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[Report No. 108-413]

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

IN THE SENATE OF THE UNITED STATES

OCTOBER 3, 2003

Mr. CAMPBELL (for himself and Mr. INOUE) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

NOVEMBER 16, 2004

Reported by Mr. CAMPBELL, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Department of the In-
5 terior Tribal Self-Governance Act of ~~2003~~ 2004”.

1 **SEC. 2. AMENDMENT.**

2 The Indian Self-Determination and Education Assist-
 3 ance Act is amended by striking title IV (25 U.S.C. 458aa
 4 et seq.) and inserting the following:

5 **“TITLE IV—TRIBAL SELF-**
 6 **GOVERNANCE**

7 **“SEC. 401. DEFINITIONS.**

8 “In this title:

9 “(1) COMPACT.—The term ‘compact’ means a
 10 compact under section 404.

11 “(2) CONSTRUCTION PROGRAM.—The term
 12 ‘construction program’ means a tribal undertaking
 13 to complete any or all included programs relating to
 14 the administration, planning, environmental deter-
 15 mination, design, construction, repair, improvement,
 16 or expansion of roads, bridges, buildings, structures,
 17 systems, or other facilities for purposes of housing,
 18 law enforcement, detention, sanitation, water supply,
 19 education, administration, community health, irriga-
 20 tion, agriculture, conservation, flood control, trans-
 21 portation, or port facilities or for other tribal pur-
 22 poses.

23 “(3) CONSTRUCTION PROJECT.—The term ‘con-
 24 struction project’ means a tribal undertaking that
 25 constructs 1 or more roads, bridges, buildings, struc-
 26 tures, systems, or other facilities for purposes of

1 housing, law enforcement, detention, sanitation,
2 water supply, education, administration, community
3 health, irrigation, agriculture, conservation, flood
4 control, transportation, or port facilities or for other
5 tribal purposes.

6 “(4) DEPARTMENT.—The term ‘Department’
7 means the Department of the Interior.

8 “(5) FUNDING AGREEMENT.—The term ‘fund-
9 ing agreement’ means a funding agreement under
10 section 405(b).

11 “(6) GROSS MISMANAGEMENT.—The term
12 ‘gross mismanagement’ means a significant viola-
13 tion, shown by clear and convincing evidence, of a
14 compact, funding agreement, or statutory or regu-
15 latory requirement applicable to Federal funds
16 transferred to an Indian tribe by a compact or fund-
17 ing agreement that results in a significant reduction
18 of funds being made available for the included pro-
19 grams assumed by an Indian tribe.

20 “(7) INCLUDED PROGRAM.—The term ‘included
21 program’ means a program that is eligible for inclu-
22 sion under a funding agreement (including any por-
23 tion of such a program and any function, service, or
24 activity performed under such a program).

1 “(8) INDIAN TRIBE.—The term ‘Indian tribe’,
2 in a case in which an Indian tribe authorizes an-
3 other Indian tribe, an inter-tribal consortium, or a
4 tribal organization to plan for or carry out an in-
5 cluded program on its behalf in accordance with sec-
6 tion 403(a)(3), includes the other authorized Indian
7 tribe, inter-tribal consortium, or tribal organization.

8 “(9) INHERENT FEDERAL FUNCTION.—The
9 term ‘inherent Federal function’ means a Federal
10 function that cannot legally be delegated to an In-
11 dian tribe.

12 “(10) INTER-TRIBAL CONSORTIUM.—

13 “(A) IN GENERAL.—The term ‘inter-tribal
14 consortium’ means a coalition of 2 or more sep-
15 arate Indian tribes that join together for the
16 purpose of participating in self-governance.

17 “(B) INCLUSION.—The term ‘inter-tribal
18 organization’ includes a tribal organization.

19 “(11) SECRETARY.—The term ‘Secretary’
20 means the Secretary of the Interior.

21 “(12) SELF-GOVERNANCE.—The term ‘self-gov-
22 ernance’ means the program of self-governance es-
23 tablished under section 402.

24 “(13) TRIBAL SHARE.—The term ‘tribal share’
25 means an Indian tribe’s portion of all funds and re-

1 sources that support secretarial included programs
2 that are not required by the Secretary for the per-
3 formance of inherent Federal functions.

4 **“SEC. 402. ESTABLISHMENT.**

5 “The Secretary shall carry out a program within the
6 Department to be known as the ‘Tribal Self-Governance
7 Program’.

8 **“SEC. 403. SELECTION OF PARTICIPATING INDIAN TRIBES.**

9 “(a) IN GENERAL.—

10 “(1) CONTINUING PARTICIPATION.—An Indian
11 tribe that was participating in the Tribal Self-Gov-
12 ernance Demonstration Project at the Department
13 under title III on October 25, 1994, may elect to
14 participate in self-governance under this title.

15 “(2) ADDITIONAL PARTICIPANTS.—

16 “(A) IN GENERAL.—In addition to Indian
17 tribes participating in self-governance under
18 paragraph (1), an Indian tribe that meets the
19 eligibility criteria specified in subsection (b)
20 shall be entitled to participate in self-govern-
21 ance.

22 “(B) NO LIMITATION.—The Secretary
23 shall not limit the number of additional Indian
24 tribes to be selected each year from among In-
25 dian tribes that are eligible under subsection (b).

1 “(3) OTHER AUTHORIZED INDIAN TRIBE,
 2 INTER-TRIBAL CONSORTIUM, OR TRIBAL GOVERN-
 3 MENT.—If an Indian tribe authorizes another Indian
 4 tribe, an inter-tribal consortium, or a tribal organiza-
 5 tion to plan for or carry out an included program on
 6 its behalf under this title, the authorized Indian tribe,
 7 inter-tribal consortium, or tribal organization shall
 8 have the rights and responsibilities of the authorizing
 9 Indian tribe (except as otherwise provided in the au-
 10 thorizing resolution).

11 “(4) JOINT PARTICIPATION.—Two or more In-
 12 dian tribes that are not otherwise eligible under sub-
 13 section (b) may be treated as a single Indian tribe
 14 for the purpose of participating in self-governance as
 15 a consortium if—

16 “(A) if each Indian tribe so requests; and

17 “(B) the consortium itself is eligible under
 18 subsection (b).

19 “(5) TRIBAL WITHDRAWAL FROM A CONSOR-
 20 TIUM.—

21 “(A) IN GENERAL.—An Indian tribe that
 22 withdraws from participation in an inter-tribal
 23 consortium or tribal organization, in whole or in
 24 part, shall be entitled to participate in self-gov-

1 ernance if the Indian tribe is eligible under sub-
2 section (b).

3 “(B) EFFECT OF WITHDRAWAL.—If an In-
4 dian tribe withdraws from participation in an
5 inter-tribal consortium or tribal organization,
6 the Indian tribe shall be entitled to its tribal
7 share of funds and resources supporting the in-
8 cluded programs that the Indian tribe will be
9 carrying out under the compact and funding
10 agreement of the Indian tribe.

11 “(C) PARTICIPATION IN SELF-GOVERN-
12 ANCE.—The withdrawal of an Indian tribe from
13 an inter-tribal consortium or tribal organization
14 shall not affect the eligibility of the inter-tribal
15 consortium or tribal organization to participate
16 in self-governance on behalf of 1 or more other
17 Indian tribes.

18 “(D) WITHDRAWAL PROCESS.—

19 “(i) IN GENERAL.—An Indian tribe
20 may fully or partially withdraw from a par-
21 ticipating inter-tribal consortium or tribal
22 organization its tribal share of any in-
23 cluded program that is included in a com-
24 pact or funding agreement.

25 “(ii) EFFECTIVE DATE.—

1 “(I) IN GENERAL.—A withdrawal
2 under clause (i) shall become effective
3 on the date specified in the resolution
4 that authorizes transfer to the partici-
5 pating tribal organization or inter-
6 tribal consortium.

7 “(II) NO SPECIFIED DATE.—In
8 the absence of a date specified in the
9 resolution, the withdrawal shall be-
10 come effective on—

11 “(aa) the earlier of—

12 “(AA) 1 year after the
13 date of submission of the re-
14 quest; or

15 “(BB) the date on
16 which the funding agree-
17 ment expires; or

18 “(bb) such date as may be
19 agreed on by the Secretary, the
20 withdrawing Indian tribe, and
21 the tribal organization or inter-
22 tribal consortium that signed the
23 compact or funding agreement on
24 behalf of the withdrawing Indian

1 tribe, inter-tribal consortium, or
2 tribal organization.

3 “(E) DISTRIBUTION OF FUNDS.—If an In-
4 dian tribe or tribal organization eligible to enter
5 into a self-determination contract under title I
6 or a compact or funding agreement under this
7 title fully or partially withdraws from a partici-
8 pating inter-tribal consortium or tribal organi-
9 zation, the withdrawing Indian tribe—

10 “(i) may elect to enter into a self-de-
11 termination contract or compact, in which
12 case—

13 “(I) the withdrawing Indian tribe
14 or tribal organization shall be entitled
15 to its tribal share of funds and re-
16 sources supporting the included pro-
17 grams that the Indian tribe will be
18 carrying out under its own self-deter-
19 mination contract or compact and
20 funding agreement (calculated on the
21 same basis as the funds were initially
22 allocated to the funding agreement of
23 the inter-tribal consortium or tribal
24 organization); and

1 “(II) the funds referred to in
2 subclause (I) shall be withdrawn by
3 the Secretary from the funding agree-
4 ment of the inter-tribal consortium or
5 tribal organization and transferred to
6 the withdrawing Indian tribe, on the
7 condition that sections 102 and
8 105(i), as appropriate, shall apply to
9 the withdrawing Indian tribe; or

10 “(ii) may elect not to enter into a self-
11 determination contract or compact, in
12 which case all funds not obligated by the
13 inter-tribal consortium associated with the
14 withdrawing Indian tribe’s returned in-
15 cluded programs, less closeout costs, shall
16 be returned by the inter-tribal consortium
17 to the Secretary for operation of the in-
18 cluded programs included in the with-
19 drawal.

20 “(F) RETURN TO MATURE CONTRACT STA-
21 TUS.—If an Indian tribe elects to operate all or
22 some included programs carried out under a
23 compact or funding agreement under this title
24 through a self-determination contract under
25 title I, at the option of the Indian tribe, the re-

1 sulting self-determination contract shall be a
2 mature self-determination contract.

3 “(b) ELIGIBILITY.—To be eligible to participate in
4 self-governance, an Indian tribe shall—

5 “(1) complete the planning phase described in
6 subsection (c);

7 “(2) request participation in self-governance by
8 resolution or other official action by the tribal gov-
9 erning body; and

10 “(3) demonstrate, for the 3 fiscal years pre-
11 ceding the date on which the Indian tribe requests
12 participation, financial stability and financial man-
13 agement capability as evidenced by the Indian tribe’s
14 having no uncorrected significant and material audit
15 exceptions in the required annual audit of its self-
16 determination or self-governance agreements with
17 any Federal agency.

18 “(c) PLANNING PHASE.—

19 “(1) IN GENERAL.—An Indian tribe seeking to
20 participate in self-governance shall complete a plan-
21 ning phase in accordance with this subsection.

22 “(2) ACTIVITIES.—The planning phase—

23 “(A) shall be conducted to the satisfaction
24 of the Indian tribe; and

25 “(B) shall include—

1 “(i) legal and budgetary research; and

2 “(ii) internal tribal government plan-
3 ning and organizational preparation.

4 “(d) GRANTS.—

5 “(1) IN GENERAL.—Subject to the availability
6 of appropriations, an Indian tribe that meets the re-
7 quirements of paragraphs (2) and (3) of subsection
8 (b) shall be eligible for grants—

9 “(A) to plan for participation in self-gov-
10 ernance; and

11 “(B) to negotiate the terms of partici-
12 tion by the Indian tribe or tribal organization
13 in self-governance, as set forth in a compact
14 and a funding agreement.

15 “(2) RECEIPT OF GRANT NOT REQUIRED.—Re-
16 ceipt of a grant under paragraph (1) shall not be a
17 requirement of participation in self-governance.

18 **“SEC. 404. COMPACTS.**

19 “(a) IN GENERAL.—The Secretary shall negotiate
20 and enter into a written compact with an Indian tribe par-
21 ticipating in self-governance in a manner that is consistent
22 with the trust responsibility of the Federal Government,
23 treaty obligations, and the government-to-government re-
24 lationship between Indian tribes and the United States.

1 “(b) CONTENTS.—A compact under subsection (a)
2 shall—

3 “(1) specify the general terms of the govern-
4 ment-to-government relationship between the Indian
5 tribe and the Secretary; and

6 “(2) include such terms as the parties intend
7 shall control year after year.

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

10 “(d) EFFECTIVE DATE.—The effective date of a com-
11 pact under subsection (a) shall be—

12 “(1) the date of the execution of the compact
13 by the Indian tribe; or

14 “(2) another date agreed to by the parties.

15 “(e) DURATION.—A compact under subsection (a)
16 shall remain in effect for so long as permitted by Federal
17 law or until terminated by written agreement, retroces-
18 sion, or reassumption.

19 “(f) EXISTING COMPACTS.—An Indian tribe partici-
20 pating in self-governance under this title, as in effect on
21 the date of enactment of the Department of the Interior
22 Tribal Self-Governance Act of ~~2003~~ 2004, shall have the
23 option at any time after that date—

24 “(1) to retain its negotiated compact (in whole
25 or in part) to the extent that the provisions of the

1 compact are not directly contrary to any express
2 provision of this title; or

3 “(2) to negotiate a new compact in a manner
4 consistent with this title.

5 **“SEC. 405. FUNDING AGREEMENTS.**

6 “(a) IN GENERAL.—The Secretary shall negotiate
7 and enter into a written funding agreement with the gov-
8 erning body of an Indian tribe in a manner that is con-
9 sistent with the trust responsibility of the Federal Govern-
10 ment, treaty obligations, and the government-to-govern-
11 ment relationship between Indian tribes and the United
12 States.

13 “(b) INCLUDED PROGRAMS.—

14 “(1) BUREAU OF INDIAN AFFAIRS AND OFFICE
15 OF SPECIAL TRUSTEE.—

16 “(A) IN GENERAL.—A funding agreement
17 shall, as determined by the Indian tribe, au-
18 thorize the Indian tribe to plan, conduct, con-
19 solidate, administer, and receive full tribal
20 share funding for all programs carried out by
21 the Bureau of Indian Affairs and the Office of
22 Special Trustee, without regard to the agency
23 or office within which the program is performed
24 (including funding for agency, area, and central

1 office functions in accordance with section
2 409(c)), that—

3 “(i) are provided for in the Act of
4 April 16, 1934 (25 U.S.C. 452 et seq.);

5 “(ii) the Secretary administers for the
6 benefit of Indians under the Act of Novem-
7 ber 2, 1921 (25 U.S.C. 13), or any subse-
8 quent Act;

9 “(iii) the Secretary administers for
10 the benefit of Indians with appropriations
11 made to agencies other than the Depart-
12 ment of the Interior; or

13 “(iv) are provided for the benefit of
14 Indians because of their status as Indians.

15 “(B) INCLUSIONS.—Programs described in
16 subparagraph (A) shall include all programs
17 with respect to which Indian tribes or Indians
18 are primary or significant beneficiaries.

19 “(2) OTHER AGENCIES.—A funding agreement
20 under subsection (a) shall, as determined by the In-
21 dian tribe, authorize the Indian tribe to plan, con-
22 duct, consolidate, administer, and receive full tribal
23 share funding for all programs carried out by the
24 Secretary outside the Bureau of Indian Affairs,
25 without regard to the agency or office within which

1 the program is performed, including funding for
2 agency, area, and central office functions in accord-
3 ance with subsection 409(c), to the extent that the
4 included programs are within the scope of paragraph
5 (1).

6 “(3) DISCRETIONARY PROGRAMS.—A funding
7 agreement under subsection (a) may, in accordance
8 with such additional terms as the parties consider to
9 be appropriate, include programs administered by the
10 Secretary, in addition to programs described in para-
11 graphs (1) and (2), that are of special geographical,
12 historical, or cultural significance to the Indian tribe.

13 “(4) COMPETITIVE BIDDING.—Nothing in this
14 section—

15 “(A) supersedes any express statutory re-
16 quirement for competitive bidding; or

17 “(B) prohibits the inclusion in a funding
18 agreement of a program in which non-Indians
19 have an incidental or legally identifiable inter-
20 est.

21 “(5) EXCLUDED FUNDING.—A funding agree-
22 ment shall not authorize an Indian tribe to plan,
23 conduct, administer, or receive tribal share funding
24 under any program that—

1 “(A) is provided under the Tribally Con-
2 trolled Community College Assistance Act of
3 1978 (25 U.S.C. 1801 et seq.);

4 “(B) is provided for elementary and sec-
5 ondary schools under the formula developed
6 under section 1128 of the Education Amend-
7 ments of 1978 (25 U.S.C. 2008); and

8 “(C) is provided for the Flathead Agency
9 Irrigation Division or the Flathead Agency
10 Power Division (except that nothing in this sec-
11 tion affects the contract authority of the Flat-
12 head Agency Irrigation Division or the Flathead
13 Agency Power Division under section 102).

14 “(6) SERVICES, FUNCTIONS, AND RESPONSIBIL-
15 ITIES.—A funding agreement shall specify—

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

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

20 “(C) the responsibilities of the Indian tribe
21 and the Secretary under the funding agreement.

22 “(7) BASE BUDGET.—A funding agreement
23 shall, at the option of the Indian tribe, provide for
24 a stable base budget specifying the recurring funds
25 (including funds available under section 106(a)) to

1 be transferred to the Indian tribe, for such period as
2 the Indian tribe specifies in the funding agreement,
3 subject to annual adjustment only to reflect changes
4 in congressional appropriations.

5 “(8) NO WAIVER OF TRUST RESPONSIBILITY.—
6 A funding agreement shall prohibit the Secretary
7 from waiving, modifying, or diminishing in any way
8 the trust responsibility of the United States with re-
9 spect to Indian tribes and individual Indians that ex-
10 ists under treaties, Executive orders, court decisions,
11 and other laws.

12 “(c) AMENDMENT.—The Secretary shall not revise,
13 amend, or require additional terms in a new or subsequent
14 funding agreement without the consent of the Indian tribe.

15 “(d) EFFECTIVE DATE.—A funding agreement shall
16 become effective on the date specified in the funding
17 agreement.

18 “(e) EXISTING AND SUBSEQUENT FUNDING AGREE-
19 MENTS.—

20 “(1) SUBSEQUENT FUNDING AGREEMENTS.—
21 Absent notification from an Indian tribe that is
22 withdrawing or retroceding the operation of 1 or
23 more included programs identified in a funding
24 agreement, or unless otherwise agreed to by the par-
25 ties to the funding agreement—

1 “(A) a funding agreement shall remain in
2 effect until a subsequent funding agreement is
3 executed; and

4 “(B) the term of the subsequent funding
5 agreement shall be retroactive to the end of the
6 term of the preceding funding agreement.

7 “(2) EXISTING FUNDING AGREEMENTS.—An
8 Indian tribe that was participating in self-govern-
9 ance under this title on the date of enactment of the
10 Department of the Interior Tribal Self-Governance
11 Act of ~~2003~~ 2004 shall have the option at any time
12 after that date—

13 “(A) to retain its existing funding agree-
14 ment (in whole or in part) to the extent that
15 the provisions of that funding agreement are
16 not directly contrary to any express provision of
17 this title; or

18 “(B) to negotiate a new funding agreement
19 in a manner consistent with this title.

20 “(3) MULTIYEAR FUNDING AGREEMENTS.—An
21 Indian tribe may, at the discretion of the Indian
22 tribe, negotiate with the Secretary for a funding
23 agreement with a term that exceeds 1 year.

1 **“SEC. 406. GENERAL PROVISIONS.**

2 “(a) **APPLICABILITY.**—An Indian tribe may include
3 in any compact or funding agreement provisions that re-
4 flect the requirements of this title.

5 “(b) **CONFLICTS OF INTEREST.**—An Indian tribe
6 participating in self-governance shall ensure that internal
7 measures are in place to address, pursuant to tribal law
8 and procedures, conflicts of interest in the administration
9 of included programs.

10 “(c) **AUDITS.**—

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

14 “(2) **COST PRINCIPLES.**—An Indian tribe shall
15 apply cost principles under the applicable Office of
16 Management and Budget circular, except as modi-
17 fied by—

18 “(A) section 106 of this Act or any other
19 provision of law; or

20 “(B) any exemptions to applicable Office
21 of Management and Budget circulars granted
22 by the Office of Management and Budget.

23 “(3) **FEDERAL CLAIMS.**—Any claim by the Fed-
24 eral Government against an Indian tribe relating to
25 funds received under a funding agreement based on

1 an audit under this subsection shall be subject to
2 section 106(f).

3 “(d) REDESIGN AND CONSOLIDATION.—An Indian
4 tribe may redesign or consolidate included programs or re-
5 allocate funds for included programs in any manner that
6 the Indian tribe determines to be in the best interest of
7 the Indian community being served, so long as the rede-
8 sign or consolidation does not have the effect of denying
9 eligibility for services to population groups otherwise eligi-
10 ble to be served under applicable Federal law.

11 “(e) RETROCESSION.—

12 “(1) IN GENERAL.—An Indian tribe may fully
13 or partially retrocede to the Secretary any included
14 program under a compact or funding agreement.

15 “(2) EFFECTIVE DATE.—

16 “(A) AGREEMENT.—Unless the Indian
17 tribe rescinds a request for retrocession, the
18 retrocession shall become effective on the date
19 specified by the parties in the compact or fund-
20 ing agreement.

21 “(B) NO AGREEMENT.—In the absence of
22 such a specification, the retrocession shall be-
23 come effective on—

24 “(i) the earlier of—

1 “(I) the date that is 1 year after
2 the date of submission of the request;

3 or

4 “(II) the date on which the fund-
5 ing agreement expires; or

6 “(ii) such date as may be agreed on
7 by the Secretary and the Indian tribe.

8 “(f) NONDUPLICATION.—A funding agreement shall
9 provide that, for the period for which, and to the extent
10 to which, funding is provided to an Indian tribe under this
11 title, the Indian tribe—

12 “(1) shall not be entitled to enter into a con-
13 tract with the Secretary for funds under section 102,
14 except that the Indian tribe shall be eligible for new
15 included programs on the same basis as other Indian
16 tribes; and

17 “(2) shall be responsible for the administration
18 of included programs in accordance with the com-
19 pact or funding agreement.

20 “(g) RECORDS.—

21 “(1) IN GENERAL.—Unless an Indian tribe
22 specifies otherwise in the compact or funding agree-
23 ment, records of an Indian tribe shall not be treated
24 as agency records for purposes of chapter 5 of title
25 5, United States Code.

1 “(2) RECORDKEEPING SYSTEM.—An Indian
2 tribe shall—

3 “(A) maintain a recordkeeping system; and

4 “(B) on 30 days’ notice, provide the Sec-
5 retary with reasonable access to the records to
6 enable the Department to meet the require-
7 ments of sections 3101 through 3106 of title
8 44, United States Code.

9 **“SEC. 407. PROVISIONS RELATING TO THE SECRETARY.**

10 “(a) TRUST EVALUATIONS.—A funding agreement
11 shall include a provision to monitor the performance of
12 trust functions by the Indian tribe through the annual
13 trust evaluation.

14 “(b) REASSUMPTION.—

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

20 “(A) imminent jeopardy to a physical trust
21 asset, natural resource, or public health and
22 safety that—

23 “(i) is caused by an act or omission of
24 the Indian tribe; and

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

3 “(B) gross mismanagement with respect to
4 funds transferred to an Indian tribe by a com-
5 pact or funding agreement, as determined by
6 the Secretary in consultation with the Inspector
7 General, as appropriate.

8 “(2) PROHIBITION.—The Secretary shall not
9 reassume operation of an included program unless—

10 “(A) the Secretary first provides written
11 notice and a hearing on the record to the In-
12 dian tribe; and

13 “(B) the Indian tribe does not take correc-
14 tive action to remedy gross mismanagement or
15 the imminent jeopardy to a physical trust asset,
16 natural resource, or public health and safety.

17 “(3) EXCEPTION.—

18 “(A) IN GENERAL.—Notwithstanding sub-
19 paragraph (2), the Secretary may, on written
20 notice to the Indian tribe, immediately re-
21 assume operation of an included program if—

22 “(i) the Secretary makes a finding of
23 both imminent and substantial jeopardy
24 and irreparable harm *imminent, substan-*
25 *tial, and irreparable harm* to a physical

1 trust asset, a natural resource, or the public
2 health and safety caused by an act or omis-
3 sion of the Indian tribe; and

4 “(ii) the ~~imminent and substantial~~
5 ~~jeopardy and irreparable harm~~ *imminent,*
6 *substantial, and irreparable harm* to the
7 physical trust asset, natural resource, or
8 public health and safety arises out of a
9 failure by the Indian tribe to carry out its
10 compact or funding agreement.

11 “(B) REASSUMPTION.—If the Secretary re-
12 assumes operation of an included program
13 under subparagraph (A), the Secretary shall
14 provide the Indian tribe with a hearing on the
15 record not later than 10 days after the date of
16 reassumption.

17 “(c) INABILITY TO AGREE ON COMPACT OR FUND-
18 ING AGREEMENT.—

19 “(1) FINAL OFFER.—If the Secretary and a
20 participating Indian tribe are unable to agree, in
21 whole or in part, on the terms of a compact or fund-
22 ing agreement (including funding levels), the Indian
23 tribe may submit a final offer to the Secretary.

24 “(2) DETERMINATION.—Not more than 45
25 days after the date of submission of a final offer, or

1 as otherwise agreed to by the Indian tribe, the Sec-
2 retary shall review and make a determination with
3 respect to the final offer.

4 “(3) NO TIMELY DETERMINATION.—If the Sec-
5 retary fails to make a determination with respect to
6 a final offer within the time specified in paragraph
7 (2), the Secretary shall be deemed to have agreed to
8 the offer.

9 “(4) REJECTION OF FINAL OFFER.—

10 “(A) IN GENERAL.—If the Secretary re-
11 jects a final offer (or 1 or more provisions or
12 funding levels in a final offer), the Secretary
13 shall—

14 “(i) provide timely written notification
15 to the Indian tribe that contains a specific
16 finding that clearly demonstrates, or that
17 is supported by a controlling legal author-
18 ity, that—

19 “(I) the amount of funds pro-
20 posed in the final offer exceeds the
21 applicable funding level to which the
22 Indian tribe is entitled under this
23 title;

1 “(II) the included program that
2 is the subject of the final offer is an
3 inherent Federal function;

4 “(III) the Indian tribe cannot
5 carry out the included program in a
6 manner that would not result in sig-
7 nificant danger or risk to the public
8 health; or

9 “(IV) the Indian tribe is not eli-
10 gible to participate in self-governance
11 under section 403(b);

12 “(ii) provide technical assistance to
13 overcome the objections stated in the noti-
14 fication required by clause (i);

15 “(iii) provide the Indian tribe a hear-
16 ing on the record with the right to engage
17 in full discovery relevant to any issue
18 raised in the matter and the opportunity
19 for appeal on the objections raised (except
20 that the Indian tribe may, in lieu of filing
21 an appeal, directly proceed to bring a civil
22 action in United States district court
23 under section 110(a)); and

24 “(iv) provide the Indian tribe the op-
25 tion of entering into the severable portions

1 of a final proposed compact or funding
2 agreement (including a lesser funding
3 amount, if any), that the Secretary did not
4 reject, subject to any additional alterations
5 necessary to conform the compact or fund-
6 ing agreement to the severed provisions.

7 “(B) EFFECT OF EXERCISING CERTAIN
8 OPTION.—If an Indian tribe exercises the op-
9 tion specified in subparagraph (A)(iv)—

10 “(i) the Indian tribe shall retain the
11 right to appeal the rejection by the Sec-
12 retary under this section; and

13 “(ii) clauses (i), (ii), and (iii) of that
14 subparagraph shall apply only to the por-
15 tion of the proposed final compact or fund-
16 ing agreement that was rejected by the
17 Secretary.

18 “(d) BURDEN OF PROOF.—In any administrative
19 hearing or appeal or civil action brought under this sec-
20 tion, the Secretary shall have the burden of demonstrating
21 by clear and convincing evidence the validity of the
22 grounds for rejecting a final offer made under subsection
23 (c) or the grounds for a reassumption under subsection
24 (b).

25 “(e) GOOD FAITH.—

1 “(1) IN GENERAL.—In the negotiation of com-
2 pacts and funding agreements, the Secretary shall at
3 all times negotiate in good faith to maximize imple-
4 mentation of the self-governance policy.

5 “(2) POLICY.—The Secretary shall carry out
6 this Act in a manner that maximizes the policy of
7 tribal self-governance.

8 “(f) SAVINGS.—To the extent that included programs
9 carried out by Indian tribes under this title reduce the
10 administrative or other responsibilities of the Secretary
11 with respect to the operation of Indian programs and re-
12 sult in savings that have not otherwise been included in
13 the amount of tribal shares and other funds determined
14 under section 409(e), the Secretary shall make such sav-
15 ings available to the Indian tribes, inter-tribal consortia,
16 or tribal organizations for the provision of additional serv-
17 ices to program beneficiaries in a manner equitable to di-
18 rectly served, contracted, and included programs.

19 “(g) TRUST RESPONSIBILITY.—The Secretary may
20 not waive, modify, or diminish in any way the trust re-
21 sponsibility of the United States with respect to Indian
22 tribes and individual Indians that exists under treaties,
23 Executive orders, other laws, or court decisions.

24 “(h) DECISIONMAKER.—A decision that constitutes
25 final agency action and relates to an appeal within the

1 Department brought under subsection (c)(4) may be
2 made—

3 “(1) by an official of the Department who holds
4 a position at a higher organizational level within the
5 Department than the level of the departmental agen-
6 cy in which the decision that is the subject of the
7 appeal was made; or

8 “(2) by an administrative law judge.

9 “(i) **RULE OF CONSTRUCTION.**—Each provision of
10 this title and each provision of a compact or funding
11 agreement shall be liberally construed for the benefit of
12 the Indian tribe participating in self-governance, and any
13 ambiguity shall be resolved in favor of the Indian tribe.

14 **“SEC. 408. CONSTRUCTION PROGRAMS AND CONSTRU-**
15 **TION PROJECTS.**

16 “(a) **IN GENERAL.**—An Indian tribe participating in
17 self-governance may carry out a construction program or
18 construction project under this title in the same manner
19 as the Indian tribe carries out other included programs
20 under this title, consistent with the provisions of all appli-
21 cable Federal laws.

22 “(b) **FEDERAL FUNCTIONS.**—An Indian tribe partici-
23 pating in self-governance may, in carrying out construc-
24 tion projects under this title, elect to assume all Federal
25 responsibilities under the National Environmental Policy

1 Act of 1969 (42 U.S.C. 4321 et seq.), the National His-
2 toric Preservation Act (16 U.S.C. 470 et seq.), and related
3 provisions of law that would apply if the Secretary were
4 to carry out a construction project, by adopting a resolu-
5 tion—

6 “(1) designating a certifying officer to rep-
7 resent the Indian tribe and to assume the status of
8 a responsible Federal official under those laws; and

9 “(2) accepting the jurisdiction of the Federal
10 courts for the purpose of enforcement of the respon-
11 sibilities of the responsible Federal official under ap-
12 plicable environmental law.

13 “(c) NEGOTIATIONS.—

14 “(1) IN GENERAL.—In accordance with all ap-
15 plicable Federal laws, a construction program or
16 construction project shall be treated in the same
17 manner and be subject to all provisions of this Act
18 as are all other tribal assumptions of included pro-
19 grams under this Act.

20 “(2) CONSTRUCTION PROJECTS.—A provision
21 shall be included in the funding agreement that, for
22 each construction project—

23 “(A) states the approximate start and
24 completion dates of the construction project,
25 which may extend for 1 or more years;

1 “(B) provides a general description of the
2 construction project;

3 “(C) states the responsibilities of the In-
4 dian tribe and the Secretary with respect to the
5 construction project;

6 “(D) describes—

7 “(i) the ways in which the Indian
8 tribe will address project-related environ-
9 mental considerations; and

10 “(ii) the standards by which the In-
11 dian tribe will accomplish the construction
12 project; and

13 “(E) the amount of funds provided for the
14 construction project.

15 “(d) CODES AND STANDARDS; TRIBAL ASSUR-
16 ANCES.—A funding agreement shall contain a certification
17 by the Indian tribe that the Indian tribe will establish and
18 enforce procedures designed to ensure that all construc-
19 tion-related included programs carried out through the
20 funding agreement adhere to building codes and other
21 codes and architectural and engineering standards (includ-
22 ing public health and safety standards) identified by the
23 Indian tribe in the funding agreement, which codes and
24 standards shall be in conformity with nationally recog-

1 nized standards for comparable projects in comparable lo-
2 cations.

3 “(e) RESPONSIBILITY FOR COMPLETION.—The In-
4 dian tribe shall assume responsibility for the successful
5 completion of a construction project in accordance with
6 the funding agreement.

7 “(f) FUNDING.—

8 “(1) IN GENERAL.—At the option of an Indian
9 tribe, full funding for a construction program or
10 construction project carried out under this title shall
11 be included in a funding agreement as an annual ad-
12 vance payment.

13 “(2) ENTITLEMENT.—Notwithstanding the an-
14 nual advance payment provisions or any other provi-
15 sion of law, an Indian tribe shall be entitled to re-
16 ceive in its initial funding agreement all funds made
17 available to the Secretary for multiyear construction
18 programs and projects carried out under this title.

19 “(3) CONTINGENCY FUNDS.—The Secretary
20 shall include associated project contingency funds in
21 an advance payment described in paragraph (1), and
22 the Indian tribe shall be responsible for the manage-
23 ment of the contingency funds included in the fund-
24 ing agreement.

25 “(4) REALLOCATION OF SAVINGS.—

1 “(A) IN GENERAL.—Notwithstanding any
2 other provision of an annual Act of appropria-
3 tion or other Federal law, an Indian tribe may
4 reallocate any financial savings realized by the
5 Indian tribe arising from efficiencies in the de-
6 sign, construction, or any other aspect of a con-
7 struction program or construction project.

8 “(B) PURPOSES.—A reallocation under
9 subparagraph (A) shall be for construction-re-
10 lated activity purposes generally similar to
11 those for which the funds were appropriated
12 and distributed to the Indian tribe under the
13 funding agreement.

14 “(g) APPROVAL.—

15 “(1) IN GENERAL.—If the planning and design
16 documents for a construction project are prepared
17 by an Indian tribe in a manner that is consistent
18 with the certification given by the Indian tribe as re-
19 quired under subsection (d), approval by the Sec-
20 retary of a funding agreement providing for the as-
21 sumption of the construction project shall be deemed
22 to be an approval by the Secretary of the construc-
23 tion project planning and design documents.

1 “(2) REPORTS.—The Indian tribe shall provide
2 the Secretary with construction project progress and
3 financial reports not less than semiannually.

4 “(3) INSPECTIONS.—The Secretary may con-
5 duct onsite project inspections at a construction
6 project semiannually or on an alternate schedule
7 agreed to by the Secretary and the Indian tribe.

8 “(h) WAGES.—

9 “(1) IN GENERAL.—All laborers and mechanics
10 employed by a contractor or subcontractor in the
11 construction, alteration, or repair (including painting
12 and decorating) of a building or other facility in con-
13 nection with a construction project funded by the
14 United States under this title shall be paid wages at
15 not less than the amounts of wages prevailing on
16 similar construction in the locality as determined by
17 the Secretary of Labor in accordance with sub-
18 chapter IV of chapter 31 of title 40, United States
19 Code.

20 “(2) AUTHORITY.—With respect to construc-
21 tion, alteration, or repair work to which that sub-
22 chapter is applicable under this subsection, the Sec-
23 retary of Labor shall have the authority and func-
24 tions specified in the Reorganization Plan numbered
25 14, of 1950.

1 “(3) APPLICABILITY OF SUBSECTION.—Not-
2 withstanding any other provision of law, this sub-
3 section does not apply to any portion of a construc-
4 tion project carried out under this Act—

5 “(A) that is funded from a non-Federal
6 source, regardless of whether the non-Federal
7 funds are included with Federal funds for ad-
8 ministrative convenience; or

9 “(B) that is performed by a laborer or me-
10 chanic employed directly by an Indian tribe or
11 tribal organization.

12 “(4) APPLICABILITY OF TRIBAL LAW.—This
13 subsection does not apply to a compact or funding
14 agreement if the compact, self-determination con-
15 tract, or funding agreement is otherwise covered by
16 a law (including a regulation) adopted by an Indian
17 tribe that requires the payment of not less than pre-
18 vailing wages, as determined by the Indian tribe.

19 “(i) APPLICABILITY OF OTHER LAW.—Unless other-
20 wise agreed to by the Indian tribe, no provision of the Of-
21 fice of Federal Procurement Policy Act (41 U.S.C. 401
22 et seq.), the Federal Acquisition Regulation, or any other
23 law or regulation pertaining to Federal procurement (in-
24 cluding Executive orders) shall apply to any construction
25 program or project conducted under this title.

1 **“SEC. 409. PAYMENT.**

2 “(a) IN GENERAL.—At the request of the governing
3 body of the Indian tribe and under the terms of a funding
4 agreement, the Secretary shall provide funding to the In-
5 dian tribe to carry out the funding agreement.

6 “(b) ADVANCE ANNUAL PAYMENT.—At the option of
7 the Indian tribe, a funding agreement shall provide for
8 an advance annual payment to an Indian tribe.

9 “(c) AMOUNT.—Subject to subsection (e) and sec-
10 tions 405 and 406 of this title, the Secretary shall provide
11 funds to the Indian tribe under a funding agreement for
12 included programs in the amount that is equal to the
13 amount that the Indian tribe would have been entitled to
14 receive under contracts and grants under this Act (includ-
15 ing amounts for direct program and contract support costs
16 and, in addition, any funds that are specifically or func-
17 tionally related to the provision by the Secretary of serv-
18 ices and benefits to the Indian tribe or its members) with-
19 out regard to the organization level within the Federal
20 agency in which the included programs are carried out.

21 “(d) TIMING.—Unless the funding agreement pro-
22 vides otherwise, the transfer of funds shall be made not
23 later than 10 days after the apportionment of funds by
24 the Office of Management and Budget to the Department.

25 “(e) AVAILABILITY.—Funds for trust services to indi-
26 vidual Indians shall be available under a funding agree-

1 ment only to the extent that the same services that would
2 have been provided by the Secretary are provided to indi-
3 vidual Indians by the Indian tribe.

4 “(f) MULTIYEAR FUNDING.—A funding agreement
5 may provide for multiyear funding.

6 “(g) LIMITATION ON AUTHORITY OF THE SEC-
7 RETARY.—The Secretary shall not—

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

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

14 “(3) reduce the amount of funds required under
15 this Act—

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

19 “(B) in subsequent years, except as nec-
20 essary as a result of—

21 “(i) a reduction in appropriations
22 from the previous fiscal year for the pro-
23 gram to be included in a compact or fund-
24 ing agreement;

1 “(ii) a congressional directive in legis-
2 lation or an accompanying report;

3 “(iii) a tribal authorization;

4 “(iv) a change in the amount of pass-
5 through funds subject to the terms of the
6 funding agreement; or

7 “(v) completion of an activity under
8 an included program for which the funds
9 were provided;

10 “(C) to pay for Federal functions, includ-
11 ing—

12 “(i) Federal pay costs;

13 “(ii) Federal employee retirement ben-
14 efits;

15 “(iii) automated data processing;

16 “(iv) technical assistance; and

17 “(v) monitoring of activities under
18 this Act; or

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

22 “(h) FEDERAL RESOURCES.—If an Indian tribe
23 elects to carry out a compact or funding agreement with
24 the use of Federal personnel, Federal supplies (including
25 supplies available from Federal warehouse facilities), Fed-

1 eral supply sources (including lodging, airline transpor-
2 tation, and other means of transportation including the
3 use of interagency motor pool vehicles), or other Federal
4 resources (including supplies, services, and resources
5 available to the Secretary under any procurement con-
6 tracts in which the Department is eligible to participate),
7 the Secretary shall acquire and transfer such personnel,
8 supplies, or resources to the Indian tribe.

9 “(i) PROMPT PAYMENT ACT.—Chapter 39 of title 31,
10 United States Code, shall apply to the transfer of funds
11 due under a compact or funding agreement authorized
12 under this Act.

13 “(j) INTEREST OR OTHER INCOME.—

14 “(1) IN GENERAL.—An Indian tribe may retain
15 interest or income earned on any funds paid under
16 a compact or funding agreement to carry out gov-
17 ernmental purposes.

18 “(2) NO EFFECT ON OTHER AMOUNTS.—The
19 retention of interest or income under paragraph (1)
20 shall not diminish the amount of funds that an In-
21 dian tribe is entitled to receive under a funding
22 agreement in the year in which the interest or in-
23 come is earned or in any subsequent fiscal year.

1 “(3) INVESTMENT STANDARD.—Funds trans-
2 ferred under this title shall be managed using the
3 prudent investment standard.

4 “(k) CARRYOVER OF FUNDS.—

5 “(1) IN GENERAL.—Notwithstanding any provi-
6 sion of an Act of appropriation, all funds paid to an
7 Indian tribe in accordance with a compact or fund-
8 ing agreement shall remain available until expended.

9 “(2) EFFECT OF CARRYOVER.—If an Indian
10 tribe elects to carry over funding from 1 year to the
11 next, the carryover shall not diminish the amount of
12 funds that the Indian tribe is entitled to receive
13 under a funding agreement in that fiscal year or any
14 subsequent fiscal year.

15 “(l) LIMITATION OF COSTS.—

16 “(1) IN GENERAL.—An Indian tribe shall not
17 be obligated to continue performance that requires
18 an expenditure of funds in excess of the amount of
19 funds transferred under a compact or funding agree-
20 ment.

21 “(2) NOTICE OF INSUFFICIENCY.—If at any
22 time an Indian tribe has reason to believe that the
23 total amount provided for a specific activity under a
24 compact or funding agreement is insufficient, the In-

1 dian tribe shall provide reasonable notice of the in-
2 sufficiency to the Secretary.

3 “(3) SUSPENSION OF PERFORMANCE.—If the
4 Secretary does not increase the amount of funds
5 transferred under the funding agreement, the Indian
6 tribe may suspend performance of the activity until
7 such time as additional funds are transferred.

8 **“SEC. 410. CIVIL ACTIONS.**

9 “(a) INCLUSION AS CONTRACT.—Except as provided
10 in subsection (b), for the purposes of section 110, the term
11 ‘contract’ shall include a funding agreement.

12 “(b) CONTRACTS WITH PROFESSIONALS.—For the
13 period during which a funding agreement is in effect, sec-
14 tion 2103 of the Revised Statutes (25 U.S.C. 81), and
15 section 16 of the Act of June 18, 1934 (25 U.S.C. 476)
16 shall not apply to a contract between an attorney or other
17 professional and an Indian tribe.

18 **“SEC. 411. FACILITATION.**

19 “(a) IN GENERAL.—Except as otherwise provided by
20 law, the Secretary shall interpret each Federal law (includ-
21 ing a regulation) in a manner that facilitates—

22 “(1) the inclusion of included programs in
23 funding agreements; and

24 “(2) the implementation of funding agreements.

25 “(b) REGULATION WAIVER.—

1 “(1) REQUEST.—An Indian tribe may submit a
2 written request for a waiver to the Secretary identi-
3 fying the specific text in regulation sought to be
4 waived and the basis for the request.

5 “(2) DETERMINATION BY THE SECRETARY.—
6 Not later than 60 days after the date of receipt by
7 the Secretary of a request under paragraph (1), the
8 Secretary shall approve or deny the requested waiver
9 in writing to the Indian tribe.

10 “(3) GROUND FOR DENIAL.—The Secretary
11 may deny a request for a waiver only on a specific
12 finding by the Secretary that the identified text in
13 the regulation may not be waived because such a
14 waiver is prohibited by Federal law.

15 “(4) FAILURE TO MAKE DETERMINATION.—If
16 the Secretary fails to approve or deny a waiver re-
17 quest within the time required under paragraph (2),
18 the Secretary shall be deemed to have approved the
19 request.

20 “(5) FINALITY.—The Secretary’s decision shall
21 be final for the Department.

22 **“SEC. 412. DISCLAIMERS.**

23 “Nothing in this title expands or alters any statutory
24 authority of the Secretary so as to authorize the Secretary

1 to enter into any funding agreement under section
2 405(b)(2) or 415(c)(1)—

3 “(1) with respect to an inherent Federal func-
4 tion;

5 “(2) in a case in which the statute establishing
6 a program does not authorize the type of participa-
7 tion sought by the Indian tribe (without regard to
8 whether 1 or more Indian tribes are identified in the
9 authorizing statute); or

10 “(3) limits or reduces in any way the services,
11 contracts, or funds that any other Indian tribe or
12 tribal organization is eligible to receive under section
13 102 or any other applicable Federal law.

14 **“SEC. 413. APPLICABILITY OF OTHER PROVISIONS.**

15 “(a) MANDATORY APPLICATION.—Sections 5(d), 6,
16 102(c), 104, 105(f), 110, and 111 apply to compacts and
17 funding agreements under this title.

18 “(b) DISCRETIONARY APPLICATION.—

19 “(1) IN GENERAL.—At the option of a partici-
20 pating Indian tribe, any or all of the provisions of
21 title I or title V shall be incorporated in a compact
22 or funding agreement.

23 “(2) EFFECT.—Each incorporated provision—

24 “(A) shall have the same effect as if the
25 provision were set out in full in this title; and

1 “(B) shall be deemed to supplement or re-
2 place any related provision in this title and to
3 apply to any agency otherwise governed by this
4 title.

5 “(3) EFFECTIVE DATE.—If an Indian tribe re-
6 quests incorporation at the negotiation stage of a
7 compact or funding agreement, the incorporation—

8 “(A) shall be effective immediately; and

9 “(B) shall control the negotiation and re-
10 sulting compact and funding agreement.

11 **“SEC. 414. BUDGET REQUEST.**

12 “(a) REQUIREMENT OF ANNUAL BUDGET RE-
13 QUEST.—

14 “(1) IN GENERAL.—The President shall iden-
15 tify in the annual budget request submitted to Con-
16 gress under section 1105 of title 31, United States
17 Code, all funds necessary to fully fund all funding
18 agreements authorized under this title.

19 “(2) DUTY OF SECRETARY.—The Secretary
20 shall ensure that there are included, in each budget
21 request, requests for funds in amounts that are suf-
22 ficient for planning and negotiation grants and suffi-
23 cient to cover any shortfall in funding identified
24 under subsection (b).

1 “(3) TIMING.—All funds included within fund-
2 ing agreements shall be provided to the Office of
3 Self-Governance not later than 15 days after the
4 date on which funds are apportioned to the Depart-
5 ment.

6 “(4) DISTRIBUTION OF FUNDS.—The Office of
7 Self-Governance shall be responsible for distribution
8 of all funds provided under this title.

9 “(5) RULE OF CONSTRUCTION.—Nothing in
10 this subsection authorizes the Secretary to reduce
11 the amount of funds that an Indian tribe is other-
12 wise entitled to receive under a funding agreement
13 or other applicable law.

14 “(b) PRESENT FUNDING; SHORTFALLS.—In all
15 budget requests, the President shall identify the level of
16 need presently funded and any shortfall in funding (in-
17 cluding direct program costs, tribal shares and contract
18 support costs) for each Indian tribe, either directly by the
19 Secretary of Interior, under self-determination contracts,
20 or under compacts and funding agreements.

21 **“SEC. 415. REPORTS.**

22 “(a) IN GENERAL.—

23 “(1) REQUIREMENT.—On January 1 of each
24 year, the Secretary shall submit to Congress a re-
25 port regarding the administration of this title.

1 “(2) ANALYSIS.—A report under paragraph (1)
2 shall include a detailed analysis of tribal unmet need
3 for each Indian tribe, either directly by the Sec-
4 retary, under self-determination contracts under title
5 I, or under compacts and funding agreements au-
6 thorized under this subchapter.

7 “(3) NO ADDITIONAL REPORTING REQUIRE-
8 MENTS.—In preparing reports under paragraph (1),
9 the Secretary may not impose any reporting require-
10 ment on participating Indian tribes not otherwise
11 provided for by this Act.

12 “(b) CONTENTS.—A report under subsection (a)
13 shall—

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

18 “(2) identify—

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

21 “(B) with particularity, all funds that are
22 specifically or functionally related to the provi-
23 sion by the Secretary of services and benefits to
24 self-governance Indian tribes and members of
25 Indian tribes;

1 “(C) the funds transferred to each Indian
2 tribe and the corresponding reduction in the
3 Federal bureaucracy;

4 “(D) the funding formula for individual
5 tribal shares of all Central Office funds, with
6 the comments of affected Indian tribes, devel-
7 oped under subsection (d); and

8 “(E) amounts expended in the preceding
9 fiscal year to carry out inherent Federal func-
10 tions, including an identification of inherent
11 Federal functions by type and location;

12 “(3) contain a description of the methods used
13 to determine the individual tribal share of funds con-
14 trolled by all components of the Department (includ-
15 ing funds assessed by any other Federal agency) for
16 inclusion in compacts or funding agreements;

17 “(4) before being submitted to Congress, be dis-
18 tributed to the Indian tribes for comment (with a
19 comment period of not less than 30 days); and

20 “(5) include the separate views and comments
21 of each Indian tribe or tribal organization.

22 “(c) REPORT ON NON-BIA PROGRAMS.—

23 “(1) IN GENERAL.—In order to optimize oppor-
24 tunities for including non-Bureau of Indian Affairs
25 included programs in agreements with Indian tribes

1 participating in self-governance under this title, the
2 Secretary shall—

3 “(A) review all included programs adminis-
4 tered by the Department, other than through
5 the Bureau of Indian Affairs, without regard to
6 the agency or office concerned;

7 “(B) not later than January 1, ~~2004~~ 2005,
8 submit to Congress—

9 “(i) a list of all such included pro-
10 grams that the Secretary determines, with
11 the concurrence of Indian tribes partici-
12 pating in self-governance, are eligible to be
13 included in a funding agreement at the re-
14 quest of a participating Indian tribe; and

15 “(ii) a list of all such included pro-
16 grams for which Indian tribes have re-
17 quested to include in a funding agreement
18 under section 405(b)(3) due to the special
19 geographic, historical, or cultural signifi-
20 cance to the Indian tribe, indicating wheth-
21 er each request was granted or denied and
22 stating the grounds for any denial.

23 “(2) PROGRAMMATIC TARGETS.—The Secretary
24 shall establish programmatic targets, after consulta-
25 tion with Indian tribes participating in self-govern-

1 ance, to encourage bureaus of the Department to en-
2 sure that a significant portion of those included pro-
3 grams are included in funding agreements.

4 “(3) PUBLICATION.—The lists and targets
5 under paragraphs (1) and (2) shall be published in
6 the Federal Register and be made available to any
7 Indian tribe participating in self-governance.

8 “(4) ANNUAL REVIEW.—

9 “(A) IN GENERAL.—The Secretary shall
10 annually review and publish in the Federal Reg-
11 ister, after consultation with Indian tribes par-
12 ticipating in self-governance, revised lists and
13 programmatic targets.

14 “(B) CONTENTS.—The revised lists and
15 programmatic targets shall include all included
16 programs that were eligible for contracting in
17 the original list published in the Federal Reg-
18 ister in 1995, except for included programs spe-
19 cifically determined not to be contractible as a
20 matter of law.

21 “(d) REPORT ON CENTRAL OFFICE FUNDS.—Not
22 later than January 1, ~~2004~~ 2005, the Secretary shall, in
23 consultation with Indian tribes, develop a funding formula
24 to determine the individual tribal share of funds controlled

1 by the Central Office of the Bureau of Indian Affairs for
2 inclusion in the self-governance compacts.

3 **“SEC. 416. REGULATIONS.**

4 “(a) IN GENERAL.—

5 “(1) PROMULGATION.—Not later than 90 days
6 after the date of the enactment of the Department
7 of the Interior Tribal Self-Governance Act of ~~2003~~
8 *2004*, the Secretary shall initiate procedures under
9 subchapter III of chapter 5, of title 5, United States
10 Code, to negotiate and promulgate such regulations
11 as are necessary to carry out the amendments made
12 by that Act.

13 “(2) PUBLICATION OF PROPOSED REGULA-
14 TIONS.—Proposed regulations to implement the
15 amendments shall be published in the Federal Reg-
16 ister not later than 1 year after the date of enact-
17 ment of that Act.

18 “(3) EXPIRATION OF AUTHORITY.—The author-
19 ity to promulgate regulations under paragraph (1)
20 shall expire on the date that is 18 months after the
21 date of enactment of that Act.

22 “(b) COMMITTEE.—

23 “(1) MEMBERSHIP.—A negotiated rulemaking
24 committee established under section 565 of title 5,
25 United States Code, to carry out this section shall

1 have as its members only Federal and tribal govern-
2 ment representatives.

3 “(2) LEAD AGENCY.— Among the Federal rep-
4 resentatives, the Office of Self-Governance shall be
5 the lead agency for the Department of the Interior.

6 “(c) ADAPTATION OF PROCEDURES.—The Secretary
7 shall adapt the negotiated rulemaking procedures to the
8 unique context of self-governance and the government-to-
9 government relationship between the United States and
10 Indian tribes.

11 “(d) EFFECT.—

12 “(1) REPEAL.—All regulatory provisions under
13 part 1000 of title 25, Code of Federal Regulations,
14 are repealed on the date of enactment of the Depart-
15 ment of the Interior Tribal Self-Governance Act of
16 ~~2003~~ 2004.

17 “(2) EFFECTIVENESS WITHOUT REGARD TO
18 REGULATIONS.—The lack of promulgated regula-
19 tions shall not limit the effect of this Act.

20 “(3) INTERIM PROVISION.—Notwithstanding
21 this subsection, any regulation under part 1000 of
22 title 25, Code of Federal Regulations, shall remain
23 in effect, at an Indian tribe’s option, in imple-
24 menting compacts until regulations are promulgated.

1 **“SEC. 417. EFFECT OF CIRCULARS, POLICIES, MANUALS,**
2 **GUIDANCES, AND RULES.**

3 “Unless expressly agreed to by a participating Indian
4 tribe in a compact or funding agreement, the participating
5 Indian tribe shall not be subject to any agency circular,
6 policy, manual, guidance, or rule adopted by the Depart-
7 ment, except for—

8 “(1) the eligibility provisions of section 105(g);
9 and

10 “(2) regulations promulgated under section
11 416.

12 **“SEC. 418. APPEALS.**

13 “In any administrative appeal or civil action for judi-
14 cial review of any decision made by the Secretary under
15 this title, the Secretary shall have the burden of proof of
16 demonstrating by clear and convincing evidence—

17 “(1) the validity of the grounds for the decision;
18 and

19 “(2) the consistency of the decision with the
20 provisions and policies of this title.

21 **“SEC. 419. AUTHORIZATION OF APPROPRIATIONS.**

22 “There are authorized to be appropriated such sums
23 as are necessary to carry out this title.”

Calendar No. 804

108TH CONGRESS
2^D SESSION

S. 1715

[Report No. 108-413]

A BILL

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

NOVEMBER 16, 2004

Reported with amendments