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114TH CONGRESS }
1st Session }

SENATE

{ REPORT
{ 114-060

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

—————
MAY 22, 2015.—Ordered to be printed
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Mr. BARRASSO, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 286]

The Committee on Indian Affairs, to which was referred the bill (S. 286) 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 without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 286 is to amend the *Indian Self-Determination and Education Assistance Act of 1975* (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

This legislation, S. 286, 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 Indian programs within the Department by Indian tribes or hindered negotiations between the Department and Indian tribes for renewing compacts or annual funding agreements. The provisions included in S. 286 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* (Act) is one of the most important legislative acts affecting Indian country of the last four decades. This Act has been a key driver in improving communities throughout Indian country.

The Act originally authorized Indian tribes to enter into contracts with the Bureau of Indian Affairs (BIA) within the Department of the Interior, and the Indian Health Service (IHS) within the Department of Health and Human Services, to receive Federal funds and manage programs that would otherwise be managed by the Federal agencies. These contracts are commonly referred to as “638 contracts” after the Public Law Number 93–638 for the Act.

Expansion of this tribal administration approach has taken separate paths at these 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.

Indian tribes could administer these programs through compacts after demonstrating a higher level of accountability and fiscal responsibility, including three years of administering 638 contracts without material audit problems. Each 638 contract or self-governance compact identifies functions and activities to be carried out by the tribe, as well as any administrative, reporting, or other requirements that must be followed. However, 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 Act was amended to establish a self-governance demonstration program within the IHS as well. In 1994, the Act was again amended to make the Department of the Interior Self-Governance Demonstration Program permanent. The 1994 amendments also made certain non-BIA programs within the Department of the Interior eligible for contracting or compacting.¹

When Congress made the IHS self-governance program permanent in 2000, several detailed improvements were enacted, such as adding specific definitions and identifying mandatory and prohibited terms and conditions of compacts, funding agreements, and construction projects. Tribes wanted to incorporate those improvements into the Department of the Interior self-governance program, in part, to gain consistency in the administration of their self-governance programs.

In addition, Indian tribes contend that the Department bureaucracy has for many years resisted efforts by the tribes to further streamline compacting processes, and that, without additional reforms, the success of the Act’s policy of tribal self-determination may not reach the full potential.

LEGISLATIVE HISTORY

In the 108th Congress, Senators Campbell and Inouye introduced the “*Department of the Interior Tribal Self-Governance Act of 2004*”,

¹ Title IV of the Act mandates that all BIA programs are eligible for inclusion in self-governance compacts, but allows certain non-BIA programs in DOI to be subject to compacting under certain limited circumstances.

S. 1715. The Committee held a hearing on the bill on May 12, 2004. The Committee met to consider the bill on June 16, 2014. The Committee favorably ordered the bill to be reported, as amended, to the Senate. The bill did not pass the Senate.

In the 109th and 110th Congresses, the Committee held oversight hearings relative to tribal self-governance, but no bill was introduced. In the 109th Congress on September 20, 2006, the Committee held an oversight hearing on “*Tribal Self Governance*”. During the 110th Congress, the Committee held an oversight hearing on the “*Successes and Shortfalls of Title IV of the Indian Self-Determination and Education Assistance Act: Twenty Years of Self-Governance*” on May 13, 2008.

Even though no Senate bill was introduced in the 111th Congress, the Committee held a hearing on November 18, 2010 on a bill the House of Representatives passed, H.R. 4347, the “*Department of the Interior Tribal Self-Governance Act of 2010*” at which the Department of the Interior testified against the bill. While considerable work to address the Department’s issues was undertaken by Congressional staff and tribal representatives, no further Committee action was taken on the bill.

In the 112th Congress, Representative Boren introduced H.R. 2444, the “*Department of the Interior Tribal Self-Governance Act of 2011*.” This bill contained several revisions to prior bills based on discussions between Congressional staff, the Department officials, and tribal representatives. The Subcommittee on Indian and Insular Affairs of the Committee on Natural Resources of the House of Representatives held a hearing on this bill on September 22, 2011. No further action was taken on this bill.

Also in the 112th Congress, the Committee on Indian Affairs held an oversight hearing, “*Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination*”, on September 20, 2012. On December 17, 2012, Senators Akaka and Barrasso introduced S. 3685, but no further action was taken by the Committee on the bill.

In the 113th Congress, Senator Cantwell introduced S. 919, the “*Department of the Interior Tribal Self-Governance Act of 2014*” on May 9, 2013. Senators Barrasso, Baucus, Crapo, Heinrich, Murray, Schatz, Tester, Udall (NM) and Wyden were original co-sponsors. Senators Murkowski, Begich, Warren and Walsh were later added as cosponsors. The Committee held a hearing on S. 919 on January 29, 2014. 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.

The House companion bill, H.R. 4546 was sponsored by Representative DeFazio with six cosponsors. That bill was referred to the Committee on Natural Resources for the House of Representatives on May 1, 2014, with referrals to both Subcommittees on Indian and Alaska Native Affairs and on Water and Power. The Subcommittee on Indian and Alaska Native Affairs held a hearing on the bill on July 15, 2014. No further action was taken on this bill.

In the 114th Congress, Senator Barrasso introduced S. 286 on January 18, 2015. Senators Tester, Crapo, Franken, Murkowski, and Schatz co-sponsored the bill. On February 4, 2015, the Committee met to consider the bill. The Committee ordered the bill,

without amendments, to be reported favorably to the Senate by voice vote.

OVERVIEW OF THE BILL

This legislation, S. 286, would amend the Act to streamline the Department of the Interior's process for approving self-governance compacts and annual funding agreements for Indian programs. 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 each tribe seeking a new compact or renewal of a compact (or annual funding agreement) must use two different negotiation processes.

The bill, S. 286, contains two titles. The first title would amend the Pub. L. No. 93-638 contract negotiation process under Title I (i.e., the non-self-governance title) of the *Indian Self-Determination and Education Assistance Act of 1975* 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 of 1975* 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 also makes clear that nothing in the bill expands or limits which non-BIA 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 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.

Even though it has been in the Act for over twenty years, this authority 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, both of which satisfy the requirements as eligible programs under existing law.

SUMMARY OF KEY PROVISIONS OF S. 286

This bill, S. 286, reflects the numerous changes that have been made over time during the debate on prior bills. Most notably, discussions between Congressional staff, tribal, and Federal officials led to greater clarity in several provisions for negotiating and renewing BIA compacts as well as the "savings" clause set forth in Section 202.

Title I. 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 101 clarifies that 638 contracts are subject to the Act's procurement rules, but remain exempt from other Federal procurement rules.

Section 102 requires the Secretary to negotiate 638 contracts in good faith.

Section 104 codifies current Office of Management and Budget policy that not less than fifty percent of expenses of a tribal governing body for administering these Indian programs be deemed reasonable and allowable for determining "indirect cost rates."²

Title II. The second title of the bill is intended to mirror the IHS program in several respects by codifying several regulations, clarifying procedures, and minimizing opportunities for the Secretary to delay compacting or funding.

Sections 404 and 405 set forth requirements and procedures for amendments to compacts, retrocession of programs³ and the types of programs that may be included in compacts. For the most part, many of these provisions are merely codifying existing regulations.

Section 408 authorizes, for construction contracts for buildings, roads, or infrastructure, tribes to assume some Federal responsibilities under the National Environmental Policy Act and National Historic Preservation Act. It further requires tribes to adhere to certain codes (similar to what tribes do under Indian housing laws).

Section 409 sets forth an expedited process for funding transfers from the Secretary to the tribe and prohibit the Secretary from failing to transfer funds or reducing funding unless authorized by Federal law. Current law authorizes lump-sum funding, but many tribes contend that the transfers have been obstructed in various ways by the Secretary, contrary to the Act. They further contend that the Secretary has been known to hold back funding as leverage in compact negotiations.

Section 410 requires the Secretary to act on a compacting tribe's regulatory waiver request within 120 days or the waiver is deemed approved (current law provides no alternative for tribes when the Secretary fails to act, except to sue for performance).

Section 414 requires an annual report to Congress regarding the needs of and funding to Indian tribes, funding formula methodology, list of non-BIA programs eligible for compacting, programmatic targets to encourage compacting, and views of tribes on this information. This provision essentially codifies existing regulations or imports IHS self-governance requirements to the BIA self-governance.

Section 417 requires that, for judicial review of any appeals or administrative actions, the Secretary have the burden of proof demonstrating by a preponderance of the evidence the validity of the

²The "indirect cost rate" means a negotiated rate for such costs as utilities or administrative overhead, agreed to between an Indian tribe or tribal organization and the appropriate Federal agency. Indirect costs include reasonable and allowable costs of administrative or other expense related to the overhead incurred in connection with the operation of the Federal program (defined at 25 CFR 900.6).

³Retrocession means to "return" a compacted program to the BIA to resume Federal management of the program. This retrocession rarely happens—but if it does, this section would provide certainty to that process.

grounds for the decision, except for “final offers” to compact, which require a higher standard of clear and convincing evidence.

Section 202 Amendments. One important change in S. 286 (also included in S. 919 from the 113th Congress) from prior bills is a new section 202 that includes a “savings clause.” Section 202 states in this “savings clause” 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 in the bill.

The principal intended purpose of section 202 is to clarify and make more succinct that *none of the amendments or provisions of the bill* will affect current law relating to (1) contracting or compacting of *non-BIA programs* under the Act, or (2) Congressionally approved *water settlements*. With respect to contracting or compacting non-BIA programs, if a non-BIA program or function could not be contracted or compacted under the Act on the day *before* the enactment of the bill, that program or function cannot be compacted *after* the enactment of the bill. It also clarifies that the water settlements that are relevant are only those which have been “expressly ratified or approved by an Act of Congress.”

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 2015.*’

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 of 1975* (25 U.S.C. 450) by adding to the definition of ‘self-determination contract.’ This section revises the definition to state that, except as provided in: (1) section 105(a)(3) of the Act, no contract shall be considered to be a procurement contract, and (2) section 107(a)(1), no contract shall be subject to any Federal procurement law, including regulations (e.g., the Federal Acquisition Regulations).

Section 105(a)(3) governs construction contracts and allows the Secretary and respective tribe to agree to make certain procurement provisions applicable to those contracts. Section 107(a)(1) authorizes the Secretary to promulgate regulations governing procurement (and other matters) applicable to these contracts under this Act in accordance the rulemaking procedures under 5 U.S.C. 552, 553, and subchapter III.

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

Section 101(c) provides that certain sections of *Indian Self-Determination and Education Assistance Act* relating to the definitions, reporting and auditing requirements, criminal penalties, wage and labor standards, liability insurance, retention of Federal employees, application of Federal contracting laws, and the use and acquisition

of Federal property apply to compacts and funding agreements under Title IV of this Act.

In addition, Section 314 of the *Department of the Interior and Related Agencies Appropriations Act, 1991* (Pub. L. No. 101–512) relating to Federal Tort Claim Act coverage also applies to compacts and funding agreements under Title IV of this Act.

Section 102. Contracts by the Secretary of Interior

Section 102(1) amends the Act to simplify a reference to the *Indian Financing Act of 1974*. Section 102(2) provides that the Secretary shall at all times negotiate in good faith and, subject to section 202, 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 technical correction to Section 105 of the Act by substituting a corrected reference to sections 102 and 103 (instead of referencing sections 450f and 450h) of the Act. Further, this section would require, subject to section 202, 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 decision by the Office of Management and Budget and the Department of the Interior regarding documentation requirements. Under this section, eligible costs would include not less than fifty percent 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 these costs 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 funding agreement terms are subject to the provisions in section 102 of the Act governing the negotiation process and declinations.

TITLE II

Section 201. Tribal self-governance

Section 201 amends the Act by revising several provisions of Title IV which govern the tribal self-governance program.

Section 201(a) provides definitions for key terms included in Title IV which, in addition to those in Title I, include ‘compact’, ‘construction program and construction project’, ‘Department’, ‘funding agreement’, ‘program’, ‘self-governance’ and ‘Secretary’.

Section 201(b) amends Section 402 of the 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 provides tribes with existing funding agreements more options with respect to subsequent funding agreements and negotiating multiyear 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 406 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 fund-

ing 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 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-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 2015 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 February 10, 2015, was prepared for S. 286:

FEBRUARY 10, 2015.

Hon. JOHN BARRASSO,
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. 286, the Department of the Interior Tribal Self-Governance Act of 2015.

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. 286—Department of the Interior Tribal Self-Governance Act of 2015

S. 286 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 2015–2020 period. Enacting S. 286 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 286 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. 286.

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. 286 will have a minimal impact on regulatory or paperwork requirements.

CHANGES IN EXISTING LAW

In accordance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 286, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic):

25 U.S.C. § 450b (Indian Self-Determination and Education Assistance Act)

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

[(j) “self-determination contract” means a contract (or grant or cooperative agreement utilized under section 450e–1 of this title) entered into under part A of this subchapter 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 [FN1] the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 450e–1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;]

(j) “self-determination contract” means a contract entered into under title I (or a grant or cooperative agreement used under section 9) 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 under title I (or grant or cooperative agreement used under section 9) shall be—

- (1) considered to be a procurement contract; or*
- (2) except as provided in section 107(a)(1), subject to any Federal procurement law (including regulations);*

25 U.S.C. 450c(b) (Indian Self-Determination and Education Assistance Act)

SECTION 5(B). REPORTING AND AUDIT REQUIREMENTS FOR RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE.

(b) ACCESS TO BOOKS, DOCUMENTS, PAPERS, AND RECORDS FOR AUDIT AND EXAMINATION BY COMPTROLLER GENERAL, ETC.—

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 retention period for the report that 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. *The retention period shall be defined in regulations promulgated by the Secretary pursuant to section 414.*

25 U.S.C. § 450f (Indian Self-Determination and Education Assistance Act)

SECTION 102. CONTRACTS BY SECRETARY OF THE INTERIOR.

(c) LIABILITY INSURANCE; WAIVER OF DEFENSE.—

- (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 1452 of this title, 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.*

(f) GOOD FAITH REQUIREMENT.—In the negotiation of contracts and funding agreements, the Secretary shall—

- (1) at all times negotiate in good faith to maximize implementation of the self-determination policy; and*
- (2) carry out this Act in a manner that maximizes the policy of tribal self-determination, in a manner consistent with—*
 - (A) the purposes specified in section 3; and*
 - (B) the Department of the Interior Tribal Self-Governance Act of 2015.*

(g) RULE OF CONSTRUCTION.—Subject to section 202 of the Department of the Interior Tribal Self-Governance Act of 2015, each provision of this Act and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian

tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian tribe.

25 U.S.C. § 450j (Indian Self-Determination and Education Assistance Act)

SECTION 103. ADMINISTRATIVE PROVISIONS.

(b) Payments; transfer of funds by Treasury for disbursement by tribal organization; accountability for interest accrued prior to disbursement Payments of any grants or under any contracts [pursuant to sections 450f and 450h of this title] *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 part. 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.

(p) *INTERPRETATION BY SECRETARY.—Except as otherwise provided by law (including section 202 of the Department of the Interior Tribal Self-Governance Act of 2015), 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.*

25 U.S.C. § 450j–1 (Indian Self-Determination and Education Assistance Act)

SECTION 104. CONTRACT FUNDING AND INDIRECT COSTS.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter 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]; *and*

(ii) any additional administrative or other [expense related to the overhead incurred] *expense incurred by the governing body of the Indian tribe or tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not dupli-*

cate any funding provided under subsection (a)(1) of this section.

(B) In calculating the reimbursement rate for expenses described in subparagraph (A)(ii), not less than 50 percent of the expenses described in subparagraph (A)(ii) that are incurred by the governing body of an Indian tribe or tribal organization relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable.

[(B)](C) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

25 U.S.C. § 450l (Indian Self-Determination and Education Assistance Act)

SECTION 105. CONTRACT OR GRANT SPECIFICATIONS.

(a) **TERMS.**—Each self-determination contract entered into under this subchapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

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

“(2) Annual funding agreement.—

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

“(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

“(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.

25 U.S.C. § 458aa (Indian Self-Determination and Education Assistance Act)

SECTION 201. 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; CONSTRUCTION PROJECT.**—*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 403.

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

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

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

(9) *SELF-GOVERNANCE*.—The term ‘self-governance’ means the Tribal Self-Governance Program established under section 402.

(10) *TRIBAL SHARE*.—The term ‘tribal share’ means the portion of all funds and resources of an Indian tribe that—

(A) support any program within the Bureau of Indian Affairs, the Office of the Special Trustee, or the Office of the Assistant Secretary for Indian Affairs; and

(B) are not required by the Secretary for the performance of an inherent Federal function.

25 U.S.C. § 458bb (Indian Self-Determination and Education Assistance Act)

SEC. 402. TRIBAL SELF-GOVERNANCE PROGRAM.

(a) *ESTABLISHMENT*.—The Secretary shall establish and carry out a program within the Department to be known as the “Tribal Self-Governance Program”.

(b) *SELECTION OF PARTICIPATING INDIAN TRIBES*.—

(1) *IN GENERAL*.—

(A) *ELIGIBILITY*.—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 (c) to participate in self-governance.

(B) *JOINT PARTICIPATION*.—On the request of each participating Indian tribe, 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 (c) 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 (c).

(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 (c).

(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, if the tribal organization still qualifies under subsection (c).

(D) *WITHDRAWAL PROCESS.*—

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

(ii) *NOTIFICATION.*—The Indian tribe shall provide a copy of the tribal resolution described in clause (i) to the Secretary.

(iii) *EFFECTIVE DATE.*—

(I) *IN GENERAL.*—A withdrawal under clause (i) shall become effective on the date that is specified in the tribal resolution and 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; and

(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 into 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 sections 102 and 105

(i), as appropriate, shall apply to the withdrawing Indian tribe; or

(ii) may elect not to enter into a self-determination contract or compact, in which case all unexpended funds and resources associated with the withdrawing Indian tribe's returned programs (calculated on the same basis as the funds were initially allocated to the funding agreement of the tribal organization) 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).

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

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

(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.

(d) *PLANNING PHASE.*—

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

(2) *ACTIVITIES.*—The planning phase shall—

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

(B) include—

(i) legal and budgetary research; and

(ii) internal tribal government planning, training, and organizational preparation.

(e) *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 (c) 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.

25 U.S.C. § 458cc (Indian Self-Determination and Education Assistance Act)

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.]

(a) *AUTHORIZATION.*—The Secretary shall, on the request of any Indian tribe or tribal organization, enter into a written funding agreement with the governing body of the Indian tribe or the tribal organization in a manner consistent with—

(1) the trust responsibility of the Federal Government, treaty obligations, and the government-to government relationship between Indian tribes and the United States; and

(2) subsection (b).

(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] the Office of Assistant Secretary for Indian Affairs, and the Office of the Special Trustee without regard to the agency or the office of that Bureau or those Offices 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) of this section, 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) section 13 of this title; **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 T3; and

(D) *any other programs, services, functions, or activities (or portions thereof) that are provided through the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, or the Office of the Special Trustee with respect to which Indian tribes or Indians are primary or significant beneficiaries;*

(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) section 413 (c)** of this title, 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; *and*

(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 2008 of this title; 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 450f of this title;

(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 450j(e) of this title;

(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 450f of this title, 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.】

(m) *OTHER PROVISIONS.*—

(1) *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 Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.); or*

(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).*

(2) *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.*

(3) *BASE BUDGET.*—*A funding agreement shall, at the option of the Indian tribe, provide for a stable base budget specifying the recurring funds (which may include 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.*

(4) *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.*

(n) *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.*

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

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

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

ties to the funding agreement or by the nature of any noncontinuing program, service, function, or activity contained in a 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; 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 406(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 2015 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 1 year.

25 U.S.C. 458aa et seq. (Title IV of the Indian Self-Determination and Education Assistance Act)

ISEC. 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 activities 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.】

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) *such date as is mutually agreed upon by the parties.*

(e) **DURATION.**—*A compact under subsection (a) shall remain in effect—*

(1) *for so long as permitted by Federal law; or*

(2) *until termination by written agreement, retrocession, or re-assumption.*

(f) **EXISTING COMPACTS.**—*An Indian tribe participating in self-governance under this title, as in effect on the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2015, 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. 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; 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 an Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to section 106(f).

(d) **REDESIGN AND CONSOLIDATION.**—Except as provided in section 407, an Indian tribe may redesign or consolidate programs or reallocate funds for programs in any manner that the Indian tribe determines to be in the best interest of the Indian community being served, so long as that 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 subsection (b)(2) or (c) of section 403, 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 an Indian tribe rescinds a request for retrocession under paragraph (1), the 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) 1 year after the date on which the request is submitted; and

(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 the 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 to be 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 a notice period of not less than 30 days, 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. 406. PROVISIONS RELATING 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, a natural resource, 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 imminent and substantial jeopardy and irreparable harm to a trust asset, a natural resource, or the public health and safe-

ty 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 an applicable 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 60 days after the date of receipt of a final offer by the one or more officials designated pursuant to paragraph (4), the Secretary shall review and make a determination with respect to the final offer.

(3) EXTENSIONS.—The deadline described in paragraph (2) may be extended for any length of time, as agreed upon by both the Indian tribe and the Secretary.

(4) DESIGNATED OFFICIALS.—

(A) IN GENERAL.—The Secretary shall designate one or more appropriate officials in the Department to receive a copy of the final offer described in paragraph (1).

(B) NO DESIGNATION.—If no official is designated, the Executive Secretariat of the Secretary shall be the designated official.

(5) NO TIMELY DETERMINATION.—Except as otherwise provided in section 202 of the Department of the Interior Tribal Self-Governance Act of 2015, if the Secretary fails to make a determination with respect to a final offer within the period specified in paragraph (2), the Secretary shall be deemed to have agreed to the offer.

(6) 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 as determined under section 106(a)(1);

(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 403(c);

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

(IV) the Indian tribe is not eligible to participate in self-governance under section 402(c);

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

(VI) with respect to a program or portion of a program included in a final offer pursuant to section 403(b)(2), the program or the portion of the program is not otherwise available to Indian tribes or Indians under section 102(a)(1)(E);

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

(iii) provide the Indian tribe with—

(I) a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter; and

(II) 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 United States 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 action, hearing, or appeal or civil action brought under this section, the Secretary shall have the burden of proof—

(1) of demonstrating, by a preponderance of the evidence, the validity of the grounds for a reassumption under subsection (b); and

(2) of clearly demonstrating the validity of the grounds for rejecting a final offer made under subsection (c).

(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.*—

(1) *IN GENERAL.*—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 408(c), except for funding agreements entered into for programs under section 403(c), the Secretary shall make such savings available to the Indian tribes or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(2) **DISCRETIONARY PROGRAMS OF SPECIAL SIGNIFICANCE.**—For any savings generated as a result of the assumption of a program by an Indian tribe under section 403(c), 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 by—

(1) 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) an administrative law judge.

(i) **RULES OF CONSTRUCTION.**—Subject to section 202 of the Department of the Interior Tribal Self-Governance Act of 2015, 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. 407. 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 agreement of the Secretary, 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 those Acts or regulations; and

(2) accepting the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying tribal officer assuming the status of a responsible Federal official under those Acts or regulations.

(c) **SAVINGS CLAUSE.**—Notwithstanding subsection (b), nothing in this section authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), 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—*

(A) *are licensed to practice in the State in which the facility will be built; and*

(B) *certify that—*

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

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

(e) *TRIBAL ACCOUNTABILITY.*—

(1) *IN GENERAL.*—*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 the Indian tribe received funding.*

(2) *REQUIREMENTS.*—*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 (d)(1) and applicable Federal laws 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 tribe, based upon the review and verification by the Secretary, to the satisfaction of the Secretary, 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.*—

(1) *IN GENERAL.*—*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.

(2) *ADVANCE PAYMENTS.*—The Secretary shall include all associated project contingency funds with each advance payment, and 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 105, and any resulting construction project agreement shall be incorporated into the funding agreement as addenda.

(h) *FEDERAL REVIEW AND VERIFICATION.*—

(1) *IN GENERAL.*—On a schedule negotiated by the Secretary and the Indian tribe—

(A) the Secretary shall 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 (d); and

(B) before the project planning and design documents are implemented, the Secretary shall 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 (d).

(2) *REPORTS.*—The Indian tribe shall provide the Secretary with project progress and financial reports not less than semi-annually.

(3) *OVERSIGHT VISITS.*—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 and except as otherwise provided in this Act, no provision of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), the Federal Acquisition Regulations issued pursuant to that Act, 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.

(k) *APPLICABILITY.*—Notwithstanding any other provision of this section, section 202 of the Department of the Interior Tribal Self-Governance Act of 2015 applies to subsections (a) through (j).

SEC. 408. PAYMENT.

(a) *IN GENERAL.*—At the request of the governing body of an Indian tribe and under the terms of an applicable funding 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 403 and 405, 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 at which the programs are carried out.

(2) *SAVINGS CLAUSE.*—Nothing in this section reduces programs, services, or funds of, or provided to, another Indian tribe.

(d) *TIMING.*—

(1) *IN GENERAL.*—Pursuant to the terms of any compact or funding agreement entered into under this title, the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolution.

(2) *TRANSFERS.*—Not later than 1 year after the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2015, in any instance in which 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 paragraph (1) or (2) of section 403(b), 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, acquire and transfer such personnel, 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 that are not otherwise guaranteed or insured by the Federal Government.

(k) **CARRYOVER OF FUNDS.**—

(1) **IN GENERAL.**—Notwithstanding any provision of an appropriations Act, 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.

(4) *SAVINGS CLAUSE.*—Nothing in this section reduces any programs, services, or funds of, or provided to, another Indian tribe.

(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 to an applicable funding agreement.

(n) *APPLICABILITY.*—Notwithstanding any other provision of this section, section 202 of the Department of the Interior Tribal Self-Governance Act of 2015 applies to subsections (a) through (m).

SEC. 409. FACILITATION.

(a) *IN GENERAL.*—Except as otherwise provided by law (including section 202 of the Department of the Interior Tribal Self-Governance Act of 2015), 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 to the Secretary a written request for a waiver of applicability of a Federal regulation, including—

- (A) an identification of the specific text in the regulation sought to be waived; and
- (B) the basis for the request.

(2) *DETERMINATION BY THE SECRETARY.*—Not later than 120 days after receipt by the Secretary and the designated officials under paragraph (4) of a request under paragraph (1), the Secretary shall approve or deny the requested waiver in writing to the Indian tribe.

(3) *EXTENSIONS.*—The deadline described in paragraph (2) may be extended for any length of time, as agreed upon by both the Indian tribe and the Secretary.

(4) *DESIGNATED OFFICIALS.*—The Secretary shall designate one or more appropriate officials in the Department to receive a copy of the waiver request described in paragraph (1).

(5) **GROUNDS FOR DENIAL.**—*The Secretary may deny a request under paragraph (1)—*

(A) *for a program eligible under paragraph (1) or (2) of section 403(b), 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 403(c), 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.*

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

(7) **FINALITY.**—*A decision of the Secretary under this section shall be final for the Department.*

SEC. 410. DISCLAIMERS.

Nothing in this title expands or alters any statutory authority of the Secretary in a manner that authorizes the Secretary to enter into any agreement under section 403—

(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) *that 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. 411. DISCRETIONARY APPLICATION OF OTHER SECTIONS.

(a) **IN GENERAL.**—*Except as otherwise provided in section 101(c), at the option of a participating Indian tribe or Indian tribes, any of the provisions of title I may be incorporated in any compact or funding agreement under this title.*

(b) **EFFECT.**—*Each incorporated provision under subsection (a) shall—*

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

(2) *supplement or replace any related provision in this title; and*

(3) *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 shall—*

(1) *be effective immediately; and*

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

SEC. 412. ANNUAL BUDGET LIST.

The Secretary shall list, in the annual budget request submitted to Congress under section 1105 of title 31, United States Code, any funds proposed to be included in funding agreements authorized under this Act.

SEC. 413. REPORTS.**(a) IN GENERAL.—**

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

(2) **ANALYSIS.**—*Any Indian tribe may submit to the Office of Self-Governance and to the appropriate Committees of Congress a detailed annual analysis of unmet tribal needs for funding agreements under 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; and*

(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);*

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

(4) *include the separate views and comments of each Indian tribe or tribal organization; and*

(5) include a list of—

(A) *all such programs that the Secretary determines, in consultation with Indian tribes participating in self-governance, are eligible for negotiation to be included in a funding agreement at the request of a participating Indian tribe; and*

(B) *all such programs which Indian tribes have formally requested to include in a funding agreement under section 403(c) due to the special geographic, historical, or cultural significance of the program to the Indian tribe, indicating whether each request was granted or denied, and stating the grounds for any denial.*

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

(1) **IN GENERAL.**—*In order to optimize opportunities for including non-Bureau of Indian Affairs and non-Office of Special Trustee programs in agreements with Indian tribes participating in self-governance under this title, the Secretary shall review all programs administered by the Department, other than through the Bureau of Indian Affairs or Office of the Special Trustee, without regard to the agency or office concerned.*

(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 an appropriate portion of those programs are available to be included in funding agreements.*

(3) *PUBLICATION.*—The lists under subsection (b)(5) and targets under paragraph (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.*—In preparing the revised lists and programmatic targets, the Secretary shall consider all programs that were eligible for contracting in the original list published in the Federal Register in 1995, except for programs specifically determined not to be contractible as a matter of law.

(d) *REPORT ON CENTRAL OFFICE FUNDS.*—Not later than January 1, 2016, 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 for inclusion in the compacts.

SEC. 414. REGULATIONS.

(a) *IN GENERAL.*—

(1) *PROMULGATION.*—Not later than 90 days after the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2015, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title.

(2) *PUBLICATION OF PROPOSED REGULATIONS.*—Proposed regulations to implement this title shall be published in the Federal Register not later than 21 months after the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2015.

(3) *EXPIRATION OF AUTHORITY.*—The authority to promulgate regulations under paragraph (1) shall expire on the date that is 30 months after the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2015.

(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 representatives of the Federal Government and tribal government.

(2) *LEAD AGENCY.*—Among the Federal representatives described in paragraph (1), 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 may repeal any regulation that is inconsistent with this Act.

(2) *CONFLICTING PROVISIONS.*—Subject to section 202 of the Department of the Interior Tribal Self-Governance Act of 2015,

this title shall supersede any conflicting provision 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 implementation of this title.*

SEC. 415. EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCE, AND RULES.

Unless expressly agreed to by a participating Indian tribe in a 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 pursuant to section 414.*

SEC. 416. APPEALS.

Except as provided in section 406(d), in any administrative action, 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 requirements and policies of this title.*

SEC. 417. APPLICATION OF OTHER PROVISIONS.

Section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (Public Law 101-512; 104 Stat. 1959), shall apply to compacts and funding agreements entered into under this title.

SEC. 418. AUTHORIZATION OF APPROPRIATIONS.

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

