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THE SUCCESS AND SHORTFALL OF SELF-GOVERNANCE UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AFTER TWENTY YEARS

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

MAY 13, 2008

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THE SUCCESS AND SHORTFALL OF SELF–GOVERNANCE UNDER THE INDIAN SELF–DETERMINATION AND EDUCATION ASSISTANCE ACT AFTER TWENTY YEARS

Tuesday, May 13, 2008

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

The Committee met, pursuant to notice, at 2:30 p.m. in room 562, Dirksen Senate Office Building, Hon. Lisa Murkowski, Vice Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. We are calling to order the Committee on Indian Affairs. We have an oversight hearing on the Success and Shortfalls of Title IV of the Indian Self-Determination and Education Assistance Act.

Chairman Dorgan is planning on joining us here this afternoon. He is not able to be here for probably the first 45 minutes or so. But he has indicated that he is looking forward to the opportunity to hear from all of you and an opportunity to ask questions. So we will await his arrival, but until then, I will begin with the proceedings.

I want to acknowledge Chairman Dorgan for bringing this hearing on tribal self-governance. I think it is fair to say that the self-governance program has literally reshaped the way in which health care services are delivered to Native people in Alaska. So any hearing on this particular subject is always of great interest to me and so many within the State.

I want to welcome Gene Peltola, the President and CEO of Yukon Kuskokwim Health Corporation. I know you took a long flight from Bethel and experienced a little mechanical difficulty to get here, so we appreciate your long journey and your willingness to be part of the group this afternoon.

It has been nearly 40 years since President Nixon issued his famous special message to Congress on Indian affairs, which outlined his new and more enlightened Federal Indian policy of tribal self-determination. By enacting the Indian Self-Determination Education and Education Assistance Act, Congress set in motion the transition from Federal domination of Indian programs to meaning-

ful tribal control of these programs to make them more responsive for their Native communities.

In 1988, Congress expanded upon that approach by enacting a tribal self-governance demonstration project and then several years later, made self-governance a permanent program within the BIA and the IHS. After 20 years, the humble beginning of self-governance as an experimental demonstration project, with only 7 tribes compacting $27 million in BIA programs, has expanded to over 230 tribes compacting an estimated $350 million for the BIA and over 380 tribes and tribal organizations compacting over $1.2 billion within the IHS.

The self-governance program has enabled Indian tribal governments to make significant improvements in the delivery and quality of health care, resource management and road systems. I have noted in previous Committee hearings that self-governance has been particularly successful in our Alaska Native communities.

By all accounts, it would appear that self-governance is a tribal success story, but there remain so many outstanding issues that need further examination. This Committee held an oversight hearing in the 109th Congress on self-governance which suggested that there may be compelling reasons to reform the BIA's self-governance if it is going to continue to flourish. I want to welcome back Mr. Ron Allen, Chairman Allen, who testified during the 109th, and I am interested in hearing whether any progress has been made or not since the time of that hearing and any other recommendations they may have for improvement.

A significant problem in impacting the success of self-governance is the shortfalls in the Government's payments of contract support costs for the BIA and the IHS programs. Contract support costs are essential to the tribal administration of these programs. Other departments of the Government pay their contractors general and administrative costs that they incur, and I believe that the Departments of Interior and Health and Human Services should and must do the same.

Contract support costs shortfalls force compacting tribes to reach into funds intended for the tribes' offices intended to fund the administration of their programs, which in turn then necessarily forces a reduction in services. This is not what self-governance is all about.

A tribe's decision in the first instance to join the self-governance program, to take on basically the responsibility of the Federal Government's job of delivering services to Native people turns in large measure on the Government's agreement to pay these costs. Yet I understand that the BIA has an estimated $25 million current contract support cost shortfall, and that IHS programs are currently facing a $110 million shortfall. I do hope to hear from the Interior Department on how its contract support cost policy has affected the shortfall and how it has impacted this self-governance program.

I do thank the witnesses for their participation and look forward to your testimony. With that, Senator Tester, I will turn to you for any comments you would choose to make.

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Vice Chair Murkowski. I also want to thank the Chairman, but I want to thank you, because I know that you have played a big role in getting this hearing up. I think it is a very important hearing to have.

I also want to welcome the panel. Thank you all for being here. A special welcome to Chairman Steele from the Salish Kootenai. I have had the opportunity to work with Chairman Steele at the State level and it is good to work with you at this level, too.

One of the things that I think we all hope and we all try to achieve is self-sufficiency in Indian Country. I think self-government is a big first step in that. We need to hear from you folks as to what we can do to help improve the system. I know it is not perfect, but ways that we can change or adapt or new ideas, whatever it may be, workable solutions, let's just put it that way, that Congress can enact to really empower even more than what has been empowered in the past.

As I said, I think this is an important hearing. I think it is a right first step to have. I know it hasn't been exactly a success story in all cases. In some cases it has worked better than others. That tells me that we may have to do some tweaking here and there. Those tweaks, from my perspective, need to come from you.

So I appreciate your being here. I look forward to hearing from Mr. Cason, too, as this panel rolls forward, and once again, thank you. Thank you, Senator Murkowski, for your efforts.

Senator MURKOWSKI. Thank you, Senator Tester. With that, we will begin, and we will start with you, Mr. Cason. Mr. James Cason is the Associate Deputy Secretary of the Department of the Interior here in Washington. I will just introduce everybody and then ask you to begin, Mr. Cason.

He will be followed by the Honorable Ron Allen, who is the Chairman and Executive Director of the Jamestown S'Klallam Tribe in Sequim, Washington; the Honorable Clifford Lyle Marshall, Hoopa Valley Indian Tribe in Hoopa, California. We also have the Honorable James Steele, Jr., Chairman of the Confederated Salish and Kootenai Tribes in Pablo, Montana; and Mr. Gene Peltola, who is the President and CEO of the Yukon-Kuskokwim Health Corporation in Bethel, Alaska.

Senator Barrasso, we are just about ready to go to the panel, but if you would care to make any opening comments, we would be happy to hear from you.

STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Senator Murkowski. I appreciate the opportunity. I want to thank you for holding this hearing.

When I visit with leaders on the Wind River Reservation in Wyoming, I find that both of our tribes there, the Northern Arapaho and the Eastern Shoshone, are working to build autonomy within their own people, as Senator Tester and you both have commented on. Our concerns are that the agency charged with administering the contracts to allow self-governance, the BIA, is often weighed

down by Government bureaucracy. That is what I heard two months ago in one of our now several different visits to the reservation in Wyoming. There are procedural requirements that slow the process of delivering needed services, and I think it is time to seriously take a look at the bureaucratic red tape that we expect the States and tribes and private individuals to face whenever cooperating with the Government. I think they are specific and significant in terms of working with our own tribes.

The BIA should put tribes in a position to succeed, to provide a platform for the Indian people to prosper and then the Government really ought to just get out of the way.

So I am looking forward to the hearings, and finding the best ways to help our tribes succeed. Thank you, Madam Chairman.

Senator MURKOWSKI. Thank you, Senator Barrasso.

With that, Mr. Cason, we will proceed to you, please.

STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Mr. CASON. Thank you so much. Good afternoon, Vice Chairman Murkowski and members of the Committee. I am pleased to be here today to discuss the Department of Interior's tribal self-governance program.

In 1988, Congress amended the Indian Self-Determination and Education Assistance Act by adding Title III, which authorized self-governance demonstration projects. In 1994, Congress again amended the Act by adding Title IV, establishing a program within the Department of Interior to be known as tribal self-governance. The addition of Title IV made self-governance a permanent option for tribes.

These amendments authorize federally-recognized tribes to negotiate funding agreements with the Department of Interior for programs, services, functions or activities administered by the Bureau of Indian Affairs and within certain parameters, authorizes such funding agreements for other bureaus of the Department.

The law allows federally-recognized tribes to assume programs administered by the Department's bureaus and offices other than BIA, subject to negotiations, and as long as the programs are available to Indian tribes or Indians. The law also authorizes the Secretary to include other programs administered by the Secretary which are of special geographic, historical or cultural significance to the participating tribe requesting the compact.

In 1990, the first seven funding agreements with the Department were negotiated for about $27 million in total funding. For fiscal year 2007, there are 94 agreements that include 234 federally-recognized tribes and approximately $380 million in total funding. Some of these agreements are with tribal consortia, which account for the difference in the number of tribes exceeding the number of agreements.

The Department funding agreements allow federally-recognized tribes to provide a wide range of programs and services to their members such as law enforcement, education and welfare assistance. Many of the funding agreements include trust-related programs, such as real estate services, appraisals, probates, natural resource programs, such as forestry, fisheries and agriculture.

What makes these funding agreements unique is that Title IV allows tribal governments to redesign programs for their members, set their own priorities consistent with Federal laws and regulations, and respond to the unique needs of tribal members without seeking approval from departmental officials.

Many tribes have been successful in implementing self-governance programs and annual funding agreements to meet their tribal needs. Detailed examples are included in my written testimony.

While the hearing today is an oversight hearing on tribal self-governance, the Department of Interior is aware that the House of Representatives' legislation would extend provisions of Title V of the Indian Self-Determination and Education Assistance Act to programs within the Department of Interior. Within the Department, except for the Bureau of Indian Affairs and specific instances with other bureaus, there are functions and responsibilities that do not lend themselves to compacting or funding agreements under the provisions like those in Title V of the Indian Self-Determination and Education Assistance Act.

In addition, if Title V were extended to the entire Department, non-BIA bureau programs that have both Indian and non-Indian stakeholders would be subject to funding agreements at the tribes' discretion. And if extended, the non-BIA bureaus of Interior would have no negotiating rights with regard to what would be authorized under those agreements. Therefore, consistent with the Department's statement to the House Natural Resources Committee where the Department expressed opposition to H.R. 3994, the Department again before this Committee expresses its opposition to any extension of provisions of Title V to non-BIA bureaus of the Department.

It is my understanding, however, that the self-governance group may be on the cusp of a different sort of proposal and we would be very encouraged to take a look at that. As I understand it, that alternative proposal would strike the other non-BIA bureaus in its approach to extend Title V.

As the Department moves forward with the current Title IV provisions, we have gained valuable insight into working in partnership with non-BIA bureaus and tribes. We look forward to continuing to work with tribes on ways to expand compacting opportunities and improve our program.

Madam Chairman, that concludes my statement and I will be happy to answer questions.

[The prepared statement of Mr. Cason follows:]

PREPARED STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Good afternoon, Chairman Dorgan, Vice Chairman Murkowski, and Members of the Committee. I am pleased to be here today to discuss the Department of the Interior's Tribal Self Governance program.

Self-governance Tribes have been good managers of the programs they have undertaken. Some Tribes add their own resources to the programs and are able to fashion programs to meet the particular needs of their beneficiaries. They are also well suited to address changing needs. Tribes have said that our current compacts with them reflect a true government-to-government relationship that indicates they are not viewed by the Federal government as just another federal contractor.

While the hearing today is an oversight hearing on Tribal Self Government, the Department of the Interior is aware of the House of Representatives' legislation that

would extend the provisions of Title V of the Indian Self-Determination and Education Assistance Act, which governs the programs of the Indian Health Service, to the programs of the Department of the Interior. Within the Department, except the Bureau of Indian Affairs and specific instances with other bureaus, there are functions and responsibilities that do not lend themselves to compacting or funding agreements under provisions like those in Title V of the Indian Self-Determination and Education Assistance Act. Therefore, consistent with the Department's statement to the House Natural Resources Committee, where the Department expressed its opposition to H.R. 3994, the Department again, before this Committee, expresses its opposition to any extension of the provisions of Title V of the Indian Self-Determination and Education Assistance Act to the non-BIA bureaus of the Department of the Interior.

The policy of Indian self-determination is one that has endured for almost forty years. In a message to Congress on March 6, 1968, President Lyndon Johnson said:

> I propose a new goal for our Indian programs: A goal that ends the old debate about "termination" of Indian programs and stresses self-determination . . . The greatest hope for Indian progress lies in the emergence of Indian leadership and initiative in solving Indian problems. Indians must have a voice in making the plans and decisions in programs which are important to their daily life . . .

In July 1970, President Nixon gave his famous Special message to Congress which stated:

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. . . . The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . .. Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered. . .

And more recently, on October 30, 2006, President Bush declared:

> My Administration will continue to work on a government-to-government basis with tribal governments, honor the principles of tribal sovereignty and the right to self-determination, and help ensure America remains a land of promise for American Indians, Alaska Natives, and all our citizens.

Background

In 1988, Congress amended the Indian Self-Determination and Education Assistance Act (the Act) by adding Title III, which authorized the Self-Governance demonstration project. In 1994, Congress again amended the Act by adding Title IV, establishing a program within the Department of the Interior to be known as Tribal Self-Governance. The addition of Title IV made Self-Governance a permanent option for tribes. These amendments, in section 403(b), authorize federally recognized tribes to negotiate funding agreements with the Department of the Interior (Department) for programs, services, functions or activities administered by the Bureau of Indian Affairs (BIA) and, within certain parameters, authorized such funding agreements with other bureaus of the Department. In the year 2000, the Act was amended again to include Titles V and VI, making Self-Governance a permanent option for tribes to negotiate compacts with the Indian Health Service (IHS) within the Department of Health and Human Services and providing for a now-completed study to determine the feasibility of conducting a Self-Governance Demonstration Project in other programs of that Department.

The law allows federally recognized Tribes to assume programs administered by the Department's bureaus and offices other than the BIA subject to negotiations and as long as the programs are available to Indian Tribes or Indians. The law also authorizes the Secretary to include other programs administered by the Secretary which are of special geographic, historical, or cultural significance to the participating Tribe requesting a compact.

In 1990, the first seven funding agreements with the Department were negotiated for about $27 million in total funding. For FY 2007, there are 94 agreements that include 234 federally recognized tribes and approximately $380 million in total funding. Some of these agreements are with tribal consortia, which account for the number of such tribes exceeding the number of agreements. These Department funding agreements allow federally recognized tribes to provide a wide range of pro-

grams and services to their members such as law enforcement, education, and welfare assistance. Many of the funding agreements include trust related programs such as real estate services, appraisals, probates and natural resource programs such as forestry, fisheries, and agriculture. What makes these funding agreements unique is that Title IV allows tribal governments to re-design programs for their members and set their own priorities consistent with Federal laws and regulations. This authority allows tribal leaders the ability to respond to the unique needs of their tribal members without seeking approval by Departmental officials.

Successes

Many Tribes have been successful implementing Self-Governance programs to meet their tribal needs. For example, the Chickasaw Nation accomplishments in 2006 included providing education services to 7,209 students. 945 students participated in remedial education and tutoring and 82 percent of the students receiving tutoring gained one grade level or more. Scholarships were provided to 181 undergraduate students and 43 graduate students. The Tribe's tribal district court heard 1,118 cases. It collected almost $50,000 in court fees and over $32,000 for restitution and child support. In January 2006, the Tribe's Supreme Court and district court were audited by a team from the BIA central office and received excellent ratings. The Tribe also provided career counseling, skills assessment, aptitude testing, and other employment readying services to 1,320 clients. The Tribe coordinated a job fair that attracted 53 vendors and over 500 job seekers. The Tribe's police department implemented a new computer system which has aided in multiple dispatching methods and improved data collection, investigation, and crime analysis and reporting. This example is just one of many where Tribes have been successful in directly administering federal programs.

Section 403(b)(2) of Title IV authorizes other bureaus within the Department of the Interior to enter into funding agreements with Tribes subject to such terms as may be negotiated between the parties. The Council of Athabascan Tribal Governments (CATG) has successfully implemented Annual Funding Agreements (AFAs) since 2004 to perform activities in the Yukon Flats National Wildlife Refuge in Interior Alaska. The CATG represents the Tribal governments of Arctic Village, Beaver, Birch Creek, Canyon Village, Chalkyitsik, Circle, Gwichyaa Zhee Gwich'in Tribal Government of Fort Yukon, Rampart, Stevens Village, and Venetie. Members of these Tribes live near or within the Yukon Flats National Wildlife Refuge, the third largest of the more than 540 conservation units in the National Wildlife Refuge System. The Refuge was established in 1980, and includes more than 8.5 million acres of wetland and boreal forest habitat along 300 miles of the Yukon River, north of Fairbanks, Alaska. It is internationally noted for its abundance of migratory birds.

Activities subject to the AFAs include: (1) locating and marking public easements across private lands within the Refuge boundary; (2) assisting with environmental education and outreach in local villages; (3) monitoring wildlife harvest; (4) surveying moose populations (in cooperation with the Alaska Department of Fish and Game); and (5) maintaining Federal property in and around Fort Yukon. Public use (including sport and subsistence hunting, fishing, and trapping) is not affected by these agreements. Management authority remains with the Fish and Wildlife Service as required by the National Wildlife Refuge System Administration Act.

The Bureau of Land Management also has an annual funding agreement with the CATG. Under the agreement, CATG performs preseason refresher training and testing services for Emergency Firefighters within Alaska's Upper Yukon Zone.

In FY 2007, Redwood National and State Parks had three agreements under the Indian Self-Governance Act with the Yurok Tribe for watershed restoration in the South Fork Basin of Lost Man Creek (a boundary area between the Park and the Yurok reservation); the conduct of archeological site condition assessments; and natural resource maintenance. Since 2002, the Lower Elwha Klallam Tribe has been assisting the National Park Service as a Self- Governance tribe in the planning, design, and implementation of mitigation measures for the Elwha River Restoration Project. At Grand Portage National Monument, there have been AFAs for the past nine years. The agreement between the National Park Service and the Grand Portage Band of Minnesota Chippewa touches most park operations. The Band and the Park dedicated a new Grand Portage Heritage Center in August 2007. Over nine years, $3.3 million has been transferred to the Band and 34 special projects have been completed in addition to routine maintenance.

The Bureau of Reclamation has also been successful under the current law. In FY 2007, Reclamation had seven annual agreements with six Tribes, totaling more than $18.6 million.

Extension of Title V

Non-BIA bureau programs, that have both Indian and non-Indian stakeholders, would be the subject of funding agreements at the Tribe's discretion if Title V were extended to the Department. If extended, the non-BIA bureaus of Interior would have no negotiating rights with regard to what would be authorized under those agreements.

We understand some of the impetus for extending Title V to the Department at this time stems from the agreement between the U.S. Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation regarding the National Bison Range Complex in Montana. While there has been considerable controversy over the 2006 AFA between the Service and the CSKT, through this process the Department is gaining a better understanding of what each party needs to make a successful agreement with a non-BIA bureau work well. We believe that ultimately the process will grow stronger as a result of our efforts.

We are opposed to simply providing the receiving party unilateral power to determine the terms and length of the agreement as well as the disposition of the funds, which would occur if Title V were unilaterally extended to non-BIA bureaus within the Department. This is particularly true where non-BIA bureaus have other statutory mandates with which they must comply. We believe the authority provided to the Secretary for the Self-Governance program is sufficient to protect the interests of Indian Tribes in non-BIA programs.

Conclusion

As the Department moves forward with the current Title IV, we have gained valuable insight into working in partnership with non-BIA bureaus and Tribes. We look forward to continuing to work with the tribes on ways to expand compacting opportunities and improve our program.

Mr. Chairman, this concludes my statement and I will be happy to answer any questions you may have.

Senator MURKOWSKI. Thank you. We appreciate that.

And we will go to Chairman Allen, please.

STATEMENT OF HON. W. RON ALLEN, CHAIRMAN/CEO, JAMESTOWN S'KLALLAM TRIBE

Mr. ALLEN. Thank you, Madam Chair and Senators. I appreciate the opportunity to testify.

As you have identified, I am the Chair of the Jamestown S'Klallam Tribe, located in Northwestern Washington State. Our Tribe has been among the original seven tribes that advanced to self-governance back in 1991. We were also one of the first ten in the demonstration project in 1988.

So I come to the Committee with a great deal of experience and exposure to self-governance and the success of self-governance as we moved forward over this last 20 years. Just a few weeks ago, we celebrated our 20th anniversary of the self-governance movement and reflected on the successes of the self-governance movement. What self-governance is, in a nutshell, it is empowering the tribe. It is recognizing our sovereignty as a government and recognizing our rightful place as a government within the family of the American political system.

So what it is doing is picking up from the Nixon era, moving us forward and recognizing that as a government, we need to be empowered to take control over our own affairs and manage our own affairs and not to be second guessed by a Federal bureaucratic system.

Conceptually, back in 1975, the Indian Self-Determination Act was intended to empower the tribes, and it was also intended to reduce the Federal bureaucracy and put the controls in the tribes' authority, so that tribal governments could manage our own af-

fairs. We were contractors back in the 1970s and 1980s and into the 1990s. In the 1990s, when self-governance emerged, now we asked the Federal Government start recognizing the tribes as governments, let us make our own decisions as governments, with regard to the limited resources that the Federal Government provides to our people for programs A through Z. It has had a remarkable success. When you think about where we started with the pilot project in 1988, with ten tribes and the seven tribes that started in 1991, with the Lummi Nation and the Salish and Kootenai Tribes and five others of us that moved forward, we now have identified well over 300 tribes that are moving forward with respect to both DOI, BIA and the IHS. We have had remarkable success. And we have written books now and put out material that show that success.

So we are here before this Committee, we want to continue to advance the authority of the tribes. As always, when Congress passes legislation and recognizes authorities and provides instruction to the Executive Branch, you always have the interpretation of what the Congress meant. And sometimes the report language isn't enough, or the language in the bill isn't enough. So we have found ourselves exposed to obstacles and impediments, bureaucratic impediments, we always refer to them, that impede our ability to move our agenda forward.

Our agenda, Jim had mentioned that we are suggesting that at this juncture, we would delete the non-BIA agencies. We are not intending to delete them. What we are suggesting is to put them in abeyance for the moment, because of where we are politically in this Congressional session. If the Congress has the power and ability and will to be able to move it forward with regard to at least the BIA component of the legislation that we are advancing, and that we would come back in the next session and advance what we believe to be self-governance with respect to the rest of the BIA programs.

It really is just a political reality factor that we are weaving into it. We have been negotiating these amendments now for six years. And for the last five years with the Department of Interior. In the last year and a half, we have had significant success with Jim Cason and his colleagues over at Interior and have had remarkable movement. Now we have bridged gaps, we have bridged gaps with 95, 97 percent of the issues. That required a compromise on both sides, both the Department of Interior and the BIA have both imposed compromises in order to propose to you the legislation that we are submitting and we have been discussing. We understand that the House is going to introduce a piece of legislation that is very similar, if not almost exact, to what we are suggesting for you to consider and that would help us move this agenda forward.

Now, I would say that thinking of all the past hearings that we have had, historically, that are about empowering tribes, we have had generations, generations of Self-Governance before the Self-Determination Act. The Self-Determination Act advanced many more generations of leaders. I can think of Wendell Chino down in Mescelaro Apache, Roger Jourdain of Red Lake, Joe de la Cruz at Quinault Nation and others, who have moved this agenda forward

with the support of Congress. Now we are at a juncture where we need to move forward again to fully empower us.

The Title V amendments, you already approved and recognize our authority. We know that the DOI and BIA should be consistent. So our proposal here is focusing on what authority we have right now at the BIA and those programs in Interior that do have, that clearly are tribally-authorized in order to control.

I will conclude there, Madam Chair and be open to questions. We really hope that you can help us move this forward so we can make some significant progress for this session.

[The prepared statement of Mr. Allen follows:]

PREPARED STATEMENT OF HON. W. RON ALLEN, CHAIRMAN/CEO, JAMESTOWN S'KLALLAM TRIBE

Good afternoon. Thank you for the opportunity to be here today. My name is W. Ron Allen and I am the Chairman and Chief Executive Officer of the Jamestown S'Klallam Tribe, located in Washington State. I am also the Chairman of the Department of the Interior (DOI) Self-Governance Advisory Committee (SGAC), and I offer my testimony today in both capacities. My Tribe was one of the first 7 Tribes to negotiate a Self-Governance Compact and Funding Agreement in 1990. I am pleased to be able to testify on what Congress needs to do on Tribal Self-Governance.

I am here to urge you to introduce and promptly enact legislation to enhance Indian Tribes' opportunities under Self-Governance by amending Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) (P.L. 93–638 as amended). A House version of this legislation, H.R. 3994, is currently under review by the House Natural Resources Committee. We have been told the House Committee expects to report its bill before the end of this month. We hope that members of this Committee will introduce a companion bill in the Senate and move this Committee and the Senate to approve this critical legislation this year. I attach to this testimony draft legislation substantively similar to H.R. 3994 which Tribes hope the Senate will adopt.

These Tribally proposed Title IV amendments advance several important purposes. Most fundamentally, they create consistency between the Title IV Self-Governance initiative in the DOI and the Title V Self-Governance initiative in the Department of Health and Human Services (DHHS). Since its enactment in 2000, Title V of P.L. 93–638 has proven to be a sound framework for carrying out government-to-government agreements in the health care arena. The Title IV amendments would essentially mirror Title V, enhancing consistency, clarity, and workability in the relationship between the federal and Tribal governments.

The Title IV amendments have long been a top legislative priority of Self-Governance Tribal leaders. Four years ago, Tribal leaders testified before this Committee in support of a predecessor bill, S. 1715, the Department of the Interior Tribal Self-Governance Act of 2003. That bill was favorably reported and recommended for passage by this Committee in Senate Report No. 108–413 (Nov. 16, 2004), but unfortunately died in that Congress. Two years later, I testified at this Committee's oversight hearing on Self-Governance in Indian Country, along with other Tribal leaders, in favor of comprehensive Self-Governance legislation. This Committee has thus heard about the need for this legislation on a number of occasions over the past 5 years and Self-Governance Tribes urge the Committee and the full Senate to act on this legislation this session.

Passage of the Title IV amendments would represent a major milestone on the path toward Tribal Self-Governance and self-reliance. The true import of these proposed amendments, however, cannot be understood without an appreciation of the unprecedented positive impact Self-Governance has had on Indian Tribes over the past 20 years.

Background of Title IV

Although it is hard to imagine today, prior to 1975, the federal government administered almost all programs serving American Indian and Alaska Native Tribes. In 1975, the ISDEAA was enacted with three primary goals: (1) to place the federal government's Indian programs firmly in the hands of the local Indian people being served; (2) to enhance and empower local Tribal governments and their governmental institutions; and (3) to correspondingly reduce the federal bureaucracy.

The original Title I of the ISDEAA, still in operation today, allows Tribes to enter into contracts with the DHHS and the DOI to assume the management of programs serving Indian Tribes within these two agencies. Frustrated by the stifling bureaucratic oversight imposed by BIA and the Indian Health Service (IHS), and the lack of flexibility and cost-effectiveness inherent in Title I contracting, a small group of Tribal leaders helped win passage of the Tribal Self-Governance Demonstration Project in 1988. That Project authorized the Jamestown S'Klallam and nine other Tribes to enter into compacts with DOI.

Unlike Title I contracts—which subjected Tribes to federal micromanagement of assumed programs and forced Tribes to expend funds as prioritized by BIA and IHS officials—Self-Governance agreements allowed Tribes to set their own priorities and determine how program funds should be allocated. The Demonstration Project proved to be a tremendous success, and in 1994, Congress enacted Title IV of the ISDEAA, thereby implementing permanent Tribal Self-Governance within DOI.

The Success of Self-Governance

The success of Self-Governance can be seen in the increasing number of Tribes that choose to participate. In Fiscal Year 1991, the first year Self-Governance agreements were negotiated between the BIA with Tribes, only seven Tribes entered into agreements. At that time, the total dollar amount compacted by Indian Tribes was slightly over $27 million. By Fiscal Year 2006, 231 Tribes and Tribal consortia entered into 91 annual funding agreements, operating over $300 million in programs, services, functions and activities.

The growth in Tribal participation in Self-Governance revealed by these numbers is remarkable. The number of Tribes and Tribal consortia participating in Self-Governance today is *33 times greater* than in 1991. While only a tiny fraction of Tribes participated in Self-Governance the first year in 1991, *today approximately 40 percent of all federally recognized Tribes are Self-Governance Tribes and the interest by other Tribes is continuing to grow.*

Under Self-Governance, Tribes have assumed the management of a large number of DOI programs, including roads, housing, education, law enforcement, court systems, and natural resources management. Why is this initiative such a huge success? Simply put, Self-Governance *works* because it:

- *Promotes Efficiency.* Devolving federal administration from Washington, D.C. to Indian Tribes across the United States has strengthened the efficient management and delivery of federal programs impacting Indian Tribes. As this Committee well knows, prior to Self-Governance, up to 90 percent of federal funds earmarked for Indian Tribes were used by federal agencies for administrative purposes. Under Self-Governance, program responsibility and accountability has shifted from distant federal personnel to Tribal leaders elected by those to be served. Efficiencies have increased as politically accountable Tribal leaders leverage their knowledge of actual needs, local resources, conditions and trends to make cost-saving management decisions. [1]
- *Strengthens Tribal Planning and Management Capacities.* By placing Tribes in decision-making positions, Self-Governance vests Tribes with ownership of the critical ingredient necessary to plan our own futures: information. At the same time, Self-Governance has provided a generation of Tribal members with management experience beneficial for the continued effective stewardship of our resources.
- *Allows for Flexibility.* Self-Governance allows Tribes great flexibility when making decisions concerning allocation of funds. Whether managing programs in a manner consistent with traditional values or allocating funds to meet changing

[1] As an aside, this policy of transferring management from federal to Tribal governmental control is currently being undermined by the National Business Center (NBC), the Interior agency charged with negotiating indirect cost agreements with Tribes and Tribal organizations. NBC has recently threatened to abandon its longstanding policy of allowing, without documentation, 50 percent of Tribal council expenses in Tribal indirect cost pools. Under the new policy, no such expenses would be allowable as indirect costs unless a Tribe could document, through detailed personnel activity reports, the time and expense council members and staff devote to running federal programs. Many, if not most, Tribes vest managerial responsibility for carrying out ISDEAA agreements in their Tribal councils, and such Tribes count on indirect cost reimbursements to defray the cost of these Tribal governmental functions. The NBC's unilateral revocation of the "50 percent rule" would force Tribes to spend great amounts of time to produce—and the DOI to review—documentation parsing Tribal council minutes and activity reports to determine the precise amount of council members' time and expense devoted to federal programs. We ask this Committee to urge the Secretary to avoid this wasteful exercise by directing the NBC to abandon its plan to revoke the 50 percent rule.

priorities, Self-Governance Tribes are developing in ways consistent with their own needs and priorities, not those of a monolithic federal bureaucracy.

- *Affirms Sovereignty.* By utilizing signed compacts, Self-Governance affirms the fundamental government-to-government relationship between Indian Tribes and the U.S. Government. It also advances a political agenda of both the Congress and the Administration: namely, shifting federal functions to local governmental control.

In short, Self-Governance works, because it places management responsibility in the hands of those who care most about seeing Indian programs succeed: Indian Tribes and their members.

Need for Title IV Amendments

While the overarching policy of Self-Governance has been a great success for my Tribe and so many others, the legal framework to carry out that policy within the DOI could be vastly improved. Shortly after Title IV was enacted, the DOI began a rulemaking process to develop and promulgate regulations. The process was a failure in many ways. Ultimately, five years after the rulemaking process began, DOI published regulations that, from the Tribal perspective, failed to fully implement Congress's intent when Title IV was enacted. The regulations moved Self-Governance backward, not forward.

In 2000, after the enactment of Title V of the ISDEAA—permanent Self-Governance within DHHS—Tribal leaders began discussions about how the Title IV statute could be amended to get the initiative back on track. The development of Title V benefitted from the lessons learned as Title IV was implemented; Title V directly addressed many of the problem issues that emerged during the Title IV rulemaking process. Congress in Title V filled many of the gaps and corrected many of the problems in Title IV. But the improvements and greater Tribal authority embodied in Title V remain absent from Title IV. Consequently, many Self-Governance Tribes today are forced to operate under two different sets of administrative requirements, one for IHS and one for BIA.

Tribal leaders have decided that Title IV needed to be amended to incorporate many of Title V's provisions, and that has been a top legislative priority for over six years. Four years ago, I testified before this Committee in support of S. 1715, a bill that would have amended Title IV in many of the same ways as H.R. 3994. Numerous meetings and extensive correspondence sought to narrow the differences between Tribal and DOI representatives. On September 20, 2006, several Tribal leaders presented testimony to this Committee regarding problems implementing Self-Governance in DOI under Title IV and made the case for legislative relief. These problems, ranging from inadequate funding levels to bureaucratic recalcitrance, have caused participation in Tribal Self-Governance to level off and even recede. That is unfortunate because Self-Governance has a proven track record of enhancing the ability of Tribes to improve the efficiency, accountability and effectiveness of programs and services.

Over the past year, discussions between the Tribal Title IV Task Force and DOI representatives intensified and yielded a number of compromise agreements reflected in the attached draft Tribally proposed bill. This bill incorporates all of the agreements reached between Tribal and DOI representatives. While some areas of disagreements remain, agreement has been reached on over 97 percent of the bill's contents. The vast majority of the proposed amendments are not new or radical ideas—most have been adapted directly from Title V.

Thus the Tribal draft reflects nearly six years of discussions, drafting, negotiations, and redrafting—and, as discussed below, significant Tribal concessions. The time has come to pass this legislation, which would significantly advance Congress's policy of promoting Tribal Self-Governance.

Overview of the Proposed Amendments

The proposed bill would bring Title IV into line with Title V, creating administrative efficiencies for Tribes while also importing the beneficial provisions of Title V currently missing in the earlier Self-Governance statute. Let me quickly summarize a few of the key provisions in the amendments, as embodied in the Tribal draft. To address problems in the DOI's implementation of the Tribal Self-Governance program, and to expand Tribes' options for pursuing their right to Self-Governance, the draft bill would, among other things:

- clarify and limit the reasons for which the agency may decline to enter a proposed agreement, and the time frame for making the decision;
- require that funds be transferred promptly after they have been apportioned to the Department;

- clarify how the construction provisions would apply;
- protect Tribes from DOI attempts to impose unilaterally terms in compacts or funding agreements; and,
- provide a clear avenue of appeal and burden of proof for Tribes to challenge adverse agency decisions.

Over the past four months we have had intense discussions with DOI representatives about various provisions in H.R. 3994 and the Tribal draft bill. They have made it clear that they have problems with some of the bill's provisions, and you may hear testimony from Department representatives opposing one or another provision of the bill. In weighing such testimony, I ask that you keep the following major facts in mind:

First, the Tribally proposed draft bill that is attached to my testimony is different from H.R. 3994 in a number of important respects. While it contains the consensus language that Tribal and department representatives reached on close to 95 percent of the provisions prior to the introduction of H.R. 3994, it also contains Self-Governance Tribes most recent efforts to bridge the gaps on the remaining areas of disagreement.

In fact, *the Tribally proposed draft bill reflects significant compromises on the part of Tribes.* For example, a major priority of Self-Governance Tribes for years has been to expand Self-Governance by making certain non-BIA programs within the DOI compactable as a matter of right. The DOI has repeatedly made clear that the administration would fight the enactment of these amendments if they contain these mandatory non-BIA provisions. To enhance the chances that this important legislation will pass during this Congress, Self-Governance Tribes reluctantly decided to strike the mandatory non-BIA provisions from the bill. We continue to think that these mandatory provisions make good policy sense and will pursue their enactment in the future. But for now, in order to get the remaining amendments passed this year, we are deferring our request as to non-BIA provisions.

Second, there is ample precedent for the few provisions in the bill with which DOI may continue to have problems. Title V, which has worked very well in the context of health care services, served as the model for H.R. 3994 and contains most of the contested provisions, none of which has caused the IHS any difficulty in its implementation of similar provisions over the past seven years.

Finally, to some extent Self-Governance presents an inherent, and perhaps intractable, tension between Tribes and the Department. A bureaucracy such as the DOI will inevitably resist yielding its authority—and its funding—to other entities, such as Tribes. For this reason, complete agreement between Tribal and federal viewpoints is likely impossible, and Congress should not wait for such agreement before acting. We believe that the Title IV amendments, especially after the most recent Tribal concessions discussed above, protect the interests of the federal government while advancing those of Tribal governments. We hope that this Committee will agree and finally take action to enact them.

Need to Clarify the Applicability of Title IV to the Department of Transportation

Almost none of the provisions presently included in H.R. 3994 are new—Self-Governance Tribal leaders have been advocating them for over six years and many of them come directly from Title V. I would like to take a moment to discuss a provision that would be new, however: the proposed Section 419 that would clarify that Title IV applies to agreements entered into by Tribes and the Department of Transportation (DOT) to carry out transportation programs such as the Indian Reservation Roads Program.

This new provision is important and necessary. The 2005 highway bill, SAFETEA–LU, authorized Tribal governments to receive funding from and to participate in a number of Department of Transportation (DOT) programs as direct beneficiaries without having the BIA or state governments acting as intermediaries. The statute specifically says that DOT and Tribes can enter into agreements for these programs "in accordance with the [ISDEAA]."[2] Some DOT officials have interpreted this language to mean the agreements must be consistent with the ISDEAA but are not really ISDEAA agreements. This erroneous interpretation has caused a great deal of confusion and disagreement over whether, and to what extent, Title IV applies to DOT. The new section 419 will make clear that the negotiation and

[2] 23 U.S.C. § 202(d)(5).

implementation of Tribal funding agreements with DOT will be governed by Title IV.

Tribal Self-Determination in Natural Resource Management

Finally, a few words about another idea for advancing Tribal Self-Determination and Self-Governance that has been before this Committee in the past. The DOI Self-Governance Advisory Committee has supported legislation increasing Tribal Self-Determination in natural resource management; Title III of S. 1439 in the 109th Congress. Under that bill, Tribes would have been authorized to develop an Indian Trust Asset Management Plan that, once approved by the Secretary of Interior, could be implemented by the Tribe without the need for Secretarial approval of every individual transaction or decision. A similar concept has been incorporated into the Tribal Energy Resource Agreement provisions of the Energy Policy Act of 2005.[3] We suggest that the Committee revisit the idea of expanding Tribal self-determination in natural resource management, and we are prepared to present concrete legislative proposals to that end.

Conclusion

In conclusion, I would like to step back for a moment and reinforce a broader point. As a long-term Self-Governance Tribal leader and in my role as Chairman of the DOI Self-Governance Advisory Committee, I have had the opportunity to talk regularly with many other Tribal leaders regarding Self-Governance. Although they recognize the implementation problems cited above, and the need for the Title IV amendments described earlier, every single Tribal leader made a point of praising the overwhelming success of Self-Governance. That has also been our experience at Jamestown. Self-Governance allows us to prioritize our needs and plan our future in a way consistent with the Tribe's distinct culture, traditions, and institutions.

My deepest hope is that this Congress will enact the Title IV amendments proposed by the Tribes (see attached draft bill) so that we can build on the successes of the past 20 years and further Tribal Self-Governance in partnership with the United States, to achieve our mission and our goals.

Thank you.

[3] Pub. L. No. 109–58 (Aug. 8, 2005).

Attachment: Tribally Proposed Draft Bill

Tribally Proposed Bill Based on Provisions in H.R. 3994

May 13, 2008

A BILL

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

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

SECTION 1. SHORT TITLE.

This Act may be cited as the `Department of the Interior Tribal Self-Governance Act of 2007'.

SEC. 2. TRIBAL SELF-GOVERNANCE.

Title IV of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) is amended to read as follows:

`TITLE IV--TRIBAL SELF-GOVERNANCE

`SEC. 401. DEFINITIONS.

`In this title:

`(1) COMPACT- The term `compact' means a self-governance compact entered into under section 404.

`(2) CONSTRUCTION PROGRAM- The term `construction program' or `construction project' means a tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control,

transportation, or port facilities, or for other tribal purposes.

`(3) DEPARTMENT- The term `Department' means the Department of the Interior.

`(4) FUNDING AGREEMENT- The term `funding agreement' means a funding agreement entered into under section 405(b).

`(5) GROSS MISMANAGEMENT- The term `gross mismanagement' means a significant violation, shown by clear and convincing evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds transferred to an Indian tribe under a compact or funding agreement that results in a significant reduction of funds available for the programs assumed by an Indian tribe.

`(6) PROGRAM- The term `program' means any program, function, service, or activity (or portion thereof) within the Department of the Interior that is included in a funding agreement.

`(7) INDIAN TRIBE- The term `Indian tribe', in a case in which an Indian tribe authorizes another Indian tribe or a tribal organization to plan for or carry out a program on its behalf in accordance with section 403(a)(2), includes the other authorized Indian tribe or tribal organization.

`(8) INHERENT FEDERAL FUNCTION- The term `inherent Federal function' means a Federal function that cannot legally be delegated to an Indian tribe.

`(9) SECRETARY- The term `Secretary' means the Secretary of the Interior.

`(10) SELF-GOVERNANCE- The term `self-governance' means the program of self-governance established under section 402.

`(11) TRIBAL SHARE- The term `tribal share' means an Indian tribe's portion of all funds and resources that support Secretarial programs that are not required by the Secretary for the performance of inherent Federal functions.

`SEC. 402. ESTABLISHMENT.

`The Secretary shall carry out a program within the Department to be known as the `Tribal Self-Governance Program.'.

`SEC. 403. SELECTION OF PARTICIPATING INDIAN TRIBES.

`(a) In General-

`(1) PARTICIPANTS-

`(A) The Secretary, acting through the Director of the Office of Self-Governance, may select up to 50 new Indian tribes per year from those eligible under subsection (b) to participate in self-governance.

`(B) If each Indian tribe requests, two or more otherwise eligible Indian tribes may be treated as a single Indian tribe for the purpose of participating in Self-Governance.

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

`(3) JOINT PARTICIPATION- Two or more Indian tribes that are not otherwise eligible under subsection (b) may be treated as a single Indian tribe for the purpose of participating in self-governance as a tribal organization if--

`(A) each Indian tribe so requests; and

`(B) the tribal organization itself or at least one of the tribes participating in the tribal organization is eligible under subsection (b).

`(4) TRIBAL WITHDRAWAL FROM A TRIBAL ORGANIZATION-

`(A) IN GENERAL- An Indian tribe that withdraws from participation in a tribal organization, in whole or in part, shall be entitled to participate in self-governance if the Indian tribe is eligible under subsection (b).

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

`(C) PARTICIPATION IN SELF-GOVERNANCE- The withdrawal of an Indian tribe from a tribal organization shall not affect the eligibility of the

tribal organization to participate in self-governance on behalf of one or more other Indian tribes.

`(D) WITHDRAWAL PROCESS-

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

`(ii) EFFECTIVE DATE-

`(I) IN GENERAL- A withdrawal under clause (i) shall become effective on the date specified in the tribal resolution.

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

`(aa) the earlier of--

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

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

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

`(E) DISTRIBUTION OF FUNDS- If an Indian tribe or tribal organization eligible to enter into a self-determination contract under title I or a compact or funding agreement under this title fully or partially withdraws from a participating tribal organization, the withdrawing Indian tribe--

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

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

funds were initially allocated to the funding agreement of the tribal organization); and

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

`(ii) may elect not to enter a self-determination contract or compact, in which case all funds not obligated by the tribal organization associated with the withdrawing Indian tribe's returned programs, less close-out costs, shall be returned by the tribal organization to the Secretary for operation of the programs included in the withdrawal.

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

`(b) Eligibility- To be eligible to participate in self-governance, an Indian tribe shall--

`(1) successfully complete the planning phase described in subsection (c);

`(2) request participation in self-governance by resolution or other official action by the tribal governing body; and

`(3) demonstrate, for the 3 fiscal years preceding the date on which the Indian tribe requests participation, financial stability and financial management capability as evidenced by the Indian tribe having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency.

`(c) Planning Phase-

`(1) IN GENERAL- An Indian tribe seeking to begin participation in Self-Governance shall complete a planning phase in accordance with this subsection.

`(2) ACTIVITIES- The planning phase--

`(A) shall be conducted to the satisfaction of the Indian tribe; and

`(B) shall include--

`(i) legal and budgetary research; and

`(ii) internal tribal government planning and organizational preparation.

`(d) Grants-

`(1) IN GENERAL- Subject to the availability of appropriations, an Indian tribe or tribal organization that meets the requirements of paragraphs (2) and (3) of subsection (b) shall be eligible for grants--

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

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

`(2) RECEIPT OF GRANT NOT REQUIRED- Receipt of a grant under paragraph (1) shall not be a requirement of participation in self-governance.

`SEC. 404. COMPACTS.

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

`(b) Contents- A compact under subsection (a) shall--

`(1) specify and affirm the general terms of the government-to-government relationship between the Indian tribe and the Secretary, and

`(2) include such terms as the parties intend shall control during the term of the compact.

`(c) Amendment- A compact under subsection (a) may be amended only by agreement of the parties.

`(d) Effective Date- The effective date of a compact under subsection (a) shall be--

`(1) the date of the execution of the compact by the parties; or

`(2) another date agreed upon by the parties.

`(e) Duration- A compact under subsection (a) shall remain in effect for so long as permitted by Federal law or until termination by written agreement, retrocession, or reassumption.

`(f) Existing Compacts- An Indian tribe participating in self-governance under this title, as in effect on the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2007, shall have the option at any time after that date--

`(1) to retain its negotiated compact (in whole or in part) to the extent that the provisions of the compact are not directly contrary to any express provision of this title; or

`(2) to negotiate a new compact in a manner consistent with this title.

`SEC. 405. FUNDING AGREEMENTS.

`(a) In General- The Secretary shall negotiate and enter into a written funding agreement with the governing body of an Indian tribe or tribal organization in a manner consistent with the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

`(b) Included Programs-

`(1) BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE-

`(A) IN GENERAL- A funding agreement shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for all programs carried out by the Bureau of Indian Affairs and Office of Special Trustee, without regard to the agency or office within which the program is performed (including funding for agency, area, and central office functions in accordance with subsection 409(c)), that--

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

`(ii) the Secretary administers for the benefit of Indians under the Act of November 2, 1921 (25 U.S.C. 13), or any subsequent Act;

`(iii) the Secretary administers for the benefit of Indians with appropriations made to agencies other than the Department of the Interior;

`(iv) are provided for the benefit of Indians because of their status as Indians; or

'(v) with respect to which Indian tribes or Indians are primary or significant beneficiaries.

(2) DISCRETIONARY PROGRAMS- A funding agreement under subsection (a) may, in accordance with such additional terms as the parties consider to be appropriate, include other programs, or portions thereof, administered by the Secretary that are of special geographic, historical, or cultural significance to the Indian tribe.

`(3) COMPETITIVE BIDDING- Nothing in this section--

`(A) supersedes any express statutory requirement for competitive bidding; or

`(B) prohibits the inclusion in a funding agreement of a program in which non-Indians have an incidental or legally identifiable interest.

`(4) EXCLUDED FUNDING- A funding agreement shall not authorize an Indian tribe to plan, conduct, administer, or receive tribal share funding under any program that--

`(A) is provided under the Tribally Controlled Community College Assistance Act of 1978 (25 U.S.C. 1801 et seq.); and

`(B) is provided for elementary and secondary schools under the formula developed under section 1128 of the Educational Amendments of 1978 (25 U.S.C. 2008).

`(5) SERVICES, FUNCTIONS, AND RESPONSIBILITIES- A funding agreement shall specify--

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

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

`(C) the responsibilities of the Indian tribe and the Secretary under the funding agreement.

`(6) BASE BUDGET- A funding agreement shall, at the option of the Indian tribe, provide for a stable base budget specifying the recurring funds (including funds available under section 106(a)) to be transferred to the Indian tribe, for such period as the Indian tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations.

`(7) NO WAIVER OF TRUST RESPONSIBILITY- A funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian

tribes and individual Indians that exists under treaties, Executive orders, court decisions, and other laws.

`(c) Amendment- The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe.

`(d) Effective Date- A funding agreement shall become effective on the date specified in the funding agreement.

`(e) Existing and Subsequent Funding Agreements-

`(1) SUBSEQUENT FUNDING AGREEMENTS- Absent notification from an Indian tribe that it is withdrawing or retroceding the operation of one or more programs identified in a funding agreement, or unless otherwise agreed to by the parties to the funding agreement--

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

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

`(2) EXISTING FUNDING AGREEMENTS- An Indian tribe that was participating in self-governance under this title on the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2007 shall have the option at any time after that date--

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

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

`(3) MULTI-YEAR FUNDING AGREEMENTS- An Indian tribe may, at the discretion of the Indian tribe, negotiate with the Secretary for a funding agreement with a term that exceeds one year.

`SEC. 406. GENERAL PROVISIONS.

`(a) Applicability- An Indian tribe may include in any compact or funding agreement provisions that reflect the requirements of this title.

`(b) Conflicts of Interest- An Indian tribe participating in self-governance shall ensure that internal measures are in place to address, pursuant to tribal law and procedures, conflicts of interest in the administration of programs.

`(c) Audits-

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

`(2) COST PRINCIPLES- An Indian tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by--

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

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

`(3) FEDERAL CLAIMS- Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f).

`(d) Redesign and Consolidation- An Indian tribe may redesign or consolidate programs or reallocate funds for programs in any manner that the Indian tribe deems to be in the best interest of the Indian community being served, so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

`(e) Retrocession-

`(1) IN GENERAL- An Indian tribe may fully or partially retrocede to the Secretary any program under a compact or funding agreement.

`(2) EFFECTIVE DATE-

`(A) AGREEMENT- Unless the Indian tribe rescinds the request for retrocession, such retrocession shall become effective on the date specified by the parties in the compact or funding agreement.

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

`(i) the earlier of--

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

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

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

`(f) Nonduplication- A funding agreement shall provide that, for the period for which, and to the extent to which, funding is provided to an Indian tribe under this title, the Indian tribe--

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

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

`(g) Records-

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

`(2) RECORDKEEPING SYSTEM- An Indian tribe shall--

`(A) maintain a recordkeeping system; and

`(B) on 30 days' notice, provide the Secretary with reasonable access to the records to enable the Department to meet the requirements of sections 3101 through 3106 of title 44, United States Code.

SEC. 407. PROVISIONS RELATED TO THE SECRETARY.

`(a) Trust Evaluations- A funding agreement shall include a provision to monitor the performance of trust functions by the Indian tribe through the annual trust evaluation.

`(b) Reassumption-

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

`(A) imminent jeopardy to a physical trust asset, natural resources, or public health and safety that--

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

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

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

`(2) PROHIBITION- The Secretary shall not reassume operation of a program in whole or part unless--

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

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

`(3) EXCEPTION-

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

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

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

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

`(c) Inability To Agree on Compact or Funding Agreement-

`(1) FINAL OFFER- If the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary.

`(2) DETERMINATION- Not more than 45 days after the date of submission of a final offer, or as otherwise agreed

to by the Indian tribe, the Secretary shall review and make a determination with respect to the final offer.

`(3) NO TIMELY DETERMINATION- If the Secretary fails to make a determination with respect to a final offer within the time specified in paragraph (2), the Secretary shall be deemed to have agreed to the offer.

`(4) REJECTION OF FINAL OFFER-

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

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

`(I) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title;

`(II) the program that is the subject of the final offer is an inherent Federal function;

`(III) the Indian tribe cannot carry out the program in a manner that would not result in significant danger or risk to the public health; or

`(IV) the Indian tribe is not eligible to participate in self-governance under section 403(b);

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

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

`(iv) provide the Indian tribe the option of entering into the severable portions of a final proposed compact or funding agreement (including a lesser funding amount, if any), that the Secretary did not reject, subject to

any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

`(B) EFFECT OF EXERCISING CERTAIN OPTION- If an Indian tribe exercises the option specified in subparagraph (A)(iv)--

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

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

`(d) Burden of Proof- In any administrative hearing or appeal or civil action brought under this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting a final offer made under subsection (c) or the grounds for a reassumption under subsection (b).

`(e) Good Faith-

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

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

`(f) Savings- To the extent that programs carried out by Indian tribes and tribal organizations under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 409(c), the Secretary shall make such savings available to the Indian tribes or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

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

`(h) Decisionmaker- A decision that constitutes final agency action and relates to an appeal within the Department conducted under subsection (c)(4) may be made--

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

`(2) by an administrative law judge.

`(i) Rules of Construction- Each provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian tribe.

`SEC. 408. CONSTRUCTION PROGRAMS AND PROJECTS.

`(a) Option to Assume Certain Responsibilities.— In undertaking a construction project under this title, an Indian tribe may elect to assume all Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), and related provisions of law that would apply if the Secretary were to undertake the construction project, by adopting a resolution--

(1) designating a certifying officer to represent the Indian tribe and to assume the status of a responsible Federal official under such laws; and

(2) accepting the jurisdiction of the Federal court for the purpose of enforcement of the responsibilities of the certifying tribal officer assuming the status of a responsible Federal official under such laws.

`(b) Negotiations-

`(1) CONSTRUCTION PROJECTS- A provision shall be included in the funding agreement that, for each construction project--

`(A) states the approximate start and completion dates, which may extend for one or more years;

`(B) provides a general description of the construction project;

`(C) states the responsibilities of the Indian tribe and the Secretary with respect to the construction project;

`(D) describes--

`(i) the ways in which project-related environmental considerations shall be addressed; and

`(ii) the standards by which the Indian tribe shall accomplish the project;

`(E) states the amount of funds provided for the project; and

`(F) states that each project must comply with applicable Federal laws, program statutes and regulations.

`(c) Codes and Standards; Tribal Assurances-

`(1) IN GENERAL- The funding agreement shall contain specific assurances by the Indian tribe that it will follow proper public health and safety standards in carrying out all construction-related activities, including--

`(A) the use of architects and engineers who are licensed, bonded and qualified to perform the type of construction involved in the funding agreement who will provide a certification that the plans and specifications meet or exceed the applicable health and safety standards;

`(B) applicable Federal, State, local, or tribal codes and applicable engineering standards, appropriate for the particular project; and

`(C) necessary inspections and testing by the Indian tribe.

`(2) CERTIFICATION- In the case of a tribe which has previously administered a construction project budget of greater than $1,000,000, the assurances required in paragraph (1) may be satisfied if the funding agreement contains a certification by the Indian tribe that it has established and will adhere to procedures to enforce these assurances and the certification and provides a copy of the certification under subparagraph (1) to the Secretary.

`(3) VERIFICATION- In the case of a tribe which has not previously administered a construction project budget of greater than $1,000,000, the assurances and certifications required in paragraph (1) may be satisfied by quarterly provision by the tribe to the Secretary of all professional contracts, surety bonds, plans, designs, estimates, specifications, engineering standards, health and safety codes, and inspection and testing reports applicable to all construction-related activities administered under the funding agreement.

`(d) Responsibility for Completion- The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the funding agreement.

`(e) Funding-

`(1) IN GENERAL- Funding for construction projects carried out under this title shall be included in funding agreements as annual advance payments, with semiannual payments at the option of the Indian tribe. Annual advance and semiannual payment amounts shall be determined based on mutually agreeable project schedules reflecting work to be accomplished within the advance payment period, work accomplished and funds expended in previous payment periods, and the total prior payments, subject to the availability of appropriations for that purpose.

`(2) CONTINGENCY FUNDS- The Secretary shall include associated project contingency and retention funds in an advance payment described in paragraph (1), and the Indian tribe shall be responsible for the management of the contingency funds included in the funding agreement. Retention funds shall be retained unspent by the Indian tribe until the end of the construction project and may only be spent after approval by the Secretary.

`(3) REALLOCATION OF SAVINGS-

`(A) IN GENERAL- An Indian tribe may reallocate any financial savings realized by the Indian tribe arising from efficiencies in the design, construction, or any other aspect of a construction program or construction project.

`(B) PURPOSES- A reallocation under subparagraph (A) shall be for construction-related activity purposes for which the funds were appropriated and distributed to the Indian tribe under the funding agreement.

`(f) Approval-

`(1) IN GENERAL- The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Indian tribe in advance of construction of the facilities specified in the scope of work for each negotiated construction project agreement or any amendment thereof which results in a significant change in the original scope of work.

`(2) CONSISTENT WITH CERTIFICATION- If the planning and design documents for a construction project have been prepared in a manner consistent with the required

certification of a tribe referenced in subsection (c)(2), approval by the Secretary of a funding agreement providing for the assumption of the construction project shall be deemed to be an approval of the project planning and design documents under paragraph (1).

`(3) REPORTS- The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually.

`(4) INSPECTION- The Secretary may conduct onsite project inspections at a construction project semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

`(g) Wages-

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

`(2) AUTHORITY- With respect to construction alteration, or repair work to which that subchapter is applicable under this section, the Secretary of Labor shall have the authority and functions specified in the Reorganization Plan numbered 14, of 1950, and section 3145 of title 40.

`(h) Applicability of Other Law- Unless otherwise agreed to by the Indian tribe, no provision of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), the Federal Acquisition Regulation, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project conducted under this title.

`SEC. 409. PAYMENT.

`(a) In General- At the request of the governing body of the Indian tribe and under the terms of an agreement, the Secretary shall provide funding to the Indian tribe to carry out the funding agreement.

`(b) Advance Annual Payment- At the option of the Indian tribe, a funding agreement shall provide for an advance annual payment to an Indian tribe.

`(c) Amount- Subject to subsection (e) and sections 405 and 406 of this title, the Secretary shall provide funds to the Indian tribe under a funding agreement for programs in an amount that is equal to the amount that the Indian tribe would have been entitled to receive under contracts and grants under this Act (including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members) without regard to the organization level within the Department in which the programs are carried out.

`(d) Timing- Unless the funding agreement provides otherwise, the transfer of funds shall be made not later than 10 days after the apportionment of funds by the Office of Management and Budget to the Department.

`(e) Availability- Funds for trust services to individual Indians shall be available under a funding agreement only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the Indian tribe.

`(f) Multiyear Funding- A funding agreement may provide for multiyear funding.

`(g) Limitations on Authority of the Secretary- The Secretary shall not--

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

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

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

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

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

`(i) a reduction in appropriations from the previous fiscal year for the program to be included in a compact or funding agreement;
`(ii) a congressional directive in legislation or an accompanying report;
`(iii) a tribal authorization;
`(iv) a change in the amount of pass-through funds subject to the terms of the funding agreement; or
`(v) completion of an activity under a program for which the funds were provided;

`(C) to pay for Federal functions, including--
`(i) Federal pay costs;
`(ii) Federal employee retirement benefits;
`(iii) automated data processing;
`(iv) technical assistance; and
`(v) monitoring of activities under this title; or

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

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

`(i) Prompt Payment Act- Chapter 39 of title 31, United States Code, shall apply to the transfer of funds due under a compact or funding agreement authorized under this title.

`(j) Interest or Other Income-

`(1) IN GENERAL- An Indian tribe may retain interest or income earned on any funds paid under a compact or funding agreement to carry out governmental purposes

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

`(3) INVESTMENT STANDARD- Funds transferred under this title shall be managed using the prudent investment standard.

`(k) Carryover of Funds-

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

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

`(l) Limitation of Costs-

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

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

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

`(m) Distribution of Funds- The Office of Self-Governance shall be responsible for distribution of all Bureau of Indian Affairs funds provided under this title unless otherwise agreed by the parties.

`SEC. 410. FACILITATION.

`(a) In General- Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that facilitates--

`(1) the inclusion of programs in funding agreements; and

`(2) the implementation of funding agreements.

`(b) Regulation Waiver-

`(1) REQUEST- An Indian tribe may submit a written request for a waiver to the Secretary identifying the

specific text in regulation sought to be waived and the basis for the request.
`(2) DETERMINATION BY THE SECRETARY- Not later than 120 days after receipt by the Secretary of a request under paragraph (1), the Secretary shall approve or deny the requested waiver in writing to the Indian tribe.
`(3) GROUND FOR DENIAL- The Secretary may deny a request under paragraph (1) only upon a specific finding by the Secretary that the identified text in the regulation may not be waived because such a waiver is prohibited by Federal law.
`(4) FAILURE TO MAKE DETERMINATION- If the Secretary fails to approve or deny a waiver request within the time required under paragraph (2), the Secretary shall be deemed to have approved the request.
`(5) FINALITY- The Secretary's decision shall be final for the Department.

`SEC. 411. DISCLAIMERS.

`Nothing in this title expands or alters any statutory authority of the Secretary so as to authorize the Secretary to enter into any agreement under sections 405(b)(2) or 405(b)(3)--
`(1) with respect to an inherent Federal function;
`(2) in a case in which the law establishing a program explicitly prohibits the type of participation sought by the Indian tribe (without regard to whether one or more Indian tribes are identified in the authorizing law); or
`(3) limits or reduces in any way the services, contracts, or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law.

`SEC. 412. APPLICATION OF OTHER SECTIONS OF THE ACT.

`(a) Mandatory Application- Sections 5(d), 6, 7, 102(c), 102(d), 104, 105(a)(1), 105(f), 105(m)(1)(B), 110, and 111 and section 314 of Public Law 101-512 (covered under chapter 171 of Title 28, United States Code, commonly known as the "Federal Tort Claims Act") apply to compacts and funding agreements under this title.
`(b) Discretionary Application-

`(1) IN GENERAL- At the option of a participating Indian tribe or Indian tribes, any or all of the provisions of title I shall be incorporated in any Department compact or funding agreement.

`(2) EFFECT- Each incorporated provision--

`(A) shall have the same force and effect as if set out in full in this title; and

`(B) shall be deemed to supplement or replace any related provision in this title and to apply to any agency otherwise governed by this title.

`(3) EFFECTIVE DATE- If an Indian tribe requests incorporation at the negotiation stage of a compact or funding agreement, the incorporation--

`(A) shall be deemed effective immediately; and

`(B) shall control the negotiation and resulting compact and funding agreement.

`SEC. 413. BUDGET REQUEST.

`(a) Requirement of Annual Budget Request-

`(1) IN GENERAL- The President shall identify in the annual budget request submitted to Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title.

`(2) DUTY OF SECRETARY- The Secretary shall ensure that there are included, in each budget request, requests for funds in amounts that are sufficient for planning and negotiation grants and sufficient to cover any shortfall in funding identified under subsection (b).

`(3) RULE OF CONSTRUCTION- Nothing in this subsection authorizes the Secretary to reduce the amount of funds that an Indian tribe is otherwise entitled to receive under a funding agreement or other applicable law.

`(b) Present Funding; Shortfalls- In all budget requests, the President shall identify the level of need presently funded and any shortfall in funding (including direct program costs, tribal shares, and contract support costs) for each Indian tribe, either directly by the Secretary, under self-determination contracts, or under compacts and funding agreements.

`SEC. 414. REPORTS.

`(a) In General-

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

`(2) ANALYSIS- A report under paragraph (1) shall include a detailed analysis of tribal unmet need for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this title.

`(3) NO ADDITIONAL REPORTING REQUIREMENTS- In preparing reports under paragraph (1), the Secretary may not impose any reporting requirements on participating Indian tribes not otherwise provided by this title.

`(b) Contents- The report under subsection (a)(1) shall--

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

`(2) identify--

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

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

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

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

`(E) amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of inherent Federal functions by type and location;

`(3) contain a description of the methods used to determine the individual tribal share of funds controlled by all components of the Department (including funds assessed by any other Federal agency) for inclusion in compacts or funding agreements;

`(4) before being submitted to Congress, be distributed to the Indian tribes for comment (with a comment period of no less than 30 days); and

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

`(c) Report on Non-BIA, Non-OST Programs-

`(1) IN GENERAL- In order to optimize opportunities for including non-Bureau of Indian Affairs and non-Office of Special Trustee programs in agreements with Indian tribes participating in self-governance under this title, the Secretary shall--

`(A) review all programs administered by the Department, other than through the Bureau of Indian Affairs or Office of Special Trustee, without regard to the agency or office concerned; and

`(B) not later than January 1 of each year, submit to Congress--

`(i) a list of all such programs that the Secretary determines, with the concurrence of Indian tribes participating in self-governance under this title, are eligible to be included in a funding agreement at the request of a participating Indian tribe; and

`(ii) a list of all such programs for which Indian tribes have requested to include in a funding agreement under section 405(b)(3) due to the special geographic, historical, or cultural significance of the program to the Indian tribe, indicating whether each request was granted or denied, and stating the grounds for any denial.

`(2) PROGRAMMATIC TARGETS- The Secretary shall establish programmatic targets, after consultation with Indian tribes participating in self-governance, to encourage bureaus of the Department to ensure that a significant portion of those programs are included in funding agreements.

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

`(4) ANNUAL REVIEW-

`(A) IN GENERAL- The Secretary shall annually review and publish in the Federal Register, after

consultation with Indian tribes participating in self-governance, revised lists and programmatic targets.

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

`(d) Report on Central Office Funds- Not later than January 1, 2010, the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs and the Office of Special Trustee for inclusion in the compacts.

`SEC. 415. REGULATIONS.

`(a) In General-

`(1) PROMULGATION- Not later than 90 days after the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2007, the Secretary shall initiate procedures under subchapter III of chapter 5, of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out the amendments made by this title.

`(2) PUBLICATION OF PROPOSED REGULATIONS- Proposed regulations to implement the amendments shall be published in the Federal Register not later than 1 year after the date of the enactment of this title.

`(3) EXPIRATION OF AUTHORITY- The authority to promulgate regulations under paragraph (1) shall expire on the date that is 24 months after the date of the enactment of this title.

`(b) Committee-

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

`(2) LEAD AGENCY- Among the Federal representatives, the Office of Self-Governance shall be the lead agency for the Department.

`(c) Adaptation of Procedures- The Secretary shall adapt the negotiated rulemaking procedures to the unique context of self-

governance and the government-to-government relationship between the United States and Indian tribes.

`(d) Effect-

`(1) REPEAL- All regulatory provisions under part 1000 of title 25, Code of Federal Regulations, inconsistent with this title are repealed on the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2007.

`(2) EFFECTIVENESS WITHOUT REGARD TO REGULATIONS- The lack of promulgated regulations shall not limit the effect of this title.

`SEC. 416. EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, AND RULES.

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

`(1) the eligibility provisions of section 105(g); and

`(2) regulations promulgated under section 415.

`SEC. 417. APPEALS.

`In any administrative appeal or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence--

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

`(2) the consistency of the decision with the provisions and policies of this title.

`SEC. 418. AUTHORIZATION OF APPROPRIATIONS.

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

`SEC. 419. APPLICABILITY OF THE ACT TO THE DEPARTMENT OF TRANSPORTATION.

`(a) The Secretary of the Department of Transportation shall carry out a program within the Department of Transportation to be known as the Tribal Transportation Self-Governance Program.

`(b) Notwithstanding any other provision of law, the Secretary of Transportation shall enter into compacts and funding agreements under this title with any Tribe who elects to utilize the authority of this title to govern any funds made available to Indian tribes under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59) or successor authorities.

`(c) Notwithstanding any other provision of law, the negotiation and implementation of each compact and funding agreement entered into under this section shall be governed by the provisions of this title. "

END

Senator MURKOWSKI. Thank you, Mr. Allen. I would like to recognize the Chairman, and also Senator Cantwell has joined the Committee.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. Senator Murkowski, thank you very much. I regret I was delayed, but Senator Murkowski and Senator Tester indicated they would be here.

Let me thank all the witnesses. I will just put my opening statement in the record and we will proceed with the witnesses.

[The prepared statement of Senator Dorgan follows:]

PREPARED STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Today the Committee will examine the Tribal Self-Governance Program as the program reaches its twentieth year in existence.

As we'll hear today, the program is seen by many as an overall success. The basic idea of vesting tribal governments' with greater authority to manage and control programs administered by the United States to benefit their communities is the cornerstone of the Indian Self-Determination policy.

The Self-Governance Program took Self-Determination one step further. The program offers a Tribe the flexibility to pick and choose programs and prioritize funding amounts that fit their individual community's needs.

Dissatisfied with the services provided by the federal government, many Tribes today administer their own education, health care, and law enforcement services. In

addition, Tribes are managing programs for job training, dam safety, forestry, utility services, and even land title record keeping. These Tribes have generally taken greater control of their destiny.

The goals of the Self-Governance Program are to reduce the federal bureaucracy, improve the delivery of services to tribal residents, and strengthen the governing bodies of Indian Tribes.

As we'll hear today; however, we are falling short of that goal.

One indicator for me is the fact that no Tribe in North Dakota participates in the Self-Governance Program. I believe their reluctance lies in part on the barriers that will be discussed today.

The Self-Governance program began as a demonstration project for 10 Tribes in 1988. The number of participating Tribes quickly increased when the program was made permanent. However, that has leveled off over the past decade.

Many Tribes point to the bureaucratic obstacles that exist at the federal level. The most prominent barriers to participation are delays in distributing funds to Tribes, and the inadequate provision of contract support costs.

Congress, the agencies, and the Tribes must all cooperate and coordinate to make the Program a success. However, I believe much of the failure lies in a lack of planning. While it does not have an easy job, the Bureau of Indian Affairs has simply not planned for growth in the Program.

For decades, the Bureau of Indian Affairs has been forced to wear several hats. It provides direct services to some Tribes, and enters into Self-Determination contracts and Self-Governance compacts with others. As a result, the agency has to employ direct service providers, contract and compact negotiators, and others to service the contracts and compacts. This is no easy task.

For the first time in decades, the BIA sought to address these difficulties.

Assistant Secretary Artman began his dialogue with Tribes on the modernization of the Bureau of Indian Affairs. While the term modernization may cause some unease, I believe that he started a necessary dialogue that would force the Bureau to plan for the future.

Of course, Mr. Artman's work has been cut short. Last week, I expressed my disappointment regarding his departure. But the Bureau must move forward. It is my hope that those who remain at the Bureau will listen to today's discussion, and begin to plan for not only the future of the Bureau, but also the future of Indian country.

Senator MURKOWSKI. Thank you.

Mr. Marshall.

STATEMENT OF HON. CLIFFORD LYLE MARSHALL, CHAIRMAN, HOOPA VALLEY TRIBE

Mr. MARSHALL. Good afternoon. My name is Clifford Lyle Marshall, Chairman of the Hoopa Valley Tribe. I first ask that my written testimony be entered into the record.

Senator MURKOWSKI. Without objection, so ordered. It will be entered, as will all the testimony from all the participants.

Mr. MARSHALL. Thank you for this opportunity to present my views regarding the self-governance program. Please allow me to trump Chairman Allen by saying that the Hoopa Tribe was the tribe in the Nation to enter into a self-governance compact with the United States in 1990.

I thank this Committee for its continuing bipartisan support of the tribal self-governance program. Through self-governance, Indian Country has experienced many dynamic and pioneering changes in the last 20 years. Through self-governance tribes have been able to strengthen tribal government, stabilize funding bases, improve and expand services and increase staffing and technical capabilities. Self-governance tribes have also become effective partners with the United States, working together to address and resolve decades of backlogged trust management issues.

The self-governance program spurred an important transition from bureaucratic, one size fits all programs to flexible, tribally-designed and administered programs. For this reason, they work. This is not to say that self-governance is easy. Self-governance is government and performing the functions of government is hard work. During the first eight years of self-governance, the Hoopa Tribe adopted over 40 ordinances, including a legislative procedures act and a budget ordinance to make our government more efficient and accountable. Today, tribal ordinances total over 70. We added to and improved our governmental capabilities. Today the Hoopa Tribe has assumed management authority over all Federal programs on our reservation.

Currently, the Tribe manages 54 programs, including 10 enterprises created in the last 20 years. The Tribe manages all lands and resources on the reservation. These programs include a range of services to our people, have spurred economic development on our reservation and ensure quality management of our trust resources. Our programs are audited annually and evaluated annually by the BIA regional office.

Self-governance is an authorizing law, not an appropriations law. Yet it has given the Hoopa Tribe the ability to generate significant additional dollars to help offset the costs of carrying out trust activities. At Hoopa, we can show that the Tribe matches $3 from other sources for each $1 compacted from the BIA that is used for trust management programs.

In 1997, Hoopa and six other California tribes established the California Trust Reform Consortium to work with the BIA Pacific Regional Office to address trust resource management issues. In 1998, the Consortium and Regional Office entered into an agreement that defines the management roles and responsibility of the regional office and the tribes in this regard. This working relationship has worked well for the last 10 years.

The specific problem to the future of self-governance is, frankly, the Office of Special Trustee and the Department of Interior's redesign of the trust relationship. The self-governance program was designed to create flexibility. Trust reform reorganization is inflexible. The Hoopa Tribe's successes all occurred before the effort of trust reform reorganization, and we are now in conflict with it because they do not mirror the universal program as designed by the OST.

Tribal self-governance programs do not fit into the inflexible trust reform boxes the Department of Interior has now created. We can only expect to see regression of all the progress made if dominating Federal control re-emerges. Please sunset OST this session or limit its purpose or protect the agreements entered into with the self-governance tribes.

In particular, Congress needs to continue to protect the successful trust management programs developed by the Section 139 tribes to ensure the advances we have made to date.

We are deeply disappointed that the Title IV amendment proposals do not include the mandatory non-BIA programs. Trust responsibility is the obligation of the United States, not the BIA. All Federal agencies that perform operations that impact trust resources or rights of a tribe have a trust obligation to protect those

resources and rights. We strongly feel that compacting should be extended to other Federal agencies and we ask that current Section 403(b)(2) should remain in Title IV.

Congress passed various Federal laws that mandate restoration of the Trinity River, which goes through my reservation, to protect the Hoopa Tribe's federally-protected fishing rights. The Bureau of Reclamation, however, has determined that the restoration programs are not Indian programs under the Self-Governance Act, and trust responsibility affords them no priority in setting budgets.

Trinity River habitat restoration, however, is so under-funded that it threatens our federally-reserved fishing rights. Specific language in H.R. 3994, which would enable tribes to contract to perform programs that restore, maintain and preserve a resource in which an Indian tribe has a federally-reserved right, would resolve problems in executing contracts that we currently face wit the Bureau of Reclamation over management of Trinity River programs.

The Hoopa Tribe requests that the Senate Committee introduce Title III of Senate Bill 1439, the Indian Trust Reform Act of 2005, as a standalone bill. Title III would create the Indian Trust Asset Management Demonstration Project which would allow tribes to design and manage the resources as long as the tribes meet the requirements of Federal law. The Hoopa Valley Tribe already does this.

We ask Congress, in conclusion, to continue to support self-governance and protect the progress self-governance tribes have made from the potential negative effects of the Department's trust reform reorganization. We ask that you sunset OST. We also ask Congress to address mandatory non-BIA compacting and finally, we ask that you introduce Title III of Senate Bill 1439 as a standalone bill.

This concludes my remarks and I would be happy to address any questions you may have.

[The prepared statement of Mr. Marshall follows:]

PREPARED STATEMENT OF HON. CLIFFORD LYLE MARSHALL, CHAIRMAN, HOOPA VALLEY TRIBE

Good Afternoon. I am Clifford Marshall, Chairman of the Hoopa Valley Tribe of Northern California. Thank you for this opportunity to present my views regarding the Self-Governance Program and, more importantly, the future of Self Governance. The Hoopa Tribe was one of the first tier of tribes under the Self-Governance Project in 1988 and was the first tribe in the Nation to enter a Self-Governance compact with the United States in 1990.

First, and foremost, I thank this Committee for its continuing bipartisan support for the Tribal Self-Governance Program. The Self-Governance provisions in the Indian Self-Determination and Education Assistance Act stand as one of the most progressive pieces of Indian legislation enacted by Congress. In 1988, Congress listened to many tribes who were saying loudly that they were extremely unhappy with BIA programs and funding. Congress answered with the Self Governance Project that provided tribes with funding, flexibility in designing their own programs, and the authority to set their own budget priorities.

Through Self Governance, Indian Country has experienced many dynamic and pioneering changes in the last twenty years. Self-Governance tribes have progressively moved to stabilize funding bases, improve and expand services at the reservation level, and increase staffing and technical capabilities. Tribes have been able to strengthen tribal government, and establish administrative capability. Through Self-Governance, tribes have become effective partners with the United States, working together to positively address and resolve decades of backlogged trust management issues.

The Self-Governance Program spurred an important transition from bureaucratic one-size-fits-all, federally-dominated programs to flexible tribally-designed and ad-

ministered programs. Tribes are in the best position to determine what is needed by, and how to provide for, their governments and members. Prior to Self-Governance, there had been a lack of tribal participation in designing programs and setting agendas; instead, there was a reliance on federal-project planning. These federally-developed programs were not only chronically under-funded, they were not meeting the on-the-ground needs of Indian people. Self-Governance afforded tribes the opportunity to take over the planning and development of these programs. At that point they became based on the priorities and needs of Indian communities as determined by the tribes, and for this reason, they work.

This doesn't mean to say that Self-Governance is easy. Self-Governance is government, and performing the functions of government is hard work. Before Self-Governance the Tribe contracted most BIA programs under the Indian Self-Determination Act, Public Law 93–638. Frustrated with the short-comings of 93–638 contracting, the inflexibility of the BIA-designed programs, the draconian oversight of the BIA and contract compliance obligations, and the stark reality that needs on the ground were not being met, the Tribe embarked on Self-Governance and has not looked back.

For the first eight years of the program, we worked simply to regain control of reservation affairs and develop our governmental and administrative structure. The Tribal Council adopted over forty (40) ordinances, including the Tribe's own legislative procedures ordinance and a Tribal Budget Ordinance, to make our government more efficient and accountable. Today tribal ordinances total seventy (70). Again, creating a structure of government wasn't easy. During this beginning period, we were also able to stabilize our tribal government funding base, which required a lot of hard work and negotiation. We added to and improved our governmental capabilities, and set a course to begin planning for our future. Today, the Hoopa Tribe has assumed management authority over all Federal programs on its reservation.

Specific Hoopa Self-Governance Programs

Self-Governance has allowed us the flexibility to design our own programs. Currently, the Tribe manages 54 programs, created in the last twenty years. These programs provide a range of services to our people, have spurred economic development on our reservation, and ensure quality management of our trust resources. We are proud of the fact that Hoopa was the first to compact health care with the Indian Health Service (IHS) in California, and now has a hospital, a dental clinic, and the only ambulance service and emergency room within 70 miles of the reservation and the next nearest hospital. Much of the other programs we manage would be Bureau of Indian Affairs (BIA) trust resources and services related programs.

The Tribe established the first tribal court in California in 1983, adding a branch of government that the BIA had overlooked when it drafted the first tribal constitutions in the 1930's. The Tribe then established its own law enforcement department for resource protection and to enforce fish regulations. The Tribe then entered into a cross-deputization agreement with Humboldt County, giving tribal police the authority to enforce state criminal laws. This relationship was the first in California and has been in existence for approximately 13 years. The Tribe also enforces its own civil traffic code.

The Tribe originally contracted forestry management from the BIA as part of a settlement agreement for mismanagement of tribal timber lands in 1983. Since 1988, we have compacted and independently managed our forest lands under a 10-year forest management plan that exceeds environmental standards required by Federal law. This plan has allowed our timber to be "Smart Wood" certified, a certification that allows lumber products produced from our timber to be exportable to Europe, which has created increased value and revenue from our annual timber sales. Our Forestry Department has received exemplary trust evaluations from then BIA's Pacific Regional Office (PRO).

The Tribe also owns and operates its own logging company, creating seasonal employment and additional revenue from annual timber harvests. We also have our own nursery to grow trees for replanting. Forestry management includes forestry protection, and the Hoopa Tribe has created its own wildland fire protection program. All tribal firefighters meet the same qualification requirements of the United States Forest Service.

When Hoopa assumed forestry management, we also took over the BIA roads department. Though the reservation contains over 100 miles of roads, the only Tribe receives $113,000 a year for roads maintenance from the BIA, not enough to maintain one mile of road. To maintain and upgrade our forest roads neglected for decades by the BIA, a percentage of our annual timber sales go toward road maintenance. Almost seven years ago, the Tribe invested in an aggregate plant that now helps subsidize the roads program by paying the salaries of roads department em-

ployees with revenues generated from state and federal contracts and from the sale of sand, gravel, road base and cement.

The Tribe has also compacted realty from the BIA regional office. Through tribal ordinances, the Tribe assigns land to tribal members for housing, agriculture, and grazing. The Tribe created a public utilities district that has spent the past 15 years laying a reservation-wide water system. We are now in the process of developing a reservation-wide irrigation system, using river water as the source, and are in the beginning stages of designing a reservation-wide sewer system that is projected to be needed to serve our community.

Hoopa has its own Tribal Environmental Protection Agency, TEPA, which ensures that our resource management programs perform in compliance with Federal EPA regulations. TEPA monitors and enforces both air and water quality standards set by the Tribal Council. TEPA is also responsible for enforcement of the Tribe's solid waste ordinance. This past year the Tribe established the Office of Emergency Services to prepare and coordinate our departments and make the Tribe eligible for FEMA funding in the event of a disaster. The Tribe has its own fisheries department that monitors in-stream habitat and salmon populations in the Trinity River basin. This is a well-respected program that also contracts with the Bureau of Reclamation and the United States Fish and Wildlife Service for collection of fisheries enhancement data.

We also have a housing authority, a human services department that provides alcohol and drug abuse counseling, as well as family crisis counseling, and an education department that encompasses preschool to a junior college branch campus.

In regard to addressing poverty through economic development, we still have a long way to go. We have created programs addressing the obstacles to employment such as lack of education, training, and drug and alcohol abuse. With the collapse of the timber industry in our region in the 1970's we have been searching for a new industry that would establish an economic base from which we could build a local economy around. In 2003, the Tribe invested in, financed, and built the largest and most state-of-the-art modular housing plant on the West Coast, to provide an affordable product for Northern California residents. This plant produces homes using the same materials as on-site construction for less than half the cost. Our hopes were that this would create the opportunity for tribal members to invest in businesses that provide services and/or materials to the plant. Because of the collapse of the housing industry, along with the housing mortgage industry, sales for our corporation, "Xontah Builders" has dropped significantly and employment in our plant has been reduced by 50 percent. We are still in operation, operating with a skeleton crew of thirty-five (35) and anticipate increased sales once the housing market rebounds.

Funding Benefits and Government-to-Government Relationships

A benefit of major importance in Self-Governance that gets little attention is how it has helped to generate additional funding for carrying out underfunded federal programs. Evidence of chronically underfunded Indian programs, sometimes as much as 75 percent within the BIA and IHS budgets, has been well-documented over the past several decades. Many tribes hesitate to assume federal programs under Self-Governance because they understand there is not adequate money to support the tribe in carrying out the functions of the programs that the tribes want to administer. However, while Self-Governance is an authorizing law–not an appropriations law–it gives tribes the ability to generate significant additional dollars to help offset the cost of carrying out trust activities. At Hoopa, we can show that the Tribe matches $3.00 from other sources for each $1.00 compacted from the BIA that is used for trust management programs.

Another benefit is the ability to redefine the working relationships between tribes and the BIA. For Self-Governance to work, tribes must develop and define a strong positive working relationship with their BIA counterpart. The Hoopa Tribe has enjoyed a solid working relationship with the BIA Pacific Regional Office (PRO) for more than a decade. In 1997, Hoopa and six other California tribes established the California Trust Reform Consortium. It was created to work with the PRO to address the trust resource management issues upon which many of the claims made in the Cobell litigation are based.

In 1998, the Consortium and the PRO entered into an agreement that established the terms, conditions and operating procedures for the Consortium. The ability to develop a new working relationship with the Regional Office was made possible by the flexibility created by Self-Governance. The agreement defines the management roles and responsibilities of the PRO and the tribes and includes provisions for a funding process through the PRO, a joint oversight advisory council, a process for developing "measurable and quantifiable trust management standards," methods for

resolving disagreements and disputes, and finally, a participatory process for annual trust evaluations. This working relationship that is unique to California has worked well for the last ten years.

Specific Problems that Impede the Development of Tribal Self-Governance: Trust Reform

To be blunt, the specific problem to the development of Self-Governance is the Office of Special Trustee (OST) and the Department of the Interior's (DOI's) redesign of the trust relationship. OST is an obstacle to tribal governmental, social, and economic development. The Self-Governance Program is designed to create flexibility. Trust Reform Reorganization is inflexible. I have presented to you the successes of my Tribe in developing government, social programs, and resource management programs, and in developing a unique working relationship with the BIA PRO. Please note that all of these occurred before the effort of Trust Reform Reorganization, and are now in direct conflict with it because they do not mirror the universal program as designed by the OST. Please sunset OST this session, or limit its purpose to the management of IIM accounts, or adopt language that will protect the agreements entered into with the Self-Governance Tribes.

An example of this is the Office of Self Governance's decision not to honor an agreement entered into between the Hoopa Tribe and the tribes of the California Trust Reform Consortium and the PRO. This agreement was entered into in 1995 and approved by the Washington office by Special Authorization. This agreement allowed the Regional Office to distribute BIA funds for forestry and roads programs directly to the Tribes. This resolved a bureaucratic problem of having the PRO send the funds back to Washington and then resent from Washington to the tribes; a process which would delay receipt of the funds by several months. In 2008, however, the OSG reinterpreted the Self-Governance Act as prohibiting anyone, other than the OSG, from distributing funds to the Tribe. Because the language previously approved in 1995 was included every year in the Tribes' annual funding agreement, the Office of Self Governance (OSG) held up approval of the agreement for four months. The problem that was resolved through negotiation under Self Governance over thirteen years ago has now been reinstated because it does not comport with the DOI's model for trust reorganization.

The OSG needs to understand that the Self-Governance Act was not designed to promote or protect bureaucratic activities; instead it exists to engage the direct participation of tribes to improve the provision of services to Indian people and the working relationships between the United States and tribes. We can only expect to see regression of all the progress made if dominating federal control re-emerges, something that the Self-Governance Program sought to keep at bay.

We view the reorganization plans of the DOI, starting with BITAM, as an attack on Self-Governance principles. There is an inherent conflict. Self Governance was designed to give tribes the flexibility to design their own programs and set their own internal funding priorities. Tribal Self-Governance programs, created before Trust reform, do not fit into the inflexible trust reform boxes DOI has now created. In the end, the DOI/OST trust plans will fail because tribal governments' local priorities and needs are not addressed in the reorganization plan. This is a plan for bookkeepers, not tribal governments.

Congress needs to continue to protect the programs developed by the Section 139 tribes. These programs were designed before the DOI's Trust Reform Reorganization and have been described as being light-years ahead of other tribally-developed self-governance programs and DOI's trust reform programs. We need the continued protection of Congress to ensure the advances we have made to date are not undermined by DOI's Trust Reform Reorganization.

Non-BIA Mandatory Programs

Another area of major concern for the Hoopa Tribe is compacting non-BIA programs. We are deeply disappointed that the Title IV amendment proposals no longer include the mandatory non-BIA programs. We understand that the Title IV Task Force agreed to remove this section, which was originally drafted by the Hoopa Valley Tribe, because of the strong opposition from Interior. It is short-sighted to leave out of Self-Governance those non-BIA programs that have statutory trust obligations to tribes and Indian people. The issue is this: Trust Responsibility is an obligation of the United States not the BIA. All federal agencies that perform operations that impact trust resources or rights of a tribe have a trust obligation to protect those resources and rights. Self-Governance affords tribes with the ability to ensure these resources are protected through compacting. We strongly feel that this ability should be extended to other federal agencies.

On the Trinity River, which flows through the Hoopa Reservation and which the Tribe has federally protected fishing rights, the Bureau of Reclamation operates the Trinity River Division of the Central Valley Project. The Trinity Dam, completed in 1964, was the primary reason for 80 percent declines in the Trinity River fishery resources, and has been the subject of numerous congressional and court actions associated with violations of the United States' trust obligations to the Tribe. To correct the declines in fishery resources, Congress passed various federal laws that mandated restoration of the Trinity River fishery resources as part of the Federal trust obligations to the Tribe. Ironically, the Bureau of Reclamation (BOR) has determined that the programs that are mandated by Congress to fulfill the trust obligations of the United States to our Tribe are not "Indian Programs" under the Self-Governance Act.

The problem here is that funding for Trinity River habitat restoration is so underfunded that it jeopardizes a trust resource and threatens our federally-reserved fishing rights. The Hoopa Tribe is also recognized by law as a co-manager of the Trinity River Fishery. The Hoopa Valley Tribe has worked tirelessly for years to get Congressional action to address this inadequate funding level for the Trinity River Restoration Program. But what we are seeing instead is the movement of legislation to fund other river restoration efforts, without identifying additional funds, furthering the burden on the limited funds that the Trinity River Restoration Program currently relies upon. Trust Responsibility is not perceived by BOR as an obligation that gives tribal water and fishing rights any priority. Absent an acknowledgement that a trust duty is owed, protection of the Tribe's rights takes a back seat to other projects, even newly proposed projects.

The House bill, H.R. 3994, included specific language in Section 405(b)(2)(B) which would enable tribes to contract to perform programs, or portions thereof, that "restore, maintain or preserve a resource (for example, fisheries, wildlife, water or minerals) in which an Indian tribe has a federally reserved right, as quantified by a Federal court." We refer you to our November 8, 2007, testimony before the House Committee on Natural Resources for details on the importance of this provision to the Hoopa Tribe, and how it would resolve problems we currently face with the BOR over the management of Trinity River programs. These problems include delays in executing contracts which result in a significant financial burden for the Tribe and administrative, programmatic and staffing nightmares for our programs. What needs to be understood, which does not seem to be by other federal agencies, is that the trust responsibility to tribes is the trust responsibility of the United States and it is owed to tribes by all federal agencies.

Having said this, we ask that Congress include the federally-reserved rights language in Title IV amendments. If this is not possible at this time, we ask that it be clear that current section 403(b)(2) remains in the law. We would like to move forward with legislation that allows tribes to exercise their self-governance in other areas and in a more expansive way. With this, we ask you to take up and address the federally-reserved right issue with respect to non-BIA agencies as soon as possible.

TITLE III of S. 1439, the Indian Trust Asset Management Demonstration Act

The Hoopa Tribe requests that the Senate Committee introduce Title III of the S. 1439, the Indian Trust Reform Act of 2005 as a stand-alone bill. Hoopa worked with several tribes in the Northwest and the Committee staff on the development of this proposal. Title III of S. 1439 would create the Indian Trust Asset Management Demonstration Project, which would allow tribes to continue their own tribally-developed trust resource management programs. Title III authorizes tribes to design and manage their resources in a manner different than the Secretary as long as the tribes meet the requirements of tribal and federal law. Again, I point out that the Hoopa Tribe is already doing this with our forestry program, which is acknowledged nationally as a model program. Title III also would grandfather in Section 139 (131) tribes that currently manage their own trust resources into the Project. Active participation by tribal governments in the management of trust assets not only creates positive results, but reduces the chance of conflicts or breach of trust claims. We are committed to working with the Committee toward the enactment of Title III.

Conclusion

We ask Congress to continue to support Self-Governance and protect the progress Self-Governance tribes have made from the potential negative effects of DOI's Trust Reform Reorganization. We ask that you sunset OST. We ask that Congress enact mandatory non-BIA provisions as soon as possible. If this is not possible at this

time, we ask that section 403(b)(2) remain in Title IV and that Congress begin working on the future of Self-Governance with the participation of the tribes. Finally, we ask that you introduce Title III of S. 1439 as a stand-alone bill. This concludes my remarks and I would be happy to address any questions you may have.

Senator MURKOWSKI. Thank you, Mr. Marshall. We appreciate your specific suggestions.

With that, we will move to Chairman Steele.

STATEMENT OF HON. JAMES STEELE, JR., TRIBAL COUNCIL CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES

Mr. STEELE. Chairman Dorgan, Vice Chairwoman Murkowski, Committee members and particularly Senator Tester from Montana, my name is James Steele, Jr., and I serve as the Chairman of the Tribal Council of the Confederated Salish and Kootenai Tribes. On behalf of my tribes, I thank you for the opportunity to provide our views to your Committee.

I have submitted a more detailed statement for the record that I will now summarize.

The Indian Self-Determination Act of 1975 and the Tribal Self-Governance Act of 1994 have been two of the most successful and important pieces of Federal Indian legislation in the history of this Country. The last 20 or 30 years have seen great changes in Indian Country. Progress has been made, and it is no coincidence that this progress has been realized at the same time as the Indian Self-Determination Act has been implemented and improved by the passage of the Self-Governance Act.

We were one of the first to enter into a contract with the BIA to operate and manage BIA programs in the 1970s. We were also one of the original 10 tribes to implement the Self-Governance Act when it was just a demonstration project. Today, I believe we operate more Federal programs than any tribe in the Country. We have done so with excellent evaluations and clean audits. A recent report funded by the State of Montana showed that the Confederated Salish and Kootenai Tribes contributed $317 million a year to the Montana economy.

My submitted statement discusses our success in operating our large electrical utility, known as Mission Valley Power, for the past 20 years that serves tribal and non-tribal members on the reservation; the Bureau of Indian Affairs' land title recording office for the Flathead Reservation since 1996; the BIA Safety of Dams program; the BIA's forestry program, fire programs, including one with the U.S. Fish and Wildlife Service for protection of the National Bison Range; the Individual Indian Monies Program and Title Plant functions for the Flathead Reservation.

In addition to the programs I have just discussed, we compact for all other available BIA programs, including law enforcement, tribal courts, education, et cetera. There are areas where improvements are needed, and for these reasons, the enactment of the pending legislation is important.

Work still needs to be done to ensure that the Federal Government will fully fund its obligation of paying full contract support costs, so that it can meet this legal requirement to contracting tribes. The Indian Self-Determination and Education Assistance Act was not intended to be a money-losing proposition for the

tribes. Nor was it intended as a mechanism for tribal governments to subsidize Federal programs and Federal statutory obligations.

Just as tribally-contracted programs should be funded at the same level as federally-administered programs, so should they have equal liability coverage under the Federal Tort Claims Act. Unfortunately, the Interior Department has not established a successful overall record with respect to self-governance contracting of non-BIA programs. We have been at the forefront in the effort to contract non-BIA programs primarily through our 14-year effort to contract activities at the National Bison Range.

The Bison Range consists of three national wildlife refuges, located in the middle of the Flathead Indian Reservation, two of which are owned by the tribes. We are currently in the final stages of negotiations with the United States Fish and Wildlife Service for another annual funding agreement to contract activities and positions at the National Bison Range complex. We are hopeful that we can reach agreement on a new AFA that would return CSKT to the bison range and establish a productive tribal-Federal partnership.

To fully realize Congressional objectives behind the Tribal Self-Governance Act, there needs to be an accompanying Congressional commitment to fully fund the Federal programs being contracted by the tribes. Shrinking or stagnant Federal funding requirements requiring supplementation of tribal dollars is a real problem for many tribes and a huge disincentive.

We are supportive of the proposed legislation and in particular, agree with the definition for the term "inherent Federal function." The proposed definition would provide consistency with Title V of the Act, thus promoting a more cohesive Federal self-governing policy overall.

We support the inclusion of activities in the Office of Special Trustee as mandatory for inclusion in an AFA at a tribe's option. We support language which retains the existing authority for tribal self-governance, contracting of non-BIA programs which are of special geographical, historical or cultural significance to an Indian tribe. We support the language that we retain the existing statutory language mandating funding to tribes for contract support costs and the language regarding Federal Tort Claims Act coverage.

I encourage this Committee to continue working with the tribes to improve the Tribal Self-Governance act and ensure that it fulfills tribal and Congressional objectives. We need to eliminate disincentives and remove barriers to self-governance participation. The proposed legislation is a good start toward accomplishing those ends.

On behalf of the Confederated Salish Kootenai Tribes, thank you for the opportunity to provide testimony and also thank you for the opportunity to submit more lengthy written testimony. Thank you.

[The prepared statement of Mr. Steele follows:]

PREPARED STATEMENT OF HON. JAMES STEELE, JR., TRIBAL COUNCIL CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES

Greetings Chairman Dorgan, Vice-Chairwoman Murkowski and Committee members. My name is James Steele, Jr. and I serve as the Chairman of the Tribal Council of the Confederated Salish and Kootenai Tribes ("CSKT" or "Tribes"). On behalf of the Confederated Salish and Kootenai Tribes, I thank you for the opportunity to provide our views to your Committee.

I am pleased to testify before this Committee on the draft legislation which would amend the Tribal Self-Governance Act's Interior Department provisions found in Title IV of the Indian Self-Determination and Education Assistance Act. I note that, almost four years ago today, my predecessor, Tribal Chairman Fred Matt, provided testimony to your Committee on similar Self-Governance amendments.

The Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975 and the 1994 amendments to that act, known as the Tribal Self-Governance Act (Title IV of ISDEAA) have been two of the most successful and important pieces of federal Indian legislation in the history of this country. They rank with the Indian Reorganization Act of 1934 as setting the stage for Tribal governments to determine our own affairs, protect our own communities, and provide for our own people in concert with our respective cultures and traditions. It has been a crucial step in realizing the federal policy of Indian Self-Determination which was ushered in over thirty years ago. I say "step" because I believe the federal government is still in the process of realizing that goal.

The last twenty or thirty years have seen great changes in Indian country. Many Tribes have developed vibrant economies, established stronger governments, rebuilt communities, and achieved other hallmarks of progress and success. It is no coincidence that this progress has been realized at the same time as the Indian Self-Determination and Education Assistance Act has been implemented and improved, including by passage of the Tribal Self-Governance Act. The record shows that empowering Tribal governments and communities clearly results in benefits not only for Tribal members, but for surrounding communities and the larger public as well. After President Nixon signed the Indian Self-Determination Act into law the Salish and Kootenai Tribes we were one of the first to enter into a contract with the Bureau of Indian to operate and manage BIA programs. We were also one of the original 10 tribes to implement the Self-Governance Act when it was just a demonstration project initiated by the late Congressman Sid Yates during his tenure as Chairman of the House Appropriations Subcommittee on the Interior. We have expanded the number of programs we operate ever since and today I believe we operate more federal programs than any Tribe in the country and we have done so with excellent evaluations and clean audits.

At present, the CSKT Tribal government administers $25 million in self-governance funds, $150 million in contracts and grants, and $44 million in Tribal revenue. Our government alone has 1,000 full-time employees. We are the largest employer on the Flathead Reservation, one of the largest employers in western Montana and we contribute over $30 million in payroll and over $50 million in purchasing in the local economy. A recent report funded by the State of Montana showed that the Confederated Salish and Kootenai Tribes contribute $317 million to the Montana economy annually.

Tribal Self-Governance Act Successes

Congress should be pleased to see that there is no shortage of success stories from Indian Tribes participating in the Interior Department's Tribal Self-Governance program. I am proud to testify that the Confederated Salish and Kootenai Tribes have many of our own. Following are just a few of these success stories:

- In the mid-1980s we took over total control and management of the electrical utility on our reservation, known as the Electrical Division of the Flathead Indian Irrigation Project and then renamed as Mission Valley Power (MVP). This utility serves every home and business on the reservation, to Indians and non-Indians. It is considered one of the best run utilities in the state of Montana. Since the Tribes took over, MVP has replaced and updated much of the utility's infrastructure yet managed to retain some of the lowest rates in the region. We have even been approached by off-reservation residents asking if the utility could be extended to serve them.
- CSKT has contracted the operation of the Bureau of Indian Affairs' (BIA) Land Title Recording Office for the Flathead Reservation since 1996. We are one of only Tribes I know of who contract this program. Control of this program's activities helped create the Tribal government capacity and infrastructure that allowed us to partner with the BIA to address the problem of land fractionation on the Flathead Indian Reservation through a program for Tribal acquisition of fractionated interests.
- In 1989, CSKT contracted the BIA's Safety of Dams (SOD) program. One of the main objectives of this program is to eliminate or ameliorate structural and/or safety concerns at 17 locations on the Flathead Reservation as identified by the Department of Interior National Dams—Technical Priority Rating listing.

CSKT's SOD Program provides investigations, designs and SOD modifications to resolve the concerns of the dams on the list.

The Tribes' SOD Program has been extremely successful and, under our administration, Reservation dams have been modified at a cost significantly lower than originally estimated by the Bureau of Reclamation. For example, the Black Lake Dam was completed in November 1992 at a savings of approximately $1.3 million below BOR estimates. The Pablo Dam Modification Project was completed in February 1994 at a savings of nearly $140,000. The first phase of the McDonald Dam SOD program has been a "model" program which has been used by other tribes.

- Our Forestry Program is another example of a success made possible by the Tribal Self-Governance contracting framework. In Fiscal Year 1996, following a year-long Tribal study of the assumption of BIA's Forestry programs, CSKT compacted all of those Forestry activities. We also administer fire pre-suppression and suppression activities through other agreements, including one with the U.S. Fish and Wildlife Service for fire protection at the National Bison Range, which is located on our Reservation.
- In Fiscal Years 1997 and 1998 respectively, CSKT began compacting for administration of both the Individual Indian Monies (IIM) program and the Northwest Regional Office title plant functions for the Flathead Reservation. Few tribes operate these programs. The fact that CSKT does so is a testament to our strong commitment to exercise our full authority under the Tribal Self-Governance Act.

In addition to the above-listed areas, CSKT compacts for all other available BIA programs, including: law enforcement; Tribal courts; education programs, etc. Our Tribal government infrastructure and staff is well-equipped to administer these programs and we are very experienced in federal contracting requirements. Our Natural Resources Department alone has well over 100 employees, including biologists, botanists, hydrologists, wildlife technicians, etc.

While it is outside the scope of the Indian Self Determination Act or the Tribal Self Governance Act it may also be noteworthy that we have signed an innovative agreement with the State of Montana governing hunting and fishing on all lands on the reservations that applies to be both tribal members and non-Indians. I point this out because that agreement is an important exercise in tribal governmental authority, which is one of the underpinnings of tribal Self Determination and Self Governance.

One of the great benefits of the Tribal Self-Governance contracting scheme is that it results in capacity building at the Tribal level (as illustrated by our above-referenced Land Title Records Office example). This capacity building results in benefits for Tribal governments, Tribal enterprises, and communities as a whole—both Indian and non-Indian. It helps provide quality jobs for Tribal members who want to remain in the Tribal community. It also helps to provide a stronger civic structure that supports greater economic development, environmental protection, safety, and other public benefits.

Areas Where Improvements Are Needed

Contract Support Costs. Work still needs to be done to ensure that the federal government will fully fund its obligation of paying full contract support costs so that it can meet this requirement to contracting Tribes. As we have stated to this Committee before, the Indian Self-Determination and Education Assistance Act was not intended to be a money-losing proposition for tribes, nor was it intended as a mechanism for Tribal governments to subsidize federal programs and federal statutory obligations. Unfortunately, the reality of Tribes having to absorb indirect costs associated with contracting federal programs currently serves as a real disincentive for Tribes to contract such programs as intended by Congress. We assume that all other federal contractors fully recover their indirect costs when doing business with the federal government and have never understood why tribes get disparate and negative treatment in this regard, especially since our indirect cost rates are negotiated pursuant to the same OMB criteria as are used by other contractors.

Federal Tort Claims Act (FTCA) coverage. Just as Tribally-contracted programs should be funded at the same level as federally-administered programs, so should they have equal liability coverage. CSKT is concerned about the apparent trend within the U.S. Department of Justice to opine that FTCA coverage does not extend to contracting Tribes, their employees or volunteers under various circumstances. This, like insufficient contract support cost funding, creates a fundamental, and powerful, disincentive for Tribal contracting and thereby undermines the Congressional objectives behind the Act.

Contracting of Non-BIA Programs. Unfortunately, the Interior Department has not established a successful overall record with respect to Self-Governance contracting of non-BIA programs. The Confederated Salish and Kootenai Tribes have been at the front of the effort to contract non-BIA programs, primarily through our nearly 14-year effort to contract activities at the National Bison Range Complex (NBRC). The NBRC consists of three National Wildlife Refuges located in the middle of the Flathead Indian Reservation. It is also noteworthy that the bison at the NBRC descend from a herd once owned by tribal members. All three refuges are administered by the U.S. Fish and Wildlife Service (FWS) as part of the National Wildlife Refuge System. Two of the NBRC refuges, the Ninepipe and Pablo Refuges, are actually located on Tribally-owned land; FWS operates them as refuges through easements granted by CSKT.

In 14 years, the FWS has entered into only one other AFA and that is in Alaska for some work to be done at Yukon Flats with the Council of Athabascan Tribal Governments. That AFA does not contain any personnel transfers.

CSKT is hopeful that the Department's record in this area will change. Certainly there have been supporters at the policy making level of the Interior Department (such as Secretary Kempthorne, Deputy Secretary Scarlett, Associate Deputy Secretary Cason and Assistant Secretary Laverty) and there have been some excellent people for us to work with in the field (such as Dean Rundle from the Denver office and others) but there have also been a number of opponents, primarily entrenched federal employees or retirees who do like to see things change. Were it not for our perseverance and the support from headquarters, we would likely still be mired down. We are currently in the final stages of negotiations with the U.S. Fish and Wildlife Service for another Annual Funding Agreement to contract activities and position at the NBRC. We are hopeful that we can reach agreement on a new AFA that would return CSKT to the National Bison Range and establish a productive Federal-Tribal partnership.

Tribal Subsidizing of Federal Programs. To fully realize congressional objectives behind the Tribal Self-Governance Act, there needs to be an accompanying congressional commitment to fully funding the federal programs being contracted by Self-Governance Tribes. Shrinking or stagnant federal funding necessitating supplementation of Tribal dollars is a real problem for many Tribes. I realize that, as an appropriations matter, this is somewhat of a separate issue from the Self-Governance legislation itself. It is, however, integrally related to achieving the goals of the Act and merits attention.

Draft Title IV Amendments Legislation

As has been our position before this Committee with past proposals for Self-Governance amendments, CSKT is generally supportive of the proposed legislation.

With respect to § 401(8) of the proposed legislation, CSKT believes that inclusion of a definition for the term "inherent federal function" is very important, and we are glad to see it addressed in the current legislation before the House and the draft legislation presented to this Committee. During some of our past negotiations, the discussion of what constitutes an "inherent federal function" within the meaning of the Tribal Self-Governance Act has at times been frustrating. Providing, for the first time, a definition for the term in Title IV is a good start for addressing this issue. The proposed definition would provide consistency with Title V of the Act, thus promoting a more cohesive federal Self-Governance policy overall.

We support the explicit identification, in § 405(b)(1)(A), of Office of Special Trustee (OST) activities as mandatory for inclusion in an AFA (at a Tribe's option). This reflects organizational changes within the Interior Department since the Act was originally passed, and makes clear that the programs are still available for Tribal compacting despite any reorganization. CSKT has been entering into AFA's with the OST for performing appraisal activities.

CSKT also supports § 405(b)(2) of the proposed legislation, which retains the existing authority for Tribal Self-Governance contracting of non-BIA programs which are of special geographical, historical or cultural significance to an Indian Tribe. As indicated above, CSKT has utilized this authority to enter into a past AFA with the U.S. Fish and Wildlife Service covering activities at the National Bison Range Complex and we are currently in negotiations with the Service for a new AFA there.

CSKT is pleased to see that the current Title IV amendments legislation on the House side (H.R. 3994), as well as the proposed Senate legislation, no longer contain the prohibition of "compacting" the Flathead Agency Power Division or Flathead Agency Irrigation Division which is currently found in 25 U.S.C. § 458cc(b)(4)(C). CSKT has contracted the Power Division under a P.L. 638 contract since 1987 and, as indicated above, has built a solid record of success in administration of the utility, now known as Mission Valley Power.

It is important that § 409(c) of the proposed legislation would retain the existing statutory language mandating funding to tribes for contract support costs. As noted above, this is a fundamental issue for realizing the full potential of the Tribal Self-Governance objectives. Stronger efforts to secure adequate appropriations for this area are badly needed.

The provision in § 412(a) of the proposed legislation which further clarifies application of the Federal Tort Claims Act (FTCA) will hopefully assist in clarifying the federal responsibilities for liability coverage when Tribes contract for administration of federal programs and activities. We continue to support the optional incorporation of Title I provisions into an AFA, as stated in § 412(b) of the proposed legislation. Such incorporation can help strengthen an AFA and supply additional tools for contracting Tribes. It also promotes consistency between ISDEAA's Titles.

Closing Comments

I believe the Confederated Salish and Kootenai Tribes are a good example of how Tribes can thrive under the Tribal Self-Governance framework. As illustrated by this testimony, surrounding communities—both Indian and non-Indian—also benefit from this type of Tribal success. I encourage this Committee to continue working with Tribes to improve the Tribal Self-Governance Act and ensure that it fulfills Tribal and Congressional objectives. Together, we need to make sure that there are incentives to participate in the Tribal Self-Governance framework. Similarly, we need to eliminate disincentives and remove barriers to Self-Governance participation. The proposed legislation is a good start towards accomplishing those ends.

On behalf of the Confederated Salish and Kootenai Tribes, thank you for the opportunity to provide testimony. I would be happy to answer any questions.

Senator MURKOWSKI. Thank you, Chairman Steele.

Finally, we will go to Mr. Peltola.

STATEMENT OF GENE PELTOLA, PRESIDENT/CEO, THE YUKON–KUSKOKWIM HEALTH CORPORATION, ACCOMPANIED BY: LLOYD B. MILLER, ESQ., PARTNER, SONOSKY, CHAMBERS, SACHSE, ENDRESON AND PERRY, LLP; DAN WINKELMAN, ESQ., GENERAL COUNSEL, YUKON–KUSKOKWIM HEALTH CORPORATION

Mr. PELTOLA. Good afternoon, Chairman Dorgan, Vice Chair Murkowski, Members of the Senate Committee on Indian Affairs. I am Gene Peltola, President and CEO of the Yukon-Kuskokwim Health Corporation.

YKHC provides health care to the federally-recognized tribes in Alaska. My testimony today simply focuses on the disparities within Title IV. The Yukon-Kuskokwim Health Corporation has been contracting with the Indian Health Service since before the enactment of the Indian Self-Determination Act. Today we provide comprehensive health care to 28,000 largely Yupik Eskimo people across a roadless area the size of Oregon, where the average per capita income is $15,000. Gas in our main hub city of Bethel is almost $5 per gallon, and in our villages it is approaching $7 per gallon, the same price we pay for milk.

When considering the high energy, food and personnel costs against an IHS appropriation that does not allow for mandatory inflation costs, providing health care in our region is a daily and extraordinary challenge.

This is especially true when considering the enormous health disparities our region faces. For example, Alaska Natives' leading cause of death is cancer. The Alaska Native cancer mortality rate is 26 percent higher than the U.S. Caucasian rates. While cancer mortality for the rest of Americans is decreasing, it is increasing for us.

Also terribly disturbing are our region's high suicide rates. Our age-adjusted suicide rate for 15 to 19 year olds is 17 times the national average, something that is entirely preventable.

Over 20 years ago, former Committee Chairman Inouye wrote that the single greatest impediment to the success of tribal self-determination was the failure of the IHS and BIA to pay contract support costs. I can testify that what Chairman Inouye said in 1987 is just as true today.

In Fiscal Year 2007, YKHC's annual true shortfall exceeded $10 million for the very first time. It has gone up approximately $1 million each year as we seek to take on the ever-growing IHS programs in a climate of ever-rising costs. This is truly a crisis.

In 1992 and 1993, when we began operating the local IHS hospital, we suffered a shortfall of over $2.2 million in contract support costs. The impact to YKHC was immediate. Over 40 positions were laid off within months. Subsequent rounds of reductions in force and layoffs occurred in 1997, 2006 and 2007. These events have had a very severe impact on the quality of care that YKHC can provide our people.

However, the impact is not just measured by $10 million in shortfall. As a result of that underpayment, YKHC cannot employ as many primary care providers and we therefore lose an additional $6 million in revenue from third parties like Medicaid.

Across Indian Country, we call this the compacting penalty. Any tribe taking on a Federal trust program has to be ready either to subsidize the trust responsibly, which we cannot do, or else essentially relieve the Government of part of that trust responsibility by cutting the trust programs. Whether that means cutting a police officer or a realty specialist for a tribe compacting with the BIA, or cutting a doctor or nurse for a tribal organization like ours, compacting with the Indian Health Service, the cut is the same. Nowhere else does the Government deal with its contractors in this way, whether it is a Halliburton or Acme, Congress always makes appropriations necessary to meet the Government's obligation.

But even after the Supreme Court announced in the Cherokee case that our contracts are as good as gold, we continue to suffer enormous underpayments. This has to change.

I have six recommendations today. First, the Committee should consider directing the GAO to study the actual impact of these continuing severe shortfalls. Second, the Committee needs to look closely at what is going on with the BIA in this area. Tribes are experiencing a near 100 percent shortfall in the payment of their personal costs associated with carrying out BIA contracts.

Third, the Committee needs to put a halt to the National Business Center's unilateral change in its indirect cost practices. The Committee should impose a moratorium on all changes until there has been thorough tribal consultation.

Fourth, the Committee should pressure the BIA to develop expertise in the details of contract support cost administration. If the BIA's data is not reliable, it jeopardizes all tribal self-determination.

Fifth, I would ask the Committee to look into the status of the pending contract support litigation. Litigation is grinding on in various courts and boards, and one judge has recently ruled that tribes

have stood by and waited to file their claims while a class action was pending, actually have lost all their rights to pursue those claims. This was a shock, considering that in parallel litigation against the BIA, the very same tribe did rely on a class action to protect their rights, and in fact, they recovered their share of over $100 million in damages awarded against the BIA.

The fairest approach would be for Congress to extend the statute of limitations for all tribal contractors to pursue their claims over historic IHS underpayments from prior years. A more comprehensive approach would be a legislative change to create a new claim payment mechanism that would permit all tribes to receive appropriate compensation through the judgment fund without draining litigation that takes years to resolve.

Finally, the current contract support shortfall of over $100 million from the Indian Health Service, which has received absolutely no increase in six years, and the $40 million shortfall from the BIA, must finally be eliminated. This can be done through a combination of appropriation increases by removing the current caps and by tapping into agency collections and unobligated balances from prior years. Surely, using leftover agency balances to meet the Government's legal obligations to Indian tribes is a higher priority than to supplement internal agency operations, as currently occurs.

Ultimately, receiving full contract support costs is not just about money. For tribal organizations like YKHC, it means being able to systematically address cancer, suicide and other health disparities.

I thank you for the opportunity and honor to address you and your Committee today. I believe that full contract support appropriations is one small step, but it would be a giant leap in addressing the health disparities of Native Americans nationwide. Thank you.

[The prepared statement of Mr. Peltola follows:]

PREPARED STATEMENT OF GENE PELTOLA, PRESIDENT/CEO, THE YUKON-KUSKOKWIM HEALTH CORPORATION

Good afternoon. Mr. Chairman and members of the Committee:

The Yukon-Kuskokwim Health Corporation has been contracting with the Indian Health Service since before the enactment of the Indian Self-Determination Act. Today we provide comprehensive healthcare to *28,000* largely Yupik Eskimo people across a roadless area the size of Oregon, where the average per capita income is $15,000. Gas in our main hub city of Bethel is almost $5 per gallon, and in our villages it is approaching $7 per gallon, the same price we pay for milk. When considering the high energy, food and personnel costs against an Indian Health Service appropriation that does not allow for mandatory medical inflation costs, providing healthcare for our 58 tribes is a daily and extraordinary challenge.

This is especially true when considering the enormous health disparities our region faces. For example, Alaska Natives' leading cause of death is cancer. The Alaska Native cancer mortality rate is approximately 26 percent higher than for U.S. Caucasians. While cancer mortality for the rest of Americans is decreasing, it is increasing dramatically for Alaska Natives. Particularly disturbing are our region's high suicide rates. Our age-adjusted suicide rate for 15–19 year olds is 17 times the national average.

Over 20 years ago, former Chairman Inouye of this Committee wrote that the single greatest impediment to the success of tribal self-determination was the failure of the Indian Health Service to pay contract support costs. I can testify that what Chairman Inouye said in 1987 is just as true today.

In the just concluded Fiscal Year 2007, YKHC's annual true shortfall exceeded $10 million for the very first time, and it has gone up approximately $1 million each year as we seek to take on ever growing IHS programs in a climate of ever rising costs. This is truly a crisis.

Most people hear about "contract support costs" and their eyes glaze over. But these are very real costs, either the fixed costs of our overhead that are set by the government, based upon independent annual audits, or else the cost of providing workers compensation insurance, and health and retirement benefits to our staff. That's what contract support costs are. They are fixed and they are real.

In 1992 and 1993, when we began operating the local IHS hospital, we suffered a shortfall of over $2.2 million in contract support costs. The impact to YKHC was immediate: over 40 positions were laid off within months after hospital operations began. Subsequent rounds of reductions in force and layoffs occurred in 1997, 2006 and 2007.

These events have had a very severe impact on the quality of care that YKHC can provide. However, the impact is not just measured by the $10 million shortfall. As a result of that underpayment, YKHC cannot employ as many primary care provider teams. The care that those teams provide to our patients is typically billed to Medicare, Medicaid, or private insurance when available. The result is that $10 million in reduced direct care services translates into an additional $6 million in lost revenues from these sources. So, the real loss is at least $16 million to our programs, and even more when you consider that we direct those lost third-party revenues back into staffing additional teams throughout our villages.

Across Indian Country, we call this the compacting penalty, although it is equally applicable to self-determination contracting tribes. Any tribe taking on the administration of a federal trust program—whether from IHS or the BIA—has to be ready either to subsidize the trust responsibility (which we cannot do) or else essentially relieve the government of part of that trust responsibility by cutting the trust programs. Whether that means a police officer or a realty specialist for a tribe compacting with the BIA, or a doctor or a nurse for a tribal organization like ours compacting with the IHS, the cut is the same.

Nowhere else does the government deal with its contractors in this way. Whether it is Haliburton or Acme, Congress always makes the appropriations necessary to meet the government's contract obligations. But even after the Supreme Court announced in the *Cherokee* case that our contracts are as good as gold, we continue to suffer enormous underpayments. This has got to change.

I have six recommendations.

First, the Committee should consider directing the General Accountability Office to study the actual impact of the continuing shortfalls tribes are suffering in their contract payments. I am sure YKHC's experience is not unique, and hopefully a GAO report will help energize Congress to do its part in remedying the situation. As part of the GAO study, some examination should be made into IHS's new policy, announced two years ago, not to provide any contract support costs whatsoever for any new contract or compact operation, regardless of circumstance, and notwithstanding Congress making available up to $5 million for this purpose every year. The current situation is bringing to a stop all forward progress on tribal self-determination and self-governance.

I also recommend that the Committee request that IHS provide its own comprehensive report on its contract support cost shortfalls. IHS provided such a report to Congress in 1997 and a new report is long overdue. IHS should be instructed to work in close consultation with self-governance Tribes in the development of its report.

Second, the Committee needs to look closely at what is going on with the BIA in this area. I know from our sister organization in Southwest Alaska, the Association of Village Council Presidents, that Tribes are experiencing a near 100 percent shortfall in the payment of their personnel costs associated with carrying out BIA contracts. Again, this means Tribes are either subsidizing or, in Alaska cutting, these vital trust services.

Third, the Committee needs to put a halt to the National Business Center's unilateral change in its indirect cost practices. As a non-profit 100 percent of our Board costs are covered in our indirect cost pool. But the same is not true of tribal governments, and historically NBC has only permitted 50 percent of Tribal Council costs to be treated this way. But very recently, NBC eliminated even the 50 percent rule, now demanding timekeeping records from all Tribal Council members. The Committee should impose a moratorium on this change until there has been thorough Tribal consultation.

Fourth, the Committee should pressure the BIA to develop expertise in the details of contract support cost administration, now that the BIA has begun implementing its first-ever contract support cost policy in over 30 years. Congress depends heavily on the integrity of the data both agencies provide. If BIA's data is not reliable, it jeopardizes all tribal self-determination.

Fifth, I would ask the Committee to look into the status of the pending contract support litigation. After 12 years of litigation, YKHC recently settled its old claims for approximately $42 million. But this was the exception. For other Tribes, litigation is grinding on in various courts and Boards. One judge just ruled that tribes who stood by and waited to file their claims while the *Zuni* class action litigation was pending actually *lost* all their rights to pursue those claims. This was a shock, considering that in parallel litigation against the BIA, the very same tribes were years ago told that they *could* rely on a class action to protect their rights, and in fact they recovered their share of over $100 million in damages awarded against the BIA.

The fairest approach would be for Congress to extend the statute of limitations for all tribal contractors to pursue their claims over historic IHS underpayments from prior years.

A more comprehensive approach would be a legislative change to create a new claim payment mechanism that would permit all tribes to receive appropriate compensation through the Judgment Fund, without draining litigation that takes years to resolve.

In the absence of reform in this area along these or some other lines, I am deeply concerned that YKHC's experience will prove to be the exception, and that even the 15 percent of tribal contractors that have dared to litigate will never see their rights vindicated.

Finally, the current contract support shortfall of over $100 million from IHS—which has received absolutely no increase in 6 years—and the $40 million shortfall from the BIA, must finally be eliminated. In addition to the reforms proposed years ago in S. 2172 and H.R. 4148, this can be done through a combination of appropriation increases and by using agency collections and unobligated balances from prior years. In this respect, surely using leftover agency balances to meet the government's legal obligations to Indian tribes is a higher priority than to supplement internal agency operation as currently occurs.

Ultimately, receiving full contract support costs is not just about money. For tribal organizations like YKHC it means being able to systematically address cancer, suicide and other health disparities.

Full contract support costs represent the ability to hire a provider to perform portable mammograms in our villages to detect breast cancers early in stage 1 when the 5 year survival rate is over 90 percent versus a later stage; it represents the ability to hire a counselor to deploy a community-wide behavioral health initiative in order to save a teenager from taking his own life.

The funding of full contract support costs and—more importantly—its relationship to directly improving American Indians' and Alaska Natives' health status, is a matter entirely within Congress's power to address!

Thank you for the opportunity and honor to address your Committee today.

Senator MURKOWSKI. Thank you, Mr. Peltola.

Chairman Dorgan.

The CHAIRMAN. Mr. Cason, I have read your testimony. Let me ask a question about something Mr. Peltola just referred to, and that is the ten-day turnaround time with respect to reimbursements. The Indian Health Service has, it seems to me, done better in that regard than the Bureau of Indian Affairs. Can you tell me what is happening at the BIA?

Mr. CASON. It is my understanding, Mr. Chairman, that it ends up being a combination of a lack of formulaic approach for distributing money, a staffing issue within our Office of Self-Governance and mechanisms for getting money out to tribes. So it is not just one root cause why it takes BIA longer than IHS to distribute money to the tribes.

It is an issue that is on the plate of the Office of Self-Governance, to try to improve the timeliness of making payments. That is a thing that we would like to try to accomplish, but there are some impediments.

The CHAIRMAN. Well, can they make those improvements? Will they make those improvements? Will they commit to the tribes they will make those improvements?

Mr. CASON. At this point, Mr. Chairman, I am not sure that the Office of Self-Governance has the answer on how to fix it to get to a point where they can make 10-day payments. But their objective is to speed the process as much as they can.

The CHAIRMAN. Well, but it seems to me that there has to be some accountability. I understand the concern of the tribes, if they don't have the funding in hand, and they have incurred the cost, how do they deal with that? So we are wanting to be encouraging to the tribes with respect to self-governance and self-determination. And then what we hear is what we so often hear, I don't like to be overly critical of the BIA, but I am obviously upset at the moment that we don't have an Assistant Secretary as the head of the BIA. That was vacant for two years, filled for one year and now vacant again. There is something dreadfully wrong with this picture.

And then we have hearings, not just on this issue, but we have hearings on virtually every issue and try to find out why is this not moving forward, why is this happening, why is there the backlog, why is there not approval? I was in a State a while back and saw a building that had sat, brand-new, beautiful building, sat empty for a year while they were waiting for somebody in the BIA to sign some papers. Nobody would sign the papers.

So when I hear Mr. Peltola and others talk about reimbursements, I notice that the Indian Health Service has made whatever adjustments that it is necessary for them to make in order for them to have a much better record than the BIA at this point. I guess my question is, will you make a commitment to improving things there and if so, when?

Mr. CASON. As I said, Mr. Chairman, it is an initiative on the part of the Office of Self-Governance to do a better job. They do have some limitations in their processes and their staffing too.

The CHAIRMAN. What does that mean? I don't understand what that means. I don't understand what formulaic means. Your answer is not something I understand. What does formulaic mean?

Mr. CASON. Okay. Well, as I understand the distribution of the IHS funding, it is basically a funding paradigm that, I have a set number of dollars that I am distributing in a year. When I get to the next year, I am able to distribute those number of dollars right up front as soon as I get an appropriation.

Then if there are any additional dollars to be distributed as a result of an appropriation, then separate actions are taken on the incremental dollars. We don't have the same approach within Indian Affairs, that we end up negotiating on a year-by-year basis the contracted amounts that we would give based upon the appropriation we have. So we have more of a process to get to a distributed amount than the IHS approach.

That is compounded by the fact that the Office of Self-Governance operates with a staffing difficulty or shortfall, so the amount of work that they have to do with the staffing that they have leaves them in a position that they are not as timely as they need to be.

The CHAIRMAN. Well, the staffing shortfall, have you requested funding to meet that in order to respond to it?

Mr. CASON. Mr. Chairman, I am not sure about what Assistant Secretary Artman has done in terms of requesting funding for that particular problem.

The CHAIRMAN. Well, who would be sure?

Mr. CASON. I think that would be the Office of Self-Governance and their budget shop that would be able to tell you that.

The CHAIRMAN. But you come to a hearing and say we don't have the staffing, do you think that your agency requested the staffing?

Mr. CASON. As I said, Mr. Chairman, I am not specifically sure about whether they requested additional staffing for that specific office.

The CHAIRMAN. I don't understand that answer at all. Somebody—well, you have come, I don't mean to badger you, but look, you have come to testify on this subject, you have told us the funds aren't getting out on time because of staffing issues, among other issues. And I ask you, well, did you request adequate staffing and you say, I don't know.

Mr. CASON. I would be happy to answer the question for the record, go back and research it and find out exactly what the answer is and provide that to the Committee.

The CHAIRMAN. All right. I would appreciate it if you would do that.

[The information referred to follows:]

The Fiscal Year 2009 President's Budget does not request increased funding or FTEs for the Self-Governance program in Indian Affairs. However, Indian Affairs plans to add two additional staff to the program in 2008 through the use of existing resources within the Indian Affairs budget.

The CHAIRMAN. I am going to submit some additional questions particularly dealing with contract health. I appreciate all the witnesses being here today.

Senator MURKOWSKI. Thank you, Mr. Chairman.

We know that it is not always exclusively about the money. But when it comes to the contract support costs, and Mr. Peltola, I think you said this, you have taken on the obligation to provide for, at least out in YKHC, a level of health care and those obligations. You have undertaken, you have incurred the costs and yet, you are not reimbursed the actual costs out there, you are not reimbursed even close sometimes to what those costs are.

And nowhere else, nowhere else can you think of a situation where the agreement is, well, you take on this obligation and assume the cost, and we will see how much we actually end up reimbursing you, and then you throw in issues of timeliness, the level of frustration is understandably high. Certainly we hear this time and time again in the State of Alaska. In my opening comments, I said, there are real good things we can say about self-governance. But I think we also need to appreciate that we do need to keep the commitment that we have made there.

You mentioned, Mr. Peltola, the initial number of layoffs that you were forced to move forward with this $2.2 million shortfall that you saw, I think it was in 1990. Do you have any idea, over the course of the years, then, how many folks you have actually had to lay off? Do you keep data in terms of the lost jobs, the lost revenues, the other impacts that you have to YKHC as a result of contract support cost shortfalls?

Mr. PELTOLA. In 1990, 1997, 2006, 2007, we had to lay off approximately 150 people.

Senator MURKOWSKI. A hundred and fifty throughout that? And then as you have indicated, when you have to make those staffing decisions, what happens is a level of service is also cut off to the Natives in the region. So that is 150 direct jobs, but you also have a ripple effect within the community, I would imagine.

Mr. PELTOLA. Yes, there is, Senator Murkowski. On top of that, as you are well aware, in 1980, Congress appropriated a staffing package for a new hospital in Bethel, funding 56 new positions. That money never did reach the Bethel Hospital, none of it.

Senator MURKOWSKI. For any of those positions?

Mr. PELTOLA. Fifty-six positions were funded by Congress and none of that money reached Bethel Regional Hospital.

Senator MURKOWSKI. You were successful in filing suit against the Government for contract support costs. It is my understanding that the vast majority of self-governance tribes is about 85 percent of them who have claims do not actually file their contract support cost claims. Why is that? Why do you figure that is?

Mr. PELTOLA. I really don't have an accurate answer on that. I think a lot of them are waiting to see what is happening. YKHC was fortunate enough on the 23rd of May of 1996 to file a claim for a contract support shortfall. We have updated that every year. Just recently, the first week of December, well, last fall, after 11 years, our claim finally got to the U.S. Contract Court of Appeals.

Senator MURKOWSKI. Eleven years to get there?

Mr. PELTOLA. It took 11 years to get there, and we were ordered into mediation. After five and a half days of mediation, we settled the claim with a $25 million settlement on the claim with interest back to May 23rd, 1996. It totaled almost $43 million. That money came from the U.S. Treasury in mid-February.

Senator MURKOWSKI. I might suggest that one of the reasons why you don't have more filing the claims is just the length of time that you were waiting and fighting, the legal costs that you incur, and you are trying to provide health care out in an area that desperately needs it. Your first job is not to fight the Federal Government for the promises they have made to you. So we appreciate what you do out there.

We don't have a clock here running, but I think my five minutes are up. I will turn to Senator Tester, and we will have an opportunity for second rounds.

Senator TESTER. Thank you, Madam Vice Chair.

Just real quickly, Chairman Steele, would you agree in your situation that the IHS reimbursement works better than the BIA reimbursement?

Mr. STEELE. I don't know if I would go that far. I would just say, in kind of indirectly answering, we had contracted the contract health services from the Indian Health Service. Because the contract support costs weren't adequate and we were seeing that we were having to potentially subsidize with tribal dollars those costs, we retroceded that back to the Indian Health Service. Because it was weighing heavy on our tribal side of the budget, our tribal dollars. And we weren't getting the adequate funding for the contract support costs. So we retroceded back.

So I am not really in a position to answer adequately your question, Senator. But I don't know that I would go that far.

Senator TESTER. Sitting in this position for the last 16, 17 months, we have had a lot of folks come in, we have had a lot of hearings. Last week, for example, it was inadequate funding on oil well leases, particularly in North Dakota, on that reservation. This week it happens to be inadequate staffing for this law enforcement, health care.

And if you have been here in the Committee meetings, I know a lot of the people that are watching have, the Chairman has asked the same questions almost every hearing: do you have adequate money, do you have adequate staff, did you request it in your budget. And I can't recall if he ever got an answer on any of those questions, not once.

I think it is important to know if there is inadequacy in getting the dollars out, we have to recognize either that you made the request and somebody turned it down above you, or it is not a priority. And that is really the way the two fall down. My goal here, my goal as a policy-maker at the Federal level, is to give tribes the tools so they can be self-sufficient, so they can say, we don't need you any more. They can do it on their own. That is my goal.

But the fact is, if we are putting up roadblocks, whether it is procedural or through regulations or through different administrative requirements, that doesn't work very well. So that was more of a lecture than a question, thank you guys for being here. I appreciate it. We have some work to do.

Senator MURKOWSKI. Senator Barrasso.

Senator BARRASSO. Thank you very much. I want to follow up on what all of you have said, I am running into the same experiences. And there is a situation in Wyoming that is ongoing.

Mr. Cason, if I could ask you, when projects are new, people don't have experience, and there have been difficulties, are there things that your agency does to facilitate the tribes' taking on new contracts, helping them better figure out what they need to do to get the funding, to fill out the forms and to receive the funding? It just seems that until they really get geared up to learn how to do that, the delays seem to be extraordinary.

Mr. CASON. Senator, I believe there is. As Senator Tester mentioned, our basic view of the self-governance is similar to what he said. The successful outcome of a self-governance program in the end is every tribe runs its own affairs. What we try to do is facilitate that. Is it perfect? No. But we do have a fund where we help new tribes who want to take on self-governance and actually prepare for it. Then once they have gone through that preparation period, then the funding allocated, the programs they take over become available to them. They get the same number of dollars to run a program that basically we do, along with contract support costs.

There has been a fair mention about contract support costs, adequacy or inadequacy. That is an issue. In my relationship with the tribes, we basically worked on that issue to include both indirect and direct support costs as part of the budget process. We did move to get more money into that program over time. It is still not all the way there to full funding.

But it is an important component of running these programs. We have been supportive of trying to improve on that area of the budget.

Senator BARRASSO. We are certainly looking for ways to help, through advice, through flexibility. I know when Senator Thomas was here, he was able to secure an appropriation for the Wind River Reservation to upgrade its irrigation system. The BIA still holds $7 million for the project, yet only about $200,000 has been spent in the past two years, due to red tape and the tribe's contract difficulties. I don't know if you know the specifics of that case.

Does that sound unusual to you or something that you would find disturbing?

Mr. CASON. The experience I have had with our Indian Affairs programs is, I would say across the board, that in some cases we have project funding that does take a while to utilize, because we run into some impediment of one sort or another. And all the way to the other end of the spectrum, where the process runs very smoothly and very expeditiously and we can get projects started and done in a timely way.

So unusual that we would have an issue? No. I have seen a number of those things. I don't know the specifics about the Wind River situation, but I would be happy to look into it if you would like.

Senator BARRASSO. I would very much appreciate it if you would.

[The information referred to follows:]

While you didn't mention a specific fiscal year, upon our research, we identified a $7.5 million appropriation in the FY 2006 Conference Report for Irrigation Projects in the Department of the Interior spending bill. In the FY 2006 Conference Report, the language states . . .

> "The addition of $7,500,000 in non-reimbursable construction funds for Indian irrigation rehabilitation is separate from the Navajo Indian Irrigation Project, which retains its own construction budget of $12,773,000. Within the funds provided for Indian irrigation rehabilitation, a number of Bureau and tribal projects are in desperate need of immediate attention to continue delivering water to users. The Bureau is expected to consult with the House and Senate Committees on Appropriations, in the form of a detailed proposal, prior to obligating funds. The Bureau is expected to administer these funds from the central office program level to address projects with the greatest need of rehabilitation. Construction of new projects or expansion of existing projects is secondary to the rehabilitation, reconstruction, and necessary upgrade of current irrigation projects and systems. Specific projects to be addressed under these guidelines and to be addressed in the Bureau's proposal for the obligation of these funds are: the Fort Yates Unit of the Standing Rock Sioux Project, the Blackfeet Irrigation Project, the Crow Irrigation Project, the Fort Belknap Irrigation Project, the Fort Peck Irrigation Project, and the Wind River Irrigation Project."

Senator BARRASSO. Chairman Steele, I don't know if you heard the question, but just looking at the situation at Wind River Indian Reservation, where we had $7 million for a project for an upgrade to the irrigation system, it has been two years and only $200,000 has gotten there, due to red tape, tribe's contract difficulties. Does that seem unusual to you in your experience or disturbing to you?

Mr. STEELE. You are speaking in general, across the board?

Senator BARRASSO. Yes.

Mr. STEELE. I would say in general, it is an accurate statement.

Senator BARRASSO. It is accurate, that kind of time delay due to red tape and difficulties dealing with the systems?

Mr. STEELE. Yes, I would say in general it is an accurate statement.

Senator BARRASSO. Then I would find that disturbing and I imagine other members of the Committee would.

No further questions, Madam Chairman, thank you.

Senator MURKOWSKI. Thank you, Senator Barrasso. Senator Cantwell.

STATEMENT OF HON. MARIA CANTWELL, U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Madam Chair. I thank the witnesses for being here today, particularly Chairman Allen. Thank you for being here from the Northwest, and thank you for your leadership in the proposal you are putting forth today to outline how self-governance can happen in a more efficient way. I know there have been 15 different Washington tribes that have used various elements of this. From time to time, we do hear concerns about flexibility, so I am sure you are trying to address that.

What are the specific parts of Title V that you think we really need to incorporate into these amendments? I understand your concern in the fact that when the rulemaking came out on the Title IV amendments that the process kind of got bogged down and that Title V really is a more reflective end result that we want to look for. So what specifically works about that that we should adopt?

Mr. ALLEN. Thank you, Senator. I guess I would point, there are a number of them in there, probably some of the more important ones to move self-governance forward within the Department of Interior and BIA is, the language that would clarify the reasons why the agency may decline a tribe's proposal to enter into a compact, what they can do is drag it on into time immemorial and the tribe just basically loses interest.

So this amendment provides time-specific process where they have to respond to a final proposal by the tribe and then they have to give the reasons.

Senator CANTWELL. And that works that way in Title V?

Mr. ALLEN. Yes, it does. It has very specific time frames in which they have to respond to you, here is our request, you need to give us in writing what your argument is. That also rolls over into a clear avenue where we can appeal.

Right now, we don't have that process. We can't even get to that juncture in the negotiation. So many tribes are impeded from entering into negotiations for that very reason. They won't provide the information that we need in order to negotiate. So there is that issue.

Title V, as you had discussed, requires the Department to transfer the funds promptly. That is an issue of staffing. Senators are correct, that is a problem. On the DOI side, they have authorized I think like eight FTEs. To put it in perspective, eight FTEs over $300 million, relative to the 11,000 FTEs that are in the BIA, you would think there could be some adjustment in FTEs in order to accommodate that kind of process to get those monies out to the tribes.

But the language in this amendment would provide promptly, you have an obligation to do it, so you are going to figure out a way to do it. Construction provisions, clarify that we will have clear and consistent authority to move forward with our construction

projects. And it would prevent the BIA from imposing unilateral adjustments. Many times what they will do, we will negotiate from program A through Z, then they will unilaterally reduce the funding numbers because they have changed their allocation.

Mr. Cason referenced some of the problems at BIA. They have a moving target in many of their programs, general assistance programs. It is like they throw them back into a pot and readjust the allocation. So the tribes never know from year to year what your allocation is. On the IHS side, you always know from year to year, subject to any adjustment that the Congress makes.

So those are some of the primary objectives. There are a couple of others that are important. But what it does is provide more certainty and requires the BIA to move the proposals forward, if you are taking on more programs or if a new tribe is coming in and wanting to negotiate their initial compact and funding agreement.

Senator CANTWELL. Is health care just naturally easier than some of these other areas?

Mr. ALLEN. BIA tried to say it is naturally easy for IHS, because they just deal with health care, or the BIA deals with social programs, natural resource programs, governmental programs, enforcement, et cetera. So there is a different level of different kinds of activities that they administer as opposed to IHS. IHS has a lot of very sophisticated programs, from their clinical programs to hospitals.

Senator CANTWELL. I was going to say, look at what we have to deal with here, it is a very complex set of challenges. I would think some other things would be a lot more straightforward, particularly the construction, juxtaposed to say——

Mr. ALLEN. We feel that construction is consistent with the other programs and should be treated consistently. So there is a difference, there is no question about it. But there is no reason why there can't be consistency as the Federal Government, whether it is the BIA, Department of Interior or IHS, when they are dealing with tribal governments.

Senator CANTWELL. So why do you think this got bogged down?

Mr. ALLEN. In my opinion, the success of self-governance has moved forward effectively. I just think that the system is continuing to dig back in. The notion that it doesn't want to let go, that we really don't know what we are doing in general, broad terms, and there needs to be better oversight or more oversight over our affairs. That is recalcitrance, it wouldn't matter whether it was basic programs or trust programs like the Hoopa Nation has raised or other programs, like Salish and Kootenai with DOI Fish and Wildlife Service and so forth.

The notion that they don't trust the Indians, and I am saying this very bluntly, is out there still. We are still fighting that image, that notion. Even though we have 20 plus years of success of effectively and responsibly administering Federal monies that you procure for the benefit of Indian people.

Senator CANTWELL. Thank you, Madam Chair.

Senator MURKOWSKI. Thank you, Senator.

Mr. Cason, I want to ask a question, this goes to the liability issue. I understand that there still is a difference between the tribes and the Department of the Interior regarding the Secretary's

liability for tribal operations of programs that can't be reassumed by the Secretary. Would the Secretary avoid liability or be able to avoid liability by simply refusing to reassume the programs?

Mr. CASON. I don't believe so, Madam Chairman. The concern that we have had over time, the issue of Title V applied to Title IV has been an issue regarding liability. Our lawyers have advised us that tribes taking over programs does not relieve the Secretary of the liability associated with the performance of the program. Being currently engaged, at least within the confines of this Administration, with extensive litigation about what the Federal Government's liability is for performance of our program over time has been of concern.

We have spent a considerable amount of time dealing with our liability. There are at least claims of our liability in the hundreds of millions to billions of dollars that we have been trying to work out during the course of this Administration. Understandably, the Administration is very concerned about our outlying liability exposure.

On this particular issue, there have been concerns about the standards at which we have to perform and the intersection of those standards. What I mean by that, Madam Chairman, is that in some of the past proposed ways of approaching this problem, and I haven't seen the new proposal from the self-governance group yet, but in past iterations that we have talked about, it basically calls for a standard of essentially irreparable harm before the Secretary could intrude into a program that has been compacted.

But at the same time, the Federal Government, Department of Interior, BIA, is being held to exacting high fiduciary standards of managing its trust responsibilities. So there is a big gap between those two. And our ability to reassume programs to ensure that we can meet our fiduciary duties is not the same as the standard in which the Secretary could exercise a reassumption of a program.

So we think that there is some potential legal liability for the Department there. One of the things we would seek to do in any change to the law is try to marry up authority to run a program with the responsibility for it.

Senator MURKOWSKI. Let me ask you this, then, Mr. Allen, from your perspective, how big of a risk are we talking about in terms of liability for the Government? Can you think of any situation or any instance where a self-governance tribe has sued the U.S. Government for failure to protect the tribe from its own self-governance decision? Mr. Cason has indicated that from the Government's perspective, they feel there is lots of money on the line here in terms of liability. What has your experience been?

Mr. ALLEN. This is an interesting question. When we raise the question of the liability with regard to trust resources versus the other trust, the other trust activities that we engage in, I don't know of any suit of tribe with the Federal Government with respect to the programs that we are administering and administering to the benefit of our people that we took over from the BIA.

Senator MURKOWSKI. It seems that he would be suggesting that your own management was inappropriate. I am trying to reconcile the two.

Mr. ALLEN. I can assure you that the BIA could never take over any of our programs and do the same job that we are doing. They just can't do the same level of quality of service, categorically, whether you are dealing with trust activities or any other programs that we administer. I will footnote that the tribes do, as mentioned by my colleagues here, contribute a great deal of our money, our own money, to make the services better. But the quality of the service that we are able to provide to our people is unquestionably better. If they were to try to reassume those programs, there would be a major degradation of the services to our people with respect to every program that we have taken over.

I know that there are liabilities that the Department is concerned about. But I don't agree that that notion, and that maybe it is coming out of the Cobell case, is a reason to undermine the tribes' ability to take over these programs. In the past, there have been notions that in taking over these programs that we want the government to relinquish all Federal obligation. It is much more surgical than that. Tribes are much more intelligent and knowledgeable about what legal obligations you still retain versus what obligations we take over and will absorb and take full responsibility for it.

Senator MURKOWSKI. Mr. Marshall, you look like you are just itching to jump in there.

Mr. MARSHALL. I think you hit the nail on the head, and I have said this before, the issue of liability, I know of no self-governance tribe that sued the United States for its own mismanagement in the last 20 years of self-governance. It hasn't happened. Tribes who have assumed the responsibility of managing their own resources do it for a reason, because it is probably because it has been mismanaged in the past and they want to do a better job.

My tribe has taken over forestry management, fisheries management. The tribes that step up and do those things do that with a commitment. It always comes back to the liability issue that we can't let you do that because you might sue us for what you do. It hasn't happened and I don't think it ever will.

So there is a process, if the Bureau determines that a program is being mismanaged by a tribe, it declares the program to be in imminent jeopardy. Then the Bureau would reassume management of the program.

But the tribes that I am familiar with, especially the tribes to my left and right who have been in the trenches with us since the beginning, we have taken on the responsibility and we have found other money. It is not tribal funds, it is not always tribal funds. We match programs with them, I could show you my budget, I have a column for tribal money, a column for indirect cost money, a column for compact money, a column for grants tribes still contract, a column for enterprise funds. So you are dealing with five, six columns of funding sources, and you work out a budget so that you cover the cost of all of your programs and you set your own priorities.

In terms of resource management, when tribe assume management of trust resources, it also generates revenue. From that revenue generation you also set priorities and you cover costs. We learn as we go. So 20 years of developing a government which is

the foundation of our nation, then figuring out ways to afford it are positive. But this idea that, well, now I am glad we were here in the beginning before, like I said, trust reform reorganization comes in and says, wait a minute, we have to make sure we are covered.

A question that was asked by the Senator, can you help tribes get started, well, we have been at it for 20 years. If you truly want tribes to move toward self-governance, they are going to take baby steps. That is what I testified to, about establishing government and administrative capability, you can't, in the first instance say, well, if you are a baby and you fall down, we are not liable if you bump your head. You have to give the tribes the ability to learn how to do this. And when they get there, they are going to do a great job. We are an example of that, and I give you my guarantee. If people need to know how to do it, ask us, because we are doing it.

Thank you for the question.

Senator MURKOWSKI. I appreciate your comments there. Just one last question for those of you that represent tribes. This is as it relates to this 50 percent rule that the National business Center has changed, allowing 50 percent of the tribal council costs to be counted as indirect contract support costs without documentation, thus requiring tribal councils to document all of their costs under this new rule.

We are all about accountability here in the Government and making sure that the monies that are provided are spent wisely. Do you believe that under this new rule it provides more assurances that the Federal Government, I guess the Federal monies, rather, are being spent in appropriate manners as it relates to the indirect costs? Does this help you at all in your opinion? If not, I am assuming not, tell me exactly why. Mr. Allen?

Mr. ALLEN. Where to begin this conversation? We fought this little battle with the Inspector General 15, 20 years ago, somewhere in that nature. When the Federal Government deals with the tribal governments, they are dealing on a government to government basis. We are contracting, we are taking over the Federal contracts and all the activities that the Federal Government incurs, all the costs. We have been identifying them as indirect costs, then we identified direct, indirect costs or direct contract costs that are associated with those kinds of costs.

Those are the costs that provide the oversight of these Federal programs and activities. It is a different animal now as we move forward. Back then, the way the A–87 rule reads is that council costs are not allowed except, and then except means when you can show that the council costs are providing the oversight of these programs.

All of us do that. I am not even going to say some of us or most of us. All of us do that. All of our councils, no matter what the size and how the configuration is, we all provide oversight over every one of our programs. It varies, just like you as the Congress provide a variance of oversight over all the programs of the Federal Government.

So back then, they wanted us to identify by time sheet or by stipend variation of when they actually provide oversight over BIA or IHS or HUD or DOL programs, et cetera, and we said, you are

crazy to do this. Because what we will do is we will incorporate into our indirect costs additional staff to track down every one of our council members and do that, because that is not their job. You don't do it as a Senator or Congress people don't do that. Nobody does that.

So we said, look, keep it simple here. They do provide oversight and yes, they do provide oversight over other tribal functions. We would argue those tribal functions are Federal functions, we are actually carrying out what the Federal Government should be doing for us. But we decided not to argue that case, just leave it at 50 percent, and no matter how the tribe does it, if they have salaries or if they have stipends, it doesn't make any difference. Just cut it down the middle, say it is 50 percent, and if we win some, we lose some, it is okay, we will live with that.

Now they want to revisit it and say, it is illegal. Now the DNC and the legal counsel from the Department of Interior are saying that is against the law, that for the last 25 years, you, the Federal Government have been violating the law. We are going with this new policy, where did that come from?

So now they are revisiting this thing. Our argument is that we probably need some sort of very clear remedy that that is a part of the Federal oversight by the tribal government for these Federal activities and really don't get into the nitty-gritty of breaking it down, category by category, program by program. It just doesn't make sense.

Senator MURKOWSKI. What about any of the rest of you? Mr. Steele?

Mr. STEELE. Madam Chair, if I can philosophically talk for a second, I think my opinion, since 1491 and prior, we were self-governing. We were sovereign nations and we believe we are sovereign nations now. It is ironic to me that we have to go through, we signed the Treaty of Hellgate in 1855 with the United States Government, not with the State of Montana.

To be very frank, it always bothers me to have to come to D.C. and work out exactly what my colleague, Chairman Allen, is talking about. It is frustrating, because my ancestors negotiated a treaty that reserved a reservation for our people, gave up a big chunk of Washington territory which is now Montana. And we have to go through all of these little hoops that we are talking about. I appreciate your question, I know I am not answering it.

But it gets frustrating to me. I think the essence of self-governance is for us that are at this table and other tribes to not have to come to D.C. and to ask for this or ask for that. Keep the Federal responsibility, it needs to be maintained, that is a treaty right, it is a treaty responsibility. But give us the tools to be self-governing. Give us the tools to do what we need to do as a government.

Our constitution of our tribe prohibits our council from levying taxes. What a novel idea. So we have to get creative. We have to be business-like, business-minded. We have to raise funds without dealing with taxes. We can't raise taxes on our own members without their express consent.

I guess in answering your question, Madam Chair, we just need the tools and the ability to continue our self-governance that we

have practiced for hundreds of years, not just in the last 20. And I appreciate the last 20, but for hundreds and thousands of years we have been self-governing. So I know I didn't answer directly.

Mr. MARSHALL. You did, and it was in the same vein as Senator Barrasso suggested, that the Federal Government gives you the tools and then we get out of the way and let you do the work.

Mr. Marshall?

Mr. MARSHALL. Indirect cost is something that we have negotiated every year. It is an annual tooth-pulling procedure. We could settle on an indirect cost rate, not have to go through that process, understand what the rules are that would give us stability in budgeting for administration and fiscal management. So ours has fluctuated, and we did go through a process that Chairman Allen was saying, is government direct or indirect. So you couldn't use indirect cost monies to pay for the executive secretary, because that was government. But I could pay for the salary of my administrative assistant, because that was administration.

So we have these terms, when their offices are about 50 feet apart and they work together doing practically the same thing. That makes for instability. What governments really need to do is stabilize their governmental capability, define it, and if they know that they are going to get adequate funding on an annual basis from the programs that they compact or contract. And of course, we talked about trust reform reorganization. We are held to very high standards now for fiscal accountability, fiscal management. We have to comply with the Single Audit Act, and we pay a great deal of money to have professionals come in, because we are managing, as Mr. Steele said, he is managing a program that contributes $300 million to his State. My annual budget is over $70 million, gross.

So I have to have a strong fiscal department. We also have records management obligations that require that we house, maintain records on site. We do ours electronically because that is an obligation that has now come through trust reform reorganization. Those are added costs and expectations from us. I remember one of the self-governance tribes was hammered severely because it didn't have fireproof filing cabinets to protect their records. Well, who comes up with the money for that, to comply? It wasn't about records management, it was how to protect them. Those are additional costs that the tribes assume.

So if we can have stability in funding, specifically whether you call it contract support or indirect cost, then it makes it easier for us to establish the capability that the Department is expecting from us.

Senator MURKOWSKI. Mr. Peltola, since you have traveled farthest, I will give you the last word.

Mr. PELTOLA. Madam Chair, I would just like to make one final parting comment. That is, I want to reiterate what Ron Allen had to say. At least in health care, in my region, the membership of my 58 tribes, it would be a total disservice to those tribal members for the Government to provide health care service. They could not even come close to providing the spectrum of services that we provide today and the level of health care that we provide to our people. I don't know what I would do, I would stick my head in the sand,

I guess, if that ever happened, because it would be impossible for them to do it.

I would like to close by saying, I believe it was 1992 when the Senate Select Committee held hearings in Alaska. The only Senators there were Senator Stevens from Alaska and Senator McCain from Arizona. But I testified before the Select Committee, and I closed out stating that, Senators, if our area office of the Indian Health Service were to close, become extinct tonight at 5 o'clock, and if the headquarters in Rockville, Maryland became extinct at 5 o'clock and we still had the ability to receive the funds, it would be a step forward for health care for Native Americans residing in Alaska.

Thank you.

Senator MURKOWSKI. Thank you, gentlemen.

Mr. Cason, I will circle back to you and give you an opportunity to respond.

Mr. CASON. I am sorry, Madam Chairman, I wasn't really after the last word, but I did want to make a comment. There is a lot of frustration on the part of Indian Country overall about dealing with the process of funding from BIA, particularly on the indirect and direct contract support costs.

But I would like to have everybody know, it is frustrating on the part of the BIA employee, too, to have to do it. We end up in a situation where we have scarce dollars that we are trying to allocate in a broad spectrum of ways across Indian Country. There is desire to have more dollars, so that puts pressure on the institution to make sure where we are allocating dollars is a fair distribution.

Then when we take a look at things like indirect support costs that may range from 30 percent to 130 percent of contract costs, we feel like we are in a position where we have to be mindful of what kind of costs we are paying. Because every dollar I give to one tribe is a dollar I cannot give to another tribe.

So we look at the costs that we are putting out there, because we are in a situation right now of pro-rating the dollars that we have available. Because there are scarce dollars, we want to make sure everybody gets the fairest mix that we can. It is a frustrating situation on both sides of the fence. We are happy to work with Indian Country to find better ways of skinning this cat. We end up in a situation that maybe in the end, some sort of a grant process may be a better way to do things than we do them. But we haven't gotten there yet.

We would like to simplify the process as well. But we are tasked to provide accountability for where did every dollar go, how did it get spent, how is it justified. That adds to the frustration that everybody has in the process. Thank you.

Senator MURKOWSKI. I appreciate your comments there. I do recognize, though, again, that we are asking through this contract support cost and the whole operation here, we are asking for the tribes to administer a job that we here in the Federal Government would have otherwise been doing. So it really does come down, I said earlier in this hearing that it really isn't always about cost, or excuse me, the dollars that are available.

But when we do have to ration, divide things on a pro-rata basis and yet the efforts are still underway to provide for that level of

service, we have to figure out clearer equity here. To have tribes kind of take the Federal Government on, using precious resources in that way or just fighting for what it is that they believe they had fairly contracted for, we do need to find a better path forward. I appreciate your efforts and your willingness on behalf of the Administration to work to find that better path forward.

I appreciate the efforts of all of you in this area, Chairman Allen, your leadership clearly, and those of you from around the Country, as we try to resolve some of these very difficult issues that face us in Indian Country and how we make it happen better here in Washington, D.C.

With that, we will stand adjourned.

[Whereupon, at 4:02 p.m., the Committee was adjourned.]

APPENDIX

JOINT PREPARED STATEMENT OF HON. RON HIS-HORSE-IS-THUNDER, CHAIRMAN, STANDING ROCK SIOUX TRIBE; HON. A.T. STAFNE, CHAIRMAN, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION; HON. MARCUS WELLS, JR., CHAIRMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

We write jointly to highlight a shortfall which significantly affects Indian tribes and tribal organizations carrying out construction projects under either Title I or Title IV of the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§450–450n, as well as to urge the Committee to pass a proposed "technical" amendment to the ISDA which would resolve the issue.

Major construction cost increases over the last several years, combined with statutory cost-indexing and the inability to prepare cost-effective bid packages due to low appropriations levels, are unnecessarily increasing overall project costs to the taxpayer for tribal construction projects and pushing the date of completion of these projects further and further into the future. The current circumstances are as follows:

- According to various federal and industry indices, construction costs are increasing by at least 10 percent or more per year;
- Congress and the Department of Interior generally provide small amounts of construction funding each year to any single construction project, which often does not even keep up with statutorily mandated cost indexing, let alone regional and nation-wide inflation;
- Total project costs increase if bid packages are smaller, and decrease with larger bid packages;
- Current interest rates for borrowing money remain historically low.

Under these circumstances, financing construction projects makes good economic sense and is sound public policy. Tribes can build their respective projects using cost-effective bid packages, and in current dollars, before construction costs increase even further. Because of the statutory cost indexing for many authorized projects, tax-exempt bond financing (or other modes of financing) would save the federal government and the U.S. taxpayer substantial costs over the life of the project. It would also allow tribes to build their projects faster, thus bringing the benefit of these projects to tribal and rural communities much sooner than if traditional "pay-as-you-go" financing is used. Moreover, because interest rates for borrowing money remain historically low for all types of financing, contracting and compacting tribes should be able to obtain financing at favorable rate of interests.

Therefore, we have proposed the attached "technical" amendment to the ISDA at 25 U.S.C. 450j–1(k). That subsection of the ISDA provides a non-exhaustive list of costs that are allowable without approval of the Secretary of the Interior. Our proposed amendment would add the following provision to the list:

> (11) Interest payments, retirement of principal, costs of issuance, and costs of insurance or similar credit support for a debt financing instrument, the proceeds of which are used to support a contracted construction project.

This provision would benefit tribes contracting for specific construction projects under Title I of the ISDA, as well as tribes carrying out construction projects under Title IV Self-Governance agreements, because they could opt to include this Title I provision in their compacts.

This so-called "flexible financing" model has already proven effective in the Indian Reservation Roads (IRR) construction arena. The provisions of the SAFETEA–LU legislation and its regulations specifically authorize States and tribes to use bonds or other debt financing instruments to pay for project construction costs, and then use federal appropriations to pay back the financing costs over time.

The Standing Rock Sioux Tribe was at the forefront of flexible financing in the road construction arena. The Tribe was able to successfully complete a $26.5 million

roads project in three years, utilizing annual IRR Program funding to partially pay for a private bank loan. The Tribe's experience serves as a model for demonstrating that flexible financing can be a win-win situation for both tribes and the Federal government. Assuming a conservative 5 percent construction cost inflation over time, the Tribe has calculated that, by utilizing flexible financing, the Tribe saved $27 million in overall project costs. In recent years, construction cost inflation has been more in the range of 8 percent to 15 percent, depending on the type of materials and certain geographical considerations, so the actual savings were probably substantially greater. It is also important to note that this savings calculation does not take into account the additional transaction costs and bid-price increases necessitated by pay-as-you-go financing, which forces a tribe to bid out smaller components of the project each year, rather than achieving economies of scale with large bid packages. Standing Rock Sioux Tribal officials estimate that each additional bid package incurs between $100,000 and $125,000 in additional transaction costs for the project. Eliminating these unnecessary costs results in still more total project savings over time. Furthermore, in the Standing Rock Sioux Tribe roads scenario, the Tribe took out loans in the amount of 6.125 percent interest. For water project construction, discussed further below, tribes have taken out U.S. Department of Agriculture (USDA) loans (often attached to USDA grants) at rates between 4.0 percent and 4.5 percent. With a lower interest rate, one would expect the total project savings to be *even greater* over time with flexible financing.

We are particularly interested in flexible financing as it relates to our municipal, rural, and industrial water projects—and our Tribes have been battling with the Department of Interior to recognize that financing costs are allowable costs for these vital water projects. Each of our respective Tribes has contracted with the Department of Interior under the ISDA to construct the important drinking water systems that will provide safe, clean drinking water to our residents and communities. The construction of drinking water systems is essential to revitalize economic growth on our respective Reservations, and the United States government has made repeated promises to our Tribes to provide a safe and plentiful domestic water supply. However, our drinking water systems are far from complete, and federal funding has historically been inadequate to keep up with inflation and cost-indexing. Many families on our Reservations must still clean dishes and bathe themselves and their small children in brown well water that reeks of heavy minerals such as manganese, coal, iron and lime. These unhealthy minerals also exacerbate the dangerously high level of diabetes in our communities. As a result, many families in our rural communities still haul in or truck in potable water to their homes, making life on the Reservation expensive and inconvenient. To speed these important drinking water projects along, we have taken it upon ourselves to find alternative sources of supplemental funding, such as grants and loans from the USDA.

A Department of Interior administrative ruling has already held that debt financing is an allowable use of federal funds under a tribe's Indian self-determination agreement when the debt instrument is used to pay for valid water construction costs. The Three Affiliated Tribes of the Fort Berthold Reservation had to bring a lawsuit against the Bureau of Reclamation in 2005 to gain recognition that the Tribe's successful financing of a small portion of the water system construction project through low-interest USDA loans could be repaid with ISDA contract funds. Ultimately, the Administrative Law Judge ruled for the Three Affiliated Tribes, holding that these were allowable costs under current law. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Great Plains Regional Dir., Bureau of Reclamation,* IBIA 05–7–A, at 25–31 (Dec. 22, 2005). However, the Department of Interior has refused to recognize this principle for other tribes or other types of financing instruments. For example, the Assiniboine and Sioux Tribes of the Fort Peck Reservation have so far been unable to negotiate language into their Fiscal Year 2008 Annual Funding Agreement (AFA) with the Bureau of Reclamation which would allow for reimbursement of financing costs. The Assiniboine and Sioux Tribes may be forced to bring yet another lawsuit against the Bureau to gain federal recognition of a legal right that should now be well-recognized. Our respective Tribes' discussions with the Interior Solicitor's office on this issue have also been unfruitful.

This impasse between our Tribes and the Department of Interior prompted Senator Conrad, joined by co-sponsors Senator Johnson and Senator Tester, to introduce S. 2200—the Tribal Water Resources Innovative Financing Act—in October last year. That bill would affirm the ability of Indian tribes to use flexible financing techniques to advance the construction of critical water projects. We respectfully request that you join Senator Conrad in sponsoring and supporting this important legislation, so that tribes can finance drinking water construction projects in today's dollars, bringing these important projects to completion much sooner and more cost effectively than could occur with traditional pay-as-you-go funding methods.

However, this issue is not limited to roads projects or drinking water projects. The reasons why the financing of these projects makes sense apply with equal force to any construction projects under the ISDA—including schools, health care facilities, waste and wastewater treatment facilities, government offices, and any other vital infrastructure.

We believe that the ISDA already provides that financing costs are allowable costs for construction projects, in accordance with the ruling of the Administrative Law Judge in the *Three Affiliated Tribes* case. However, due to the reticence of the Department of Interior, we respectfully urge you to pass the attached legislation to affirm this principle for all contracting tribes–including tribes carrying out construction projects under both Title I Self-Determination contracts and Title IV Self-Governance arrangements.

We thank the Committee for providing oversight on these important issues and for the opportunity to present this testimony.

PROPOSED TECHNICAL AMENDMENT TO

INDIAN SELF-DETERMINATION ACT AFFIRMING

FINANCING COSTS AS ALLOWABLE COSTS FOR

CONTRACTED CONSTRUCTION PROJECTS

(January 2008)

Viz:

1 Section 450j-1(k) of Chapter 25 of the U.S. Code shall be amended by
2 adding at the end the following:
3
4 '(11) Interest payments, retirement of principal, costs of issuance,
5 and costs of insurance or similar credit support for a debt financing
6 instrument, the proceeds of which are used to support a contracted
7 construction project.'

This technical amendment would affirm and clarify that allowable costs of self-determination construction contracts include the costs of debt financing, so long as the debt proceeds are utilized for the contracted construction project. A Department of Interior administrative ruling has already held that debt financing is an allowable use of federal funds under a tribe's Indian self-determination agreement where the debt instrument was used to pay for valid water project construction costs. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Great Plains Regional Dir., Bureau of Reclamation*, IBIA 05-7-A, at 25-31 (Dec. 22, 2005). However, the Department of Interior has taken the narrow view that this ruling applies only to that Tribe and only for the type of loan at issue in the appeal. The attached legislation would affirm that construction project financing costs are allowable costs for all tribes utilizing financing to further federally authorized construction projects.

For reference, the full text of 25 U.S.C. § 450j-1(k) currently reads as follows:

(k) Allowable uses of funds without approval of Secretary

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

expenditure of the funds is supportive of a contracted program:

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

(2) Publication and printing costs.

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

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

(5) Costs for capital assets and repairs.

(6) Management studies.

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

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

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

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

PREPARED STATEMENT OF CHAD SMITH, PRINCIPAL CHIEF, CHEROKEE NATION

On behalf of the Cherokee Nation, please accept the following remarks regarding the successes and shortfalls under the Indian Self-Determination and Education Assistance Act (ISDEA) after twenty years of existence. I want to thank you for convening this hearing to discuss important issues affecting Indian Country specifically contract support costs and Title IV Amendments.

Introduction

The Cherokee Nation (Nation) is a government, cultural entity, social service agency, and regional development organization deeply committed to advancing the health and social well-being of its citizens through the improvement of its communities, creation of a strong economy, and preservation of the Cherokee language. The Nation was one of the first tribes in the United States to execute a self-determination contract under the original ISDEA and in 1990 executed a self-governance agreement under ISDEA, Title III. Since 1994, all of the Nation's self-determination programs have been administered under Self-Governance compacts with the Department of the Interior and the Department of Health and Human Services.

Title IV Amendments

The United States Constitution recognizes Indian nations as governments. Hundreds of treaties, federal laws and court cases have reaffirmed that Indian nations retain the inherent powers to govern themselves. Since the passage of the Indian Self-Determination and Education Assistance Act in 1975, tribes have been enabled to administer programs and services formerly administered by the Bureau of Indian Affairs and the Indian Health Service on behalf of their people. The law was amended in 1988 and in 1994 to broaden the scope of Self-Governance and tribes began to negotiate Self-Governance agreements with the Federal Government. In 2000, Congress enacted further amendments authorizing Self-Governance as a permanent option for Indian Health Service.

The Cherokee Nation was among the first ten Self-Governance tribes and has experienced great success designing and delivering services based upon the needs and priorities of our citizens rather than based upon federal priorities. The successes of Self-Governance tribes are due in part to local control of service delivery, flexibility of resources, partnership development and collaboration with other local governments and an overall ability of a people to govern themselves and thereby control their destiny.

However, there still remain obstacles to overcome in order for Self-Governance to reach full potential. The proposed tribal amendments to Title IV of the Indian Self-Determination and Education Assistance Act have been drafted to fulfill important purposes such as to ensure consistency between Title IV and Title V (the permanent Self-Governance authority within the Department of Health and Human Services enacted in 2000) and to clarify statutory requirements governing construction-related matters.

The Cherokee Nation has been actively involved in the Title IV Amendments Workgroup and proposed language to address tribal concerns regarding section 405(e) existing and subsequent funding agreements. It has been the experience of Cherokee Nation that an inequity in negotiation power has existed between the parties, due in large part, to the Department of Interior's ability to withhold payment if the tribe does not agree to the terms of the Department. In recent years, the reality of negotiations has been "agree to the terms, or don't get paid." Conversely, under negotiations with the Indian Health Service, funds due to the tribe continue to be paid under *Title V Section 505 (e) Subsequent Funding Agreements.* This allows for the parties to concentrate on reaching compromise on the issues and for true negotiations to occur.

Recommendation: It is imperative to the furtherance of Self-Governance that the same provisions and interpretations afforded under Title V with Indian Health Service be extended to the Bureau of Indian Affairs under the Title IV Amendments.

Contract Support Costs

While enactment of the ISDEA has provided a solid foundation for the Cherokee Nation and other Tribes throughout the United States to chart a course for self-determination, it is greatly hampered by the lack of the Federal Government's commitment to providing funding for contract support costs that has made it difficult, if not impossible, for Tribes to enter and maintain ISDEA compacts and contracts.

Pursuant to the Nation's compact with the Department of the Interior, the Nation administers a wide array of Federal Government programs serving Indian people, including credit and finance programs; agricultural, forestry and real estate services; tribal courts; social services, Indian child welfare and housing improvement programs; a general assistance program; Johnson O'Malley education programs; law enforcement services; the Indian Reservation Roads construction, planning and maintenance programs; Individual Indian Money services; higher education and adult education services; and child abuse and early childhood wellness programs.

Under the Nation's Self-Governance compact with the Department of Health and Human Services, the Nation operates six rural outpatient clinics providing Indians with primary medical care, dental services, optometry, radiology, mammography, behavioral health services, medical laboratory services, pharmacy services, community nutrition programs, and a public health nursing program. The Nation also operates inpatient and outpatient contract health services programs for management of specialty care.

The Cherokee Nation has been able to make tremendous improvements to these formerly Federal programs and services. The ISDEA has enabled the Nation to resume responsibility for its own affairs and carry out these programs and services in a more responsive and accountable manner for the benefit of Indian people. Unfortunately, the Nation's progress has been severely impeded by the Federal Government's failure to fund required contract support costs as mandated by ISDEA, de-

spite the efforts of Congress to prevent such systematic underfunding of contract support costs by making several strengthening amendments to the act in 1988 and 1994.

Since the time of the Nation's first Self-Governance compact with the Department of the Interior in 1990, the Nation has never been fully funded with contract support costs as mandated by ISDEA. The Bureau of Indian Affairs (BIA) neglects to provide to the Nation in excess of a $900,000 in contract support costs annually.

On May 8, 2006 the BIA signed a Contract Support Cost Policy that became effective in Fiscal Year 2007. This policy now allows the payment of Direct Contract Support Costs (DCSC) in addition to the payment of Indirect Contract Support Costs (IDC). A workgroup comprised of federal and tribal representatives has been organized to assist in the implementation of this policy including the development of the annual BIA CSC Shortfall Report to Congress. *Historically since 1998, the Department of Interior has not filed these reports consistent with Section 106(c) of the ISDEA.*

The Indian Self-Determination Fund (ISDF), also known as Contract Support Costs (CSC) Pool 1, is no-year (available until spent) appropriations. At this time, the only funds available to pay start-up and CSC for new contracts are funds from prior year's appropriations. No recurring appropriations have been made to the ISDF, therefore once the prior appropriations are gone there are no CSC funds available for new assumptions. Currently, a tribe may utilize the ISD Fund to assume BIA programs for the first year but will have to incur the full CSC for that new program from direct program dollars thereafter.

Recommendation: In addition to fully funding Contract Support Costs, the Nation requests recurring appropriations be made to the BIA Indian Self-Determination Fund (ISDF), also known as CSC Pool 1.

As for the Indian Health Service (IHS), in 1992 and 1994, respectively, the Nation assumed operation of the Redbird Smith Health Center in Sallisaw, Oklahoma, and the Wilma P. Mankiller Health Center in Stilwell, Oklahoma. In 1995, the Nation began administering the W.W. Hastings Indian Hospital contract health program outpatient program, and in Fiscal Year 1997, the Nation assumed control of the facility's contract health program inpatient program. Until September 1999, the Nation did not receive ANY contract support funding for the operation of these four multi-million dollar programs. In FY 2007, the Nation was funded at only 63 percent of its requirement for contract support for IHS programs, a shortage of $3.9 million per year. Despite the lack of adequate contract support funds, the Nation realizes the benefits and opportunities of exercising self-determination through ISDEA and remains committed to undertaking additional programs and services previously administered by the Federal Government. However, the lack of contract support funds have served as a disincentive for tribes to further compact and contract with the Federal Government under ISDEA.

The Nation recently opened a 105,000 square-foot clinic in Muskogee, Oklahoma through the IHS Joint Venture program. The Nation is extremely supportive of the Joint Venture Program as it demonstrates the shared commitment of the Nation and the Federal Government in providing additional health facilities for the Indian population. The Muskogee Clinic will have an operating budget of approximately $24 million annually to serve an estimated 7,576 users in its first year of operation (10,396 projected in FY 2015). The new services will include primary care, maternal and child care, dental care, eye care, audiology, pharmacy, physical therapy, and many other vital services. The Nation provided nearly $23 million of Tribal funds to bring a much needed facility to serve the Indian population in the Muskogee area.

When a Joint Venture is entered into between a tribe and the IHS, the IHS agrees to fund the operational and equipment costs for the facility, and the tribe agrees to fund the design and construction costs. *Although it is mandatory that Contract Support Costs (CSC) are added to direct operational costs, it is neither included as part of the Joint Venture Agreement nor submitted by the IHS and therefore, not appropriated by Congress as part of the cost of Joint Venture project.* CSC is a legitimate component of costs to operate a new facility; however, it is not planned for in the operational start-up costs in either the Facilities Appropriation or the Joint Venture account. This presents a critical policy issue, where the IHS has committed by way of a Joint Venture agreement to fund the operational costs for the facility, but has not acquired sufficient appropriations to fulfill its end of the bargain when a Tribe chooses to operate the facility.

Estimates indicate the Nation's current rate for indirect costs (which comprise the majority of contract support costs) would require an additional $6.7 million annually for the Muskogee Clinic. In order for the continued success of the Joint Venture program, the Nation strongly believes that contract support funds are included as a

component of the program. Without such funding, resources must be diverted from patient care to necessary administrative services resulting in diminished health care services.

Recommendation: When IHS has contracted to fund the operational and equipment costs for a facility, the IHS should submit to Congress the *total* cost of that commitment. The Contract Support Costs should be included as part of the total project cost within the Joint Venture Agreement.

In January 2008, the Cherokee Nation initiated the process to undertake operations of all applicable programs, services, functions and activities (PSFAs) at the W.W. Hastings Indian Hospital in Tahlequah, Oklahoma. The decision is based on years of careful consideration and will enable the Nation to provide a comprehensive health care system for the use and benefit of all eligible beneficiaries consisting of a hospital, clinics, and various programs within the area for the use and benefit of all eligible beneficiaries.

Negotiations are currently underway and the Nation intends to assume operations of the facility on October 1, 2008. Preliminary estimates indicate that the Nation's current rate for indirect costs (which comprise the majority of contract support costs) would require an additional $4 million annually for the W.W. Hastings Hospital. The contract support needs due to the additional programs and services assumed at the Muskogee clinic, as well as the impending programs and services at W.W. Hastings Hospital, indicate additional financial burden for the Nation, as well as the entire Indian health system, absent congressional intervention.

The contract support cost problem has caused severe financial strains on the Nation's programs and facilities, as it has for many other tribes in the country. Since contract support costs are fixed costs that a contractor must incur, Tribes typically either (1) reduce funds budgeted for critical healthcare, education and other services under the contract in order to cover the shortfall; (2) they divert Tribal funds to subsidize the federal contract (when such Tribal funds are available); or (3) they use a combination of these two approaches. The Nation remains committed to the furtherance of a comprehensive health care system because the imperative of self-governance is that important. Despite the lack of adequate funds to carry out services and activities through ISDEA compacts, including program funding cuts and underfunded contract support, the Nation can provide more efficient, and cost effective services as well as provide continuity of services to our citizens.

Given the conduct of the agencies and recent court decisions, it is clear that reforms are needed. Congress intended that tribes would be fully paid contract support costs if they agree to take over the administration of these Federal programs. But that is not what has happened, and the courts have been slow to respond, if at all.

Recommendations: Some of the reforms to the contract support costs system should include:

Specifically mandate that Indian Health Service utilize any unobligated balances from prior appropriations Acts to make payments to tribes or tribal organizations for contract support costs. The IHS already has this authority but has made a policy decision to not make these funds available to meet the contract support cost obligations associated with contracts, self-governance compacts, or annual funding agreements. This resolution would have no impact to the total appropriations to Indian Health Service.

Resolving the accounting quagmire created when the government-wide indirect cost rate is not followed by all government agencies. This accounting mess has led not only to an under-calculation in indirect cost rates, but it has also severely strained the ability of tribes to operate all their Federal programs across all agencies within OMB's guidelines. For nearly 20 years tribes have called for reform in this area. It is also critical that Congress uphold existing statutory flexibility in the expenditure of self-governance funds, to best meet special or unique local needs, when self-determination funds are pooled with other funds in each tribe's "indirect cost pool."

Strengthening the mandate to fully fund contract support costs by removing "availability" clauses. Courts have at times interpreted the "availability" clauses to negate the mandate to fund contract support costs, an interpretation that effectively downgrades the Nation's government contracts, negotiated in good faith, to something more akin to a discretionary grant.

When discussing contract support costs, Tribes often state that the greatest threat to the success of ISDEA is the failure to fully fund contract support costs. The Nation fully agrees with that statement as it has indeed been one of the greatest problems impeding the Nation's progress. The Nation believes that there is so much more that can be done, and so much more that must be done, to meet the critical health, education, economic and social needs of Cherokee citizens and all other Indians eligible for our services. The Nation is confident in its abilities to carryout the

Federal Government's trust programs, however, the Nation's ability to administer these programs successfully and to maximize delivery of high quality services to Indian people, depends on having adequate contract support cost funding.

The United States Supreme Court recognizes that contract support costs are a contract obligation that must be paid and the current system simply should not go on any longer. Neither the BIA nor IHS pays full contract support costs even though all other Government contractors receive their full administrative overhead when they deal with the Federal Government. Although Tribes enter into these agreements and take over significant responsibilities from the Federal Government, the Nation is consistently treated as a second-class contractor, which is unacceptable. *Neither agency even requests full contract support funding from Congress, at times because they haven't the will, and at other times because the Department or the Office of Management and Budget stands in the way.* And, of course, there are other, competing demands on the appropriations committees.

Recommendation: After pursuing legal remedy which lasted ten long years, the United States Supreme Court, by unanimous decision, applied traditional government contract law to conclude that the government is liable whenever it fails to pay fully on a contract and where appropriations are legally available to pay the contract. The Nation strongly urges Congress to fully fund Contract Support Costs.

Closing

In closing, the Cherokee Nation commends the Senate Committee on Indian Affairs for its continued efforts to address the insufficiencies regarding contract support costs and the Nation looks forward to working with Congress to address this long standing issue that greatly impedes the ability of Tribes to function as thriving, responsible governments.

Thank you for holding this oversight hearing on *"The Success and Shortfall of Self Governance under the Indian Self-Determination and Education Assistance Act after Twenty Years"* and for your work on behalf of the Cherokee people and your continued support in Indian Country. Should you require additional information, I encourage you to contact Cherokee Nation's Senior Legislative Officer, Paula Ragsdale.

JOINT PREPARED STATEMENT OF MARIE CARROLL, PRESIDENT, ARCTIC SLOPE NATIVE ASSOCIATION; JOHN "CHANCE" HOULE, CHAIRMAN, CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION; GREGORY PYLE, CHIEF, CHOCTAW NATION OF OKLAHOMA; HAROLD FRANK, CHAIRMAN, FOREST COUNTY POTAWATOMI COMMUNITY; ANDY TUEBER, PRESIDENT, KODIAK AREA NATIVE ASSOCIATION; ALONZO COBY, CHAIRMAN, SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION; NANCY EGAN, CHAIRWOMAN, SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION; AND LINWOOD KILLAM, CEO, RIVERSIDE-SAN BERNARDINO COUNTY INDIAN HEALTH, INC.

We write as leaders of several Tribes and Tribal Organizations to convey our very strong support for reform in the Nation's treatment of Tribes administering essential Indian Health Service and Bureau of Indian Affairs governmental programs under Title I, Title IV and Title V of the Indian Self-Determination Act of 1975. It is absolutely critical that Congress at long last see to it that our self-determination contracts and compacts are fully paid, including our full contract support cost requirements due under those contracts and compacts.

The Indian Self-Determination Act has long been a beacon of hope as our Tribal communities recover from decades of abuse and neglect. By contracting and compacting for the management of IHS and BIA programs benefitting our communities, we have traveled far down the road of reestablishing and strengthening Tribal Self-Determination, precisely as Congress envisioned in 1975. We have also provided an invaluable service to the United States, by simultaneously helping reduce the size of the Federal bureaucracy and increasing and enhancing the quality of Federal programs serving Native American people.

But the Federal Government has not always honored its commitment under these agreements, and historically we have suffered increasingly large shortfalls in the Government's payment of our contract support cost requirements.

In its 1988 reforms to the Indian Self-Determination Act, Congress recognized that the payment of contract support costs, much like general and administrative costs incurred by any government contractor, was critical to the success of Tribal Self-Determination. These contract support costs represent our fixed costs of carrying out our agreements with the Federal Government. Contract support costs are the costs of our Federally mandated audits. They are the costs of our worker's compensation insurance for our police officers, our doctors and our nurses. They are the

costs of our accounting systems. They are fixed costs that must be incurred year in and year out, and these costs are annually audited by independent certified public accountants, all as required by Federal law.

Most of our Tribes and Tribal organizations lack any collateral source of funds to cover these fixed costs. As a consequence, when the Indian Health Service or the Bureau of Indian Affairs fails to pay these costs, the only option we have is to cut services. Ultimately, then, our very own Indian people are penalized by the Federal Government's failure to honor the self-determination agreements that Congress in 1975 urged our Tribes to take on.

The growing crisis caused by continuing shortfalls in contract payments owed to Tribes and Tribal organizations is reflected in substantially reduced contracting and compacting initiatives, layoffs, and reductions in force among program personnel administering these agreements, as well as in the increasing possibility of wholesale retrocessions of contracted programs back to the Federal Government. We respectfully call upon Congress to focus its attention immediately on this crisis, before it is too late.

We respectfully urge Congress to consider the following multi-faceted approaches to addressing the current crisis.

First, if members of Congress have any lingering doubt as to the critical nature of contract support cost payments, and the terrible impact continuing shortfalls in those payments have on Tribes and Tribal organizations, then Congress should direct the General Accountability Office, IHS, and BIA to report to Congress in detail. The GAO and the National Congress of American Indians each provided reports to Congress in 1999, providing a strong record for renewed action today. But if further investigation is necessary, then GAO should be tasked with primary responsibility for swiftly updating its 1999 report.

Second, the Bureau of Indian Affairs—which only adopted a comprehensive policy on contract support costs in 2006, 31 years after Congress passed the Indian Self-Determination Act—must be directed to commit substantial resources and personnel to strengthening its ability to accurately administer the BIA's responsibilities under the law. Recent experience shows that the BIA is still ill-equipped to properly carry out its responsibilities for accurately determining contract support cost requirements, and accurately allocating its appropriation to pay those requirements.

Third, the National Business Center should be prohibited from unilaterally altering its methodology for determining Tribal indirect cost rates. NBC sets the rates for most Tribes and Tribal organizations that contract or compact with the BIA, and for 80 percent of the Tribes and Tribal organizations that contract with IHS. As such, it is imperative that NBC's methodologies not be changed without extensive advance Tribal consultation, followed by formal notice and comment.

Fourth, Congress should consider legislation to facilitate the resolution of historic breach of contract claims against the Indian Health Service. In recent years the courts have permitted class actions to address the Governments's liability for underpaying contract support costs due under the BIA's contracts and compacts. However, and quite inconsistently, the courts have not permitted liabilities over IHS's failure to pay full contract support cost requirements to be resolved in an identical manner. As a result, although the Supreme Court in the *Cherokee Nation* case found IHS's conduct in the period 1994–1997 to be unlawful, only 6 out of over 330 Tribes have ever been able to recover compensation.

In the short term, we urge Congress to clarify Tribal rights in this area by extending the statute of limitations for pursuing claims to at least December 31, 2010. In the long term, we urge Congress to consider establishing an alternate mechanism—one that would not require litigation—for arriving at fair compensation for the contract underpayments that occurred during the *Cherokee* period.

Any reform legislation in this area must recognize that the Government continues to face litigation over its contract support cost payments in more recent years, including claims filed by most of our Tribes and Tribal organizations. The Government's liability for IHS and BIA underpayments in more recent years is presently being litigated. Since the courts have not finally spoken to the Government's liability in these more recent years, it is sensible for Congress to limit reform legislation in this area to the resolution of claims arising during the *Cherokee* years only.

Fifth, we respectfully urge Congress to draw upon two sources to finally close the gap in future contract support cost payments. First, new appropriations are vitally needed in sums that will substantially reduce the gaps in contract obligations—which currently hover near $50 million for the BIA and well over $100 million for IHS. In addition, Congress should commit a fixed amount of each agency's prior year unobligated balances toward this effort. Tapping into each agency's prior year unobligated balances to cover current contract support shortfalls is certainly a high-

er priority than tapping into those funds to support internal agency administration (as currently occurs with the BIA in the area of trust reform).

Finally, Congress should give active consideration once again to the proposals (as contained in years past in S. 2127 and H.R. 4148), to create an automatic payment mechanism that would operate independently of the ordinary appropriations cycle, for contracts that have been lawfully awarded under the Indian Self-Determination Act. Alternatively, we recommend that Congress eliminate the current earmarking "not to exceed" caps that inhibit the agencies' ability to pay full contract support costs. Under these earmarks, the agencies insist they have no options when they underpay our contracts. While we do not agree with the agencies on this point, it is clear that, so long as these earmarks are in place, the agencies cannot exercise any discretion to reach into the remainder of their appropriations. Prior to 1998 (for the Indian Health Service) and 1994 (for the Bureau of Indian Affairs) no earmarks limited the agencies' discretion in this respect. If Congress would eliminate these earmarks, the agencies would once again have the authority to reach into other portions of the agencies' appropriations to pay these contracts. It is apparent from the *Cherokee* litigation that the agencies at the time did not understand they had such authority. With new guidance from the Supreme Court on this issue, removing the caps would permit contracting Tribes and the agencies to work together to manage Congress's overall appropriations consistent with the Government's contractual obligations.

Before closing, we also respectfully urge Congress to making a number of improvements to the Indian Self Determination Act. Among these:

- Congress should prohibit IHS or the BIA from declining to award a contract, whether in its entirety or in part, due to an agency concern that appropriations may not be available to fully pay the contract. Whether appropriations will be available to fully pay a contract is a matter exclusively within the province of Congress to decide, not the agencies.
- Similarly, Congress should prohibit IHS and the BIA from refusing to award and fund a subsequent funding agreement, either based upon agency concerns over available appropriations or (as has frequently happened in recent years) over an agency's unilateral imposition of new contract language on a Tribe. Although such language is included in proposed amendments to rewrite Title IV of the Indian Self-Determination Act, we make special note of the critical and immediate importance of this particular reform.
- Congress should direct the BIA to develop a comprehensive tribal shares identification and distribution process, much as the Indian Health Service did in the mid 1990s. Such a process will permit Tribes to bring resources currently retained in the BIA regional offices down to the agency and reservation levels. For similar reasons, Congress should eliminate the current appropriations rider which protects the BIA central office from the tribal shares process—again, a process which IHS Headquarters has carried out since the mid-1990s.
- Congress should develop amendments to the Indian Self-Determination Act that would make Tribal employees carrying out self-determination programs eligible for participation in the Federal retirement and health insurance systems. Such a provision would substantially reduce the need for "direct" contract support costs currently furnished to pay such benefits, while helping maintain parity between direct service programs and contracted and compacted programs.
- Congress should clarify that Congress's approval of program expenditures set forth in section 106(k) of the Act includes expenditures made from Tribal indirect cost pools.
- Congress should accelerate to February 1 the deadline for IHS and BIA to furnish their section 106(c) annual shortfall reports to Congress, so that Congress can consider such reports when entertaining supplemental appropriations bills.

Thank you for the opportunity to offer testimony in connection with the Committee's May 13 hearing, and for holding the record open to receive these remarks.

PREPARED STATEMENT OF MELANIE BENJAMIN, CHIEF EXECUTIVE, MILLE LACS BAND OF OJIBWE

Good afternoon, Chairman Dorgan, Vice Chair Murkowski, and members of the Committee. My name is Melanie Benjamin. I am the elected Chief Executive of the Mille Lacs Band of Ojibwe.

The key message in my testimony is this—I urge you to introduce and work to secure Senate and House passage *this year* of the compromise tribal legislative pro-

visions to reform Title IV, the self-governance portion of Public Law 93–638 that governs relations between the Interior Department and tribes like the Mille Lacs Band. Enactment of these provisions will remove many obstacles to greater tribal self-governance.

I have a second message which is in response to a critical on-going issue on our Reservation. In 2007, University of Minnesota Law Professor Kevin Washburn testified before your committee about law enforcement matters and detailed a law enforcement crisis our Band is facing due to a hostile relationship with Mille Lacs County, which asserts that our Reservation no longer exists. In response to critical public safety issues on our Reservation, Professor Washburn asked the Committee to consider legislation that would create an escape valve from Public Law 83–280 when state retrocession of criminal jurisdiction to the Federal Government is not an option. We believe that Self-Governance would be an appropriate vehicle for developing such authority under which the Secretary and Tribe could enter into a direct agreement under Title IV when the state is being non-responsive to public safety concerns.

I made the same request of Chairman Rahall when I testified before the House Natural Resources Committee on Self-Governance matters. We would like to work with the Committee to develop such authority and make it part of Title IV.

Background

The Mille Lacs Band has long been a leader among other Tribes in seeking greater tribal self-governance authority and in putting it into practice. The Band was among the first ten Indian Tribes to participate in self-governance with the Bureau of Indian Affairs (BIA) in the late 1980s and the first Tribe to negotiate an agreement with the Indian Health Service (IHS) in the early 1990s.

It has been 20 years since the beginning of tribal self-governance. Two tribal leaders—Wendell Chino and Roger Jourdain—brought this concept to the forefront in 1987 as the country was planning the bicentennial celebration of the United States Constitution. Chino and Jourdain called for a meeting of tribal leaders in Kansas City to discuss the 200th anniversary and the need for changes in federal Indian policy.

Tribes' participation in the bicentennial of the Constitution's signing was significant. They provided research on what the Constitution's framers envisioned as the basis of governance and presented information on the Constitution at the Philadelphia symposium. They also raised awareness about the U.S. Constitution being modeled on the Iroquois Confederacy and the Constitution's outlining of the special relationship between tribes and the Federal Government.

In addition, ten tribes met with Congress to discuss problems in Indian Country; three main problems were identified: the plenary power of Congress; the relationship between Indian tribes and the United States; and the working relationship with the Bureau of Indian Affairs (BIA). Congress addressed one of these issues by giving each tribe $100,000 to find a better way to work with the BIA under the Self-Governance Demonstration Project which became Title III of P.L. 93–638. The tribes agreed to this action, and each tribe drafted its proposal. The tribes also agreed that they needed to be treated as governments like they were during the treaty-making era, when tribes met with the President on a government-to-government basis. The transition from the former federal Indian policy of Self-Determination to Self-Governance was a logical step.

On the 20th anniversary of Self-Governance policy, the question is: Has Self-Governance resulted in improvements in Indian Country? For the Mille Lacs Band of Ojibwe, self-governance has led to a number of successes: First, all six other Chippewa Bands in Minnesota have negotiated and signed Self-Governance compacts with the Federal Government, which has increased cooperation among member bands with the Mille Lacs Band of Ojibwe. Second, the Mille Lacs Band has improved its government by developing laws and a separation-of-powers system of government. Third, the Band's main source of financial success has been its two casinos, which are operated by a separate corporate system. Without Self-Governance, the Band could not have developed these businesses to the level they are today. The Band's departments were allowed to work directly with federal agencies to ensure compliance with federal requirements, which saved time in developing these businesses.

Other opportunities that would not have been made available under past policies include: resolving issues with state government, setting up partnerships with businesses, improving government structure, working with other tribal governments, and better financial management. Finally, the Band's tribal government is better able to establish government-to-government relationships with the Federal, state, county and municipal governments.

In the years since Self-Governance was first established as federal law, we have worked closely with this Committee and other Tribes to reform the law so as to permit greater tribal self-governance authority that curbs the federal bureaucracy's insatiable appetite to dominate tribal operations. Unless the Bureau of Indian Affairs and the Office of Special Trustee are controlled by the law, they tend to restrict tribal authority, priorities, administration, and programs.

We are, today, at a point where we must ask the Congress to step in once again and change the law to remove more obstacles to tribal self-governance.

As you know, four years ago, this Committee favorably reported out a predecessor bill, S. 1715, the Department of the Interior Tribal Self-Governance Act of 2003 (Senate Report No. 108–413, Nov. 16, 2004), but the full Senate never voted on it.

Enact the Draft Tribal Bill

The efforts of the past seven years to reach agreement with Interior on specific changes to the Title IV statute have borne great fruit. The Tribal and Interior representatives have listened to each other and found ways to accommodate the other's concerns.

The attached tribal draft bill reflects these compromises. But more importantly, it represents a huge concession on the part of the Tribes—it completely drops all provisions which would have made mandatorily applied self-governance to non-BIA and non-OST offices of the Department like the National Park Service and Fish and Wildlife agencies.

While the Mille Lacs Band very much regrets having to make this compromise, we agree with our fellow Tribes that it must be made in order to clear the way for enactment *this year* of much-needed self-governance reforms that focus on BIA and OST and with which the Department has shown substantial agreement.

Like other Self-Governance Tribes, we reluctantly give up, *temporarily,* our request for the application of tribal self-governance authority to every corner of the Department of the Interior. We do so only in order to remove the remaining Departmental objections to enactment of the rest of the tribal draft bill in 2008.

A House version of this legislation, H.R. 3994, is currently under review by the House Natural Resources Committee. The House Committee has told us it expects to mark up the bill in the next month. We hope that you will introduce a companion bill in the Senate and that this critical legislation can be enacted during this session of Congress. The draft legislation I have attached to my testimony is substantively identical to H.R. 3994.

Why the Tribal Reform Bill is Needed

A. The Bill Will Remove Dual and Overlapping Requirements

Mille Lacs and many other Tribes have self-governance agreements with both IHS and BIA. But because Congress enacted Title IV governing BIA in 1994 and Title V governing IHS in 2000, Title IV and Title V now contain provisions that differ from each other and thus require self-governance tribes to operate separate administrative structures and systems for programs funded by BIA and IHS.

Congress expanded tribal authority and flexibility when it enacted Title V governing IHS-funded programs. But the same Tribes still labor under the more restrictive authority of Title IV governing BIA-funded programs. These dual requirements are an administrative and cost burden to Tribes like Mille Lacs Band. And they deter Tribes from assuming more federal program administration under self-governance authority.

B. The Bill Will Expedite Negotiations and Reduce Conflict

The bill would make significant improvements to the negotiation and implementation of self-governance agreements. Negotiation disputes would be resolved quickly with uniform standards. It would clarify and limit how the BIA may decline to enter into a proposed agreement, and the time frame for making its decision. It would require that funds be transferred promptly after they have been apportioned to the Department. It would streamline how construction provisions would be implemented. And it would protect tribes from BIA attempts to impose unilaterally terms in compacts or funding agreements. Finally, it would provide a clear avenue of appeal and burden of proof for Tribes to challenge adverse agency decisions.

C. The Bill is Modeled After the 8-Year-Old IHS Law

As you know, Congress in 2000 enacted Title V to govern tribal-self-governance agreements with the IHS. Title V, which has worked very well in the context of health care services, served as the model for the tribal draft bill on Title IV. None of the several provisions of the draft tribal Title IV bill that BIA refuses to support has caused the IHS any heartburn over the past eight years. Self-Governance, by

definition, will always reflect an inherent tension between Tribes and the BIA. Any federal bureaucracy will try to avoid yielding its authority—and its funding—to tribes. This Committee, and the Senate and Congress, should keep this in mind when weighing the persuasiveness of any continuing objections raised by BIA.

We believe that the Title IV amendments, especially after the most recent tribal concessions discussed above, protect the interests of the Federal Government while advancing those of tribal governments. We hope that this Committee will agree.

Conclusion

For eight years we have tried to negotiate with Interior to gain its agreement to add to Title IV the reforms made by Congress to Title V (IHS). The broader Title V self-governance authority has worked well at IHS where there is widespread participation by tribes in self-governance. We believe tribal participation would expand if Title IV were amended to look more like Title V (as reflected in the attached tribal draft bill).

Given the Department's objections to extending self-governance authority to the non-BIA, non-OST agencies within the Department, the Tribes have reluctantly agreed to sever those sections and request this year only amendments dealing with BIA and OST. We have done this only to facilitate passage this year. We ask that you honor this significant tribal concession with prompt enactment of these remaining provisions which are largely without controversy.

The compromise tribal amendments will provide for more efficient and responsive tribal program administration. Broad-based and sustained economic development and growth will surely follow an expansion of tribal self-governance authority. And so we ask the Committee to marshal its energies and persuade the Senate and the House to enact these tribal amendments in the closing days of this Congress.

Thank you for this opportunity to express the views of the Mille Lacs Band of Ojibwe, and for your work, Mr. Chairman, and the work of this Committee over the years in supporting tribal self-governance at the request of tribal governments and in the face of resistance from the federal agencies.

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Attachment: Tribal BIA/OST Amendments to Title IV*

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*The information referred to is printed on pages 15–42 of this hearing.