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AMENDING THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT TO PROVIDE FURTHER SELF-GOVERNANCE BY INDIAN TRIBES, AND FOR OTHER PURPOSES

DECEMBER 4, 2014.—Ordered to be printed

Mr. TESTER, from the Senate Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 919]

The Committee on Indian Affairs, to which was referred the bill (S. 919) 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, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

PURPOSE

The purpose of S. 919 is to amend the Indian Self-Determination and Education Assistance Act to streamline the Department of the Interior's process for approving self-governance compacts and annual funding agreements. The bill would align the process used by the Department of the Interior to be similar to the processes used by the Indian Health Service.

NEED FOR LEGISLATION

S. 919 is needed to correct the bureaucratic processes and procedures that the Department of the Interior Self-Governance program has imposed which have discouraged the further compacting of Interior programs by tribes. The provisions included in S. 919 also provide greater certainty and more guidance from Congress on issues relating to decision-making timeframes, re-assumption of programs by the Department, construction projects, and timing of funding transfers.

BACKGROUND

The Indian Self-Determination and Education Assistance Act of 1975 is one of the most important legislative acts affecting Indian

country of the last four decades and it has been the key driver in improving communities throughout Indian country. The Act authorizes tribes to enter into contracts with the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, and the Indian Health Service (IHS), U.S. Department of Health and Human Services, to receive federal funds and manage programs that would otherwise be managed by the federal agencies.

The Act was amended in 1988 to establish the Department of the Interior Self-Governance Demonstration Program. For the first time, tribes were authorized to plan, administer, and consolidate multiple programs and services that had always been administered by the Department of the Interior. These self-governance agreements allow tribal management of programs pursuant to one compact instead of requiring different contracts for each individual program. In 1992, the law was amended to establish a self-governance demonstration program within the IHS as well.

In 1994, the law was amended to make the Interior Self-Governance program permanent. The 1994 amendments also made certain non-BIA programs within the Department of the Interior eligible for contracting or compacting.

S. 919 would amend the Indian Self-Determination Act to streamline the Department of the Interior's process for approving self-governance compacts and annual funding agreements. The bill would also align the process used by the Department of the Interior to be similar to the processes used by the IHS. Currently tribes must use two negotiation processes.

S. 919 contains two titles. The first title would change the P.L. 93-638 contract negotiation process under Title I (i.e., the non-self-governance title) of the Indian Self-Determination and Education Assistance Act and add more flexibility in administering those contracts for tribes that either have not qualified for self-governance or have chosen to administer only a few BIA programs.

The second title includes amendments to the self-governance provisions of Title IV of the Indian Self-Determination and Education Assistance Act that would clarify procedures, and limit the Secretary's ability to delay compacting or release of funding. These changes are meant to mirror the provisions that the tribes have found beneficial in the IHS compacting process.

Section 202 of this legislation makes clear that nothing in the bill expands or limits which programs are eligible for inclusion in self-governance compacts beyond those already authorized to be included by current law. The section also clarifies that provisions of water settlements and their authorizing legislation are not affected by the self-governance amendments.

While section 202 makes clear that the bill is not expanding the scope of federal programs eligible for inclusion in self-governance agreements, current law does provide the Secretary with the discretion to include certain non-BIA programs in self-governance agreements as negotiated with tribes. These programs include those which have a special geographic, historical, or cultural significance to a petitioning tribe. This authority, in existence for the past 20 years, has been used sparingly by the Secretary. The Committee commends the Department for its past efforts to include programs such as the National Bison Range Complex in Montana and

the Yukon Flats National Wildlife Refuge in Alaska, which satisfy the requirements as eligible programs under existing law.

LEGISLATIVE HISTORY

On May 9, 2013, Senator Maria Cantwell (D-WA) introduced S. 919, along with Senators John Barrasso (R-WY), Max Baucus (D-MT), Mike Crapo (R-ID), Martin Heinrich (D-NM), Patty Murray (D-WA), Brian Schatz (D-HI), Jon Tester (D-MT), Tom Udall (D-NM) and Ron Wyden (D-OR). Senators Lisa Murkowski (R-AK), Mark Begich (D-AK), Elizabeth Warren (D-MA) and John Walsh (D-MT) were later added as cosponsors. The bill was referred to the Committee on Indian Affairs. On January 29, 2014, the committee held a hearing on the bill. On June 11, 2014, the committee met to consider the bill. One substitute amendment was offered and adopted, and the Committee then ordered the bill, as amended, to be reported favorably to the Senate by voice vote.

SUMMARY OF AMENDMENT

Senator Cantwell filed an amendment in the nature of a substitute that reflects further discussion with tribal and federal officials since the bill's introduction.

Since S. 919 was introduced, discussions with tribal and federal officials led to language that would amend Title II of the bill in an effort to provide more clarity to tribes and the Department of the Interior, and other stakeholders that the bill does not intend to authorize any future P.L. 93-638 agreements that would not be already authorized under existing law. Other technical amendments were made in Title I of the bill, including the movement of references to the savings clause of the bill, changing dates, and clarifying the good faith negotiations requirement provisions.

Section 202 Amendments:

One change the amendment makes is rewording the definition of "tribal water rights settlements." The amendment clarifies that the water settlements that are relevant are only those which have been "expressly ratified or approved by an Act of Congress."

Additional changes include collapsing three provisions in the savings clause found in section 202(b) into a single provision. The intent of all the parties is that S. 919 does not expand the scope of programs eligible for tribal contracting under Public Law 93-638. The bill as introduced contained three provisions that were intended to provide this assurance. The amendment provides greater clarity and succinctness to the provisions, without altering the overall meaning of the savings clause. A final amendment to 202(b)(4) makes clear that that S. 919 is not authorizing any tribal contracting that would be inconsistent with already finalized tribal water rights settlements.

SECTION-BY-SECTION ANALYSIS OF BILL AS ORDERED REPORTED

Section 1—Short Title; Table of contents

Section 1 states that the Act may be cited as the 'Department of the Interior Tribal Self-Governance Act of 2013.'

TITLE I—INDIAN SELF-DETERMINATION

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

Section 101(a) amends the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450) by adding to the definition of ‘self-determination contract.’ This section revises the definition 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.

Section 101(b) provides for the retention period of records for auditing purposes to be defined in regulations.

Section 101(c) provides that certain sections of Indian Self-Determination and Education Assistance Act and the Department of the Interior and Related Agencies Appropriations Act, 1991 (Public Law 101–512) apply to certain compacts and Funding Agreements.

Section 102. Contracts by Secretary of Interior

Section 102 amends the Indian Self-Determination and Education Assistance Act to simplify a reference to the Indian Financing Act of 1974. The section further provides that the Secretary shall at all times negotiate in good faith, and that the provisions of contracts or funding agreements should be liberally construed for the benefit of the Indian Tribe.

Section 103. Administrative provisions

Section 103 makes a minor correction to Section 105 of Indian Self-Determination and Education Assistance Act by substituting a reference to Sections 102 and 103 (as opposed to 450f and 450h of Title 25). 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 in self-determination contracts and Funding Agreements; implementation of self-determination contracts and funding agreements; 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 the Department of the Interior regarding 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 program, function, service or activity pursuant to the contract. 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 fund-

ing agreement terms do not make inapplicable the provisions in Section 102 of the Indian Self-Determination and Education Assistance Act requiring proposals and declinations.

TITLE II

Section 201. Tribal self-governance

Section 201 amends the Indian Self-Determination and Education Assistance Act by revising much of Title IV—Tribal Self-Governance.

Section 201(a) provides definitions for key terms included in Title IV—Tribal Self-Governance.

Section 201(b) amends Section 402 of the Indian Self-Determination and Education Assistance Act to provide for the establishment and eligibility requirements for the Tribal Self-Governance Program. 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 201(c) amends Section 403 of the Indian Self-Determination and Education Assistance Act and directs the Secretary to negotiate and enter into a funding agreement with the governing body of an Indian tribe or tribal organization. It clarifies that a funding agreement authorizes a tribe, at its option, to plan, conduct, consolidate, administer and receive full tribal share funding for all programs, functions, services or activities of the BIA, the Office of the Assistant Secretary for Indian Affairs, and the Office of the Special Trustee. A funding agreement may include programs, functions, services or activities 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 funding agreement shall authorize a tribe, at its option, 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 BIA, Office of the Assistant-Secretary for Indian Affairs, and the Office of the Special Trustee, that is otherwise available to tribes or Indians under Section 102 of Indian Self-Determination and Education Assistance Act. A tribe has discretion to include in its funding agreement, a stable budget specifying the recurring funds to be transferred to the tribe. Absent tribal consent, the Secretary cannot amend the terms of a funding agreement. This section also pro-

vides tribes with existing funding agreements more options with respect to subsequent funding agreements and negotiating multi-year funding agreements.

Section 201(d) amends Title IV of the Indian Self-Determination and Education Assistance Act by mirroring for the Department of the Interior those self-governance provisions found in Title V—Tribal Self-Governance-Indian Health Service, and clarifying any distinctions that are needed for Department of the Interior differences.

The new “Section 404” of the Indian Self-Determination and Education Assistance Act 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” provides for certain provisions that must be included in funding agreements. Conflicts of interest, auditing principles, tribal redesign and consolidation authority must be addressed. With respect to discretionary programs of special significance, however, tribal reallocation, consolidation, and redesign are only allowed when the Secretary and the tribe enter into a joint agreement.

The section also provides that tribal records are not subject to the Freedom of Information Act, unless a tribe specifies otherwise in a funding agreement or a compact. A tribe must provide the Secretary with reasonable access to its records with at least 30 days notice.

“Section 406” provides that a funding agreement include a provision to monitor the performance of trust functions by the Indian tribe. A compact or a funding agreement 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, the Secretary may, on written notice to the tribe, immediately reassume operation of a program if there is a finding of 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 tribe.

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 reassuming a program and by clearly demonstrating the validity of the grounds for rejecting a final offer.

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

funding agreements be construed for the benefit of tribes and any ambiguities be resolved in favor of tribes.

“Section 407” 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 construction projects must be included in funding agreements as annual or semi-annual advance payments. Section 407 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 408” authorizes multi-year funding agreements. 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 funding agreement with insufficient funds and may suspend its performance (after providing reasonable notice of such insufficiency to the Secretary) until funds are adequate.

“Section 409” requires the Secretary to interpret federal laws in a manner that facilitates the implementation of, and the inclusion of programs in, funding agreements. 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 410” provides that Title IV neither expands nor alters the Secretary’s statutory authority to enter into any funding agreement with respect to an inherent federal function, in instances where a statute prohibits a tribe’s participation in a program, or when the funding agreement would limit or reduce services, contracts, or funds that any other tribe is eligible to receive under federal law.

“Section 411” provides a tribe with the discretion to incorporate any provision of Title I into a compact or a funding agreement.

“Section 412” requires the President to identify in a report to accompany the annual budget request submitted to Congress all amounts necessary to fully fund all funding agreements entered into under this Act.

“Section 413” 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 report-

ing 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-Office of Special Trustee programs. Section 413 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 the BIA, the Office of the Special Trustee, and the Office of the Assistant Secretary for Indian Affairs for inclusion in compacts.

“Section 414” 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.

“Section 415” provides that except for the eligibility provisions of section 105(g) and regulations of section 414 of the Indian Self-Determination and Education Assistance Act, a tribe is not subject to any agency circular, policy, manual, or guidance absent the tribe’s consent.

“Section 416” provides that, except as described in the provisions in section 406, 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 417” clarifies that “Section 413 of the Department of the Interior and Related Agencies Appropriations Act, 1991” shall apply to self-governance compacts and funding agreements.

“Section 418” authorizes the appropriation of such sums as may be necessary to carry out Title IV—Tribal Self-Governance.

Section 202. Effect of certain provisions

This section provides that nothing in the Department of the Interior Tribal Self-Governance Act of 2013 increases, limits, or modifies the Secretary’s authority held the day before the enactment of the Act. No program, function, service or activity that was not eligible to be included in a compact or funding agreement the day before the enactment of this Act becomes eligible due to its enactment. Further, no tribal water settlement or Congressional Act expressly ratifying or approving such water settlement is affected by the enactment of this Act.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated November 13, 2014, was prepared for S. 919:

NOVEMBER 13, 2014.

Hon. JON TESTER,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 919, the Department of the Interior Tribal Self-Governance Act of 2014.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 919—Department of the Interior Tribal Self-Governance Act of 2014

S. 919 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 responsibility for certain programs, functions, and services or activities that would otherwise be carried out by the federal government. The bill would amend how contracts are negotiated between the tribes and the Department of the Interior (DOI) and would establish new guidelines for administering the program. Based on information provided by DOI, CBO estimates that implementing the legislation would have no significant effect on the federal budget over the 2015–2019 period. Enacting S. 919 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 919 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 919.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 919 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW (CORDON RULE)

On June 11, 2014, the Committee on Indian Affairs unanimously approved a motion by Chairman Tester to waive the Cordon rule. Thus, in the opinion of the committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.