnote 9.*

- (1) have the same force and effect as if set out in full in this title;
- (2) supplement or replace any related provision in this title; and
- (3) apply to any agency otherwise governed by this title.

- (c) **EFFECTIVE DATE.**—If an Indian Tribe requests incorporation at the negotiation stage of a compact or funding agreement, the incorporation shall—
- (1) be effective immediately; and
 - (2) control the negotiation and resulting compact and funding agreement.

Sec. 411. ANNUAL BUDGET LIST

The Secretary shall list, in the annual budget request submitted to Congress under section 1105 of title 31, United States Code, any funds proposed to be included in funding agreements authorized under this title.

Sec. 412. REPORTS

(a) **IN GENERAL.**—

(1) **REQUIREMENT.**—On January 1 of each year, the Secretary shall submit to Congress a report regarding the administration of this title.

(2) **ANALYSIS.**—Any Indian Tribe may submit to the Office of Self-Governance and to the appropriate committees of Congress a detailed annual analysis of unmet Tribal needs for funding agreements under this title.

(b) **CONTENTS.**—The report under subsection (a)(1) shall—

(1) be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds;

(2) identify—

(A) the relative costs and benefits of self-governance;

(B) with particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to self-governance Indian Tribes and members of Indian Tribes;

(C) the funds transferred to each Indian Tribe and the corresponding reduction in the Federal employees and workload; and

(D) the funding formula for individual Tribal shares of all Central Office funds, together with the comments of affected Indian Tribes, developed under subsection (d);

(3) before being submitted to Congress, be distributed to the Indian Tribes for comment (with a comment period of not less than 30 days);

(4) include the separate views and comments of each Indian Tribe or Tribal organization; and

(5) include a list of—

(A) all such programs that the Secretary determines, in consultation with Indian Tribes participating in self-governance, are eligible for negotiation to be included in a funding agreement at the request of a participating Indian Tribe; and

(B) all such programs which Indian Tribes have formally requested to include in a funding agreement under section 403(c) due to the special geographic, historical, or cultural significance of the program to the Indian Tribe,

indicating whether each request was granted or denied, and stating the grounds for any denial.

(c) REPORT ON NON-BIA PROGRAMS.—

(1) IN GENERAL.—In order to optimize opportunities for including non-BIA programs in agreements with Indian Tribes participating in self-governance under this title, the Secretary shall review all programs administered by the Department, other than through the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, or the Office of the Special Trustee for American Indians, without regard to the agency or office concerned.

(2) PROGRAMMATIC TARGETS.—The Secretary shall establish programmatic targets, after consultation with Indian Tribes participating in self-governance, to encourage bureaus of the Department to ensure that an appropriate portion of those programs are available to be included in funding agreements.

(3) PUBLICATION.—The lists under subsection (b)(5) and targets under paragraph (2) shall be published in the Federal Register and made available to any Indian Tribe participating in self-governance.

(4) ANNUAL REVIEW.—

(A) IN GENERAL.—The Secretary shall annually review and publish in the Federal Register, after consultation with Indian Tribes participating in self-governance, revised lists and programmatic targets.

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

(d) REPORT ON CENTRAL OFFICE FUNDS.—Not later than January 1, 2020, the Secretary shall, in consultation with Indian Tribes, develop a funding formula to determine the individual Tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs and the Office of the Special Trustee for inclusion in the compacts.

Sec. 413. REGULATIONS

(a) IN GENERAL.—

(1) PROMULGATION.—Not later than 90 days⁴² after the date of enactment of the PROGRESS for Indian Tribes Act, 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.

42 January 19, 2021.

(2) PUBLICATION OF PROPOSED REGULATIONS.—Proposed regulations to implement this title shall be published in the Federal Register not later than 21 months⁴³ after the date of enactment of the PROGRESS for Indian Tribes Act.

(3) EXPIRATION OF AUTHORITY.—The authority to promulgate regulations under paragraph (1) shall expire on the date that is 30 months⁴⁴ after the date of enactment of the PROGRESS for Indian Tribes Act.

(b) COMMITTEE.—

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

(2) LEAD AGENCY.—Among the Federal representatives described in paragraph (1), the Office of Self-Governance shall be the lead agency for the Department.

(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.—

(1) REPEAL.—The Secretary may repeal any regulation that is inconsistent with this Act.

(2) CONFLICTING PROVISIONS.—Subject to section 101(a) of the PROGRESS for Indian Tribes Act⁴⁵ and except with respect to programs described under section 403(c), this title shall supersede any conflicting provision of law (including any conflicting regulations).

(3) EFFECTIVENESS WITHOUT REGARD TO REGULATIONS.—The lack of promulgated regulations on an issue shall not limit the effect or implementation of this title.

Sec. 414. EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCE, AND RULES

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

- (1) the eligibility provisions of section 105(g); and
- (2) regulations promulgated pursuant to section 413.

43 *July 21, 2022.*

44 *April 21, 2023.*

45 *See footnote 9.*

Sec. 415. APPEALS

Except as provided in section 406(d), in any administrative action, appeal, or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by a preponderance of the evidence—

- (1) the validity of the grounds for the decision; and
- (2) the consistency of the decision with the requirements and policies of this title.

Sec. 416. APPLICATION OF OTHER PROVISIONS⁴⁶

Section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (Public Law 101–512; 104 Stat. 1959), shall apply to compacts and funding agreements entered into under this title.

Sec. 417. AUTHORIZATION OF APPROPRIATIONS

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

46 *Sec. 201(d) of the the PROGRESS for Indian Tribes Act, S. 209 (2020) further adds:*

Sections 4, 5, 6, 7, 102(c), 104, 105(a)(1), 105(f), 110, and 111 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304, 5305, 5306, 5307, 5321(c), 5323, 5324(a)(1), 5324(f), 5331, and 5332) and section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (Public Law 101–512; 104 Stat. 1959), apply to compacts and funding agreements entered into under title IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5361 et seq.)

**TITLE V – TRIBAL SELF-GOVERNANCE TO AMEND THE
INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT
TO PROVIDE FURTHER SELF-GOVERNANCE BY INDIAN TRIBES,
AND FOR OTHER PURPOSES**

Sec. 501. DEFINITIONS [25 U.S.C. § 5381]

(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 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.

(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 [25 U.S.C. § 5382]

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.

Sec. 503. SELECTION OF PARTICIPATING INDIAN TRIBES⁴⁷
[25 U.S.C. § 5383]

(a) CONTINUING PARTICIPATION.--Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III on the date of the 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 withdrawn from participation in an inter-tribal consortium or tribal organization, in whole or in part, shall be

⁴⁷ 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. No. 105-83, § 325; Pub. L. No. 106-260, § 12; Pub. L. No. 105-277, § 351; Pub. L. No. 111-88, § 419; Pub. L. No. 107-20, § 2609; and Pub. L. No. 113-76, § 424 have substantively modified tribal rights to enter ISDEAA agreements. *See* endnote 1.

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. No. 105-143, as amended. See endnote 1.

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 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. § 5384]

(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 the enactment of this title shall have the option at any time after the date of the 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 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. § 5385]

(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. 5342 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 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 the 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 [25 U.S.C. § 5386]

(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 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).

(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 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 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 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 [25 U.S.C. § 5387]

(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 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;

(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 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 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.

(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 [25 U.S.C. § 5388]

(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.⁴⁸

(b) MULTIYEAR FUNDING.--The Secretary is authorized to 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

⁴⁸ Section 311 of Pub. L. No. 105-83 involves the allowable payment dates for quarterly ISDEEA payments. *See* endnote 5.

contract support costs⁴⁹ 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 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).

(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

49 *Pub. L. No. 115-141, Division G, by reference extends through FY 2018 section 405 of Pub. L. No. 113-235 which states that the amount of contract support costs "available" for ISDEAA agreements for fiscal years 1994 through 2014 are only those "amounts appropriated to or otherwise designated in committee reports "for the appropriations acts for those years. See endnote 4.*

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, 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.--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. § 5389]

(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 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 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 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). With respect to construction alteration, or repair work to which the Act of March 3, 1931, is applicable under this section, the Secretary of Labor shall have the authority and functions set forth in the Reorganization Plan numbered 14, of 1950, and section 2 of the Act of June 13, 1934 (48 Stat. 948).

(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 **[25 U.S.C. § 5390]**

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. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply.

Sec. 511. CIVIL ACTIONS [25 U.S.C. § 5391]

(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. 5123), 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 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 [25 U.S.C. § 5392]

(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 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.

(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 [25 U.S.C. § 5393]

(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, 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 [25 U.S.C. § 5394]

(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, 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 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, 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. § 5395]

(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) **OBLIGATIONS OF THE UNITED STATES.**--The Indian Health Service under this subchapter 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. § 5396]**

(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 [25 U.S.C. § 5397]

(a) **IN GENERAL.**--

(1) **PROMULGATION.**--Not later than 90 days after the date of the enactment of the Tribal Self-Governance Amendments of 2000, 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 the enactment of the Tribal Self-Governance Amendments of 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.

(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.

(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) and regulations promulgated under section 517.

Sec. 518. APPEALS [25 U.S.C. § 5398]

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 [25 U.S.C. § 5399]

(a) **IN GENERAL.**--There are authorized to be appropriated such sums as may be necessary to carry out this title.

(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.

**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 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.

ENDNOTES – FY 2018 (through July 5, 2018)

Within these endnotes are amendments and clarifications to the preceding HSDW compilation of the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, as amended. Often, modifications or amendments to the Act are accomplished through annual appropriations acts and are effective only for the duration of that particular appropriation cycle. Occasionally, appropriations provisions will have a permanent effect on the Act. We include both types of provisions here or in footnotes to the HSDW compilation of the ISDEAA.

These endnotes include laws that amend or modify the ISDEAA up to and through the enactment of Pub. L. No. 116-94, the Further Consolidated Appropriations Act of 2020. The endnotes are to be updated annually to accommodate amendments, largely from annual appropriations measures, to the ISDEAA.

1. Limitations in Alaska

Pub. L. No. 105-83, § 325; Pub. L. No. 105-277, § 351; Pub. L. No. 106-260, § 12; and Pub. L. No. 107-20, § 2609 have substantively altered the rights of tribes in Alaska to enter agreements under the ISDEAA for the provision of health care programs.

Section 325 of Public Law 105-83 provides:

“(a) Notwithstanding any other provision of law, and except as provided in this section, the Aleutian/Pribilof Islands Association, Inc., Bristol Bay Area Health Corporation, Chugachmiut, Copper River Native Association, Kodiak Area Native Area Association, Maniilaq Association, Metlakatla Indian Community, Arctic Slope Native Association, Ltd., Norton Sound Health Corporation, Southcentral Foundation, Southeast Alaska Regional Health Consortium, Tanana Chiefs Conference, Inc., and Yukon-Kuskokwim Health Corporation (hereinafter “regional health entities”), without further resolutions from the Regional Corporations, Village Corporations, Indian Reorganization Act Councils, tribes and/or villages which they represent are authorized to form a consortium (hereinafter “the Consortium”) to enter into contracts, compacts, or funding agreements under Public Law 93-638 (25 U.S.C. § 450 et seq.⁵⁰), as amended, to provide all statewide health services provided by the Indian Health Service of the Department of Health and Human Services through the Alaska Native Medical Center and the Alaska Area Office. Each specified “regional health entity” shall maintain that status for purposes of participating in the consortium only so long as

50 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

it operates a regional health program for the Indian Health Service under Public Law 93-638 (25 U.S.C. § 450 et seq.⁵¹), as amended.

(b) The Consortium shall be governed by a 15-member Board of Directors, which shall be composed of one representative of each regional health entity listed in subsection (a) above, and two in 25 U.S.C. § 450b(e),⁵² and sub-regional tribal organizations which operate health programs not affiliated with the regional health entities listed above and Indian tribes not receiving health services from any tribal, regional or sub-regional health provider. Each member of the Board of Directors shall be entitled to cast one vote. Decisions of the Board of Directors shall be made by consensus whenever possible, and by majority vote in the event that no consensus can be reached. The Board of Directors shall establish at its first meeting its rules of procedure, which shall be published and made available to all members.

(c) The statewide health services (including any programs, functions, services and activities provided as part of such services) of the Alaska Native Medical Center and the Alaska Area Office may only be provided by the Consortium. Statewide health services for purposes of this section shall consist of all programs, functions, services, and activities provided by or through the Alaska Native Medical Center and the Alaska Area Office, not under contract or other funding agreement with any other tribe or tribal organization as of October 1, 1997, except as provided in subsection (d) below. All statewide health services provided by the Consortium under this section shall be provided pursuant to contracts or funding agreements entered into by the Consortium under Public Law 93-638 (25 U.S.C. § 450 et seq.⁵³), as amended, and for such purpose as defined in section 4(h) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450b(h)⁵⁴).

(d) Cook Inlet Region, Inc., through Southcentral Foundation (or any successor health care entity designated by Cook Inlet Region, Inc.) pursuant to Public Law 93-638 (25 U.S.C. § 450 et seq.⁵⁵), as amended, is hereby authorized to enter into contracts or funding agreements under such Public Law for all services provided at or through the Alaska Native Primary Care Center or other satellite clinics in Anchorage or the Matanuska-Susitna Valley without submission of any further authorizing resolutions from any other Alaska Native Region, village corporation, Indian Reorganization Act council, or tribe, no matter where located. Services provided under this paragraph shall, at a minimum, maintain the level of statewide and Anchorage Service Unit services provided at the Alaska Native Primary Care

51 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

52 *This section has been recodified to 25 U.S.C. § 5304(e).*

53 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

54 *This section has been recodified to 25 U.S.C. § 5304(h).*

55 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

Center as of October 1, 1997, including necessary related services performed at the Alaska Native Medical Center. In addition, Cook Inlet region, Inc., through Southcentral Foundation, or any lawfully designated health care entity of Cook Inlet Region, Inc., shall contract or enter into a funding agreement under Public Law 93-638 (25 U.S.C. § 450 et seq.⁵⁶), as amended, for all primary care services provided by the Alaska Native Medical Center, including, but not limited to, family medicine, primary care internal medicine, pediatrics, obstetrics and gynecology, physical therapy, psychiatry, emergency services, public health nursing, health education, optometry, dentistry, audiology, social services, pharmacy, radiology, laboratory and biomedical, and the administrative support for these programs, functions, services and activities. Cook Inlet Region, Inc., through Southcentral Foundation, or any lawfully designated health care entity of Cook Inlet Region, Inc., may provide additional health care services at the Alaska Native Medical Center if such use and services are provided pursuant to an agreement with the Consortium. All services covered by this subsection shall be provided on a nondiscriminatory basis without regard to residency within the Municipality of Anchorage.”

Section 351 of Pub. L. No. 105-277, as amended by § 2609 of Pub. L. No. 107-20, precluded expending funds for ISDEAA agreements with Alaska native villages or village corporations through FY 2004. The rights of villages or village corporations to renew agreements entered into prior to August 27, 1997 were not impaired. These provisions have been extended through FY 2020 by Section 433 of the Pub. L. No. 116-94 extending Section 424 of Pub. L. No. 113-76. Section 433 reads as follows:

“**Sec. 424.** (a) Notwithstanding any other provision of law, and until October 1, 2018, the Indian Health Service may not disburse funds for the provision of health care services pursuant to Public Law 93-638 (25 U.S.C. 450 et seq.⁵⁷) to any Alaska Native village or Alaska Native village corporation that is located within the area served by an Alaska Native regional health entity.

(b) Nothing in this section shall be construed to prohibit the disbursement of funds to any Alaska Native village or Alaska Native village corporation under any contract or compact entered into prior to May 1, 2006, or to prohibit the renewal of any such agreement.

(c) For the purpose of this section, Eastern Aleutian Tribes, Inc., the Council of Athabascan Tribal Governments, and the Native Village of Eyak shall be treated as Alaska Native regional health entities to whom funds may be disbursed under this section.”

Public Law 105-143, Title II, as amended, provides:

56 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

57 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

**“TITLE II -- Limitation On Health Care Contracts And Compacts For The
Ketchikan Gateway Borough**

Sec. 201. FINDINGS. Congress finds that--

(1) the execution of more than 1 contract or compact between an Alaska Native village or regional or village corporation in the Ketchikan Gateway Borough and the Secretary to provide for health care services in an area with a small population leads to duplicative and wasteful administrative costs; and

(2) incurring the wasteful costs referred to in paragraph (1) leads to decrease in the quality of health care that is provided to Alaska Natives in an affected area.

Sec. 202. DEFINITIONS. In this title:

(1) **ALASKA NATIVE-** The term ‘Alaska Native’ has the meaning given the term ‘Native’ in section 3(b) of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602(b)).

(2) **ALASKA NATIVE VILLAGE OR REGIONAL OR VILLAGE CORPORATION-** The term ‘Alaska Native village or regional or village corporation’ means an Alaska Native village or regional or village corporation defined in, or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 et seq.).

(3) **CONTRACT; COMPACT-** The terms ‘contract’ and ‘compact’ mean a self-determination contract and a self-governance compact as these terms are defined in the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.⁵⁸).

(4) **SECRETARY-** The term ‘Secretary’ means the Secretary of Health and Human Services.

Sec. 203. LIMITATION.

(a) **IN GENERAL-** The Secretary shall take such action as may be necessary to ensure that, in considering a renewal of a contract or compact, or signing of a new contract or compact for the provision of health care services in the Ketchikan Gateway Borough other than community based alcohol services, there will be only one contract or compact in effect. Notwithstanding any other provision of law, such contract or compact shall provide services to all Indian and Alaska Native beneficiaries of the Indian Health Service in the Ketchikan Gateway Borough without the need for resolutions of support from any Indian tribe as defined in the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450b(e))⁵⁹.

(b) **CONSIDERATION-** In any case in which the Secretary, acting through the Director of the Indian Health Service, is required to select from more

58 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

59 *This section has been recodified to 25 U.S.C. § 5304(e).*

than 1 application for a contract or compact described in subsection (a), in awarding the contract or compact, the Secretary shall take into consideration--

- (1) the ability and experience of the applicant;
- (2) the potential for the applicant to acquire and develop the necessary ability; and
- (3) the potential for growth in the health care needs of the covered borough.”

Section 12 of Pub. L. No. 106-260 provides:

“(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 or 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.⁶⁰)” where such phrase appears in each section.”

2. BIA Central Office Shares

The Interior Department and Further Continuing Appropriations Act, Fiscal Year 2010, Pub. L. No. 111-88 (October 30, 2009), prohibits the BIA from distributing central office funds or pooled overhead funds in FY 2010 ISDEAA agreements. This provision appears to repeal by implication the ISDEAA provision that tribes and tribal organizations have the right to enter agreements to assume central office funds and functions. The provision, as it appears in Pub. L. No. 116-94, reads:

“Notwithstanding any other provision of law, no funds available to the Bureau of Indian Affairs for central office oversight and Executive Direction and Administrative Services (except executive direction and administrative services funding for Tribal Priority Allocations, regional offices, and facilities operations and maintenance) shall be available for contracts, grants, compacts, or cooperative agreements with the Bureau of Indian Affairs under the provisions of the Indian Self-Determination Act or the Tribal Self-Governance Act of 1994 (Public Law 103-413).”

60 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

This provision has been carried forward in the continuing resolutions and appropriations acts since FY 2010, including Pub. L. No. 116-94 for fiscal year 2020.

3. Investment of Advance Payments

Section 111 of the Department of the Interior portion of Pub. L. No. 108-447, Division E, Title I limits how tribes, tribal organizations and consortia can invest ISDEAA funds. This provision, which had been renewed annually in the appropriations acts, was made permanent by the FY 2005 Act. The provision reads:

“Sec. 111. Advance payments made by the Department of the Interior to Indian tribes, tribal organizations, and tribal consortia pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. §450 et seq.⁶¹) or the Tribally Controlled Schools Act of 1988 (25 U.S.C. § 2501 et seq.) may hereafter be invested by the Indian tribe, tribal organization, or consortium before such funds are expended for the purposes of the grant, compact, or annual funding agreement so long as such funds are--

(1) invested by the Indian tribe, tribal organization, or consortium only in obligations of the United States, or in obligations or securities that are guaranteed or insured by the United States, or mutual (or other) funds registered with the Securities and Exchange Commission and which only invest in obligations of the United States or securities that are guaranteed or insured by the United States; or

(2) deposited only into accounts that are insured by an agency or instrumentality of the United States, or are fully collateralized to ensure protection of the funds, even in the event of a bank failure.”

4. Contract Support Costs

In Public Law 116-94, Further Consolidated Appropriations Act, 2020, Division D, Congress maintains separate accounts first established in FY 2016 for contract support costs in both the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA) budgets. The Act provides an indefinite amount for contract support costs funding for each agency: “such sums as may be necessary.” These provisions are specific to FY 2020.

The Act states with regard to IHS:

*“For payments to tribes and tribal organizations for contract support costs associated with Indian Self-Determination and Education Assistance Act agreements with the Indian Health Service for fiscal year 2020, such sums as may be necessary: *Provided*, That, notwithstanding any other provision of law, no amounts made available under this heading shall be available for transfer to another budget account.”*

61 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

The Act states with regard to BIA:

“For payments to tribes and tribal organizations for contract support costs associated with Indian Self-Determination and Education Assistance Act agreements with the Bureau of Indian Affairs and the Bureau of Indian Education for fiscal year 2020, such sums as may be necessary, which shall be available for obligation through September 30, 2021: *Provided*, That, notwithstanding any other provision of law, no amounts made available under this heading shall be available for transfer to another budget account.”

There was no formal conference report, but there was an accompanying Joint Explanatory Statement published in the December 17, 2019 Congressional Record. The Joint Explanatory Statement with regard to IHS contract support costs states:

“CONTRACT SUPPORT COSTS. The agreement continues language from fiscal year 2019 establishing an indefinite appropriation for contract support costs estimated to be \$820,000,000, which is equal to the request.

The Explanatory Statement with regard to BIA contract support costs states:

“CONTRACT SUPPORT COSTS. The bill provides an indefinite appropriation for contract support costs, consistent with fiscal year 2019 and estimated to be \$271,000,000.”

Fiscal Year 2020 Limitation. Section 406 of Division D of the Act provides that no FY 2018 funds may be used by the IHS or the BIA to pay prior year CSC or to repay the Judgment Fund for payment of judgments or settlements related to past year CSC claims.

The Act states:

“SEC. 406. Amounts provided by this Act for fiscal year 2020 under the headings “Department of Health and Human Services, Indian Health Service, Contract Support Costs” and “Department of the Interior, Bureau of Indian Affairs and Bureau of Indian Education, Contract Support Costs” are the only amounts available for contract support costs arising out of self-determination or self-governance contracts, grants, compacts, or annual funding agreements for fiscal year 2020 with the Bureau of Indian Affairs or the Indian Health Service: *Provided*, That such amounts provided by this Act are not available for payment of claims for contract support costs for prior years, or for repayments of payments for settlements or judgements awarding contract support costs for prior years.”

Prior Year Fiscal Limitations. Section 405 of Division D of the FY 2020 Further Consolidated Appropriations Act, P.L. 116-94, incorporates by reference Section 405 of the FY 2015 appropriations act: “Sections 405 and 406 of division F of the Consolidated

and Further Continuing Appropriations Act, 2015 (Public Law 113-235) shall continue in effect in fiscal year 2020.” This provision, which retroactively limits the amount of contract support costs available for ISDEAA agreements for fiscal years 1994 through 2013, has been included in the appropriations acts for many years and has not precluded recovery on past-year CSC claims. It reads as follows:

“Sec. 405. Notwithstanding any other provision of law, amounts appropriated to or otherwise designated in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208, 105-83, 105-277, 106-113, 106-291, 107-63, 108-7, 108-108, 108-447, 109-54, 109-289, division B and Continuing Appropriations Resolution, 2007 (division B of Public Law 109-289, as amended by Public Law 110-5 and 110-28), Public Laws 110-92, 110-116, 110-137, 110-149, 110-161, 110-329, 111-6, 111-8, 111-88, 112-10, 112-74, and 113-6 for payments for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 2013 for such purposes, except that the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.”

Under Pub. L. No. 105-277, Congress limited the availability of IHS contract support costs to those costs directly attributable “to contracts, grants and compacts pursuant to the Indian Self-Determination and Education Assistance Act.” H.R. Rep. 105-825, at 290 (Oct. 19, 1998). This provision, codified at 25 U.S.C. § 5326, reads:

“That, heretofore and hereafter and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act 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 and Education Assistance 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.”

Under § 113 of Pub. L. No. 106-113, Congress extended this limitation to the Department of the Interior. H.R. Rep. 106-479 at 379 (Nov. 17, 1999). This provision, codified at 25 U.S.C. § 5327, reads:

“**Sec. 113.** 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 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.”

5. Quarterly Payments

Section 311 of Pub. L. No. 105-83 involves the allowable payments dates for quarterly ISDEEA payments. It provides:

“**Sec. 311.** Notwithstanding Public Law 103-413, quarterly payments of funds to tribes and tribal organizations under annual funding agreements pursuant to section 108 of Public Law 93-638, as amended, beginning in fiscal year 1998 and thereafter, may be made on the first business day following the first day of a fiscal quarter.”

6. TPA Redistribution

Under Section 105 of Title I, Division D of Pub. L. No. 116-94, the Secretary of the Interior is authorized to redistribute Tribal Priority Allocation funds to address tribal funding inequities. This provision, as it appears in Pub. L. No. 116-94 reads:

“**Sec. 105.** Notwithstanding any other provision of law, the Secretary of the Interior is authorized to redistribute any Tribal Priority Allocation funds, including tribal base funds, to alleviate tribal funding inequities by transferring funds to address identified, unmet needs, dual enrollment, overlapping service areas or inaccurate distribution methodologies. No tribe shall receive a reduction in Tribal Priority Allocation funds of more than 10 percent in fiscal year 2020. Under circumstances of dual enrollment, overlapping service areas or inaccurate distribution methodologies, the 10 percent limitation does not apply.”

7. Tribal Return of Funds

Under Pub. L. No. 116-94, Congress provides that a tribe may return appropriations to the Bureau of Indian Affairs with no diminishment of the federal trust responsibility to that tribe and no limitation to access future appropriations. This provision, as it appears in Pub. L. No. 116-94:

“In the event any tribe returns appropriations made available by this Act to the Bureau of Indian Affairs, this action shall not diminish the Federal Government’s trust responsibility to that tribe, or the government-to-government relationship between the United States and that tribe, or that tribe’s ability to access future appropriations.”

8. TPA in Alaska

Since 2010, amounts made available for Tribal Priority Allocations in Alaska through the Department of the Interior have been restricted to tribes meeting certain conditions. 25 U.S.C. § 13f reads as follows:

“ (a) Notwithstanding any other provision of law, with respect to amounts made available for tribal priority allocations in Alaska, such amounts hereafter shall only be provided to tribes the membership of which on June 1 of the preceding fiscal year is composed of at least 25 individuals who are Natives (as such term is defined in section 3(b) of the Alaska Native Claims Settlement Act) who reside in the area generally known as the village for such tribe.

(b) Amounts that would have been made available for tribal priority allocations in Alaska but for the limitation contained in subsection (a) shall be provided to the respective Alaska Native regional nonprofit corporation (as listed in section 103(a)(2) of Public Law 104-193, 110 Stat. 2159) for the respective region in which a tribe subject to subsection (a) is located, notwithstanding any resolution authorized under federal law to the contrary.”

9. Tribal Self-Governance Amendments of 2000, Findings and Policy

Below are Sections 1 through 3 of the “Tribal Self-Governance Amendments of 2000,” Pub. L. No. 106-260:

Sec. 1. SHORT TITLE.

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

Sec. 2. FINDINGS. [25 U.S.C. 5381 notes]

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 note⁶²)

62 This section has been recodified to 25 U.S.C. 5321 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 [25 U.S.C. 5381 notes]

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 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 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.

10. Federal Tort Claims Act Coverage

Public Law 101-512, § 314, as amended, extended the full protection and coverage of the Federal Tort Claims Act to Indian tribes, tribal organizations and Indian contractors performing functions pursuant to an ISDEAA agreement. The provision deems any Indian tribe, organization or Indian contractor to be a part of the federal government when performing duties under a contract, grant agreement, or any other agreement or compact authorized by the ISDEAA for the purpose of defending claims arising during the course of performance of that agreement. For claims asserted against such a tribe, tribal organization, Indian contractor or tribal employee after September 30, 1990, the claim is deemed to be an action against the United States. The United States Attorney General must defend against such claims according to the provisions of the Federal Tort Claim Act. The provision reads:

“Sec. 314. With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990, but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.⁶³) or by title V, part B, Tribally Controlled School Grants of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, as amended (102 Stat. 385; 25 U.S.C. 2501 et seq.), an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claim Act: *Provided further*, That nothing in this section shall in any way affect the provisions of

63 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

section 102(d) of the Indian Self-Determination and Education Assistance Act of 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.⁶⁴).

11. Law Enforcement

The Indian Law Enforcement Reform Act, Public Law 101-379 (1990), 25 U.S.C. § 2801 et seq., authorized the Secretary of the Interior to promulgate “regulations relating to the consideration of applications for contracts awarded under the [ISDEAA] to perform the functions of the Branch of Criminal Investigations.” The resulting regulations require that entities conducting Indian Country law enforcement using federal funds, including tribes contracting under the ISDEAA, must comply with “minimum Federal standards.” 25 C.F.R. § 12.12. In particular, law enforcement programs must meet the “minimal qualitative standards and procedures specified in chapter 68 Bureau of Indian Affairs Manual (BIAM) and the Law Enforcement Handbook.” Id. § 12.14. The attempt by the BIA to issue regulations covering all law enforcement services, not just the Branch of Criminal Investigations, when operated by tribes may be ineffective since the regulations were not issued through negotiated rulemaking and section 107 of the Act provides that no regulations may be applied to self-determination contracts, or their approval or declination, unless promulgated through negotiated rulemaking under that section.

12. Recovery Act Self-Determination Provisions

The American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5 (Feb. 17, 2009), the economic stimulus legislation, provides significant funding for transportation, health, public safety, and other purposes that tribes may be able to include in ISDEAA agreements. Such agreements must conform to ARRA’s strict transparency, reporting, and accountability provisions, as specified in section 1610(b) of the Act:

“(b) All projects to be conducted under the authority of the Indian Self-Determination and Education Assistance Act, the Tribally-Controlled Schools Act, the Sanitation and Facilities Act, the Native American Housing and Self-Determination Assistance Act and the Buy-Indian Act shall be identified by the appropriate Secretary and the appropriate Secretary shall incorporate provisions to ensure that the agreement conforms with the provisions of this Act regarding the timing for use of funds and transparency, oversight, reporting, and accountability, including review by the Inspectors General, the Accountability and Transparency Board, and Government Accountability Office, consistent with the objectives of this Act.”

64 *The ISDEAA has been recodified to 25 U.S.C. § 5301 et seq.*

13. Tribal Clinics

The Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, contained a \$125 million supplemental appropriation for tribal clinics, \$89 million more than in FY 2019. The provision reads as follows:

Provided further, That, of the funds provided, \$125,000,000 shall remain available until expended to supplement funds available for operational costs at tribal clinics operated under an Indian Self-Determination and Education Assistance Act compact or contract where health care is delivered in space acquired through a full service lease, which is not eligible for maintenance and improvement and equipment funds from the Indian Health Service. . . .

IHS uses the supplemental appropriation to fund increases for the Village Built Clinics Program in Alaska and to fund leases entered into under section 105(l) of the ISDEAA, 25 U.S.C. § 5324(l).