

TRIBAL SELF-GOVERNANCE AMENDMENTS OF 1998

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OCTOBER 2, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. YOUNG of Alaska, from the Committee on Resources,  
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1833]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 1833) to amend the Indian Self-Determination and Education Assistance Act to provide for further Self-Governance by Indian Tribes, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Tribal Self-Governance Amendments of 1998”.

**SEC. 2. FINDINGS.**

Congress finds that—

(1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to Self-Governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes;

(3) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal Self-Governance and dominates tribal affairs;

(4) the Tribal Self-Governance Project, established under title III of the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450f note) was designed to improve and perpetuate the government-to-government

relationship between Indian tribes and the United States and to strengthen tribal control over Federal funding and program management;

(5) although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to tribal governments, upon tribal request, over decision making for Federal programs, services, functions, and activities (or portions thereof)—

(A) is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian tribes; and

(B) strengthens the Federal policy of Indian self-determination.

#### SEC. 3. DECLARATION OF POLICY.

It is the policy of Congress to—

(1) permanently establish and implement tribal Self-Governance within the Department of Health and Human Services;

(2) call for full cooperation from the Department of Health and Human Services and its constituent agencies in the implementation of tribal Self-Governance—

(A) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;

(B) to permit each Indian tribe to choose the extent of its participation in Self-Governance;

(3) in accordance with the provisions of the Indian Self-Determination Act relating to the provision of Federal services to Indian tribes;

(D) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals;

(E) to affirm and enable the United States to fulfill its obligations to the Indian tribes under treaties and other laws;

(F) to strengthen the government-to-government relationship between the United States and Indian tribes through direct and meaningful consultation with all tribes;

(G) to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding and discretion to plan, conduct, redesign and administer programs, services, functions and activities (or portions thereof) that meet the needs of the individual tribal communities;

(H) to provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portions thereof) are assumed by Indian tribes;

(I) to encourage the Secretary to identify all programs, services, functions, and activities (or portions thereof) of the Department of Health and Human Services that may be managed by an Indian tribe under this Act and to assist Indian tribes in assuming responsibility for such programs, services, functions, and activities (or portions thereof); and

(J) to provide Indian tribes with the earliest opportunity to administer programs, services, functions, and activities (or portions thereof) from throughout the Department of Health and Human Services.

#### SEC. 4. TRIBAL SELF-GOVERNANCE.

The Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) is amended by adding at the end the following new title:

### **“TITLE V—TRIBAL SELF-GOVERNANCE**

#### **“SEC. 501. ESTABLISHMENT.**

“The Secretary of Health and Human Services shall establish and carry out a program within the Department of Health and Human Services to be known as the ‘Tribal Self-Governance Program’ in accordance with this title.

#### **“SEC. 502. DEFINITIONS.**

“(a) IN GENERAL.—For purposes of this title—

“(1) the term ‘inherent Federal functions’ means those Federal functions which cannot legally be delegated to Indian tribes;

“(2) the term ‘inter-tribal consortium’ means a coalition of two or more separate Indian tribes that join together for the purpose of participating in Self-Governance, including, but not limited to, a tribal organization;

“(3) the term ‘tribal shares’ means an Indian tribe’s portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions;

“(4) the term ‘Secretary’ means the Secretary of Health and Human Services; and

“(5) the term ‘Self-Governance’ means the program established pursuant to section 501.

“(b) INDIAN TRIBE.—Where an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term ‘Indian tribe’ as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

**“SEC. 503. SELECTION OF PARTICIPATING INDIAN TRIBES.**

“(a) CONTINUING PARTICIPATION.—Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title may elect to participate in Self-Governance under this title under existing authority as reflected in tribal resolution.

“(b) ADDITIONAL PARTICIPANTS.—

“(1) In addition to those Indian tribes participating in Self-Governance under subsection (a), each year an additional 50 Indian tribes that meet the eligibility criteria specified in subsection (c) shall be entitled to participate in Self-Governance.

“(2)(A) An Indian tribe that has withdrawn from participation in an inter-tribal consortium or tribal organization, in whole or in part, shall be entitled to participate in Self-Governance provided the Indian tribe meets the eligibility criteria specified in subsection (c).

“(B) If an Indian tribe has withdrawn from participation in an inter-tribal consortium or tribal organization, it shall be entitled to its tribal share of funds supporting those programs, services, functions, and activities (or portions thereof) that it will be carrying out under its compact and funding agreement.

“(C) In no event shall the withdrawal of an Indian tribe from an inter-tribal consortium or tribal organization affect the eligibility of the inter-tribal consortium or tribal organization to participate in Self-Governance.

“(c) APPLICANT POOL.—The qualified applicant pool for Self-Governance shall consist of each Indian tribe that—

“(1) successfully completes the planning phase described in subsection (d);

“(2) has requested participation in Self-Governance by resolution or other official action by the governing body (or bodies) of the Indian tribe or tribes to be served; and

“(3) has demonstrated, for the previous 3 fiscal years, financial stability and financial management capability.

Evidence that during such years the Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe’s self-determination contracts or Self-Governance funding agreements with any Federal agency shall be conclusive evidence of the required stability and capability for the purposes of this subsection.

“(d) PLANNING PHASE.—Each Indian tribe seeking participation in Self-Governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian tribe and shall include—

“(1) legal and budgetary research; and

“(2) internal tribal government planning and organizational preparation relating to the administration of health care programs.

“(e) GRANTS.—Subject to the availability of appropriations, any Indian tribe meeting the requirements of subsections (c)(2) and (3) shall be eligible for grants—

“(1) to plan for participation in Self-Governance; and

“(2) to negotiate the terms of participation by the Indian tribe or tribal organization in Self-Governance, as set forth in a compact and a funding agreement.

“(f) RECEIPT OF GRANT NOT REQUIRED.—Receipt of a grant under subsection (e) shall not be a requirement of participation in Self-Governance.

**“SEC. 504. COMPACTS.**

“(a) COMPACT REQUIRED.—The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in Self-Governance in a manner consistent with the Federal Government’s trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

“(b) CONTENTS.—Each compact required under subsection (a) shall set forth the general terms of the government-to-government relationship between the Indian tribe and the Secretary, including such terms as the parties intend shall control year after year. Such compacts may only be amended by mutual agreement of the parties.

“(c) EXISTING COMPACTS.—An Indian tribe participating in the tribal Self-Governance on the date of enactment of this title shall have the option at any time thereafter to—

“(1) retain its Tribal Self-Governance Project compact (in whole or in part) to the extent the provisions of such compact are not directly contrary to any express provision of this title, or

“(2) negotiate in lieu thereof (in whole or in part) a new compact in conformity with this title.

“(d) TERM AND EFFECTIVE DATE.—The effective date of a compact shall be the date of the approval and execution by the Indian tribe or another date agreed upon by the parties, and shall remain in effect for so long as permitted by Federal law or until terminated by mutual written agreement, retrocession, or reassumption.

**“SEC. 505. FUNDING AGREEMENTS.**

“(a) FUNDING AGREEMENT REQUIRED.—The Secretary shall negotiate and enter into a written funding agreement with each Indian tribe participating in Self-Governance in a manner consistent with the Federal Government’s trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

“(b) CONTENTS.—Each funding agreement required under subsection (a) shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for all programs, services, functions, and activities (or portions thereof), including tribal shares of discretionary Indian Health Service competitive grants (excluding congressionally earmarked competitive grants), that are carried out for the benefit of Indians because of their status as Indians (including all programs, services, functions, or activities (or portions thereof) where Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and grants (which may be added to a funding agreement after award of such grants) without regard to the agency or office of the Indian Health Service (or of such other agency) within which the program, service, function, or activity (or portion thereof) is performed, including tribal share funding for all local, field, service unit, area, regional, and central headquarters or national office functions administered under the authority of—

“(1) the Act of November 2, 1921 (25 U.S.C. 13);

“(2) the Act of April 16, 1934 (25 U.S.C. 452 et seq.);

“(3) the Act of August 5, 1954 (68 Stat. 674);

“(4) the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.);

“(5) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2401 et seq.);

“(6) any other act of Congress authorizing agencies of the Department of Health and Human Services to administer, carry out or provide financial assistance to such programs, services, functions or activities (or portions thereof) described in this section; or

“(7) any other act of Congress authorizing such programs, services, functions or activities (or portions thereof) under which appropriations are made to agencies other than agencies within the Department of Health and Human Services, when the Secretary administers such programs, services, functions or activities (or portions thereof).

“(c) INCLUSION IN COMPACT OR FUNDING AGREEMENT.—Indian tribes or Indians need not be identified in the authorizing statute for a program or element of a program to be eligible for inclusion in a compact or funding agreement under this title.

“(d) FUNDING AGREEMENT TERMS.—Each funding agreement shall set forth terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered, the general budget category assigned, the funds to be provided, including those to be provided on a recurring basis, the time

and method of transfer of the funds, the responsibilities of the Secretary, and any other provisions to which the Indian tribe and the Secretary agree.

“(e) **SUBSEQUENT FUNDING AGREEMENTS.**—Absent notification from an Indian tribe that is withdrawing or retroceding the operation of one or more programs, services, functions, or activities (or portions thereof) identified in a funding agreement, or unless otherwise agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, and the terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.

“(f) **EXISTING FUNDING AGREEMENTS.**—Each Indian tribe participating in the Tribal Self-Governance Project established under title III, as in force before the enactment of the Tribal Self-Governance Amendments of 1998, on the date of enactment of this title shall have the option at any time thereafter to—

“(1) retain its Tribal Self-Governance Project funding agreement (in whole or in part) to the extent the provisions of such funding agreement are not directly contrary to any express provision of this title, or

“(2) adopt in lieu thereof (in whole or in part) a new funding agreement in conformity with this title.

“(g) **STABLE BASE FUNDING.**—At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under section 106(a) of the Act) to be transferred to such Indian tribe, for such period as may be specified in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations by sub-sub activity excluding earmarks.

“**SEC. 506. SELF-GOVERNANCE FEASIBILITY STUDY.**

“(a) **IN GENERAL.**—The Secretary shall conduct a study, in consultation with Indian tribes and other entities specified in subsection (b), to determine the feasibility of including in Self-Governance, on a demonstration project basis, programs of the Department of Health and Human Services, other than the Indian Health Service, that benefit Indian tribes or their members, and to identify the programs suitable for inclusion in such demonstration.

“(b) **ENTITIES TO BE CONSULTED.**—In conducting the study required under this section, the Secretary shall consult with Indian tribes, States, counties and municipalities, program beneficiaries, and concerned public interest groups, and may consult with other entities as the Secretary finds appropriate.

“(c) **ISSUES.**—The study under this section shall consider the following issues with respect to the feasibility and design of a Self-Governance demonstration:

“(1) The probable effects on specific programs and program beneficiaries.

“(2) Statutory, regulatory, or operational impediments to implementation.

“(3) Strategies for facilitating Self-Governance.

“(4) Probable costs associated with Self-Governance.

“(5) Methods to ensure quality and accountability in Self-Governance demonstrations.

“(6) Such other issues as may be identified by the Secretary.

“(d) **REPORT TO CONGRESS.**—Not later than 18 months after the date of the enactment of this Act, the Secretary shall report to the Congress the findings and conclusions of the study under this section and any separate or dissenting views of the entities consulted pursuant to subsection (b).

“(e) **AUTHORIZATION OF APPROPRIATIONS.**—There are authorized to be appropriated for fiscal years 1999 and 2000 such sums as necessary to carry out the purposes of this section, to remain available until expended.

“**SEC. 507. GENERAL PROVISIONS.**

“(a) **APPLICABILITY.**—The provisions of this section shall apply to compacts and funding agreements negotiated under this title and an Indian tribe may, at its option, include provisions that reflect such requirements in a compact or funding agreement.

“(b) **CONFLICTS OF INTEREST.**—Indian tribes participating in Self-Governance under this title shall ensure that internal measures are in place to address conflicts of interest in the administration of Self-Governance programs, services, functions, or activities (or portions thereof).

“(c) **AUDITS.**—

“(1) **SINGLE AGENCY AUDIT ACT.**—The provisions of chapter 75 of title 31, United States Code requiring a single agency audit report shall apply to funding agreements under this title.

“(2) **COST PRINCIPLES.**—An Indian tribe shall apply cost principles under the applicable Office of Management and Budget Circular, except as modified by section 106, or by any exemptions to applicable Office of Management and

Budget Circulars subsequently granted by Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f).

“(d) RECORDS.—

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

“(2) RECORDKEEPING SYSTEM.—The Indian tribe shall maintain a record-keeping system, and, after 30 days advance notice, provide the Secretary with reasonable access to such records to enable the Department of Health and Human Services to meet its minimum legal recordkeeping system requirements under the sections 3101 through 3106 of title 44, United States Code.

“(e) REDESIGN AND CONSOLIDATION.—An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 505 and reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served.

“(f) RETROCESSION.—An Indian tribe may retrocede, fully or partially, to the Secretary programs, services, functions, or activities (or portions thereof) included in the compact or funding agreement. Unless the Indian tribe rescinds the request for retrocession, such retrocession will become effective within the time frame specified by the parties in the compact or funding agreement. In the absence of such a specification, such retrocession shall become effective on—

“(1) the earlier of—

“(A) one year from the date of submission of such request; or

“(B) the date on which the funding agreement expires; or

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

“(g) WITHDRAWAL.—

“(1) PROCESS.—An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact or funding agreement. Such withdrawal shall become effective within the time frame specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal shall become effective on—

“(A) the earlier of—

“(i) one year from the date of submission of such request; or

“(ii) the date on which the funding agreement expires; or

“(B) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.

“(2) DISTRIBUTION OF FUNDS.—When an Indian tribe or tribal organization eligible to enter into a self-determination contract under title I or a compact or funding agreement under this title fully or partially withdraws from a participating inter-tribal consortium or tribal organization, the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activities (or portions thereof) which it will be carrying out under its own self-determination contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-tribal consortium or tribal organization), and such funds shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, provided that the provisions of sections 102, 105(i), and 506, as appropriate, shall apply to such withdrawing Indian tribe.

“(3) REGAINING MATURE CONTRACT STATUS.—If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) carried out under a compact or funding agreement under this title through a self-determination contract under title I, at the option of the Indian tribe, the resulting self-determination contract shall be a mature self-determination contract.

“(h) NONDUPLICATION.—For the period for which, and to the extent to which, funding is provided under this title or under the compact or funding agreement, the Indian tribe shall not be entitled to contract with the Secretary for such funds under section 102, except that such Indian tribe shall be eligible for new programs on the same basis as other Indian tribes.

**“SEC. 508. PROVISIONS RELATING TO THE SECRETARY.**

**“(a) MANDATORY PROVISIONS.—**

**“(1) HEALTH STATUS REPORTS.—**Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision that requires the Indian tribe to report on health status and service delivery—

“(A) to the extent such data is not otherwise available to the Secretary and specific funds for this purpose are provided by the Secretary under the funding agreement; and

“(B) if such reporting shall impose minimal burdens on the participating Indian tribe and such requirements are promulgated under section 518 of this title.

**“(2) REASSUMPTION.—**(A) Contracts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision authorizing the Secretary to reassume operation of a program, service, function, or activity (or portions thereof) if there is a finding of imminent endangerment of the public health caused by an act or omission of the Indian tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement.

“(B) The Secretary shall not reassume operation of a program, service, function, or activity unless (i) the Secretary has first provided written notice and a hearing on the record to the Indian tribe; and (ii) the Indian tribe has not taken corrective action to remedy the imminent endangerment to public health.

“(C) Notwithstanding subparagraph (B), the Secretary may, upon written notification to the tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if (i) the Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian tribe; and (ii) the endangerment arises out of a failure to carry out the compact or funding agreement. If the Secretary reassumes operation of a program, service, function, or activity (or portion thereof) under this subparagraph, the Secretary shall provide the tribe with a hearing on the record not later than 10 days after such reassumption.

“(D) In any hearing or appeal involving a decision to reassume operation of a program, service, function, or activity (or portion thereof), the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence the validity of the grounds for the reassumption.

**“(b) FINAL OFFER.—**In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. The Secretary shall have no more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe made in compliance to review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

**“(c) REJECTION OF FINAL OFFERS.—**If the Secretary rejects an offer, made under subsection (b) (or one or more provisions or funding levels in such offer), the Secretary shall provide—

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

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

“(B) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

“(C) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in imminent danger to the public health; or

“(D) the tribe is not eligible to participate in Self-Governance under section 503 of this title;

“(2) technical assistance to overcome the objections stated in the notification required by paragraph (1);

“(3) 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, provided that the Indian tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a Federal district court pursuant to section 110(a); and

“(4) the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including 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. If an Indian tribe exercises the option specified herein, it shall retain the right to appeal the Secretary’s rejection under this section, and paragraphs (1), (2), and (3) shall only apply to that portion of the proposed final compact, funding agreement or provision thereof that was rejected by the Secretary.

“(d) BURDEN OF PROOF.—With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b).

“(e) GOOD FAITH.—In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the Self-Governance policy. The Secretary shall carry out this title in a manner that maximizes the policy of tribal Self-Governance, consistent with section 3.

“(f) SAVINGS.—To the extent that programs, functions, services, or activities (or portions thereof) carried out by Indian tribes under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 509(d), the Secretary shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

“(g) TRUST RESPONSIBILITY.—The Secretary is prohibited from waiving, modifying or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exist under treaties, Executive orders, other laws, and/or court decisions.

“(h) DECISIONMAKER.—A decision that constitutes final agency action and relates to an appeal within the Department of Health and Human Services conducted under subsection (c) shall be made either—

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

“(2) by an administrative judge.

**“SEC. 509. TRANSFER OF FUNDS.**

“(a) IN GENERAL.—Pursuant to the terms of any compact or funding agreement entered into under this title, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (d), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semi-annual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

“(b) MULTI-YEAR FUNDING.—The Secretary is hereby authorized to employ, upon tribal request, multi-year funding agreements for construction or other multi-year activities, and references in this title to funding agreements shall include such multi-year agreements.

“(c) FUNDING FOR CONSTRUCTION PROGRAMS.—Compacts or funding agreements authorized by this title, including agreements encompassing construction programs, shall provide for advance transfers of funding to the Indian tribe in the form of full funding or annual or semi-annual installments, at the discretion of the Indian tribe.

“(d) AMOUNT OF FUNDING.—The Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) and amounts for contract support costs specified under sections 106(a)(2), (a)(3),



(a)(5), and (a)(6), including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

“(e) PROHIBITIONS.—The Secretary is expressly prohibited from—

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

“(2) withholding portions of such funds for transfer over a period of years; and

“(3) reducing the amount of funds required herein—

“(A) to make funding available for Self-Governance monitoring or administration by the Secretary;

“(B) in subsequent years, except pursuant to—

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

“(ii) a congressional directive in legislation or accompanying report;

“(iii) a tribal authorization;

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

“(v) completion of a project, activity, or program for which such funds were provided;

“(C) to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this Act; or

“(D) to pay for costs of Federal personnel displaced by self-determination contracts under this Act or Self-Governance;

except that such funds may be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)(2).

“(f) OTHER RESOURCES.—In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of Interagency 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 is authorized to and shall acquire and transfer such personnel, supplies, or resources to the Indian tribe.

“(g) REIMBURSEMENT TO INDIAN HEALTH SERVICE.—With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service is authorized to provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment, and the reimbursements received therefrom, along with the funds received from the Indian tribe pursuant to this title, may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

“(h) 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.

“(i) INTEREST OR OTHER INCOME ON TRANSFERS.—An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this Act shall be managed using the prudent investment standard.

“(j) CARRYOVER FUNDS.—All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from one year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

“(k) PROGRAM INCOME.—All Medicare, medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement and the Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for medicaid and Medicare receipts, and such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its

funding agreement in the year the program income is received or for any subsequent fiscal year.

“(1) **LIMITATION OF COSTS.**—An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

**“SEC. 510. CONSTRUCTION PROJECTS.**

“(a) **IN GENERAL.**—Unless agreed to by the participating Indian tribe, no provision of the Office of Federal Procurement Policy Act or the Federal acquisition regulations or any other general law or regulation pertaining to Federal procurement (including executive orders), shall apply to any construction activity included in a compact or funding agreement.

“(b) **HEALTH AND SAFETY STANDARDS.**—In all construction projects performed pursuant to this title, the parties shall specify appropriate health and safety standards relevant to the construction activity which shall be in conformity with nationally recognized standards for comparable projects.

**“SEC. 511. FEDERAL PROCUREMENT LAWS AND REGULATIONS.**

“Notwithstanding any other provision of law, unless expressly agreed to by the participating Indian tribe, the compacts and funding agreements entered into under this title shall not be subject to Federal contracting or cooperative agreement laws and regulations (including executive orders and the Secretary’s procurement regulations), except to the extent that such laws expressly apply to Indian tribes.

**“SEC. 512. CIVIL ACTIONS.**

“(a) **CONTRACT DEFINED.**—For the purposes of section 110, the term ‘contract’ shall include compacts and funding agreements entered into under this title.

“(b) **APPLICABILITY OF CERTAIN LAWS.**—Section 2103 of the Revised Statutes of the United States Code (25 U.S.C. 81) and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts entered into by Indian tribes participating in Self-Governance under this title.

**“SEC. 513. FACILITATION.**

“(a) **SECRETARIAL INTERPRETATION.**—Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders and regulations in a manner that will facilitate—

“(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section;

“(2) the implementation of compacts and funding agreements entered into under this title; and

“(3) the achievement of tribal health goals and objectives.

“(b) **REGULATION WAIVER.**—

“(1) An Indian tribe may submit a written request to waive application of a regulation for a compact or funding agreement entered into with the Indian Health Service under this title, to the Secretary identifying the applicable Federal regulation sought to be waived and the basis for the request.

“(2) Not later than 90 days after receipt by the Secretary of a written request by an Indian tribe to waive application of a regulation for a compact or funding agreement entered into under this title, the Secretary shall either approve or deny the requested waiver in writing. A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. A failure to approve or deny a waiver request not later than 90 days after receipt shall be deemed an approval of such request. The Secretary’s decision shall be final for the Department.

“(c) **ACCESS TO FEDERAL PROPERTY.**—In connection with any compact or funding agreement executed pursuant to this title or an agreement negotiated under the Tribal Self-Governance Project established under title III, as in effect before the enactment of the Tribal Self-Governance Amendments of 1998, upon the request of an Indian tribe, the Secretary—

“(1) shall permit an Indian tribe to use existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other

personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the tribe for their use and maintenance;

"(2) may donate to an Indian tribe title to any personal or real property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—

"(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;

"(B) if property described in subparagraph (A) has a value in excess of \$5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Department of Health and Human Services; and

"(C) all property referred to in subparagraph (A) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States; and

"(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appropriate for use by the entity for any purpose for which a compact or funding agreement is authorized under this title.

"(d) MATCHING OR COST-PARTICIPATION REQUIREMENT.—All funds provided under compacts, funding agreements, or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

"(e) STATE FACILITATION.—States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this title and other Federal laws benefiting Indians and Indian tribes.

"(f) RULES OF CONSTRUCTION.—Each provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in Self-Governance and any ambiguity shall be resolved in favor of the Indian tribe.

**"SEC. 514. BUDGET REQUEST.**

"(a) IN GENERAL.—The President shall identify in the annual budget request submitted to the Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title, including funds specifically identified to fund tribal base budgets. All funds so identified shall be apportioned to the Indian Health Service, Office of Tribal Self-Governance. The Office shall be responsible for distribution of all funds provided under section 505. Nothing in this provision shall be construed to authorize the IHS to reduce the amount of funds that a Self-Governance tribe is otherwise entitled to receive under its funding agreement or other applicable law, whether or not such funds are apportioned to the Office of Tribal Self-Governance under this section.

"(b) PRESENT FUNDING; SHORTFALLS.—In such budget request, the President shall identify the level of need presently funded and any shortfall in funding (including direct program and contract support costs) for each Indian tribe in the United States, either directly by the Secretary, under self-determination contracts, or under compacts and funding agreements authorized under this title.

**"SEC. 515. REPORTS.**

"(a) ANNUAL REPORT.—The Secretary shall submit to Congress on January 1 of each year following the date of enactment of this title a written report regarding the administration of this title. Such report shall include a detailed report on the level of need being presently funded or unfunded for each Indian tribe in the United States, either directly by the Secretary, under self-determination contracts under this Act, or under compacts and funding agreements authorized under this Act.

"(b) CONTENTS.—The report shall be compiled from information contained in funding agreements, annual audit reports, and Secretarial data regarding the disposition of Federal funds and shall—

"(1) identify the relative costs and benefits of Self-Governance;

"(2) identify, with particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to Self-Governance Indian tribes and their members;

"(3) identify the funds transferred to each Self-Governance Indian tribe and the corresponding reduction in the Federal bureaucracy;

“(4) identify the funding formula for individual tribal shares of all central and headquarters funds, together with the comments of affected Indian tribes or tribal organizations, developed under subsection (c);

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

“(6) include the separate views and comments of the Indian tribes or tribal organizations; and

“(7) prior to being submitted to Congress, be distributed to the Indian tribes for comment, such comment period to be for no less than 30 days.

In compiling this report the Secretary shall not impose any reporting requirements on participating Indian tribes or tribal organizations, not otherwise provided in this Act.

“(c) **REPORT ON IHS FUNDS.**—Not later than 180 days after the date of enactment of this title, the Secretary shall, in consultation with Indian tribes, report on funding formula or formulas used to determine the individual tribal share of funds controlled by all components of the Indian Health Service (including funds assessed by any other Federal agency) for inclusion in Self-Governance compacts or funding agreements. The Secretary shall include such formula or formulas (or any revisions thereof) in the annual report submitted to the Congress under subsection (b), together with the views of the affected Indian tribes and tribal organizations.

**“SEC. 516. DISCLAIMERS.**

“(a) **NO FUNDING REDUCTION.**—Nothing in this title shall be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian tribe under this or other applicable Federal law. Any Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 110.

“(b) **FEDERAL TRUST AND TREATY RESPONSIBILITIES.**—Nothing in this Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exist under treaties, Executive orders, or other laws and court decisions.

“(c) **TRIBAL EMPLOYMENT.**—For purposes of section 2(2) of the Act of July 5, 1935 (49 Stat. 450, chapter 372) (commonly known as the National Labor Relations Act), an Indian tribe carrying out a self-determination contract, compact, annual funding agreement, grant, or cooperative agreement under this Act shall not be considered an employer.

“(d) **OBLIGATIONS OF THE UNITED STATES.**—The Indian Health Service shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Indian tribe to do so.

**“SEC. 517. APPLICATION OF OTHER SECTIONS OF THE ACT.**

“(a) **MANDATORY APPLICATION.**—All provisions of sections 6, 7, 8, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act and section 314 of Public Law 101–512 (coverage under the Federal Tort Claims Act), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.

“(b) **DISCRETIONARY APPLICATION.**—At the request of a participating Indian tribe, any other provision of title I, to the extent such provision is not in conflict with this title, shall be made a part of a funding agreement or compact entered into under this title. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this title. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

**“SEC. 518. REGULATIONS.**

“(a) **IN GENERAL.**—

“(1) Not later than 90 days after the date of enactment of this title, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title.

“(2) Proposed regulations to implement this title shall be published in the Federal Register by the Secretary no later than 1 year after the date of enactment of this title.

“(3) No regulations to implement this title may be published unless they are recommended by the committee formed under subsection (b).

“(4) The authority to promulgate regulations under this title shall expire 21 months after the date of enactment of this title.

“(b) COMMITTEE.—A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this title, and the Committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

“(c) ADAPTATION OF PROCEDURES.—The Secretary shall adapt the negotiated rule-making procedures to the unique context of Self-Governance and the government-to-government relationship between the United States and Indian tribes.

“(d) EFFECT.—The lack of promulgated regulations shall not limit the effect of this title.

“(e) EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, AND RULES.—Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Indian Health Service, except as provided in section 105(g) and 510.

**“SEC. 519. APPEALS.**

“In any appeal (including civil actions) involving decisions made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—

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

“(2) the decision is fully consistent with provisions and policies of this title.

**“SEC. 520. AUTHORIZATION OF APPROPRIATIONS.**

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

**SEC. 5. AMENDMENTS CLARIFYING CIVIL PROCEEDINGS.**

(a) BURDEN OF PROOF IN DISTRICT COURT ACTIONS.—Section 102(e)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f(e)(1)) is amended by inserting after “subsection (b)(3)” the following: “or any civil action conducted pursuant to section 110(a)”.

(b) CONFIRMATION OF TRIAL DE NOVO.—Section 110(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450m–1) is amended by adding at the end the following new sentence: “In any action brought under this subsection, the district courts shall conduct a trial de novo with full rights of discovery and proceed in accordance with the Federal Rules of Civil Procedure.”

(c) EFFECTIVE DATE.—This section shall apply to any proceedings commenced after October 25, 1994.

**SEC. 6. REPEAL.**

(a) IN GENERAL.—Title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f note) is hereby repealed.

(b) EFFECTIVE DATE.—This section shall take effect on October 1, 1998.

**SEC. 7. EFFECTIVE DATE.**

Except as otherwise provided, the provisions of this Act shall take effect on the date of the enactment of this Act.

**PURPOSE OF THE BILL**

The purpose of H.R.1833 is to amend the Indian Self-Determination and Education Assistance Act to provide for further Self-Governance by Indian Tribes, and for other purposes.

**BACKGROUND AND NEED FOR LEGISLATION**

H.R. 1833, the Tribal Self-Governance Amendments of 1998, would create a new title in the 1975 Indian Self-Determination and Education Assistance Act (40 U.S.C. 450 et seq.). The 1975 Act allows Indian tribes to contract for or take over the administration and operation of certain federal programs which provide services to Indian tribes. Subsequent amendments to the 1975 Act created

Title III of the Act which provided for a Self-Governance Demonstration Project that allows for large-scale tribal Self-Governance compacts and funding agreements on a demonstration basis.

The new title created by H.R. 1833 would make this contracting by tribes permanent for programs contracted for within the Indian Health Service (IHS). Under this authority, Indian and Alaska Native tribes would be able to contract for the operation, control, and redesign of various IHS activities. Pursuant to H.R. 1833, tribes which have already contracted for IHS activities would continue under their contracts while an additional 50 new tribes would be selected each year to enter into new contracts.

H.R. 1833 also allows for a feasibility study regarding the execution of tribal Self-Governance compacts and funding agreements of Indian-related programs outside the IHS but within the Department of Health and Human Services (HHS) on a demonstration project basis.

#### COMMITTEE ACTION

H.R. 1833 was introduced on June 7, 1997, by Congressman George Miller (D-CA) and was cosponsored by Congressman Don Young (R-AK), Congressman Dale Kildee (D-MI), Delegate Eni Faleomavaega (D-AS), and Congressman Patrick Kennedy (D-RI). The bill was referred to the Committee on Resources. On March 17, 1998, the Full Committee on Resources held a hearing on the bill where the Administration and various other witnesses testified in support. On March 25, 1998, the Full Committee on Resources met to consider H.R.1833. Congressman Miller offered an amendment in the nature of a substitute which was adopted by voice vote. The amendment: (1) referenced federal treaty obligations in the findings section of H.R. 1833; (2) referenced treaty obligations and encouraged meaningful tribal consultation in the declaration of policy section; (3) provided that inherent federal functions are those functions that cannot be legally delegated to the tribes; (4) referenced treaty obligation in the compacting and funding agreements sections; (5) provided that eligible tribal shares include portions of discretionary grants but not statutorily mandated grants; (6) provided that existing funding agreements remain in effect until subsequent funding agreements are executed; (7) provided for stable base funding; (8) created a separate section for a non-IHS Self-Governance feasibility study; (9) provided that program redesigns should not unjustly deny services to existing service populations; (10) allowed the IHS to provide goods and services to tribes on a reimbursable basis; (11) allowed tribes to manage advance transfer of funds using the prudent investment standard; (12) confirmed that provisions of this law shall be liberally construed for the benefit of participating Indian tribes and that ambiguities shall be resolved in their favor; (13) gave the Secretary of HHS 45 days rather than 30 days to reject a tribe's final compact offer; (14) gave the Secretary 90 days rather than 60 days to act on a tribe's waiver request; (15) provided that funds identified in the budget request shall be apportioned to the IHS Office of Tribal Self-Governance; (16) limited the Secretary's reporting requirements; (17) prohibited the IHS from charging Indian patients for services or requiring Indian tribes to do so; (18) limited the effect of agency circulars, policies, manuals,

guidances, and rules without tribal assent except as provided for in construction contracts; (19) authorized the appropriation of such sums as necessary; and (20) repealed title III of the Indian Self-Determination and Education Assistance Act.

The bill as amended was then ordered favorably reported to the House of Representative by voice vote.

#### SECTION-BY-SECTION ANALYSIS

##### SECTION 1. SHORT TITLE

This provision sets forth the short title, the Tribal Self-Governance Amendments of 1998.

##### SECTION 2. FINDINGS

This provision sets forth the findings of Congress which, among other things, reaffirm the sovereignty of Indian tribes and the unique government-to-government relationship between the United States and Indian tribes. The findings make clear that the federal government has failed to fully meet its trust responsibility and to satisfy its obligations under treaties and other laws. The findings also explain that Congress has concluded that Self-Governance is an effective mechanism to implement and strengthen the federal policy of government-to-government relations with Indian tribes by transferring to Indian tribes full control and funding for federal programs, functions, services, or activities, or portions thereof.

Throughout this bill, but particularly in the Findings and Declaration of Policy sections, the phrase “under treaties” is used in describing the United States’ trust obligation to Indian tribes and individuals. This phrase is intended to explain that much of the federal-Indian relationship is predicated on a government-to-government relationship as reflected in the treaties, which are contractual relationships between governments. Treaties are a significant part of the legal relationship between Indian tribes and the United States. Self-Governance, by its use of compacts, another traditional contracting device used between governments, is designed to honor the government-to-government relationship and remind the parties to these agreements of the historical basis for their relationship.

##### SECTION 3. DECLARATION OF POLICY

This section states Congress’ policy to permanently establish and implement tribal Self-Governance within HHS with the full cooperation of its agencies. Among the key policy objectives Congress seeks to achieve through the Self-Governance Program are to: (1) maintain and continue the United States’ unique relationship with Indian tribes; (2) allow Indian tribes the flexibility to choose whether they wish to participate in Self-Governance; (3) ensure the continuation and fulfillment of the United States’ trust responsibility and other responsibilities towards Indian tribes that are contained in treaties and other laws; (4) permit a transition to tribal control and authority over programs, functions, services, or activities (or portions thereof); and (5) provide a corresponding parallel reduction in the federal bureaucracy.

## SECTION 4. TRIBAL SELF-GOVERNANCE

This section sets out the substantive provisions of the Self-Governance Program in the IHS by adding a new Title V to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.). All references in this section to new sections are to new sections of that Act.

*Section 501. Establishment*

This provision directs the Secretary of HHS to establish a permanent Tribal Self-Governance Program in the IHS.

*Section 502. Definitions*

Subsection (a)(1) defines “inherent Federal functions”. These are functions which the Executive Branch cannot by law delegate to other branches of government or to non-governmental entities. This definition is consistent with the Department of the Interior Solicitor’s Memorandum of May 17, 1996, entitled “Inherently Federal Functions under the Tribal Self-Governance Act of 1994.” It is the Committee’s understanding that this definition recognizes that there are differences between departmental and agency functions and those may be analyzed on a case-by-case basis. It is important to note that, in the tribal procurement context, there is another factor the Committee has considered—when the federal government is returning tribal governmental powers and functions that are inherent in tribes’ governmental status such as those possessed by tribes before the establishment of the federal Indian bureaucracy, the scope of allowable transfers is broader than in the transfer of federal governmental powers to private or other governmental entities.

Subsection (a)(2) defines “inter-tribal consortium”. The Committee notes that during the Title III Self-Governance Demonstration Project, the IHS authorized inter-tribal consortia, such as the co-signers to the Alaska Tribal Health Compact, to participate in the Project and that participation has had great success. The definition of “inter-tribal consortium” is intended to include “tribal organizations” as that term is defined in section 4(l) of the Indian Self-Determination Act, Public Law 93–638. This would include consortia such as those involved in the Alaska Tribal Health Consortium. It is the Committee’s intent that inter-tribal consortia and tribal organizations shall count as one tribe for purposes of the 50 tribe per year limitation contained in new section 503(a), as added by H.R. 1833.

Subsection (a)(3) defines “tribal shares”. This definition is consistent with the Title IV Rule-making Committee’s determination that residual funds are those “necessary to carry out the inherently federal functions that must be performed by federal officials if all tribes assume responsibilities for all BIA programs.” 29 Fed. Reg. 63, at 7235 (Feb. 12, 1998) (Proposed Rule, 25 Code of Federal Regulations 1000.91). All funds appropriated under the Indian Self-Determination and Education Assistance Act are either tribal shares or agency residual.

Subsection (a)(4) defines “Secretary” as the Secretary of Health and Human Services.



Subsection (a)(5) defines “Self-Governance” as the program established under this title.

The Committee plans to add a definition of “gross mismanagement” to this section at the request of HHS. The inclusion of this term is to govern one of the criteria that the Secretary is to consider in the reassumption of a tribally-operated program. The Secretary will be given the authority to reassume programs that imminently endanger the public health where the danger arises out of a compact or funding agreement violation. The Committee believes that the inclusion of a performance standard, in this case gross mismanagement, is also an appropriate grounds for reassumption. Gross mismanagement will be defined as a significant, clear, and convincing violation of compact, funding agreement, regulatory or statutory requirements related to the transfer of Self-Governance funds to the tribe that results in a significant reduction of funds to the tribe’s Self-Governance Program. The Committee’s definition of gross mismanagement is narrowly tailored and will require a high degree of proof by the Secretary. The Committee is well aware of tribal concerns and agrees that the inclusion of this performance standard must not be utilized by the Secretary in such a manner as to needlessly impose monitoring and auditing requirements that hinder the efficient operation of tribal programs. Intrusive and over burdensome monitoring and auditing activities are antithetical to the goals of Self-Governance.

Subsection (b) defines “Indian Tribe”. This definition enables an Indian tribe to authorize another Indian tribe, inter-tribal consortium or tribal organization to participate in Self-Governance on its behalf. The authorized Indian tribe, inter-tribal consortium or tribal organization may exercise the authorizing Indian tribe’s rights as specified by tribal resolution.

### *Section 503. Selection of participating tribes*

This section describes the eligibility criteria that must be satisfied by any Indian tribe interested in participating.

Under subsection (a), all tribes presently participating in the Tribal Self-Governance Demonstration Project under Title III of the Indian Self-Determination and Education Assistance Act may elect to participate in the permanent Self-Governance Program. Tribes must do so through tribal resolution.

Subsection (b) allows an additional 50 tribes a year to participate in Self-Governance. This subsection also allows an Indian tribe that chooses to withdraw from an inter-tribal consortium or tribal organization to participate in Self-Governance provided it independently meets the eligibility criteria in Title V. Tribes and tribal organizations that withdraw from tribal organizations and inter-tribal consortia under this section shall be entitled to participate in the permanent program under new section 503(b)(2) and this participation shall not be counted against the 50 tribe a year limitation contained in section 503(a).

Under subsection (c), the eligibility criteria for Self-Governance tribes are the same as those that apply under Title IV. To participate, an Indian tribe must successfully complete a planning phase, must request participation in the program through a resolution or official action of the governing body, and must have demonstrated

financial stability and financial management capability for the past three years. Proof of no material audit exceptions in the tribe's self determination contracts or Self-Governance funding agreements is conclusive proof of such qualification. The Committee notes that the financial examination addressed in subsection 503(c)(3) refers solely to funds managed by the tribe under Title I and Title IV of the Indian Self-Determination and Education Assistance Act. H.R. 1833 has been deliberately crafted to make clear that a tribe's activities in other economic endeavors are not subject of the section 503(c) examination. Similarly, the "budgetary research" referred to in new section 503(d)(1) requires a tribe to research only budgetary issues related to the administration of the programs the tribe anticipates transferring to tribal operation under Self-Governance.

Under subsection (d), every Indian tribe interested in participating in Self-Governance shall complete a planning phase prior to participating in the program. The planning phase is to include legal and budgetary research and internal tribal government planning and organizational preparation. The planning phase is to be completed to the satisfaction of the tribe.

Under subsection (e), subject to available appropriations, any Indian tribe interested in participating in Self-Governance is eligible to receive a grant to plan for participation in the program or to negotiate the terms of a compact and funding agreement.

Subsection (f) provides that receipt of a grant from HHS is not required to participate in the permanent program.

#### *Section 504. Compacts*

This section authorizes Indian tribes to negotiate compacts with the Secretary and identifies generally the contents of compacts. While the compact process was not specifically part of prior legislative enactment, the Committee understands that compacts have developed as an integral part of Self-Governance. The Committee believes that compacts serve an important and necessary function in establishing government-to-government relations, which as noted earlier, is the keystone of modern federal Indian policy.

Under subsection (a), the Secretary is required to negotiate and enter into a written compact consistent with the trust responsibility, treaty obligations and the government-to-government relationship between the United States and each participating tribe.

Subsection (b) requires that compacts state the terms of the government-to-government relationship between the Indian tribe and the United States. Compacts may only be amended by agreement of both parties.

Under subsection (c), upon enactment of Title V, Indian tribes have the option of retaining their existing compacts, or any portion of the compacts that do not contradict the provisions of Title V.

Under subsection (d), the date of approval and execution by the Indian tribe is generally the effective date of a compact, unless otherwise agreed to by the parties. A compact will remain in effect as long as permitted by federal law or until terminated by written agreement of the parties, or by retrocession or reassumption.

*Section 505. Funding agreements*

This section authorizes Indian tribes to negotiate funding agreements with the Secretary and identifies generally the contents of those agreements.

Under subsection (a), the Secretary is required to negotiate and enter into a written funding agreement consistent with the trust responsibility, treaty obligations and the government-to-government relationship between the United States and each participating tribe.

Under subsection (b), an Indian tribe may include in a funding agreement all programs, functions, services, or activities, (or portions thereof) that it is authorized to carry out under Title I of the Indian Self-Determination and Education Assistance Act. Funding agreements may, at the option of the Indian tribe, authorize the tribe to plan and carry out all programs, functions, services, or activities (or portions thereof) administered by the IHS that are carried out for the benefit of Indians because of their status as Indians or where Indian tribes or Indian beneficiaries are the primary or significant beneficiaries, as set forth in statutes. For each program, function, service, or activity (or portion thereof) included in a funding agreement, an Indian tribe is entitled to receive its full tribal share of funding, including funding for all local, field, service unit, area, regional, and central/ headquarters or national office locations. Available funding includes the Indian tribe's share of discretionary IHS competitive grants but not statutorily mandated competitive grants.

The Committee is concerned with the reluctance of the IHS to include all available federal health funding in self governance funding agreements. The Committee notes, as an example, the refusal of the IHS to so include the Diabetes Prevention Initiative funding. As a result, funding was delayed and undue administrative requirements diverted resources from direct services. This section is intended to directly remedy this situation.

The Committee has received ample testimony showing the benefits of Self-Governance. In 1998, the National Indian Health Board recently released "National Study on Self-Determination and Self-Governance," providing empirical evidence that Self-Governance leads to more efficient management of tribal health service delivery, especially preventive services. This study consistently observed an overall improvement in quality of care when tribes operate their own health care systems. Less than full funding agreements will result in less than maximum use of federal resources to address the health care in Indian country. Accordingly, this section is to be interpreted broadly by affording a presumption in favor of including in a tribe's Self-Governance funding agreement any federal funding administered by the IHS.

Under subsection (c), Indians do not need to be specifically identified in authorizing legislation for a program to be eligible for inclusion in a compact or funding agreement.

Under subsection (d), each funding agreement should generally set out the programs, functions, services, or activities (or portions thereof) to be performed by the Indian tribe, the general budget category assigned to each program, function, service, or activity (or

portion thereof), the funds to be transferred, the time and method of payment and other provisions that the parties agree to.

Under subsection (e), each funding agreement remains in full force and effect unless the Secretary receives notice from the Indian tribe that it will no longer operate one or more of the programs, functions, services, or activities (or portions thereof) included in the funding agreement or until a new funding agreement is executed by the parties.

The Committee is concerned with reports that the IHS has been able to use the annual negotiations provisions of section 303(a) of the Indian Self-Determination and Education Assistance Act to obtain an unfair bargaining advantage during negotiations by threatening to suspend application of the Act to a tribe if it does not sign an Annual Funding Agreement. This subsection is meant to facilitate negotiation between the tribes and the IHS on a true government-to-government basis. The Committee believes the retroactive provision is fair because this assures that no act or omission of the federal government endangers the health and welfare of tribal members.

Under subsection (f), upon enactment of Title V, tribes may either retain their existing annual funding agreements, or any portions thereof, that do not conflict with provisions of Title V, or negotiate new funding agreements that conform to Title V.

Under subsection (g), an Indian tribe may include a stable base budget in its funding agreement. A stable base budget contains the tribe's recurring funding amounts and provides for transfer of the funds in a predictable and consistent manner over a specific period of time. Adjustments are made annually only if there are changes in the level of funds appropriated by Congress. Non-recurring funds are not included and must be negotiated on an annual basis. The Committee intends this section to codify the existing IHS policy guidance on stable base funding.

*Section 506. Self-governance feasibility study*

This provision requires an 18 month feasibility study with prior government-to-government consultation with tribes to determine how to implement Self-Governance, to identify any legal obstacles, costs or savings, develop quality assurances and such other issues as determined by the Secretary.

The Committee has deferred to the Secretary's request not to provide for a demonstration or pilot project component to the feasibility study to determine how to best apply Self-Governance to agencies other than the Indian Health Service at HHS. The Secretary has pledged to work in a cooperative spirit with the Indian tribes to quickly identify those programs outside the IHS that are suitable for Self-Governance. The Committee believes that there are agencies and programs outside of IHS that should be ready to participate in the Self-Governance Program at the conclusion of the study and anticipates the introduction of legislation at that time to authorize such participation.

The Committee understands that the Secretary already has the authority to utilize pilot agreements as a research tool in consultation with the tribes in the course of the 18 month feasibility study. The Committee agrees with the Secretary that this study authority

should be contained in a new title of the Indian Self-Determination and Education Assistance Act.

*Section 507. General provisions*

Under subsection (a), the provisions in this section may, at the tribe's option, be included in a compact or funding agreement negotiated under Title V.

Subsection (b) clarifies that Indian tribes are to assure that internal measures are in place to address conflicts of interest in the administration of programs, functions, services, or activities (or portions thereof).

Subsection (c) clarifies that the Single Agency Audit Act (31 U.S.C. chapter 75) applies to Title V funding agreements. Indian tribes are required to apply cost principles set out in applicable Office of Management and Budget (OMB) Circulars, as modified by section 106 of Title I or by any exemptions that may be applicable to future OMB Circulars. No other audit or accounting standards are required. Claims against Indian tribes by the federal government based on any audit of funds received under a Title V funding agreement are subject to the provisions of section 106(f) of Title I.

Under subsection (d), an Indian tribe's records are not considered federal records for purposes of the Federal Privacy Act, unless otherwise stated in the compact or funding agreement. Indian tribes are required to maintain a record keeping system and, upon reasonable advance request, provide the Secretary with reasonable access to records to enable HHS to meet its minimum legal record keeping requirements under the Federal Records Act.

Under subsection (e), an Indian tribe may redesign or consolidate programs, functions, services, or activities (or portions thereof) and reallocate or redirect funds in any way the Indian tribe considers to be in the best interest of the Indian community.

Under subsection (f), an Indian tribe may retrocede fully or partially back to the Secretary any program, function, service, or activity (or portion thereof) included in a compact or funding agreement. A retrocession request becomes effective within the time frame specified in the compact or funding agreement, one year from the date the request was made, the date the funding agreement expires, or any date mutually agreed to by the parties, whichever occurs first.

Under subsection (g), an Indian tribe that participates in Self-Governance through an inter-tribal consortium or tribal organization can withdraw from the consortium or organization. The withdrawal becomes effective within the timeframe set out in the tribe's authorizing resolution. If a timeframe is not specified, withdrawal becomes effective one year from the submission of the request or on the date the funding agreement expires, whichever occurs first. An alternative date can be agreed to by the parties, including the Secretary.

When an Indian tribe withdraws from an inter-tribal consortium or tribal organization and wishes to enter into a Title I contract or Title V agreement on its own, it is entitled to receive its share of funds supporting the program, function, service, or activity (or portion thereof) that it will carry out under its new status. The funds must be removed from the funding agreement of the participating

organization or inter-tribal consortium and included in the withdrawing tribe's agreement or contract. If the withdrawing tribe is to receive services directly from the Secretary, the tribe's share of funds must be removed from the funding agreement of the participating organization or inter-tribal consortium and retained by the Secretary to provide services. Finally, an Indian tribe that chooses to terminate its participation in the Self-Governance Program may, at its option, carry out programs, functions, services, or activities (or portions thereof) in a Title I contract or Self-Governance funding agreement and retain its mature contractor status.

Subsection (h) provides that a tribe operating under a Self-Governance compact may not contract under section 102 (a "638 contract") for the same programs.

*Section 508. Provisions relating to the Secretary*

This section sets out mandatory and non-mandatory provisions relating to the Secretary's obligations.

Subsection (a) delineates mandatory provisions which are health status reports and reassumption. To the extent that the data is not otherwise available to the Secretary, compacts and funding agreements must include a provision requiring the Indian tribe to report data on health status and service delivery. The Secretary is to use this data in her annual reports to Congress. The Secretary is required to provide funding to the Indian tribe to compile such data. Reporting requirements can only impose minimal burdens on the Indian tribe and may only be imposed if they are contained in regulations developed under negotiated rulemaking. Compacts or funding agreements must also include a provision authorizing the Secretary to reassume a program, function, service, or activity (or portion thereof) if she makes a finding of imminent endangerment of the public health caused by the Indian tribe's failure to carry out the compact or funding agreement or gross mismanagement that causes a significant reduction in available funding. The Secretary is required to provide the Indian tribe with notice of a finding. The Indian tribe may take action to correct the problem identified in the notice. The Secretary has the burden at the hearing of demonstrating by clear and convincing evidence the validity of the grounds for reassumption. In cases where the Secretary finds imminent substantial and irreparable endangerment of the public health caused by the tribe's failure to carry out the compact or funding agreement, the Secretary may immediately reassume the program but is required to provide the tribe with a hearing on the record within ten days after reassumption.

Under subsection (b), if the parties cannot agree on the terms of a compact or funding agreement, the Indian tribe may submit a final offer to the Secretary. The Secretary has 45 days to determine if the offer will be accepted or rejected. The 45 days can be extended by the Indian tribe. If the Secretary takes no action, the offer is deemed accepted by the Secretary.

Subsection (c) describes the only circumstances under which the Secretary may reject an Indian tribe's final offer. A rejection requires written notice to the Indian tribe within 45 days of receipt with specific findings that clearly demonstrate or are supported by controlling legal authority that: (1) the amount of funds proposed

exceeds the funding level that the Indian tribe is entitled to; (2) the program, function, service, or activity (or portion thereof) that is the subject of the offer is an inherent federal function that only can be carried out by the Secretary; (3) the applicant is not eligible to participate in self-governance; or 4) the Indian tribe cannot carry out the program, function, service or activity (or portion thereof) without a significant danger or risk to the public health. The Committee believes the fourth provision appropriately balances the Secretary's trust responsibility to assure the delivery of health care services to Indian beneficiaries with the equally important goal of fostering maximum tribal self-determination in the administration of health care programs transferred under Title V. The Committee has included the requirement of a "specific finding" is included to avoid rejections which merely state conclusory statements that offer no analysis and determination of facts supporting the rejection.

The Secretary must also offer assistance to the Indian tribe to overcome the stated objections, and must provide the Indian tribe with an opportunity to appeal the rejection and have a hearing on the record. In any hearing the Indian tribe has the right to engage in full discovery. The Indian tribe also has the option to proceed directly to federal district court under section 110 of Title I of the Indian Self-Determination and Education Assistance Act.

The Secretary may only reject those portions of a "final offer" that are supported by the findings and must agree to all severable portions of a "final offer" which do not justify a rejection. By entering into a partial compact or funding agreement, the Indian tribe does not waive its right to appeal the Secretary's decision for the rejected portions of the offer.

Under subsection (d), the Secretary has the burden of demonstrating by clear and convincing evidence the validity of a rejection of a final offer in any hearing, appeal or civil action. A decision relating to an appeal within HHS is considered a final agency action if it was made by an administrative judge or by an official of HHS whose position is at a higher level than the level of the departmental agency in which the decision that is the subject of the appeal was made.

Under subsection (e), the Secretary is required to negotiate in good faith and carry out his discretion under Title V in a manner that maximizes the implementation of Self-Governance.

Under subsection (f), any savings in HHS' administrative costs that result from the transfer of programs, functions, services, or activities (or portions thereof) to Indian tribes in Self-Governance agreements that are not otherwise transferred to Indian tribes under Title V must be made available to Indian tribes for inclusion in their compacts or funding agreements. We have consistently indicated that Self-Governance should achieve reductions in federal bureaucracy and create resultant cost savings. This subsection makes clear that such savings are for the benefit of the Indian tribes. Savings are not to be utilized for other agency purposes, but rather are to be provided as additional funds or services to all tribes, inter-tribal consortia, and tribal organizations in a fair and equitable manner.

Under subsection (g), the Secretary is prohibited from waiving, modifying or diminishing the trust responsibilities or other responsibilities as reflected in treaties, executive orders or other laws and court decisions of the United States to Indian tribes and individual Indians. The Committee reaffirms that the protection of the federal trust responsibility to Indian tribes and individuals is a key element of Self-Governance. The ultimate and legal responsibility for the management and preservation of trust resources resides with the United States as trustee. The Committee believes that health care is a trust resource consistent with federal court decisions. This subsection continues the practice of permitting substantial tribal management of its trust resources provided that tribal activities do not replace the trustee's specific legal responsibilities. New section 507(a)(2) (reassumption), with its concept of imminent endangerment of the public health, provides guidance in defining the Secretary's trust obligation in the health context.

Under subsection (h), final agency action is a decision by either an official from HHS at any higher organizational level than the initial decision maker or an administrative law judge. Paragraph (h)(2) is included to assure that the persons deciding an administrative appeal are not the same individuals who made the initial decision to reject a tribe's "final offer."

*Section 509. Transfer of funds*

Under subsection (a), the Secretary is required to transfer all funds provided for in a funding agreement, pursuant to section 509(d) below. Funds are also required to be provided for periods covered by continuing resolutions adopted by Congress, to the extent permitted by such resolutions. When a funding agreement requires that funds be transferred at the beginning of the fiscal year, the transfer are to be made within 10 days after OMB apports the funds, unless the funding agreement states otherwise.

Under subsection (b), the Secretary is authorized to negotiate multi-year funding agreements. Under subsection (c), requires that compacts or funding agreements authorized by Title V (including agreements for construction programs) provide for advance transfers of funding to the Indian tribe.

Under subsection (d), the Secretary is required to provide an Indian tribe the same funding for a program, function, service, or activity (or portion thereof) under Self-Governance that the tribe would have received under Title I of the Indian Self-Determination and Education Assistance Act. This includes all Secretarial resources that support the transferred program, and all contract support costs (including indirect costs) that are not available from the Secretary but are reasonably necessary to operate the program. The bill requires that the transfer of funds occur along with the transfer of the program. Thus the bill states that "the Secretary shall provide" the funds specified, and the Secretary is not authorized to phase-in funds in any manner that is not voluntarily agreed to by Self-Governance tribe.

Under subsection (e), the Secretary is specifically prohibited from withholding, refusing to transfer or reducing any portion of an Indian tribe's full share of funds during a compact or funding agreement year, or for a period of years. The Committee is aware that



for the first 21 years of administration of the Indian Self-Determination and Education Assistance Act, HHS has never taken the position that it has the discretion to delay funding for any program transferred under that Act absent tribal consent. However, a 1996 IHS circular purported to do just that. Since this circular was issued, several IHS area offices have refused to turn over substantial program funds to tribal operation. In one instance both an area office and IHS headquarters refused to transfer portions of programs for several years, and with respect to several headquarters functions, the IHS refused to transfer the functions altogether. A recent Oregon federal district court decision declared IHS' actions in these instances illegal and the Committee agrees.

Additionally, funds that an Indian tribe is entitled to receive may not be reduced to make funds available to the Secretary for monitoring or administration; may not be used to pay for federal functions (such as pay costs or retirement benefits); and may not be used to pay costs associated with federal personnel displaced by Self-Governance or Title I contracting.

In subsequent years, funds may only be reduced in very limited circumstances: if Congress reduces the amount available from the prior year's appropriation; if there is a directive in the statement of managers which accompanies an appropriation; if the Indian tribe agrees; if there is a change in the amount of pass-through funds; or if the project contained in the funding agreement has been completed.

Under subsection (f), if an Indian tribe elects to carry out a compact or funding agreement using federal personnel, supplies, supply sources or other resources that the Secretary has available under procurement contracts, the Secretary is required to acquire and transfer the personnel, supplies or resources to the Indian tribe.

Under subsection (g), the IHS is authorized on a reimbursable basis to provide goods and services to tribes. Reimbursements are to be credited to the same or subsequent appropriation account which provided the initial funding. The Secretary is authorized to receive and retain the reimbursed amounts until expended without remitting them to the Treasury.

Subsection (h) makes the Prompt Payment Act (31 U.S.C. Chapter 39) applicable to the transfer of all funds due to a tribe under a compact or funding agreement. The first annual or semi-annual transfer due under a funding agreement must be made within 10 calendar days of the date OMB apportions the appropriations for that fiscal year. Under this section, the Secretary is obligated to pay to a Self-Governance tribe interest, as calculated under the Prompt Payment Act, for any late payment under a funding agreement

Under subsection (i), an Indian tribe may retain interest earned or other income on funds transferred under a compact or funding agreement. Interest earned must not reduce the amount of funds the tribe is entitled to receive during the year the interest was earned or in subsequent years. An Indian tribe may invest funds received in a funding agreement as it wishes, provided it follows the "prudent investment standard."

Subsection (j) clarifies that all funds paid to an Indian tribe under a compact or funding agreement are "no year" funds and

may be spent in the year they are received or in any future fiscal year. Carryover funds are not to reduce the amount of funds that the tribe may receive in subsequent years.

Under subsection (k), all program income (including Medicare/Medicaid) earned by an Indian tribe is supplemental to the funding that is included in its funding agreement. The Secretary may not reduce the amount of funds that the Indian tribe may receive under its funding agreement for future fiscal years. The Indian tribe may retain such income and spend it either in the current or future years.

Subsection (l) clarifies that an Indian tribe is not required to continue performance of a program, function, service, or activity (or portion thereof) included in a funding agreement if doing so requires more funds than were provided under the funding agreement. If an Indian tribe believes that the amount of funds transferred is not enough to carry out a program, function, service, or activity (or portion thereof) for the full year, the Indian tribe may so notify the Secretary. If the Secretary does not supply additional funds the tribe may suspend performance of the program, function, service, or activity (or portion thereof) until additional funds are provided.

#### *Section 510. Construction projects*

Under this section, unless agreed to by the Indian tribe, federal procurement or acquisition laws or regulations do not apply to any construction activity included in a compact or funding agreement. For all construction projects performed under Title V, the parties will negotiate appropriate health and safety standards relevant to the construction project.

#### *Section 511. Federal procurement laws and program regulations*

Unless otherwise agreed to by the parties, compacts and funding agreements are not subject to federal contracting or cooperative agreement laws and regulations (including executive orders) unless those laws expressly apply to Indian tribes. Compacts and funding agreements are also not subject to program regulations that apply to the Secretary's operations.

#### *Section 512. Civil actions*

The Committee intends that section 110 of the Indian Self-Determination and Education Assistance Act, which grants tribes access to federal district court to challenge a decision by the Secretary, shall apply to new Title V.

#### *Section 513. Facilitation*

Subsection (a) requires the Secretary to interpret all executive orders, regulations and federal laws in a manner that will facilitate the inclusion of programs, functions, services, or activities (or portions thereof) and funds associated therewith under Title V, implementation of Title V compacts and funding agreements, and the achievement of tribal health goals and objectives where they are not inconsistent with federal law. This section reinforces the Secretary's obligation not merely to provide health care services to Na-

tive American tribes, but to facilitate the efforts of tribes to manage those programs for the maximum benefit of their communities

Under subsection (b), an Indian tribe may seek a waiver of any applicable federal regulation issued under new section 518 by submitting a written waiver request to the Secretary. The Secretary has 90 days to respond and a failure to act within that period is deemed an approval of the request by operation of law. Action on a waiver request is final for HHS. Denials may only be made on a specific finding that the waiver is prohibited by federal law. No action within the 90 day period by the Secretary is deemed an approval. Although the waiver procedures do not apply to other departmental regulations, this section makes clear that tribes are not subject to departmental program regulations that govern how the department administers a particular program. Rather, tribes are expected to carry out transferred health care programs pursuant to tribal rules and regulations. The only exception is where a particular program requirement is set forth in statute, in which case a tribe must comply with the statutory limitation or mandate.

Subsection (c) addresses tribal use of federal buildings, hospitals and other facilities, as well as the transfer to tribes of title to excess personal or real property. At the request of an Indian tribe the Secretary is required to permit the Indian tribe to use government-owned real or personal property under the Secretary's jurisdiction under such terms as the parties may agree to. The Secretary is required to donate title to personal or real property that is excess to the needs of any agency or the General Services Administration as long as the Secretary has determined that the property is appropriate for any purpose for which a compact is authorized, irrespective of whether a tribe is in fact administering a particular program that matches that purpose. For instance, if a tribe is not administering a mental health program under its IHS compact or funding agreement, the Secretary may nonetheless acquire excess or surplus property and donate such property to the tribe so long as the Secretary determines that the tribe will be using the property to administer mental health services.

Title to property furnished by the government or purchased with funds received under a compact or funding agreement vests in the Indian tribe if it so chooses. Such property also remains eligible for replacement, maintenance or improvement on the same terms as if the United States had title to it. Any property that is worth \$5,000 or more at the time of a retrocession, withdrawal or reassumption may revert back to the United States at the option of the Secretary.

Under subsection (d), funds transferred under compacts and funding agreements are to be considered non-federal funds for purposes of meeting matching or cost participation requirements under federal or non-federal programs.

Subsection (e) encourages and authorizes states to enter agreements with tribes supplementing and facilitating Title V and other federal laws that benefit Indians and Indian tribes, e.g., welfare reform. It is designed to provide federal authority so as to remove equal protection objections where states enter into special arrangements with tribes.

The Committee wants to foster enlightened and productive partnerships between state and local governments, on the one hand, and Indian tribes on the other. The Committee wants to be sure that states are authorized by the federal government to undertake such initiatives, as part of the federal government's Constitutional authority to deal with Indian tribes as political entities, irrespective of any limitations which have from time to time been argued might otherwise exist with respect to state action under either state constitutional provisions or other provisions of the Constitution. Many state and tribal governments have undertaken positive initiatives both in health care issues and in natural resource management, and it is the Committee's strong desire to fully support, authorize and encourage such cooperative efforts.

Subsection (f) clarifies that provisions in Title V and in compacts and funding agreements shall be liberally construed and ambiguities decided for the benefit of the Indian tribe participating in the program.

*Section 514. Budget request*

Under subsection (a), the President is required to annually identify in his budget all funds needed to fully fund all Title V compacts and funding agreements. These funds are to be apportioned to the IHS Office of Tribal Self-Governance. The IHS may not thereafter reduce the funds a tribe is otherwise entitled to receive whether or not such funds have been apportioned to the Office of Tribal Self-Governance.

The Committee has been made aware that the current system for payment and approval of funding and amendments for Annual Funding Agreements for Self-Governance Demonstration tribes is inefficient and time consuming. In addition, by leaving authority and responsibility for distributions to IHS area offices, there have been reported instances of excessive and unwarranted assertion of authority by area offices over Self-Governance tribes. This includes area offices retaining shares of funds not authorized to be retained by the tribe's Annual Funding Agreement. The Committee concludes that by requiring a report on Self-Governance expenditures, and by moving all Self-Governance funding onto a single line, the Congress will be able to achieve the following ends: more accurately gauge the amount of funding flowing directly to tribes through participation in Self-Governance; generate savings through decreasing the bureaucratic burden on the payment and approval process in the IHS; expedite the transferal of funding to tribal operating units; and aid in the implementation of true government to government relations and tribal self determination.

Under subsection (b), the budget must identify the present level of need and any shortfalls in funding for every Indian tribe in the United States that receives services directly from the Secretary, through a Title I contract or in a Title V compact and funding agreement.

*Section 515. Reports*

Under subsection (a), the Secretary is required to submit to Congress on January 1 of every year a written report on the Self-Governance Program. The report is to include the level of need pres-

ently funded or unfunded for every Indian tribe in the United States that receives services directly from the Secretary, through a Title I contract or in a Title V compact and funding agreement.

Under subsection (b), the Secretary's report must identify: the costs and benefits of Self-Governance; all funds related to the Secretary's provision of services and benefits to Self-Governance tribes and their members; all funds transferred to Self-Governance tribes and the corresponding reduction in the federal bureaucracy; the funding formula for individual tribal shares; and the amount expended by the Secretary during the preceding fiscal year to carry out inherent federal functions.

The Secretary's report must, at the request of any Indian tribe, include comments from the tribe. The report must be distributed to all Indian tribes for comment no less than 30 days prior to its submission to Congress. Finally, the Secretary may not impose reporting requirements on Indian tribes unless specified in Title V.

Subsection (c) requires the Secretary to consult with Indian tribes and report, within 180 days after Title V is enacted, on funding formulae used to determine tribal shares of funds controlled by IHS. The formulae are to become a part of the annual report to Congress discussed above in section 514(b). This provision is not intended to relieve HHS from its obligation under Title V to make all funds controlled by the central office, national, headquarters or regional offices available to Indian tribes. This provision is also not intended to require reopening funding formulae that are already being used by HHS to distribute funds to Indian tribes. Any new formulae or revision of existing formulae should be determined only after significant regional and national tribal consultation.

#### *Section 516. Disclaimers*

Subsection (a) states that nothing in Title V shall be interpreted to limit or reduce the funding for any program, project or activity that any other Indian tribe may receive under Title I or other applicable federal laws. A tribe that alleges that a compact or funding agreement violates this section may rely on section 110 of the Indian Self-Determination and Education Assistance Act to seek judicial review of the allegation.

Subsection (b) clarifies that the trust responsibility of the United States to Indian tribes and individual Indians which exists under treaties, executive orders, laws and court decisions shall not be reduced by any provision of Title V.

Subsection (c) excludes Indian tribes carrying out responsibilities under a compact or funding agreement from falling under the definition of "employer" as that term is used in the National Labor Regulations Act.

Under subsection (d), the IHS is prohibited from billing, or requiring Indian tribes from billing, individual Indians who have the economic means to pay for services. For many years the Interior and Related Agencies Appropriation Acts included language that prohibited the IHS, without explicit direction from Congress, from billing or charging Indians who have the economic means to pay. In 1997 the language was removed from the appropriation bills and it has not been included since. This section reflects the Committee's

intent that the IHS is prohibited from billing Indians for services, and is further prohibited from requiring any Indian tribe to do so.

*Section 517. Application of other sections of the Act*

Subsection (a) incorporates a number of sections from Title I of the Indian Self-Determination and Education Assistance Act and makes them applicable to Title V. These sections include section 6 (setting out penalties that apply if an individual embezzles or otherwise misappropriates funds under Title V); section 7 (Davis-Bacon wage and labor standards and Indian preference requirements); section 102(c)–(d) (relating to Federal Tort Claims Act coverage); section 104 (relating to the right to use federal personnel to carry out responsibilities in a compact or funding agreement); section 105(k) (access to federal supplies); section 111 (clarifying that Title V shall have no impact on existing sovereign immunity and the United States’ trust responsibility); and section 314 from Public Law 101–512, as amended (relating to Federal Tort Claims Act coverage).

Under subsection (b), at the request of an Indian tribe, other provisions of Title I of the Act which do not conflict with provisions in Title V may be incorporated into a compact or funding agreement. If incorporation is requested during negotiations, it will be considered effective immediately.

*Section 518. Regulations*

This section gives the Secretary limited authority to promulgate regulations implementing Title V.

Under subsection (a), the Secretary is required to initiate procedures to negotiate and promulgate regulations necessary to carry out Title V within 90 days of its enactment. The procedures must be developed under the Federal Advisory Committee Act. The Secretary is required to publish proposed regulations no later than one year after the date of enactment of Title V. The authority to promulgate final regulations under Title V expires 21 months after enactment. The Committee is aware of the success of the Title I negotiated rulemaking and believes that one reason for its success is a similar limitation of rulemaking authority contained in section 1070(a) of the Indian Self-Determination and Education Assistance Act, which this section is modeled after.

Subsection (b) requires a negotiated rulemaking committee established under 5 U.S.C. 565 to carry out this section shall be comprised only of federal and tribal government members. A majority of the tribal committee members must be representatives of and must have been nominated by Indian tribes with Title V compacts and funding agreements. The committee will confer with and allow representatives of Indian tribes, inter-tribal consortiums, tribal organizations and individual tribal members to actively participate in the rulemaking process.

Subsection (c) clarifies that the negotiated rulemaking procedures may be modified by the Secretary to ensure that the unique context of Self-Governance and the government-to-government relationship between the United States and Indian tribes is accommodated.

Subsection (d) clarifies that the effect of Title V shall not be limited if regulations are not published.

Under subsection (e), unless an Indian tribe agrees otherwise in a compact or funding agreement, no agency circulars, policies, manuals, guidances or rules adopted by the IHS apply to the tribe except as specified in this subsection.

*Section 519. Appeals*

In any appeal (including civil actions) involving a decision by the Secretary under Title V, the Secretary carries the burden of proof. To satisfy this burden the Secretary must establish by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of Title V.

*Section 520. Authorization of appropriations*

This section authorizes Congress to appropriate such funds as are necessary to carry out Title V.

*Section 5. Amendments clarifying civil proceedings*

Subsection (a) amends section 102(e)(1) of the Indian Self-Determination and Education Assistance Act to clarify that the Secretary has the burden of proof in any civil action pursuant to section 110(a).

Subsection (b) confirms that the district courts were able to conduct a de novo review of claims arising under section 110 of the Indian Self-Determination and Education Assistance Act. Section 110 provides tribes and tribal contractors with the right to pursue civil claims over tribal contracts, compacts, and funding agreements in the federal district courts. Congress provided tribes with this relief to assure that tribes had a strong, effective, and immediate means to obtain agency compliance with the Act's requirements. The federal courts, however, have given opposing interpretations over whether this section vests courts with de novo review authority. Legislative history arising under the 1994 Indian Self-Determination Act Amendments indicates that Congress may very well have intended for the courts to have de novo review. The Committee proposes to eliminate this provision when H.R. 1833 is considered by the House of Representatives. The Committee's elimination of the de novo provision from this bill is not intended in any way to send a signal to the courts or the Administration that de novo review was not intended in the first place. Rather, elimination of this provision is simply intended to let litigation between the tribes and the Administration continue on, and for the courts to ultimately decide this matter.

Under subsection (c), the amendment to sections 102(e)(1) and 110(a) set out in subsections (a) and (b) above shall apply to any proceeding commenced after October 25, 1994.

SECTION 6. REPEAL

This section repeals Title III of the Indian Self-Determination and Education Assistance Act effective as of October 1, 1998.

## SECTION 7. EFFECTIVE DATE

This section provides that the provisions of H.R. 1833 shall take effect on the date of its enactment, unless otherwise provided.

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(1)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

## CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact H.R. 1833.

## COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 1833. However, clause 7(d) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

## COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, the bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

2. With respect to the requirement of clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of this bill.

3. With respect to the requirement of clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office.



## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
 CONGRESSIONAL BUDGET OFFICE,  
 Washington, DC, September 25, 1998.

Hon. DON YOUNG,  
 Chairman, Committee on Resources,  
 House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1833, the Tribal Self-Governance Amendment of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dorothy Rosenbaum.

Sincerely,

JUNE E. O'NEILL, *Director*.

Enclosure.

*H.R. 1833—The Tribal Self-Governance Amendments of 1998*

CBO estimates that H.R. 1833 would increase authorizations of appropriations by less than \$500,000 during 1999 and 2000. Because enacting the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. The legislation contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, and tribal governments.

H.R. 1833 would amend the Indian Self-Determination and Education Assistance Act to establish a permanent tribal self-governance program within the Indian Health Service (IHS). Under existing demonstration authority, the IHS and tribes enter into funding agreements whereby the tribe assumes administrative and programmatic duties that were previously performed by the federal government. Because the current demonstration authority does not end until 2006, and because the provisions of the new permanent program would not be significantly different from current law, CBO estimates that establishing a permanent program would have no federal budgetary impact over fiscal years 1998 to 2003. Under the existing demonstration program, IHS may select 30 new tribes each year to participate. Under the bill, the number would be raised to 50. Because in recent years fewer than 10 new tribes each year have become eligible to participate, CBO assumes that this change in law would have no effect.

H.R. 1833 would authorize appropriations for fiscal years 1999 and 2000 for the IHS to conduct a study and report to Congress on the feasibility of expanding self-governance compacts to include programs operated by units of the Department of Health and Human Services other than the IHS. CBO estimates that this study would cost less than \$500,000.

The CBO staff contact for this estimate is Dorothy Rosenbaum. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104-4

H.R. 1833 contains no unfunded mandates.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

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

**TITLE I—INDIAN SELF-DETERMINATION ACT**

\* \* \* \* \*

**CONTRACTS BY THE SECRETARY OF THE INTERIOR**

**SEC. 102. (a) \* \* \***

\* \* \* \* \*

(e)(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) *or any civil action conducted pursuant to section 110(a)*, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

\* \* \* \* \*

SEC. 110. (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract). *In any action brought under this subsection, the district courts shall conduct a trial de novo with full rights of discovery and proceed in accordance with the Federal Rules of Civil Procedure.*

\* \* \* \* \*

**【TITLE III—INDIAN SELF-GOVERNANCE DETERMINATION PROJECT**

【SEC. 301. The Secretary of the Interior and the Secretary of Health and Human Services (hereafter in this title referred to as the “Secretaries”) each shall, for a period not to exceed 18 years following enactment of this title, conduct a research and demonstration project to be known as the Tribal Self-Governance Project according to the provisions of this title.

**[SEC. 302. (a)** For each fiscal year, the Secretaries shall select thirty tribes to participate in the demonstration project, as follows:

**[(1)** a tribe that successfully completes a Self-Governance Planning Grant, authorized by Conference Report 100-498 to accompany H.J.Res. 395, One Hundredth Congress, first session shall be selected to participate in the demonstration project; and

**[(2)** the Secretaries shall select, in such a manner as to achieve geographic representation, the remaining tribal participants from the pool of qualified applicants. In order to be in the pool of qualified applicants—

**[(A)** the governing body of the tribe shall request participation in the demonstration project;

**[(B)** such tribe shall have operated two or more mature contracts; and

**[(C)** such tribe shall have demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by such tribe having no significant and material audit exceptions in the required annual audit of such tribe's self-determination contracts.

**[SEC. 303. (a)** The Secretaries is directed to negotiate, and to enter into, an annual written funding agreement with the governing body of a participating tribal government that successfully completes its Self-Governance Planning Grant. Such annual written funding agreement—

**[(1)** shall authorize the tribe to plan, conduct, consolidate, and administer programs, services and functions of the Department of the Interior and the Indian Health Service of the Department of Health and Human Services that are otherwise available to Indian tribes or Indians, including but not limited to, the Act of April 16, 1934 (48 Stat. 596), as amended, and the Act of November 2, 1921 (42 Stat. 208);

**[(2)** subject to the terms of the written agreement authorized by this title, shall authorized the tribe to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions or services;

**[(3)** shall not include funds provided pursuant to the Tribally Controlled Community College Assistance Act (Public Law 95-471), for elementary and secondary schools under the Indian School Equalization Formula pursuant to title XI of the Education Amendments of 1978 (Public Law 95-561, as amended), or for either the Flathead Agency Irrigation Division or the Flathead Agency Power Division: Provided, That nothing in this section shall affect the contractability of such divisions under section 102 of this Act;

**[(4)** shall specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretaries pursuant to this agreement;

**[(5)** shall specify the authority of the tribe and the Secretaries, and the procedures to be used, to reallocate funds or modify budget allocations within any project year;

**[(6)** shall, except as provided in paragraphs (1) and (2), provide for payment by the Secretaries to the tribe of funds from one or more programs, services, functions, or activities in an

amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs and indirect costs, and for any funds which are specifically related to the provision by the Secretaries of services and benefits to the tribe and its members: Provided, however, That funds for trust services to individual Indians are available under this written agreement only to the extent that the same services which would have been provided by the Secretaries are provided to individual Indians by the tribe;

[(7) shall not allow the Secretaries to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exists under treaties, Executive orders, and Acts of Congress;

[(8) shall allow for retrocession of programs or portions thereof pursuant to section 105(e) of this Act; and

[(9) shall be submitted by the Secretaries ninety days in advance of the proposed effective date of the agreement to each tribe which is served by the agency which is serving the tribe which is a party to the funding agreement and to the Congress for review by the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives.

[(b) For the year for which, and to the extent to which, funding is provided to a tribe pursuant to this title, such tribe—

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

[(2) shall be responsible for the administration of programs, services and activities pursuant to agreements under this title.

[(c) At the request of the governing body of the tribe and under the terms of an agreement pursuant to subsection (a), the Secretaries shall provide funding to such tribe to implement the agreement.

[(d) For the purpose of section 110 of this Act the term "contract" shall also include agreements authorized by this title; except that for the term of the authorized agreements under this title, the provisions of section 2103 of the Revised Statutes of the United States (25 U.S.C. 81), and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts by participating Indian tribal governments operating under the provisions of this title.

[(e) To the extent feasible, the Secretaries shall interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title.

[(f) To the extent feasible, the Secretaries shall interpret Federal laws and regulations in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements authorized by this title.

[SEC. 304. The Secretaries shall identify, in the President's annual budget request to the Congress, any funds proposed to be included in the Tribal Self-Governance Project. The use of funds pursuant to this title shall be subject to specific directives or limitations as may be included in applicable appropriations Acts.

【SEC. 305. The Secretaries shall submit to the Congress a written report on July 1 and January 1 of each of the five years following the date of enactment of this title, on the relative costs and benefits of the Tribal Self-Governance Project. Such report shall be based on mutually determined baseline measurements jointly developed by the Secretaries and participating tribes, and shall separately include the views of the tribes.

【SEC. 306. Nothing in this title shall be construed to limit or reduce 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 and the provisions of section 110 of this Act shall be available to any tribe or Indian organization which alleges that a funding agreement is in violation of this section.

【SEC. 307. For the purpose of providing planning and negotiation grants to the ten tribes added by section 3 of the Tribal Self-Governance Demonstration Project Act to the number of tribes set forth by section 302 of this Act (as in effect before the date of enactment of this section), there is authorized to be appropriated \$700,000.

【SEC. 308. (a) The Secretary of Health and Human Services, in consultation with the Secretary of the Interior and Indian tribal governments participating in the demonstration project under this title, shall conduct a study for the purpose of determining the feasibility of extending the demonstration project under this title to the activities, programs, functions, and services of the Indian Health Service. The Secretary shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act.

【(b) The Secretary of Health and Human Services may establish within the Indian Health Service an office of self-governance to be responsible for coordinating the activities necessary to carry out the study required under subsection (a).

【SEC. 309. The Secretary of the Interior shall conduct a study for the purpose of determining the feasibility of including in the demonstration project under this title those programs and activities excluded under section 303(a)(3). The Secretary of the Interior shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act.

【SEC. 310. For the purposes of providing one year planning and negotiations grants to the Indian tribes identified by section 302, with respect to the programs, activities, functions, or services of the Indian Health Service, there are authorized to be appropriated such sums as may be necessary to carry out such purposes. Upon completion of an authorized planning activity or a comparable planning activity by a tribe, the Secretary is authorized to negotiate and implement a Compact of Self-Governance and Annual Funding Agreement with such tribe.】

\* \* \* \* \*

## **TITLE V—TRIBAL SELF-GOVERNANCE**

### **SEC. 501. ESTABLISHMENT.**

*The Secretary of Health and Human Services shall establish and carry out a program within the Department of Health and Human Services to be known as the “Tribal Self-Governance Program” in accordance with this title.*

### **SEC. 502. DEFINITIONS.**

(a) *IN GENERAL.—For purposes of this title—*

(1) *the term “inherent Federal functions” means those Federal functions which cannot legally be delegated to Indian tribes;*

(2) *the term “inter-tribal consortium” means a coalition of two or more separate Indian tribes that join together for the purpose of participating in Self-Governance, including, but not limited to, a tribal organization;*

(3) *the term “tribal shares” means an Indian tribe’s portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions;*

(4) *the term “Secretary” means the Secretary of Health and Human Services; and*

(5) *the term “Self-Governance” means the program established pursuant to section 501.*

(b) *INDIAN TRIBE.—Where an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term “Indian tribe” as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.*

### **SEC. 503. SELECTION OF PARTICIPATING INDIAN TRIBES.**

(a) *CONTINUING PARTICIPATION.—Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III on the date of enactment of this title may elect to participate in Self-Governance under this title under existing authority as reflected in tribal resolution.*

(b) *ADDITIONAL PARTICIPANTS.—*

(1) *In addition to those Indian tribes participating in Self-Governance under subsection (a), each year an additional 50 Indian tribes that meet the eligibility criteria specified in subsection (c) shall be entitled to participate in Self-Governance.*

(2)(A) *An Indian tribe that has withdrawn from participation in an inter-tribal consortium or tribal organization, in whole or in part, shall be entitled to participate in Self-Governance provided the Indian tribe meets the eligibility criteria specified in subsection (c).*

(B) *If an Indian tribe has withdrawn from participation in an inter-tribal consortium or tribal organization, it shall be entitled to its tribal share of funds supporting those programs,*

services, functions, and activities (or portions thereof) that it will be carrying out under its compact and funding agreement.

(C) In no event shall the withdrawal of an Indian tribe from an inter-tribal consortium or tribal organization affect the eligibility of the inter-tribal consortium or tribal organization to participate in Self-Governance.

(c) **APPLICANT POOL.**—The qualified applicant pool for Self-Governance shall consist of each Indian tribe that—

(1) successfully completes the planning phase described in subsection (d);

(2) has requested participation in Self-Governance by resolution or other official action by the governing body (or bodies) of the Indian tribe or tribes to be served; and

(3) has demonstrated, for the previous 3 fiscal years, financial stability and financial management capability.

Evidence that during such years the Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe's self-determination contracts or Self-Governance funding agreements with any Federal agency shall be conclusive evidence of the required stability and capability for the purposes of this subsection.

(d) **PLANNING PHASE.**—Each Indian tribe seeking participation in Self-Governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian tribe and shall include—

(1) legal and budgetary research; and

(2) internal tribal government planning and organizational preparation relating to the administration of health care programs.

(e) **GRANTS.**—Subject to the availability of appropriations, any Indian tribe meeting the requirements of subsections (c)(2) and (3) shall be eligible for grants—

(1) to plan for participation in Self-Governance; and

(2) to negotiate the terms of participation by the Indian tribe or tribal organization in Self-Governance, as set forth in a compact and a funding agreement.

(f) **RECEIPT OF GRANT NOT REQUIRED.**—Receipt of a grant under subsection (e) shall not be a requirement of participation in Self-Governance.

#### **SEC. 504. COMPACTS.**

(a) **COMPACT REQUIRED.**—The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in Self-Governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) **CONTENTS.**—Each compact required under subsection (a) shall set forth the general terms of the government-to-government relationship between the Indian tribe and the Secretary, including such terms as the parties intend shall control year after year. Such compacts may only be amended by mutual agreement of the parties.

(c) **EXISTING COMPACTS.**—An Indian tribe participating in the tribal Self-Governance on the date of enactment of this title shall have the option at any time thereafter to—

(1) retain its Tribal Self-Governance Project compact (in whole or in part) to the extent the provisions of such compact are not directly contrary to any express provision of this title, or

(2) negotiate in lieu thereof (in whole or in part) a new compact in conformity with this title.

(d) **TERM AND EFFECTIVE DATE.**—The effective date of a compact shall be the date of the approval and execution by the Indian tribe or another date agreed upon by the parties, and shall remain in effect for so long as permitted by Federal law or until terminated by mutual written agreement, retrocession, or reassumption.

**SEC. 505. FUNDING AGREEMENTS.**

(a) **FUNDING AGREEMENT REQUIRED.**—The Secretary shall negotiate and enter into a written funding agreement with each Indian tribe participating in Self-Governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) **CONTENTS.**—Each funding agreement required under subsection (a) shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for all programs, services, functions, and activities (or portions thereof), including tribal shares of discretionary Indian Health Service competitive grants (excluding congressionally earmarked competitive grants), that are carried out for the benefit of Indians because of their status as Indians (including all programs, services, functions, or activities (or portions thereof) where Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and grants (which may be added to a funding agreement after award of such grants)) without regard to the agency or office of the Indian Health Service (or of such other agency) within which the program, service, function, or activity (or portion thereof) is performed, including tribal share funding for all local, field, service unit, area, regional, and central headquarters or national office functions administered under the authority of—

(1) the Act of November 2, 1921 (25 U.S.C. 13);

(2) the Act of April 16, 1934 (25 U.S.C. 452 et seq.);

(3) the Act of August 5, 1954 (68 Stat. 674);

(4) the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.);

(5) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2401 et seq.);

(6) any other act of Congress authorizing agencies of the Department of Health and Human Services to administer, carry out or provide financial assistance to such programs, services, functions or activities (or portions thereof) described in this section; or

(7) any other act of Congress authorizing such programs, services, functions or activities (or portions thereof) under which appropriations are made to agencies other than agencies within the Department of Health and Human Services, when the Sec-



retary administers such programs, services, functions or activities (or portions thereof).

(c) *INCLUSION IN COMPACT OR FUNDING AGREEMENT.*—Indian tribes or Indians need not be identified in the authorizing statute for a program or element of a program to be eligible for inclusion in a compact or funding agreement under this title.

(d) *FUNDING AGREEMENT TERMS.*—Each funding agreement shall set forth terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered, the general budget category assigned, the funds to be provided, including those to be provided on a recurring basis, the time and method of transfer of the funds, the responsibilities of the Secretary, and any other provisions to which the Indian tribe and the Secretary agree.

(e) *SUBSEQUENT FUNDING AGREEMENTS.*—Absent notification from an Indian tribe that is withdrawing or retroceding the operation of one or more programs, services, functions, or activities (or portions thereof) identified in a funding agreement, or unless otherwise agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, and the terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.

(f) *EXISTING FUNDING AGREEMENTS.*—Each Indian tribe participating in the Tribal Self-Governance Project established under title III, as in force before the enactment of the Tribal Self-Governance Amendments of 1998, on the date of enactment of this title shall have the option at any time thereafter to—

(1) retain its Tribal Self-Governance Project funding agreement (in whole or in part) to the extent the provisions of such funding agreement are not directly contrary to any express provision of this title, or

(2) adopt in lieu thereof (in whole or in part) a new funding agreement in conformity with this title.

(g) *STABLE BASE FUNDING.*—At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under section 106(a) of the Act) to be transferred to such Indian tribe, for such period as may be specified in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations by sub-sub activity excluding earmarks.

**SEC. 506. SELF-GOVERNANCE FEASIBILITY STUDY.**

(a) *IN GENERAL.*—The Secretary shall conduct a study, in consultation with Indian tribes and other entities specified in subsection (b), to determine the feasibility of including in Self-Governance, on a demonstration project basis, programs of the Department of Health and Human Services, other than the Indian Health Service, that benefit Indian tribes or their members, and to identify the programs suitable for inclusion in such demonstration.

(b) *ENTITIES TO BE CONSULTED.*—In conducting the study required under this section, the Secretary shall consult with Indian tribes, States, counties and municipalities, program beneficiaries,

and concerned public interest groups, and may consult with other entities as the Secretary finds appropriate.

(c) *ISSUES.*—The study under this section shall consider the following issues with respect to the feasibility and design of a Self-Governance demonstration:

(1) *The probable effects on specific programs and program beneficiaries.*

(2) *Statutory, regulatory, or operational impediments to implementation.*

(3) *Strategies for facilitating Self-Governance.*

(4) *Probable costs associated with Self-Governance.*

(5) *Methods to ensure quality and accountability in Self-Governance demonstrations.*

(6) *Such other issues as may be identified by the Secretary.*

(d) *REPORT TO CONGRESS.*—Not later than 18 months after the date of the enactment of this Act, the Secretary shall report to the Congress the findings and conclusions of the study under this section and any separate or dissenting views of the entities consulted pursuant to subsection (b).

(e) *AUTHORIZATION OF APPROPRIATIONS.*—There are authorized to be appropriated for fiscal years 1999 and 2000 such sums as necessary to carry out the purposes of this section, to remain available until expended.

**SEC. 507. GENERAL PROVISIONS.**

(a) *APPLICABILITY.*—The provisions of this section shall apply to compacts and funding agreements negotiated under this title and an Indian tribe may, at its option, include provisions that reflect such requirements in a compact or funding agreement.

(b) *CONFLICTS OF INTEREST.*—Indian tribes participating in Self-Governance under this title shall ensure that internal measures are in place to address conflicts of interest in the administration of Self-Governance programs, services, functions, or activities (or portions thereof).

(c) *AUDITS.*—

(1) *SINGLE AGENCY AUDIT ACT.*—The provisions of chapter 75 of title 31, United States Code requiring a single agency audit report shall apply to funding agreements under this title.

(2) *COST PRINCIPLES.*—An Indian tribe shall apply cost principles under the applicable Office of Management and Budget Circular, except as modified by section 106, or by any exemptions to applicable Office of Management and Budget Circulars subsequently granted by Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f).

(d) *RECORDS.*—

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

(2) *RECORDKEEPING SYSTEM.*—The Indian tribe shall maintain a recordkeeping system, and, after 30 days advance notice,

*provide the Secretary with reasonable access to such records to enable the Department of Health and Human Services to meet its minimum legal recordkeeping system requirements under the sections 3101 through 3106 of title 44, United States Code.*

(e) *REDESIGN AND CONSOLIDATION.—An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 505 and reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served.*

(f) *RETROCESSION.—An Indian tribe may retrocede, fully or partially, to the Secretary programs, services, functions, or activities (or portions thereof) included in the compact or funding agreement. Unless the Indian tribe rescinds the request for retrocession, such retrocession will become effective within the time frame specified by the parties in the compact or funding agreement. In the absence of such a specification, such retrocession shall become effective on—*

(1) *the earlier of—*

(A) *one year from the date of submission of such request;*

*or*

(B) *the date on which the funding agreement expires; or*

(2) *such date as may be mutually agreed by the Secretary and the Indian tribe.*

(g) *WITHDRAWAL.—*

(1) *PROCESS.—An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact or funding agreement. Such withdrawal shall become effective within the time frame specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal shall become effective on—*

(A) *the earlier of—*

(i) *one year from the date of submission of such request; or*

(ii) *the date on which the funding agreement expires;*

*or*

(B) *such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.*

(2) *DISTRIBUTION OF FUNDS.—When an Indian tribe or tribal organization eligible to enter into a self-determination contract under title I or a compact or funding agreement under this title fully or partially withdraws from a participating inter-tribal consortium or tribal organization, the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activi-*

ties (or portions thereof) which it will be carrying out under its own self-determination contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-tribal consortium or tribal organization), and such funds shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, provided that the provisions of sections 102, 105(i), and 506, as appropriate, shall apply to such withdrawing Indian tribe.

(3) *REGAINING MATURE CONTRACT STATUS.*—If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) carried out under a compact or funding agreement under this title through a self-determination contract under title I, at the option of the Indian tribe, the resulting self-determination contract shall be a mature self-determination contract.

(h) *NONDUPLICATION.*—For the period for which, and to the extent to which, funding is provided under this title or under the compact or funding agreement, the Indian tribe shall not be entitled to contract with the Secretary for such funds under section 102, except that such Indian tribe shall be eligible for new programs on the same basis as other Indian tribes.

**SEC. 508. PROVISIONS RELATING TO THE SECRETARY.**

(a) *MANDATORY PROVISIONS.*—

(1) *HEALTH STATUS REPORTS.*—Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision that requires the Indian tribe to report on health status and service delivery—

(A) to the extent such data is not otherwise available to the Secretary and specific funds for this purpose are provided by the Secretary under the funding agreement; and

(B) if such reporting shall impose minimal burdens on the participating Indian tribe and such requirements are promulgated under section 518 of this title.

(2) *REASSUMPTION.*—(A) Contracts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision authorizing the Secretary to reassume operation of a program, service, function, or activity (or portions thereof) if there is a finding of imminent endangerment of the public health caused by an act or omission of the Indian tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement.

(B) The Secretary shall not reassume operation of a program, service, function, or activity unless (i) the Secretary has first provided written notice and a hearing on the record to the Indian tribe; and (ii) the Indian tribe has not taken corrective action to remedy the imminent endangerment to public health.

(C) Notwithstanding subparagraph (B), the Secretary may, upon written notification to the tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if (i) the Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian tribe; and (ii) the endangerment arises out of a failure to carry out the compact

or funding agreement. If the Secretary reassumes operation of a program, service, function, or activity (or portion thereof) under this subparagraph, the Secretary shall provide the tribe with a hearing on the record not later than 10 days after such reassumption.

(D) In any hearing or appeal involving a decision to reassume operation of a program, service, function, or activity (or portion thereof), the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence the validity of the grounds for the reassumption.

(b) *FINAL OFFER.*—In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. The Secretary shall have no more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe made in compliance to review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

(c) *REJECTION OF FINAL OFFERS.*—If the Secretary rejects an offer, made under subsection (b) (or one or more provisions or funding levels in such offer), the Secretary shall provide—

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

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

(B) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(C) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in imminent danger to the public health; or

(D) the tribe is not eligible to participate in Self-Governance under section 503 of this title;

(2) technical assistance to overcome the objections stated in the notification required by paragraph (1);

(3) 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, provided that the Indian tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a Federal district court pursuant to section 110(a); and

(4) the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including 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. If an Indian tribe exercises the option specified herein, it shall retain the right to appeal the Sec-

retary's rejection under this section, and paragraphs (1), (2), and (3) shall only apply to that portion of the proposed final compact, funding agreement or provision thereof that was rejected by the Secretary.

(d) *BURDEN OF PROOF.*—With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b).

(e) *GOOD FAITH.*—In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the Self-Governance policy. The Secretary shall carry out this title in a manner that maximizes the policy of tribal Self-Governance, consistent with section 3.

(f) *SAVINGS.*—To the extent that programs, functions, services, or activities (or portions thereof) carried out by Indian tribes under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 509(d), the Secretary shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(g) *TRUST RESPONSIBILITY.*—The Secretary is prohibited from waiving, modifying or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exist under treaties, Executive orders, other laws, and/or court decisions.

(h) *DECISIONMAKER.*—A decision that constitutes final agency action and relates to an appeal within the Department of Health and Human Services conducted under subsection (c) shall be made either—

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

(2) by an administrative judge.

#### **SEC. 509. TRANSFER OF FUNDS.**

(a) *IN GENERAL.*—Pursuant to the terms of any compact or funding agreement entered into under this title, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (d), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semi-annual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

(b) *MULTI-YEAR FUNDING.*—The Secretary is hereby authorized to employ, upon tribal request, multi-year funding agreements for con-

struction or other multi-year activities, and references in this title to funding agreements shall include such multi-year agreements.

(c) *FUNDING FOR CONSTRUCTION PROGRAMS.*—Compacts or funding agreements authorized by this title, including agreements encompassing construction programs, shall provide for advance transfers of funding to the Indian tribe in the form of full funding or annual or semi-annual installments, at the discretion of the Indian tribe.

(d) *AMOUNT OF FUNDING.*—The Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) and amounts for contract support costs specified under sections 106(a)(2), (a)(3), (a)(5), and (a)(6), including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

(e) *PROHIBITIONS.*—The Secretary is expressly prohibited from—

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

(2) withholding portions of such funds for transfer over a period of years; and

(3) reducing the amount of funds required herein—

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

(B) in subsequent years, except pursuant to—

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

(ii) a congressional directive in legislation or accompanying report;

(iii) a tribal authorization;

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

(v) completion of a project, activity, or program for which such funds were provided;

(C) to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this Act; or

(D) to pay for costs of Federal personnel displaced by self-determination contracts under this Act or Self-Governance; except that such funds may be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)(2).

(f) *OTHER RESOURCES.*—In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of Interagency 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 is authorized to and shall acquire and transfer such personnel, supplies, or resources to the Indian tribe.

(g) *REIMBURSEMENT TO INDIAN HEALTH SERVICE.*—With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service is authorized to provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment, and the reimbursements received therefrom, along with the funds received from the Indian tribe pursuant to this title, may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

(h) *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.

(i) *INTEREST OR OTHER INCOME ON TRANSFERS.*—An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this Act shall be managed using the prudent investment standard.

(j) *CARRYOVER FUNDS.*—All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from one year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

(k) *PROGRAM INCOME.*—All Medicare, medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement and the Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) provides otherwise for medicaid and Medicare receipts, and such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

(l) *LIMITATION OF COSTS.*—An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.



**SEC. 510. CONSTRUCTION PROJECTS.**

(a) *IN GENERAL.*—Unless agreed to by the participating Indian tribe, no provision of the Office of Federal Procurement Policy Act or the Federal acquisition regulations or any other general law or regulation pertaining to Federal procurement (including executive orders), shall apply to any construction activity included in a compact or funding agreement.

(b) *HEALTH AND SAFETY STANDARDS.*—In all construction projects performed pursuant to this title, the parties shall specify appropriate health and safety standards relevant to the construction activity which shall be in conformity with nationally recognized standards for comparable projects.

**SEC. 511. FEDERAL PROCUREMENT LAWS AND REGULATIONS.**

Notwithstanding any other provision of law, unless expressly agreed to by the participating Indian tribe, the compacts and funding agreements entered into under this title shall not be subject to Federal contracting or cooperative agreement laws and regulations (including executive orders and the Secretary's procurement regulations), except to the extent that such laws expressly apply to Indian tribes.

**SEC. 512. CIVIL ACTIONS.**

(a) *CONTRACT DEFINED.*—For the purposes of section 110, the term “contract” shall include compacts and funding agreements entered into under this title.

(b) *APPLICABILITY OF CERTAIN LAWS.*—Section 2103 of the Revised Statutes of the United States Code (25 U.S.C. 81) and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts entered into by Indian tribes participating in Self-Governance under this title.

**SEC. 513. FACILITATION.**

(a) *SECRETARIAL INTERPRETATION.*—Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders and regulations in a manner that will facilitate—

(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section;

(2) the implementation of compacts and funding agreements entered into under this title; and

(3) the achievement of tribal health goals and objectives.

(b) *REGULATION WAIVER.*—

(1) An Indian tribe may submit a written request to waive application of a regulation for a compact or funding agreement entered into with the Indian Health Service under this title, to the Secretary identifying the applicable Federal regulation sought to be waived and the basis for the request.

(2) Not later than 90 days after receipt by the Secretary of a written request by an Indian tribe to waive application of a regulation for a compact or funding agreement entered into under this title, the Secretary shall either approve or deny the requested waiver in writing. A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. A failure to approve or deny a waiver request

*not later than 90 days after receipt shall be deemed an approval of such request. The Secretary's decision shall be final for the Department.*

*(c) ACCESS TO FEDERAL PROPERTY.—In connection with any compact or funding agreement executed pursuant to this title or an agreement negotiated under the Tribal Self-Governance Project established under title III, as in effect before the enactment of the Tribal Self-Governance Amendments of 1998, upon the request of an Indian tribe, the Secretary—*

*(1) shall permit an Indian tribe to use existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the tribe for their use and maintenance;*

*(2) may donate to an Indian tribe title to any personal or real property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—*

*(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;*

*(B) if property described in subparagraph (A) has a value in excess of \$5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Department of Health and Human Services; and*

*(C) all property referred to in subparagraph (A) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States; and*

*(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appropriate for use by the entity for any purpose for which a compact or funding agreement is authorized under this title.*

*(d) MATCHING OR COST-PARTICIPATION REQUIREMENT.—All funds provided under compacts, funding agreements, or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.*

*(e) STATE FACILITATION.—States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this title and other Federal laws benefiting Indians and Indian tribes.*

*(f) RULES OF CONSTRUCTION.—Each provision of this title and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in Self-Governance and any ambiguity shall be resolved in favor of the Indian tribe.*

**SEC. 514. BUDGET REQUEST.**

(a) *IN GENERAL.*—The President shall identify in the annual budget request submitted to the Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title, including funds specifically identified to fund tribal base budgets. All funds so identified shall be apportioned to the Indian Health Service, Office of Tribal Self-Governance. The Office shall be responsible for distribution of all funds provided under section 505. Nothing in this provision shall be construed to authorize the IHS to reduce the amount of funds that a Self-Governance tribe is otherwise entitled to receive under its funding agreement or other applicable law, whether or not such funds are apportioned to the Office of Tribal Self-Governance under this section.

(b) *PRESENT FUNDING; SHORTFALLS.*—In such budget request, the President shall identify the level of need presently funded and any shortfall in funding (including direct program and contract support costs) for each Indian tribe in the United States, either directly by the Secretary, under self-determination contracts, or under compacts and funding agreements authorized under this title.

**SEC. 515. REPORTS.**

(a) *ANNUAL REPORT.*—The Secretary shall submit to Congress on January 1 of each year following the date of enactment of this title a written report regarding the administration of this title. Such report shall include a detailed report on the level of need being presently funded or unfunded for each Indian tribe in the United States, either directly by the Secretary, under self-determination contracts under this Act, or under compacts and funding agreements authorized under this Act.

(b) *CONTENTS.*—The report shall be compiled from information contained in funding agreements, annual audit reports, and Secretarial data regarding the disposition of Federal funds and shall—

- (1) identify the relative costs and benefits of Self-Governance;
- (2) identify, with particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to Self-Governance Indian tribes and their members;

(3) identify the funds transferred to each Self-Governance Indian tribe and the corresponding reduction in the Federal bureaucracy;

(4) identify the funding formula for individual tribal shares of all central and headquarters funds, together with the comments of affected Indian tribes or tribal organizations, developed under subsection (c);

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

(6) include the separate views and comments of the Indian tribes or tribal organizations; and

(7) prior to being submitted to Congress, be distributed to the Indian tribes for comment, such comment period to be for no less than 30 days.

*In compiling this report the Secretary shall not impose any reporting requirements on participating Indian tribes or tribal organizations, not otherwise provided in this Act.*

*(c) REPORT ON IHS FUNDS.—Not later than 180 days after the date of enactment of this title, the Secretary shall, in consultation with Indian tribes, report on funding formula or formulas used to determine the individual tribal share of funds controlled by all components of the Indian Health Service (including funds assessed by any other Federal agency) for inclusion in Self-Governance compacts or funding agreements. The Secretary shall include such formula or formulas (or any revisions thereof) in the annual report submitted to the Congress under subsection (b), together with the views of the affected Indian tribes and tribal organizations.*

**SEC. 516. DISCLAIMERS.**

*(a) NO FUNDING REDUCTION.—Nothing in this title shall be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian tribe under this or other applicable Federal law. Any Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 110.*

*(b) FEDERAL TRUST AND TREATY RESPONSIBILITIES.—Nothing in this Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exist under treaties, Executive orders, or other laws and court decisions.*

*(c) TRIBAL EMPLOYMENT.—For purposes of section 2(2) of the Act of July 5, 1935 (49 Stat. 450, chapter 372) (commonly known as the National Labor Relations Act), an Indian tribe carrying out a self-determination contract, compact, annual funding agreement, grant, or cooperative agreement under this Act shall not be considered an employer.*

*(d) OBLIGATIONS OF THE UNITED STATES.—The Indian Health Service shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Indian tribe to do so.*

**SEC. 517. APPLICATION OF OTHER SECTIONS OF THE ACT.**

*(a) MANDATORY APPLICATION.—All provisions of sections 6, 7, 8, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act and section 314 of Public Law 101-512 (coverage under the Federal Tort Claims Act), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.*

*(b) DISCRETIONARY APPLICATION.—At the request of a participating Indian tribe, any other provision of title I, to the extent such provision is not in conflict with this title, shall be made a part of a funding agreement or compact entered into under this title. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this title. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.*

**SEC. 518. REGULATIONS.****(a) IN GENERAL.—**

(1) *Not later than 90 days after the date of enactment of this title, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title.*

(2) *Proposed regulations to implement this title shall be published in the Federal Register by the Secretary no later than 1 year after the date of enactment of this title.*

(3) *No regulations to implement this title may be published unless they are recommended by the committee formed under subsection (b).*

(4) *The authority to promulgate regulations under this title shall expire 21 months after the date of enactment of this title.*

**(b) COMMITTEE.—***A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this title, and the Committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.*

**(c) ADAPTATION OF PROCEDURES.—***The Secretary shall adapt the negotiated rulemaking procedures to the unique context of Self-Governance and the government-to-government relationship between the United States and Indian tribes.*

**(d) EFFECT.—***The lack of promulgated regulations shall not limit the effect of this title.*

**(e) EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, AND RULES.—***Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Indian Health Service, except as provided in section 105(g) and 510.*

**SEC. 519. APPEALS.**

*In any appeal (including civil actions) involving decisions made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—*

*(1) the validity of the grounds for the decision made; and*

*(2) the decision is fully consistent with provisions and policies of this title.*

**SEC. 520. AUTHORIZATION OF APPROPRIATIONS.**

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

## ADDITIONAL VIEWS

### 1. INTRODUCTION

The nature of Self-Governance is rooted in the inherent sovereignty of American Indian and Alaska Native tribes. From the founding of this nation, Indian tribes and Alaska Native villages have been recognized as “distinct, independent, political communities” exercising powers of self-government, not by virtue of any delegation of powers from the federal government, but rather by virtue of their own innate sovereignty. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). The tribes’ sovereignty predates the founding of the United States and its Constitution and forms the backdrop against which the United States has continually entered into relations with Indian tribes and Native villages.

The present model of tribal Self-Governance arose out of the federal policy of Indian Self-Determination. The modern Self-Determination era began as Congress and contemporary Administrations ended the dubious experiment of Termination which was intended to end the federal trust responsibility to Native Americans.

The centerpiece of the Termination policy, House Concurrent Resolution 108, stated that “Indian Tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians.” H. Con. Res. 108, 83rd Cong., 1st Sess. (1953). While the intent of this legislation was to free the Indians from federal rule, it also destroyed all protection and benefits they received from the government. The same year, Congress enacted Public Law 280 which further eroded tribal sovereignty by transferring criminal jurisdiction from the federal government and the tribes to the state governments.

As a policy, Termination was a disaster. Recognizing this, President Kennedy campaigned in 1960 promising the Indian tribes that:

There would be no change in treaty or contractual relationships without the consent of the tribes concerned. There would be protection of the Indian land base, credit assistance, and encouragement of tribal planning for economic development.

Francis Paul Prucha, “The Great Father,” 1087 (1984). Reservations were also included in many of the “Great Society” programs of the late 1960s, bringing a much-needed infusion of federal dollars onto many reservations. In 1968, President Lyndon B. Johnson delivered a message to Congress that stressed:

[A] policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-develop-

ment, 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.

Message from the President, March 6, 1968, Weekly Compilation of Presidential Documents, vol. IV, No. 10, Wash. D.C., U.S. Gov. Printing Office.

President Richard Nixon's 1970 "Special Message on Indian Affairs" also called for increased tribal self-determination:

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support \* \* \*.

Special Message to the Congress, Pub. Papers, 564, 567 (1970). Together, these messages sparked Congress to work on legislation that laid the foundation for modern federal Indian policy for the remainder of this century. AND so, five years later, Congress enacted one of the most profound and powerful pieces of Indian legislation in this Nation's history.

## 2. SELF-DETERMINATION

In 1975, Congress passed the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638. This legislation gave Indian tribes and Alaska Native villages the right to assume responsibility for the administration of federal programs which benefited Indians. In addition to assuming the authority to make operating and administrative decisions regarding the way these federal programs would be run, tribes that chose to enter into Indian Self-Determination Act (or "638") contracts were given the right to receive the federal funds that the agencies—generally the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS)—would have ordinarily received for those programs. Unlike former policy, the Indian Self-Determination Act did not relieve the government of their trust responsibilities to the tribes.

Congress enacted the Indian Self-Determination Act believing it that (1) Indian tribes, having greater knowledge about and a greater stake in the outcome of these federal programs, would run BIA and IHS programs better and thus provide better services to their members, (2) the direct responsibility of running these programs would enhance and strengthen tribal governments, and (3) Indian tribes could make more efficient use of federal dollars than the existing federal bureaucracy, thus delivering more services than in the past.

However, Indian Self-Determination Act or "638" contracts required volumes of paperwork to be filed as a means to supervise the tribes' activities. If a tribe wanted to operate more than one program, it would have to exercise an additional 638 contract which required a separate approval process. Though the Act was

intended to decrease Federal involvement in the daily lives of reservation Indians, its specific performance and reporting requirements allowed BIA staffers to remain a pervasive force in Indian affairs.

At the time of its enactment, the 638 contract program did not allow tribes to move funds between programs to adapt to changing and unforeseen circumstances during a funding period. Thus, the tribes' powers to design or adapt programs according to tribal needs remained restricted.

The inflexibility of 638 contracts also created problems with cash flow. Payments were made to tribes on a cost-reimbursement basis, often many months after the tribe might have incurred major expenses. Some tribes chose not to divert money from a program that was over-funded in order to deal with this problem. If a tribe failed to expend all of the 638 contract funding by the end of the fiscal year, the funds carried over only within program-specific budgets.

The tribes' main complaint, however, was that the 638 contract process made tribal staff primarily accountable to and measured by, not their own tribal councils but BIA employees at the Agency, Area and Central Offices. They had to follow strict federal laws, rules and regulations that were often of little relevance to day-to-day existence on an Indian reservation. If trust assets were involved, the BIA had to concur in any decisions made.

Thus, while the Indian Self-Determination Act was and is still acknowledged as a watershed moment in the history of tribal self-governance, by the mid-1980s many tribal leaders agreed that it was time for even greater change. They felt that the federal bureaucracy devoted to 638 program oversight had simply grown out of control and the percentage of federal dollars allocated for Indian programs actually spent on the reservations was still far too small.

### 3. SELF-GOVERNANCE

To address these concerns, the Indian tribes asked Congress to consider amendments to the Self-Determination Act. At the same time, a group of tribal representatives began meeting to discuss proposals for trimming the BIA bureaucracy and amending the Act as well.

But during the fall of 1987, a series of articles appeared in the Arizona Republic entitled "Fraud in Indian Country," that detailed an egregious history of waste and mismanagement within the BIA. These articles spurred House Appropriations Subcommittee on Interior and Related Agencies Chairman Sidney Yates (D-IL) to conduct an oversight hearing on these alleged abuses.

At the hearing, Department of Interior officials proposed that funds appropriated to the Bureau of Indian Affairs be turned over to the tribes to let them manage their own affairs in an attempt to address these charges. But, the officials testified, by accepting the federal funds, the tribes would release the federal government from its trust responsibility. Alliance leaders disagreed with this quid pro quo, but supported the concept of removing BIA middlemen from the funding process. With Chairman Yates' encouragement, tribal representatives met with the Secretary of the Interior and other Department officials the very next day to further hash



out this concept. By mid-December of 1987, ten tribes had agreed to test the Department's proposal.

It was out of this proposal that the Tribal Self-Governance Demonstration Project was born.

In 1988 Congress enacted Pub. L. No. 100-472 which created Title III of the Indian Self-Determination Act which authorized the Secretary of Interior to negotiate Self-Governance compacts with up to twenty tribes. These tribes, for the first time, would be able to "plan, conduct, consolidate, and administer programs, services, and functions" heretofore performed by Interior officials. The Act required that these programs be "otherwise available to Indian tribes or Indians," but within these parameters the tribes were authorized to redesign programs and reallocated funding according to terms negotiated in the compacts. Tribes would be able to prioritize spending on a systemic level, dramatically reducing the Federal role in the tribal decision-making process. But perhaps the biggest difference between the "638" contract process and the Self-Governance program is that instead of funds coming from multiple contracts there would be one grant with a single Annual Funding Agreement.

The original ten tribes that agreed to participate in the demonstration project were the Confederated Salish and Kootenai Tribes, Hoppa Tribe, Jamestown S'Klallam Tribe, Lummi Nation, Mescalero Apache Tribe, Mille Lacs Band of Ojibew, Quinalt Indian Nation, Red Lake Chippewa Tribe, Rosebud Sioux Tribe, and Tlingit and Haida Central Council.

Negotiations between the tribes and the Interior Department, however, bogged down and the tribes sought an additional extension of the demonstration project. In 1991 President Bush signed into law "The Tribal Self-Governance Demonstration Project Act", Pub. L. No. 102-184, which extended the Project for three more years and increased the number of Tribes participating from twenty to thirty. The bill required the new tribes participating to complete a one-year planning period before they could negotiate a Compact and Annual Funding Agreement. In 1991, the Interior Department established the Office of Self-Governance within the Office of the Assistant Secretary, Indian Affairs.

The 1991 law also directed the IHS to conduct a feasibility study to examine the expansion of the Self-Governance project to IHS programs and services. The law also authorized the Secretary of Health and Human Services to establish an Office of Self-Governance in the IHS.

In 1992, Congress amended section 314 of the Indian Health Care Improvement Act to allow the Secretary of Health and Human Services to negotiate Self-Governance compacts and annual funding agreements under Title III of the Indian Self-Determination Act with Indian tribes. Pub. L. No. 102-573, sec. 814. The Self-Governance Demonstration Project proved to be a success both in the Interior Department and the Department of Health and Human Services. Thus, tribes approached Congress requesting that it make the Department of Interior portion of the Demonstration Project permanent.

In 1994, Congress responded by passing the "Tribal Self-Governance Act of 1994" as part of the Indian Self-Determination Act

Amendments, Pub. L. No. 103-413. The Tribal Self-Governance Act, contained in Title IV of the Indian Self-Determination Act, permanently established the Self-Governance program within the Department of Interior and thus solidified the Federal government goals of negotiating with Indian Tribes and Alaska Native villages on a government-to-government basis while retaining the federal trust relationship. The Tribal Self-Governance Act allowed Self-Governance tribes to compact all programs and services that tribes could contract under Title I of the Indian Self-Determination Act. The Act demanded an "orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual tribal communities." The Act also clarified the requirements and obligations of tribes entering the Self-Governance process.

Tribes entering the Self-Governance program had to meet four eligibility requirements. First, the tribe (or tribes in the case of a consortium) must be federally recognized. Second, the tribe must document, with an official action of the tribal governing body, a formal request to enter negotiations with the Department of Interior. In the case of a consortium of tribes, the governing body of each participating tribe must authorize participation by an official action of the tribal governing body. Third, the tribe must demonstrate financial stability and financial management capability as evidenced by the tribe having no material audit exceptions in the required annual audit of the tribe's 638 contracts. Fourth, the tribe must have successfully completed a planning phase, requiring the submission of a final planning report which demonstrates that the tribe has conducted legal and budgetary research and internal tribal government and organizational planning.

The 1994 Act then authorized the Secretary of the Interior to negotiate annual funding agreements with eligible tribes in a manner consistent with the federal trust responsibility. The agreements authorize a tribe to:

\* \* \* plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of Interior through the Bureau of Indian Affairs, without regard to the agency or office of the Bureau of Indian Affairs within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office functions. \* \* \*

The 1994 Act's inclusion of "agency, area, and central office functions," in contrast to Title III, means that with each new Self-Governance tribe, the resources of the various branches of the BIA delivering services to that tribe will shrink. To facilitate this transfer, the Act specifically lists all applicable activities for which tribes and the BIA receive corresponding funding.

Under the 1994 Act, annual funding agreements include what the tribe would have received if the sum total of its 638 contracts were added up, in addition to Area and Central Office funds and other Interior Programs. The process for review and award of Self-Governance compacts and annual funding agreements is stream-

lined when compared to 638 contracts. Once an agreement is negotiated, the Secretary submits it to the other Indian tribes served by the BIA and the two Congressional Committees of jurisdiction. Tribes may obtain their funding in either annual or semi-annual installments.

The 1994 Act, however, did not make changes to the demonstration project status of the Self-Governance program within the Indian Health Service. The IHS authority remained on a demonstration project basis within Title III of the Indian Self-Determination Act.

The Indian tribes and the Administration agree that it is now time to take the next logical step forward in the Self-Governance process and make the Self-Governance program permanent within the Department of Health and Human Services.

#### 4. THE 1998 AMENDMENTS

The Tribal Self-Governance Amendments of 1998 establish a permanent Self-Governance Program within the Department of Health and Human Services under which American Indian and Alaska Native tribes may enter into compacts with the Secretary for the direct operation, control, and redesign of Indian Health Service (IHS) activities. A limited number of Indian tribes have had a similar right on a demonstration project basis since 1992 under Title III of the Indian Self-Determination and Education Assistance Act. All Indian tribes have enjoyed a similar but lesser right to contract and operate individual IHS programs and functions under Title I of the Indian Self-Determination Act since 1975 (so-called "638 contracting").

In brief, the legislation would expand the number of tribes eligible to participate in Self-Governance, make it a permanent within the IHS and authorize the Secretary of Health and Human Services to conduct a feasibility study for the execution of Self-Governance compacts with Indian tribes for programs outside of the IHS. The 1998 amendments incorporate a number of federal contracting laws and regulations that have worked well for Indian tribes and the Department in the past.

The legislation is modeled on the existing permanent Self-Governance legislation for Interior Department programs contained in Title IV of the Indian Self-Determination Act. The legislation reflects years of planning by Indian tribes, Alaska Native villages, and consultation by the Department of Health and Human Services.

The 1998 amendments give Indian tribes who meet certain criteria—generally speaking, they have to have experience in government contracting, have clean audits, and demonstrate management capability—the right to take over the operation of IHS functions, including the funds necessary to run them. The 1998 amendments continue the principle focus of the Self-Governance program: to remove needless and sometimes harmful layers of federal bureaucracy that dictate Indian affairs. By giving tribes direct control over federal programs run for their benefit and making them directly accountable to their members, Congress has enabled Indian tribes to run programs more efficiently and more innovatively than federal officials have in the past. And, allowing tribes to run these

programs furthers the Congressional policy of strengthening and promoting tribal governments.

Self-Governance recognizes that Indian tribes care for the health, safety, and welfare of their own members as well as that of non-Indians who either live on their reservations or conduct business with the tribes and are thus committed to safe and fair working conditions and practices.

#### 5. CONCLUSION

Sometimes we need to look to the past in order to understand our proper relationship with Indian tribes. More than two centuries ago, Congress set forth what should be our guiding principles. In 1789, Congress passed the Northwest Ordinance, a set of seven articles intended to govern the addition of new states to the Union. These articles served as a compact between the people and the States, and were “to forever remain unalterable, unless by common consent.” Act of Aug. 7, 1789, ch. 13, 1 Stat. 50, 52. Article Three set forth the Nation’s policy towards Indian tribes:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken away from them without their consent \* \* \* but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them \* \* \*.

Id. The Founders carefully and wisely chose these principles to govern the conduct of this Nation in its dealing with American Indian tribes. Over the years, these principles have often been forgotten. Self-Government is but one of many ways to honor these principles.

Just over two hundred years later, Justice Thurgood Marshall delivered a unanimous Supreme Court in 1983 stating that,

Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress’ objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress’ overriding goal of encouraging tribal self-sufficiency and economic development.

*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–35, quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). See also *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (concluding that “[o]ur cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.”).

If we are to adhere and remain faithful to the principles that our Founders set forth—the principles of good faith, consent, justice and humanity—then we must continue to promote tribal self-government.

GEORGE MILLER.