

# IMPLEMENTATION OF AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT

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## HEARING

BEFORE THE

## SELECT COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON THE IMPLEMENTATION OF AMENDMENTS TO  
THE INDIAN SELF-DETERMINATION ACT

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JUNE 9, 1989  
WASHINGTON, DC



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1990

24-400

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# IMPLEMENTATION OF AMENDMENTS TO THE INDIAN SELF-DETERMINATION ACT

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FRIDAY, JUNE 9, 1989

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

The committee met, pursuant to notice, at 9:34 a.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Cochran, Reid, Gorton, and Conrad.

Our first panel on the Amendments of the Indian Self-Determination Act consists of the following: The Honorable William Ron Allen, Chairman of the Jamestown Klallam Tribe of Washington; Mr. Lionel John, the Executive Director of the United South and Eastern Tribes of Nashville, TN; Mr. S. Bobo Dean, Esquire, of Hobbs, Strauss, Dean & Wilder of Washington.

## STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning. The committee meets this morning to consider H.R. 881, and its Senate companion bill S. 521, a bill to provide for the restoration of the Federal trust relationship with the Coquille Tribe of Indians in Oregon. The Coquille Tribe was one of many Oregon tribes terminated from Federal recognition in 1954 when the Congress enacted the Western Oregon Termination Act. Today, the tribe is one of only three tribes that have not been restored to Federal recognition. And because tribes whose federally recognized status was terminated by an act of the Congress cannot be restored to federally recognized status through an administrative action, such as the Federal acknowledgment process, Senator Mark Hatfield has asked this committee to consider the House and Senate legislation that would restore the tribe's Federal recognition.

In addition, the committee meets today to examine the process of implementation of the amendments that were enacted in the 100th Congress to the Indian Self-Determination and Education Assistance Act. The panels of witnesses scheduled to present testimony to the committee this morning will address: First, the status of the regulations that would implement the new amendments; second, the status of the self-governance demonstration project; third, the status of the act's requirement that the Federal Government provide liability insurance with a preference extended to Indian insurers; fourth, the Indian priority system, which is a system through

which tribes express their priorities for funding; and fifth, the proposed transfer of the responsibility for negotiating the indirect costs associated with the operation of self-determination contracts from the Office of the Interior Department's inspector general to the Office of the Secretary. Last, but certainly not least, we will hear from those charged with the primary responsibility of implementing the amendments to the Act, Dr. Everett J. Rhoades, Director of the Indian Health Service, and the Acting Assistant Secretary for Indian Affairs within the Department of the Interior, Mr. Pat Ragsdale. We look forward to the important testimony of each of today's witnesses.

But before we proceed with the hearing, I would like to ask the Committee to turn first to the matter of the bill that is scheduled for our consideration today, the Coquille Restoration Act, and for the presentation of the bill to the committee, I would call upon Senior Counsel to the Committee, Mr. Peter Taylor.

Chairman Allen.

**STATEMENT OF HON. WILLIAM RON ALLEN, CHAIRMAN,  
JAMESTOWN KLALLAM TRIBE, SEQUIM, WA**

Mr. ALLEN. Thank you, Mr. Chairman, for the opportunity to come before you and this committee to testify regarding the critical issue of developing the Public Law 93-638 regulations.

You have my testimony before you, and what I'll try to do is articulate it as best I can without reading it too much.

This process of developing the regulations for Public Law 93-638 and 100-472 we have felt is a critical process, that is intended to try to modify the relationship between the tribes and the Federal Government consistent with the government-to-government policy.

We feel that since the enactment of Public Law 93-638 act in 1975, the tribes have made a considerable amount of progress in developing their skills and their proficiency in handling their governmental responsibilities, affairs and their programs; yet, we have always been frustrated over the bureaucratic process and regulations that have come out of that first law and the very complex bureaucratic maze that we have to navigate through in order to accomplish our objectives.

So it takes a great deal of creativity on our part to try to make the goals of that act and the goals of the tribes in their pursuit of self-determination and self-proficiency a success.

The current system, in our judgment, has never been consistent with the policy of government-to-government relationship. It has never really been administered consistent with our unique relationship as governmental entities with our treaty rights and our sovereign jurisdictional obligations to our people.

On top of that, the consistent frustration that the tribes have experienced with the paternalistic disposition that we experience through IHS and BIA has caused us to work with this committee and Congress to try to change that system and change that relationship and do it in a positive manner.

We feel that a great deal of the tribes' efforts have been aborted with the fight of the tribes trying to pursue our self-sufficiency and self-determination and independence relative to the subtle underly-

ing struggle of a bureaucracy to survive and to justify itself. We find the battle for the precious dollars that are appropriated by Congress to us is a very difficult process for us, and we also find a great deal of frustration in terms of trying to get those dollars prioritized consistent with our priorities and purposes.

In our judgment, this reality is a part of the dilemma we are facing, and that is dealing with how we are going to implement the new Amendment Act that changes the law, and hopefully changes it in a proper context to establish the proper relationship between the tribes and the Federal Government.

We feel that this amendment has provided us the opportunity to change this system. How this regulatory process takes place to implement this law is the basic theme of my discussion.

When we worked with this committee and the House Interior and Insular Affairs Committee, we had a number of objectives that we were trying to accomplish that we recognized were deficient within the current regulatory system to address the needs of the tribes.

One of the areas that we were quite frustrated with relative to our government-to-government relationship is the consultation process utilized by the Federal agencies. We recognize that it was a process that wasn't successfully and effectively working and, in our judgment, wasn't dealing with us in that true context of government-to-government relationship. So we were very diligent about putting the word "participation" into that law to try to replace "consultation," because we felt that that is a way that the governmental relationship should be conducted. Thus, when policy and regulations are developed, such as we are dealing with right now, they would be developed in that context that we would work with the Federal Government in negotiating those solutions, remedies, and conditions under which we would carry out this activity.

We had hoped that if the bureaucracy—that is, IHS and BIA—was working with us, we would be able to walk over this threshold and spend less time fighting with the agencies and more time dealing with the needs of tribes, as well as spend a lot less time here in Washington, DC.

In the first phase of this process, the bureaus did try to implement the regulation consistent with the timeframe set out in the law, but, unfortunately, the communication and the interaction with the tribes was very poor. We appealed to this committee and the House committee to support the tribes recommendation that the schedule be delayed to allow us to actively participate in this process. We felt that that relationship was critical to make the law a success. Those of us who are responsible for implementing this law and carrying out our governmental responsibilities must utilize these amendments as the framework to administer Public Law 93-638 contracts, and assure that the activities within the contracts are realistic and reasonable relative to what we have been experiencing.

We felt, in the early phase, that the bureaucracy was not acknowledging that relationship and was not willing to do that. They wanted to proceed with the process and an approach that was essentially the same as consultation. We objected to that, and so we

pushed hard for these workshops referred to as "regulation drafting workshops."

In the mind of the tribes, that process meant that we would negotiate with IHS and BIA one single set of regulations for both Bureaus—because we felt this law applied to both Bureaus—and that the context in which each of those sections applied to Public Law 93-638 contracts would be a context consistent with the practical application and implementation for those of us who actually administer it.

The first two meetings took place in Nashville and Albuquerque. They were well attended by approximately 250 tribal representatives. Consistently, the same faces showed up at these sessions, and they were the tribal leaders, their technical assistants, lawyers—people who represented the tribes and understood what these regulations meant.

We put this into a form in which we would try to negotiate it. We recognized in the early phases of this process that the Bureau was struggling with it, and they were struggling with it in the context that they felt that this was not a negotiating process; this was a process where they were going to hear the views of the tribes, and then they would go back to their offices and draft the regulations as they saw fit, taking into consideration those views. Now, that is not different from the consultation process.

In our mind, the identity of the document that we drafted—and we drafted that document in the context of regulations, so that what we were dealing with was the actual substance that we felt would come out in a published form. This was critical, and we worked very hard at accomplishing that.

We consistently heard Federal positions that said that we didn't understand what regulations were all about. Of course, we objected to that view, because we feel that we have the expertise, knowledge, and the competence to understand exactly how to develop regulations. You don't have to live and work in Washington, DC, to know how to develop regulations. And we wanted to put them in that context.

We weren't concerned about minor technical aspects, but we were concerned about substance. We had a great deal of difficulty getting the Bureau, particularly, to come prepared to negotiate those positions. That was quite frustrating for us. It was frustrating because they would make arguments that they weren't prepared and they didn't come to these sessions understanding what they were about. We felt that they should have known, and there was no reason for them not to know. The communication, in our judgment, was very clear about what this purpose was.

The Bureau and IHS, to a certain extent, made arguments that this environment of 250 tribal representatives was not the proper environment in which you can develop regulations. We recognize that that is a difficult forum, but we also pointed out that this forum is necessary so that the very complex objectives for all the tribes, villages and rancherias involved are addressed so that the unique conditions of each of our tribal areas and needs could be addressed as well as possible. We felt we could work out our differences and recognize that the dynamics of the process will allow fur-



ther modifications down the road. The process was basically rejected by the Bureau.

We had also recommended that we could utilize the steering committee that was established by the Indian Health Service to be the liaison between the tribes and the bureaucracy, and that the Steering Committee, which was initiated by the IHS program but was selected by the tribal leadership in the 12 regions, we felt—the form of which, as we moved forward in this process from the larger group to a smaller group, that those smaller representative groups could work out the details as the larger group moved a little bit closer in what we thought was the appropriate context of these regulations.

Now, that hasn't been accepted by the Bureau. It has been accepted by IHS, and they initiated it, which means that they acknowledge, in our judgment, the governmental relationship between the tribes and the bureaucracy.

We are quite frustrated that the Bureau seems to think that Indian representatives on IHS are only knowledgeable about Indian Health Service issues. We pointed out that the Indian leaders on the Steering Committee are Indian leaders who deal with both BIA and IHS issues and are knowledgeable with the broad expertise and background to deal with both bureaus, including the broad spectrum of programs that are addressed inside the BIA.

That has been a frustrating experience for us because the Bureau has not been willing to acknowledge that entity to try to work out the details, or even come to an acceptance of the concept that we would negotiate these regulations.

The other example of frustration that we have experienced was putting the schedule together to develop the regulations. We couldn't even get cooperation to get a consistent schedule. We kept getting arguments that the Bureau was a different system, and so therefore we had to work out a different kind of a schedule. Only slowly, in the recent weeks, have we developed a schedule—with a great deal of frustration and effort—that is somewhat consistent.

A part of it is that we have consistently asked for the cooperative spirit between the tribes and the bureaucracy to make this thing happen, and to try to make it happen expeditiously.

We hear comments that the departmental clearance process statutorily is mandated to have 60 days minimum, and OMB has another 30 days. Our problem with that is that the statute exists, but that doesn't mean that you can't, in good spirit, work with us to try to expedite that. Can we work to try to make that happen quicker, if we could work together? There was absolutely no offer to try to make that happen.

The other thing that bothered us a great deal was that we had heard from the Bureau that this would never get by OMB. That really irritated us, too, because it was like this Darth Vader sitting in the background that you'll never get by, and we felt that it was absolutely inappropriate that an entity within the administration should be used as if that's going to be our hammer, if you will, to modify regulations or the contents of regulations.

We ask why we couldn't meet with OMB, the Bureau, and IHS together and work out some of these differences so that we, the tribes, are communicating the needs for the regulations together

and work out the problems so that there is not an intermediary between us, the Bureau and OMB regarding how these regulations should be developed. We point out that BIA didn't wholeheartedly support this law, nor did IHS. IHS even recommended to the President that it should be vetoed.

With those understandings, we had a great deal of skepticism whether our views would be clearly articulated to OMB individuals regarding how these regulations would be developed.

So this attitude has been a real problem for us, and a difficult experience for us in the willingness of the Departments to work with us.

We feel like the way the process is emerging, what has happened in the recent past at the last workshop in Albuquerque, that the Bureau and IHS—the Bureau, particularly—has taken a position that they're going to draft the NPRM, that is, the Notice of Proposed Rule Making for the regulations, and that we will be allowed to comment to try to modify them through the comment process, which is simply no different than the current consultation process.

Now, IHS has been willing to work with us. We point out to the committee that there is a distinct difference between the way IHS is dealing with us versus the way BIA is dealing with us. IHS, in my judgment, is acting more as a trustee to us than the BIA because they're willing to work with us in the sense of to review their draft, to review their NPRM before it goes out, to negotiate the context and the conditions of those regulations, and to work out a compromise.

The BIA, on the other hand, has said they will not give us any document, or even show us any draft, until after the document is completely completed. So the frustrating experience is that we have an inconsistency in the way the two departments are acting.

So, as you can see, where we are in this process is that the regulations are in the hands of the two Departments. There is a difference between the way the tribes are interacting with IHS, as opposed to BIA, in this process.

We recognize there are still some problems in IHS. I have given some more positive comments towards IHS, but there are still some problems in IHS within the HHS level of the Department responsible for promulgating regulations. We recognize those same kinds of problems also reside in the Department of the Interior.

But we feel that if they would work with us in actually sitting across the table in working these problems out, that these issues could be concluded much more in the context of tribes.

In conclusion, I would like to urge this committee to assist us in influencing the administration to implement this law. Right now the primary issue is the Department of the Interior and HHS's co-operation regarding this bill. We feel that if we are not able to implement this law consistent with the President's policy of government-to-government relationship and consistent with the Congressional mandate of pursuit of self-sufficiency and self-determination, then, in our judgment, this effort would result in a grave disappointment. We would digress back to a status quo condition which would be very discouraging for the tribes. It simply means that we would be back-peddling a number of steps and would have to make another charge.

Thank you, Mr. Chairman.

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

The CHAIRMAN. Thank you very much, Mr. Chairman.  
Mr. John.

**STATEMENT OF LIONEL JOHN, EXECUTIVE DIRECTOR, UNITED  
SOUTH AND EASTERN TRIBES, NASHVILLE, TN**

Mr. JOHN. Good morning, Mr. Chairman and members of the committee and staff.

I am pleased to be here this morning testifying before you on some recent events that surrounded the Public Law 93-638 amendments, Public Law 100-472.

I must share with you first that I have just had a wonderful experience, having been selected by tribal people to participate and help chair the proceedings of the regulation work groups. I also had the wonderful experience of being a cochairperson of the Indian Health Service steering committee. It has been wonderful to work with these people.

We would hope the spirit of this experience would be something that we could build on and that we could continue to work in this direction, when Indian measures are enacted, that the tribes be given participation.

I don't know of any other legislation where we had specific language that called for participation of Indian people into a regulatory development process. It has worked to a point. However, we feel that there are still some things missing in the process.

One of the things that I would recommend to the committee is to consider either another amendment or to have a technical amendment to refine some of the areas that have surfaced at this stage of the development process that may need clarifying language.

I'm going to touch on some of these items in my discussion this morning and see if we can encourage some further development of clarifying language.

First off, the process which we have spoken about this morning of involving tribes has fallen short in terms of what is desired.

We had this experience where we were able to work with the agencies. Of course, we struggled through the learning process of how to get along with each other, but it did take some steps forward.

Now it seems that at this stage of the process, as Mr. Allen pointed out to you, there are other parts of the process that are looming as impediments to a total combination of effort. It seems that the language has to touch on the refinement of the process in dealing with OMB and with the departments. We work at the lower agency levels quite well at this point, but it seems that we don't have access to encourage any expedience on the part of the Department and OMB.

This was demonstrated in the schedules that we are working under today. We are now looking at some implementation date of late 1990, which is really uncertain because, as we go along month by month, there seems to be new occurrences of issues that surface that slow down the process. As a result, we don't really know when we'll arrive with the regulation. I don't think that was the intent

in the first place, because it was very explicit in the amendment that there were time lines established when things were to occur.

Once we got into the process we recognized that truly those time lines were far too short for the entire process to be consummated, but we think now that the time lines are far too long. And there is nothing to control that. That's the point I'm bringing to you. There needs to be additional language to expedite the process.

This whole business that we are involved in is a process of change, and we have gotten this far with the experience that we have so far, and we need to look beyond that to see what we can add to it to make these things happen much more readily, because the end result of what we are looking at is improved conditions for Indian people and Indian life on the reservations. Any time we have delays in implementation of regulations, or any enactment of a law, it just means that there is that much longer a wait for Indian people to realize benefits from these new laws. We wish that that would be examined.

In the development of the regulations, there are a number of issues that have surfaced which we think need additional attention.

One of these issues, as I recall, in earlier hearings in previous years there was a great deal of concern on tribal recovery of indirect cost. At this time, we have worked with the indirect cost issues, and I don't feel satisfied that we have yet found the solution of what we're trying to achieve.

In the first instance, the tribes were very anxious and hopeful that we would find a mechanism whereby the tribes could, once and for all, recover the full cost that they were experiencing for operating Federal Government programs.

While we have language very explicitly saying in the amendment bill that there will be 100 percent indirect cost recoveries paid to the tribes, we find that at least so far in this year's experience that neither agency has demonstrated any willingness to follow the language of the amendments.

From the Indian Health Service, there are shortfalls recognized. There is provision in the act that each secretary must come back to the appropriation committee by March 15 and ask for supplemental monies. Instead of that, we had a request from Indian Health Service to take what it called third-party recovery—clinical and hospital sites collecting from insurance companies and using that money to supplant the government's responsibility for indirect cost payments.

The tribes—and particularly in the USET area—feel very strongly opposed to that. They feel that those monies that are gained by third party recovery should be used to broaden the delivery of health care and that the money should not be used in substitute of providing the 100 percent recovery to the tribes.

The Bureau of Indian Affairs is the movement on with the indirect cost issue of transferring the negotiation of indirect cost rates, as has been described already. The USET tribes met earlier this week and tribal chairman from Mississippi, Mr. Philip Martin, introduced a resolution which was unanimously adopted by the USET member tribes opposing the transfer of the indirect cost ne-

gotiation simply because they feel it is the old adage of "the fox in the hen house" routine.

Most disturbing to the tribal leaders was the language in the justification for the Bureau's budget, which indicated that the Bureau was intending to reduce overall costs of indirect recoveries. The tribes feel that that's just another game to shorten what those tribes are going to recover, and they just don't feel that's appropriate.

We have, on various occasions, offered solutions or ideas to agencies which generally go unheard. We do think that we have some ideas on how this could be worked out, and we think that there needs to be additional emphasis put on this matter because it isn't satisfying, as yet, as it is developing.

Additionally, in relation to funding problems, the Bureau, of course, was instructed in the act to engage in a study of its budget, its funding process, and the IPS—the Indian Priority System.

The Bureau, we feel—at least from the Eastern Tribes—short-changed the effort by not providing any funds to conduct the work. There was a total restriction on using any Bureau money for any type of study work; thus, it made it very difficult for tribes to deal with the subject.

Furthermore, we discovered in the process that, generally speaking, tribes don't understand the Bureau's budget process, and when we asked the Bureau if they would teach the tribes what their processes were, we didn't get very far with the request.

So there is more work that needs to be done with this, and I really worry that the report that you have received back from the Bureau of Indian Affairs may be lacking in quality because it did not get the full play that at least the Eastern tribes felt that it should have had. I bring that to your attention this morning.

The need for joint regulations and joint process between the two agencies has already been mentioned. That's one of the shortcomings of the amendment bill. While it was addressed in the report language, there was no specific language in the amendment that required the two agencies to come up with common regulations. We think that in order to make this happen, then the language must be inserted; otherwise, it will continue to wander around. We think that we need to see some language to kind of shepherd that along.

So far in the work, as far as the development of working documents, we find that the amendments addressed specific contracts. There had been work that had been going on previously with the agencies about simplified contracts, and this process doesn't really seem to address that in the fullest sense.

Also, in the act, itself, there seems to be an oversight as far as the emphasis placed on grants and cooperative agreements. It has been mentioned briefly, and has been addressed only briefly so far in the development process. So we think that there needs to be more attention paid to that.

The law speaks to the provision of general liability insurance for tribes. I know in the audience today and later to testify before you will be other experts, but I just wish to mention to you that the tribes are very interested in some form of development where they can participate in an economic development manner to form an

Indian insurance company and, in the process, help tribes help themselves.

I will defer on that subject to other witnesses this morning and let them broaden the issue.

We did find that there are some inconsistencies. When I mentioned technical amendments earlier, the inconsistencies that I speak of are key points between the recent passage of the 437 amendments and the 638 amendments. We have some of those delineated in a document which we will present to you.

There was concern from the tribal sector that the work thus far focus a good deal on the necessity for standards. There was some discussion about the possibility of using standards or the requirement of standards as a sort of barrier or obstacle and using it as a form of declination. While the amendments are silent on the issue of declinations, as had been in the previous act, we now have this issue of standards.

The tribal people certainly feel and understand that there is definitely a need for standards. I think the issue is who is going to master the standards and how they are to be utilized. The tribal people subscribe to standards. But the point that I raised that the tribes are objecting to is that these issues be used as obstacles—as declination issues. We don't think that is the intent of this amendment.

We have a concern about some language we didn't deal with thus far to any appreciable degree in the regulation development process about a citation in section 102 of title II which states that the contracting capability will extend for funding to other agencies than the Bureau of Indian Affairs and the Indian Health Service, and that gives us a little bit of difficulty—particularly the word "other." We're not sure if that allows that we can use these Public Law 93-638 mechanisms to contract with the Department of Labor, with Housing and Urban Development, with the Department of Education, and with other governmental agencies.

We think that needs some clarification as to what we really intended to have happen. Certainly, I believe Indian people would be delighted to have a single process to deal with the Government. One of the major complaints before us, as you may well know, is that there has been long records of multitudes and multitudes of reports and contracting requirements put upon the tribes from all of the various governmental agencies. We are just simply looking for an easier way to go, and we think that this might be the vehicle. I'm suggesting that be looked at and broadened.

Additionally, we did have some concerns about a couple of other items. The Indian Health Service came in with a split budget this year distinguishing between the Federal and the tribal funds. The tribes don't clearly understand the intent of that and are suspicious of it, and, at the present time, wish that the subject be deferred until we can understand what is intended and what can be accomplished by going by that process.

We think that those types of adventures ought to be researched and discussed with tribal representatives before we get to actually submitting to such things.

One other issue which is not contained in the amendments but is of grave concern to Indian people is the subject of eligibility for

services under the Indian Health Service. We have provisions that are standing out there today which have postponed the implementation of final regulation on eligibility. We understand that the work is underway by the Indian Health Service to deal with the issue, but that the reports may come in late.

We really think that there has to be some very in-depth work done on that issue and, even beyond that, the tribes feel very strongly, as we have stated to you before, that the issue of eligibility is certainly the domain of the tribal governments. We don't feel that governmental agencies should be dictating to tribes who is going to be serviced or members of their tribes. That has been a long-standing position of Indian tribes.

I have a final item here which I will just mention briefly. There are a number of issues that we have dealt with both in the Bureau of Indian Affairs and the Indian Health Service in this regulatory development process which have fallen victim in reality to a shortage of time.

We had the regulation development workshops going. Indian Health Service primarily sponsored these workshops and then ran against a shortage of funds to continue work. We left the last workshop, which was held in Albuquerque, with a number of issues which I call out to lunch. We did not reach conclusion in all respects of consideration for these issues, and while the agencies are continuing to develop regulations for those subjects, they're going to be coming back out to Indian country without the benefit of full participation. We'll have to address it in that fashion because we simply ran out of time.

The agencies didn't have any more funds to continue this process that we were using, and so subsequently we have had to drop back and resort to other measures to get the work accomplished.

I will conclude my remarks this morning. I certainly appreciate the opportunity to come before you and express the concerns that I have realized exist out in Indian country. I will certainly be happy to continue to work with you.

Thank you, Mr. Chairman.

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

Senator COCHRAN. Mr. Chairman.

The CHAIRMAN. Yes?

Senator COCHRAN. Mr. Chairman, I wonder if I could ask that a copy of the resolution that Mr. John referred to that had been adopted at the recent meeting that was offered by Philip Martin, Chief of the Mississippi Band of Choctaw Indians be printed in the record as an exhibit to his testimony.

The CHAIRMAN. Is the resolution available?

Mr. JOHN. I would need to get it. It was transported back to my office, and they are putting the appropriate numbering scheme to it. We will submit it to you, sirs, as readily as possible.

Senator INOUE. Upon submission, that resolution will be made part of the record.

Senator COCHRAN. Thank you, Mr. Chairman.

[Resolution appears in appendix.]

The CHAIRMAN. Thank you very much.

Mr. Dean.

STATEMENT OF S. BOBO DEAN, ESQ., HOBBS, STRAUSS, DEAN &  
WILDER, WASHINGTON, DC

Mr. DEAN. Good morning, Mr. Chairman.

My name is Bobo Dean. I am with the law firm of Hobbs, Strauss, Dean & Wilder of Washington, DC, and Portland, OR.

We are presently representing 13 tribes and tribal organizations in connection with tribal participation in the development of the regulations under the 1988 amendments to the Indian Self-Determination Act. I have personally been involved in Federal-Indian law since 1965, and represented the Miccosukee Tribe in 1970 when it negotiated the first contract for tribal operation of an entire BIA agency.

We have provided a written statement to the staff of the committee, and also a memorandum analyzing the April 3 draft regulations which were circulated by the Indian Health Service to tribal representatives across the country. And also, although I believe it is not an official issuance of the BIA, it does note a number of BIA comments and input with respect to the regulation process. So far as we know, that April 3 draft is the last draft of the regulations that is publicly available.

We would ask that the points that we have made in those statements be considered.

In our oral testimony, we would simply like to highlight a few of the points where, to borrow a phrase from Mr. John, we feel that the Federal agencies are perhaps out to lunch in their approach to the particular issues that are before them.

I would also like to ask that we have an opportunity to submit for the record a statement on the construction regulation portion of the regulations. The tribal representatives and the IHS construction work group are still at work developing an approach to the application of the Federal acquisition regulations to 638 construction regulations.

The amendments provide that the exemption from Federal acquisition regulations does not apply to construction, although it does apply to other forms of Public Law 53-638 contracting. The issue there is whether that means that all of the Federal acquisition regulations are applicable or whether the secretaries retain the right, as the statute would seem to provide, to waive those Federal acquisition regulations that are not appropriate in an Indian self-determination contract.

That issue has been discussed but not resolved in that work group, and my understanding is that the Federal representatives indicated a willingness to consider tribal input on that issue. That is still in preparation. I believe we will be able to provide something in a few days to the committee that we ask to be included in the record.

The CHAIRMAN. So ordered.

[Information to be supplied appears in appendix.]

Mr. DEAN. Thank you.

One of the major disputes which has arisen in the history of the Indian Self-Determination Act over the years involves the level of funding to which tribes are entitled under the act. Under the April 3 draft, the appeal of a funding dispute is treated as a declination



under the act. This ensures that funding does not become a threshold issue to be resolved before a proposal can be processed—a position which had been taken by the Indian Health Service in the past and which is criticized in Senate Report 100-274, the legislative history of the 1988 amendments.

We believe that the April 3 draft correctly addresses this issue, but we understand that the Indian Health Service objects to the draft language because it refers to a funding level appeal as a declination appeal. IHS, we understand, is willing to provide the same hearing and appeal rights when a contract is refused on a funding issue as it does in any other dispute, but unwilling to describe such a refusal to contract as a declination.

In our opinion, this is not merely a semantic dispute. The act requires the Indian Health Service or the BIA to do one of two things when it receives a request from a tribe to contract: One, it may approve the proposal; or, two, if its objects are not resolved through discussions and negotiations, it may decline it and provide an appeal and a hearing. That is the statutory mandate. The April 3 draft reflects this mandate.

The IHS approach that a dispute over funding involves a third alternative is unacceptable, even when the same appeal rights are provided by regulation. Under the IHS approach, as we understand it, such rights are provided by the agency as a matter of grace. In fact, the statute gives IHS no third alternative. It must approve or it must decline in accordance with the statutory declination procedure.

We urge, therefore, that the language of the April 3 draft should be retained.

The IHS also seeks to add a sixth method to the five statutory provisions which allow the unilateral reduction in a recurring contract funding level. The IHS would add "changed circumstances and factors" as a ground on which the agency may unilaterally reduce a contract funding level in future years.

We are unaware of the statutory basis for this IHS regulatory proposal which would substantially increase the discretion of the agencies to reduce recurring contract funding levels without tribal consent.

Section 105(c)(2) of the act permits "changed circumstances and factors" to be taken into consideration when contracts are renegotiated, but that does not authorize unilateral reductions by the agency, and we believe that the regulation should track the unilateral reduction provisions which are contained in the 1988 amendments.

We are also concerned with the status of the implementation of calendar year contracting mandated by section 105(d) of the amended act. As we understand this provision, it requires that contracts in fiscal year 1990 commence on January 1, 1990, "unless the Secretary and the Indian tribe or tribal organization agree on a different period." However, the Administration has not requested the quarter-year funding necessary to implement this provision without leaving the final quarter of the contract year contingent on a future appropriation.

The whole reason that I understand that Congress provided for calendar year contracting was to enable the contract to be negotiat-

ed and put in place based upon firm appropriation figures; therefore, to implement this provision without having in hand the funds necessary to fund the contract for a full year would defeat the purpose of the amendment.

We urge that your committee work with the Appropriations Committee to assure either that the Bureau of Indian Affairs and Indian Health Service be provided with the dollars necessary to implement this provision in fiscal year 1990, or that the act be amended to prohibit BIA or IHS from insisting upon calendar year contracting over the objection of the tribal contractor.

We also believe that the Indian Health Service has taken an unnecessarily restrictive interpretation of the new statutory language relating to mature contracts. We recognize that the mature contract is a new and, so far as we know, unprecedented concept in government contracting. IHS has concluded that an Indian tribe wishing mature contract status cannot opt for a mature contract for a specific term of years—that the term of the contract, under the 1988 amendments, must be indefinite.

We urge that the committee review this matter with IHS to clarify that a tribal governing body has the discretion to select a contract term which it deems best for the needs of its members and most consistent with the purposes of the contract, and that the 1988 amendments are not meant to require an indefinite term for a contract qualifying as mature when a definite term—for example, 5 years—is more appropriate based on the needs of the tribe or the purposes of the contracted program.

The Bureau of Indian Affairs suggests that the declination criteria of section 102 of the act shall apply to the renewal of an existing contract for the same functions or programs. That is to say, if a tribe has contracted a law enforcement program and the contract comes up for renewal and they are not expanding the functions which they contracted—simply a renewal of a program which has been in place and which has already passed the declination criteria—the Bureau position, as I understand it, is that the contract proposal would have to be again reviewed against the declination criteria in the same manner as it was reviewed initially.

This is contrary to the present BIA and IHS regulations. The existing BIA regulations provide that contracts will be renewed when involving the same functions as already contracted.

We advocate the retention of that language, and adding to it a phrase from existing BIA guidelines, “renewal of such contracts is not at the discretion of the Secretary.” We urge that that language should be incorporated into the regulations.

The IHS also seeks to eliminate regulatory presumptions from the draft which make it easier for an Indian tribe or tribal organization to contract under the act. The regulatory presumptions which are continued in the April 3 draft from the existing BIA and IHS regulations clarifies that the burden lies with the Secretary to prove that an Indian tribe cannot satisfactorily operate a Public Law 93-638 contract.

We believe that these provisions, which are essentially a part of the present system and are included in the April 3 draft but questioned by the Indian Health Service, should be retained.

The IHS also wishes to weaken the statutory timeframe in which to award a contract under the act. The IHS would provide in regulations that a contract which was not declined on the 60th day is deemed approved on the 90th day "to the extent the proposal conforms to the law and regulations," and would delete language which would allow the Indian tribe to incur contract costs from the 31st day after approval of the contract.

As we understand the 1988 amendments, it mandates that the agencies act to disapprove and provides that the contract shall be approved on the 90th day if it has not previously been disapproved.

The language proposed by the IHS would have the effect that a tribe would essentially proceed at its peril where the agency has not acted, and it could act as though the contract had been approved, but the Agency would still be able to complain later that the proposal was not in conformity with the law or regulations.

We think that if a proposal is going to be declined by the agency, the Agency should gear itself up and act to provide a declination notice within the statutory timeframe.

Another controversial issue in the regulation drafting process has been the question of program quality assurance, program standards, and data recording requirements, which Mr. John has mentioned.

The reason for this controversy is that this section goes to the heart of the contracting debate; namely, how much authority are the Federal agencies willing to relinquish to Indian tribes and tribal organizations which contract under the act. It is a question of who will ultimately exercise control over the lives of Indian people.

The Act, especially as amended by Public Law 100-472, answers this question in favor of the Indian people, themselves.

In the area of program quality, the IHS and tribal representatives have reached a compromise which is reflected in the April 3 draft on the issue of tribally developed standards and data requirements. The IHS still has some reservations, but has recognized the right of Indian tribes to develop their own standards, which must be reviewed and approved by the agency.

The Bureau is still reviewing this position and has yet to comment so far as we are aware. Its representatives have suggested that for some Bureau-funded programs there must be specific mandatory program requirements. This may be so in some instances. For example, regulations perhaps should provide that certain training must be provided to police officers carrying firearms. There may be a series of mandatory requirements, to which I would suspect no tribal organization would object.

But these minimum requirements should be stated in regulations to assure fairness to all tribes and to deter the agencies from imposing detailed requirements as to program content which would inhibit innovation in the tailoring of programs to meet tribal needs.

As I have noted, we have included a number of other issues in our written statement. To conclude my oral testimony, I would only like to mention that I think the regulation process so far has not sufficiently addressed the manner in which other programs in the Department of the Interior and the Department of Health and

Human Services will be brought into the Public law 93-638 process. Both agencies have recognized that the 1988 amendments make other programs carried on by the Secretaries for Indian tribes subject to 638. They have indicated that they are developing, in consultation with those other agencies, some approach to those programs, but we are not aware of where that process has reached.

I would simply then like to thank you, Mr. Chairman, for the opportunity to present these views. And I would urge that the committee continue this oversight process and work closely with both agencies until the regulations are issued.

Thank you, Mr. Chairman.

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

The CHAIRMAN. Thank you very much, Mr. Dean.

Before we proceed, may I assure all the witnesses that your prepared statements and supporting documents will all be made a part of the record in total, together with your oral statement.

The matter before us today and the discussion that evolves around it are very important. In my mind, this may be the most important hearing of this session because we are considering something very fundamental and basic, and that is the nature of Indians, Indian tribes, nations, and rancherias, the nature of the Government of the United States, and the nature of the relationship between Indian organizations and the Government of the United States.

Under international definitions, the United States is considered a sovereign. A sovereign is one who is generally empowered with determining membership or citizenship, has the power to enact ordinances or rules and regulations that will affect the conduct of its members. A sovereign usually has the power to tax.

The United States is a sovereign. Do you consider Indian nations and tribes to be sovereign?

Mr. ALLEN. I might try to respond to that, Mr. Chairman. In my opinion, the answer is yes. We firmly believe that the tribal governments are sovereigns. We believe that we have the right and responsibility to manage the affairs of our tribes and our resources. We are frustrated over some of the losses that we experience—whether it might be through legislation or through the court system—but we are adjusting to it as a reality checked to the conditions that we are experiencing today.

But the tribes do not have any reservation and do not fall back one inch in their efforts to move our governments forward in terms of managing our affairs—to be able to control our governmental affairs to the fullest context.

That is what we feel we are trying to accomplish through the various laws that we urge Congress to pass to allow us to implement that relationship between us and the Federal Government.

We recognize that the cross-jurisdictional issues can be very complex, but we feel that, as we move forward within the competence, expertise, and capabilities of the tribes—all the way from the skills that we have as managers to the legal aspects to the political skills of the tribal leadership—we do act in a manner of the same kind of sovereign context as the U.S. Government.

We recognize that we are a microcosm. We are very small as against the backdrop of the U.S. Government. And we feel that we

can move forward and work collectively together, but we need the kind of spirit and attitude and cooperation that is necessary for us to accomplish that.

The funding and assistance that we get through the Federal Government's obligation to the tribes through statutory or Executive Orders or statutory laws or treaties is critical to making that happen, and we feel that's what the Self-Determination Act was trying to accomplish—to give us strength and be on our feet.

The CHAIRMAN. I just want to know: are you sovereign?

Mr. ALLEN. Yes.

The CHAIRMAN. Mr. John, do you consider Indians to be sovereign?

Mr. JOHN. Yes; I do. I look at it a little further back, in a sense, in that the Indian tribes have always been sovereign tribal governments in this country. Even though Indian tribes were defeated and conquered by the U.S. Army back in the formation of this Government, Indian governments and Indian tribes have never been dispossessed of their right of government.

What we talked about today in a lot of these discussions surrounding Public Law 93-638 amendments and so forth is really the provision of services. Because Indian people are poor, they need help, they need redevelopment—just like a foreign country might. The U.S. Government has been generous and has sought to help the Indian tribes, and that's a separate issue than the tribes' own ability to self-govern and continue to govern. They have never been dispossessed of that, and they still hold it intact as they always did.

The CHAIRMAN. Mr. Dean, as a lawyer do you consider Indians to be sovereign?

Mr. DEAN. Yes; I do.

The CHAIRMAN. I consider Indians to be sovereign. The Constitution so says as do laws that support that proposition. And the treaties that we have entered into with Indian nations are the usual requirements of a sovereign relationship.

Now, on the nature of our relationship—and this may sound facetious, and I am not being facetious—is that relationship one of a master and subject, with the master being the United States and the Indians being subjects? Or patron and peasants? Or ruler and subject? Is that the relationship that should exist?

Mr. ALLEN. Mr. Chairman, I feel the answer is no.

The CHAIRMAN. Thank you. Is it a sovereign to sovereign relationship?

Mr. ALLEN. I didn't hear the question. Did you say "sovereign versus sovereign"?

The CHAIRMAN. Yes.

Mr. ALLEN. Yes.

The CHAIRMAN. We have heard many speakers describe this relationship as a trustee relationship. As the lawyer will tell you, a trustee generally is one who is entrusted with the resources or title to goods held in behalf of a beneficiary, and oftentimes the beneficiary is young, immature, or incompetent or non compos mentis. Is that the relationship we have? Is it the United States as trustee with a non compos mentis or incompetent beneficiary?

Mr. JOHN. Sir, that seems to be the way it is perceived and, in many respects, I look at it a little differently in terms of the experi-

ence this country has had, for example, in its world war experience.

The CHAIRMAN. Is that the way it should be?

Mr. JOHN. There was the Marshall Plan, you know. When the United States won the war in Europe there was a Marshall Plan that went to help restore those countries, to give them assistance and development. We often look at the relationship between the U.S. Government and tribal governments in that fashion.

Mr. DEAN. Mr. Chairman, I think that the changing concept of the trust responsibility is part of what the problem is with implementing Indian self-determination. The agencies that have worked with Indian tribes for many years perhaps too much retain the concept that the role of the Federal Government is there because Indian tribes are basically not capable of making decisions for themselves.

It seems to me that the Congress has made very clear that it does not view the relationship in that way.

The CHAIRMAN. Before the Congress amended Public Law 93-638, the language that we are considering states as follows: "The Secretary of the Interior and the Secretary of Health and Human Services shall each, to the extent practicable, consult with national and regional Indian organizations to consider and formulate appropriate rules and regulations to implement the provisions of the title." That was what the language used to be under the old law.

The amendments we passed say the following: "The Secretary shall consider and formulate appropriate regulations to implement the provisions of this act with the participation of Indian tribes."

With every intent and deliberately this Congress crossed out the four words "to the extent practicable" and replaced it with the word "shall." We crossed out the word "consult" and we used the word "participation." And, in our committee report, we made it clear, and these are the words of the Congress of the United States: "The new regulations shall be prepared with the active participation of Indian tribal governments and organizations."

Do you believe that the intent of Congress has been carried out by the agencies involved in the government of the United States?

Mr. ALLEN. In my opinion, no.

The CHAIRMAN. Mr. John.

Mr. JOHN. I believe it is in its fledgling state. There has been movement, but it is a new experience. It is only starting to blossom.

Mr. DEAN. Mr. Chairman, I believe that there has been a partial compliance and that the two workshops in Nashville and Albuquerque which resulted in this draft of April 3 clearly involved the active participation. Some Federal representatives told us you can't have a room full of 300 people drafting regulations, and I think those two meetings proved that that's not correct. The Indian people, with the assistance of the Federal people and lawyers and others, have, in fact, done that. And the work has really been largely done.

There remain some items that we mentioned here and some that we haven't mentioned that still need to be resolved, but there is a set of regulations for both agencies that is in existence and simply needs to be refined.

The CHAIRMAN. Chairman Allen, you have suggested that the time be extended?

Mr. ALLEN. At this point, no. The current schedule says that the regulations should be completed by next August—1990. We feel that that can be shortened. It could happen a little bit quicker. But we do not want the schedule to be shortened to not allow the active participation of the tribes in development of these regulations.

The CHAIRMAN. You said that you do not believe that the intent of Congress has been carried out. Are you telling us that you have not been given the opportunity to participate in the promulgation of regulations?

Mr. ALLEN. I need to concur with Mr. John and Mr. Dean in that there has been some participation. The frustration is in the nonacceptance of the active participation relationship with the Bureau. That is what we need. We need assistance to get both the Bureau and IHS to work together with us to conclude this process.

The way it is currently set up, they will promulgate these regulations and we will have to try to modify them through the consultation process. We feel that the need for the tribe to sit at the same table with the Federal Departments to resolve the details is critical to assure that they come out consistent with the tribes.

The Federals have said that these regulations are for them as much as for us, and we don't disagree with that. But our problem is that it is for us primarily, and if we are not at the table working out the details—and details can mean a big difference in the way this is implemented—that's going to be critical to the end result. After the conclusion of this process it is very difficult to modify it, so that's why we're very concerned about this process.

The CHAIRMAN. On several occasions I have made public statements suggesting that for too long the relationships that exist between the Congress and the Bureau and the Service have been adversarial in nature. I have also noted that the relationships, for the most part, existing between Indian tribes and organizations and the Bureau and the Indian Health Service have been adversarial in nature as well. I think this has gone on too long. I think the time has come when we should improve upon this.

It has been said by many of my colleagues in many debates that one cannot legislate friendship and amity and love. We cannot legislate an amicable relationship. And I believe to some extent that is true.

We can tighten up the language, but I would hope that that would not be necessary.

I call upon our new assistant secretary, who will be appearing before us shortly, to get together and begin a new era, because you can have all the laws and all the amendments, and if both sides decide to bring out their knives, nothing is going to happen.

Unfortunately, there is very little understanding and concurrence on what the relationship should be like. I am sorry to say that, the way I look at it, it is an adversarial relationship that exists today. It is not one of a trustee with a competent beneficiary, nor is it one of a sovereign and a sovereign, and that's the way it should be.

I thank you very much, sir.

Our next panel consists of: The Honorable Edward Thomas, president of the Tlingit and Haida Central Council of Juneau, AK; the Honorable Laurence Kenmille, councilman of the Confederated Salish and Kootenai Tribal Council of the Flathead Reservation of Montana, who will be accompanied by Mr. Thomas Acevedo, Esquire, tribal attorney; and Ms. Dorothy Dupree, finance officer of the Pasqua Yaqui Tribal Council of Tucson, AZ.

President Thomas.

**STATEMENT OF HON. EDWARD THOMAS, PRESIDENT, TLINGIT  
AND HAIDA CENTRAL COUNCIL, JUNEAU, AK**

Mr. THOMAS. Good morning, Mr. Chairman.

My name is Edward Thomas. I am the elected president of the Tlingit and Haida Central Council of Juneau, AK. Greetings from Alaska.

I wanted to take a few minutes to again thank you and the members of this distinguished committee for providing for us Public Law 100-472, of which title III is a part.

I think this particular act provides many opportunities to streamline the bureaucratic process, to improve the relationships with the tribes in the area of contracting, and for Indians to realize a higher degree of self-determination, and for that we thank you.

Before I begin my comments directly related to the demonstration project, I wanted to echo some of the earlier comments, particularly in the area of regulation development.

I did attend the meeting in Nashville. I did not attend the meeting in Albuquerque. I, for one, appreciated the efforts of the government agencies in trying to be more accommodating in the development of the policy; however, I do have some concerns about the changing of the time frames that were originally established in the act, itself.

I, for one, have resisted throughout, regulation development process that we needed, to be so complicated in carrying out the letter of the law. I think that we have demonstrated under title III that we can function. We can carry out the intents of Congress without many of these regulations being promulgated.

I realize that there are parts that need higher scrutiny. I realize there are things that need to be done in consultation and working together. But I think where the law is very clear on what needs to be done, particularly in the area of funding, including the change in the fiscal year, the title III demonstration projects, the indirect costs, I think all of those things can be implemented immediately. I don't think we need to wait and wait and wait until everybody can somehow agree. Any time you recommend change, as this law is recommending, there is going to be conflict and there are going to be adversarial feelings for a while until the dominating body takes charge, and that, of course, I hope is the Congress.

Now, I realize that they're recommending that we wait until September 29 to have the notice of proposed rule making begin their review process. I think that's far too long. I think it should start now. The draft regulations, for the most part, are out. I think we can analyze them pretty quickly and get on with the business of



implementing the law. If we don't have complete concurrence, we can work on those later.

I think that in these final moments of promulgation of these regulations I would like to see a little bit more involvement of Congress in making sure that timeframe consultation is adhered to in line with the intent of Congress.

Also, I think that it is important that the Government gets much more receptive to receiving the recommendations of the various task forces on the Indian priority systems, or IPS system. These recommendations, from what I have reviewed of them and from my participation in the Alaska area workshops, are very good recommendations and could be very helpful in dealing with the concerns that many tribes have over the funding.

Title III, or the demonstration project, is a very important tool to many of those demonstration tribes to investigate efficient methods of contracting for Federal programs by tribal governments.

I think that one of the benefits of going through a demonstration program is that you can go and try out something without having to change the law of the land and accomplish much more by looking at something through a demonstration mode.

In my project, for example, I proposed that we get rid of the Southeast Agency and convert those administrative dollars into program dollars that would help the needy people of my tribe and other tribes of my agency.

This proposal creates conflict because when you are recommending those changes, you are talking about displacing career people in the Bureau of Indian Affairs. For many of the people in my agency, those are our tribal members, also. So we're talking about conflict that is not comfortable, but yet we must go through because many of the people in my area that need these services do not get the degree of services necessary to make changes in their lives that are going to be positive for the future.

Now, some of the things that have happened—and I won't dwell on some of the negatives because I think there are a lot of positives, but the negative would be as a result of this conflict if the Bureau got quite defensive. We have had delays upon delays of getting the base funding for both phase I and phase II of our projects. This has created problems more related to the reporting to Congress as prescribed by the law, and I don't put this forth as an excuse, only as reality. Last year we didn't get the funding until the middle of May, and our first report was due April 1. You can see that it is pretty hard to meet the reporting requirement on your project when you get funding after you are supposed to have submitted your first quarterly report.

The Government has been very slow in reaction to the requests of nearly all of the demonstration tribes—particularly in the area of finance. I struggle with being overzealous and saying I don't see how the Government can function when it doesn't even know its own financial status, or an agency can function, or an area, or even central office. It seems to me, from my experience, that it would have to have that information readily available at all times, and therefore to pass it on to somebody else should be a very simple process. But it has taken us just about a year and three months to

get our final, unbanded report from the Bureau of Indian Affairs in Alaska.

I have reviewed that information, and it still does not look complete, because I was able to get some other information when they were talking about reorganizing the Bureau, and therefore I think my information is still incomplete.

Also, what is happening in some of our areas is that the Bureau agencies are campaigning in opposition to the policies not only of the Congress, but of their particular offices—campaigning against demonstration projects, campaigning against more modifications to the way we administer our programs.

The CHAIRMAN. How are they campaigning?

Mr. THOMAS. Campaigning by going to other tribes and saying that if we got rid of the Southeast Agency, for example, that if they, themselves, wanted to get into another contract by themselves there would be no technical assistance for them because there would be no agency. Yet, to clarify that and say that technical assistance is not a tool only of the agency, but of the Federal Government, it is pretty hard to dispute that when they have all the figures and the resources to go out and do that campaign.

So that is one mechanism.

The dominance of a larger tribe like mine in the area is brought forth in the various councils of the smaller tribes saying that we can't have the dominance within an agency. That would be negative in the long run. That kind of campaigning is what is going on in my area.

And then some personal campaigning with other members saying that I'm a tribal member, so why should I be displaced because of the demonstration program.

One of the positive things that have happened as a result of title III is that we have, in spite of the fact that it has been very slow, been able to get information that will allow us to do a financial analysis on all of these levels of Government, and this analysis has confirmed the suggestion that the BIA has been overburdened at the administrative levels, and that the cost is phenomenal compared to the services that we actually get out to the people.

We hope that working together we can remedy some of that.

Another positive thing has been legal and historical analysis done by the various tribes. Many of the tribes are concerned that by getting rid of one or two layers of Government agencies that we somehow diminish our relationship—the government-to-government relationship that was spoken about a little earlier.

Our legal work has shown us that that is not necessarily true, nor does it have to be true. We can, in fact, eliminate various levels of Government agencies and still maintain our government-to-government relationship.

Another positive thing is that by being a part of the demonstration group, we have been asked by other tribes, not only in our own area, but throughout other parts of the country, in the development of regulations as to some of the experiences that we have had that would help lend some insight into the development of regulations. I think that was very positive.

Indirect costs—I need to stress that these programs all need indirect costs. Simply because they are a demonstration or a separate

purpose does not minimize the need of the tribal Government to have resources to manage those particular programs. I think, while we're talking about indirect costs, I would propose that all programs equally get indirect costs, including ICWA and HIP—other programs that have historically been left out.

I think that indirect costs are the lifeblood of many tribes, and I think that Public Law 100-472 has time and again stressed the importance of indirect costs to tribes. I hope that we can move past having various programs exempt from indirect cost pools.

Like you, I believe that title III, as well as other amendments to Public Law 93-638, must lead to permanent improvements in Federal contract policies to Indian tribes. Otherwise, I feel that this process and the process that we are experiencing in our demonstration project can, in fact, lead to more polarization between tribes and Federal agencies. I think with the limited resources that we have, we cannot afford to have any more polarizations and expending large amounts of energy, resources, fighting with each other over jurisdictions, over various ambiguous policies, delays in funding, and other things like that.

I think it is very important that we begin with the idea that we are going to get into a much better relationship for the future.

I was to talk a little bit about the liability insurance, and I believe we have other experts here that will do a much better job in that. I will briefly say that my tribe is very interested in the amendments that provide for the Government to work with us to get better insurance to our tribes in the area of liability and other types of insurance.

We do endorse the Government doing a little bit more. I think they need to publish lists of people that are interested in providing reduced rates to the tribes. In my State, we are quite isolated. We need more information about insurance companies. I think many other isolated tribes may be faced with that very same problem.

I think that the Government should coordinate and try to attract insurance companies to workshops concurrent with national Indian organization meetings. By doing that, I think we can capitalize on the fact that many Indian tribes are already at those meetings, and that by providing them more information about insurance, I think that would help all of us become more familiar with some of the options available to tribes in the area of insurance.

One of the important concerns that tribes have, however, is that as you get into insurance and self-insurance, whether to form your own insurance company, how do you deal with the issue of waiving your sovereign immunity. I think that we need help in that area, and I hope we will hear more about it here today.

But I think that it is important that we continue to work with the administration, as well as Congress, in trying to find ways to address the area of waiving sovereign immunity so that we can insure ourselves against liability.

In closing, Mr. Chairman, I had hoped that, like these cleansing rains of today, these amendments would cleanse the process that tribes go through in order to contract, and I think it can. We all know that we're going to get a little wet, but I think the final resolve should be—and I hope will be—that we are going to start a

fresh, new approach to working together for the benefit of all of our people.

Thank you very much for this opportunity.

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

The CHAIRMAN. Thank you, Mr. Thomas.

Mr. Kenmille.

**STATEMENT OF HON. LAURENCE KENMILLE, COUNCILMAN, CONFEDERATED SALISH AND KOOTENAI TRIBAL COUNCIL, FLAT-HEAD RESERVATION, PABLO, MT. ACCOMPANIED BY THOMAS ACEVEDO, ESQ., TRIBAL ATTORNEY**

Mr. KENMILLE. Thank you, Mr. Chairman and members of the committee.

I bring greetings from the Salish and Kootenai Tribe of the Flat-head Nation.

We have had a good description of the background of self-governance. The way the tribes are approaching self-governance is very, very cautiously. It is a new era that we will be looking at in a relationship with the U.S. Government and the Confederated Salish and Kootenai Tribe.

The process that we are looking at in self-governance is sort of redefining the process that we have had before. We have always looked at it, from the time of 1855, where we have had a true government-to-government relationship in defining our treaty and working out that relationship. From that point on, it has been declining.

The way we look at self-governance is that it is a new era, and in this new era we are going on a government-to-government relationship.

The tribes, themselves, have made significant strides in trying to work out this relationship of self-governance—how it is going to be affecting our tribes, and how it is going to be affecting the Bureau of Indian Affairs.

We want to make sure that every avenue is addressed so that my tribal people are protected and the United States Government still has that relationship of fiscal responsibility in the funds that they do give the tribe that we are requesting.

The investments that we have made have been long hours in council meetings, we spent four and a half days, we have made extended reports to Congress previously on how we have progressed, we have also made them available to other tribes, we have made up a consolidated budget that would be not only looking at the IPS sections of the Bureau of Indian Affairs budget.

Our ideas of self-governance are far-reaching into the efforts of the amounts that are being spent in the Bureau of Indian Affairs in comparison to the tribe.

We are looking at consolidating the budget and how much money the tribe is putting in, the Bureau of Indian Affairs is putting in, and all other agencies, so that we can get an overall view of where those needs and priorities have to lie.

It is a very difficult process. It is a long process. But we know that this process, in the end, will be beneficial to all.

One of the problems that we have run into is the funding parameters—what the tribal government needs and what the Bureau of Indian Affairs has in the contract is very, very difficult to work with. We have to make it more broad.

The definition of how the Bureau of Indian Affairs is looking at it at this present time is just the IPS portion of it. We just can't look at it similarly—if it is going to be a workable program we have to look at it totally, and not only the IPS, which only consists of about 25 to 40 percent in some instances. Approximately 60 to 75 percent of the budget is not actually being looked into in the self-governance program that should be related to the tribes, and must work in the relationship in that way.

The process that we are looking at with the Bureau of Indian Affairs would be a true transfer model where the tribes would be taking into consideration all the aspects and then having these models transferred over to the tribes with the Bureau of Indian Affairs having their input.

But, at the same time that we're doing these transfer models, we have to, in our own words, get our own tribal house in order. And how we're revealing that is that we're looking at each portion of our department and how they are fitting in with the Bureau of Indian Affairs—forestry, natural resources, general assistance, IHS, a variety of programs that are handled under the tribe, and how they intermingle with the Bureau of Indian Affairs and all the other agencies within the reservation.

Our tribal secretary and tribal treasurer at this point in time are developing a fiscal plan that would be providing those departments, how those will be intertwined, and where those moneys are coming from, and making a multiyear budget that would be consistent with the self-governance projects as we go along.

The way we're looking at this is that when we first started this process, Mr. Chairman, it was kind of like looking at a shotgun marriage. The Bureau of Indian Affairs wanted to give us all of this and get us going on it.

But we're looking at this process right now as sort of a prenuptial agreement where we are looking at each side and we're saying, "This will be your responsibility. This will be our responsibility." And as we go along, maybe we will not be villains to each other, but we will be advocates to each other, as it used to be in the early stages of the Confederated Salish and Kootenai Tribes where they used to be a helpful hand and we used to be a helpful hand.

Maybe as we go along, we will have this sort of marriage so that they will be taking the considerations of the U.S. Government's responsibility and the tribes will be accepting their responsibility as a nation to their people.

We have come a long way since the beginning of this project, and we have a long way to go. We do have a lot of people working on it. We have all of our resources people working on it. We also have a consultant, Chuck Johnson, who does all the gathering of the information from outside of our area and brings it in and gives a report to the tribal council.

As I stated before, the tribe is looking at a multi-year consolidation of all of our resources. I feel that when we do the consolidation of those resources, that the tribe has to be the forerunner in

making the rules and regulations with the advocacy of the Bureau of Indian Affairs reviewing them.

As we looked in the past, the Bureau of Indian Affairs has made rules and regulations without really responding to the tribes' needs.

We, on the reservation, are the Flathead Nation. We know our needs and have our priorities established. We lose them when we go through the Bureau of Indian Affairs' IPS system. They are lost. After we make our priority system, they go to the Bureau of Indian Affairs and they are all mingled together and they are lost.

The way we see this agreement working is that the tribes will take on the responsibility of doing the prioritization in response to the need and the dollars that are available. If we feel that there are more dollars needed, the priorities will be justifying where the tribal dollars will have to go.

We are not against putting in our own dollars and supporting our tribal needs. We are minimal in what funds we do have available, but as we look at it, there are some responsibilities that this tribe has to pursue, and one of those things is to make sure that we are self-governing our people's needs and resources.

As you know, we have taken on a lot of responsibility in other areas such as shoreline protection, natural resource stream life protection, and we have handled it very well working with the residents of the reservation—not only Indian, but non-Indian, as well.

I would like to read the five areas we will be pursuing. In these five areas, Mr. Chairman, we want to know if those recommendations that we are making—the process that we are going through—will be those satisfactory to or in conjunction with what the Senate has address in our direction.

The first one on the recommendations is that Congress interpret the self-governance transfer model broadly. We have a lot of areas that, in relationship to the budget, we are not getting the information well, we want to have the transfer, the capacity, the technology, the authority, and the range of the budget all included in the interpretation of this self-governing transfer model.

We recommend that Congress mandate BIA to participate in the Confederated Tribes' consolidated budget system. That process is that we will be developing the system, and the Bureau of Indian Affairs will then come to the tribes and review those systems with the tribe to see that they are in comparison with the statutory requirement that the Federal Government has in those specific areas.

We recommend that Congress support the tribes serving as the lead management agency for other Federal funds that pass through the Bureau of Indian Affairs when the tribes cannot demonstrate capacity to serve and lead in the priority-setting role.

Now, when we get into that area, we find that the BIA has not fulfilled its obligations through its intergovernmental affairs, nor has it provided full and timely information to the tribe. A lot of times the tribes receive outside funding other than the funds funneled through the Bureau of Indian Affairs, and we do not receive the initiative information until it is too late or we have to scramble to get things put together so that we can meet those requirements to receive funding for certain needs of the reservation.

Fourth, we recommend that Congress mandate within the self-government compact minimum feasibility allocations to the agencies or reservation level of all technical and financial resources that are of benefit to the Flathead Indian Reservation.

Fifth, that Congress require the BIA to act in compliance to and confront with tribally adopted comprehensive plans that are incorporated in the self-governance compact.

What we are asking in number five, Mr. Chairman, is that we want the Bureau of Indian Affairs to get with us prior to any of the settings of the rules and requirements that will be set forth by the tribe and by the Bureau of Indian Affairs. There are a lot of statutory requirements that they know about but, as we progress, they don't bring it up to us until at the end of the process.

We want the Bureau of Indian Affairs to make sure that they work with the tribes in this area—research some areas first, and, as we progress, bring those statutory requirements to the tribes and then we will progress from there in meeting those statutory requirements.

At this point, Mr. Chairman, I would like to relinquish my time and have Tom Acevedo, who is the tribal attorney and also the person of the panel to talk about the risk insurance.

The CHAIRMAN. May I assure you at this stage that your five recommendations appear to have much merit, and we will study them very carefully.

Mr. KENMILLE. Thank you, Mr. Chairman.

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

The CHAIRMAN. Mr. Acevedo.

Mr. ACEVEDO. Mr. Chairman and members of the staff, I'm happy to be here this morning and to have this opportunity to speak with you about that portion of this hearing on insurance.

Let me sort of just touch briefly on what Councilman Kenmille and Chairman Thomas talked about in terms of self-governance and self-insurance.

We feel that the liability insurance provided in the 1988 amendments to the self-determination act is but a spinoff or an attendant part of this self-governance concept in terms of moving on to this new era that you crystallized in terms of your conversations this morning with the previous panel.

The idea of self-insurance or providing liability insurance for the tribes, and the tribes taking on that obligation themselves, in some fashion, now creates a further opportunity for tribes to be self-sufficient and in creating a new vehicle which we think will, as time goes along, be an investment vehicle for tribes and also provide economic development funds that could possibly grow out of that investment.

That idea is the sort of the underlying theme of where we'd like to go with self-insurance for tribes.

Let me back-track as to how we got to where we are today.

First of all, I am here in my capacity as chairman of the board of directors of the Double Eagle Insurance Company. It is a risk management company, that was formed by a group of tribal leaders who saw the opportunity by the amendments that Congress enacted in 1988 to the Self Determination Act, providing that the burden of providing liability insurance for tribes who contract in

the Public Law 93-638 programs, would now have those premiums provided for by the Federal Government through the Bureau of Indian Affairs.

The second component of those amendments is the new language that we appreciate very much which exists in the new law is: "The Secretary shall, to the greatest extent practicable, give preference to coverage underwritten by Indian-owned economic enterprises." The latter part of that sentence adds "such enterprises may include nonprofit corporations." This is the new addition in the act.

We seized upon the opportunity of nonprofit corporation for the creation of a risk management company that could provide coverage to tribes who enter into Public Law 93-638 contracts with the Federal Government.

The idea behind forming a nonprofit corporation was one in terms of attracting tribal interest nationwide. We felt that if we were engaged in a profitmaking corporation that we would somehow create an impression that certain tribes were in this for a profit motive and not one of trying to provide low-coverage risk insurance to the members and provide a good service to those members. So the concept of a nonprofit company was one that was embraced.

The integrity of this new company I think is spoken for by the people who are participants in it. One of your distinguished panel members this morning, Mr. Lionel John, is one of the officers of the corporation. We also have Mr. Jasper Hostler, who is a member of the Hoopa Tribe and is the tribal vice chairman, who also sits on the corporation as one of its officers. We have Mr. Tom Lone Eagle from the Big Pine Shoshone Paiute Tribe, he is the chairman of that tribe, and sits on as one of the officers of the company. And you have Dorothy Dupree, who sits next to me, and is our CEO of the company.

So we have people of high caliber and quality that can be trusted and who are looked to in Indian country as leaders and who can provide direction for providing competent insurance coverage to tribes across the United States.

Mr. Thomas I think asked the question in terms of his concern of how tribes can protect themselves if they have to waive their sovereign immunity.

As you know, when tribes contract with the Federal Government in the Public Law 93-638 program, there is language that has existed in the previous act and now exists in this act that says that the insurance companies who provide insurance shall not assert the defense of sovereign immunity that the tribe enjoys.

I think that partially answers Mr. Thomas' question about how you waive that. How you waive it is through the type of coverage that you secure from the particular company, and the scope of that coverage, then it depends on the scope of the waiver, so that if it is not a universal waiver then the tribes' limited treasuries cannot be threatened by major lawsuits.

The other component that we're looking at is putting cap on recovery, but still providing legitimate insurance coverage to people who are injured and who need coverage as a benefit to them. As you know, state legislatures are now wrestling with that very concept, themselves.



Tribes, because of their sovereign immunity, in the past have not had to address the question in terms of liability in this area and have shielded themselves behind sovereign immunity. They now have the opportunity to provide insurance to those people who are, in terms of fairness, who have suffered an injury, but also not to make those insurance recovery claims outrageous and have tribes assessed excessive damages.

Tribes, as sovereign governments, can set what those ceilings are and determine the scope the kind of coverage.

We think that is one way that our particular company, because of our unique understanding of tribes and tribal governments and working with them, in terms of the underwriting requirements, can present those to the tribes and allow them to make those items part of their consideration for participating in this risk management pool.

The other method of controlling costs is that the tribes, themselves, are directly self-insuring by being within the scope of this pool. As a consequence, they will be able to keep the premiums down because they will be able to control the scope of claims and have more of an incentive to do so.

We think that the concept of going out and simply contracting with existing major carriers doesn't afford that opportunity at all, simply because those carriers don't have the same incentives that the tribes do. The Tribes are providing coverage, and in doing so they do a general, across-the-board risk management assessment, and then set the premium at the particular given level.

The concept of a tribal risk-management pool is separate and distinct from general insurance and has greater merit, in our mind.

I would like to have Ms. Dupree, who is our CEO, explain some of the technical concepts in terms of what risk management is all about so that this committee and yourself have a fair understanding of what we are and what we are able to do.

Thank you, Mr. Chairman.

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

The CHAIRMAN. Ms. Dupree.

#### STATEMENT OF DOROTHY DUPREE, FINANCE OFFICER, PASQUA YAQUI TRIBAL COUNCIL, TUCSON, AZ

Ms. DUPREE. Thank you, Mr. Chairman, for your invitation to present testimony to Public Law 93-638 and the changes afforded thereof by Public Law 100-472.

In October 1988, the CRI came to work for the Pasqua Yaqui Tribe as their finance director. This is the beginning of the involvement that I had with the amendment to Public Law 93-638.

The issue that I immediately recognized as being somewhat of a significant issue was that of liability. My previous capacity before becoming the finance director was a corporate risk manager for a large, international corporation.

Realizing that the requirement that the Secretary provide the liability for tribes in the process of Public Law 93-638 contracting was a small victory for tribes because they no longer had to bear the high cost of liability. As we all know, with liability the costs have been escalating over the last 10 years. There does not seem to

be any, aside from Federal legislation, resource to do away with that escalating cost.

The problems that I noticed immediately are two that were very significant in the new requirement. The first is that no one could tell me where the funds were coming from to pay for the premiums of a liability policy. We can only assume, in a worst-case scenario, that those premiums would come from Public Law 93-638 contracting funds. Tribes have a difficult time, as it is, with the little money that they do have to provide quality services to their reservation's tribal members.

The second major problem is the segregation of those liabilities, because tribes operate on an integrated basis, not only Public Law 93-638 programs. Pure tribal liability programs is what I'd like to call them. You are intermingling your personnel, your space, and your resources to provide your services.

It is very difficult, without tribal input, to segregate adequately those liabilities.

Tribes have been very concerned that there has been inaction on the part of the Bureau of Indian Affairs and IHS. When I've questioned representatives of IHS, they have deferred to the Bureau of Indian Affairs with the explanation that the responsibility for the liability mainly lies with the Bureau of Indian Affairs because the exposures are in those Public Law 93-638 contract programs, not with the medical services that are covered under Federal Tort Claims Act.

The Bureau has taken two actions in leading toward the implementation. First, they have contracted with Marsh & McLennan, which is a large, national insurance broker, to do an analysis of what it would cost to write a national insurance policy.

I have had a chance to review that analysis. There are two distinct pitfalls to that analysis. First, as I referred to above, there is no tribal input. The key tool in determining the exposures of any liability is to analyze the program administration methods and whether or not there are good quality-control procedures in place of the administration of these programs. That was not included in the analysis.

The second major pitfall to that analysis is that there is no claims history, therefore they have no data to back up what it is that they've analyzed.

The second action that was taken by the Bureau of Indian Affairs was to request the 1-year extension in order to further investigate what they could do with the liability problem. Tribes being concerned called a meeting in Albuquerque in March 20. Out of this meeting there was an interim board of 18 representatives across the United States who have two goals: First, was to develop a regulation to implement—and that regulation I have attached to my testimony—self-insurance and risk management companies representing the membership of tribes; the second goal was to investigate the nonprofit development of a self-insurance risk management company.

On May 1 and 2 we had a second meeting in Denver, CO, at which we incorporated Double Eagle Risk Management, Inc., under Salish and Kootenai law in Montana.

Double Eagle since then has sent a letter to the chairman of the House and Senate Interior Appropriations Subcommittees requesting that \$6.5 million—which, by the way, is \$1 million over the estimate of the Marsh & McLennan analysis—requesting that that be added to the Bureau of Indian Affairs indirect cost funding to be earmarked for Double Eagle Risk Management—\$1 million of that to establish our initial reserves, and \$5.5 million of that to contract with tribes in providing their liability coverage.

We formally would like to request your endorsement of our letter to the Appropriations Committee.

We truly believe tribes can insure and that it will be at a lower cost in the long run to the Federal Government. It will take a 3- to 5-year reserve pool build-up period, and after that the cost to the government should be very minimal.

#### DOUBLE EAGLE RISK MANAGEMENT

What is risk management? Risk management is a process whereby risks and exposures are identified, measured, and treated. One of those treatments is self-insurance. One other treatment is traditional insurance placement. Another treatment is loss prevention programs to reduce or eliminate risk.

The benefits of pooling are evidenced by government municipalities and large corporations. There are two characteristics that you need to meet in order to form a successful pooling concept: you need to be diverse in nature, and you need to be large in number. I believe that tribes meet those requirements.

Tribes benefit from risk management through Double Eagle or a tribal membership risk management company by a number of ways. First of all, they can design their own coverage; thereby, they are sensitive to each tribe's needs. They are provided loss prevention and control programs to reduce the exposures on reservations. They still have control over the claims litigation, which I believe is one of the most important points of self-insurance. And the dollars stay within Indian country.

Those dollars do not go to a non-Indian insurance company to add to their profit margin. They can ultimately serve to provide investment money back into Indian country for economic development.

To my testimony I have added three charts. Chart FA shows the interrelationship of the Public Law 93-638 liability participants. Chart FB is a two-tribe model that segregates the liabilities by activity level and demonstrates the treatment of how those would be insured. FC is a second two-tribe model that isolates the activities by activity type.

This committee's assistance is vital in two ways: First, to exercise your leadership with the Appropriations Subcommittee to secure funding for companies like Double Eagle; and, second, assistance that is vital is to direct BIA and IHS to prioritize the formation of self-insurance pools.

We look forward to your support and endorsement of our company.

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

The CHAIRMAN. May I assure you that your request for additional funding will be very carefully considered and appropriate action will be taken.

Ms. DUPREE. Thank you.

The CHAIRMAN. Some of us are also members of the appropriations committee.

Do you have any cost estimate as to savings that may be realized from this risk pool operation?

Ms. DUPREE. The standard estimate of savings that municipalities and corporations have enjoyed is approximately 10 percent. That 10 percent is what would go for pure profit to insurance companies. That, instead, would, due to our nonprofit nature, be a savings.

The CHAIRMAN. A 10-percent savings?

Ms. DUPREE. Right.

The CHAIRMAN. We believe that it would be much larger than that.

Ms. DUPREE. Well, it ultimately would be. The problem that we have right now is that there has been no gathering of data on a composite basis of tribes and their exposures; therefore, it is difficult to determine the amount of money that is going to be required—not the amount of money, but the amount of coverage that is going to be required compared to the activities out on reservations and through the tribal contractors.

The ultimate savings would be tremendously more. An example of this is: Let's say we have a 5-year analysis going on. If the liability were to be placed on the conventional insurance market, you would be paying and using the Mash & McLennan estimate of \$5.5 million. You would be paying that company \$5.5 million to provide a conventional national insurance policy; whereas, that same amount would go to Double Eagle Risk Management Inc. in year 1. In year 2 you would have \$5.5 million, and possibly more because by then they would have a little more experience and, as you know, they charge more when they realize the number of risks that are out there. So again, in year 2, \$5.5 million goes to that insurance company and \$5.5 million comes to Double Eagle.

In year 3, \$5.5 million goes to the insurance company. In year 3, \$5.5 million goes to Double Eagle.

In year 4, \$5.5 million. In year 4, zero to Double Eagle because by then, using the estimate that it takes 3 to 5 years to establish an adequate reserve to cover your liabilities, we would no longer need the funding, whereas, in the conventional insurance market, it is a yearly expense.

The CHAIRMAN. As a general rule, laws and ordinances and regulations and rules are applied and administered uniformly. Over the years, Congress has noted that this uniform application may oftentimes place into jeopardy certain segments of our society because the people that have to live with the rules are not uniform in nature. You have very powerful and wealthy people, wealthy groups, and then you have very weak, inexperienced, impoverished people.

And so, as a result, communities and States and localities have adopted legal services for the poor, they have adopted public defenders for others, ombudsmen in some communities. Even on the

international scene the world bank has what we call a soft window, where so-called less-developed countries can borrow money at concessionary rates.

I have mulled over this, but what do you think about a similar type of arrangement for Indians? Obviously, you have very powerful Indian nations, a large population with many resources, some very wealthy. On the other hand, you have very poor, small nations and rancherias, as well as nations and tribes in Alaska and the Arctic Circle with no lines of communication, no roadways. In some areas, there is one community health assistant and no physicians or clinics, as you will find.

Do you think it would be well if this Congress considered the creation of special groups to assist less-prepared and weak nations?

Mr. THOMAS. I think you're right on target. I think that the availability of resources for the purposes of insurance and other costs of that nature are very difficult. I think if we had a soft window, so to speak, not only in the area of insurance, but economic development and other things that would take us past the pure management of service contracts, I think that is the proper direction to go.

Mr. ACEVEDO. Mr. Chairman, from Salish and Kootenai we think that it would be an excellent thing for the Congress to consider. I think Mr. John and the previous panel mentioned something about a Marshall Plan in terms of how he views the relationship between the United States Government and Indian Tribes, and your suggestion is along that line. It would be something that would be of great assistance to tribes.

Senator INOUE. The only reason I brought this up is that whenever you establish an ombudsman office, it is suggested the relationship is a rather adversarial one. You need someone to be your advocate, for example. But you think it is something that has merit?

Mr. KENMILLE. Mr. Chairman, I think tribes across the Nation advocate on behalf of a lot of other tribes in helping them progress. When a tribe has progressed further than another tribe, the way the Salish and Kootenai Tribe looks at it is that we are not so far ahead that we can't reach back and help somebody else come up with us. That's basically how the insurance company would be working.

Right now you look at Public Law 93-638 and the contracts that they have there, but as time expands it can go into much more depth of insurance and taking up the responsibilities of what tribes want in an insurance company.

So as we go along, tribes will help each other out. When one progresses, another tribe will reach back and help the other tribe progress.

The CHAIRMAN. Well, I thank you very much.

As you indicated, Congress should monitor, especially at this time, the implementation of this law. I can assure you that this hearing is just the first of several. We will be monitoring the implementation of the amendments very, very carefully because we are involving ourselves in a relatively new area. And we shall occasionally call upon you to assist us in keeping us up to date as to how it is coming along.

Thank you very much.

Our third panel consists of the following: Mr. James Sizemore, a CPA with the Warm Springs Tribe of Portland, OR; and the Honorable Twila Martin-Kekahbah, chairman of the Turtle Mountain Tribal Council of North Dakota.

Who wishes to go first?

Mr. SIZEMORE. Mr. Chairman, I have been invited to go first, so I will.

**STATEMENT OF JAMES SIZEMORE, CPA, WARM SPRINGS TRIBE,  
PORTLAND, OR**

Mr. SIZEMORE. I wish to thank the committee for the opportunity to discuss the appropriations process with you.

In my 13 years in the Indian business, I have had the task of analyzing the Bureau of Indian Affairs' budget and the Indian Health Service budget each year and attempting to convey to the tribal council at Warm Springs what they mean and what the impacts of those budget justifications are or would be on the tribe.

I would liken that to waking up from a nightmare. It is sort of disorienting. It is very difficult to go through those two documents and determine what they mean to an individual tribe.

I have submitted written testimony, and I will basically walk through it.

I would like to highlight three points that I think are important.

First, tribes are rapidly developing very effective and sophisticated governments, yet the tribes are not recognized as governments in the present appropriations process. The processes are currently more geared to provider/recipient relationships.

Under Dr. Rhoades' leadership we have seen an attitude in the IHS that is more supportive of government-to-government relationships. Whether they can convince the higher-ups is yet to be seen, but we do appreciate their support.

The second point is that the Indian priority system utilized by the BIA was designed to support and complement self-determination. It could have been an effective process if properly utilized and honored. Unfortunately, that has not been the case.

The third point I'd like to make is that a true government-to-government relationship would require that an appropriations process be rooted in law. The present process is not. In fact, it is not even in regulation. It is in the manuals of the agencies and can be changed by the agencies or staff within the agencies without any involvement by the tribes or the Congress.

This committee recognized that fact and, in the Self-Determination Amendments, asked for a report on the Indian priority system and the appropriations process. I worked with the group in the Portland area, and we decided that our report would be an educational document and that we would attempt to provide a tool to Congress and tribal leadership. It consists of an analysis of the Indian priority system, the history of the system, the problems with it, and recommendations for what an appropriate government-to-government process should look like.

I have attached to my testimony the executive summary from that report.

I have also looked at the reports from all of the other areas around the country and find that the feelings about the process and the system are very consistent among Indian tribes.

The system, as it stands today—or what is left of the Indian priority system—is now 19 years old. It was developed following President Nixon's announcement of the new self-determination policy.

At Warm Springs, the system has been used to integrate and coordinate services with the agency. Each year the tribe works with the superintendent to coordinate program activities and to set the priorities. The tribe's budgeting process is dovetailed with the Bureau's budget in order to ensure that basic tribal priorities are met. The tribe has enjoyed an excellent working relationship with the BIA and the IHS at that level and at the area levels—and in headquarters, in many instances.

What I'd like to do now is turn you to a blue attachment to my testimony. The first page of that is basically an analysis of what would be the outcome of priority setting at the agency. Under the present IPS process, tribes are asked to prioritize funding for their programs at the 80-, 90-, and 100-percent levels, and also at the 110-percent level. Once that is done, these amounts are added incrementally from the 80-percent level.

You will note that there is a need column which is blank. The process used to have an ability for the tribes to submit their needs so that those needs could go into a national information base. That column no longer exists in the process. There is no "need" collection.

If I could turn you to the second page, I will explain how hypothetically this system would work.

As you can see, the tribe has incrementally prioritized its funding, and hypothetically, wherever Congress draws the line in terms of appropriations, that would be the funding that would go to that location. That is not what occurs.

If I could ask you to turn the page one more time, I would like to point out a tool developed at Warm Springs which is used for the tribe and the superintendent to clarify the roles and relationships of the tribe to the Bureau and the expectation of the tribal council of the superintendent and his staff with respect to the programs. This is a developing tool used for the last few years. I brought it to you to point out that there is no such tool in the IPS system. The first sets of pages are all that gets to the central office today, so when the central office makes decisions about programs, those decisions are made without any information about the impact on local programs, and the superintendent is not in that loop.

That's a little bit about how the system works—or at least how it was designed to work.

You'll note there are only 10 programs left. Inflation and moving programs out of the IPS have reduced programs. The tribe chooses to fund programs themselves and try to keep what is left of Bureau programs funded adequately.

If I could turn you to page three of my testimony, I'd like to highlight some points about this system. Under the self-determination law, one would expect tribal decision-making would have increased gradually, permitting tribes to take over more and more decision-making. In 1970, over half the Bureau budget was within

the Indian priority system—at that time called the band analysis. Today, about 25 percent of the budget rests there.

In 1980, tribes were given a choice of 37 programs into which to prioritize funding. In 1991, there are 29.

BIA has proposed to remove or cut several other programs from the IPS through the budget process, but, fortunately, the appropriations committees have not permitted it. In several cases, such as forestry self-determination grants, the Congress has restored funding, only to have BIA attempt to cut those programs again the following year.

In the case of self-determination grants, the Congress restored a portion of the 1987 reductions in 1988 and instructed the BIA to return those funds to the Indian priority system at the locations from which they were reduced. This was not done. In the 1990 budget, the BIA seeks to cut the amounts out again. It doesn't seem that Congressional wishes make any more difference than tribal wishes.

New charges have been levied against local programs, effectively eating away at the buying power. In the case of facilities, the cost of phones used to be charged to facilities operations and maintenance. Congress saw a savings in that budget. But what really happened is that the cost of phones was shifted to local IPS programs—again reducing their buying power.

Mandatory pay costs have been implemented without additional funding. Inflation has eaten away the resource.

New tribes are added and funds are not requested.

In the Portland area we have tribes who have officially refused to participate in the process because they see it as assisting in cutting their own throat. In the multi-tribe agencies, tribes are unable in many cases to determine what share of the programs are theirs to contract or to reprogram.

If the tribes are to have such a government-to-government relationship through the process and to further develop their own capabilities, there needs to be stability in financing. A constant up and down movement and constantly pulling the rug out from under them does nothing but undermine the process of growth.

Tribes need to have additional flexibility. There are many, many programs authorized by the Congress which tribes are not permitted to prioritize funds into.

I might mention that this flexibility should be extended to the IHS budget. If tribes were able to shift funds within their local service units, you might see an added emphasis on primary prevention activities hopefully, over the long term, shortening the demand on crisis intervention.

There needs to be a reduced competition for funds. The American industry is streamlining, and I think the agencies could do so, as well.

We have Federal statutes that seem to be in conflict. We have an Indian Reorganization Act that calls for tribes being informed about the budget being requested. That law is not being fulfilled today.

The Self-Determination Act would lead one to believe that tribes should participate in the process, but they are locked out while the process is secret during the formulative process.



Finally, there needs to be an equitable distribution of resources. Many tribes have addressed that in their area reports. I think it is unfortunate that the BIA has undertaken an equity study and tribes were not involved in the design of that study, nor have they been informed as that study has been pursued.

Mr. Chairman, the report of the Portland area has a lengthy section of recommendations, and I will provide copies. I believe the committee has finally obtained copies from the Bureau.

I do wish to thank you for the opportunity to present this testimony.

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

The CHAIRMAN. Thank you.

#### STATEMENT OF TWILA MARTIN-KEKAHBAH, CHAIRMAN, TURTLE MOUNTAIN TRIBAL COUNCIL, BELCOURT, ND

Ms. MARTIN-KEKAHBAH. Mr. Chairman, my name is Twila Martin-Kekahbah. I am the tribal chairperson of the Turtle Mountain Band of Chippewa in North Dakota.

I would like to thank you for the opportunity to provide testimony on the Indian priority system, IPS, and how it relates to self-determination.

Due to the importance of this issue, I have been accompanied by my full council and other members of our tribe. The Turtle Mountain Band of Chippewa Indians' membership includes over 25,000 enrolled members, of which over 13,000 members live on or adjacent to the reservation.

The reservation is plagued with chronic unemployment, which averages about 65 percent. The per capita income was \$3,300, and ranks Rolette County as one of the lowest in the State of North Dakota. Our population is young, with 42 percent less than 16 years of age, and a median age of 19.5 years.

In 1882, President Chester Arthur, by Executive order, reduced the size of our reservation from an approximate 24- by 32-mile reservation to a mere 6- by 12-mile reservation. By this action, a tract of country estimated to contain over 9 million acres was thrown open to white settlement. As a result, our land base was severely reduced.

Turtle Mountain has 36,000 acres of tribal land, 40,000 acres of individual allotted trust acres in the immediate service area, 8,800 individual allotted trust acres in western North Dakota, and 123,372 individual allotted trust acres located within 12 different counties in the State of Montana. Seventy-six percent of our land holdings are outside of the reservation boundaries.

The tribal land is not rich, fertile land, nor do we have any oil, gas, or valuable minerals. There are tribes who have oil and gas, forestry, fishing, et cetera, while others, like ours, have little or no resources available to provide tribal revenue.

Due to our large population and housing shortage, much of our tribal land is utilized for home sites. Income from our tribal land is, therefore, nonexistent.

I applaud Mr. Sizemore in his finesse in being able to give an objective viewpoint, in a sense, of the IPS system, whereas mine is going to be more from an emotional perspective.

The Bureau of Indian Affairs in a budget allocation meeting with the Turtle Mountain Tribal Council on April 19, 1989, informed the Tribe that they must be cut \$66,000. The tribal council walked out on the negotiations.

The tribal council questioned the Bureau of Indian Affairs' method of allocating moneys under the Indian priority system because we believe funding for the Turtle Mountain Band of Chipewa is grossly inequitable.

For example, in fiscal year 1989, the average IPS dollar per person for Turtle Mountain was \$320, which ranked 10th out of the 12 Aberdeen area agencies. The high in the area was \$1,100 per person.

Our law enforcement department and tribal court have the second, if not the highest, incidence of need per month in the Aberdeen area and ranks 12th out of 12 agencies with \$47 per person in law enforcement dollars. This compares to the high of \$294 in the area.

We are incensed by these proposed cuts, as they mean less money for scholarships, our local community college, fire protection, law enforcement, the tribal court system, and other programs crucial to the stability of our tribe.

For too long, the Bureau of Indian Affairs has manipulated the tribal budget by pulling programs off the system at random to cover the BIA central office's shortfalls or favored projects without consultation with affected tribes.

In addition, it is a known fact that under-funding creates a divide and conquer mentality which is not conducive in promoting tribal unity. For example, each year when the tribal council, the Bureau of Indian Affairs, and all the other programs under the Indian priority system meet to rank the programs based on need and then attempt to allocate the dollars proportionately, there has never been an adequate amount of money to justify the internal friction created by the system; however, the Bureau has repeatedly encouraged this type of reaction by its inept method of funding.

It is interesting to note that the Bureau of Indian Affairs' fiscal year 1990 budget justification to Congress lists the Bureau's budget as nearly \$1.5 billion. The amount of funds available to tribes under the Indian priority system is \$2.5 million. This calculates out to 17 percent of total allocated funds for the tribes to promote self-determination.

These figures speak for themselves. How can tribes exercise true self-determination when the Bureau allows this? That's 17 percent of the Bureau's overall budget.

The Indian priority system causes political and internal problems for the tribal government and program BIA personnel due to everyone trying to increase their program to meet minimum needs when, in fact, that base amount of funds are not available to meet these minimum needs.

The lack of resources and isolation from metropolitan areas also creates high unemployment and the socioeconomic problems associated with poverty for our reservation.

It is with this in mind we contend that not only the Turtle Mountain Band is not receiving equitable funding, but the entire Aberdeen area isn't, as compared to tribes in other areas.

This is certainly true when one considers the resources available to the tribes in the Aberdeen area. As stated before, Turtle Mountain does not have oil and gas, forestry, fishing, or natural resources available to them. Instead, our resource is our human potential. Therefore, how are we, the elected officials, capable of judging what is considered to be the most pressing need to our tribe when every one of the programs funded is essential to our survival.

Mr. Chairman, I would like you to bear in mind some critical questions which we have addressed to the Bureau of Indian Affairs.

First, if the BIA is requesting \$1.5 billion for fiscal year 1990, why is Turtle Mountain's IPS projected allocation only \$3 million?

Second, from all the research we have been conducting on the BIA's method of formula funding, we cannot make heads or tails of how they ever come up with the money allocations to the area offices and respective tribes. For example, in 1978 the tribe had 28 programs under the IPS with a budget of \$4,670,000. Now, in fiscal year 1989, we have 15 programs with a total allocation of \$3,097,000. How did this formula come about? Wasn't there any consideration of population increase?

Third, why is the Turtle Mountain Band of Chippewa Indians the only tribe in the country who still has their enrollment under the BIA? And why do we need to include enrollment in the IPS funding? That is a direct Bureau responsibility; therefore, it should not be included in the IPS allocation.

We request that Congress mandate the BIA to remove our tribal enrollment from IPS and appropriate sufficient funds to maintain the Turtle Mountain membership roll.

Fourth, if the BIA had a budget nationwide of \$1.1 million for fiscal year 1989 for community fire services, why did the Aberdeen area receive only \$53,500, and Turtle Mountain only \$10,000?

Fifth, under the fiscal year 1990 budget, a \$3 million increase is being allocated to social services for the Indian Child Welfare Act. Why is the Turtle Mountain Tribe not receiving any portion of this?

It is my understanding this allocation is nationwide. With the number of child abuse cases which have been investigated on our reservation, doesn't anyone in the Bureau realize we also need additional monies to address our problems.

Sixth, there are two programs which will also be discussed under my testimony. Those two programs are no longer a part of the IPS, but are now under the unbanded, non-IPS funding system. Why is it that when a program is taken off the IPS it loses dollars instead of maintaining or increasing? The programs I am referring to are the roads maintenance program and facility management.

In facility management, under another new Bureau formula funding methodology, the tribe stands to lose \$380,000. If this funding methodology is utilized in the current IPS funding formula, you and I both know, Mr. Chairman, that Turtle Mountain is again getting the short end of the stick.

My question is: How did the Bureau come up with this funding formula for facility management, and how can we change it? And why does BIA mandate agency administration and executive direction programs be maintained under the IPS? They should be taken off, and the funding for their continuation be obtained elsewhere.

Mr. Chairman, the Turtle Mountain Band of Chippewas are tired of being the nice guys, sitting back in a rural, isolated area of North Dakota not making waves, trying to make do with what we get. However, we have now reached our limit of tolerance. We can no longer abide with the Bureau's base funding formula that they have determined for us.

As you listen to the following, you will understand why we are angry and are seeking your assistance in securing an equitable funding base.

The areas that we get funded under are scholarships. The present fiscal year 1990 budget is not enough to fund the average submittal of 700 applicants annually. This appropriation can only serve 250, or 36 percent, of the applicable students—64 percent of our students are not funded.

As noted earlier, we have a young population with many of our young people entering school age. Since the Turtle Mountain Band of Chippewas' resources are human, educational attainment has been our avenue in seeking self-determination. Unlike many non-Indian rural communities, we don't have the out migration or the brain drain of our educated Indians. Instead, our people, once educated, return to our reservation communities to serve the people in the fields in which they have been trained.

Adult education development is another program. This program provides precollege preparation, GED, high school equivalency, pre-GED, and literacy education. In a recent tribal survey of 600 adult residents, it was revealed that 52 percent did not have a high school diploma. We have many of our people that have not gone on to college.

Regarding the tribally controlled community college, the Turtle Mountain Community College's mission is toward becoming a self-supporting, full-service, participating community college. To serve this mission, the following objectives need to be addressed: We need to improve instructional capabilities and student service capabilities, expand the comprehensive learning center, establish an endowment, and expand our library services.

Another of the college's missions is to establish a tribal institution involved in exerting leadership within the community, providing services and preserving the cultural and social heritage of the Turtle Mountain Tribe.

To serve this mission, the following objectives need to be addressed—and, again, I say this because if you look at economic development and self-sufficiency, we need the tools and the mechanisms. I think I stated once before in testimony that institutions such as universities have political science courses that train in the area of leadership and tribal government, so we need to utilize our community colleges for that perspective, as well.

Adult vocational training is another area of the IPS program. For this year, alone—fiscal year 1989—there have been 800 contacts from people interested in vocational training. Under the IPS system as it exists, 250 actual applicants received adult vocational training.

The adult vocational training program has and will continue to be an avenue for individuals to learn a trade technical skill to compete in the job market.

In the traditional social services and tribal court areas, the tribal court—much of the court work flow involves offenses and delinquencies relating to alcohol and drugs, with alcohol-related offenses being more prevalent.

The work flow is provided into three areas: criminal, civil, and juvenile. Due to staff shortages, one-third of all our cases are not heard in court.

The tribal courts need an adult probation and parole department for monitoring individuals placed on probation. At the present time, we have no direct supervision capability. They need an investigator to investigate actions that have been filed by the prosecutor's office. We need social workers to do the necessary investigations and assessments in the juvenile cases other than abuse and neglect.

Because of the complexity of cases and Federal regulations calling for accountability, there needs to be a law library.

We need to have a public defender to represent indigent Indian people as called for under new Federal legislation. At the present time, our court is understaffed.

As for law enforcement, the law enforcement does not have the adequate number of police officers to handle the number of cases that we currently have.

Mr. Chairman, I believe that, in conclusion, what I'd like to point out is that it was my desire to have provided a bureau-wide overview of the IPS system; however, due to central office and areas' inability to comprehend the funding formula for the budget allocation of that system, we were unable to do so.

To paraphrase our area director's response when questioned on the IPS funding formula and its allocation to tribes, he responded by saying, "I don't know. I just don't know." Well, Mr. Chairman, neither do we.

[Prepared statement of Ms. Martin-Kekahbah appears in appendix.]

The CHAIRMAN. I thank you very much, Madam Chairperson. I can assure you that all of the questions you have asked will be submitted to the appropriate agencies and I will request that responses be submitted to you and to the committee. We would be very interested in their answers to your questions.

I thank both of you very much for sharing your problems with us. This makes our oversight responsibilities a bit more effective.

When we proceeded to enact these amendments, we knew that some of these amendments would cause problems, and apparently instead of alleviating some of your problems we may have added a new burden. We will be studying them very carefully.

Thank you very much.

Our final panel consists of: Mr. William P. Ragsdale, the Acting Assistant Secretary of Indian Affairs, The U.S. Department of the Interior; and Dr. Everett J. Rhoades, Director of the Indian Health Service.

Mr. Secretary.

**STATEMENT OF WILLIAM P. RAGSDALE, ACTING ASSISTANT  
SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE  
INTERIOR**

Mr. RAGSDALE. Good morning, Mr. Chairman.

Mr. Chairman, thank you. We are pleased to be here this morning. I have with me some staff and representatives from the Department, but I will defer introducing them at this time.

I would ask that my statement be entered into the record, Mr. Chairman.

The CHAIRMAN. It will be included immediately following your oral presentation.

Mr. RAGSDALE. I will try not to be redundant. I believe it adequately represents our position regarding the development of the rules and the implementation of this most important legislation.

First of all, I'd like to set the record straight. The Bureau of Indian Affairs, to the very best of my knowledge, never contemplated vetoing the amendments to the Indian Self-Determination and Educational Assistance Act. I have been serving as the Deputy for Bureau Operations for the last 2 years, and neither myself nor anyone else in the Indian Bureau, including the former Assistant Secretary, to the best of my knowledge ever contemplated recommending a veto by the President.

First of all, I'd like to say about the Public Law 93-638 amendments that we are challenged and devoted to implementing this most important legislation which provides a framework for carrying out of the government-to-government and trust relationships. It is important to note, however, that much substantive law, treaty, court decisions, and so on, provide the foundation for our obligations to maintain both the trust and government-to-government funding arrangements that differ from tribe to tribe.

When I finish, I would appreciate it if the chairman would ask me the same questions he asked of the tribal chairmen with respect to tribal sovereignty, and I would be most happy to respond on the record for the committee. But first let me talk about a couple of other things.

Let me talk to the heart of the matter, and that is the important policy that the Congress of the United States and the executive entered into when this legislation was first enacted regarding the exercise of self-determination, and that is the commitment that the United States gave to the Indian tribes across the Nation to provide a unique contracting relationship between the United States and the Indian tribes in the most direct manner.

Also, under this commitment it was reaffirmed that the exercise of Indian rights, which had been assured as a matter of Federal law, including court decisions, etc., would not be affected.

The next aspect of policy and the commitment of the unique and continuing relationship of the United States of America with Indian tribes has dealt with the policy of the trust relationship and the way the United States of America would execute both the government-to-government and trust relationship.

Last week I spent 1 week in the State of Wisconsin. I was asked on a number of occasions by State officials and, in particular, by State legislators, about the U.S. Government's policy.

Essentially what I said was that I believe that, number one, treaty rights are somewhat like the Constitutional rights of all citizens of this country in that they are both solemn commitments to Indian and non-Indian people, alike, that should be carried out and you could expect this as a part of the American system.

Second, that tribal governments have fully joined in the process of being recognized as having full status in the American system of government and should be welcomed into that system under the U.S. framework.

Third, that the abrogation, abolition, or termination of rights of Indians is not on the table for serious discussion or negotiation by those responsible for keeping this public policy in both the Congress of the United States and the executive branch, to the best of my knowledge.

I know this committee has an enlightened attitude in this regard, and I know the chairman—and hopefully the committee, as well—will do all that they can to better educate the American public in this regard.

Finally, I want to emphasize that I do not consider the employees of this agency, the Bureau of Indian Affairs, in an adversary role in terms of this guarantee and commitment of the United States to further the relationships I have just talked about.

I have been in this Indian Bureau for 20 years and I am a career Indian Affairs employee. It has been my personal witness that the majority of the employees in the Indian Bureau fight for Indian rights, and we do that with a great amount of vigor, against a lot of adversaries in some instances. You don't do that and have an adversarial relationship, overall, with the clients and your beneficiaries.

I am prepared to respond to your questions, Mr. Chairman.

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

The CHAIRMAN. Mr. Secretary, I thank you for your statement. It is very encouraging—especially your emphasis upon your policy on treaty rights. I think we coincide completely in that respect. I am also pleased to learn that you do not believe that the relationship that exists is an adversarial one, but I am certain you will have to agree that the perception in many parts of this land—Indian country and otherwise—would seem to lead one to conclude that the relationship is an adversarial one, unfortunately.

I should point out at this juncture that I do not intend to ask any questions for the record other than a couple for the IHS, which does not relate to the subject matter here, because, instead, I will be submitting questions. I don't want the exchange between us to be construed by anyone as being an exercise of an adversarial relationship.

I thank you very much, sir.

Mr. RAGSDALE. Thank you, Mr. Chairman.

The CHAIRMAN. Dr. Rhoades.

**STATEMENT OF DR. EVERETT J. RHOADES, DIRECTOR, IHS,  
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

Dr. RHOADES. Thank you very much, Mr. Chairman.

My name is Everett Rhoades. I am the Director of the Indian Health Service. I am accompanied by several officials of the Indian Health Service and the Department, and with your permission, I would ask that my formal statement be entered into the record.

I would add my endorsement to the positive statements I have heard this morning, because I feel as strongly about that and Indian Health Service supports.

Second, I have often commented in my speeches around the country that although there are a number of adversaries that I encounter from time to time, due to the sincere concern that I have for the Indian people who are dying but should not be dying, this has never been reflected adversely in my relationships with tribal representatives or their other legal representatives.

Perhaps if I might just summarize the progress to date in this new phenomenon that we are involved in with the tribes that is no longer called "consultation," but, I believe, is appropriately called "participation." I would just like to review for the committee that in the 14 years since the original landmark piece of legislation was passed, a considerable amount of progress has been made toward tribal assumption of control of their own health programs.

For example, of the 127 service units in the Indian Health Service, 52 are now operated by the tribes; 7 of the 50 hospitals are operated by the tribes; 73 of 139 of our health centers are operated by the tribes; 2 of the 7 school health centers and approximately 250 smaller stations and satellite clinics are operated by the tribes. We currently have about 350 contracts for a variety of services funded at approximately \$180 million. These are solely for services.

In addition to that, we have approximately \$30 million in contracts for architectural and engineering construction services.

If I could just call your attention to the chart here on my right, I think I can remain seated and point out the major steps that have taken place since the amendments were signed into law on October 5, 1988.

Within a very few weeks, joint meetings were held between BIA and the Indian Health Service in several areas of the country involving a total of over 1,300 participants. The purpose for this was orientation, to ensure that the law was understood and to begin an education process for the Indian Health Service. This was followed very quickly by Indian Health Service Area Director tribal meetings in each of the 12 Indian Health Service areas which were held by December 1988. At this time I established four major work groups representing the major divisions that we believe are encompassed in the amendments to the 638 process—that is, administrative, construction, program, and resource provisions.

These four work groups were made up of approximately 66 percent Indian tribal participants selected by the tribes, representing those tribes from within each of the 12 areas. This included representatives from the National Indian Health Board and other national Indian organizations. This also involved over 400 other participants.

The purpose of these work groups was basically to begin laying out the rulemaking specifications that the law called for, as a first step in the preparation of notice of proposed rulemaking.



There were joint area meetings then held to review the work of these work groups; "joint" reflecting BIA and Indian Health Service and tribal participation taking place the first month of this year.

I established a steering committee to advise me about the mechanism of securing participation by the Indian tribes, and also the process to be followed in carrying out the intent of the law. All of our efforts have been designed to carry out the intent of the law, as we have understood it.

This group is to make recommendations to me. I made a commitment to this group that I will not make decisions of a substantive nature relating to regulations until I have reviewed them with the Steering Committee.

I might just point out, Mr. Chairman, that all of the groups that I have in the Indian Health Service, whether it is work groups or steering committee or the chairmanship of the regulation drafting, workshops have been chaired by either an Indian person, tribal person, or co-chaired between Indian Health Service and the tribes.

This led to what was called the Nashville Regulation Drafting Workshop, attended by approximately 260 participants. These participants went through the documents prepared by the working groups, line by line, with probably some of the most comprehensive and finest discussions taking place between Indian Health Service, BIA officials, and the tribes as to precisely the point in this law.

This proved to be a much more formidable undertaking than I think most of us had anticipated going into that workshop. It required that a second workshop be held, and which was attended by over 300 participants who continued developing a document which would largely reflect the point of view of the tribal participants and the Federal agencies. This document would then form the basis for continued development of these regulations. That is approximately where we are at this point.

I have been extremely impressed by the level of medical, health, clinical, and professional input into these activities by the tribes.

I might just point out, parenthetically, that both Lionel John and the representative from the Northwest have served, and continue to serve, on the steering committee for the Indian Health Service.

I believe the process has been largely successful. I think it is easy to see that it is a time-consuming process. I think your own remarks earlier this morning about the profound importance of this process suggests to me that one should approach the development of regulations quite deliberately—and I do not say this in order to delay the implementation of the regulations. There is no benefit to be derived by the Indian Health Service for delaying the implementation of these regulations.

In fact, I have a group working together in consultation with tribal participants looking at every aspect of the existing regulations and the language that is now appearing in the proposed language to see what can, in fact, be implemented in contracts prior to publication of these regulations. I believe that a modest to a moderate amount of progress can be made in this direction.

Mr. Chairman, this would serve to summarize the major point that I really wanted to bring before this committee. I am available to answer any questions you might have.

[Prepared statement of Dr. Rhoades appears in appendix.]

The CHAIRMAN. I thank you very much. I will be submitting several questions to which I hope you can respond. I would very much hope that you will go through the testimony of the witnesses who proceeded you and respond to their questions. I think it would be extremely helpful.

Doctor Rhoades, we all know that there is going to be a \$45 million shortfall, and several Indian tribes have approached the committee expressing their concern about what will happen to health care in their reservation.

In this audience we have tribal leaders from the Pueblo of Isleta, and they have advised me that, as a result of this shortfall, their operations would have to end. Their contract health care program will be terminated at the end of June, which would mean that services such as obstetric care, dialysis, and other acute care will be terminated in their area.

The other one comes from the Navajos in the Albuquerque area—concern that with this budget shortfall it would mean that their health care program will be ending about June the 23rd.

In both cases, they consider—and I concur—that they are emergencies. I hope you will respond to them.

In the spirit of amity and comity, I would like to announce that on June 20 at 11 a.m., this committee will convene to consider the nomination of Dr. Edward Brown, who has been nominated to serve as Assistant Secretary and Director of the BIA. At that time we will have as witnesses two Senators from Arizona and possibly a Member of the House delegation. In addition, the senior leader of Dr. Brown's tribe has been invited to testify, if he so wishes. In order to accommodate all those who may wish to testify, we are inviting them to submit statements. These statements, subject to our study, will be made part of the record.

We intend, at the end of the hearing, to immediately vote upon the nomination and hopefully report it out that day, unless something should come up that we don't anticipate at this moment.

And so those of you who may be interested in submitting statements are welcome to do so, but the speaking witnesses will be the two Senators, a Member of the House, and a leader of the tribe and, obviously, the nominee, himself.

At this time I would like to call upon my very distinguished colleague, Senator Conrad.

Senator CONRAD. Thank you, Mr. Chairman.

I will be brief, given the lateness of the hour. But there are several questions that were raised by Twila Martin-Kekahbah, the chairperson of the Turtle Mountain Band, that I think deserve a review.

I'd very much like to know, Mr. Ragsdale, if you could tell me why the IPS dollar per person for Turtle Mountain in fiscal year 1989 was \$320, when the high in the area was \$1,100. How is that arrived at? There seems to be some confusion in terms of what formula is used to come up with a result like that.

Mr. RAGSDALE. Well, I agree there is some confusion. I can't speak to the dollar amounts. The fact of the matter is that we had a meeting scheduled at 11 o'clock this morning to meet with Congressman Dorgan, I believe, with some of my staff to go over their

agency budget schedule. But I think an assumption that was made that we distributed the dollars at the agency level in the IPS based upon a per capita formula or something like that is just not correct. The base level of funding for each agency operation, area office operation, and so forth, is based upon some historical base that nobody can figure out.

That is one of the reasons that the resource allocation study was requested in the President's budget a couple of years ago to get someone to do an objective analysis of how the dollars are distributed against some sort of program criteria or standards and use that as a basis to start consultation with Indian tribes about perhaps changing the way monies are allocated in the Bureau through the IPS system.

Senator CONRAD. Let me be clear. I did not mean to suggest that the formula was done on some sort of per capita basis. As it has been presented to me and presented in the testimony of the Chairperson, it is very unclear what formulas are used. As you said, these base amounts seem to be lost in the mists of time. But to get a result where they get \$320 a person and others \$1,100 a person—and I can tell you that if you go to this reservation and the other reservations of my State, you'll find probably the most difficult economic conditions of any in the country—something is wrong. Wouldn't you agree that there is some problem?

Mr. RAGSDALE. I don't know what their analysis is. In fairness, I would have to say I'd have to look at the tribes analysis and compare it against the agency dollars and the allocation. But I think that one of my guesses, based upon hearing the chairperson testify, is that she was making a distinction about the amount of money that the tribe was currently contracting as opposed to the amount that was still in the direct operational mode there at the agency. But generally—and if the agency base has been reduced over the years in terms of total dollars, my feeling would be that that would be out of the ordinary compared against our regular Bureau base operations because the fact of the matter is that we have increased and requested an increase in the tribe agency portion of the budget this year.

Now, everything that is in the tribe agency budget that comes as a results of the IPS system—prioritization—is not the only amount of dollars that are subject to contracting and that provide direct services. The total amount of contracting last fiscal year for example, was \$366 million to approximately 345 Indian tribes across the country. That is a large number over the total amount in the tribe agency bases for a lot of different reasons.

Senator CONRAD. Let me just refocus this so that it is clear where that number comes from. The number of \$320 per capita is simply arrived at by taking the total IPS payments to that tribe divided by the number of members, and you get \$320 dollars. If you do the same calculation for Lower Brule you get \$1,100. If you do the same calculation for the Winnebago III Tribe you get \$726 dollars.

Again, the question I would have is: if those numbers are correct, doesn't that disparity suggest to you that there is some problem in the funding formula?

Mr. RAGSDALE. Yes; I would suggest that we need to revise the way that we allocate the dollars. Yes, sir.

Senator CONRAD. Mr. Chairman, it is troubling when the tribes are not able to discern how it is that payments are made.

Our Congressmen had a hearing out in the State, and it was the testimony of the tribal representatives who were present that they could not make head nor tails—I think they indicated the same thing today—about how these numbers were developed.

We ought to have a transparent system. We ought to have one where everyone can at least agree on how the numbers were arrived at, it would seem to me, if we are to have a system that is going to maintain the respect of everyone involved in the process.

Mr. Chairman, I have many other questions, and I will submit them for the record in the interest of time.

[Questions and answers appear in appendix.]

Senator CONRAD. I appreciate very much the graciousness of the Chairman in allowing me this time.

The CHAIRMAN. It is always a pleasure to have you with us. The questions you have asked are very important. As you know, your constituent has submitted a whole list of questions—five of them, to be specific—and I have asked the Secretary and the Doctor to respond to them.

Doctor Rhoades, if I may, just for the record at this time, since the tribal leaders from the Isleta Pueblo are here and they may want to know what is going to happen to them, as a result of this shortfall, they fear the termination of their contract health care program by the end of June. Nationwide, I have been advised that this program will be terminated on or about the end of July, which would mean that for the last 2 months we may not have many of these body-sustaining, life-sustaining services in many of these reservations.

For example, we understand there is a hiring freeze that has been placed over 400 direct health care positions which would result in the reduction of the available number of hospital beds in all of the IHS hospitals. Can you tell us how the Indian Health Service intends to respond to this crisis?

Dr. RHOADES. Mr. Chairman, the information presented by the distinguished leaders from Isleta and the information from Navajo, I believe, is generally correct on the differences that we might have. I haven't seen some of their data about beds and so forth, but my expectation is that there is about a \$45 million shortfall. I hope it is not greater than that. It may affect as many as 400 positions in the direct care system.

I think it is fair to say that this is the biggest threat to the integrity of the Indian Health Service's program that I have encountered since 1983 when we went through a similar exercise in the Indian Health Service. It is very serious.

I have just now received the requested spending plans from each of the areas. I am in the process of analyzing that at this moment, and will be receiving information from them on an approximately four-weekly basis.

The only choices that are available to us are the obvious choices. In the absence of any ability to deal with the question for eligibility for services, the only thing that is left for one to do is to deal with those services, themselves. The question, as it has always

been, is: Who will be denied care? And what services will be denied?

In the abstract, the answers to the letter are reasonably easy; that is, given the mission of the Indian Health Service, given the Congressional directives, given what we know about what is killing Indian people—basically, I have always maintained, and I think we have been modestly successful in the general philosophy of the Indian Health Service, is that we must give our attention to the youth.

The rationing of care is not a new phenomena for the Indian Health Service, notwithstanding the fact that it is more acute this year than ever.

I will be looking at the range of services very, very carefully to see about the disturbance to the general status of health of Indian people in relationship of who gets denied care. I don't believe there are any other alternatives.

I hope that we will be able to maintain a degree of contract health care perhaps through August, but I do not know that that is the fact at this moment.

I do not conceive how it will be possible to continue that through the rest of the year.

In the meantime, we have already undertaken action such as a severe curtailment of travel, a curtailment of meetings, permitting our inventory of supplies to fall to a level that we believe is tolerable—we hope it is not intolerable—but not providing us the cushion that we would wish.

I am in great need of suggestions as to how one might accomplish this in the most equitable way, but I believe our alternatives are very, very basic and very few.

The CHAIRMAN. We have just gone through the exercise of the dire, urgent, emergency supplemental bill. And, to the best of my recollection, notwithstanding budgetary constraints, we have not called upon non-Indian Americans to forego the receipt of health services. For example, we put in over \$3 billion for the Veterans' Administration to make certain that services will continue at the highest level. The same thing is true with the military hospitals, CHAMPUS, and other programs. We have provided in the supplemental incentive payments so that certain specialists can be enticed to serve.

This is the only place that we are asking, according to your statement, people to deny themselves possibly obstetric care or dialysis or surgery, and I, in this land of fairness and equity, don't think that will fly.

Are you planning to submit a supplemental request?

Dr. RHOADES. Mr. Chairman, it is my understanding that the considerations that have taken place in regard to possible supplemental had been such that we do not plan to submit a supplemental request this year.

The CHAIRMAN. Every other agency submits a supplemental. Are you afraid to do this?

Dr. RHOADES. No, sir; It is my understanding that in the formulation of the 1989 budget the allowances within the Public Health Service favored the Indian Health Service somewhat at the ex-

pense of the other agencies in the Public Health Service, and that approximately 4-percent growth was allowed.

My understanding is that it is a continued reflection of the extremely difficult choices that have to be made at the present time, given the severe budget constraints with which we live.

Ther CHAIRMAN. We are making difficult choices throughout this land, but the difficult choices have never affected the health delivery service in non-Indian sectors. This is the only place we are going to call upon people to tighten their belts and, to put it bluntly, die peacefully.

Would you submit to this committee at the earliest relevant information and statistics that we can use to formulate, on our own initiative, a supplemental request which we will submit to the Congress of the United States in behalf of the Indian country.

Dr. RHOADES. Yes, sir; we can do that almost immediately, I believe.

[Information supplied appears in appendix.]

The CHAIRMAN. I would appreciate that very much.

With that, I would like to thank both of you again. We will be submitting to you several questions, and we look forward to your responses.

[Questions and answers appear in appendix.]

The CHAIRMAN. I hope that we can begin a new era of closer collaboration and amity and destroy this perception that has been growing throughout this land that the relationship between the Congress and the Bureau of Indian Affairs, Indian Country and the Bureau of Indian Affairs, has been an adversarial one. If it is, it should be stopped; if it is not, we should clear it up.

I join you in the necessity to carry out an educational program to advise our fellow non-Indian citizens of the nature of the sovereignty of Indian people.

Thank you very much.

Dr. RHOADES. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, sir.

[Whereupon, at 12:49 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

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## APPENDIX

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### ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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#### TESTIMONY

of

W. Ron Allen, Chairman  
Jamestown Klallam Tribe in Washington State  
for the

P.L. 93-638 and P.L. 100-472 Regulations Development Process Hearing  
on June 9, 1989

before the  
Senate Select Committee on Indian Affairs

Mr. Chairman and Committee members, my name is W. Ron Allen and I'm the Chairman and Executive Director of the Jamestown Klallam Tribe. I would like to thank you for inviting me to this hearing to address this critical issue of developing the regulations for the Self-Determination and Education Assistance Amendment Act of 1988.

The spirit and intent of this Act is to provide the tribes with improved administrative authorities and mechanisms to carry the Self-Determination and Self-Sufficiency goals forward. These Amendments are also directed at improving the political/bureaucratic environment to administer the P.L. 93-638 Act consistent with the President's "Government-to-Government" Policy. In carrying out our governmental responsibilities, tribes are becoming more stable, skilled, efficient, and effective at managing their governmental affairs. The passage of P.L. 93-638 has assisted tribes in becoming proficient and skilled at managing their own programs. Yet, over these last few years we have been extremely frustrated with the overly bureaucratic maze that we have to navigate to accomplish our objectives.

The current system and consultation process has never been conducted consistent with the "Government-to-Government" Policy. We have our unique

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governmental status, sovereignty, treaty rights, and jurisdictional obligations to serve our people, but the system still treats the tribes as a constituency. A tribal constituency which the bureaucracy attempts to manage as if we do not have the skills, competence, capability, education, and/or experience to manage the trust resources or other governmental functions such as education or social services without a considerable amount of oversight. This paternalistic disposition of the BIA and IHS agencies is the most objectionable aspect of the government-to-government relationship from the tribes' perspective.

We consistently find that the current bureaucratic system is deeply rooted in a subtle mentality of self-protection. Subsequently, the tribes not only find that we have to spend an excessive amount of energy making the current system work for us, but fight the bureau for the precious dollars that Congress makes available to the tribes.

The competitive reality juxtaposing over the destiny of the BIA or IHS relative to the independence and self-sufficiency of tribes that is at the root of our current dilemma. The 1988 Amendments to P.L. 93-638 provide the opportunity for the development of new regulations to implement Self-Determination. How this regulatory development process is to be logically conducted consistent with the legislative purposes is the primary theme of my testimony.



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In 1988 when the tribes were working with the Senate Select Committee and the House Committee on Interior and Insular Affairs in developing the "638" Amendments, we were addressing a number of issues to improve the conditions for tribal "638" contractors. One of the key issues was our effort to change the system of "consultation" with the tribes on the development of policy, rules, and regulations to "participation". In our judgement, this means that in the context of the "Government-to-Government" relations, tribes would now negotiate as equals with the federal government the conditions of "638" contracts. The tribes commenced to work with the BIA and IHS in developing the regulations for this laws with this fundamental shift in participatory involvement inbeded in the law.

We felt that if the Bureau and IHS would sincerely work with us in developing the regulations, the tribes would be walking over the threshold of an opportunity to spend less time and effort fighting the bureaucracy and more of the resources carrying out the purpose of the Indian Self-Determination Act.

In the early phase of the development of the regulations, the BIA and IHS were attempting to draft the regulations within the schedule outlined in the law. Unfortunately, the communication was poor between the agencies and the tribes and the tribes objected to the process of developing the regulations without our direct participation. This initial bureaucratic process caused considerable alarm from the tribes because we knew that the

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Bureau did not wholeheartedly support the 1988 Amendments and that the IHS appealed to the President to veto the Amendments.

The tribes sought support from this Committee and the House Committee on Interior and Insular Affairs to delay the proposed schedule for the development of the regulations to assure our substantive involvement. We were successful in that effort and with the support of IHS and the reluctant disposition of BIA, we scheduled two workshops to "jointly" (tribes & BIA/IHS) draft single set of regulations for both BIA and IHS. These workshops were viewed by the tribes as a legitimate process to address the regulatory needs and resolve conflicts and disagreements.

The tribes were extremely disappointed that the Bureau was dragging its feet in participating in the process. BIA officials kept asserting that the tribes did not fully understand how the regulations were to be developed. They also presented a position that the environment of 250 tribal leaders, lawyers, and technicians was an unfair situation to allow them to argue for their views. We acknowledged that the tribal representatives outnumbered the BIA and IHS personnel, yet we consistently pointed out that if their positions were reasonable or consistent with the law they would find support from the tribes.

From the beginning of the process, the BIA would not accept the concept of negotiating these regulations with the tribes consistent with the principle of the "Government-to-Government" relationship. They rarely came to the

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workshop with their positions developed and were not prepared to work out differences when such differences arose.

The two first meetings, referred to as the Regulation Drafting Workshop (RDW I & II) initiated by the Indian Health Service were conducted in Nashville and Albuquerque. At first the Bureau would not state whether or not they would acknowledge this process, but in the second meeting said that they only considered the process another form of consultation. They consistently vacillated back and forth regarding their involvement in the process and then finally settled on a position of drafting their own version of the regulations.

We want to point out to the Committee that the 250 tribal participants represented over 450 tribes, Alaska villages, and California Rancherias. The Bureau on the other hand, would take the position that because there were some tribes, villages, and rancherias not present, that we did not represent all of Indian country. This position we feel is a smoke screen to justify why they would have to draft regulations to "protect" those tribes not present. Every time we presented an argument or a position and tried to get the BIA to commit to a position, they would shift to a non-committed posture apparently to leave their options open for deliberation in their closed environment where no tribal representatives would be present to challenge their position.

The Bureau has argued that regulations cannot be developed with such a large group. We pointed out, however that the effort worked in the first two

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sessions and that we were only asking for one more national session to resolve the disagreements. We then proposed that the final phases could be coordinated through the Steering Committee forum. The Steering Committee, which had been initiated by IHS, was established to provide a small workable group of Indian leaders who represented each of the 12 regions. This Committee was to negotiate the final problem or conflict areas. It was embraced by the tribes as a compromise approach to have a smaller group negotiate the final details of regulations with the departments.

Another example of our frustrating experiences with the Bureau is its unwillingness to accept the Indian leaders on the Steering Committee as the point of tribal contact in this process. The BIA has asserted various reasons for not accepting the Steering Committee; all of which boil down to the fact that the Committee was generated by IHS and not the BIA.

A key problem with the Bureau has been their attitude. During the workshop meetings they have consistently said that this issue or problem will not get past OMB. The tribes would respond by saying why can't we work these issues out with OMB? In our judgement, BIA simply did not want the tribes in a position to talk to upper level Department or OMB personnel regarding the process because of the influence of our logic and consistency with the law and the President's policy.

The development of the schedule to complete the regulation process is another area that has reflected the Bureau's unwillingness to cooperate. It

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has taken us months to get the Bureau to cooperate in the development of a joint schedule; they have consistently been publishing a different schedule than IHS even after we thought that an agreement was reached in the Steering Committee.

The way the process is emerging, we feel the strategy of the Bureau is to posture their position so as to not commit to the idea of negotiating with the tribes and in the end draft their version of the regulations referred to a "Notice of Proposed Rule Making" (NPRM). This strategy would result in reverting back to the old system with the tribes in a position of attempting to modify regulations that have been developed internally by the BIA. We feel that their regulations would be implicitly aimed at the BIA retaining control over tribes.

One of the ironic observations of the process is that IHS has conducted itself more in the context of a trustee than the Bureau. There are a number of problems in IHS, but they are not as major as within the Bureau of Indian Affairs. Within the top level of the HHS there is exhibited concern about their commitment to work with the tribes in the final phases including the Clearance process.

My comments have been directed at the political and policy aspect of the process to promote a Congressional awareness of the importance of changing this process and the relationship of the Administration with the tribes in administering Indian programs. I have other more technical comments to

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supplement and compliment those views that you will receive today and would like the opportunity to provide them within the next week.

In conclusion, I would like to urge this Committee to assist the tribes in influencing the Administration to implement this policy consistent with the "Government-to-Government" Policy. It would be a grave disappointment if we are not able to persuade the Administration to adjust to the intent of the P.L. 100-472 and regress back to the status quo situation. A situation where the bureaucracy will prevail and the hope of Self-Determination fades into the night.

Mr. Chairman, I again thank you for this opportunity to testify before this Committee on this subject.

STATEMENT OF  
S. BOBO DEAN, ESQ.,  
BEFORE  
THE SENATE COMMITTEE ON INDIAN AFFAIRS  
OVERSIGHT HEARING ON  
THE INDIAN SELF-DETERMINATION ACT

June 9, 1989

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My name is S. Bobo Dean. I am a partner in the law firm of Hobbs, Straus, Dean & Wilder of Washington, D.C. and Portland, Oregon. Our firm has been representing Indian tribes and tribal organizations which operate P.L. 93-638 contracts with the Bureau and Indian Health Service since the creation of the firm seven years ago. Our clients which administer programs under P.L. 93-638 include the Miccosukee Tribe of Indians of Florida, the Metlakatla Indian Community, the Oglala Sioux Tribe of the Pine Ridge Reservation, the Oglala Sioux Tribal Public Safety Commission, the Bristol Bay Area Health Corporation, the Norton Sound Health Corporation, the Maniilaq Association, and a number of other tribal school boards and other special purpose organizations. We are presently representing thirteen tribes and tribal organizations in connection with tribal participation in the development of regulations under the 1988 amendments to Public Law 93-638.

I have personally been involved in Indian law since 1965 and represented the Miccosukee Tribe in 1970 when it negotiated the first contract for tribal operation of an entire Bureau of Indian Affairs agency.

The enactment by the Congress of the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638) (hereinafter the "Act") in 1975 was a major step toward creating a viable system of democratic self-government in the Indian country and ending the era of paternalistic federal domination of the Indian tribes.

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The recent amendment to the Self-Determination Act (P.L. 100-472) was enacted in response to tribal demands -- based on the experience of thirteen years -- for the elimination of bureaucratic road blocks erected to deter Indian people from achieving the goals of the Act.

Significant reforms were made possible not only because of the substantive provisions of P.L. 100-472 but because the statute directed the Secretaries of the Interior and Health and Human Services to formulate appropriate regulations "with the active participation of Indian tribal governments and organizations." Thus Indian tribal representatives are intended to participate with federal representatives in the development of regulations to implement the self-determination reforms enacted in 1988.

This process got off to a good start. The agencies held two national regulation drafting workshops with tribal representatives in February (Nashville) and March (Albuquerque) of this year. This consultation resulted in a draft which was circulated to tribes by the government on April 3. Under P.L. 100-472, the agencies were to have regulations in place by August 5, 1989, less than two months from today. However, the agencies have requested additional times and are now targeting September 7, 1990 as the new implementation date for revised regulations, two years after enactment of P.L. 100-472. That date would not only exclude almost all of fiscal year 1990 from the impact of the reforms enacted in 1988, but would also leave the period for negotiating FY 1991 contracts (to begin October 1, 1990) uncovered.

We compliment the agencies on the extensive consultation with tribal representatives which has resulted in the April 3 draft regulations. However, we are distressed (1) that apparently little further tribal input is planned and (2) a major reason for the additional delay in reaching final regulations is apparently due to the agencies' intent to extensively re-write the April 3 draft. While (as we note below) some refinements are needed in the latest draft, we feel that the work has largely been done, and there is no reason for the entire 1990-91 contract year to pass before the principal reforms enacted by Congress in 1988 are put in place.



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We are also concerned that the agencies have not yet provided guidance as to the negotiation of contracts in FY 1990 pending the issuance of regulations. Some of our clients have requested a simple contract extension for FY 1990 and been refused by the contracting officers -- apparently because they just have not been told what to do. Other area offices have advised contractors that they can extend for FY 1990 but request implementation of some provisions of the 1988 amendments. We recommend that the latter approach be implemented nationally since many tribal contractors should now be re-negotiating for the renewal of contracts which expire at the end of FY 1989.

Two distinguished tribal leaders who have testified today have participated in the consultation process, and I will defer to their comments on the policy issues raised by the federal attitude toward tribal involvement. I will direct my remarks to a number of specific legal and technical issues which have been highlighted in the consultation thus far. In some cases these issues have been resolved in the latest (April 3) draft distributed to tribes by the agencies. In others the agencies continue to frustrate the intent of P.L. 100-472.

#### Funding Level Appeals.

(April 3 Draft Report p. 36, hereafter "Draft.")

The major disputes which have arisen under P.L. 93-638 involve the level of funding to which tribes are entitled under the Act. Under the April 3 draft, appeal of a funding dispute falls under the declination criteria of § 102 of the Act and not the contract disputes provision. This ensures that funding does not become a threshold criterion to the award of a contract in violation of the clear intent of the 1988 Amendments. See Senate Report 100-274 at p. 24. But we understand that IHS objects to the draft language because it refers to a funding level appeal as a declination appeal. IHS is willing to provide the same hearing rights when a contract is refused on funding grounds but unwilling to describe such a refusal as a declination.

In our opinion, this is not merely a semantic dispute. The Act requires IHS to do one of two things when it receives a request for a contract for a tribe (1) to approve it or (2) to decline it and provide an appeal and a hearing. The April 3 draft reflects this clear statutory mandate. The IHS approach -- that a dispute over funding involves a third alternative -- is unacceptable even when the same appeal rights are provided by

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regulation. Under the IHS approach, such rights are provided by the agency as a matter of grace. In fact, the statute gives IHS no third alternative: it must approve or it must decline in accordance with the statutory declination procedure. We urge that the language in the April 3 draft be retained.

The IHS also challenges one of the five statutory methods by which funds for a self-determination contract may be reduced: namely, a directive in the statement of the managers accompanying a conference report on an appropriations act or continuing resolution (P.L. 100-472 § 106(b)(2)(B)). The IHS recommends deleting this provision from the regulations, citing President Reagan's signing statement which states that the provision is "unconstitutional, yet severable." Inconsistency between the Congress and the Executive Branch on this issue will certainly lead to confusion as to the levels of funding to which tribes are entitled under the Act. We recommend that the Committee consult with the Indian Health Service and the Senate Appropriations Committee to clarify this issue so that funding reductions on this basis will either be clearly authorized or not authorized.

The IHS also seeks to add a sixth method to the five statutory provisions. The IHS would add a "changed circumstances and factors" section which was not included in the reduction of funding section of P.L. 100-472. We are unaware of the statutory basis for this IHS regulatory proposal which would substantially increase the discretion of the agencies to reduce recurring contract funding levels without tribal consent. Section 105(c)(2) of the Act permits "changed circumstances and factors" to be taken into consideration when contracts are renegotiated, but does not authorize unilateral reductions.

We are also concerned with the status of the implementation of "calendar year contracting" mandated by section 105(d) of the amended Act. As we understand this provision, it requires that contracts in FY 1990 commence on January 1, 1990, "unless the Secretary and the Indian tribe or tribal organization agree on a different period." However, the Administration has not requested the quarter year funding necessary to implement this provision without leaving the final quarter's funding level contingent on future appropriation. The whole point of calendar year contracting was to permit the negotiation and award of contracts based on firm appropriation figures. We urge that your Committee work with the Appropriations Committee to assure either that BIA and IHS be provided with the dollars necessary to implement this provision in FY 1990 or that the Act be amended to prohibit BIA or IHS from insisting on calendar year contracting over the objection of a tribal contractor.

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Contracting Process.  
(Draft pp. 23-25)

Congress made clear that the "fundamental objective" of the Federal Indian self-determination policy is to increase and strengthen the ability of tribal governments to plan and administer services and programs to their members. P.L. 100-472 created "mature contracts" (contracts with an indefinite term), removed the six "threshold criteria" which the agencies had used as an obstacle to contracting, and requires that unless a contract application is declined within 60 days based on the statutory criteria, it should be approved on the 90th day. These statutory mandates are evidenced in the regulatory provisions pertaining to contract term, continuation of contracts and review/approval of contract proposals.

The IHS, however, has taken an unnecessarily restrictive interpretation of the statutory language. IHS concludes that an Indian tribe wishing mature contract status cannot opt for mature contract status for a term of years. We urge the Committee to review this matter with IHS to clarify that a tribal governing body has the discretion to select a contract term which it deems best for the needs of its members and most consistent with the purposes of the contract and that the 1988 Amendments are not meant to require an "indefinite" term for a contract qualifying as mature when a definite term (for example five years) is more appropriate based on the needs of the tribe or the purposes of the contracted program.

The Bureau suggests that the declination criteria of § 102 of the Act shall apply to the renewal of an existing contract for the same functions or programs. This is contrary to present BIA and IHS regulations. See, for example, 25 C.F.R. § 271.20; 42 C.F.R. § 36.207. The existing BIA regulations on this issue should be retained. They provide that contracts "will" be renewed when involving the same functions as already contracted and clarifying language from existing BIA guidelines ("renewal of such contracts is not at the discretion of the Secretary") should be incorporated in the regulation.

The IHS also seeks to eliminate regulatory presumptions from the draft which make it easier for an Indian tribe or tribal organization to contract under the Act. The regulatory presumptions clarify that the burden lies with the Secretary to prove that an Indian tribe cannot satisfactorily operate a P.L.

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93-638 contract. These provisions in the April 3 draft should be retained. It is equally clear that failure by the Bureau or the IHS to approve a modification providing funds for a subsequent year of a multi-year contract is subject to appeal and a tribal right to a hearing just as in the case of a refusal to approve an initial contract proposal. The April 3 draft makes this clear by making declination to amend an award subject to declination appeal procedures, as well as a declination to make an award. This language should be retained.

Regulations pertaining to contract modifications should reflect that bilateral modifications do not require a resolution of the tribal governing bodies served unless such action is required by the tribal resolutions requesting the initial contract. The present draft does not recognize that a tribal resolution may limit the authority of the tribal organization which operates a program.

The IHS also wishes to weaken the statutory time frame in which to award a contract under the Act. The IHS would provide in regulations that a contract which was not declined on the 60th day is deemed approved on the 90th day "to the extent the proposal conforms to the law and regulations" and would delete language which would allow the Indian tribe to incur contract costs from the 31st day after approval of the contract. We urge that the April 3 language providing that the contract shall be deemed approved on the 90th day (or the 120th day if the tribe grants an extension) be retained.

Program Standards.  
(Draft p. 48)

Another controversial issue in the regulation drafting process has been the question of program quality assurance, program standards and data requirements contained in the program management subpart of the draft. The reason for this controversy is that this section goes to the heart of the contracting debate; namely, how much authority are the Federal agencies willing to relinquish to Indian tribes and tribal organizations which contract under the Act. It is a question of who will ultimately exercise control over the lives of Indian people. The Act and P.L. 100-472 answer this question in favor of the Indian people themselves.

In the area of program quality the IHS and tribal representatives reached a compromise on the issue of tribally developed standards and data requirements. The IHS still has

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some reservations but has recognized the right of Indian tribes to develop their own standards which must then be reviewed and approved by the agency. The Bureau is still reviewing this provision and has yet to comment. Its representatives have suggested that for some Bureau-funded programs there must be specific mandatory program requirements. While this may be so in some instances (i.e., proper training for police officers carrying firearms) such requirements should be minimums which are clearly stated in regulations to assure fairness to all tribes and to deter the agencies from imposing detailed requirements as to program content which would inhibit innovation and the tailoring of programs to meet tribal needs.

Contract Monitoring.  
(Draft p. 52)

In the area of contract monitoring and contract modification, the Bureau has yet to embrace the intent of Congress to transfer the responsibility for the planning, operation and implementation of Federal programs from the Federal agencies to the Indian people themselves. The Bureau appears reluctant to decrease the Federal contract monitoring bureaucracy which has replaced the Federal service bureaucracy. This is illustrated by the Bureau's desire for a provision giving the BIA discretion to increase contract monitoring and reporting based on "reasonable cause." The monitoring and reporting reasonably required should be specified in the regulations to prevent harassment of tribal contractors.

Property Management.  
(Draft p. 87)

We support the Bureau's conclusion in the property management subpart of the draft that the agencies have the legal authority to transfer title to excess real property of the Federal government to tribal contractors. Unfortunately, however, the IHS does not share this opinion. We urge this Committee to encourage the IHS to follow the Bureau's lead in this instance. We fail to understand why the two agencies take opposite positions.

Personnel Quarters Management  
(Draft pp. 89-91)

Closely related to the issue of real property management is the management of housing for employees.

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One of our clients, the Bristol Bay Area Health Corporation, has objected to IHS that federal rent-setting procedures have caused unreasonably low rental rates for government quarters since the rates are pegged to the urban Anchorage market, rather than to the rural, isolated Dillingham community near the Kanakanak hospital where the quarters are located. The BBAHC Board has decided to establish reasonable rental rates based on the rents charged in the adjacent Dillingham community rather than continuing to be bound by the IHS determination under OMB Circular A-45 to charge much lower rentals based on the Anchorage market. BBAHC's desire to increase rents complies with the command of federal law and OMB Circular A-45 that rents be set at the reasonable value of the quarters and not be set so as to provide a housing subsidy. We are concerned that IHS may attempt to cancel the BBAHC contract unless the Board backs down, and we urge that this Committee contact IHS and the Office of Management and Budget in support of BBAHC on this matter.

The IHS is also unwilling to allow tribal contractors which are responsible for the operation and maintenance of government rental quarters to retain rental receipts. The IHS has insisted that such receipts must be paid over to the IHS to be placed in a central fund with no guarantee that the facility will receive operation and maintenance funding at a level equal to the rental receipts submitted or the level of funding required for adequate maintenance. In the consultation process, BIA concluded that it has legal authority to permit contractors to retain rental proceeds for use in the maintenance and repair of quarters (as both BIA and IHS had done for years). IHS -- looking at the same law -- reached the opposite conclusion. While we have heard that IHS has reconsidered this position, we have seen nothing in writing. We urge the Committee to encourage both agencies to permit such revenue to be retained and used by tribal contractors.

Procurement Standards.  
(Draft p. 92)

In the procurement management subpart of the draft, the agencies allow tribal contractors to develop their own procurement procedures in lieu of procedures provided by the Secretaries. We recommend, however, that the authority to approve such procedures be delegated to Area staff, giving the contractor the right to appeal, rather than place such authority at the Secretarial level as the April 3 draft currently provides. The regulations should also make clear that procurement procedures which have already been approved by BIA or IHS need not be approved again.

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Financial Management.  
(Draft p. 57)

The regulations governing financial management contain some improvements but also need further modification to carry out the intent of the legislation. We urge that all tribal organizations be permitted to follow the cost principles for governments in OMB Circular A-87 (with specific exceptions to be included in the regulations) as to "allowable costs" since all are instrumentalities of their tribal governments (while tribal "non-profit organizations" should be permitted to elect to follow OMB Circular A-102, if they wish). This approach is followed in the April 3 draft, but we understand that the Bureau still would prefer simply to incorporate all applicable OMB Circulars (A-87, A-102, A-122, or 48 C.F.R. Part 31, as applicable). These general federal cost guidelines were not developed in the light of goals and provisions of P.L. 93-638 so they do not necessarily further its purposes.

The April 3 draft includes a number of selected cost principles which would apply to principles contained in Circular A-87. For example, contractors would be allowed to depreciate the cost of federally-financed facilities owned by the tribal contractor and used in a contracted program. This provision is especially important for tribes which operate health programs in facilities constructed with federal grant funds. The clause on lobbying costs is modified to permit tribal contractors to communicate with the Congress (clearly a vital tool in the achievement of tribal self-determination). A special cost principle permits professional service costs when a tribal contractor has a dispute with the federal agency up to the point that a final agency decision is made. The April 3 draft also allows "638" funds to be treated as tribal funds to meet non-federal matching requirements in other federally-funded programs. These modifications will provide specific practical assistance to tribes in their efforts to realize the goals of the Act.

In some areas the financial management guidelines still need clarification. It is obviously the intention that "cost reimbursable" and "fixed price" contracts should both remain available options. At the last Albuquerque conference, the draft was clarified to reflect that savings in a fixed price contract was not "program income" (and thus subject to restrictions on the use of such income) but merely part of the price paid to the contractor for the product or service. However, language needs to be added to the regulations to expressly authorize both the cost-reimbursable and the fixed-price method

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of contracting and define the general circumstances in which each may be used, as the present regulations do. See 48 C.F.R. § 380.405.

The Bureau suggests that advance payments may now be improper in the absence of Federal Acquisition Regulations which have been made inapplicable to P.L. 93-638 contracts. We cannot believe that the Congress intended to do away with such payments by exempting contracts under the Act from FAR regulations. We urge the Committee to review this matter with the Bureau. The elimination of "advance payments" would render self-determination contracting impracticable for many tribes. The intent of making FAR inapplicable to "638" contracts was to give the two Secretaries the authority to develop appropriate self-determination regulations without being bound by FAR constraints. Certainly, the agencies have the authority to provide for advance payments to contractors in these regulations.

The financial management subpart in the April 3 draft clearly states that the receipt of program income will not otherwise reduce funding amounts from the Secretary. This provision reflects existing agency policy guidelines as well as the clear intent of section 106 of the Act.

We are especially concerned that the Bureau and IHS are seeking a one-year extension of the requirement in § 102(c) of the Act which requires the Secretaries to obtain or provide general liability insurance. Ever rising insurance premiums divert scarce resources away from the service population. We urge that your Committee review carefully with the agencies the steps they have taken to comply with Section 102(c) and insist that they move ahead to provide the protection which the law requires.

The April 3 draft contains useful language clarifying the scope of FTCA coverage and spelling out procedures necessary to assure its effectiveness to replace the need for IHS contractors to purchase medical malpractice insurance. We are pleased that on May 23, 1989 the Department of Health and Human Services at last gave some guidance to IHS field offices as to how this coverage works. Guidelines need to be issued promptly to tribal contractors, however, containing the procedures outlined in the April 3 draft.

Secretary's Report to Congress and Budget Consultation.  
(Draft pp. 16-20)

In enacting P.L. 100-472, Congress was keenly aware of the need to provide greater accountability by the Bureau and IHS to Congress and the Indian tribes on funding allocations and



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budgetary needs. Congress recognized that information on resource availability assists Indian tribes in deciding whether or not to contract under the Act. The April 3 draft pertaining to the Secretary's annual report to Congress, to Indian tribes and the provision on consultation in preparation of the Secretary's annual budget reflects this Congressional directive. Unlike the IHS, which has been receptive to the need for the agencies to be more accountable, the Bureau has concluded that such reporting requirements are too "expensive and burdensome." We disagree and trust that the Committee will insist that reporting requirements be complied with.

Contractibility and Divisibility.  
(Draft p. 6)

Finally, we note that neither agency has adequately focused on the issues of contractibility and divisibility of programs under the Act. Before regulations can be finalized these issues should be addressed.

We believe that the 1988 Amendments resolve any significant issues as to contractibility and that the agencies need merely to promulgate regulations not inconsistent with the amended Act. Under section 102 the Act applies to any program or portion thereof which either Secretary is authorized to administer for the benefit of Indians by the Snyder Act (25 U.S.C. 313) and subsequent legislation. The Congress clearly intended by amending this section in 1988 to bar the agencies from exempting certain programs from tribal contracting under the Act. See Senate Report No. 100-274 at pages 23-25.

In the consultation process, tribal representatives have differed on whether the regulations need contain any language on this issue. We understand that the agencies still consider that there are certain federal functions which cannot be legally transferred to tribes under the Act. We recognize that the trust responsibility and other legal constraints probably do have this effect as to certain federal functions (as distinct from programs). These functions include committing the federal government to certain actions, certain trust officer functions (approvals of leases of trust lands), technical advice in determining whether an action is binding on the United States, and maintaining accountability for federal funds, programs of property used or operated directly by the federal government. We urge that these specific functions be identified in regulations so that tribes may have the full benefit of the legislation without having to contest unjustified federal assertions of non-contractibility.

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We recognize that the division of programs serving more than one tribe, when not all of the tribes being served request a contract (or multiple tribal contracts are contemplated), may be a critical issue in implementing the Act. Section 106(b)(5) of the Act provides that BIA and IHS are not required to reduce funding to non-contracting tribes in order to make funds available to another tribe under the Act. The Bureau has proposed that the declination criteria should be applied to the non-contracted portion of the program and a proposal should be declined if the non-contracted portion fails under these criteria. There is no statutory basis for this approach (except possibly as to trust resource programs). The regulations should, however, contain standards under which a program serving multiple tribes may be divided for purposes of implementing the Act. If a fair allocation of resources does not provide sufficient funds to meet declination criteria for the program to be contracted and no other resources are available, then the proposal can be declined, subject to the usual right to appeal and a hearing. We suggest that the agencies review the provisions on divisibility contained in the 1977 BIA Procedural Guidelines under the Act and circulate proposed language on divisibility for tribal comments in advance of the development of the next draft of the regulations.

These are just some of the issues presented by the regulatory process to date. We have provided for the record a detailed analysis of the April 3 draft to supplement this testimony. We thank you for the opportunity of presenting these views. I would be happy to answer any questions which the Committee may have at this time.

Attachment

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ANALYSIS  
OF THE APRIL 3, 1989  
REGULATIONS DRAFTING WORKSHOP II  
WORKING DOCUMENT  
ALBUQUERQUE, NEW MEXICO

HOBBS, STRAUS, DEAN & WILDER

May 3, 1989

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## HOBBS, STRAUS, DEAN &amp; WILDER

## LAW OFFICES

1819 H STREET, N.W., SUITE 800  
WASHINGTON, D.C. 20006  
(202) 763-5100  
TELECOPIER (202) 296-6634

CAROL L. BARBERO (DC)  
S. BOBO DEAN (DC, NY)  
HAROLD M. GROSS (DC, CA, OR)  
CHARLES A. HOBBS (DC)  
FRANCES L. HORN (DC)  
MATTHEW S. JAFFE (DC, MD)  
MARSHA KOSTURA (DC, PA)  
JOSEPH J. B. RYAN (DC, TN)  
JERRY C. STRAUS (DC)  
DEAN B. SUAGEE (DC)  
HANS WALKER, JR. (DC, ND)  
LEROY W. WILDER (OR, DC, CA)

MICHAEL P. GROSS (NM, AZ)  
KENNETH F. TWOROGER (DC, FL)  
ROBERT H. WAGSTAFF (AK, KS)  
OF COUNSEL

KAREN J. FUNK  
GOVERNMENTAL AFFAIRS COORDINATOR  
(NOT ADMITTED TO ANY BAR)

May 3, 1989

MEMORANDUM

PORTLAND OFFICE:  
2225 S.W. MONTGOMERY STREET, #6  
PORTLAND, OREGON 97201  
(503) 242-0705

NEW MEXICO AFFILIATE:  
ROTH, VAN AMBERG, GROSS,  
AMARANT & ROGERS  
RD. BOX 1447  
SANTA FE, NEW MEXICO 87501  
(505) 988-6970 AND 983-7310

FLORIDA AFFILIATE:  
TWOROGER & ASSOCIATES  
RD. BOX 1808  
FORT LAUDERDALE, FLORIDA 33329  
(305) 555-6990

ALASKA AFFILIATE:  
WAGSTAFF, POPE & CLOCKSIN  
512 WEST SIXTH AVENUE  
ANCHORAGE, ALASKA 99501  
(907) 277-6611

TO: Tribal Clients

FROM: Hobbs, Straus, Dean & Wilder

RE: Analysis of the April 3, 1989 Regulations Drafting  
Workshop II Working Document Albuquerque, New Mexico

## INTRODUCTION

This memorandum provides a report on the Regulation Drafting Workshop (RDW II) held in Albuquerque, New Mexico March 21-24, 1989 (hereafter "Albuquerque Workshop"), and the April 3, 1989 draft regulations which have been circulated by the IHS to tribal organizations since the Workshop. According to IHS, the April 3 draft reflects the majority opinion at Albuquerque. In our review of this document, however, we have found a number of instances (noted below) where revisions approved by majority vote in Albuquerque are not correctly reflected.

According to the most recent schedule, the regulations will be published as final regulations on August 10, 1990, 31 weeks later than the previously scheduled date of December 29, 1989 and almost two years after enactment of P.L. 100-472. The delay is largely the result of the additional period of time required by the Federal agencies to develop an alternative draft in lieu of accepting the collaborative effort represented by the April 3 draft. Congress had contemplated that these regulations would "become effective prior to the beginning of the first fiscal year following enactment of this amendment." This schedule would have required final regulations by October 1, 1989. Final regulations cannot be expected under the revised schedule, however, until August, 1990. Consequently, new regulations will not be in place to govern 1990 contract negotiations.

The following is a review of the sections covered and the concerns expressed by both the Federal agencies and tribal representatives who attended the four day session in Albuquerque. Both the IHS and Bureau issued "concern" memoranda at the Albuquerque Workshop which highlighted their positions on various sections of the working draft document. Many of their positions are summarized and discussed in this memorandum. Not every section reviewed generated controversy, and we therefore do not analyze each section. Issues are considered in the order in which they appear in the draft, not in order of importance.



The draft regulations on construction contracts are not discussed below as they were covered in our report dated April 5, 1989.

This memorandum is designed for use in conjunction with the April 3, 1989 draft entitled "Regulations Drafting Workshop II, Working Document March 21-24, 1989, Albuquerque, New Mexico" (yellow document) and page references contained in this memorandum are to that draft. For ease of use we have included a table of contents. We recognize that this is a long memorandum, but we urge its careful review by our tribal clients in the light of the critical importance of these issues to the future of Indian self-determination. We are forwarding this memorandum to the Bureau and IHS for their information.

## SUBPART A -- GENERAL

Applicability (p. 1) -- The Bureau finds the term "awards" used in this section and throughout the workshop draft to be an unacceptable substitute for "contract" or "grant" under the Indian Self-Determination and Education Assistance Act (hereinafter referred to as the "Act"). We suggest that the phrase "contracts, grants or cooperative agreements" be substituted for the term "awards." We understand, however, that the term "award" means agency action in approving a contract or agreement, so we are puzzled by the Bureau's objection.

We agree with the Bureau's comment that subsection (b) of the Applicability section relating to agreements with other agencies of the U.S. for Bureau or IHS administration of Indian programs should be moved to the Secretarial Policy section.

Effect on existing rights (p. 1) -- The Bureau contends that it would be improper in paragraph (c) of this section to assert that a tribal governing body may consent to reduced Federal services for its members. Existing regulations of the Bureau, however, do provide that: "Nothing in these regulations shall be construed as ... permitting significant reduction in services to Indian people as a result of ..." contracting under P.L. 93-638 (25 C.F.R. §271.1(c)). It has been our experience and the experience of Indian tribes and tribal organizations

contracting under P.L. 93-638 that significant reductions in services have resulted from contracting under the Act, despite this regulation. The intent of requiring tribal governing body consent to a reduction in services in paragraph (c) is to provide that where such services may be reduced, the diminution of services must first be authorized by the tribal governing body. A tribal governing body may, for example, choose to revise Bureau or IHS programs so that certain services are reduced in order to reallocate resources to matters which have a higher priority for the Indian tribe. Such a step should not be imposed by the Federal agency, but could be taken with tribal consent through its authorized governing body. The reprogramming of contract funds for a "new" program requested by an Indian tribe is an example of an "authorized" reduction by an Indian tribe. Paragraph (c) recognizes the tribal government's involvement in contracting under the Act.

Secretarial policy (p. 2) -- We disagree with the Bureau that the first sentence of paragraph (c), which describes the regulations as "uniform and consistent" and states Federal intentions, is inappropriate as a statement of Secretarial policy. The matter covered in that sentence (as well as those covered in the second sentence of section (c)) should be Secretarial policy to assure effective implementation of the Federal policy of Indian self-determination, and we believe that they are the policy of the present Secretary of the Interior. If the

Bureau's comment means that the Secretary's policy is not correctly stated by these sentences, we request an opportunity to meet with the Assistant Secretary for Indian Affairs on the matter.

The Bureau finds section (d) of Secretarial policy to be both overinclusive, insofar as contracting under the Act is an exercise of the government-to-government relationship even as to tribal organizations which are not governmental bodies, and underinclusive when pertaining to the reasons listed for Federal oversight. We suggest revising paragraph (d) to read:

"These regulations acknowledge that contracting under the Indian Self-Determination Act is an exercise of the government-to-government relationship between the United States and Indian tribes and such other tribal organizations which are authorized by a tribal governing body(ies) to contract with the Federal government. Consistent with the promotion of Indian self-determination, Federal oversight should be kept to a minimum, in a manner consistent with the Federal trust responsibility of the United States to Indian tribes and to ensure the continuation of services to the tribes and their members."

We disagree with the Bureau as to its contention that contracting with a so-called "non-governmental tribal organization" is not a government-to-government relationship. Non-governmental tribal organizations may only contract with the Federal government upon the authorization, by resolution, of a tribal governing body. In effect, the Indian tribe has delegated tribal authority to the tribal organization which has thereby become an instrumentality of the Indian tribe. We

represent a number of such organizations, including a tribal public safety commission, tribal school boards, and intertribal health organizations, all of which are tribal governmental instrumentalities.

We also object to the phrase "special relationship" suggested by the Bureau for paragraph (d) in place of the phrase "trust relationship." Line 5 of paragraph (d) had read: "... in a manner consistent with the fiduciary duty owed by the United States to Indian and Alaska Native tribes." The April 3 draft merely notes that "alternative language still under consideration." We believe the term "trust responsibility" is the appropriate phrase to use in this paragraph as it is from this legal relationship that the Secretaries' responsibilities set forth in the Act derive. "Special responsibility" is an amorphous concept which does not carry the specific legal significance which the phrase "trust responsibility" does. Indeed, the term "special" would itself require definition if the Bureau's suggestion is adopted. The IHS has argued in a pending administrative appeal, through its legal counsel, that the IHS has a "trust responsibility" with respect to Indian health:

"The Indian Health Service program stems from a federal trust responsibility to Indian people in the area of health care. That's the basis for the entire program. And when the government contracts out a program under the Indian Self-Determination Act, that trust responsibility doesn't end, it continues. ..." Tohono O'odham Nation v. U.S. Indian Health Service, U.S.

Department of Health and Human Services, Departmental Appeals Board, Civil Remedies Division, Docket No. C-84, pp. 27-28, Transcript of Proceedings.

We agree. This statement accurately reflects the intent of Congress in amending the Act:

"The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility ... ."

S. Rep. No. 274, 100th Cong., 1st Sess. 27 (1987) (hereinafter S. Rep. No. 100-274 at \_\_\_\_).

The Bureau argues that the phrase "throughout the contracting process" in section (e) (p. 3) of Secretarial policy is ambiguous. We suggest that this phrase be deleted as superfluous since the remainder of the sentence clearly sets forth those instances where the Secretary shall bear the burden of proof.

Both agencies are concerned about section (f) (p. 3) which asserts that as programs are assumed by tribal organizations under the Act, Federal administrative functions must necessarily decrease with a resulting reallocation of support resources. Tribal representatives at the Albuquerque conference proposed the following replacement for paragraph (f):

"The Secretary recognizes that as programs are assumed by Indian tribes or tribal organizations under self-determination contracts, Federal administrative functions will change in scope and extent. When programs are contracted, the Secretary will, with the active participation of the affected Indian tribe(s) or tribal organization(s), identify any portions of Federal administrative functions that formerly supported the contracted program, shall require that self-determination contracting activities shall be accompanied by proportionate reduction in the Department's programs and related functions and staffing, with all resulting savings identified allocated to the self-determination contract to the extent that doing so will not materially diminish the resources available to other Indian tribes or tribal organizations. Other administrative support costs, such as personal property, travel, space costs and other related savings that are experienced should be furnished to the individual self-determination contractor that will be providing the required services."

As revised, this paragraph helpfully clarifies the manner in which administrative funds to support a contracted program will be identified. Congress, in passing the legislation, noted the uniqueness of the transfer of resources and control of Federal programs to tribal contractors:

"There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources.

\* \* \*

The Federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs has been replaced by a contract monitoring bureaucracy.

\* \* \*

The Committee therefore expects that the Federal contract monitoring bureaucracy that

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has replaced the Federal service bureaucracy will be greatly reduced over the next three years.

\* \* \*

The purpose of restating this language is to clarify that the Secretary is not to consider any program or portion thereof to be exempt from self-determination contracts."

S. Rep. No. 100-274, at 6, 7, 19 and 23.

Clearly, Congress contemplated a reduction of Federal program functions and personnel in proportion to the contracting of such services by tribal contractors. This proposed regulation merely reflects the intent of the statute.

The Bureau reports that the Interior Solicitor's Office is concerned with the requirement of paragraph (g) (p. 4) that all provisions of the Act and the regulations shall be "interpreted liberally for the benefit of the Indians and any ambiguities therein resolved in their favor." This paragraph supplements the provisions of paragraphs (c) and (e) of this section pertaining to the recognition of the discretion and flexibility to be afforded contractors when the Federal agencies interpret the regulations. We recommend that the Bureau ask the Solicitor's Office to state with clarity those instances where it believes that ambiguities arising under the Act or regulations should not be resolved in favor of the Indian people. The Bureau's suggestion that the proposed regulations



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contain no ambiguities is refuted by even a cursory reading of the draft regulations.

Contract and grant authorities (p. 4) -- Under paragraph (a) of this section, the Bureau is concerned that the phrase "and subject to the requirements of these regulations" contained in the sentence "The Secretary, upon the request of any Indian tribe by tribal resolution and subject to the requirements of these regulations, shall enter into a self-determination contract . . .," may be interpreted as restricting a tribe's statutory right to require the Secretary to contract. On the contrary, we believe the phrase to be a restriction upon the Secretary and his delegates and simply underscores their obligation to act in conformity with the regulations when contracting under the Act. Failure by both agencies to comply with the Secretary's regulations under the Act (as in the case of the IHS "threshold issue" policy) in the past has been the most notorious deficiency in the implementation of the Act since its passage in 1975. The regulations make quite clear under "Eligibility" (p. 6) that any "Indian tribe or tribal organization authorized by tribal resolution(s) . . . is eligible to apply for a contract(s) or grant(s) . . . ." We fail to see how the phrase contained in the contract and grant authorities section can be interpreted as limiting a tribe's statutory rights.

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We also wish to emphasize the broad contracting authority set out in §102(a)(1)(B) of the Act. This paragraph directs the Secretary to contract programs administered under the Act of November 2, 1921 (Snyder Act) and "any Act subsequent thereto." There should be no limitation on contractibility of programs administered under any of the legislation referenced in the Act.

The Bureau suggests deleting paragraph (d) (p. 5) of this section, which provides that:

"No program or portion of a program for which a self-determination contract request is submitted under paragraph (a), (b)(1), or (c)(1) above shall be considered exempt from such contracting."

The Bureau's justification for this is that the subject will be dealt with in the "Contractibility" section. We recommend that the section be moved to the "Contractibility" section. See further discussion on contractibility below.

Eligibility (p. 6) -- We also suggest that the "Eligibility" section be moved to SUBPART B -- PREAWARD as it is somewhat confusing following the "Contract and grant authorities" section. Provisions on eligibility of individuals for services should not be included in the section which addresses the eligibility of tribes and tribal organizations to contract.

Contractibility (p. 6) -- This issue was addressed in the "Divisibility Workgroup" at the Albuquerque Workshop. The assembled group rejected the proposed Bureau language as "unnecessarily vague" and contrary to section 102 of the Act. Some tribal representatives argued that the contractibility section be deleted from the regulations. However, in our opinion, the regulations should identify those specific functions (not programs) which cannot legally be included in a contract under the Act and make clear that all other activities are contractible as provided by Congress. We are drafting a proposed contractibility clause which we will circulate under separate cover. We urge that both agencies review this issue and identify any non-contractible functions which they consider exempt from the statutory mandate to contract set forth in §102 of the Act. This section can be based in large part on Senate Report No. 100-274 and on Bureau regulations and guidelines which have been in place for many years. See BIA Procedural Guidelines under 25 C.F.R. 271 (April 1977).

Divisibility (p. 6) -- It was agreed at Albuquerque that the definition of this term be revised as follows:

"Divisibility means the division of a program for the purpose of contracting for a portion of a program at the service unit/agency, area or national levels where the program benefits more than one Indian tribe or tribal organization requesting such contract."

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The Bureau has suggested that:

"regulations will not be able to provide a way that all contract proposals involving the division of a budget/staff can be approved. A proposal to divide a budget/staff serving more than one tribe so that one or more but not all the tribes served by that budget/staff may have services provided by a tribal organization should be tested against the declination criteria both as to the proposed contract and as to the residual budget/staff to serve the one or more tribes who do not choose to be served by the tribal organization. If either part fails the test against the declination criteria, the proposal must be declined."

While we recognize that the remaining non-contracted portion of a program must be evaluated in terms of its viability when determining whether to contract a program, we disagree with the Bureau that the criteria with which to examine the non-contracted program are the declination criteria. At least two of the three declination criteria contained in §102(a)(2) refer to inadequacy of the "program or function to be contracted," rather than the function to be retained by the Bureau or IHS. Only the second declination criterion ("adequate protection of trust resources") could refer to both the contracted and non-contracted program or function, and it would be relevant only to programs involving trust resources.

The standard to be applied when division of a program may jeopardize the continuation of services to a non-contracting tribe is found in the paragraph following §106(b)(5) of the Act, which provides in part that:

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"[T]he 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."

There is no statutory authority for using the declination criteria of §102(a) to review the non-contracted portion of a program.

While we agree that divisibility is a difficult issue, the Bureau has addressed this issue in the past. We therefore suggest that the 1977 BIA Guidelines on dividing programs be reexamined. These guidelines established a formula for dividing a program. We have brought these guidelines to the attention of the agencies several times during the regulatory revision process and learned to our surprise that some of the Federal representatives were not aware of them.

Indian preference (p. 6) -- We have no objections to the revision of this section, which would now permit tribal Indian preference guidelines to apply (but only to employees of a contractor which serve the particular tribe in the case of multi-tribal contracts).

Effect on other requirements (p. 7) -- We note that there now exists three versions of this section. The April 3 draft section reads:

"These regulations govern awards under the Indian Self-Determination Act except as may be

mutually agreed to by the Indian tribe or tribal organization and the affected Federal department or agency."

The IHS rewrite provides that:

"These regulations are the exclusive provisions governing awards under the Indian Self-Determination Act except as otherwise provided by law, waived under authority of section \_\_\_\_, or as provided in these regulations."

The Bureau has proposed:

"This part governs the award and administration of contracts and grants under the Indian Self-Determination Act and the Secretary will not impose any requirements on an Indian tribe or other tribal organization relating to such contracts and grants except as --

- (1) provided in this Part;
- (2) agreed to by the Indian tribe or other tribal organization; or
- (3) provided in an applicable Federal law."

The Bureau's language seems acceptable provided that the word "expressly" is inserted before the word "provided" in paragraph (3).

Amendment of regulations (p. 7) -- The Bureau asserts that the notice and participation provisions of this section combined with the requirements of §107(c) of the Act (which require the respective Secretary to present proposed regulation revisions to the House and Senate Committees on Interior and Insular Affairs, and consult with national or regional Indian organizations before publishing the proposed revision in the

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Federal Register) create "a serious clearance problem" for this section. The Bureau concludes that: "It might help if there was provision for situations where quick action is needed or where the amendment is merely to reflect a change in law."

This section as drafted has made allowances for meaningful tribal input into the regulation amendment process. Section 107(c) of the Act was not amended by P.L. 100-472 or the other amendments of 1988. The language regarding consultation by the Secretaries of regional and national tribal organizations has been the law for fourteen years. Sections (a) and (b) (p. 7) of the draft regulations carry out this legislative intent by requiring that (a) the Secretaries provide not less than 90 days notice to and consult with Indian tribes and other tribal organizations concerning the need to amend; and (b) the Secretary provide tribal representatives the opportunity to assist and participate in the drafting of any proposed amendment with substantial deference being given the comments received from Indian tribes and tribal organizations.

It is hoped that, in the event there is a change in the Act, Indian tribes and tribal organizations will have been consulted and have participated in the revision of the law. In such case, it would only seem appropriate that these same entities assist in the revision of the regulations. The regulations finally adopted should be drafted with such thoughtfulness so as

to avoid the need for "quick changes." Regulations "merely" to reflect changes required by an amendment to the law (like the current amendments) should not be exempt from tribal consultation and participation. In genuine emergencies, changes can be made through self-implementing legislation (or through waivers).

Furthermore, since the Bureau has indicated that it has no substantive problem with the proposition that Indian tribes and tribal organizations are recognized by the Federal Government as best suited to administer Federal Indian programs, then there should be no "clearance problems" in consulting with, and giving substantial deference to, these same entities. If the Federal Indian Self-Determination Policy is to be meaningful and effective, then the process we are now engaged in must not be a one-time event, but rather must become a precedent for future interaction between the Federal government and those entities recognized by the government as best suited to administer Federal programs for Indian people.

The Bureau's alternative to this section provides Indian tribes and tribal organizations notice and the opportunity to comment concerning proposed amendments after the agencies have drafted a proposed amendment and do not allow tribal input prior to or during the formulation of the proposed amendment. We hope that both IHS and the Bureau recognize the



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invaluable assistance, insight and alternative perspectives which tribal participants have brought to the present drafting process. The value of consultations prior to Federal action, rather than after it, should be self-evident.

Waivers (p. 8) -- We identify two major concerns pertaining to this section. First, the April 3 draft as well as the Bureau's revision provide that the denial by the Secretary of a tribal request for waiver of a regulation may be appealable under the contract disputes provisions of the Act and regulations. Second, the Bureau proposes that unless the Secretary declines to waive a regulation within 60 days of the receipt of such request, the waiver will be deemed approved provided that such waiver is "not contrary to law."

The denial of a waiver under this section should be subject to the declination criteria of §102 rather than the dispute process. The contract disputes procedures set no standard for consideration of a waiver request other than the terms of a contract. Unless there is a contract, this procedure would be inappropriate since "contract disputes" arise under the terms of an existing contract. We think that regulatory waivers should be granted unless the refusal can be justified by one of the three statutory declination grounds set forth in §102 of the Act.

We object to the Bureau's proposal to deem approved a waiver request not acted upon within 60 days only when not contrary to law. One would assume that a tribal organization seeking a waiver from the Secretary would not make a request if it knew that the waiver was contrary to law. A tribal entity is therefore placed in the awkward position of altering its position upon the Secretary's failure to act within 60 days and then sometime later being informed that the "waiver" was contrary to law. This arrangement is unacceptable since it exposes the tribal contractor to potential liability for default or other legal violations without notice. As a compromise, we suggest that in the event the Secretary cannot act on a waiver request within the 60 day time period, the waiver is deemed approved and will become effective in 30 days unless within that period the Secretary concludes in writing that the waiver was, in fact, contrary to law.

Definitions (p. 8) -- This section should be reviewed at the conclusion of the drafting phase so as to ensure that all terms which are used in the regulations are adequately defined. Both agencies are concerned about the definition of "mature contract" and "mature contractor." The IHS suggested that a "mature contract" cannot be for a specific term of years under §105(c)(1)(B) of the Act. It is contrary to the intent of Indian Self-Determination to require a tribe to have a mature contract for an indefinite term if it wants a mature contract

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for five years or if the contract work is expected to have a completion date. We recommend resolving this issue by providing that in any case in which a contractor qualifies for a "mature contract" under §(4)(h) of the Act, but requests a mature contract for a definite term, the Secretary will agree to the term requested as authorized by §105(c)(1)(A). The April 3 draft provides for mature contracts with a definite term (see page 23) in the section on contract term (b) as was requested by tribal representatives.

Under the "Protection against funding reductions" section (p. 34), we address our concerns regarding the Bureau's suggested definitions of "flow-through funds" and "pass-through funds" which are defined at p. 11.

Significant and Material audit exceptions (p. 9) --

Considerable discussion at Albuquerque was devoted to this term. The final version of the definition is as follows:

"(1) Unresolved audit exceptions involving amounts of disallowed costs of the greater of \$15,000 or five percent of the award amount to which the audit exception applies or major financial contract or grant reporting deficiencies as identified by the independent auditor.

(2) A qualified opinion by the independent auditor on the fairness of the tribe's or tribal organization's financial statements representations resulting from serious departures from generally accepted accounting principles.

(3) Clear findings of unresolved financial mismanagement or misappropriation of funds as

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reported in the single audit report or  
Special Office of Inspector General audits."

This definition should be carefully reviewed by tribal organizations and their accounting staffs to ensure that the definition adequately reflects what auditors do. The accounting firm of Ernst & Whinney, which has considerable experience in auditing tribal contractors, has suggested that this definition may create problems by using terms which are not generally accepted in the profession.

#### SUBPART B--PREAWARD

Self-determination award instrument (p. 12) -- This section provides that while a contract shall ordinarily be the legal instrument through which Indian tribes and tribal organizations accomplish the purposes of the Act, grants in lieu of a contract and cooperative agreements are also authorized under §9 of the Act. The Bureau indicates that this section will need further study as it is unclear what differences, if any, there will be between such agreements and "contracts."

The underscored BIA proposal which is set forth directly beneath this section of the April 3 draft (p. 12), seems somewhat clearer. We question, however, the deletion of paragraph (d) providing that:

"An Indian tribe or tribal organization may request that funds that would otherwise be awarded as a separate grant, as provided in paragraph (a) above, be awarded and administered as a modification of an existing self-determination contract."

This section acknowledges that funds awarded as a separate grant may be awarded and administered as a modification to an existing contract. If either agency does not believe that such a combination is possible, it should explain why.

Pre-contract resolution (p. 13) -- The Albuquerque Workshop supported the inclusion of a clause which would treat the Tlingit/Haida Central Council as a tribal governing body in Alaska. The Bureau should explain why it has concluded that legal authority for this paragraph ((a)(2)(iii)) may be a problem. We understand that the Tlingit/Haida Central Council is recognized by Federal law.

Access to Federal records (p. 14) -- We agree that further review needs to be given to assure that Federal records are provided to tribal organizations in accordance with the Privacy Act, the Freedom of Information Act, and similar requirements.

The Bureau comments that the regulations make inconsistent reference to "Secretary, Area Director or field office director" throughout the regulations. The Bureau agrees, however, that the regulations should identify the individual in the Bureau who is responsible for a particular action. We favor

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inclusion of the underscored language which has been added following paragraph (5) (p. 15) providing that:

"Following a request from an Indian tribe or tribal organization, the responding official shall continuously provide information consistent with the original request regarding programmatic changes as they occur to ensure that the Indian tribe or tribal organization remains apprised."

When the agency denies an Indian tribe or tribal organization access to Federal records, the April 3 draft provides for appeal, in writing, to the Secretary who shall issue a final decision within 30 days of the date of the appeal. The Bureau asks whether this section can be changed to reference the contract disputes section. The answer is "no". If such access is denied to an Indian tribe which does not have an existing contract, the contract disputes procedure is inapplicable, so an appeal procedure must be available when access to records is requested by a tribe which is not a contractor.

Secretary's annual report to Congress (p.16) -- This section has been completely rewritten. The Bureau objects to the requirement that the Secretary's report be provided to Indian tribes "for their review no less than 30 days" prior to its presentment to Congress, finding such action to be "an unjustified expense and burden in addition to the annual report to tribes." The Bureau specifically objects to the word "review" as the term suggests: "a process for changes to be proposed and considered which would only delay the report." The

Bureau notes that a delay would be unwise as the intent of the report is to provide Congress information for the appropriations process. The Bureau recommends merely providing copies of the report or deleting the provision in its entirety. We disagree and support the language recommended by the Albuquerque Workshop. Such review would help to assure that information provided by the agencies to the Congress is more accurate than it has sometimes been in the past.

The Bureau suggests that the section (a)(1) option (p. 16) may be inconsistent with §106(c)(1) of the Act. The Bureau should elaborate on its concern as section 106(c)(1) requires the Secretary to provide:

"an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and indirect costs of tribal organizations under self-determination contracts during the previous fiscal year ... ."

Congress made quite clear that:

"These annual reports are needed by the Congress in order to provide reliable and objective data to base funding needs for indirect costs. ... This data is needed to answer questions from the Congress and from the Federal agencies on the need for indirect costs and the type of expenditures of indirect cost funds."

S. Rep. No. 100-274 at 32.

Congress also expressed the hope that such increased Secretarial reporting would facilitate communication and coordination among the Agencies, OIG and the tribes. We trust that this valuable report will be issued next March 15 as required by law.

Paragraph (a)(6) of this section (pp. 16-17) generated a great deal of disagreement. Paragraph (a)(6) requires the Secretary to report on deficiencies in direct funding for programs "as measured by the difference between needs identified by Indian tribes and tribal organizations and funding provided by the Federal government," with the Secretary providing a justification as to why unmet needs aren't funded and shall indicate funds needed to provide indirect costs to meet unmet needs.

The Bureau wishes to delete this section in its entirety, concluding that: "it goes well beyond the requirements of the Act." The IHS argues that this paragraph is inconsistent with §201 of P.L. 100-713, the Indian Health Care Amendments Act of 1988, which sets forth a method to be used to determine funding needs for health programs. IHS recommends that the section be rewritten to provide in part that:

"The funding needs and deficiency for health programs by the Indian Health Service will be determined using the methods specified in Section 201 of P.L. 100-713 ...."



We note, however, that §201 of the Indian Health Care Amendments Act provides for tribal input concerning the calculation of unmet need. Section 201(b)(3)(B) of P.L. 100-713 provides that:

"The apportionment of funds allocated to a service unit under subparagraph (A) among the health service responsibilities described in subsection (a)(4) shall be determined by the Service in consultation with the affected Indian tribes." (Emphasis added.)

Section 201(c)(4) of P.L. 100-713 also requires that:

"Under regulations, the Secretary shall establish procedures which allow any Indian tribe to petition the Secretary for a review of any determination of the health resources deficiency level of such tribe."

Furthermore, §201(c)(2) of P.L. 100-713 defines the term "health resources deficiency" as the percentage determined by dividing:

"the excess, if any, of --

the value of the health resources that the Indian tribe needs, over

the value of the health resources available to the Indian tribe, by

the value of the health resources that the Indian tribe needs."

Contrary to the statements of IHS, P.L. 100-713 requires consideration of the input of Indian tribes and tribal organizations in calculating funding needs. To the extent that the April 3 draft fails to address this requirement, as well as

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the petition provision required in §201(c)(4) of P.L. 100-713, we recommend revision. We were startled to hear a Bureau representative at Albuquerque deny that the Bureau has any means to measure the needs of its programs. We assume that the Bureau representative misspoke.

Secretary's annual report to Indian tribes and tribal organizations (p.17) -- Section 5(e) of the Act requires that:

"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."

The reporting requirements in the draft regulation describe in greater detail the reporting required of the Secretaries by section 5(e) of the Act. The Bureau concludes that: "The report described [in the draft regulation] cannot be produced. Consideration should be given to costs in staff time and other expenses which will reduce funds available for programs."

IHS has rewritten this section (pp. 18-19) to require information to tribes on total obligations for direct program services, support functions, administrative costs, actual and planned staffing levels at the location of service, BIA Agency or IHS Service Unit, Area Office and Headquarters Office. The agencies must have this information available to carry out their own management responsibilities.

We remind the Bureau of the Congressional intent behind the dissemination by the Secretary of this information:

"The Indian Reorganization Act of 1934 requires the Secretary of Interior to 'advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress'. The Bureau of Indian Affairs partially meets this requirement through its budget development system, currently called the 'Indian Priority System' and previously called 'Band Analysis', 'Zero-Based Budget,' and the 'Budget Formulation Process'. In practice, however, it has been difficult for tribes and Federal officials to correlate projected budgets with actual expenditures and resources. Often, the base figures used in Bureau budget exercises are based not on actual expenditures, but on estimates based upon the President's proposed budget. Not knowing the actual amount of resources available for the operation of programs makes it difficult for tribes that are planning to enter into self-determination contracts to determine the amount of funds that would be available for tribal operation of the program.

... Requiring Area Directors, Agency Superintendents and Service Unit Directors to report annually to tribes on staffing ceilings and filled positions, funding obligations and actual expenditures will provide a base of information which is necessary for tribes and Federal officials to jointly and cooperatively plan for the best use of those financial and staffing resources at the tribal and area levels."

S. Rep. No. 100-274 at 21, 22.

Consultation in preparation of Secretary's annual budget (p. 20) -- You should be warned that the April 3 draft at pages 20 and 21 has misidentified alternative language on the Secretary's annual budget. The critical provisions on page 20

(regular type) are an IHS description of the current budget process. Then follows the italicized provisions (a)(1)(i)-(iv), (b) approved by tribal representatives in Nashville.

The IHS has indicated that it is drafting alternative language which more closely resembles the present budget process; will consider recommendations of the IPS Task Force; and will seek to conform to 25 U.S.C. §476 which requires that:

"The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and Congress."

We agree with the IHS that a regulation taking into consideration the above noted factors would be most helpful.

The Bureau, in addition to suggesting that this section does not belong in this Subpart, asserts that the Nashville language is contrary to statutory provisions regulating the budget process.

The Nashville language (italicized on pages 20 and 21) generally requires notice and consultation with the tribes in developing appropriation requests and does not seek to override the authority of the President to submit such requests. The Bureau's objection is only pertinent to paragraph (a)(1)(iii). The second sentence of (a)(1)(iii) requiring the Secretary to

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forward the proposed budget to Congress can be deleted since the tribes can pass on the information provided them to the Congress.

Initial contract request (p. 21) -- The IHS notes that there may be changes based on further deliberations concerning this section, but for the present it is content with a revision to paragraph (m) (p. 22) which would add that where a tribe or tribal organization has not previously operated a cost type contract or grant with the Federal government, such entity would have to include in its request a more detailed description of its financial, property and procurement management capabilities than would otherwise be required. We consider this IHS proposal to be consistent with the statutory declination procedure.

Term of contract (p. 23) -- The Bureau correctly notes that section 105(c)(1)(B) of the Act provides that: "A self-determination contract shall be ... for an indefinite term in the case of a mature contract." The Bureau therefore concludes from this that the option to allow an Indian tribe or other tribal organization to have a mature contract for a specific term (paragraph (b)) is prohibited by §105(c)(1)(B) and suggests that this paragraph read as follows:

"A mature contract shall not have an expiration date. However, a tribe served under a mature contract has the right of retrocession under section \_\_\_\_\_ of this part."

While we agree that an Indian tribe or tribes which authorize a tribal organization to contract with the Federal government for the provision of services under the Act always reserves the right to retrocede a contract, we believe that it is important to add an intermediate step which a tribe may wish to take short of retrocession. Under section 4(h) of the Act, a tribal organization operating a contract in existence as of October 5, 1988, which satisfies the requirement for a mature contract, may request mature contract status provided the tribal resolution(s) which authorizes contracting under the Act does not limit the duration for which it is authorized to contract. Regulations should reflect this. We recommend that an Indian tribe, by tribal resolution, may alter the status of a contract from a mature contract, with an indefinite term, to a mature contract for a specific term or merely to a term contract and such authority should be set forth in regulations. Tribes may also wish to contract for longer than three years, but not for an indefinite term when a contracted project has a targeted completion date. It makes no sense to require an indefinite term in such cases.

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As we noted in a recent flyer (Gen. Memo. No. 89-33), P.L. 100-472 requires that, beginning in FY1990, tribal contractors are to be placed on a calendar year funding basis (paragraph (c)) except when the Secretary and tribal contractor agree otherwise. The purpose of calendar year contracting is to assure definite funding commitments. Despite this statutory mandate, neither agency has seen fit to request additional appropriations in their FY1990 budget requests to cover the additional 3 months (October 1, 1989 - December 31, 1989) of the transition year. We find the Agencies' indifference to this statutory requirement, advocated by the previous Assistant Secretary-Indian Affairs, to be quite extraordinary. If funds are not provided to permit full year funding of contracts commencing on January 1, 1990, the change to calendar year contracting should clearly be postponed since its purpose (to increase certainty as to contract funding levels) would be defeated.

The Bureau suggests rewriting paragraph (d) (p. 23) of this section, which currently reads:

"Self-determination contracts may be negotiated annually to reflect proposed changes and changes in amounts caused by changed circumstances."

The rewrite would read:

"The amount of a self-determination contract may be renegotiated annually to reflect proposed or actual changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization."

The Bureau language more clearly expresses the intended meaning of this section.

It was proposed at Albuquerque to create a subsection (e) which would provide:

"A new activity may be added to an existing mature contract and immediately designated a mature contract activity: provided, that the new activity is similar to an existing mature contract and does not require significantly different expertise in program and financial management."

We can foresee some difficulty with this subsection because of the vagueness of such terms as "new activity," "similar" and "significantly different expertise". Unless clarified these terms could result in disparate treatment by the respective agencies and in different Area Offices of each agency.

Continuation of contracts (p. 23) -- Both the Bureau and IES are dissatisfied with the draft language relating to the continuation of contracts for the same functions or programs. The Bureau notes that section (a) does not make reference to the declination criteria when reviewing whether to renew an expiring contract. The Bureau also notes that the "Review/approval of contract proposals" section does not indicate that this section applies to renewal of expiring contracts under the Act. These Bureau comments are curious since present Bureau regulations and guidelines also do not require review against the declination



criteria when a contract is renewed for the same functions or programs. See 25 C.F.R. §271.20 and BIA Procedural Guidelines (April 1977) Chapter 10; 42 C.F.R. §36.207.

The IHS would like to substitute 42 C.F.R. §36.207 (Tribal clearances - renewal contracts) as the replacement for existing paragraph (a). This is acceptable. Section 36.207 is similar to present BIA regulation 25 C.F.R. §271.20. We recommend that the term "may" on the first line of §36.207 be changed to the term "will" to conform to the approach in the BIA regulations. We also recommend that the following sentence adopted from the 1977 BIA guidelines be inserted after the first sentence of paragraph (a): "Renewal of such contracts is not at the discretion of the Secretary." This revision should make clear that under the new regulations -- as in the past -- a tribal contractor need not justify a proposal under the declassification criteria if it is for the same functions or programs already contracted. Since both agencies adopted this approach prior to the 1988 amendments, surely there is no justification for a more restricted approach under the amended law which was enacted to promote Indian Self-Determination.

Under IHS regulations at 42 C.F.R. §36.207(b), if one Indian tribe objects to renewal of a contract serving more than one Indian tribe, no contract can be made until all the tribal

governing bodies have approved the request or the matter is resolved. This should not be the case. The regulations need to address the approach to be taken to the proposed renewal more specifically. Clarification of the circumstances and manner in which programs will be divided in such cases is essential to preserve the statutory rights of both approving and disapproving Indian tribes.

In addition, this section should also reflect the right of Indian tribes to "downgrade" a mature contract to a contract for a term of years. While a mature contract may be for an indefinite period, an Indian tribe should have the right, as set forth in a tribal resolution, to conduct its own review of the tribal organization, and to limit the mature contract's term if it determines that such a step is in the tribe's interest. The importance of such tribal oversight was emphasized in the legislative history of the 1988 Amendments (see S. Rep. No. 100-274 at 23).

Consolidation of contracts (p. 24) -- The IHS wishes to revise this section to reflect that: "The Secretary is not required to consolidate either contracts across agencies and departments or contracts with grants." We note, however, that this section will need to be reconciled with paragraph (d) under Self-Determination award instrument (p. 12). In light of the fact that consolidation of contracts is made discretionary by §102(a)(3) of the Act, it would be helpful if regulations set

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forth some criteria under which the Secretary would determine whether or not to consolidate mature contracts. This would provide a greater guarantee to contractors of uniform decision making with regard to this issue. The intent of Congress in enacting this section was to:

"simplif[y] contract administration, including advance payment system functions, and authority for tribes to submit consolidated quarterly financial reports and a consolidated annual report, rather than having to unnecessarily duplicate reporting requirements. ... The Secretary and the tribes should propose procedures to the Congress to allow tribes to reprogram funds within consolidated contracts to better address tribal priorities."

S. Rep. No. 100-274 at 25, 26. We urge that the agencies work with tribal representatives to develop such procedures.

Review/approval of contract proposals (p. 24) --

Paragraphs (b)(i), (ii), (iii) and (iv) (p. 25) were approved at Albuquerque. These paragraphs address the "presumptions" which are to apply to a contract application of a tribal organization and the tribe(s) authorizing such a contract. The IHS proposes to delete this entire addition concluding that since the factors to which the presumptions are addressed have been removed from the statute, they should not be placed in regulations. An HHS attorney has stated that the presumptions would "skew" the declination hearing process by creating strong presumptions which the IHS would have to overcome. He would like the evidence presented at such a hearing to be reviewed without pre-

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existing presumptions. He argued that this would allow for a "fairer" process. However, these presumptions have been included in both BIA and IHS regulations for many years. We fail to understand how the 1988 Amendments can be used as a reason to favor the agencies by removing them.

The inclusion of these presumptions in regulations emphasize that the burden of proof is upon the Secretary to show that a contract should not be awarded. It is not accurate to state that "presumptions" were eliminated by P.L. 100-472. What that statute eliminated were certain express factors which the Secretary was directed to consider when deciding whether a contract application fell into any of the three declination criteria. Former section 102(a) of the Act (which was eliminated) provided in part that:

"in arriving at his finding [regarding approval of a contract application], the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) book keeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance." (See former §102(a) of the Act.)

The intent of Congress in removing this language was to strengthen tribal government control over contracting, eliminate agency obstacles to such contracting and emphasize that the burden is on the Secretary to demonstrate that an Indian tribe

or tribal organization cannot overcome any one of the three statutory declination criteria. Congress made quite clear that:

"These amendments strengthen the requirement for a tribal resolution in Section 102(a) as amended. Sections 102 and 103 in the original Act contain provisions for 'community support for the contract' which the Secretary has correctly interpreted to mean a tribal resolution.

\* \* \*

While this [section] preserves and strengthens the control of tribes over the decision to contract or not to contract, it is not intended to allow Federal agencies to use the resolution process as an obstacle to requests to enter into contracts.

\* \* \*

Section 201 of the Committee amendments revises current contract application procedures by eliminating some of the declination criteria including, specifically, clause (f) of sections 102(a) and 103(a) ... The burden of proof for declination is on the Secretary to clearly demonstrate that a tribe is unable to operate the proposed program or function. ...

\* \* \*

The current practice of Federal agencies that impose 'threshold criteria' on a self-determination contract application is clearly inconsistent with the intent of the Indian Self-Determination Act. ...

\* \* \*

As discussed above, 'threshold criteria' are not authorized by the Self-Determination Act. In addition, the practice of simply failing to enter into a contract, when the tribal organization has submitted an application for a self-determination contract, is contrary to the Act. ...."

S. Rep. No. 100-274 at 19, 22, 24 and 26.

The legislative history fully demonstrates the intent of the Congress in amending this section. The presumptions established by both agencies in the present regulations further that Congressional intent. They should, therefore, be retained. The opposition expressed by IHS counsel demonstrates once again how far IHS still has to go before fully accepting the goals of this legislation.

The Bureau notes that this section does not state that its provisions govern the renewal of an expiring term contract. We have already pointed out that the Bureau's attempt to eliminate the existing regulatory language which requires the renewal of contracts for the same functions or programs without a further declination review is unjustified in the light of the stated Congressional purposes of the 1988 amendments. Only when a contractor proposes to add programs or functions to an expiring contract should the declination procedures apply and then only to the proposed program or function to be added.

Paragraph (c) (p. 25) of this section currently provides that if the agency fails to approve the contract within 90 days without a timely declination, the contract is deemed approved on the 90th day. The IHS would qualify this language with the following proviso: "to the extent the proposal conforms to the law and regulations" (pp. 25-26).

We object to this qualifying language. A tribal organization whose contract application has not been declined within 60 days of submittal will begin to prepare to assume operation of an IHS or Bureau program or service. A tribal organization should not be forced to commit personnel and funds to a contract which has not been declined within the statutory time frame and then subsequently learn that its application, perhaps due to a technicality, does not "conform to the law and regulations." It is incumbent upon the agencies to make this threshold determination within the first 60 days of the contract review as mandated by §102 of the Act. "The Committee amendment directs both secretaries to approve contract proposals within ninety days unless the Secretary provides a basis, as provided in the Act, for declining a contract." S. Rep. No. 100-274 at 24. This statement needs no elaboration. The IHS proposal lays the groundwork for agency abuse of the statutory time frame. When this was brought to the attention of the agencies at Albuquerque, they agreed to examine this proviso more closely. Nevertheless, the proviso remains in the April 3 draft.

In paragraph (d) (p. 26) of this section, the IHS proposes to delete language which would have allowed a contractor who has not been awarded its approved contract to incur contract costs after the 31st day since the date of contract approval. No reason is given. This provision could provide a meaningful remedy against agency delay after a proposal has been approved.

In addition, the Albuquerque conference agreed to add a new subsection (f) (p. 26) which provides: "A contract proposal involving divisibility shall not be declined on that basis." We understand that this clause is intended to address, in part, the problem created when some tribes served by a program wish to contract and some do not. As discussed below, we feel that the statutory rights of Indian tribes under the Act require a viable procedure in the regulations for addressing the issue of divisibility.

Amount of funding (p.26) -- IHS suggests revising paragraphs (b)(3) (p. 27) and (b)(3)(ii)(E) (p. 28) of this section to read:

"Contract support functions are those functions that do not duplicate program services [and] activities which are funded in paragraph (b)(1) above and are allowable under the cost principles contained in \_\_\_\_\_. These functions may be generally classified as: ..."

"(ii) Those functions the agency performs on behalf of the program. Examples may include but are not limited to:

"(E) Executive functions of the governing body that are directly attributable to the direction or management of the contracted program."

In the previous draft, paragraph (E) had read:

"Reasonable functions of the governing body related to support of the program."



The revised appeal procedures applicable to situations where the Indian tribe or tribal organization and the Secretary cannot agree on the amount of funds to be provided under a proposed contract make clear that declination requirements apply to a dispute over funding just as much as to other disputes involving the approval of proposals. This language is discussed below. Clause (e) on page 30 cross references the declination appeals section to underscore this point.

Paragraph (g) of this section (p.30) implements §106(g) of the Act requiring the Secretary to add indirect cost funding to the direct cost base. With regard to this section, the IHS asks whether direct and indirect costs lose their identity in subsequent years. We believe the answer to be no. Section 106(g) of the Act clearly states that:

"The Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct program costs for the contract, for each subsequent year that the program remains continuously under contract."

Congress contemplated keeping these costs separate in subsequent years, noting that:

"Section 106(g) is intended to require the Secretary to provide indirect costs for each contract year in addition to the program funding which would have been available to the Secretary to operate a contracted program and to prohibit the practice which requires tribal contractors to absorb all or part of such indirect costs within

the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting. The combined amount of direct and indirect costs shall then be available for each subsequent year that the program remains continuously under contract. ... It is the Committee's hope that the Department of the Interior Office of Inspector General, the Bureau of Indian Affairs and the Indian Health Service will coordinate their efforts with the tribes to develop the most cost effective method of distributing indirect cost funds. The Committee amendment will insure that, whatever method is used, the tribal contractor will realize the full amount of direct program costs and indirect costs to which the contractor is entitled. Furthermore, the Committee amendment is intended to insure that the funds needed are continuously available, unless the Congress reduces such funds by appropriations actions."

S. Rep. No. 100-274 at 33, 34.

It should be noted that the intent of Congress is to prohibit requiring contractors to absorb such indirect costs from program funds. A tribal contractor may utilize funds to which it is entitled as indirect costs for program purposes at its election should they not be needed to reimburse indirect costs. In that sense, the funds do lose their identity once they are collected by the contractor. The identity of the contractor's entitlement to program funds and to indirect costs established in accordance with the procedures provided for by the regulations would nevertheless be preserved.

It should be remembered, however, that tribal contractors negotiate their indirect cost rate with the cognizant agency. This rate will vary from year to year as will the base

funding for the contract. As a result, it would be difficult to foresee these funds "losing their identity" in subsequent years.

Paragraph (h) on page 30 states that this section is effective for all self-determination contracts "in existence" when the regulations are published and "as shall be entered into hereafter." We question whether the funding provisions of an unexpired contract entered into prior to the publication of the regulations can be unilaterally changed by publication of the regulations without the consent of the tribal contractor. However, the requirements of §106 of the Act apply to all contracts entered into after the date of the Act in the sense that a tribal contractor is entitled to insist that its contract amount be determined in the manner required by law. While we are researching this issue and will advise you of our conclusions, at present we recommend that paragraph (h) read:

"The provisions of this section shall apply to contracts entered into after the effective date of these regulations and to any contract in existence on the effective date thereof when requested by the contractor."

Availability of appropriations (p. 30) -- In commentary on paragraph (c)(2) ("Appropriated funding available for support functions consists of:") of this section, the IHS states that two fundamental policy questions will have to be resolved before the section is finalized; namely, (1) "divisibility of both program services and support functions whether performed by

Federal government or tribal consortia," and (2) "Contractibility of functions that are unique to the Federal government (e.g., appointment of Federal staff, account for Federal funds, approval of contracts, and other functions of the Executive branch that are not directly supporting contractible programs.)"

Paragraph (f) (p. 32) provides that contracts will be increased as specified by the Congress, or if not specified, in "using any formally adopted priority system including RAM, Indian Priority System, Indian Health Care Improvement Fund, or other priority system developed by the Agency with tribal participation." The issue of equitable distribution of Bureau and IHS resources is complex and requires further study. The key to the acceptability of this language is the extent to which tribal participation in a funding allocation system is genuine and the result reflects a comprehensive tribal consensus.

Increases to contracts (p. 33) -- In paragraph (d)(2)(ii) we suggest substituting the word "appropriation" for the word "contract" as the agencies request appropriations from Congress, not contracts. In paragraph (d)(3) (pp. 33-34), the IHS suggests adding the words "unanticipated savings." We would clarify this to read "unanticipated savings by the agencies," so as not to confuse this with "carryover savings" which represent savings by tribal contractors.

Protection against funding reductions (p.34) -- IHS points out that the President's signing statement accompanying P.L. 100-472, concluded that the provision in the Act (§106(b)(2)(B)), which gives statements in a conference report the force of law, is unconstitutional, although severable from the remainder of the Act. From this fact, the IHS concludes that the phrase in paragraph (b)(1) "or related Congressional report" should be deleted. To the extent that paragraph (b)(1) does not parallel the statutory directive in §106(b)(2)(B), which provides that the amount of funds provided under a P.L. 93-638 contract shall not be reduced by the Secretary except pursuant to "a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution," it should be revised. Funding reductions should not be authorized in the regulations unless they are mandated by the Act.

As to paragraph (b)(2) of this section (p. 34), the IHS states that while this section "strictly follows" §106(b)(2)(B) of the Act, it too may be objectionable. We question the appropriateness of IHS's recommendation concerning this section. We would remind the IHS that former President Reagan, notwithstanding his reservations about §106(b)(2)(B), signed P.L. 100-472 giving every provision of that Act the force and effect of law. Paragraph (b)(2) of the proposed draft regulation simply implements §106(b)(2) of the Act.

The Constitution reserves to the judiciary the power to render an Act of Congress unconstitutional. The Executive Branch does not make this determination nor are we aware of any judicial challenge by the Executive Branch concerning this matter. Until such time as a court of competent jurisdiction rules against the constitutionality of this provision, it remains the obligation of a Federal agency to carry out the provisions of the statute. We further point out that the effect of the proposed deletion would be to leave the agencies without authority to reduce a contract even when directed to do so in conference report language.

Since Congress may establish its intent either through an Appropriation Act or in conference report language of the managers, we suggest that paragraphs (b)(1) and (b)(2) (p. 34) be revised to read:

"(1) A reduction in the amount of the agency's appropriation for the program or function to be contracted as compared to the previous appropriation for that program or function. Unless the Appropriation Act or conference report ~~related congressional report~~ provides specific directions, any such reduction shall be shared proportionately among self-determination contracts and federally operated programs or, alternatively, in amounts mutually agreeable between the Indian tribe or tribal organization and the Secretary.

(2) A directive in the statement of the managers contained in ~~accompanying~~ a conference report on an appropriation act or continuing resolution. The contract(s) will be reduced by amounts specified in the congressional directive, or if the directive is not contract-specific, then contract funding will be reduced proportionately with federally operated programs."

We revised paragraph (b)(2) to reflect that a directive of the managers is contained in the conference report which accompanies an appropriations act or continuing resolution. Such directives are not separate from the conference report.

Paragraph (4) (p. 35) of this section pertains to reductions in "pass-through funds" needed under a P.L. 93-638 contract. Paragraph (4) implements §106(b)(2)(D) of the Act. The alternative language proposed by the Bureau would result in the following meaningless language:

"The amount of funds for a self-determination contract may be reduced only if one or more of the following conditions exist:

(4) A decrease in the amount of direct funds in a contract eligible for application of an indirect cost rate."

In other words, the Bureau is stating that contract funding may be reduced when contract funds are reduced. In addition, not all contracts have indirect cost rates. In some instances the contract is awarded a lump sum for indirect cost. The intent of the statutory language is to permit a reduction in a contract when funding provided by another agency (i.e., Department of Education) is reduced.

The agencies propose a definition of "flow through", meaning funds appropriated to another agency and then transferred to the Secretary for the operation of a program or service, which covers "pass through" funding as used in the Act. (See p.

11.) We noted in our General Memorandum No. 88-70 of October 18, 1988, that while the term "pass through" was not defined, the 1987 House Committee Report accompanying the House version of the Act made clear that the term "pass through" referred to monies appropriated to another Federal agency which are then passed through to the Bureau or the IHS for use in Indian programs. Congress clearly meant by "pass through" what the agencies proposed to define as "flow through." Clarification needs to be achieved by a technical amendment to the Act rather than adding to the confusion through the use of terms in the regulations different from the way they are used in the Act.

In regard to paragraph (b)(6) (p. 35), while the Act sets forth only five reasons to justify a reduction in funding, the IHS wishes to add a sixth "changed circumstances" reason which is reflective of §105(c)(2) of the Act which provides:

"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."

This clause is out of place. This language has already been included on page 33 in the section covering contract increases. Its inclusion in the regulation implementing the statutory ban on decreases is inappropriate.



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We should note that this section allows the exclusion of funds from a contract amount to compensate Federal employees assigned to the contractor but requires the consent of the contractor to the amount of any such deduction (with unexpended funds being returned to the contractor).

Appeals process (p. 36) -- In paragraph (a)(1) the renewal of contracts and the determination of the amounts of contracts (either new awards or renewals) under §106 of the Act are subject to the same appeal procedures as declination appeals. However, on appeal the amount of an award is reviewed against the requirements of §106 of the Act, not against the declination criteria of §102. Regulatory language in contract renewals should carefully reflect two principles: (1) to the extent that a renewal is requested for the same functions or programs already under contract and there is no dispute as to funding level, then the agency (as under the existing regulations, see 25 C.F.R. §271.20, BIA Procedural Guidelines (April 1977) and 42 C.F.R. §36.207) does not review the renewal proposal against the declination criteria; and (2) if there is a funding dispute, the contractor has the same appeal rights as it would have if the request were rejected on any other ground. These provisions, which were cleared by the Bureau and IHS in Albuquerque, should resolve the long dispute with IHS over funding as a "threshold issue" which is not subject to the appeals process.

Under paragraph (b) (p. 39) an informal conference may be held within 30 days from the filing date at the contract site when feasible.

Under paragraph (c) (p. 39), appeals from an Area Director's decision or the decision of the informal conference may be made to the Interior Board of Indian Appeals, whether the appeal is from the Bureau or from IHS. If the Board concludes that the appeal concerns declination or non-emergency reassumption issues, it will refer the case to the Hearings Division of the Office of Hearings and Appeals (Interior) where the hearing will be conducted by an Administrative Law Judge within 30 days of the referral or as otherwise agreed upon. The Secretary's answer must be filed at least 15 days before the hearing. The hearing must also proceed in accordance with 5 U.S.C. §554 which governs "on the record" adjudications.

Paragraph (e)(4) (p. 41) provides that the burden of proof is on the Secretary in a declination appeal (as provided in the existing BIA and IHS regulations).

We question whether having all declination appeals go to by the Department of the Interior will prove effective. As long as appeals are heard in accordance with the Administrative Procedure Act, we do not object to appeals from IHS going to the HHS. Appeals involving health issues may require a special expertise which justifies this approach.

Contents of award document (p. 42) -- We note in paragraph (b) (p. 43) that this section provides that the regulations and the tribal contractor's approved proposal are incorporated by reference into the "award." Furthermore, this paragraph implements §110(b) of the Act by adding the final sentence which provides that: "The Federal Government may not impose additional terms and conditions without approval of the Indian tribe or tribal organization."

Status of contracts in effect on effective date of regulations (p. 43) -- This clause is unchanged from Nashville, but IHS recommends further study on conversion of "mature" contracts to the new contract format. We suggest that the phrase "existing contracts considered as mature" in paragraph (b)(1) (p. 44) should be clarified to make clear that this reference is to contractors which have requested "mature" status and have been determined by the Federal agency to be qualified for that status. Indian tribes may wish to consider whether a dispute over compliance with the new requirements should be treated as a "contract dispute" or a "declination appeal."

Designation as a mature contract (p. 44) -- An additional sentence was added to this section which provides: "Subsequent funding of such contracts shall not be subject to declination." Our records do not indicate that this addition was approved by the Albuquerque Workshop. Subsequent annual funding of contracts is and must be subject to the declination

appeal procedure when there is a dispute over the funding level of the contract. The added sentence suggests otherwise. A contractor is certainly not intended to forfeit the right to appeal a funding decision because it has achieved status as a "mature contractor." As explained above under "Appeals Process," the amount of annual funding for mature contracts is determined under the provisions of §106 of the Act, subject to the tribal right to an appeal.

All participants at the conference were uncertain as to the process by which a tribal organization could request mature contract status. This will depend upon the pre-contract authority evidenced in the tribal resolution(s). We would also note here that the definition of "mature contract" contained in the Act is silent as to whether mature contract status may be extended to grants in lieu of contracts and cooperative agreements under the Act.

Commencement of services (p. 45) -- We agree that where the Secretary has failed to comply with the applicable deadlines set forth in these regulations a tribe or tribal organization shall be able to incur preaward costs during the period prior to commencement date. The addition by IHS to this section allows for such authorized preaward costs, but only when authorized by the Secretary. At page 26 the April 3 draft regulations would provide automatic reimbursement after a 30 day delay.

## SUBPART C -- PROGRAM MANAGEMENT

Program Quality Assurance Standards and Data Reporting  
(p. 48) -- This was perhaps the most controversial area discussed in Albuquerque. After an impasse between the agencies and tribal representatives, IHS and tribal representatives developed a revision of the Nashville version which is included in the April 3 draft. The Bureau questions some aspects of this language and has it under review. While we support the language approved at the Nashville Workshop, the Albuquerque revision is acceptable in certain essential areas:

(1) The right of tribes to negotiate standards and data requirements as alternatives to BIA and IHS guidelines, including "equivalent tribally accepted standards," is recognized.

(2) JCAHO and HCFA standards are acceptable to IHS "without further specification in the contract proposal."

(3) Reporting is limited to data required for specific purposes cited in the proposed regulations in paragraph (e) (p. 49) and must be justified as essential.

(4) Under "Process for establishing contractor standards and data requirements," once an award is made, additional standards and data requirements may not be imposed "except

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through negotiation between the Department and the contractor" (paragraph (e) (p. 50)). We recommend that the phrase "except with the approval of the contractor" in paragraph (e) be substituted in place of the phrase "except through negotiation between the Department and the contractor," to avoid any misunderstanding of the meaning of the term "negotiation."

We also recommend that language be added which reflects the need for sufficient funding to permit required standards to be achieved. This was included in the Nashville draft and should be reinstated. In general, the Nashville draft better reflects the wishes of tribal representatives and the purposes of the 1988 Amendment.

Congress did not wish to see internal agency requirements imposed upon tribal contractors. While we recognize that tribal contractors are carrying out Federal programs, they are not Federal agencies for all purposes:

"The Committee amendment also prevents the Bureau of Indian Affairs from requiring tribal contractors to utilize financial, procurement, travel and personnel systems or procedures utilized by the Federal Government for the internal operation of Federal agencies.

\* \* \*

It should be clear from the intent of the Indian Self-Determination Act that the administrative procedures and methods used by Federal agencies for their own internal operations should not be imposed on tribal contractors. Nor should the Secretary impose requirements on tribal contractors that are more stringent than those im-

posed on Federal agencies or on private contractors."

S. Rep. No. 100-274 at 20.

With respect to reports the legislative history is even more explicit:

"The Committee recognizes that there may be legitimate needs for information for statistical, research or evaluation purposes, and that these needs may be negotiated with tribes. Tribes may or may not consent to reports for such purposes. Unfortunately, for the past decade, there have been too many instances of reports being imposed on tribes by Federal officials in an arbitrary and capricious manner. Too often, tribal officials have been threatened with termination of contract funds if they refuse to submit computer forms, statistical reports, 'special' reports, lists of serial numbers of law enforcement vehicles operated by the tribe, certificates of Indian blood for students served by tribal education programs, and other such reports. While such information may be important and useful, there must be agreement between the Federal agency and the tribal contractor on the purposes of such reports. Tribal compliance or noncompliance with such reporting requirements is not to be used by the Federal agencies as the basis for withholding or terminating contract funds."

S. Rep. No. 100-274 at 21.

In Albuquerque, tribal representatives argued that new or additional quality standards need to be implemented over a reasonable period of time so as to afford tribal contractors the time needed to evaluate whether they will need additional staff, Federal funding, training, updating of data processing and technical assistance in order to comply with such standards. It was

emphasized that implementation of meaningful program standards must be an ongoing and dynamic process which must remain flexible as standards change and evolve. Federal funding must be commensurate with tribal efforts to upgrade the capacity and capability of tribal contractors to implement changing standards.

Some tribal representatives object to the inclusion of program standards in regulations. These individuals argue that program standards really go to the issue of control and that standards will require approval and monitoring by the agencies to ensure compliance. This necessarily creates a tension between the need for Federal oversight versus the intent of the Act to promote Indian self-determination. Finally, those who oppose regulatory standards emphasize that standards involve cost, which the agencies and Congress have all too often in the past been unwilling to support, resulting in tribal contractors being required to meet Federally imposed standards without the financial means to attain and maintain the level of program quality required.

We recommend that the minimum program standards to be required by the Bureau and IHS (unless a regulatory waiver is granted) should be included in the regulations specifically to avoid the insistence by the Bureau and IHS staff on detailed requirements in contract scopes of work. A hospital contractor which agrees to comply with JCAHO standards need include no



other standards in its contracts. The Bureau can include minimum standards for trust, law enforcement or other sensitive programs in the regulations. See, for example, 25 C.F.R. Part 11 relating to law enforcement, and 25 C.F.R. §271.31-271.34, relating to additional requirements when trust resources are involved. Thus, reasonable requirements should be fixed in regulations and not left to negotiations so that contractors with less leverage and influence may be subject to more burdensome requirements by Bureau or IHS staff than more "powerful" contractors accept.

Contract modifications (p. 50) -- We suggest the following revisions in paragraph (a). After the phrase "Bilateral modifications do not require a resolution" add the phrase "of the tribal governing body(ies) served unless required by the tribal resolution(s) requesting the contract." Indian tribes have the right to require tribal governing body approval of contract amendments. The existing language is also ambiguous in suggesting that a resolution of the contractor's governing board may not be required. A bilateral modification must be signed by an official of the contractor duly authorized to execute the contract.

The IHS wishes to revise the last sentence in paragraph (a) (p. 50) to read: "Program changes which do not significantly affect the level or nature of services being provided may also be made by Indian tribes or tribal organizations." We

agree with this change, but would add at the end of this sentence: "without such agency approval or contract modification" to make the intent absolutely clear.

In paragraph (b) (p. 50) we recommend the following:

In paragraph (b)(1) substitute the word "authorized" for the word "excluded" in line 3.

In paragraphs (b)(2) and (3) we recommend the following:

Strike paragraphs (2) and (3) and insert in lieu thereof:

"(2) Subject to the exercise by an Indian tribe or tribal organization of its authority under § 110(b) of the Act to approve unilateral changes in a self-determination contract, modifications which only change mailing addresses or modifications which add funds to contracts, pursuant to budgets previously agreed to by the Indian tribe or tribal organization and the contracting agency, may be made unilaterally."

"(3) The appropriate federal agency shall not combine any other amendments to a contract in a modification which adds funds to a contract."

As we noted in our February 16, 1989 letter to Acting Assistant Secretary, Indian Affairs, and Director, Indian Health Service:

"The proposed draft provision allows unilateral modifications which only correct 'typographical errors', 'change mailing addresses', or

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make 'other nonsubstantive changes which do not modify the contractual obligations of the parties.' While this appears to be a rather insignificant provision, whether a change is nonsubstantive is a subjective question. Minor modifications can alter a party's rights under a contract. The revision we propose allows unilateral modifications in the form of change of address and the adding of funding to a contract. We also make clear in (3) that a funding modification cannot include other changes since such changes require bilateral agreement. In the past the agencies have sometimes coerced agreement by including substantive changes when needed funds are awarded."

For clarity we recommend a cross reference in this section to the appeals procedure to make explicit the tribal right to appeal a declination to approve an amendment to an award. We propose adding the following sentence at the end of paragraph (b)(1):

"When an Indian tribe or tribal organization requests a change, and the Federal government does not agree with the change within thirty days of the written request, the request shall be considered denied and the Indian tribe or tribal organization may appeal as provided in section \_\_\_\_."

Paragraph (4) (p. 51) should be revised to read:

"(4) When a self-determination contract is with a tribal organization which is not a tribal governing body and serves more than one Indian tribe and one Indian tribe withdraws its tribal resolution of support, the program description and funding amounts shall be negotiated under these regulations. Following such negotiations, the tribal organization shall submit a contract modification for the remaining portion of the contract. The contract status of the modified contract shall not be altered unless such alteration of contract status is warranted under section \_\_\_\_."

The section reference is to "Divisibility". This situation may present serious problems with respect to the "divisibility" of the program and the rights of the contracting and non-contracting tribal organizations. We discuss this problem further at pages 13-15 of this Memorandum.

Personnel (p. 51) -- The IHS notes that additional provisions relating to the assignment of Federal employees to contractors and other personnel issues may be added at a later date. We are somewhat dismayed by the lack of attention given by the Agencies to this section. Congress has made it easier for Federal employees to transfer to tribal employment while retaining civil service benefits. IPA transfers are made easier and federal benefits are still available. Employees under excepted service may be reclassified as competitive service personnel as well as allowing displaced federal employees to compete for government-wide jobs (See §104 of the Act; S. Rep. No. 100-274 at 29).

This section should be of great importance to the Agencies as it concerns their own employees. A greater focus on the provisions provided in §104 (especially (k)-(m)) is of utmost importance to both Federal employees and tribal contractors who may wish to hire such personnel for their invaluable experience and knowledge of the contracting process. The Agencies should recognize, and implement in regulations, the statutory mandate of facilitating the "orderly transition from

the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services" (see §3(b) of the Act). Provisions relating to the funding of Federal personnel assigned to contractors are noted at page 51 of this Memorandum.

Monitoring (p. 52) -- The proposed language limits Federal monitoring to a manner consistent with Congressional intentions. See S. Rep. No. 100-274 at 19. The Bureau wishes to replace this section with the following:

"Indian tribes and tribal organizations are responsible for managing the day-to-day operations of the contract activities and to assure compliance with applicable contract requirements and achievement of program goals as established by the contract.

The Secretary has a responsibility to monitor contracts to ensure contract compliance. In-depth reviews of contracted programs, other than reviews which are programmatic requirements, will not occur more often than once a year, unless the Secretary has reasonable cause to believe that satisfactory services may not be provided or Federal resources may not be properly managed. Periodical reviews of contracted programs or parts thereof are a normal ongoing process of the Secretary in ensuring contract compliance in the delivery of services."

The Bureau's language contains a number of broad terms which are subject to varying interpretations. Such terms as "in-depth reviews" and "reasonable cause" are undefined and can result in disparate treatment. As noted earlier, the Bureau also proposes to insert this language in the Quality Assurance

provisions of program standards. The Bureau's proposal (especially the last sentence) is in conflict with the manifest intent of the statute.

Retrocession (p. 53) -- In paragraph (c) we suggest language which would permit the provision of technical assistance even after a tribal contractor chooses to retrocede a contract. Such assistance may lead to a tribal decision to continue to operate the program. The existing draft provides for technical assistance only up to the decision to retrocede.

We are concerned that the revision to paragraph (d) of this section goes beyond the authority of §105(e) of the Act which provides that: "Whenever an Indian tribe requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective one year from the date of the request by the Indian tribe or at such date as may be mutually agreed by the Secretary and the Indian tribe." We find no authority for tribal organizations to unilaterally retrocede a contract.

However, the regulations could provide that: "A tribal organization may exercise a right to retrocede a contract previously delegated to it by a tribal governing body(ies)." While a tribal organization and the Federal agency may agree to cancel the contract by bilateral modification, such a termination should not be referred to as a "retrocession" to avoid confusion.

In paragraph (i) (p. 55) of this section the IHS wishes to restore the following language which had been stricken in the Albuquerque draft: "The Federal Government shall endeavor to provide to the Indian tribe(s) and Indians served by a retroceded contract not less than the same quantity and quality of service it would have provided if there had been no contract." The IHS wishes to restore an identical sentence to paragraph (e) of the Reassumption of programs section (p.56). We object to any unilateral reduction in the standard to be met by the Federal government in retrocession cases. Since the agencies convinced Congress to let them have one year notice of retrocession (instead of 120 days) they should be able to maintain the program level.

Note that the IHS is proposing to provide the same level of services as if there had been no contract, rather than providing the same level of services under the retroceded award. A contract to be retroceded which has been in existence for a number of years may provide services and programs which go well beyond the level of services provided to the Indian community prior to the contract. Upon retrocession by a tribe or tribal organization, the appropriate agency should provide the level of services and programs to the Indian community which the contract was authorized to provide immediately prior to retrocession rather than at the program level which existed prior to the contract. We therefore object to this IHS proposal.

Reassumption of programs (p. 55) -- IHS has raised the issue of what course of action should be available to the Federal government when a contractor fails to comply with its own standards as expressed in the contract document. The Act only contemplates rescission of a contract for the reasons set forth in §109 of the Act and does permit cancellation for contract deficiencies which do not satisfy those reasons. The language included in the April 3 draft should stay as it is since it conforms to the requirements of the Act.

In paragraph (c) of this section (line 5) the word "effect" should be "effective."

In paragraph (e) (p. 56) of this section we emphasize that the language proposed by IHS should not be included for the same reasons as noted in the discussion concerning retrocession.

#### SUBPART D -- FINANCIAL MANAGEMENT

Standards for financial management (p.57) -- Paragraph (a) of this section was slightly revised in Albuquerque. IHS reported that this paragraph was acceptable to it as well as to OMB. The Bureau argues that the standards should be in accordance with OMB Circulars A-87, A-102, A-122 and 48 C.F.R. 31, as applicable, but this approach was disapproved in Albuquerque.



It was agreed in Albuquerque to delete paragraph (b)(3) so that the Secretary's review of a tribal contractor's financial management system is limited to a pre-award review and when warranted based on the Single Audit Act audit.

Allowable costs (p. 58) -- Paragraph (b) provides that allowable costs under a P.L. 93-638 contract are to be computed in accordance with cost principles set forth in certain OMB Circulars which are specified by date, A-87 (1/15/81) or A-122 (6/27/80), so that subsequent revisions of the circular do not automatically apply. We obtained a revision to this section to allow a tribal contractor the option of choosing either A-87 (tribal government) cost principles or those found in A-122 (non-profits). It is our opinion that A-87 can apply to all tribal contractors, whether they are the governing body of an Indian tribe or not, since all tribal organizations are instrumentalities of Indian tribes in that they contract under P.L. 93-638. Because some non-profit tribal organizations wanted to maintain A-122 it was retained as an option for qualifying non-profit organizations. This section also allows waiver by the Secretary of cost principles found inconsistent with the Act.

The April 3 draft (p. 58) at paragraph (b)(1) "Factors affecting allowability of costs" provides:

"The Indian tribes or tribal organizations may use the allowable costs of self-determination awards to meet matching cost participation re-

quirements under other federally supported projects."

We understand that both IHS and BIA question the appropriateness of this provision. In our opinion it clearly serves the purposes of P.L. 93-638. Thus, "638" funding should be treated like tribal funding, not like a Federal discretionary grant program, for "matching" purposes.

The April 3 draft retains a section on "allowability of selected items of cost," which modifies certain cost principles to further the goals of the Act. Some "selected items of costs" (p. 58) (b)(2)(i)(B) have been revised based on the Albuquerque Workshop as follows:

"Professional service costs

Cost of legal, accounting, consulting and related costs in connection with the prosecution or defense of claims against the Federal Government in court are unallowable, unless the Indian tribe or tribal organization is the prevailing party or the court determines that the position of the Indian tribe or tribal organization in the litigation was substantially justified. The cost of such services in connection with contract disputes or other matters related to the performance of the contract until a final remedy is reached are allowable."

Office of the General Counsel, HHS, has questioned this provision as going beyond the Equal Access to Justice Act (EAJA). Since recovery under EAJA is extremely difficult, we think that the revision is fully justified to assist tribes in asserting their rights under the Act.

While paragraph (b)(2)(i)(C) (p. 59) "Publication and printing costs" was approved in Albuquerque, the Bureau raised the issue that regulations of the Joint Committee on Printing & Binding set requirements on printing which may be inconsistent with this section. The requirements of the Joint Committee on Printing are intended to encourage the use of the Government Printing Office by federal agencies. No meaningful public purpose is served by imposing these requirements on Indian tribes. The Bureau has determined under the existing regulations that printing by tribal contractors in the performance of 638 contracts is "incidental" and that the GPO need not be used. See 41 C.F.R. §14H-70.206. There are, however, Joint Committee on Printing regulatory limitations even on "incidental" printing (pertaining to quantity, size and color of printing) which the Bureau proposes to incorporate into the Notice of Proposed Rule Making draft.

A new selected item of cost was added which permits fund-raising activities so long as the funds raised are used to further program goals and proceeds are treated as "program income" under the contract.

Language on "Rental costs" was expanded to include land and vehicles as well as space, subject to restrictions as to reasonableness and statutory restrictions.

The allowability of interest costs on loans for buildings acquired or completed after September 1980 (b)(iii)(D) (p. 60) is expanded to include reconstruction, remodeling and capital equipment (effective December 1988) and facilities acquired for Federal program use "through internal nonfederal funds."

Office of the General Counsel, HHS, questioned the lobbying clause (b)(iii)(E) (p. 60). We continue to object to a ban on the use of contract funds to communicate with the Congress and commend the agencies for revising this clause to deal only with elections. The ability of tribes to move toward increased self-determination is dependent on their ability to bring their problems to the attention of the Congress.

The right to employ multiple indirect rates or to use lump sum overhead agreements has been clarified.

A new paragraph was added after (3)(C) (p. 61) relating to indirect costs, which provides:

"At an Indian tribe's or tribal organization's request, the Secretary shall provide assistance in the development of its indirect cost proposal(s)."

The language in (b)(3)(ii) (p. 61) pertaining to "co-nizant Federal agency" which provides that the agency designated by OMB shall be responsible for negotiating with a tribal contractor and approving the indirect cost proposal was approved in

Albuquerque. The cognizant agency may be either Interior or HHS (but will be HHS if it is the only funding source -- we recommend inserting "federal" before "contracts and grants" to clarify this provision).

Since the Albuquerque Workshop, we have learned more about the scheduled transfer of the negotiation of indirect cost rate from the Office of Inspector General to a newly created office ("Indirect Cost Rate Division") within Interior's Office of Policy Budget and Administration. The reason for the planned transfer of rate-setting functions from OIG to the Office of Policy, Budget and Administration was a concern by OMB that there was a "conflict of functions" in having OIG negotiate indirect rates and audit the contracting process. The Policy Budget and Administration Office is equal in status to the OIG and is independent of the Assistant Secretary for Indian Affairs.

While we question the necessity of this transfer, we are greatly concerned with the proposed staffing and funding of this office. The FY1990 budget for the Office of the Secretary of the Interior allocates only \$175,000 and 4 FTEs for the Indirect Cost Rate Division for the first year. This places a tremendous work load on personnel who may not have much experience with indirect cost negotiations. If the transfer is to be completed in FY1990, it must be adequately staffed and funded. Several of our tribal clients, as well as Chairman Udall and Congressmen Rhoades and Young, have brought this issue

to the attention of Chairman Yates of the Interior Appropriations Subcommittee. In light of the fact that regulations will not be in place by the beginning of FY1990, we question whether it would be prudent to complete this transfer prior to implementation of the new regulations and assurances of adequate funding.

Indirect cost proposals shall be deemed approved within 180 days after receipt by the Federal cognizant agency unless declined within 120 days. Specific appeal provisions are provided for a declined indirect cost rate.

Revised language (p. 61b) reflects the concern of the Congress as to indirect cost shortfalls caused by Federal agency action, as follows:

(A) "Theoretical over recoveries or other adverse adjustments shall not be considered in the calculation of indirect cost rates.

(B) In those cases where federal limitations, either statutory or regulatory, exist prohibiting the reimbursement of the full negotiated indirect cost rate, such actual shortfalls shall be used in the calculation of need in future indirect cost negotiated agreements."

Availability of funds and Limitation of Cost (p. 61 or 61d) -- The Bureau has suggested placing this section in an appendix and deleting the final sentence contained in (b)(1) (p. 61d) which provides:

"Notwithstanding the above, failure to supply written notice will not affect the rights of the

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Indian tribe or tribal organization under paragraph (b)(2) below."

The Bureau argues that tribes and tribal organizations should be required to provide written notice in advance of an overexpenditure. This change would conform the clause to the standard "limitation of cost" provision in current tribal cost reimbursement contracts.

We recommend the insertion at the beginning of paragraph (b) of the statement "The following shall apply in any cost-reimbursement contract." We understand that it is the intention of the agencies that contracts under the Act may be either "cost-reimbursable" or "fixed price" as at present. In paragraph (c) of this section ("limitation of price") (p. 61d), the last sentence, which would have treated savings from fixed price contracts as "program income," was deleted. In a fixed price contract, the excess of price above cost is not "program income." It is simply part of the price paid to the contractor for the product. "Program income" restrictions therefore, cannot apply to it.

In paragraph (d)(3) (carryover funding) (p. 62) we recommend revising this paragraph as follows for purposes of clarity:

(3) "Unless additional justification is provided, unexpended funds shall be used for the same

general purposes for which they were originally appropriated or authorized to be used under the self-determination contract.

(4) Upon request of a tribe or tribal organization to reprogram carryover funds, the Secretary shall evaluate the proposal under:

(a) the declination criteria contained in §102(a)(2) of the Act; and

(b) limitations imposed upon the amount of funds that may be reprogrammed without Congressional approval.

(i) The agency may administratively agree to reprogramming requests from the affected tribe or tribal organization, up to 25% of the affected line item (e.g., adult education, agricultural extension services, etc., without seeking Committee approval in advance).

(ii) All such reprogramming shall be reported quarterly, in detail, by the tribe or tribal organization.

(iii) All other reprogramming guidelines shall remain in effect, including the prohibition on new agency initiatives through reprogramming, and the requirement to submit all reorganizations through the reprogramming process for advance approval.

(iv) This flexibility shall apply only to activities included under the tribe/agency operations category, and each such change must be requested by or approved by the affected tribe before the agency shall consider it."

The foregoing language is based on the FY88 House Approp. Rep. No. 171, pp. 42-43 (1987). While this was an experimental provision, we understand from the House Appropriations Subcommittee staff that this is still current policy.

Payment (p. 62) -- Paragraph (d) of this section was revised to provide that a tribal contractor could not be removed



from the advance payment system without having received written notice providing no less than 60 days to remedy the deficiency. This should alleviate problems encountered by tribal contractors in the past.

Previous paragraph (g) of this section was deleted. This paragraph was considered superfluous.

The Bureau noted that advance payments (see paragraph (a) (p. 62)) may be improper without the Federal Acquisition Regulation (FAR) safeguards. The Bureau noted that the Solicitor's Office is reviewing this. Clearly, Congress did not intend to eliminate advance payments when it exempted contracts under the Act from the FAR.

Program Income (p. 63) -- This section has been revised to make clear that funding amounts shall not be reduced based on the receipt of program income. We note that paragraph (3) should read: "Income from payments of principal and interest on loans made with program income." In Albuquerque, a change from "project funds" to "program income" was approved.

⑤ Indemnity and insurance (p. 64) -- General liability insurance and professional medical malpractice insurance are major concerns to an Indian tribe or tribal organization contracting under the Act, especially for health services. We are troubled by actions taken by the Bureau and IHS relating to

implementation of the general liability provisions. The reason for this is that the Bureau has requested, in its FY1990 Budget request, a one year postponement of the effective date mandated by amendments to the Act which would require the Secretaries to provide general liability insurance coverage to tribal contractors operating P.L. 93-638 contracts. The Bureau justifies this request by stating that:

"This will allow the Department of Interior, Justice, and Health and Human Services, working with the Office of Management and Budget, sufficient time to address the significant administrative, legal, and budget implications of this requirement."

Both IHS and the Bureau should recall the words of Congress expressed in the Senate report accompanying the amendments to the Act:

"It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs."

S. Rep. No. 100-274 at 9.

Section 102(a)(1) of the Act provides that beginning in FY1990, the respective Secretaries shall be responsible for obtaining or providing liability insurance for tribal contractors carrying out a contract or agreement under the Act, taking

into consideration the extent to which claims are covered under the Federal Tort Claims Act (FTCA).

Both agencies have concluded that they cannot implement this statutory requirement in FY1990. However, as recently as April 4, 1989, in a hearing before the House Interior Appropriations Subcommittee on the FY1990 Bureau Budget when asked by Chairman Sidney Yates as to the reason for seeking a delay, the Bureau responded that it has been talking to a contractor who is studying the costs associated with the Federal government providing liability insurance, and the Bureau should have an estimate for general liability insurance costs within the month. When asked why the Bureau would then need a one-year postponement, it replied that the Department of Justice and OMB also have concerns which they believe have not been adequately addressed. As a result, the Bureau is not prepared to present a proposal in 1989. Pat Ragsdale, Acting Assistant Secretary, Indian Affairs, stated that the Bureau must work within the Administration to achieve a consensus as to an approach to this matter. Nevertheless, neither the Bureau nor the IHS has seen fit to request in their FY1990 Budget requests additional funding for general liability insurance. Tribal contractors will be faced again with redirecting scarce direct and indirect contract dollars to maintain general liability insurance.

We are troubled by the Administration's delay in resolving this matter. The Bureau proposes studying this issue

and perhaps implementing the statutory provision for FY1991, almost two years after P.L. 100-472 was enacted.

We find this even more troubling due to the fact that general liability insurance must act as an umbrella policy to the Federal Tort Claims Act coverage extended to tribal contractors and their health professional employees. Tribal contractors should not be put at risk nor bear the cost of maintaining costly general liability insurance while the agencies study and discuss the means by which they are to carry out the intent of Congress. The Act requires that tribal contractors be funded at levels equal to the levels that the Bureau and IHS would have were they to operate the contract or agreement. Congress recognized that the payment of general liability insurance decreases the level of services available to Indian beneficiaries (see S. Rep. No. 100-274 at 26). Indian tribes and tribal contractors should demand that the Appropriations Committees provide additional funding to the IHS and Bureau's FY1990 budget to meet the ever increasing cost for maintaining general liability insurance.

Despite the public positions of the IHS and Bureau requesting a one-year delay in the implementation date for this section, the IHS draft regulations revision dated April 3, 1989, contains a general liability section which implements the statutory provision: "without reduction of funding to tribal programs." No explanation of the expected delay is provided, nor

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is any interim arrangement proposed. There appears to be a lack of coordination within the Federal agencies on this matter.

While the draft regulations will perhaps not be in place for at least another sixteen months (August 1990), we trust that the IHS and Bureau are prepared to abide by the final paragraph of this section of the April 3 draft which provides:

"If the Secretary has not provided liability or equivalent coverage as provided herein by [FY] 1990, the Secretary shall reimburse an Indian tribe or tribal organization for the cost of such coverage without reducing the amount of funding available for services under the tribe or tribal organization's contracts or grants."

Federal Tort Claims Act provisions (p.64) -- Language was drafted and approved at Albuquerque which was the product of a collaborative effort between tribal attorneys and attorneys of the Office of the General Counsel, HHS. The final draft, however, notes that the IHS believes that there are legal issues still to be resolved. Our only question as to the April 3 draft is that clause (C) of paragraph (a)(iii) may go beyond the statutory language and lead to uncertainty in the scope of the FTCA protection by including all services under contract with IHS.

The draft regulations acknowledge that FTCA coverage provides the exclusive remedy a claimant may pursue for injury or death arising from the performance of medical or related functions of a tribal contractor. Of major import is the recog-

dition, in regulations, that employees of a tribal contractor providing health related services, are deemed employees of the Public Health Service when they provide health services to Indian and non-Indian patients:

1. at the contract facility;
2. at a non-contract facility;
3. in emergencies, including the operation of emergency transport vehicles.

Furthermore, the draft regulations acknowledge that in certain circumstances, staff privileges must be obtained by contract employees and Commissioned Corps personnel at a non-contract facility which may require such individuals to provide reciprocal medical services to the general population treated at such facility under such circumstances as:

- (a) cross covering other medical personnel;
- (b) assisting other personnel with surgeries or procedures;
- (c) assisting with unstable patients or at deliveries;
- or
- (d) assisting in patient care situations where additional assistance by a physician is required.

The regulations also acknowledge that it is the scope of work set forth in the contract or agreement, not the source

of funding, which determines the scope of FTCA coverage. If the scope of work is contemplated within the P.L. 93-638 contract or agreement and the employee is found to be in compliance with these regulations and the statutory requirements of §102(d) of the Act, he/she will be deemed an employee of the PHS for purposes of FTCA coverage.

Finally, the regulations acknowledge that health services may be extended to non-Indians under a number of circumstances as permitted or authorized by law or regulations. The Department of Health and Human Services has agreed to insert in the regulations the existing statutory and regulatory authorities which permit health services to non-Indians. The regulations contain language which provides express incorporation into any health care contract or agreement under the Act that: "For purposes of this section, the scope of the contract shall be deemed to include the provision of services to all Indian beneficiaries, and non-beneficiaries and non-Indians as provided herein" ((a)(2) p. 67).

It will be necessary to monitor the proposed rulemaking draft which IHS is presently engaged in preparing to assure that essential provisions of this section are retained. Office of the General Counsel, HHS attorneys have reiterated that the decision on FTCA coverage is reserved to the courts. While this statement is true, the P.L. 93-638 contract provisions and the scope of employment aid the court, as well as the Justice

Department (which would defend the United States in an FTCA suit) in reaching a favorable decision as to FTCA coverage. We trust, therefore, that the IHS and Bureau will advocate as broad an interpretation of §102(d) of the Act as possible.

The draft regulations seek to provide as broad a coverage as reasonably possible. It should be remembered that the United States is liable for the actions of medical personnel serving Native Americans prior to the contracting of a health service program by a tribal contractor. Congress recognized that the United States cannot divest itself of this obligation when a tribal contractor takes over the responsibility of providing health care. Prior to passage of P.L. 100-472, Congress stated that:

"The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility. Under current law [prior to passage of P.L. 100-202 which extended FTCA coverage to tribal contractors], a self-determination contract with a tribal organization operates to actually relieve the United States of the liability which it had under the Federal Tort Claims Act before the contract was executed. In its place, the tribe is required to waive its immunity from suit up to the policy limits of its insurance, and then to be subjected to litigation without any of the protective and very restrictive provisions which apply to litigation under the Federal Tort Claims Act. The Indian Self-Determination Act was never intended to operate as a means for the United States to avoid the liability it would otherwise have under the Federal Tort Claims Act. The amendment to the Act will not increase the Federal government's expo-



sure under the Federal Tort Claims Act. On the contrary, the amendment will only maintain such exposure at the same level that was associated with the operation of direct health care service programs by the Federal government prior to the enactment of the Indian Self-Determination Act."

S. Rep. No. 100-274 at 27, 28.

We urge the Office of the General Counsel to support the language contained in this section. Failure to advocate language which will allow as broad a coverage as possible under the FTCA will mean that tribal contractors will still have to purchase medical malpractice insurance to ensure that their employees are covered under a liability policy. This would be totally contrary to the intent of Congress with regard to this issue and will result in the expenditure of vast sums of scarce contract dollars.

Reporting (p. 70) -- This section implements section 5(f) of the Act which requires annual reporting by a tribal contractor to the Secretary of the amounts and purposes of expenditures made and information on the conduct of the program or service involved. Quarterly reports by tribal contractors on Standard Form 269 or 269(a) are also required.

Record retention and access to records (p. 70) -- Several revisions were approved in this section at Albuquerque but have not been accurately reflected in the April 3 draft as follows:

In paragraph (a)(2) "contract or award" was substituted for "project."

In paragraph (b)(1) it was agreed that the request of the Comptroller General and Secretary shall be a written request.

In paragraph (b)(2) (p. 71) it was agreed that the phrase "as and in a manner determined to be adequate by the appropriate Secretary," was to be deleted and the italicized language beginning "including" would be inserted in its place.

We wish to draw attention to a possible conflict which may exist between paragraph (e) of this section (p. 72) and paragraph (a) in the "Availability of information" section (p. 52). The last sentence of paragraph (e) provides that:

"Indian tribes or tribal organizations are not required to permit public access to their records." (Emphasis added.)

Paragraph (a) of the "Availability of information" section (p. 52) provides that:

"Except as otherwise provided in these regulations and providing the release of information does not constitute an unwarranted invasion of personal privacy, the Indian tribe or tribal organization shall make all reports and information concerning the award available to the Indian people served or represented by the Indian tribe or tribal organization providing such requests are reasonable and necessary." (Emphasis added.)

One could read the last sentence of paragraph (e) of the "Record retention and access to records" section (p. 72) to be the very limitation set forth in paragraph (a) of the "Availability of information" section. We therefore recommend moving the bold face proviso language in paragraph (a) to paragraph (e) so that the last sentence of paragraph (e) reads:

"Indian tribes or tribal organizations are not required to permit public access to their records except as otherwise provided in these regulations."

A cross reference to the "Availability of information" section may also be helpful. Current Bureau regulations (25 C.F.R. §271.48) (attached) provide guidance as to Privacy Act and Freedom of Information Act requirements, and consideration should be given to including such provisions in the new regulations.

Audit (p. 72) -- The alternative draft proposal of the IHS which was distributed at the Albuquerque conference was adopted in place of the earlier audit provisions. The only section which was retained from the earlier provisions was paragraph (g), now paragraph (f), of this section. This paragraph allows for additional audits of tribal contractors beyond the audit required by the Single Audit Act of 1984 so long as such audit does not duplicate the findings of the original Single Audit Act audit and are "necessary to carry out [the agencies'] responsibilities on projects awarded under these regulations."

We note that language in this section provides that Indian tribes and tribal organizations are responsible for obtaining audits as required under the Single Audit Act and the provisions of OMB Circular A-128 which IHS notes is entitled "Audits of State and Local Governments." If a tribal organization is recognized by IHS as a State or local government for purposes of auditing, it should be entitled to that status for purposes of determining appropriate cost principles (i.e., it should be entitled to rely on Circular A-87, as contemplated by the April 3 draft).

Disputes (p. 73) -- This section referencing the Contracts Disputes Act of 1978 remains largely unchanged from Nashville. A new paragraph (k) was added which provides that: "A pending appeal shall not affect or constitute a barrier to the negotiation or award of a pending contract."

We recommend that paragraph (j) (p. 76) should be revised for clarity to read as follows:

"Obligation to continue performance. Indian tribes and tribal organizations are required to continue performance during appeal of any claim, subject to the limitations of costs clause in any cost reimbursement contract."

We also note that the April 3 draft Disputes section, which is based on FAR 52.233-1 and is currently in use in IHS contracts, includes contract "adjustments" as claims subject to the Contract Disputes Act. It should be made clear that denials

of contract modifications requested by the contractor are subject to declination appeals as previously discussed and that modifications requested by the Federal agency are barred except in the very limited circumstances already noted.

Closeout (p. 77) -- The Albuquerque Workshop revised paragraph (a)(1)-(3), created a new paragraph (c) "annual funding reconciliation" (p. 78) to clarify carryover procedures and deleted paragraph (d) which would allow multiple contract numbers for mature contracts.

All financial management provisions in the April 3 draft should be reviewed carefully by tribal accounting staff. Tribal organizations should also request the advice of certified accountants familiar with their programs as to seeking further revisions. As noted earlier, Ernst & Whinney, an accounting firm which is experienced in auditing contracts under the Act, has expressed concern that some of these provisions depart from professional practice.

#### SUBPART E -- PROPERTY MANAGEMENT

The original draft provisions for this section discussed in Nashville were replaced by provisions developed by the Bureau after considerable debate. This section warrants careful review. Several major issues still remain unresolved between the two Federal agencies.

Definitions (p. 79) -- Paragraph (c) of this section "Capitalized personal property" was revised to reflect an increase to \$5,000 for the minimum value for such personal property.

The revised regulations note that the Bureau proposes to add a final definition "sensitive items" to cover personal property which, because of its nature, is subject to theft or pilferage. The Bureau stated in Albuquerque that such items would be handled as capitalized personal property.

Personal property (p. 80) -- The Bureau indicated that the threshold value of \$25,000 as the value at which approval of the Secretary was required before personal property could be purchased under a contract was required by OMB Circular A-102.

Paragraph (B) on p. 81 of the April 3 draft provides that tribal contractors shall be given priority for the donation of excess personal property prior to the agency reporting such property to the GSA or to another Federal agency. Excess personal property is defined in the regulation draft (p. 79) as any property owned by a Federal agency, other than the Bureau or IHS, and determined by that agency as being excess to its needs. Surplus personal property, on the other hand, is defined (p. 80) as "personal property owned by a Federal agency other than the BIA or IHS which has been reported to GSA as excess and determined by the FGSA as surplus by the owning agency."

The priority among tribal contractors to receive excess Federal property is set out under (B)(2) (p. 81) of this section.

Pursuant to §105(f) of the Act, regulations should set forth the criteria under which the Bureau or IHS may donate title to personal property held in the United States to a tribal contractor.

Note that the regulations under this section also provide three alternative methods (options) which a tribal contractor may select for the management and control of personal property (pp. 84-86).

Real property management (p. 87) -- A major disagreement between the Bureau and the IHS exists as to whether they have authority to transfer title to real property to Indian tribes and tribal organizations contracting under the Act. The Bureau, after a thoughtful review of the various statutory authorities, and the involvement of a number of branches of the Interior Department, concluded that the agencies can transfer title to real property (in fee simple) to tribal contractors. The Office of the General Counsel, HHS, however, does not share this view. We are hopeful that Bureau and IHS officials will resolve this issue along the lines recommended by the Bureau, and we are looking into the legal issues in dispute.

Despite the misgivings of the IHS as to the legality of transferring title to real property to tribal contractors under the Act, the Bureau's draft proposal was approved at Albuquerque. This section therefore states that title to real property purchased by the awardee vests in the Federal government "until such property is donated by the Secretary under the provisions set forth in this Subpart 2.1-2(c)," and the tribal contractor shall hold legal title for the duration of the contract (p. 87).

Just as there are three methods (options) for the management and control of personal property, the Bureau draft proposal accepted at Albuquerque provides three methods for the management and control of real property (pp. 88, 89). The choice of methods availability to a tribal contractor is dependent upon the status of the tribal contractor.

Tribal contractors who operate mature contracts may choose from one of the three methods for management and control of real property. If the tribal contractor serves more than one Indian tribe, a tribal resolution from each tribal governing body served must be presented prior to transfer (p. 88). We summarize the three methods briefly:

Method 1 (p. 88): "Awardee Owned; Awardee Operated and Maintained" -- (only a tribal contractor operating a mature contract can select this method).



Legal title will vest in the tribal contractor upon transfer of the excess real property. The tribal contractor is solely responsible for operation and maintenance, including employee quarters. Proceeds of awardee sale or rental of real property shall be deposited into an account for operation of the contract and shall be treated as program income. Paragraph (4) (p. 89) of Method 1 nevertheless provides that: "Selection of this method shall not relieve the Secretary of his obligations for operations, maintenance, and repair of the real property." If this is the case, the word "solely" in paragraph (2) (p. 88) should be deleted for it suggests that no funding will be provided by the Secretary for O&M.

Paragraph (B) (p. 89) of Method 1 provides that upon either retrocession, discontinuance or termination of a contract, title to any real property donated or conveyed to the tribal contractor "shall revert to the Federal agency." This provision is required because the authorizing statutes which permit transfer of real property contain language relating to reversion of title under certain circumstances. See 25 U.S.C. §§293a, 443a.

Consideration should be given to a transfer of title to real property in trust for the Indian tribe or tribes served under the contract so as to avoid the assertion by states of jurisdiction and taxing authority over certain lands.

Method 2 (p. 89): "Government-Owned; Government Operation and Maintenance."

The tribal contractor does not hold legal title or interest in the real property nor may the tribal contractor sell, donate or convey the real property to a third party. The Secretary will provide for the tribal contractor's use of Federal facilities [presumably located on such real property] in accordance with Agency policies and procedures. Method 2 is available to tribal contractors operating term contracts. Despite the heading of this method, this paragraph is ambiguous as to which entity has the financial burden of providing for O&M.

Method 3 (p. 89): "Government-Owned; Awardee Operation and Maintenance."

Just as in Method 2, the tribal contractor does not hold legal title or interest in the real property "unless specifically provided otherwise by [the] terms of the self-determination contract." The last part of this sentence was revised to provide that all responsibility for proper O&M of the real property belongs to the "awardee" rather than the "awarding agency."

Under paragraph (2) of Method 3 (p. 89), the terms and conditions of O&M shall be in accordance with an O&M contract negotiated between the tribal contractor and the Bureau or IHS

"contracting officer" prior to execution of a contract. The contract must contain an annual work plan for "routine" O&M and a facilities engineering deficiencies report. We recommend that the regulations make clear that O&M provisions should be included in the contract under which services are being provided. These should not be separate transactions.

Closely related to the issue of real property management is the matter of quarters management, when, under Method 2 or 3, the government retains title to the facilities. While the Bureau demonstrated flexibility on this matter, the IHS is still unwilling to allow contractors to keep rentals from quarters or to set rates for such rentals.

Regardless of which method is selected, the rental rates charged to Federal employees occupying quarters owned by the Federal government are to be determined and collected "only per the guidelines established in OMB Circulars A-18 (Policies on construction of family homes), A-25 (user charges) and A-45 (Policy governing charges for rental quarters and related facilities) and applicable BIA/IHS implementing regulations or directives." Despite objections by the tribal representatives present at Albuquerque, the Bureau was adamant on this point. Only when government owned quarters are used to house individuals who are not Federal employees and are not direct-hire contractor employees may the contractor charge full fair market value without administrative adjustments to the fair market value rate.

The April 3 draft provides for three alternative methods for quarters management. We summarize them briefly:

Method 1 (p. 90): "Awardee Owned and Operated." Funding for O&M is the responsibility of the "awardee" and can be paid from rental receipts, retained by such awardee, or from other contract funds. Rental rates may be set by the contractor.

Method 2 (p. 90): "Government Owned and Operated Facilities." If the Federal agency has responsibility for O&M, all rental rates charged shall be determined only in accordance with OMB Circulars A-18, A-25 and A-45 and applicable BIA or IHS implementing regulations. Under all circumstances where the Bureau or IHS has operation and maintenance responsibilities, rents charged and collected shall, within 5 working days of receipt by the awardee, be submitted "in the manner specified by the contracting officer, to the appropriate BIA or IHS office to be deposited into the proper account to be used only for management, operation and maintenance of such quarters."

Method 3 (p. 90): "Government Owned, Awardee Operated and Maintained." Rates charged to Federal employees and direct hire employees must be in conformance with OMB Circulars A-18, A-25, and A-45 and applicable agency regulations. Any other individual must pay fair market value rates in accordance with the circulars. It would be more consistent with the goals and provisions of P.L. 93-638 to permit quarters to be managed by

contractors under guidelines proposed by the contractor and approved by the Federal agency. The Bureau agreed to delete the specific references to the various OMB Circulars and simply include the applicable rental rates. We urge, instead, that quarters should be managed (and rentals set) under the contractor's guidelines subject to review and approval by the agency.

IHS failed to delete paragraph (2) (p. 91) which was stricken at the Albuquerque Workshop. Paragraph (2) represents the IHS's position that all rental receipts must be forwarded to the agency, even when the tribal contractor is responsible for O&M. Both agencies have allowed the tribal contractor to collect rental receipts and deposit them into an awardee-managed, separate bank account to be applied by the tribal contractor to the operation, maintenance and management of such quarters in the past. The IHS, on the other hand, now insists that a tribal contractor must collect all rents and submit, within 5 days, the full amount to the appropriate IHS officer. Under the IHS's proposal, there is no guarantee that such funds will be returned in full to the awardee for the operation, maintenance and management of the quarters. IHS insistence on this procedure places a tribal contractor in the awkward position of being responsible for the operation and maintenance of such facilities, but does not allow the tribal contractor to retain the rental receipts collected so as to have a ready and available source of funding for needed repairs and routine maintenance work. The Bureau's position which recognizes the practical

desirability of keeping rental receipts at their source should be accepted by both agencies. There is no legal or programmatic justification for the inconsistent positions.

SUBPART F -- PROCUREMENT MANAGEMENT SYSTEM

Procurement system standards (p. 92) -- The draft version which came out of the Nashville session was completely revised in Albuquerque.

This section authorizes an Indian tribe or tribal organization to procure property and services in accordance with tribal procedures, if the appropriate Secretary "concurs" with such procedures, or a tribal contractor may choose to abide by the procedures set forth in paragraphs (b)-(h) of this subpart (pp. 92-97). Tribal staff familiar with procurement issues should review these provisions.

The April 3 draft provides that Federal concurrence or nonconcurrence in the tribal contractor's tribal procurement procedures will be made "at the Secretarial level" and shall be provided to the tribal contractor within 60 days of such request (p. 92). We recommend that the authority to approve such procedures be delegated to Area Staff (subject to appeal). The April 3 draft makes clear that procurement procedures which have been previously approved by the Secretary are acceptable. However, the regulations should be crystal clear that contractors

whose procedures currently have contracting officer approval do not need approval again at any level.

Paragraph (h) (p. 96), which is part of the Secretary's procedures relating to subcontractors, was revised to reflect that the Davis-Bacon Act does not apply where the subcontractor is the recognized governing body of the Indian tribe or tribal organization. Language was inserted in paragraph (h)(11) (p. 97) to require notice of Indian preference in training and employment.

The Bureau has advocated alternative language to cross reference OMB Circular A-102. The Bureau also suggested that a provision should be included in paragraphs (h) and (i) that would prohibit tribal contractors from reaching settlement agreements which would directly or indirectly obligate the Federal agencies beyond the funds in the contract.

We note that there is no language pertaining to the appropriate appeals procedure to follow in the event that the Secretary fails to concur in the procurement system proposed by a tribal contractor. In the event the proposal is submitted prior to the granting of a P.L. 93-638 contract or agreement, the declination criteria should apply. If the procurement proposal is submitted after the granting of a contract or agreement, the contract disputes provisions should be applicable.

We are concerned here (and in other places in the draft) that differing and possibly inconsistent uses of the terms "Secretary," "federal government" and "federal agency" throughout the April 3 draft may lead to confusion as to the federal official authorized to make a decision and the appeal procedure which is available from his decision. Further study and clarification is required prior to the publication of uniform and consistent regulations applicable to both agencies as to the use of such terms and other terms designating particular agency officials.

#### SUBPART G -- GRANTS AND COOPERATIVE AGREEMENTS

This section was also entirely rewritten at the Albuquerque Workshop. Both the IHS and the Bureau proposed alternative language to the Nashville draft. Except for one provision from the Bureau's proposal, the entire IHS alternative draft language was approved in Albuquerque.

Subpart G applies to three types of grants: (1) §103(a) tribal government and improvement and planning grants of the Department of Interior; (2) §103(b) development and planning health grants of the Department of Health and Human Services; and (3) §103(e) technical assistance grants from either IHS or the Bureau.



Applicability (p.98) -- Paragraph (c) was added to this section to recognize that grants were also available from the Department of the Interior to strengthen or improve tribal government, improve the capacity of a tribal organization to contract under \$102 of the Act and acquire land.

Eligibility; Availability of funds and application dates (p. 99) -- A number of changes were made to this section to address concerns of small Indian tribes. Language was added which provides that eligibility may be restricted by priorities established in the Department's annual budget justification or in legislation and paragraph (d) (p. 100) was added which provides that:

"Nothing in this subpart shall prohibit the Secretary from providing special consideration to tribes or tribal organizations based on size, target population or demonstrated need."

Paragraph (e) was also added which requires the Secretary to publish 90 days prior to the application due date the total amount of grant funds available, including minimum and maximum funding levels and portions of funds to be retained by the Secretary for administrative and other costs.

Application (p. 100) -- As noted in earlier sections, we believe that Federal guidelines applicable to Indian tribes due to their status as "states or local governments" are also applicable to tribal organizations which are instrumentalities

of Federally recognized Indian tribes. Nevertheless, regulations continue to distinguish Indian tribes from non-governing body tribal organizations for purposes of assigning Federal guidelines which the entity must comply with. This section is no different. Paragraph (a) (p. 100) requires different forms for applying for grants pursuant to 45 C.F.R. Part 92 (for governmental entities) and 45 C.F.R. Part 74 (for all other entities).

Use of project funds (p. 102) -- We note that paragraph (b) (p. 103) provides that a tribal contractor may choose to abide by the requirements of paragraph (b) in lieu of the standard grant award requirements contained in paragraph (a). Paragraph (b)(5) (p. 103), however, is rather vague, insofar as it pertains to "any other applicable laws." The Bureau and IHS may wish to specify which laws they have in mind as a tribal contractor would rightfully be hesitant to opt for complying with the requirements of paragraph (b) when it is uncertain just what those requirements are.

We also question whether the regulations listed under (b)(7) should be applicable to tribal contractor grants under this section.

Rescission of grants (p. 105) -- We believe that the rescission of discretionary grants section may require revision. As noted in paragraphs (a) and (c) under "applicability"

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(p. 98), this section applies to grants and cooperative agreements under §103(a), (b) and (e) of P.L. 93-638. Section 109 of the the Act provides for rescission of such grants if there is a violation of rights, endangerment to health, safety, or welfare; or gross negligence or mismanagement. Tribal contractors, however, are now entitled to a hearing "on the record" under §109 of the Act (§554 "on the record adjudications"). This is a reference to procedures under Title 5 of the U.S. Code. Existing regulations of the IHS which govern these grants (42 C.F.R. Part 36 Subpart G), however, provide for an informal procedure for resolution of post-award grant disputes prior to submission to the Department Grant Appeals Board. We question whether the Board has jurisdiction to hear appeals which are required by statute to be "on the record" adjudications. We note that the Bureau concludes that: "Rescission of grants should be incorporated into Appeals section."

#### SUBPART H -- ADMINISTRATIVE REQUIREMENTS FOR CONSTRUCTION

For our report on this subpart, please refer to our memorandum of April 5, 1989, entitled: "Report on construction workgroup at Albuquerque - 638 regulation drafting workshop." We will continue to provide separate reports on the development of the construction regulations.

25 CFR § 271.48 for use with Memorandum  
Page 85 (Record retention and access to records)

§ 271.43 Freedom of information.

(a) Unless otherwise required by law, the Bureau shall not place restrictions on tribal contractors which will limit public access to the tribal contractors' records except when records must remain confidential.

(b) A tribal contractor under this part shall make all reports and information concerning the contract, including the report required under § 271.49, available to the Indian people which the contractor serves or represents. Reports and information may be withheld from disclosure only when both of the following conditions exist:

(1) The reports and information fall within one of the following exempt categories:

(i) Specifically required by statute or Executive Order to be kept secret.

(ii) Related solely to internal personnel rules and practices of the Bureau.

(iii) Commercial or financial information obtained from a person or firm on a privileged or confidential basis.

(iv) Memoranda or letters between agencies of the Federal Government which would not be available by law to a party other than the Federal Government in litigation with the Federal Government.

(v) Personnel, medical, and similar files where disclosure would be a clearly unwarranted invasion of personal privacy.

(vi) Investigatory records compiled for law enforcement purposes when production of the records would:

(A) Interfere with enforcement proceedings;

(B) Deprive a person of a right to a fair trial;

(C) Be an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures; or

(F) Endanger the life or physical safety of law enforcement personnel.

(vii) Contained in or related to examination, operating, or condition reports prepared for the use of an agency of the Federal Government responsible for the regulation or supervision of financial institutions.

(viii) Geological and geophysical information and data concerning wells.

(2) Disclosure is prohibited by statute or Executive Order or sound grounds exist for using the exemption given in paragraph (b)(1) of this section.

(c) A request to inspect or copy reports and information shall be in writing and must reasonably describe the reports and information requested. The request may be delivered or mailed to the tribal contractor. Within ten working days after receiving the request, the tribal contractor shall determine whether to grant or deny the request. The requester shall be notified immediately of the determination.

(d) The time limit for making a determination may be extended up to an additional ten working days for good reason. The requester shall be notified in writing of the extension, reasons for the extension, and date on which the determination is expected to be made.

Report on Construction Regulations

Supplied by Harold M. Gross, Esq., of Hobbs, Straus, Dean & Wilder. Mr. Gross has been designated "Tribal Co-Chair" of the Construction Work Group.

Any ambiguity as to whether Congress intended to provide to Indian tribes the right to contract for, and carry out, "construction activities" under the Indian Self-Determination Act (P.L. 93-638) was clearly put to rest by the 1988 amendments to that Act.

The 1988 amendments added to Section 4 of the Act (the definitions section) the following new definition:

"(a) 'construction programs' means programs for the planning, construction, design, construction, repair, improvement, and expansion of buildings and 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."

The newly defined term "construction programs" was then inserted into the Act at Section 102(a)(1) to require the Secretary of the Interior upon the request of any Indian tribe, to enter into a self-determination contract with a tribal organization to plan, conduct, and administer programs, or portions thereof, including construction programs. Construction programs provided by the Secretary of Health and Human Services, and for Indians by other Departments are specifically included.

Both the Senate and House Committee reports make clear that the term "self-determination contract means an intergovernmental contract that is not a procurement contract." The Senate report states:

"This definition recognizes the unique nature of self-determination contracts between the Federal Government and Indian tribal governments, or tribal organizations . . . . The Committee amendment also makes clear that self-determination contracts are not procurement contracts, as defined in the Federal Grant and Cooperative Agreement Act of 1977, and that the system of federal acquisition regulations contained in Title 41 of the Code of Federal Regulations should not apply to self-determination contracts."

The purpose of the Committee was clear:

"The elimination of otherwise applicable federal procurement laws and acquisition regulations combined with authorization by the Committee amendment of so-called "mature contracts" is intended to decrease the volume of contract compliance and reporting requirements associated with tribal contracts, and to decrease the volume of unnecessary contract monitoring requirements on the Federal agencies." (S.Rep. No. 100-274, p. 19.)

The Committee Report carefully explains the intent of the Committees carrying the bill:

"Section 103. Definitions. - New definitions are added to the Indian Self-Determination Act to clarify the meaning of terms used in the Act.

"The term 'construction programs' is defined in order to make clear the intent of the Congress that Indian tribes have the right to contract with the appropriate Secretary under the authority of the Indian Self-Determination Act to carry out construction activities and programs including the planning, design, construction, repair,

rehabilitation, improvement, and expansion of buildings or facilities. In addition to the specific programs listed in the statute, the term is intended to include pre- and post-construction costs such as site preparation, dredging, land clearance and reclamation. The term 'construction programs' also includes programs to construct facilities related to natural resource projects such as timber access roads and fish passage facilities." (S.Rep. No. 100-274, 100th Cong., 1st Sess, p. 16.)

Under the revised Section 103(a) of the amended Act, the Secretary of the Interior is authorized, upon the request of any Indian tribe ... to contract with or make a grant or grants to any tribal organization for, among other things, the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources.

And under Section 103(b), the Secretary of Health and Human Services, may, in accord with regulations adopted pursuant to Section 107 of the Act, make grants to any Indian tribe or tribal organization for the development, construction, ... or maintenance of adequate facilities ... . (Emphasis added.)

P.L. 93-638 had previously provided that contacts with tribal organizations accord with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts could be negotiated without advertising and need not conform with the bonding requirements of the Act of August 24, 1935 (49 Stat. 793), as amended. In 1984, the appropriate Secretary was given authority

to waive any provisions of such contracting laws or regulations determined inappropriate for the purpose of the contract involved or inconsistent with the provisions of the Self-Determination Act.

In the 1988 amendments, the Committees in part were responding to complaints that inappropriate application of federal procurement laws and acquisition regulations to self-determination contracts had resulted in excessive paperwork and unduly burdensome reporting requirements. (S.Rep. No. 100-274, p. 7.) As a result, a further provision was added at Section 105(a) that federal procurement laws and the system of federal acquisition requirements, contained in Title 41 and Title 48 of the Code of Federal Regulations, not apply to Indian self-determination contracts. (S.Rep. No. 100-274, p. 29.)

The House adopted the 1988 amendments first (October 27, 1987), including total exemption from federal procurement laws and FAR regulations. The Senate followed on May 27, 1988, also adopting a total exemption of self-determination contracts, including construction contracts, from federal procurement laws and FAR regulations.

But, on September 9, 1988, the House concurred in the Senate amendment, with an amendment of its own. One small part of this amendment included, for the first time, Administration-proposed language which, without a word of floor explanation,



modified the exemption which both houses had previously passed, and added it to Section 105(a) of the Act.

The exemption, as amended, read:

"Provided further, that, except for constructions contracts (or sub-contracts in such cases where the tribal contractor has sub-contracted the activity), the office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts."

By the same process, and again without a word of explanation, the language previously adopted by both Houses defining a self-determination contract in Section 4(j) was amended to read:

"Provided, that except as provided [sic] the last provision in section 105(a) of this Act, no contract entered into pursuant to this Act shall be construed to be a procurement contract."

Even as amended, however, the last provision of section 105(a) makes no provision for treating any 638 contract as a procurement contract.

One week later, on September 15, 1988, the Senate concurred in the House amendment to the Senate amendment, again without explanation to account for this particular change, and this version of the amendments became law.

When the Construction Workgroup was established, to help negotiate regulations for the newly amended P.L. 93-638 (now, technically, P.L. 100-472), debate quickly focused on the meaning of the language "except for construction contracts (or sub-contracts in such cases where the tribal contractor has sub-contracted the activity)."

Since this language merely creates an exception to an exemption, and since there is nothing in the legislative record to explain it, the issue is how much of an exception to the exemption from FARs and federal procurement laws was intended. This issue is still mostly unresolved.

The tribal representatives to the Construction Workgroup were virtually unanimous in insisting that the new language did nothing more than deny the blanket exemption from FARs (which applied to non-construction contracts) to certain construction contracts. It continued to permit the Secretary to waive some or all FARs for the purpose of regulations or on an individual basis if they were inappropriate or inconsistent with the purposes of the Act.

Through the Nashville and Albuquerque regulation drafting sessions the Construction Workgroup resolved several construction-related issues which were not FAR-related, while a subgroup of the Construction Workgroup discussed the FARs.

At the conclusion of the Albuquerque Workshop, on March 24, 1989, the Construction Workshop had reduced to eleven the number of special construction-related provisions it believed should be written as regulations for 638 construction contracts. With these exceptions, the draft regulations developed by the other regulation-writing groups were thought sufficient. The Albuquerque Workshop adopted the recommendations of the Construction Workgroup.

As to the eleven draft regulations, federal representatives noted some disagreement with five of them. These disagreements varied widely in relative importance.

These are:

(1) federal insistence on including in the regulations a warning that any modification of an existing self-determination contract that would create new or additional space with BIA, IHS or Medicare/Medicaid reimbursable funds requires specific prior approval of the Secretary;

(2) spelling out by program specific mandatory reporting requirements in addition to the general reporting requirements already set out in the general draft regulations;

(3) mandatory withdrawal of "savings" or unexpended contract funds upon the completion of construction, for reprogramming, rather than leaving the funds with the contracting tribe for purposes not inconsistent with the Act;

(4) mandatory imposition on Indian tribes of all regulations developed under the Brooks Act and currently applicable to A/E contractors. The tribal representatives offered a substitute regulation which would fully comply with the language and intent of the Brooks Act;<sup>1/</sup> and

(5) incorporating by reference in the 638 regulations FAR references, rather than spelling out the regulations themselves. The tribal representatives unanimously believe that all applicable regulations should be clear, as succinct as possible, and appear in a single place in the Code of Federal Regulations, for easy reference.

The Workgroup decided that separate appendices to the construction regulations should set out (or list) any applicable FARs or procurement regulations to be mandated in 638 construction contracts, by program to which they applied.

<sup>1/</sup> See Appendix I.

The view was widely expressed, for example, that contracts under the Housing Improvement Program (HIP) could be operated without mandating any FARs as contract requirements, and the BIA Director of the HIP program was prepared to recommend this position.

The subgroup on FARs indicated that of the approximately 543 FARs in federal regulations, some 339 of these had no relevance to Indian self-determination contracts and should be waived.

Since the Albuquerque meeting, by agreement, a tribal workgroup has continued to examine the FARs.

A few FARs are presently agreed on by all to be relevant to all 638 contracts and acceptable in their present language.

Others are relevant to some, but not all programs; and even those that are useful, may need language modification to be understood.

Often they cross-reference other regulations, so that a seemingly simple regulation can bring in pages of regulations, many of them controversial or objectionable.

The federal representatives had no incentive to work at boiling down FARs, and were concerned about limitations on their authority. At the Albuquerque session, they agreed to serve as resources for tribal representatives, who undertook to keep working on the FARs.

That ongoing process has continued to operate, taking federal regulations designed to govern relations between federal procurement officers and competitive procurement bidders and apply them to self-determination construction contracts between tribes and the United States. Shortly, the tribal representatives hope to present their version of these draft regulations to the steering committee and to the IHS and BIA. As an increasing number of tribes undertake 638 construction contracts, it is important that the mistakes of overregulation and too much bureaucracy be avoided.

Given the Administration's floor amendment which has thrown unnecessary confusion into this area, and the resistance of the agencies to changes in federal procurement policies, developing acceptable regulations in this area will continue to be a struggle in which the assistance of Congress will be needed.

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## APPENDIX I

This Attachment sets out the alternative recommended requirements for 638 construction contracts involving architect or engineer procurement. (see § 271.6 of Subpart H).

The tribal representatives recommend that the regulations governing A/E services for 638 construction contracts read, as follows:

In compliance with the Brooks Act, Indian tribes and tribal organizations contracting to provide architectural and engineering services shall publicly announce all requirements for A/E services, and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices.

The federal representatives recommend the regulation read, as follows:

Indian tribes and tribal organizations contracting to provide A/E services shall comply with the Brooks Act, P.L. 92-582. (FAR 36.6). Unless waived by the Secretary, contracts for A/E and construction services for projects shall contain the applicable FAR's listed in Appendix A for the respective agency and construction program.

The full text of the Brooks Act, P.L. 92-582, is attached. It consists of four sections. Sec. 901 defines three terms, "firm", "agency head", and "architectural and engineering services". Sec. 902 declares a policy of the federal government "to publicly announce all requirements for A/E services, and to negotiate contracts for A/E services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

It is at least arguable that this policy may not apply to Indian tribes or tribal organizations at all, since the language of the Brooks Act does not cover the situation of a tribal 638 contract to construct a federally owned facility to serve the Tribe. The question is whether the federal government has a need for A/E service or whether the Tribe does. Moreover, this section imposes no legal requirements. Even the policy it announces merely requires a public announcement and negotiations to attain certain ends. Moreover, even if the federal policy does apply to tribes or tribal organizations requiring A/E services under a 638 contract with the federal government, the language the tribal

638 contract with the federal government, the language the tribal representatives have suggested would require 638 contractors hiring architects to be in exact compliance with the announced federal policy.

Sec. 903 requires the "agency head" [clearly defined in Sec. 901 as the Secretary, Administrator, or head of a department, agency or bureau of the Federal Government [emphasis supplied] -- not a tribe or tribal organization, in the procurement of A/E services, to "encourage" [not "require"] A/E firms to submit certain data. It requires the same "agency head" to evaluate that data, plus any new data, and conduct discussions with at least three A/E firms, and then to select, based upon his published criteria, at least three firms in order of preference.

It gives the "agency head" no authority to impose this requirement on Indian tribes or tribal organizations, in or out of a 638 construction contract.

Sec. 904.(a) requires the agency head to negotiate a contract with the highest qualified A/E firm at prices which are fair and reasonable to the Government.

The tribal provision above would require the same of a tribe or tribal organization.

Sec. 904 (a) requires the agency head to take certain factors into account in deciding what is fair and reasonable compensation.

Nothing in the Brooks Act imposes this requirement on tribes or tribal organizations or authorizes the Secretary to impose this requirement on tribes or tribal organizations. Nevertheless, it would not be unreasonable for the Secretary to negotiate with tribes or tribal organizations to include such factors in their 638 contracts. Even without the tribal representatives' suggested regulation, the Secretary's authority to negotiate contracts would permit him to do so. But that is different from requiring tribes to do so by regulation.

Sec. 904(b) and (c) merely further elaborate the selection process to be followed by the "agency head". Here, however, the language of the Brooks Act is advisory, telling the agency head what he "should" do, until he is finally mandated to reach agreement. None of this language applies to anyone who does not meet the definition of "agency head", nor is there any authorization in the Brooks Act (or anywhere else) to impose this process on Indian tribes.



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Since Appendix A of Subpart H is not yet complete, it is impossible to determine what additional requirements the second sentence of the suggested federal representatives' recommendation might impose in any given case. However, if this process works as we envision it, the additional requirements will be clear, understandable, and agreed to by tribal representatives.

Hence, this analysis confines itself to the first sentence, which is sufficient to illustrate the point. The language suggested by the feds seems innocuous enough, requiring compliance with the Brooks Act. In the analysis above, we demonstrate that the language suggested by the tribal reps does comply with the Brooks Act, to the exact extent that Act is applicable to Indian tribes.

But suppose the analysis were not available; and the only available guidance was the feds' suggested language, substituted for the tribal reps' language.

To begin with, the federal proposal violates our view that all of the 638 regs should be in one place, not incorporated by reference. A prospective tribal 638 contractor not familiar with the Brooks Act gets no guidance from a requirement that he comply with the Brooks Act. Fine, but what does the Brooks Act require? The Brooks Act, (40 U.S.C. §§ 541-544; 86 Stat. 1278), is fairly simple and straightforward. (See above.)

Then there is a FAR reference: (FAR 36.6). Again, no guidance to the prospective contractor as to what is required of him. The regulation cited initially appeared in the Federal Register of September 19, 1983, at page 42362 (Title 48, C.F.R., Chap. 1, Subchapter F, Part 36 of the Federal Acquisition Regulations), which, in 1983 supposedly replaced the Federal Procurement Regulations -- or did they? -- see below.

Subpart 36.6 (which is FAR 36.6), occupies three full pages of the Federal Register (attached). As we know, it "prescribes policies and procedures applicable to the acquisition of A/E services. It consists of nine separate regulations. One of these contains five sub-regulations. Another has four sub-regulations.

Only one of these regulations makes specific reference to the Brooks Act. (§36.601-Policy). It states: "The Government shall publicly announce

all requirements for A/E services, and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices. [citing the Brooks Act, by citation, not name.] Sources for A/E services shall be selected in accordance with the procedures in this subpart, rather than the formal advertising or source selection procedures in Parts 14 or 15 of this regulation."

Our hypothetical prospective contractor now, at last, has some guidance about what is expected of him. But what are the "procedures in this subpart"? Well, they include six different selection criteria. They also require an agency acquiring A/E services to provide for one or more permanent or ad hoc A/E evaluation boards composed of members with experience in architecture, engineering, construction and [not "or"] government. They require maintenance of data on architecture firms.

They provide numerous references to "agencies" and "contracting officers" which, if these references apply at all, apply only by analogy. But regulations can't apply by analogy. They have to be rewritten to cover 638 construction contracts, if needed. On the other hand, if some parts are inapplicable, who decides what is applicable from the three Federal Register pages, and when? Unless the actual regulation, not the numerical reference is used, the Tribe may have one set of requirements in mind and the "Secretary" or the architect may have quite another. In which case, they may not have the "meeting of the minds" which a contract requires.

Many of the words used in Subpart 36.6 are terms to which special meanings are attributed in the 20 definitions set out in Part 2 of the FAR regulations. But how would you know that, if you only looked at FAR 36.6? Then again, maybe its best not to know how these words and phrases are defined, because they lose their special meaning "when they are used in a context which clearly requires a different meaning." Now, who decides whether the use of a word in a particular sentence has its regular meaning or a different meaning, especially if the only thing in the 638 regulations is a FAR number?

"Contract", for example, means, in part, "a mutually binding legal relationship obligating the seller to furnish supplies or services and the buyer to pay for them." How does that play against the 638 provision giving a tribe the unilateral right to retrocede? Or the federal government's right to terminate unilaterally a contract for its own convenience?