

DEPARTMENT OF THE INTERIOR TRIBAL SELF-GOVERNANCE ACT OF 2010

SEPTEMBER 16, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RAHALL, from the Committee on Natural Resources, submitted the following

R E P O R T

[To accompany H.R. 4347]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4347) to amend the Indian Self-Determination and Education Assistance Act to provide 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 all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Department of the Interior Tribal Self-Governance Act of 2010”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—INDIAN SELF-DETERMINATION

Sec. 101. Definitions; reporting and audit requirements; application of provisions.
Sec. 102. Contracts by Secretary of Interior.
Sec. 103. Administrative provisions.
Sec. 104. Contract funding and indirect costs.
Sec. 105. Contract or grant specifications.

TITLE II—TRIBAL SELF-GOVERNANCE

Sec. 201. Tribal self-governance.

TITLE I—INDIAN SELF-DETERMINATION

SEC. 101. DEFINITIONS; REPORTING AND AUDIT REQUIREMENTS; APPLICATION OF PROVISIONS.

(a) DEFINITIONS.—Section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) is amended by striking subsection (j) and inserting the following:

“(j) ‘self-determination contract’ means a contract entered into (or a grant or cooperative agreement used under section 9) under title I between a tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services that are otherwise provided to Indian tribes and members of Indian tribes pursuant to Federal law, subject to the condition that, except as provided in section 105(a)(3), no contract entered into (or grant or cooperative agreement used under section 9) under title I shall be—

“(1) considered to be a procurement contract; or

“(2) subject to any Federal procurement law (including regulations);”.

(b) REPORTING AND AUDIT REQUIREMENTS.—Section 5(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450c(b)) is amended by striking “after completion of the project or undertaking referred to in the preceding subsection of this section” and inserting “after the date on which a report is submitted to the Secretary under subsection (a)”.

(c) APPLICATION OF OTHER PROVISIONS.—Sections 4, 5, 6, 7, 102(c), 104, 105(a)(1), 105(f), 110 and 111 of the Indian Self-Determination and Education Assistance Act, as amended (25 U.S.C. 450 et seq.) (Public Law 93–638, as amended, 88 Stat. 2203) and section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (Public Law 101–512; 104 Stat. 1959), apply to compacts and funding agreements entered into under title IV.

SEC. 102. CONTRACTS BY SECRETARY OF INTERIOR.

Section 102 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f) is amended—

(1) in subsection (c)(2), by striking “economic enterprises” and all that follows through “except that” and inserting “economic enterprises (as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452)), except that”;

(2) by striking subsection (e) and inserting the following:

“(e) 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 a preponderance of the evidence—

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

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

(3) by adding at the end the following:

“(f) GOOD FAITH REQUIREMENT.—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, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000 (Public Law 106–260; 25 U.S.C. 458aaa note).”.

SEC. 103. ADMINISTRATIVE PROVISIONS.

Section 105 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j) is amended—

(1) in subsection (b) in the first sentence, by striking “pursuant to” and all that follows through “of this Act” and inserting “pursuant to sections 102 and 103”;

(2) by striking subsection (j) and inserting the following:

“(j) REDESIGN AND CONSOLIDATION.—If an Indian tribe can demonstrate, for the previous three fiscal years, the financial stability and financial management capability as evidenced by the Indian tribe having no material audit exceptions in the required annual audit of the self-determination contracts of the Indian tribe, then the Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under this title and reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) that are eligible to be included in Consolidated Tribal Government Programs in any manner that the Indian tribe determines 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 under applicable Federal law.”; and

(3) by adding at the end the following:

“(p) INTERPRETATION BY SECRETARY.—Except as otherwise provided by law, the Secretary shall interpret all Federal laws (including regulations) and Executive orders in a manner that facilitates, to the maximum extent practicable—

- “(1) the inclusion in self-determination contracts and funding agreements of—
 - “(A) applicable programs, services, functions, and activities (or portions thereof); and
 - “(B) funds associated with those programs, services, functions, and activities;
- “(2) the implementation of self-determination contracts and funding agreements; and
- “(3) the achievement of tribal health objectives.”.

SEC. 104. CONTRACT FUNDING AND INDIRECT COSTS.

Section 106(a)(3)(A) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j–1(a)(3)(A)) is amended—

- (1) in clause (i), by striking “, and” at the end and inserting a semicolon;
- (2) in clause (ii), by striking “expense related to the overhead incurred” and inserting in lieu thereof “expenses incurred by the governing body of the Indian tribe or tribal organization and overhead incurred”;
- (3) in clause (ii), by striking the comma at the end and inserting “; and”;
- (4) by inserting after clause (ii) the following:
 - “(iii) not less than 50 percent of the expenses incurred by the governing body of an Indian tribe or tribal organization relating to a Federal program, function, service, or activity pursuant to the contract (which expenses shall be considered to be reasonable and allowable without documentation for the purpose of this paragraph), except that in the case of an Indian tribe or tribal organization which derives all or substantially all of its program revenue from other governments or organizations, not less than 100 percent of such expenses shall be considered to be reasonable and allowable without documentation.”.

SEC. 105. CONTRACT OR GRANT SPECIFICATIONS.

Section 108 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450l) is amended—

- (1) in subsection (a)(2), by inserting “subject to subsections (a) and (b) of section 102,” before “contain”; and
- (2) in subsection (f)(2)(A)(ii) of the model agreement contained in subsection (c), by inserting “subject to subsections (a) and (b) of section 102 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f),” before “such other provisions”.

TITLE II—TRIBAL SELF-GOVERNANCE

SEC. 201. TRIBAL SELF-GOVERNANCE.

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

“TITLE IV—TRIBAL SELF-GOVERNANCE

“SEC. 401. DEFINITIONS.

“In this title:

“(1) COMPACT.—The term ‘compact’ means a self-governance compact entered into under section 404.

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

“(3) DEPARTMENT.—The term ‘Department’ means the Department of the Interior.

“(4) FUNDING AGREEMENT.—The term ‘funding agreement’ means a funding agreement entered into under section 405.

“(5) GROSS MISMANAGEMENT.—The term ‘gross mismanagement’ means a significant violation, shown by a preponderance of the evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds—

“(A) for a program administered by an Indian tribe; or

“(B) under a compact or funding agreement that results in a significant reduction of funds available for the programs assumed by an Indian tribe.

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

“(7) INHERENT FEDERAL FUNCTION.—The term ‘inherent Federal function’ means a Federal function that may not legally be delegated to an Indian tribe.

“(8) SECRETARY.—The term ‘Secretary’ means the Secretary of the Interior.

“(9) SELF-GOVERNANCE.—The term ‘self-governance’ means the program of self-governance established under section 402.

“(10) TRIBAL SHARE.—The term ‘tribal share’ means an Indian tribe’s portion of all funds and resources that support any program within the Bureau of Indian Affairs, the Office of Special Trustee, and the Office of the Assistant Secretary for Indian Affairs and that are not required by the Secretary for the performance of an inherent Federal function.

“SEC. 402. ESTABLISHMENT.

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

“SEC. 403. SELECTION OF PARTICIPATING INDIAN TRIBES.

“(a) IN GENERAL.—

“(1) PARTICIPANTS.—

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

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

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

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

“(A) each Indian tribe so requests; and

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

“(4) TRIBAL WITHDRAWAL FROM A TRIBAL ORGANIZATION.—

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

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

“(C) PARTICIPATION IN SELF-GOVERNANCE.—The withdrawal of an Indian tribe from a tribal organization shall not affect the eligibility of the tribal organization to participate in self-governance on behalf of one or more other Indian tribes provided that the tribal organization still qualifies under subsection (b).

“(D) WITHDRAWAL PROCESS.—

“(i) IN GENERAL.—An Indian tribe may, by tribal resolution, fully or partially withdraw its tribal share of any program in a funding agreement from a participating tribal organization. The Indian tribe shall provide a copy of the tribal resolution to the Secretary.

“(ii) EFFECTIVE DATE.—

“(I) IN GENERAL.—A withdrawal under clause (i) shall become effective on the date specified in the tribal resolution and that is mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the tribal organization that signed the compact and funding agreement on behalf of the withdrawing Indian tribe or tribal organization.

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

“(aa) the earlier of—

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

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

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

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

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

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

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

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

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

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

“(1) successfully complete the planning phase described in subsection (c);
“(2) request participation in self-governance by resolution or other official action by the tribal governing body; and

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

“(c) PLANNING PHASE.—

“(1) IN GENERAL.—An Indian tribe seeking to begin participation in self-governance shall complete a planning phase in accordance with this subsection.

“(2) ACTIVITIES.—The planning phase—

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

“(B) shall include—

“(i) legal and budgetary research; and

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

“(d) GRANTS.—

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

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

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

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

“SEC. 404. COMPACTS.

“(a) IN GENERAL.—The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with

the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

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

- “(1) specify and affirm the general terms of the government-to-government relationship between the Indian tribe and the Secretary; and
- “(2) include such terms as the parties intend shall control during the term of the compact.

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

“(d) EFFECTIVE DATE.—The effective date of a compact under subsection (a) shall be—

- “(1) the date of the execution of the compact by the parties; or
- “(2) another date agreed upon by the parties.

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

“(f) EXISTING COMPACTS.—An Indian tribe participating in self-governance under this title, as in effect on the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2010, shall have the option at any time after that date—

- “(1) to retain its negotiated compact (in whole or in part) to the extent that the provisions of the compact are not directly contrary to any express provision of this title; or
- “(2) to negotiate a new compact in a manner consistent with this title.

“SEC. 405. FUNDING AGREEMENTS.

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

“(b) INCLUDED PROGRAMS.—

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

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

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

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

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

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

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

“(2) DISCRETIONARY PROGRAMS OF SPECIAL SIGNIFICANCE.—A funding agreement under subsection (a) may, in accordance with such additional terms as the parties consider to be appropriate, include programs, services, functions, and activities (or portions thereof), administered by the Secretary, in addition to programs described in paragraphs (1) and (3), that are of special geographic, historical, or cultural significance to the Indian tribe. Such agreements, including the additional terms, shall be governed by the provisions of this title, except that, subject to the discretion of the Secretary—

“(A) the Indian tribe may have reallocation, consolidation, and redesign authority over any program assumed under this paragraph (2);

“(B) the Secretary may reassume any program and associated funding assumed under this paragraph (2) upon a specific finding by the Secretary of a gross violation by the Indian tribe of the terms of the funding agreement;

“(C) the Secretary may require special terms and conditions regarding a construction program or project assumed under this paragraph (2) notwithstanding the provisions of section 408;

“(D) all Federal regulations that otherwise govern the operation of any program assumed under this paragraph (2) apply to the Indian tribe unless a specific regulation is waived by the Secretary under the procedures set forth in section 410(b)(2), which waiver request may be denied upon a specific finding by the Secretary that the waiver is prohibited by Federal law or is inconsistent with the express provisions of the funding agreement; and

“(E) a stable base budget, as described in paragraph (7), may be provided for any program assumed under this paragraph (2).

“(3) PROGRAMS OTHERWISE AVAILABLE.—A funding agreement shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for any program administered by the Department of the Interior other than through the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, or the Office of the Special Trustee, that is otherwise available to Indian tribes or Indians under section 102 of this Act.

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

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

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

“(5) EXCLUDED FUNDING.—A funding agreement shall not authorize an Indian tribe to plan, conduct, administer, or receive tribal share funding under any program that—

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

“(B) is provided for elementary and secondary schools under the formula developed under section 1127 of the Education Amendments of 1978 (25 U.S.C. 2007).

“(6) SERVICES, FUNCTIONS, AND RESPONSIBILITIES.—A funding agreement shall specify—

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

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

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

“(7) BASE BUDGET.—A funding agreement pursuant to subsections (b)(1) and (b)(3) shall, at the option of the Indian tribe, provide for a stable base budget specifying the recurring funds (including funds available under section 106(a)) to be transferred to the Indian tribe, for such period as the Indian tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations. Upon agreement by the Secretary, a funding agreement under subsection (b)(2) may also provide for a stable base budget subject to the terms of this provision.

“(8) NO WAIVER OF TRUST RESPONSIBILITY.—A funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, court decisions, and other laws.

“(c) AMENDMENT.—The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe, unless such terms are required by Federal law.

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

“(e) EXISTING AND SUBSEQUENT FUNDING AGREEMENTS.—

“(1) SUBSEQUENT FUNDING AGREEMENTS.—Absent notification from an Indian tribe that it is withdrawing or retroceding the operation of one or more programs identified in a funding agreement under subsections (b)(1) or (b)(3), or unless otherwise agreed to by the parties to the funding agreement—

“(A) a funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, with funding paid annually for each fiscal year the agreement is in effect or by the nature of any noncontinuing program, services, functions, or activities contained in a funding agreement; and

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

“(2) DISPUTES.—Disputes over the implementation of paragraph (1)(A) shall be subject to section 407(c).

“(3) EXISTING FUNDING AGREEMENTS.—An Indian tribe that was participating in self-governance under this title on the date of enactment of the Department

of the Interior Tribal Self-Governance Act of 2010 shall have the option at any time after that date—

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

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

“(4) MULTYEAR FUNDING AGREEMENTS.—An Indian tribe may, at the discretion of the Indian tribe, negotiate with the Secretary for a funding agreement with a term that exceeds one year.

“SEC. 406. GENERAL PROVISIONS.

“(a) APPLICABILITY.—An Indian tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this title.

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

“(c) AUDITS.—

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

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

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

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

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

“(d) REDESIGN AND CONSOLIDATION.—An Indian tribe may redesign or consolidate programs or reallocate funds for programs in any manner that the Indian tribe deems to be in the best interest of the Indian community being served, so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law, except that, with respect to the reallocation, consolidation, and redesign of programs described in section 405(b)(2), a joint agreement between the Secretary and the Indian tribe shall be required.

“(e) RETROCESSION.—

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

“(2) EFFECTIVE DATE.—

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

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

“(i) the earlier of—

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

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

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

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

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

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

“(g) RECORDS.—

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

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

“(A) maintain a recordkeeping system; and

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

“SEC. 407. PROVISIONS RELATED TO THE SECRETARY.

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

“(b) REASSUMPTION.—

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

“(A) imminent jeopardy to a trust asset, natural resources, or public health and safety that—

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

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

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

“(2) PROHIBITION.—The Secretary shall not reassume operation of a program in whole or part unless—

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

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

“(3) EXCEPTION.—

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

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

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

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

“(c) INABILITY TO AGREE ON COMPACT OR FUNDING AGREEMENT.—

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

“(2) DETERMINATION.—Not more than 45 days after the date of submission of a final offer, or as otherwise agreed to by the Indian tribe, the Secretary shall review and make a determination with respect to the final offer.

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

“(4) REJECTION OF FINAL OFFER.—

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

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

“(I) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title because it would reduce the funds that any other Indian tribe or tribal organization is entitled to receive under Federal law;

“(II) the program that is the subject of the final offer is an inherent Federal function or is subject to the discretion of the Secretary under section 405(b)(2);

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

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

“(V) the funding agreement would violate Federal statute or regulation;

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

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

“(iv) provide the Indian tribe the option of entering into the severable portions of a final proposed compact or funding agreement (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

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

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

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

“(d) BURDEN OF PROOF.—In any administrative hearing or appeal or civil action brought under this section, the Secretary shall have the burden of demonstrating by a preponderance of the evidence the validity of the grounds for rejecting a final offer made under subsection (c) or the grounds for a reassumption under subsection (b).

“(e) GOOD FAITH.—

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

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

“(f) SAVINGS.—To the extent that programs carried out for the benefit of Indian tribes and tribal organizations under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 409(c), except for programs entered into funding agreements under section 405(b)(2), the Secretary shall make such savings available to the Indian tribes or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs. For any savings generated as a result of the assumption of a program by an Indian tribe under section 405(b)(2), such savings shall be made available to that Indian tribe.

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

“(h) DECISIONMAKER.—A decision that constitutes final agency action and relates to an appeal within the Department conducted under subsection (c)(4) may be made—

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

“(2) by an administrative law judge.

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

SEC. 408. CONSTRUCTION PROGRAMS AND PROJECTS.

“(a) IN GENERAL.—Indian tribes participating in tribal self-governance may carry out construction projects under this title.

“(b) TRIBAL OPTION TO CARRY OUT CERTAIN FEDERAL ENVIRONMENTAL ACTIVITIES.—In carrying out a construction project under this title, an Indian tribe may, subject to the Secretary’s agreement, elect to assume some Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), and related provisions

of law and regulations that would apply if the Secretary were to undertake a construction project, by adopting a resolution—

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

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

“(c) SAVINGS CLAUSE.—Notwithstanding subsection (b), nothing in this Act authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under the National Environmental Policy Act, the National Historic Preservation Act, and other related provisions of law that are inherent Federal functions.

“(d) CODES AND STANDARDS.—In carrying out a construction project under this title, an Indian tribe shall—

“(1) adhere to applicable Federal, State, local, and tribal building codes architectural and engineering standards and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and

“(2) use only architects and engineers who are licensed to practice in the State in which the facility will be built and who certify—

“(A) that they are qualified to perform the work required by the specific construction involved; and

“(B) upon completion of design, that the plans and specifications meet or exceed the applicable construction and safety codes.

“(e) TRIBAL ACCOUNTABILITY.—

“(1) In carrying out a construction project under this title, an Indian tribe shall assume responsibility for the successful completion of the construction project and of a facility that is usable for the purpose for which it was funded.

“(2) For each construction project carried out by an Indian tribe under this title, the Indian tribe and the Secretary shall negotiate a provision to be included in the funding agreement that identifies—

“(A) the approximate start and completion dates for the project, which may extend over a period of one or more years;

“(B) a general description of the project, including the scope of work, references to design criteria, and other terms and conditions;

“(C) the responsibilities of the Indian tribe and the Secretary for the project;

“(D) how project-related environmental considerations will be addressed;

“(E) the amount of funds provided for the project;

“(F) the obligations of the Indian tribe to comply with the codes referenced in subsection (c)(1) and applicable Federal laws, statutes, and regulations;

“(G) the agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction; and

“(H) the agreement of the Secretary to issue a certificate of occupancy, if requested by the Indian tribes, based upon the review and verification by the Secretary, to his or her satisfaction, that the Indian tribe has secured upon completion the review and approval of the plans and specifications, sufficiency of design, life safety, and code compliance by qualified, licensed, and independent architects and engineers.

“(f) FUNDING.—Funding appropriated for construction projects carried out under this title shall be included in funding agreements as annual or semiannual advance payments at the option of the Indian tribe. The Secretary shall include all associated project contingency funds with each advance payment. The Indian tribe shall be responsible for the management of such contingency funds.

“(g) NEGOTIATIONS.—At the option of the Indian tribe, construction project funding proposals shall be negotiated pursuant to the statutory process in section 450j(m) of title 25 and any resulting construction project agreement shall be incorporated into the funding agreement as addenda.

“(h) FEDERAL REVIEW AND VERIFICATION.—The Secretary shall have at least one opportunity to review and verify, to the satisfaction of the Secretary, that project planning and design documents prepared by the Indian tribe in advance of initial construction are in conformity with the obligations of the Indian tribe under subsection (c) and, before they are implemented, at least one opportunity to review and verify to the satisfaction of the Secretary that subsequent document amendments which result in a significant change in construction are in conformity with the obligations of the Indian tribe under subsection (c). The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually.

The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

“(i) APPLICATION OF OTHER LAWS.—Unless otherwise agreed to by the Indian tribe, no provision of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project carried out under this title.

“(j) FUTURE FUNDING.—Upon completion of a facility constructed under this title, the Secretary shall include the facility among those eligible for annual operation and maintenance funding support comparable to that provided for similar facilities funded by the Department as annual appropriations are available and to the extent that the facility size and complexity and other factors do not exceed the funding formula criteria for comparable buildings.

“SEC. 409. PAYMENT.

“(a) IN GENERAL.—At the request of the governing body of the Indian tribe and under the terms of an agreement, the Secretary shall provide funding to the Indian tribe to carry out the funding agreement.

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

“(c) AMOUNT.—

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

“(2) SAVINGS CLAUSE.—Nothing in this section shall be construed to reduce funds or provided to another Indian tribe.

“(d) TIMING.—Pursuant to the terms of any compact or funding agreement entered into under this part, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolution. Within 12 months from the date of enactment of this bill, 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 semiannual 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.

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

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

“(g) LIMITATIONS ON AUTHORITY OF THE SECRETARY.—The Secretary shall not—

“(1) fail to transfer to an Indian tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under this title for programs eligible under section 405(b)(1) or (b)(3), except as required by Federal law;

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

“(3) reduce the amount of funds required under this title—

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

“(B) in subsequent years, except as necessary as a result of—

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

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

“(iii) a tribal authorization;

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

“(v) completion of an activity under a program for which the funds were provided;

“(C) to pay for Federal functions, including—

- “(i) Federal pay costs;
- “(ii) Federal employee retirement benefits;
- “(iii) automated data processing;
- “(iv) technical assistance; and
- “(v) monitoring of activities under this title; or

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

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

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

“(j) INTEREST OR OTHER INCOME.—

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

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

“(3) INVESTMENT STANDARD.—Funds transferred under this title shall be managed by the Indian tribe using the prudent investment standard, provided that the Secretary shall not be liable for any investment losses of funds managed by the Indian tribe which are not otherwise guaranteed or insured by the Federal Government.

“(k) CARRYOVER OF FUNDS.—

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

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

“(l) LIMITATION OF COSTS.—

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

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

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

“(m) DISTRIBUTION OF FUNDS.—The Office of Self-Governance shall be responsible for distribution of all Bureau of Indian Affairs funds provided under this title unless otherwise agreed by the parties.

SEC. 410. FACILITATION.

“(a) IN GENERAL.—Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that facilitates—

- “(1) the inclusion of programs in funding agreements; and
- “(2) the implementation of funding agreements.

“(b) REGULATION WAIVER.—

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

“(2) DETERMINATION BY THE SECRETARY.—Not later than 120 days after receipt by the Secretary of a request under paragraph (1), the Secretary shall approve or deny the requested waiver in writing to the Indian tribe.

“(3) GROUND FOR DENIAL.—The Secretary may deny a request under paragraph (1)—

“(A) for a program eligible under sections 405(b)(1) and 405(b)(3) only upon a specific finding by the Secretary that the identified text in the regulation may not be waived because such a waiver is prohibited by Federal law; and

“(B) for a program eligible under section 405(b)(2), on a specific finding by the Secretary that the identified text in the regulation may not be waived because such a waiver is prohibited under Federal law.

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

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

“SEC. 411. DISCLAIMERS.

“Nothing in this title expands or alters any statutory authority of the Secretary so as to authorize the Secretary to enter into any agreement under section 405—

“(1) with respect to an inherent Federal function;

“(2) in a case in which the law establishing a program explicitly prohibits the type of participation sought by the Indian tribe (without regard to whether one or more Indian tribes are identified in the authorizing law); or

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

“SEC. 412. DISCRETIONARY APPLICATION OF OTHER SECTIONS.

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

“(b) EFFECT.—Each incorporated provision—

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

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

“(c) EFFECTIVE DATE.—If an Indian tribe requests incorporation at the negotiation stage of a compact or funding agreement, the incorporation—

“(1) shall be deemed effective immediately; and

“(2) shall control the negotiation and resulting compact and funding agreement.

“SEC. 413. FUNDING NEEDS.

“(a) REQUIREMENT OF ANNUAL BUDGET REQUEST.—

“(1) IN GENERAL.—The President shall identify in a report to accompany the annual budget request submitted to Congress under section 1105 of title 31, United States Code, all amounts necessary to fully fund all funding agreements entered into under this Act.

“(2) DUTY OF SECRETARY.—The Secretary shall identify in a report which accompanies each budget request the amount of funds that are sufficient for planning and negotiation grants and sufficient to cover any shortfall in funding identified under subsection (b).

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

“(b) PRESENT FUNDING; SHORTFALLS.—In each report identified in subsection (a), the Secretary shall identify the level of need presently funded and any shortfall in funding (including direct program costs, tribal shares, and contract support costs) for each Indian tribe, either directly by the Secretary, under self-determination contracts, or under compacts and funding agreements. The first report identified in subsection (a) shall be limited to the Bureau of Indian Affairs agency office and shall be due on February 1, 2012. The next report due on February 1, 2013, shall include all funding at the Bureau of Indian Affairs agency and regional offices. The next report due on February 1, 2014, and all subsequent reports, shall include all funding at the Bureau of Indian Affairs agency, regional, and central offices, the Office of the Assistant Secretary for Indian Affairs, and the Office of the Special Trustee.

“SEC. 414. REPORTS.

“(a) IN GENERAL.—

“(1) REQUIREMENT.—On February 1 of each year, the Secretary shall submit to Congress a report regarding the administration of this title.

“(2) ANALYSIS.—A report under paragraph (1) shall include a detailed analysis of tribal unmet need for each Indian tribe, whether the Indian tribe is served

directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this title.

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

“(b) CONTENTS.—The report under subsection (a)(1) shall—

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

“(2) identify—

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

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

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

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

“(E) amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of inherent Federal functions;

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

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

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

“(c) REPORT ON NON-BIA, NON-OST PROGRAMS.—

“(1) IN GENERAL.—In order to optimize opportunities for Indian tribes participating in self-governance under this title, the Secretary shall—

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

“(B) not later than January 1 of each year, submit to Congress—

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

“(ii) a list of all such programs for which Indian tribes have requested to include in a funding agreement under section 405(b)(2) or 405(b)(3), indicating whether each request was granted or denied, and stating the grounds for any denial.

“(2) PROGRAMMATIC TARGETS.—The Secretary shall establish programmatic targets, after consultation with Indian tribes participating in self-governance, to encourage bureaus of the Department to ensure that a significant portion of the programs identified in paragraph (1) are included in funding agreements.

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

“(4) ANNUAL REVIEW.—

“(A) IN GENERAL.—The Secretary shall annually review and publish in the Federal Register, after consultation with Indian tribes participating in self-governance, revised lists and programmatic targets.

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

“(d) REPORT ON CENTRAL OFFICE FUNDS.—Not later than February 1, 2012, the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs and the Office of the Special Trustee and the Office of the Assistant Secretary for Indian Affairs for inclusion in the compacts.

“SEC. 415. REGULATIONS.

“(a) IN GENERAL.—

“(1) PROMULGATION.—Not later than 90 days after the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2009, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out the amendments made by this title.

“(2) PUBLICATION OF PROPOSED REGULATIONS.—Proposed regulations to implement the amendments shall be published in the Federal Register not later than 18 months after the date of the enactment of this title.

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

“(b) COMMITTEE.—

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

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

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

“(d) EFFECT.—

“(1) REPEAL.—The Secretary is authorized to repeal any regulation inconsistent with the provisions of this Act.

“(2) CONFLICTING PROVISIONS.—The provisions of this title shall supersede any conflicting provisions of law (including any conflicting regulations).

“(3) EFFECTIVENESS WITHOUT REGARD TO REGULATIONS.—The lack of promulgated regulations on an issue shall not limit the effect or the implementation of this title.

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

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

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

“(2) regulations promulgated under section 415.

“SEC. 417. APPEALS.

“In any administrative appeal or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by a preponderance of the evidence—

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

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

“SEC. 418. AUTHORIZATION OF APPROPRIATIONS.

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

PURPOSE OF THE BILL

The purpose of H.R. 4347 is to amend the Indian Self-Determination and Education Assistance Act to provide further self-governance by Indian tribes, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Indian tribes and Alaska Native villages are “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. Tribal sovereignty predates the founding of the United States and the United States Constitution, and is the foundation from which the United States has continued its relationship with Indian tribes.

ISDEAA (P.L. 93-638)

After acknowledging the failure of policies attempting to assimilate Indians and terminating the government-to-government rela-

tionship between the United States and Indian tribes, the United States in the early 1960s began expressing a policy of self-determination for Indian tribes. This was further realized in 1975 when Congress enacted the Indian Self-Determination and Education Assistance Act. This Act authorized Indian tribes and Alaska Native villages to enter into contracts (often referred to as "638 contracts") with the Bureau of Indian Affairs (BIA) and the IHS to receive funds and manage individual programs heretofore managed by the agency. The Act did so while retaining the United States' trust responsibility to Indian tribes.

While the 638 contract program was seen as a good first step, it had several problems. Many long-time employees of the agencies were hesitant to give up authority, placing several obstacles in the way and requiring large amounts of paperwork from contracting Indian tribes. In addition, the program did not permit funds to be moved between programs to address unforeseen needs. The two biggest problems were attributed to the fact that the federal agency remained involved in many low-level decisions and that payments were made to the tribes on a cost-reimbursement basis.

1988 ISDEAA Amendments (P.L. 100-472)

In 1988, Congress enacted P.L. 100-472 establishing Title III of the ISDEAA, which authorized the Secretary of the Interior to negotiate self-governance compacts with 20 Indian tribes on a demonstration basis. For the first time, tribes were authorized to plan, administer, and consolidate programs and services that had always been administered by DOI. The programs compacted were those that were "otherwise available to Indian tribes or Indians." The new compacts provided for a single Annual Funding Agreement, which would guarantee funding in one grant instead of funds coming from multiple contracts. In addition, tribes had the authority to design the programs to best meet the needs of their members.

1991 ISDEAA Amendments (P.L. 102-184)

Continuing the program, in 1991, Congress enacted P.L. 102-184 to expand the Title III program as well as the number of Indian tribes eligible to enter into self-governance compacts with DOI. Further, the Act directed IHS to study the feasibility of allowing self-governance compacts for IHS programs.

In 1992, Congress amended section 314 of the Indian Health Care Improvement Act to authorize the Secretary of Health and Human Services to enter into self-governance compacts with Indian tribes pursuant to Title III of the ISDEAA.

1994 ISDEAA Amendments (P.L. 103-413)

Congress enacted P.L. 103-413 in 1994, establishing Title IV of the ISDEAA. Title IV made permanent the self-governance program within the BIA and directed the Secretary of the Interior to negotiate annual funding agreements with Indian tribes in a manner consistent with the federal trust responsibility. In response to DOI's failure to promulgate regulations to that date, the Act included negotiated rule-making between Indian tribes and DOI. Certain non-BIA programs were made eligible for compacting and the number of tribes eligible to participate in the self-governance program was again expanded.

2000 ISDEAA Amendments (P.L. 106-260)

In 2000, Congress enacted P.L. 106-260, which made the self-governance program within IHS permanent, and once again expanded the number of eligible tribes. It made several changes, such as adding definitions, identifying mandatory and prohibited terms and conditions of compacts, funding agreements, and construction projects, and requiring studies and reports. Several of these changes are included in H.R. 4347 in order to make the DOI self-governance program consistent with the IHS self-governance program.

Economic Development

In 2004, the Government Accountability Office (GAO) prepared a report on Indian economic development. As part of the report, GAO looked at the impact the self-governance program had on tribal economic development. Although GAO did not look for a direct causal relationship between the self-governance program and economic development, GAO noted that tribes that engaged in self-governance had greater gains in employment levels from 1990 to 2000 compared to tribes that participated less in the program. They also noted that self-governance tribes experienced positive growth in employment levels and per capita income.

Some tribal representatives have indicated that participation in the self-governance program provided other benefits, such as developing specific skills, which could be used in other tribal activities. Additionally, by having the ability to design their own programs, some tribes were able to exercise greater control and flexibility in the use of funds to set their own priorities.

H.R. 4347

H.R. 4347 would amend Title I and Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. § 450 *et seq.*). Title I authorizes and sets forth criteria for the contracting program within the Department of the Interior and the Department of Health and Human Services while Title IV authorizes and sets forth criteria for the self-governance program at the Department of the Interior (DOI).

Pursuant to the Title I self-determination contracting program, Indian tribes enter into contracts to perform certain functions and activities currently performed by the federal government. The programs eligible for contracting are limited to programs that are authorized under specified laws or that are for the benefit of Indian tribes. This bill would amend Title I to make technical changes and to allow tribes to become familiar with some aspects of self-governance without requiring them to enter into self-governance compacts and undertaking the broader array of activities and duties required under Title IV.

Similarly, Title IV authorizes Indian tribes to enter into self-governance compacts to perform whole programs, oftentimes several programs, which are currently performed by the federal government. Under both Title I and Title IV, the tribes act as if they are stepping into the shoes of the federal government when performing activities and administering programs. The Secretary of the Interior monitors the performance of trust functions and has the authority to reassume the activity or program in certain situations.

Finally, this bill would amend Title IV to make the self-governance program at DOI consistent with Title V, which authorizes and sets forth criteria for the self-governance program at the Indian Health Service (IHS).

COMMITTEE ACTION

H.R. 4347 was introduced on December 16, 2009, by Rep. Dan Boren (D-OK), cosponsored by Rep. Tim Walz (D-MN). The bill was referred to the Committee on Natural Resources. On June 9, 2010, the Committee held a hearing on this legislation.

On July 22, 2010, the Committee met to consider the bill. Rep. Boren offered an amendment in the nature of a substitute that would address the major concerns identified by DOI in their testimony at the June 9, 2010 hearing. The amendment in the nature of a substitute was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives by voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; Table of Contents

Section 1 provides that this Act may be cited as the “Department of the Interior Tribal Self-Governance Act of 2010,” and provides the table of contents.

Title I—Indian Self-Determination

Section 101. Definitions; reporting and audit requirements; application of provisions

Section 101 amends the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. 450) to include the definition of “self-determination contract.” This section also revises the provision to say that: (1) no contract shall be considered to be a procurement contract, and (2) no contract shall be subject to any federal procurement law, including regulations. Construction contracts under Section 105(a)(3) are excepted because that provision allows the parties to agree to make certain procurement provisions applicable. The section further provides that certain sections of ISDEAA and the Department of the Interior and Related Agencies Appropriations Act, 1991 (Public Law 101-512) apply to certain compacts and Funding Agreements (FAs). The Committee’s intent is to conform Title IV administration and authority to existing practice under a similar provision in Title V adopted by Congress in 2000.

Section 102. Contracts by the Secretary of the Interior

Section 102 amends the ISDEAA to simplify a reference to the Indian Financing Act of 1974. This section also sets forth a “preponderance of the evidence” standard, and would require that decisions be consistent with the provisions and policies of ISDEAA. The section strikes existing language that requires that decisions that constitute final agency action and relate to an appeal of a refusal of request to contract be made either by a certain level of official within the Department of the Interior (DOI) or the Department of Health and Human Services or by an administrative judge. In addi-

tion, this section requires the Secretary of the Interior (Secretary) to negotiate compacts and FAs in good faith.

Section 103. Administrative provisions

Section 103 makes a minor correction to Section 105 of ISDEAA by substituting a reference to Sections 102 and 103 (as opposed to 450f and 450h of Title 25). The section also provides an Indian tribe meeting certain requirements with the opportunity to redesign or consolidate certain programs, services, functions, and activities. Further, this section would require the Secretary to interpret all federal laws and Executive Orders in a manner that benefits tribes and facilitates inclusion of programs, functions, services, and activities (PFSA) in self-determination contracts and FAs; implementation of self-determination contracts and FAs; and achievement of tribal objectives.

Section 104. Contract funding and indirect costs

Section 104 adds a category of expenses that are eligible costs for the purposes of receiving funding and would codify a recent decision by the Office of Management and Budget and DOI on documentation requirements. Under the change, eligible costs would include not less than 50% of the expenses incurred by the governing body of a tribe or tribal organization relating to a PFSA pursuant to the contract, or, in the case of a tribe or tribal organization which derives all or substantially all of its program revenue from other governments or organizations, not less than 100% of such expenses. Furthermore, such expenses of a tribal governing body shall be treated as reasonable and allowable without burdensome documentation requirements, because they are presumed to be related to the administration of federal responsibilities assumed by the tribal governing body.

Section 105. Contract or grant specifications

Section 105 clarifies that provisions in the model statutory agreement allowing the parties to agree to additional contract and FA terms do not make inapplicable the provisions in Section 102 of ISDEAA requiring proposals and declinations.

Title II—Tribal Self-Governance

Section 201. Tribal self-governance.

Section 201 amends ISDEAA to include a revised Title IV—Tribal Self-Governance.

Title IV—Tribal Self-Governance

Section 401. Definitions

Section 401 provides definitions for key terms included in this title.

Section 402. Establishment

Section 402 directs the Secretary to establish the Tribal Self-Governance Program (Program).

Section 403. Selection of participating Indian tribes

Section 403 sets forth the terms of eligibility for participation in self-governance. An otherwise ineligible tribal organization is eligible to participate in self-governance as a single entity upon each tribe's request when at least one member tribe is eligible. It also sets forth procedures for a tribe to withdraw from a tribal organization, in whole or in part, as well as provisions for distributing funds to a withdrawing tribe. To be eligible to participate in self-governance, a tribe must successfully complete a planning phase; request participation in self-governance by resolution or other official action by the tribal governing body; and demonstrate, for the previous three fiscal years, financial stability and financial management capability as evidenced by the tribe having no uncorrected significant and material audit exceptions in the required annual audit of its agreements with any federal agency. Tribes are eligible to receive grants for planning to participate, or negotiating the terms of participation, in the Program.

Section 404. Compacts

Section 404 directs the Secretary to negotiate and enter into a written compact with tribes participating in the Program. Tribes may retain existing compacts, in whole or in part, or negotiate new compacts.

Section 405. Funding agreements

Section 405 directs the Secretary to negotiate and enter into a FA with the governing body of an Indian tribe or tribal organization. It clarifies that a FA authorizes a tribe, at its option, to plan, conduct, consolidate, administer and receive full tribal share funding for all PFSAs of the Bureau of Indian Affairs (BIA), the Office of the Assistant Secretary for Indian Affairs (AS-IA), and the Office of the Special Trustee (OST). A FA may include PFSAs administered by the Secretary that are of special geographic, historical, or cultural significance to the tribe. However, for discretionary programs of special significance, the Secretary has discretion with respect to reallocation and consolidation, reassumption, terms and conditions regarding construction, and applicable regulations. In addition, this section provides the Secretary the discretion to reassume any program and associated funding upon certain findings.

The section also provides that a FA shall authorize a tribe, at its option, to plan, conduct, consolidate, administer, and receive full tribal share funding for any program administered by DOI other than through the BIA, AS-IA, and OST, that is otherwise available to tribes or Indians under Section 102 of ISDEAA. With regard to discretionary programs of special significance, nothing in this section overrides the requirement in a FA for competitive bidding or bars the inclusion in a FA of a program where tribes have an interest. A tribe has discretion to include in its FA, with respect to BIA, AS-IA, OST, and programs otherwise available, a provision for a stable budget specifying recurring funds. For discretionary programs of special significance, a FA may provide for a stable base budget upon agreement by the Secretary. Absent tribal consent, the Secretary cannot amend the terms of a FA. This section also provides tribes with existing FAs more options with respect to subsequent FAs and negotiating multi-year FAs.

Section 406. General provisions

Section 406 provides that a tribe include in its FA or compact internal measures to address conflicts of interest. In addition, the Single Agency Audit Act applies to FAs and a tribe must comply with applicable Office of Management and Budget cost principles. This section gives tribes discretion to redesign and consolidate programs or reallocate funds so long as neither denies services to eligible Indians. With respect to discretionary programs of special significance, however, reallocation, consolidation, and redesign are only allowed when the Secretary and the tribe enter into a joint agreement. Tribal records are not subject to the Administrative Procedures Act, unless a tribe specifies otherwise in a FA or a compact. A tribe must provide the Secretary with reasonable access to its records with at least 30 days notice.

Section 407. Provisions related to the Secretary

Section 407 provides that a FA include a provision to monitor the performance of trust functions by the Indian tribe. A compact or a FA shall include provisions for the Secretary to reassume a program and associated funding upon certain findings. It requires the Secretary to provide notice, a hearing, and an opportunity for a tribe to take corrective action before reassuming a program. The Secretary must make a specific finding of imminent jeopardy to a trust asset, natural resources, or public health and safety; or gross mismanagement (under a preponderance of the evidence standard), to reassume a program and associated funding. However, there are circumstances under which the Secretary may, on written notice to the tribe, immediately reassume operation of a program.

This section further provides that if the Secretary and a participating Indian tribe are unable to agree on the terms of a compact or funding agreement, the Indian tribe may submit a final offer to the Secretary. It further provides the Secretary's criteria and procedures for considering a tribe's final offer. The Secretary bears the burden to prove by a preponderance of the evidence the validity of the grounds for rejecting a final offer or reassuming a program.

In addition, this section provides that the Secretary shall negotiate in good faith and may not waive, modify, or diminish the trust responsibility. Further, the Secretary must make savings available to a tribe for the provision of additional services to tribal beneficiaries. Finally, Section 407 requires that Title IV compacts and FAs be construed for the benefit of tribes and any ambiguities be resolved in favor of tribes.

Section 408. Construction programs and projects

Section 408 provides that Indian tribes participating in tribal self-governance may carry out construction projects under Title IV and sets forth the responsibilities and procedures of tribes undertaking these construction projects. Tribes may, subject to the Secretary's agreement, choose to carry out certain federal responsibilities under the National Environmental Policy Act, the National Historic Preservation Act, and related federal laws that are applicable if the Secretary undertakes a construction project. Further, tribes must adhere to building codes and standards in carrying out a construction project, and must be accountable for successful completion of a project. This section provides that funding for construc-

tion projects must be included in FAs as annual or semi-annual advance payments. Section 408 provides the Secretary with at least one opportunity to review and approve a tribe's project planning and design documents. Finally, federal laws pertaining to procurement do not apply to a construction program or project absent tribal consent.

Section 409. Payment

Section 409 authorizes multi-year FAs. It directs the Secretary to transfer tribal shares and resources to a tribe in a timely fashion. The Secretary may not reduce funding from year to year unless one of five narrowly defined exceptions applies. A tribe may carry over funding, interest, or income from year to year without diminishing its future entitlements. A tribe need not continue to perform a compact or a FA with insufficient funds and may suspend its performance (after providing reasonable notice of such insufficiency to the Secretary) until funds are adequate.

Section 410. Facilitation

Section 410 requires the Secretary to interpret federal laws in a manner that facilitates the implementation of, and the inclusion of programs in, FAs. It provides that an Indian tribe may submit a written request for a waiver of federal regulations to the Secretary. The Secretary must approve a tribe's request for a waiver if the waiver is not prohibited by statute. In addition, if the request is not approved or denied within 120 days, the waiver request is deemed approved.

Section 411. Disclaimers

Section 411 provides that Title IV neither expands nor alters the Secretary's statutory authority to enter into any FA with respect to an inherent federal function, in instances where a statute prohibits a tribe's participation in a program, or when the FA would limit or reduce services, contracts, or funds that any other tribe is eligible to receive under federal law.

Section 412. Discretionary application of other sections

Section 412 provides a tribe with the discretion to incorporate any provision of Title I into a compact or a FA.

Section 413. Funding needs

Section 413 requires the President to identify in a report to accompany the annual budget request submitted to Congress all amounts necessary to fully fund all FAs entered into under this Act. In addition, the Secretary shall identify in a report accompanying each budget request the amount of funds that are sufficient for planning and negotiation grants and sufficient to cover any shortfall in certain funding including direct program costs, tribal shares, and contract support costs.

Section 414. Reports

Section 414 requires the Secretary to submit an annual report to Congress regarding the administration of Title IV. This report is to include an analysis of unmet tribal needs, whether the tribe is served directly by the Secretary or under compacts and funding

agreements. In addition, the Secretary may not impose any reporting requirements on participating tribes other than those provided for in Title IV. It provides that the reports be compiled from certain documents and identifies particular areas of interest. It further requires that reports include a description of methodologies used to determine individual tribal shares. Reports must be distributed to tribes for comment prior to submission.

This section also requires the Secretary to submit an annual report to Congress on non-BIA and non-OST programs. Section 414 requires that the Secretary, in consultation with tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of BIA, OST, and AS-IA for inclusion in compacts. The Committee intends this requirement to reverse a trend in recent years in which the Department has removed PFSAs from negotiation into tribal shares by unilaterally shifting them to offices and administrative levels under reorganization plans that purport to put them out of reach of tribal negotiation.

Section 415. Regulations

Section 415 requires negotiated rulemaking and the publication of proposed implementing regulations in the Federal Register. It sets forth the membership criteria for the negotiated rulemaking committee. This section further authorizes the Secretary to repeal any regulation inconsistent with the provisions of this Act. Finally, it provides that the lack of promulgated regulations shall not limit the effect or implementation of this title. The Committee intends the negotiated rulemaking to be conducted only with tribal government representatives, consistent with the unique government-to-government relationship between tribes and the United States.

Section 416. Effect of circulars, policies, manuals, guidance, and rules

Section 416 provides that except for the eligibility provisions of section 105(g) and regulations of section 415 of the ISDEAA, a tribe is not subject to any agency circular, policy, manual, or guidance absent the tribe's consent.

Section 417. Appeals

Section 417 provides that the Secretary has the burden to prove by a preponderance of the evidence the validity of grounds for his decisions, as well as their consistency with Title IV requirements and policies.

Section 418. Authorization of appropriations

Section 418 authorizes the appropriation of such sums as may be necessary to carry out Title IV.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural 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 this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) 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 this bill. However, clause 3(d)(3)(B) 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 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend the Indian Self-Determination and Education Assistance Act to provide further self-governance by Indian tribes, and for other purposes.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII 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:

H.R. 4347—Department of the Interior Tribal Self-Governance Act of 2010

Summary: H.R. 4347 would amend certain provisions of the Indian Self-Determination and Education Assistance Act related to the Tribal Self-Governance Program. That program authorizes Indian tribes to assume responsibilities for certain programs, functions, and services or activities that would otherwise be carried out by the federal government. Based on information from the Department of the Interior (DOI), CBO estimates that implementing the legislation would cost \$5 million over the 2011–2015 period. Enacting H.R. 4347 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4347 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 4347 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars—					
	2011	2012	2013	2014	2015	2011–2015
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	1	1	1	1	1	5

	By fiscal year, in millions of dollars—					
	2011	2012	2013	2014	2015	2011–2015
Estimated Outlays	1	1	1	1	1	5

Basis of estimate: For this estimate, CBO assumes that the legislation will be enacted near the end of 2010 and that the necessary amounts will be appropriated for each fiscal year.

H.R. 4347 would amend current law related to DOI's Tribal Self-Governance Program. The bill would modify eligibility requirements for tribes participating in the program and would establish new guidelines for administering the program. Based on information provided by DOI, CBO expects that implementing the legislation would increase the agency's administrative responsibilities because more tribes would participate in the self-governance program and the agency would be subject to new requirements. Assuming appropriation of the necessary amounts, CBO estimates that implementing the legislation would cost \$1 million a year over the 2011–2015 period. DOI would use those funds to hire additional staff and to make technical upgrades to computer equipment to carry out the administrative activities required under the bill.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: H.R. 4347 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments. Many of the changes made by this legislation would benefit the tribes that participate in self-governance compacts with the Department of the Interior.

Estimate prepared by: Federal Costs: Jeff LaFave; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Marin Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

EARMARK STATEMENT

H.R. 4347 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) 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 AND EDUCATION
ASSISTANCE ACT**

* * * * *

SEC. 4. For purposes of this Act, the term—

(a) * * *

* * * * *

[(j) “self-determination contract” means a contract (or grant or cooperative agreement utilized under section 9 of this Act) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided the last proviso in section 105(a) of this Act, no contract (or grant or cooperative agreement utilized under section 9 of this Act) entered into under title I of this Act shall be construed to be a procurement contract;]

(j) “self-determination contract” means a contract entered into (or a grant or cooperative agreement used under section 9) under title I between a tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services that are otherwise provided to Indian tribes and members of Indian tribes pursuant to Federal law, subject to the condition that, except as provided in section 105(a)(3), no contract entered into (or grant or cooperative agreement used under section 9) under title I shall be—

(1) considered to be a procurement contract; or

(2) subject to any Federal procurement law (including regulations);

* * * * *

REPORTING AND AUDIT REQUIREMENTS

SEC. 5. (a) * * *

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years [after completion of the project or undertaking referred to in the preceding subsection of this section] *after the date on which a report is submitted to the Secretary under subsection (a)*, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

* * * * *

TITLE I—INDIAN SELF-DETERMINATION ACT

* * * * *

CONTRACTS BY THE SECRETARY OF THE INTERIOR

SEC. 102. (a) * * *

* * * * *

(c)(1) * * *

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned [economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451 et seq.), except that] *economic enterprises (as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452))*, *except that*, for the purposes of this subsection, such enterprises may include non-profit corporations.

* * * * *

[(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).

[(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) shall be made either—

[(A) 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 (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

[(B) by an administrative judge.]

(e) *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 a preponderance of the evidence—*

(1) *the validity of the grounds for the decision made; and*
 (2) *that the decision is fully consistent with the provisions and policies of this title.*

(f) *GOOD FAITH REQUIREMENT.—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, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000 (Public Law 106-260; 25 U.S.C. 458aaa note).*

* * * * *

ADMINISTRATIVE PROVISIONS

SEC. 105. (a) * * *

(b) Payments of any grants or under any contracts [pursuant to Sections 102 and 103 of this Act] *pursuant to sections 102 and 103* may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United

States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

* * * * *

[(j) Upon providing notice to the Secretary, a tribal organization that carries out a nonconstruction self-determination contract may propose a redesign of a program, activity, function, or service carried out by the tribal organization under the contract, including any nonstatutory program standard, in such manner as to best meet the local geographic, demographic, economic, cultural, health, and institutional needs of the Indian people and tribes served under the contract. The Secretary shall evaluate any proposal to redesign any program, activity, function, or service provided under the contract. With respect to declining to approve a redesigned program, activity, function, or service under this subsection, the Secretary shall apply the criteria and procedures set forth in section 102.]

(j) REDESIGN AND CONSOLIDATION.—If an Indian tribe can demonstrate, for the previous three fiscal years, the financial stability and financial management capability as evidenced by the Indian tribe having no material audit exceptions in the required annual audit of the self-determination contracts of the Indian tribe, then the Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under this title and reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) that are eligible to be included in Consolidated Tribal Government Programs in any manner that the Indian tribe determines 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 under applicable Federal law.

* * * * *

(p) INTERPRETATION BY SECRETARY.—Except as otherwise provided by law, the Secretary shall interpret all Federal laws (including regulations) and Executive orders in a manner that facilitates, to the maximum extent practicable—

(1) the inclusion in self-determination contracts and funding agreements of—

(A) applicable programs, services, functions, and activities (or portions thereof); and

(B) funds associated with those programs, services, functions, and activities;

(2) the implementation of self-determination contracts and funding agreements; and

(3) the achievement of tribal health objectives.

SEC. 106. (a)(1) * * *

* * * * *

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs

of reimbursing each tribal contractor for reasonable and allowable costs of—

- (i) direct program expenses for the operation of the Federal program that is the subject of the contract[, and];
- (ii) any additional administrative or other [expense related to the overhead incurred] *expenses incurred by the governing body of the Indian tribe or tribal organization and overhead incurred* by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract[,]; and
- (iii) *not less than 50 percent of the expenses incurred by the governing body of a Indian tribe or tribal organization relating to a Federal program, function, service, or activity pursuant to the contract (which expenses shall be considered to be reasonable and allowable without documentation for the purpose of this paragraph), except that in the case of a Indian tribe or tribal organization which derives all or substantially all of its program revenue from other governments or organizations, not less than 100 percent of such expenses shall be considered to be reasonable and allowable without documentation.*

* * * * *

SEC. 108. CONTRACT OR GRANT SPECIFICATIONS.

(a) Each self-determination contract entered into under this Act shall—

(1) * * *

(2) *subject to subsections (a) and (b) of section 102*, contain such other provisions as are agreed to by the parties.

* * * * *

(c) The model agreement referred to in subsection (a)(1) reads as follows:

“SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.

“(a) * * *

* * * * *

“(f) ATTACHMENTS.—

“(1) * * *

“(2) ANNUAL FUNDING AGREEMENT.—

“(A) IN GENERAL.—The annual funding agreement under this Contract shall only contain—

“(i) * * *

“(ii) *subject to subsections (a) and (b) of section 102 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f)*, such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

* * * * *

[TITLE IV—TRIBAL SELF-GOVERNANCE

[SEC. 401. ESTABLISHMENT.

[(The Secretary of the Interior (hereinafter in this title referred to as the “Secretary”) shall establish and carry out a program within the Department of the Interior to be known as Tribal Self-Governance (hereinafter in this title referred to as “Self-Governance”) in accordance with this title.

[SEC. 402. SELECTION OF PARTICIPATING INDIAN TRIBES.

[(a) **CONTINUING PARTICIPATION.**—Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project at the Department of the Interior under title III on the date of enactment of this title shall thereafter participate in Self-Governance under this title and cease participation in the Tribal Self-Governance Demonstration Project under title III with respect to the Department of the Interior.

[(b) **ADDITIONAL PARTICIPANTS.**—(1) In addition to those Indian tribes participating in self-governance under subsection (a) of this section, the Secretary, acting through the Director of the Office of Self-Governance, may select up to 50 new tribes per year from the applicant pool described in subsection (c) of this section to participate in self-governance.

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

[(c) **APPLICANT POOL.**—The qualified applicant pool for Self-Governance shall consist of each 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 tribal governing body; and

[(3) has demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by the tribe having no material audit exceptions in the required annual audit of the self-determination contracts of the tribe.

[(d) **PLANNING PHASE.**—Each Indian tribe seeking to begin participation in Self-Governance shall complete a planning phase in accordance with this subsection. The tribe shall be eligible for a grant to plan and negotiate participation in Self-Governance. The planning phase shall include—

[(1) legal and budgetary research; and

[(2) internal tribal government planning and organizational preparation.

[SEC. 403. FUNDING AGREEMENTS.

[(a) **AUTHORIZATION.**—The Secretary shall negotiate and enter into an annual written funding agreement with the governing body of each participating tribal government in a manner consistent with the Federal Government’s laws and trust relationship to and responsibility for the Indian people.

[(b) **CONTENTS.**—Each funding agreement shall—

[(1) authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the 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 in accordance with subsection (g)(3), and including any program, service, function, and activity, or portion thereof, administered under the authority of—

- [(A) the Act of April 16, 1934 (25 U.S.C. 452 et seq.);
- [(B) the Act of November 2, 1921 (25 U.S.C. 13); and
- [(C) programs, services, functions, and activities or portions thereof administered by the Secretary of the Interior that are otherwise available to Indian tribes or Indians for which appropriations are made to agencies other than the Department of the Interior;

[(2) subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, that are otherwise available to Indian tribes or Indians, as identified in section 405(c), except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law;

[(3) subject to the terms of the agreement, authorize the tribe to redesign or consolidate programs, services, functions, and activities, or portions thereof, and reallocate funds for such programs, services, functions, and activities, or portions thereof, except that, with respect to the reallocation, consolidation, and redesign of programs described in paragraph (2), a joint agreement between the Secretary and the tribe shall be required;

[(4) prohibit the inclusion of funds provided—

- [(A) pursuant to the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.);

[(B) for elementary and secondary schools under the formula developed pursuant to section 1128 of the Education Amendments of 1978 (25 U.S.C. 2008); and

[(C) the Flathead Agency Irrigation Division or the Flathead Agency Power Division, except that nothing in this section shall affect the contract authority of such divisions under section 102;

[(5) specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretary pursuant to the agreement;

[(6) authorize the tribe and the Secretary to reallocate funds or modify budget allocations within any year, and specify the procedures to be used;

[(7) allow for retrocession of programs or portions of programs pursuant to section 105(e);

[(8) provide that, for the year for which, and to the extent to which, funding is provided to a tribe under this section, the tribe—

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

[(B) shall be responsible for the administration of programs, services, functions, and activities pursuant to agreements entered into under this section; and

[(9) prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, and other laws.

[(c) ADDITIONAL ACTIVITIES.—Each funding agreement negotiated pursuant to subsections (a) and (b) may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.

[(d) PROVISIONS RELATING TO THE SECRETARY.—Funding agreements negotiated between the Secretary and an Indian tribe shall include provisions—

[(1) to monitor the performance of trust functions by the tribe through the annual trust evaluation, and

[(2) for the Secretary to reassume a program, service, function, or activity, or portions thereof, if there is a finding of imminent jeopardy to a physical trust asset, natural resources, or public health and safety.

[(e) CONSTRUCTION PROJECTS.—(1) Regarding construction programs or projects, the Secretary and Indian tribes may negotiate for the inclusion of specific provisions of the Office of Federal Procurement and Policy Act and Federal acquisition regulations in any funding agreement entered into under this Act. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply.

[(2) In all construction projects performed pursuant to this title, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements.

[(f) SUBMISSION FOR REVIEW.—Not later than 90 days before the proposed effective date of an agreement entered into under this section, the Secretary shall submit a copy of such agreement to—

[(1) each Indian tribe that is served by the Agency that is serving the tribe that is a party to the funding agreement;

[(2) the Committee on Indian Affairs of the Senate; and

[(3) the Subcommittee on Native American Affairs of the Committee on Natural Resources of the House of Representatives.

[(g) PAYMENT.—(1) At the request of the governing body of the tribe and under the terms of an agreement entered into under this section, the Secretary shall provide funding to the tribe to carry out the agreement.

[(2) The funding agreements authorized by this title and title III of this Act shall provide for advance payments to the tribes in the form of annual or semi-annual installments at the discretion of the tribes.

[(3) Subject to paragraph (4) of this subsection and paragraphs (1) through (3) of subsection (b), the Secretary shall provide funds to the tribe under an agreement under this title for programs, services, functions, and activities, or portions thereof, in an amount equal to the amount that the tribe would have been eligible to receive under contracts and grants under this Act, including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the tribe or its members, without regard to the organization level within the Department where such functions are carried out.

[(4) Funds for trust services to individual Indians shall be available under an agreement entered into under this section only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the tribe.

[(h) CIVIL ACTIONS.—(1) Except as provided in paragraph (2), for the purposes of section 110, the term “contract” shall include agreements entered into under this title.

[(2) For the period that an agreement entered into under this title is in effect, the provisions of section 2103 of the Revised Statutes of the United States (25 U.S.C. 81), section 16 of the Act of June 18, 1934 (25 U.S.C. 476), and the Act of July 3, 1952 (25 U.S.C. 82a), shall not apply to attorney and other professional contracts by Indian tribal governments participating in Self-Governance under this title.

[(i) FACILITATION.—(1) Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that will facilitate—

[(A) the inclusion of programs, services, functions, and activities in the agreements entered into under this section; and

[(B) the implementation of agreements entered into under this section.

[(2)(A) A tribe may submit a written request for a waiver to the Secretary identifying the regulation sought to be waived and the basis for the request.

[(B) Not later than 60 days after receipt by the Secretary of a written request by a tribe to waive application of a Federal regulation for an agreement entered into under this section, the Secretary shall either approve or deny the requested waiver in writing to the tribe. 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. The Secretary’s decision shall be final for the Department.

[(j) FUNDS.—All funds provided under funding agreements entered into pursuant to this Act, and all funds provided under contracts or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching requirements under any other Federal law.

[(k) DISCLAIMER.—Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under sections 403(b)(2) and 405(c)(1) with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe: *Provided*, however an Indian tribe or tribes

need not be identified in the authorizing statute in order for a program or element of a program to be included in a compact under section 403(b)(2).

[(I) INCORPORATE SELF-DETERMINATION PROVISIONS.—At the option of a participating tribe or tribes, any or all provisions of title I of this Act shall be made part of an agreement entered into under title III of this Act or this title. The Secretary is obligated to include such provisions at the option of the participating tribe or tribes. If such provision is incorporated it shall have the same force and effect as if set out in full in title III or this title.

[SEC. 404. BUDGET REQUEST.]

[(The Secretary shall identify, in the annual budget request of the President to the Congress under section 1105 of title 31, United States Code, any funds proposed to be included in agreements authorized under this title.)]

[SEC. 405. REPORTS.]

[(a) REQUIREMENT.—The Secretary shall submit to Congress a written report on January 1 of each year following the date of enactment of this title regarding the administration of this title.]

[(b) CONTENTS.—The report 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 tribes and their members;

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

[(4) include the separate views of the tribes; and

[(5) include the funding formula for individual tribal shares of Central Office funds, together with the comments of affected Indian tribes, developed under subsection (d).]

[(c) REPORT ON NON-BIA PROGRAMS.—(1) In order to optimize opportunities for including non-Bureau of Indian Affairs programs, services, functions, and activities, or portions thereof, in agreements with tribes participating in Self-Governance under this title, the Secretary shall—]

[(A) review all programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, without regard to the agency or office concerned; and

[(B) not later than 90 days after the date of enactment of this title, provide to the appropriate committees of Congress a listing of all such programs, services, functions, and activities, or portions thereof, that the Secretary determines, with the concurrence of tribes participating in Self-Governance under this title, are eligible for inclusion in such agreements at the request of a participating Indian tribe.]

[(2) The Secretary shall establish programmatic targets, after consultation with tribes participating in Self-Governance under this title, to encourage bureaus of the Department to assure that a significant portion of such programs, services, functions, and ac-

tivities are actually included in the agreements negotiated under section 403.

[(3) The listing and targets under paragraphs (1) and (2) shall be published in the Federal Register and be made available to any Indian tribe participating in Self-Governance under this title. The list shall be published before January 1, 1995, and annually thereafter by January 1 preceding the fiscal year in which the targets are to be met.

[(4) Thereafter, the Secretary shall annually review and publish in the Federal Register, after consultation with tribes participating in Self-Governance under this title, a revised listing and programmatic targets.

[(d) REPORT ON CENTRAL OFFICE FUNDS.—Within 90 days after the date of the enactment of this title, the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs for inclusion in the Self-Governance compacts. The Secretary shall include such formula in the annual report submitted to the Congress under subsection (b), together with the views of the affected Indian tribes.

[SEC. 406. DISCLAIMERS.

[(a) OTHER SERVICES, CONTRACTS, AND FUNDS.—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.

[(b) FEDERAL TRUST RESPONSIBILITIES.—Nothing in this Act shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments.

[(c) APPLICATION OF OTHER SECTIONS OF ACT.—All provisions of sections 6, 102(c), 104, 105(f), 110, and 111 of this Act shall apply to agreements provided under this title.

[SEC. 407. REGULATIONS.

[(a) IN GENERAL.—Not later than 90 days after the date of enactment of this title, at the request of a majority of the Indian tribes with agreements under 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.

[(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 representatives of Indian tribes with agreements under this title.

[(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 the Indian tribes.

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

[SEC. 408. AUTHORIZATION OF APPROPRIATIONS.

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

TITLE IV—TRIBAL SELF-GOVERNANCE

SEC. 401. DEFINITIONS.

In this title:

(1) **COMPACT.**—The term “compact” means a self-governance compact entered into under section 404.

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

(3) **DEPARTMENT.**—The term “Department” means the Department of the Interior.

(4) **FUNDING AGREEMENT.**—The term “funding agreement” means a funding agreement entered into under section 405.

(5) **GROSS MISMANAGEMENT.**—The term “gross mismanagement” means a significant violation, shown by a preponderance of the evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds—

(A) for a program administered by an Indian tribe; or

(B) under a compact or funding agreement that results in a significant reduction of funds available for the programs assumed by an Indian tribe.

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

(7) **INHERENT FEDERAL FUNCTION.**—The term “inherent Federal function” means a Federal function that may not legally be delegated to an Indian tribe.

(8) **SECRETARY.**—The term “Secretary” means the Secretary of the Interior.

(9) **SELF-GOVERNANCE.**—The term “self-governance” means the program of self-governance established under section 402.

(10) **TRIBAL SHARE.**—The term “tribal share” means an Indian tribe’s portion of all funds and resources that support any program within the Bureau of Indian Affairs, the Office of Special Trustee, and the Office of the Assistant Secretary for Indian Affairs and that are not required by the Secretary for the performance of an inherent Federal function.

SEC. 402. ESTABLISHMENT.

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

SEC. 403. SELECTION OF PARTICIPATING INDIAN TRIBES.

(a) **IN GENERAL.**—

(1) **PARTICIPANTS.**—

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

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

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

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

(A) each Indian tribe so requests; and

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

(4) TRIBAL WITHDRAWAL FROM A TRIBAL ORGANIZATION.—

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

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

(C) PARTICIPATION IN SELF-GOVERNANCE.—The withdrawal of an Indian tribe from a tribal organization shall not affect the eligibility of the tribal organization to participate in self-governance on behalf of one or more other Indian tribes provided that the tribal organization still qualifies under subsection (b).

(D) WITHDRAWAL PROCESS.—

(i) IN GENERAL.—An Indian tribe may, by tribal resolution, fully or partially withdraw its tribal share of any program in a funding agreement from a participating tribal organization. The Indian tribe shall provide a copy of the tribal resolution to the Secretary.

(ii) EFFECTIVE DATE.—

(I) IN GENERAL.—A withdrawal under clause (i) shall become effective on the date specified in the tribal resolution and that is mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the tribal organization that signed the compact and funding agreement on behalf of the withdrawing Indian tribe or tribal organization.

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

(aa) the earlier of—

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

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

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

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

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

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

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

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

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

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

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

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

(3) demonstrate, for the 3 fiscal years preceding the date on which the Indian tribe requests participation, financial stability and financial management capability as evidenced by the In-

dian tribe having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency.

(c) PLANNING PHASE.—

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

(2) ACTIVITIES.—The planning phase—

- (A) shall be conducted to the satisfaction of the Indian tribe; and*
- (B) shall include—*
 - (i) legal and budgetary research; and*
 - (ii) internal tribal government planning and organizational preparation.*

(d) GRANTS.—

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

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

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

SEC. 404. COMPACTS.

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

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

- (1) specify and affirm the general terms of the government-to-government relationship between the Indian tribe and the Secretary; and*
- (2) include such terms as the parties intend shall control during the term of the compact.*

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

(d) EFFECTIVE DATE.—The effective date of a compact under subsection (a) shall be—

- (1) the date of the execution of the compact by the parties; or*
- (2) another date agreed upon by the parties.*

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

(f) EXISTING COMPACTS.—An Indian tribe participating in self-governance under this title, as in effect on the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2010, shall have the option at any time after that date—

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

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

SEC. 405. FUNDING AGREEMENTS.

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

(b) **INCLUDED PROGRAMS.**—

(1) **BUREAU OF INDIAN AFFAIRS AND OFFICE OF SPECIAL TRUSTEE.**—

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

- (i) are provided for in the Act of April 16, 1934 (25 U.S.C. 452 et seq.);
- (ii) the Secretary administers for the benefit of Indians under the Act of November 2, 1921 (25 U.S.C. 13), or any subsequent Act;
- (iii) the Secretary administers for the benefit of Indians with appropriations made to agencies other than the Department of the Interior; or
- (iv) are provided for the benefit of Indians because of their status as Indians.

(B) **INCLUSIONS.**—Programs described in subparagraph

(A) shall include all programs with respect to which Indian tribes or Indians are primary or significant beneficiaries.

(2) **DISCRETIONARY PROGRAMS OF SPECIAL SIGNIFICANCE.**—A funding agreement under subsection (a) may, in accordance with such additional terms as the parties consider to be appropriate, include programs, services, functions, and activities (or portions thereof), administered by the Secretary, in addition to programs described in paragraphs (1) and (3), that are of special geographic, historical, or cultural significance to the Indian tribe. Such agreements, including the additional terms, shall be governed by the provisions of this title, except that, subject to the discretion of the Secretary—

(A) the Indian tribe may have reallocation, consolidation, and redesign authority over any program assumed under this paragraph (2);

(B) the Secretary may reassume any program and associated funding assumed under this paragraph (2) upon a specific finding by the Secretary of a gross violation by the Indian tribe of the terms of the funding agreement;

(C) the Secretary may require special terms and conditions regarding a construction program or project assumed

under this paragraph (2) notwithstanding the provisions of section 408;

(D) all Federal regulations that otherwise govern the operation of any program assumed under this paragraph (2) apply to the Indian tribe unless a specific regulation is waived by the Secretary under the procedures set forth in section 410(b)(2), which waiver request may be denied upon a specific finding by the Secretary that the waiver is prohibited by Federal law or is inconsistent with the express provisions of the funding agreement; and

(E) a stable base budget, as described in paragraph (7), may be provided for any program assumed under this paragraph (2).

(3) PROGRAMS OTHERWISE AVAILABLE.—A funding agreement shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for any program administered by the Department of the Interior other than through the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, or the Office of the Special Trustee, that is otherwise available to Indian tribes or Indians under section 102 of this Act.

(4) COMPETITIVE BIDDING.—Nothing in this section—

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

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

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

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

(B) is provided for elementary and secondary schools under the formula developed under section 1127 of the Education Amendments of 1978 (25 U.S.C. 2007).

(6) SERVICES, FUNCTIONS, AND RESPONSIBILITIES.—A funding agreement shall specify—

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

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

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

(7) BASE BUDGET.—A funding agreement pursuant to subsections (b)(1) and (b)(3) shall, at the option of the Indian tribe, provide for a stable base budget specifying the recurring funds (including funds available under section 106(a)) to be transferred to the Indian tribe, for such period as the Indian tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations. Upon agreement by the Secretary, a funding agreement under subsection (b)(2) may also provide for a stable base budget subject to the terms of this provision.

(8) **NO WAIVER OF TRUST RESPONSIBILITY.**—A funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, court decisions, and other laws.

(c) **AMENDMENT.**—The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe, unless such terms are required by Federal law.

(d) **EFFECTIVE DATE.**—A funding agreement shall become effective on the date specified in the funding agreement.

(e) **EXISTING AND SUBSEQUENT FUNDING AGREEMENTS.**—

(1) **SUBSEQUENT FUNDING AGREEMENTS.**—Absent notification from an Indian tribe that it is withdrawing or retroceding the operation of one or more programs identified in a funding agreement under subsections (b)(1) or (b)(3), or unless otherwise agreed to by the parties to the funding agreement—

(A) a funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, with funding paid annually for each fiscal year the agreement is in effect or by the nature of any noncontinuing program, services, functions, or activities contained in a funding agreement; and

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

(2) **DISPUTES.**—Disputes over the implementation of paragraph (1)(A) shall be subject to section 407(c).

(3) **EXISTING FUNDING AGREEMENTS.**—An Indian tribe that was participating in self-governance under this title on the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2010 shall have the option at any time after that date—

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

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

(4) **MULTIYEAR FUNDING AGREEMENTS.**—An Indian tribe may, at the discretion of the Indian tribe, negotiate with the Secretary for a funding agreement with a term that exceeds one year.

SEC. 406. GENERAL PROVISIONS.

(a) **APPLICABILITY.**—An Indian tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this title.

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

(c) **AUDITS.**—

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

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

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

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

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

(d) *REDESIGN AND CONSOLIDATION.*—An Indian tribe may redesign or consolidate programs or reallocate funds for programs in any manner that the Indian tribe deems to be in the best interest of the Indian community being served, so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law, except that, with respect to the reallocation, consolidation, and redesign of programs described in section 405(b)(2), a joint agreement between the Secretary and the Indian tribe shall be required.

(e) *RETROCESSION.*—

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

(2) *EFFECTIVE DATE.*—

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

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

(i) the earlier of—

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

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

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

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

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

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

(g) *RECORDS.*—

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

(2) *RECORDKEEPING SYSTEM.*—An Indian tribe shall—

- (A) maintain a recordkeeping system; and
- (B) on 30 days— notice, provide the Secretary with reasonable access to the records to enable the Department to meet the requirements of sections 3101 through 3106 of title 44, United States Code.

SEC. 407. PROVISIONS RELATED TO THE SECRETARY.

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

(b) *REASSUMPTION.*—

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

- (A) imminent jeopardy to a trust asset, natural resources, or public health and safety that—
 - (i) is caused by an act or omission of the Indian tribe; and
 - (ii) arises out of a failure to carry out the compact or funding agreement; or

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

(2) *PROHIBITION.*—The Secretary shall not reassume operation of a program in whole or part unless—

- (A) the Secretary first provides written notice and a hearing on the record to the Indian tribe; and
- (B) the Indian tribe does not take corrective action to remedy the mismanagement of the funds or programs, or the imminent jeopardy to a trust asset, natural resource, or public health and safety.

(3) *EXCEPTION.*—

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

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

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

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

(c) *INABILITY TO AGREE ON COMPACT OR FUNDING AGREEMENT.*—

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

(2) *DETERMINATION.*—Not more than 45 days after the date of submission of a final offer, or as otherwise agreed to by the Indian tribe, the Secretary shall review and make a determination with respect to the final offer.

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

(4) *REJECTION OF FINAL OFFER.*—

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

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

(I) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title because it would reduce the funds that any other Indian tribe or tribal organization is entitled to receive under Federal law;

(II) the program that is the subject of the final offer is an inherent Federal function or is subject to the discretion of the Secretary under section 405(b)(2);

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

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

(V) the funding agreement would violate Federal statute or regulation;

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

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

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

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

- (i) the Indian tribe shall retain the right to appeal the rejection by the Secretary under this section; and
- (ii) clauses (i), (ii), and (iii) of subparagraph (A) shall apply only to the portion of the proposed final compact or funding agreement that was rejected by the Secretary.

(d) *BURDEN OF PROOF.*—In any administrative hearing or appeal or civil action brought under this section, the Secretary shall have the burden of demonstrating by a preponderance of the evidence the validity of the grounds for rejecting a final offer made under subsection (c) or the grounds for a reassumption under subsection (b).

(e) *GOOD FAITH.*—

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

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

(f) *SAVINGS.*—To the extent that programs carried out for the benefit of Indian tribes and tribal organizations under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 409(c), except for programs entered into funding agreements under section 405(b)(2), the Secretary shall make such savings available to the Indian tribes or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs. For any savings generated as a result of the assumption of a program by an Indian tribe under section 405(b)(2), such savings shall be made available to that Indian tribe.

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

(h) *DECISIONMAKER.*—A decision that constitutes final agency action and relates to an appeal within the Department conducted under subsection (c)(4) may be made—

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

(2) by an administrative law judge.

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

SEC. 408. CONSTRUCTION PROGRAMS AND PROJECTS.

(a) *IN GENERAL.*—Indian tribes participating in tribal self-governance may carry out construction projects under this title.

(b) **TRIBAL OPTION TO CARRY OUT CERTAIN FEDERAL ENVIRONMENTAL ACTIVITIES.**—In carrying out a construction project under this title, an Indian tribe may, subject to the Secretary's agreement, elect to assume some Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), and related provisions of law and regulations that would apply if the Secretary were to undertake a construction project, by adopting a resolution—

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

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

(c) **SAVINGS CLAUSE.**—Notwithstanding subsection (b), nothing in this Act authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under the National Environmental Policy Act, the National Historic Preservation Act, and other related provisions of law that are inherent Federal functions.

(d) **CODES AND STANDARDS.**—In carrying out a construction project under this title, an Indian tribe shall—

(1) adhere to applicable Federal, State, local, and tribal building codes architectural and engineering standards and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and

(2) use only architects and engineers who are licensed to practice in the State in which the facility will be built and who certify—

(A) that they are qualified to perform the work required by the specific construction involved; and

(B) upon completion of design, that the plans and specifications meet or exceed the applicable construction and safety codes.

(e) **TRIBAL ACCOUNTABILITY.**—

(1) In carrying out a construction project under this title, an Indian tribe shall assume responsibility for the successful completion of the construction project and of a facility that is usable for the purpose for which it was funded.

(2) For each construction project carried out by an Indian tribe under this title, the Indian tribe and the Secretary shall negotiate a provision to be included in the funding agreement that identifies—

(A) the approximate start and completion dates for the project, which may extend over a period of one or more years;

(B) a general description of the project, including the scope of work, references to design criteria, and other terms and conditions;

(C) the responsibilities of the Indian tribe and the Secretary for the project;

(D) how project-related environmental considerations will be addressed;

(E) the amount of funds provided for the project;

(F) the obligations of the Indian tribe to comply with the codes referenced in subsection (c)(1) and applicable Federal laws, statutes, and regulations;

(G) the agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction; and

(H) the agreement of the Secretary to issue a certificate of occupancy, if requested by the Indian tribes, based upon the review and verification by the Secretary, to his or her satisfaction, that the Indian tribe has secured upon completion the review and approval of the plans and specifications, sufficiency of design, life safety, and code compliance by qualified, licensed, and independent architects and engineers.

(f) **FUNDING.**—Funding appropriated for construction projects carried out under this title shall be included in funding agreements as annual or semiannual advance payments at the option of the Indian tribe. The Secretary shall include all associated project contingency funds with each advance payment. The Indian tribe shall be responsible for the management of such contingency funds.

(g) **NEGOTIATIONS.**—At the option of the Indian tribe, construction project funding proposals shall be negotiated pursuant to the statutory process in section 450j(m) of title 25 and any resulting construction project agreement shall be incorporated into the funding agreement as addenda.

(h) **FEDERAL REVIEW AND VERIFICATION.**—The Secretary shall have at least one opportunity to review and verify, to the satisfaction of the Secretary, that project planning and design documents prepared by the Indian tribe in advance of initial construction are in conformity with the obligations of the Indian tribe under subsection (c) and, before they are implemented, at least one opportunity to review and verify to the satisfaction of the Secretary that subsequent document amendments which result in a significant change in construction are in conformity with the obligations of the Indian tribe under subsection (c). The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually. The Secretary may conduct onsite project oversight visits semi-annually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

(i) **APPLICATION OF OTHER LAWS.**—Unless otherwise agreed to by the Indian tribe, no provision of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project carried out under this title.

(j) **FUTURE FUNDING.**—Upon completion of a facility constructed under this title, the Secretary shall include the facility among those eligible for annual operation and maintenance funding support comparable to that provided for similar facilities funded by the Department as annual appropriations are available and to the extent that the facility size and complexity and other factors do not exceed the funding formula criteria for comparable buildings.

SEC. 409. PAYMENT.

(a) *IN GENERAL.*—At the request of the governing body of the Indian tribe and under the terms of an agreement, the Secretary shall provide funding to the Indian tribe to carry out the funding agreement.

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

(c) *AMOUNT.*—

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

(2) *SAVINGS CLAUSE.*—Nothing in this section shall be construed to reduce funds of or provided to another Indian tribe.

(d) *TIMING.*—Pursuant to the terms of any compact or funding agreement entered into under this part, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolution. Within 12 months from the date of enactment of this bill, 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 semiannual 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.

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

(f) *MULTIYEAR FUNDING.*—A funding agreement may provide for multiyear funding.

(g) *LIMITATIONS ON AUTHORITY OF THE SECRETARY.*—The Secretary shall not—

(1) fail to transfer to an Indian tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under this title for programs eligible under section 405(b)(1) or (b)(3), except as required by Federal law;

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

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

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

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

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

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

(iii) a tribal authorization;

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

(v) completion of an activity under a program for which the funds were provided;

(C) to pay for Federal functions, including—

(i) Federal pay costs;

(ii) Federal employee retirement benefits;

(iii) automated data processing;

(iv) technical assistance; and

(v) monitoring of activities under this title; or

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

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

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

(j) **INTEREST OR OTHER INCOME.**—

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

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

(3) **INVESTMENT STANDARD.**—Funds transferred under this title shall be managed by the Indian tribe using the prudent investment standard, provided that the Secretary shall not be liable for any investment losses of funds managed by the Indian tribe which are not otherwise guaranteed or insured by the Federal Government.

(k) **CARRYOVER OF FUNDS.**—

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

(2) **EFFECT OF CARRYOVER.**—If an Indian tribe elects to carry over funding from 1 year to the next, the carryover shall not di-

minish the amount of funds the Indian tribe is entitled to receive under a funding agreement in that fiscal year or any subsequent fiscal year.

(l) LIMITATION OF COSTS.—

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

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

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

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

SEC. 410. FACILITATION.

(a) IN GENERAL.—Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that facilitates—

- (1) the inclusion of programs in funding agreements; and*
- (2) the implementation of funding agreements.*

(b) REGULATION WAIVER.—

(1) REQUEST.—An Indian tribe may submit a written request for a waiver to the Secretary identifying the specific text in regulation sought to be waived and the basis for the request.

(2) DETERMINATION BY THE SECRETARY.—Not later than 120 days after receipt by the Secretary of a request under paragraph (1), the Secretary shall approve or deny the requested waiver in writing to the Indian tribe.

(3) GROUND FOR DENIAL.—The Secretary may deny a request under paragraph (1)—

(A) for a program eligible under sections 405(b)(1) and 405(b)(3) only upon a specific finding by the Secretary that the identified text in the regulation may not be waived because such a waiver is prohibited by Federal law; and

(B) for a program eligible under section 405(b)(2), on a specific finding by the Secretary that the identified text in the regulation may not be waived because such a waiver is prohibited under Federal law.

(4) FAILURE TO MAKE DETERMINATION.—If the Secretary fails to approve or deny a waiver request within the time required under paragraph (2), the Secretary shall be deemed to have approved the request.

(5) FINALITY.—The Secretary's decision shall be final for the Department.

SEC. 411. DISCLAIMERS.

Nothing in this title expands or alters any statutory authority of the Secretary so as to authorize the Secretary to enter into any agreement under section 405—

- (1) with respect to an inherent Federal function;*
- (2) in a case in which the law establishing a program explicitly prohibits the type of participation sought by the Indian tribe (without regard to whether one or more Indian tribes are identified in the authorizing law); or*
- (3) which limits or reduces in any way the services, contracts, or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law.*

SEC. 412. DISCRETIONARY APPLICATION OF OTHER SECTIONS.

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

(b) EFFECT.—Each incorporated provision—

- (1) shall have the same force and effect as if set out in full in this title; and*
- (2) shall be deemed to supplement or replace any related provision in this title and to apply to any agency otherwise governed by this title.*

(c) EFFECTIVE DATE.—If an Indian tribe requests incorporation at the negotiation stage of a compact or funding agreement, the incorporation—

- (1) shall be deemed effective immediately; and*
- (2) shall control the negotiation and resulting compact and funding agreement.*

SEC. 413. FUNDING NEEDS.

(a) REQUIREMENT OF ANNUAL BUDGET REQUEST.—

(1) IN GENERAL.—The President shall identify in a report to accompany the annual budget request submitted to Congress under section 1105 of title 31, United States Code, all amounts necessary to fully fund all funding agreements entered into under this Act.

(2) DUTY OF SECRETARY.—The Secretary shall identify in a report which accompanies each budget request the amount of funds that are sufficient for planning and negotiation grants and sufficient to cover any shortfall in funding identified under subsection (b).

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

(b) PRESENT FUNDING; SHORTFALLS.—In each report identified in subsection (a), the Secretary shall identify the level of need presently funded and any shortfall in funding (including direct program costs, tribal shares, and contract support costs) for each Indian tribe, either directly by the Secretary, under self-determination contracts, or under compacts and funding agreements. The first report identified in subsection (a) shall be limited to the Bureau of Indian Affairs agency office and shall be due on February 1, 2012. The next report due on February 1, 2013, shall include all funding at the Bu-

reau of Indian Affairs agency and regional offices. The next report due on February 1, 2014, and all subsequent reports, shall include all funding at the Bureau of Indian Affairs agency, regional, and central offices, the Office of the Assistant Secretary for Indian Affairs, and the Office of the Special Trustee.

SEC. 414. REPORTS.

(a) IN GENERAL.—

(1) **REQUIREMENT.**—On February 1 of each year, the Secretary shall submit to Congress a report regarding the administration of this title.

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

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

(b) CONTENTS.—The report under subsection (a)(1) shall—

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

(2) identify—

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

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

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

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

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

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

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

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

(c) REPORT ON NON-BIA, NON-OST PROGRAMS.—

(1) **IN GENERAL.**—In order to optimize opportunities for Indian tribes participating in self-governance under this title, the Secretary shall—

(A) review all programs administered by the Department, other than through the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, or the Office

of Special Trustee, without regard to the agency or office concerned; and

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

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

(ii) a list of all such programs for which Indian tribes have requested to include in a funding agreement under section 405(b)(2) or 405(b)(3), indicating whether each request was granted or denied, and stating the grounds for any denial.

(2) PROGRAMMATIC TARGETS.—The Secretary shall establish programmatic targets, after consultation with Indian tribes participating in self-governance, to encourage bureaus of the Department to ensure that a significant portion of the programs identified in paragraph (1) are included in funding agreements.

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

(4) ANNUAL REVIEW.—

(A) IN GENERAL.—The Secretary shall annually review and publish in the Federal Register, after consultation with Indian tribes participating in self-governance, revised lists and programmatic targets.

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

(d) REPORT ON CENTRAL OFFICE FUNDS.—Not later than February 1, 2012, the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs and the Office of the Special Trustee and the Office of the Assistant Secretary for Indian Affairs for inclusion in the compacts.

SEC. 415. REGULATIONS.

(a) IN GENERAL.—

(1) PROMULGATION.—Not later than 90 days after the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2009, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out the amendments made by this title.

(2) PUBLICATION OF PROPOSED REGULATIONS.—Proposed regulations to implement the amendments shall be published in the Federal Register not later than 18 months after the date of the enactment of this title.

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

(b) COMMITTEE.—

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

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

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

(d) **EFFECT.**—

(1) **REPEAL.**—The Secretary is authorized to repeal any regulation inconsistent with the provisions of this Act.

(2) **CONFLICTING PROVISIONS.**—The provisions of this title shall supersede any conflicting provisions of law (including any conflicting regulations).

(3) **EFFECTIVENESS WITHOUT REGARD TO REGULATIONS.**—The lack of promulgated regulations on an issue shall not limit the effect or the implementation of this title.

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

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

- (1) the eligibility provisions of section 105(g); and
- (2) regulations promulgated under section 415.

SEC. 417. APPEALS.

In any administrative appeal or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by a preponderance of the evidence—

- (1) the validity of the grounds for the decision; and
- (2) the consistency of the decision with the provisions and policies of this title.

SEC. 418. AUTHORIZATION OF APPROPRIATIONS.

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

