

## Calendar No. 566

112TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
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TO PROVIDE FOR THE CONVEYANCE OF CERTAIN PROP-  
ERTY FROM THE UNITED STATES TO THE MANIILAQ  
ASSOCIATION LOCATED IN KOTZEBUE, ALASKA

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DECEMBER 13, 2012.—Ordered to be printed

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Mr. AKAKA, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

[To accompany H.R. 443]

The Committee on Indian Affairs, to which was referred the bill (H.R. 443) to provide for the conveyance of certain property from the United States to the Maniilaq Association located in Kotzebue, Alaska, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

#### PURPOSE

The purpose of H.R. 443, as ordered reported, is to provide for the conveyance by warranty deed of certain property located in Kotzebue, Alaska from the United States to the Maniilaq Association.

#### BACKGROUND AND HISTORY

The Maniilaq Association (Maniilaq) is a non-profit organization<sup>1</sup> that provides a range of health and social services to residents of Northwest Alaska. Maniilaq provides these services under the Alaska Tribal Health Compact and corresponding funding agreements with Indian Health Service (IHS), pursuant to the self-gov-

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<sup>1</sup>Maniilaq represents twelve tribes, which are the Native Village of Ambler, the Native Village of Buckland IRA, the Native Village of Deering, the Native Village of Kiana, the Native Village of Kivalina IRA, Kobuk Traditional Council, the Native Village of Kotzebue, the Native Village of Noatak IRA, the Native Village of Noorvik IRA, Selawik IRA Council, the Native Village of Shungnak IRA, and the Native Village of Point Hope IRA. *H.R. 443, H.R. 444, H.R. 1461, H.R. 1556 and H.R. 2444: Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Natural Resources Comm.*, 112th Cong. 1 (2011) (written statement of Ian Erlich, President/Chief Executive Officer, Maniilaq Association).

ernance provisions of the Indian Self-Determination and Education Assistance Act<sup>2</sup> (ISDEAA).

H.R. 443 would require the Secretary of Health and Human Services (HHS) to convey to Maniilaq, by warranty deed, three contiguous parcels of land totaling 14.6 acres, including all buildings and appurtenances, for use in connection with the services provided by Maniilaq under its ISDEAA contracts with IHS. One of these parcels is the site of the existing Maniilaq Hospital and Health Center; the other two parcels contain employee housing.

These properties have already been conveyed to Maniilaq by way of quitclaim deed. On March 31, 2009, IHS transferred to Maniilaq, by quitclaim deed, title to the land on which the Maniilaq Hospital and Health Center sits. On November 18, 2009, after completing an environmental review and certification, IHS transferred, via two separate quitclaim deeds, two additional contiguous parcels of land on which housing for employees of the facility is located.<sup>3</sup> H.R. 443 would convey these same properties to Maniilaq, by warranty deed, for use by Maniilaq in carrying its duties under the Alaska Tribal Health Compact.

Under Section 512(c)(2)(B) of the ISDEAA, the Secretary of HHS has the authority, upon request by an Indian tribe, to donate to the tribe any property found to be in excess of the needs of HHS.<sup>4</sup> Neither the ISDEAA<sup>5</sup> nor its implementing regulations<sup>6</sup> specify the type of deed (quitclaim versus warranty) that should be used for conveying property in this manner. Testimony received by the Committee by the IHS indicates that IHS has historically conveyed property to tribes under the authority of the ISDEAA by quitclaim deed; however, IHS testified in support of conveyance by warranty deed in this particular instance.<sup>7</sup>

### *Environmental liability*

Section 3 of H.R. 443 provides that Maniilaq will not be liable for any contamination or pollution on the conveyed properties “as of the date of the conveyance.”<sup>8</sup> During his testimony in support of the Senate companion bill, S. 1898,<sup>9</sup> Robert McSwain, Deputy Director for Management Operations at IHS, noted that IHS believed that this environmental liability language should be revised

<sup>2</sup> 25 U.S.C. §§ 450 *et seq.*

<sup>3</sup> According to testimony from Maniilaq before the House Subcommittee on Indian and Alaska Native Affairs, these conveyances were done so that Maniilaq would be able to construct a long-term health facility, as well as make other necessary future expansions to the existing Maniilaq Hospital and Health Center. See *H.R. 443, H.R. 444, H.R. 1461, H.R. 1556 and H.R. 2444: Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Natural Resources Comm.*, 112th Cong. 1–2 (2011) (written statement of Ian Erlich, President/Chief Executive Officer, Maniilaq Association).

<sup>4</sup> 25 U.S.C. § 458aaa–11(c)(2). This authority is also incorporated in the Alaska Tribal Health Compact.

<sup>5</sup> 25 U.S.C. § 458aaa–11(c)(2).

<sup>6</sup> 42 C.F.R. pt. 137.

<sup>7</sup> *S. 1898 and H.R. 1560: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 6 (2012) (statement of Robert McSwain, Deputy Director for Management Operations, Indian Health Service, U.S. Department of Health and Human Services) (“It is important to emphasize that, as a normal practice, we do not transfer properties via the warranty deed mechanism. However, we will support an exception in this case, because of the Tribe’s initiative to expand access to its health care system for community members. This proposal will give the Maniilaq Association flexibility to leverage additional resources because ownership of the property under a warranty deed will give them unencumbered ownership of the property described in S. 1898. . . . The warranty deed would be the first of its kind in Alaska, since only one other property was transferred to the Southeast Alaska Regional Health Corporation through a quitclaim deed.”).

<sup>8</sup> H.R. 443, 112th Cong. § 3(a) (1st Sess. 2011).

<sup>9</sup> The text of S. 1898 is substantively the same as H.R. 443.

to make clear that Maniilaq is responsible for any environmental contamination “which may occur or arise as of or after the date of the 2009 conveyance.”<sup>10</sup>

Section 3(c) of H.R. 443 would also require the Secretary of HHS to comply with section 120(h)(3)(A)–(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

#### *Reversionary clause*

Section 1(b) of H.R. 443 provides that Section 512(c)(2)(B) of the ISDEAA<sup>11</sup> would apply to the conveyance of the properties by warranty deed. Under this provision of the ISDEAA, upon retrocession or withdrawal by Maniilaq from the Alaska Tribal Health Compact or reassumption of the compacted programs by IHS, any conveyed property valued at more than \$5,000<sup>12</sup> would (at the option of HHS) revert back to the United States.<sup>13</sup>

#### NEED FOR LEGISLATION

According to testimony received by the Committee by the Maniilaq President and Chief Executive Officer, Ian Erlich, the conveyance of the properties by quitclaim deed interferes to some degree with Maniilaq’s full use and management of the properties.<sup>14</sup>

First, according to the IHS, conveyance by quitclaim deed does not guarantee clear title as a warranty deed does. Conveyance by warranty deed would give Maniilaq security in the title to the properties, thereby allowing more flexibility in their use and management.<sup>15</sup>

In addition, according to Mr. Erlich, the 2009 quitclaim deeds contain covenants that allow HHS ongoing control over the properties. For example, Maniilaq is required under the quitclaim deeds to obtain approval by HHS for any lease, mortgage, or encum-

<sup>10</sup> *S. 1898 and H.R. 1560: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 6 (2012) (statement of Robert McSwain, Deputy Director for Management Operations, Indian Health Service, U.S. Department of Health and Human Services).

<sup>11</sup> 25 U.S.C. § 458aaa–11(c)(2)(B).

<sup>12</sup> The statute states that the value of the property is to be determined at the time of retrocession, withdrawal, or reassignment. 25 U.S.C. § 458aaa–11(c)(2)(B).

<sup>13</sup> 25 U.S.C. § 458aaa–11(c)(2)(B). At the Senate Committee on Indian Affairs’ legislative hearing on the Senate version of the bill (S. 1898), Robert McSwain, the Deputy Director for Management Operation at IHS, noted that while IHS supported the bill, it felt that “the ‘reversionary clause’ language should be clarified to apply, should the Association cease to use the property for health purposes.” (*S. 1898 and H.R. 1560: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 6 (2012) (statement of Robert McSwain, Deputy Director for Management Operations, Indian Health Service, U.S. Department of Health and Human Services)). This recommendation by IHS was noted by Committee staff at the business meeting held on June 6, 2012, during their presentation of H.R. 443 to Committee Members. The additional “clarifying” language recommended by IHS may be duplicative, however. It appears that under the applicable provision of the ISDEAA, if Maniilaq ceased to use the property for health purposes, property valued at more than \$5,000 would, at the option of the Secretary, revert back to the United States. See U.S.C. § 458aaa–11(c)(2)(B).

<sup>14</sup> See *H.R. 443, H.R. 444, H.R. 1461, H.R. 1556 and H.R. 2444: Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Natural Resources Comm.*, 112th Cong. 2 (2011) (written statement of Ian Erlich, President/Chief Executive Officer, Maniilaq Association); *S. 1898 and H.R. 1560: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 12–13 (2012) (statement of Paul Hansen, Deputy Administrator, Maniilaq Health Center); see also *S. 1898 and H.R. 1560: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 6 (2012) (statement of Robert McSwain, Deputy Director for Management Operations, Indian Health Service, U.S. Department of Health and Human Services) (stating that IHS supports transferring the properties to Maniilaq via warranty deed in order to support Maniilaq’s “initiative to expand access to its health care system for community members”).

<sup>15</sup> See *S. 1898 and H.R. 1560: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 5–6 (2012) (statement of Robert McSwain, Deputy Director for Management Operations, Indian Health Service, U.S. Department of Health and Human Services).

branch of the property. This requirement would apply if Maniilaq seeks to use the property as security for a construction loan or any other loan through which Maniilaq might seek to leverage its resources. Approval by HHS is also required under the quitclaim deeds on any contract which would impact the value of the properties,<sup>16</sup> including, for instance, contracts related to construction work associated with remodeling or expanding the facility.

Under the current quitclaim deeds, if any of these conditions are breached, HHS has the option to seek reversion of the properties back to the United States. This is inconsistent with the applicable provisions of the ISDEAA, which allow properties conveyed to tribes by HHS to revert back to the United States only upon retrocession or withdrawal by the tribe from the ISDEAA compact or reassumption of services by IHS.<sup>17</sup>

#### LEGISLATIVE HISTORY

H.R. 443 was introduced on January 25, 2011, by Representative Don Young with no cosponsors. The bill was referred to the Committee on Natural Resources, Subcommittee on Indian and Alaska Native Affairs, of the House of Representatives, and additionally to the Committee on Energy and Commerce of the House of Representatives. The Subcommittee on Indian and Alaska Native Affairs held a hearing on H.R. 443 on September 22, 2011. On October 5, 2011, the full Committee on Natural Resources held a business meeting to consider the bill. Representative Don Young offered an amendment to make technical corrections to the bill, primarily to correct the land descriptions contained in Section 2 of the bill, and the amendment was adopted by unanimous consent. The bill, as amended, was then ordered to be reported favorably to the full House. On December 8, 2011, the Committee on Energy and Commerce was discharged by unanimous consent,<sup>18</sup> and the bill, as amended, was reported to the House of Representatives and placed on the Union Calendar. The House of Representatives passed H.R. 443 on December 15, 2011, by recorded vote of 407–4. The bill was received in the Senate and referred to the Committee on Indian Affairs.

In order to expedite consideration of the legislation, Senator Murkowski requested that the Committee hold a business meeting to consider H.R. 443.<sup>19</sup> The Committee took up consideration of H.R. 443 at a business meeting on June 6, 2012, and ordered the bill to be reported to the Senate, by voice vote, without amendment.

<sup>16</sup>H.R. 443, H.R. 444, H.R. 1461, H.R. 1556 and H.R. 2444: *Hearing Before the Subcomm. on Indian and Alaska Native Affairs of the H. Natural Resources Comm.*, 112th Cong. 2 (2011) (written statement of Ian Erlich, President/Chief Executive Officer, Maniilaq Association).

<sup>17</sup>See 25 U.S.C. § 458aaa–11(c)(2)(B).

<sup>18</sup>On December 7, 2011, the Committee on Energy and Commerce of the House of Representatives notified the Committee on Natural Resources of the House of Representatives that it would forgo action on H.R. 443 so that the bill could proceed expeditiously to the full House of Representatives for consideration, but noted, however, that it did not waive any of its jurisdiction with respect to this legislation or any legislation of the same or similar subject matter.

<sup>19</sup>The Senate companion bill, S. 1898, was introduced by Senator Murkowski on November 17, 2011, and cosponsored by Senator Begich. The Senate bill, S. 1898, is substantively the same as H.R. 443. The Committee held a legislative hearing on S. 1898 on March 22, 2012.

## SECTION-BY-SECTION ANALYSIS OF H.R. 443

*Section 1—Conveyance of Property*

Section 1 would direct the Secretary of Health and Human Services, not later than 180 days after the enactment of the act, to convey by warranty deed certain properties described in Section 2 to the Maniilaq Association for use in connection with health and social services programs.

It further provides that the Secretary's conveyance of title to these properties shall supersede and render of no future effect any quitclaim deed concerning the same properties executed by the Secretary and the Maniilaq Association.

Section 1 also provides that the conveyance of the properties by warranty deed shall be made without consideration, and without imposing any obligation, term, or condition on the Maniilaq Association. It also provides that the United States will not retain any reversionary interest in the property, other than that required by this act or by Section 512(c)(2)(B) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 458aaa-11(c)(2)(B)).

*Section 2—Property Described*

This section provides the legal descriptions for the property to be conveyed to the Maniilaq Association pursuant to Section 1.

*Section 3—Environmental Liability*

This section provides that, notwithstanding any other provision of Federal law, as of the date of the conveyance, the Maniilaq Association shall not be liable for any soil, surface, groundwater, or other contamination resulting from the disposal, release, or presence of any environmental contamination, including any oil or petroleum products, or any hazardous materials, hazardous waste, pollutants, toxic substances, solid waste, or any other environmental contamination or hazard as defined in any Federal law, on any property described in Section 2.

This section grants the Secretary any "reasonably necessary" easement or access to the conveyed property in order to satisfy any retained obligations or liability of the United States.

This section also provides that the Secretary shall comply with Section 120(h)(3)(A) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9620(h)(3)(A)).

## COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on June 28, 2012, the Committee on Indian Affairs, by voice vote, adopted H.R. 443 and ordered the bill reported to the Senate, with the recommendation that the Senate do pass H.R. 443 as reported.

## COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated July 10, 2012, was prepared for H.R. 443:

*H.R. 443—An act to provide for the conveyance of certain property from the United States to the Maniilaq Association located in Kotzebue, Alaska*

H.R. 443 would convey three Indian Health Service (IHS) properties in Kotzebue, Alaska, to the Maniilaq Association, a tribal nonprofit organization. Based on information from the IHS, CBO estimates that the conveyances would have no significant impact on the federal budget. According to the agency, it does not currently receive any lease payments or other receipts from the properties. Enacting H.R. 443 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 443 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On October 25, 2011, CBO transmitted a cost estimate for H.R. 443 as ordered reported by the House Committee on Natural Resources on October 5, 2011. The two versions of the legislation are similar and the CBO cost estimates are the same.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory impact of H.R. 443 will be minimal.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding H.R. 443 other than the written testimony from the Department of Health and Human Services submitted at the Committee hearing on the Senate companion bill, S. 1898, on March 22, 2012, which is attached hereto as an exhibit.

STATEMENT OF ROBERT MCSWAIN, DEPUTY DIRECTOR FOR  
MANAGEMENT OPERATIONS, INDIAN HEALTH SERVICE,  
DEPARTMENT OF HEALTH AND HUMAN SERVICES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Good afternoon. I am Robert McSwain, Deputy Director for Management Operations of the Indian Health Service (IHS). I am pleased to have the opportunity to testify on the S. 1898 for the Maniilaq Association, providing for the conveyance of Indian Health Service (IHS) real property located in Kotzebue, Alaska.

The Indian Health Service plays a unique role in the Department of Health and Human Services (HHS) because it is a health care system that was established to meet the federal trust responsibility to provide health care to American Indians and Alaska Natives (AI/ANs). The mission of the IHS, in partnership with American Indian and Alaska Native people, is to raise the physical, mental, social, and spiritual health of AI/ANs to the highest level. The IHS

provides comprehensive health service delivery to approximately 2.1 million Ai/ANs through 31 Hospitals, 50 health centers, 31 health stations and 2 school health centers. Tribes also provide healthcare access through an additional 15 hospitals, 254 health centers, 166 Alaska Village Clinics, 112 health stations and 18 school health centers. In support of the IHS mission, the IHS and Tribes provide access to functional, well maintained and accredited health care facilities and staff housing.

S. 1898 deals with the conveyance of lands located in Kotzebue, Alaska which were used by the federal government for the delivery of IHS services. In 1995 the Maniilaq Association in Kotzebue, Alaska assumed responsibility for the provision of the IHS-funded health care services under the authority of the Indian Self-Determination and Education Assistance Act (ISDEAA). Some of the federal property, which had been used in connection with health and related programs in Kotzebue, Alaska by the IHS, was transferred through quit claim deeds to the Maniilaq Association.

S. 1898 provides for the conveyance of the Kotzebue property from the United States to the Maniilaq Association and proposes to modify the existing quit claim deed transfer by requiring the use of a warranty deed. On March 31, 2009, IHS transferred ownership of the Maniilaq Health Center/Hospital. After completing an environmental review and certification on November 18, 2009, the two additional parcels of property, named in this bill, including staff quarters, were transferred.

The IHS supports this bill because it views the proposed transfer as furthering the special partnership that exists with American Indian and Alaska Native tribal governments, and, moreover, is in keeping with the Presidential Memorandum on Administrative Flexibility as it pertains to tribal governments. It is important to emphasize that, as a normal practice, we do not transfer properties via the warranty deed mechanism. However, we will support an exception in this case, because of the Tribe's initiative to expand access to its health care system for community members. This proposal will give the Maniilaq Association flexibility to leverage additional resources because ownership of the property under a warranty deed will give them unencumbered ownership of the property described in S. 1898.

We do believe the language, relating to environmental liability, needs to be clarified so the Maniilaq Association is responsible for any environmental contamination which may occur or arise "as of or after the date of the 2009 conveyance"; and, the "reversionary clause" language should be clarified to apply, should the Association cease to use the property for health purposes.

We do not believe there will be reasons to use this mechanism in future cases. There are no existing problems with the current quit claim deed signed in 2009 with the Maniilaq Association. Traditionally, the Alaska Native

Corporations have preferred to leave the title of their facilities previously operated by the IHS with the federal government. It is highly unlikely there will be similar requests from Tribes in the other 35 states to have warranty deeds since they are currently on tribally owned lands and the government leases property from them for the health care facilities. This warranty deed transfer would be the first of its kind in Alaska, since only one other property was transferred to the Southeast Alaska Regional Health Corporation through a quit claim deed.

Concerning retrocession, we think it unlikely. We can count only four retrocessions since the enactment of ISDEAA in 1975 and these were only small program components and three have been re-assumed by the Tribes. None of these were in the Alaska Area.

We look forward to working with you, Mr. Chairman, on measures like these to improve the health of the Alaska Native population. Mr. Chairman, this concludes my testimony. I appreciate the opportunity to appear before you to discuss S. 1898. I will be happy to answer any questions the committee may have. Thank you.

#### CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of H.R. 443 will not effect any changes in existing law.

