

## Calendar No. 73

116TH CONGRESS }  
1st Session }

SENATE

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

APRIL 29, 2019.—Ordered to be printed

Mr. HOEVEN, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

[To accompany S. 209]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 209) 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. 209 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. 209, is needed to correct the bureaucratic processes and procedures that the Department of the Interior Self-Governance program has imposed which have either discouraged, to some degree, the further compacting of Indian programs within the Department of the Interior (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. 209 provide greater certainty and more guidance from Congress on issues relating to decision-making time-

frames, 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 Pub. L. No. 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 can 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.<sup>1</sup>

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.

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<sup>1</sup> 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.

## LEGISLATIVE HISTORY

In the 108th Congress, Senators Campbell and Inouye introduced the “*Department of the Interior Tribal Self-Governance Act of 2004*”, S. 1715. The Committee held a hearing on the bill on May 12, 2004. The Committee met to consider the bill on June 16, 2004. 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 of 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. No legislative hearing was held on this 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.

During the 115th Congress, Senator Hoeven introduced S. 2515 on March 7, 2018. Senators Barrasso, Murkowski, and Udall were original co-sponsors. Senator Cantwell joined as a co-sponsor on March 20, 2018 and Senator Sullivan joined on April 10, 2018. Senator McCain joined as a co-sponsor on August 21, 2018.

No legislative hearing was held on this bill. However, on April 18, 2018, the Committee held an oversight hearing on “*The 30th Anniversary of Tribal Self-Governance: Successes in Self-governance and an Outlook for the Next 30 Years*” where the Committee received testimony in support of the bill.

On April 11, 2018, the Committee held a duly called business meeting at which S. 2515 was considered. The Committee ordered the bill, without amendments, to be reported favorably to the Senate by voice vote.

During this Congress, Senators Hoeven, Udall, Barrasso, and Smith, introduced S. 209 on January 24, 2019. Senator Cantwell was added as a co-sponsor on January 29, 2019. No legislative hearing was held on this bill. On January 29, 2019, the Committee held a duly called business meeting at which S. 209 was considered. The Committee ordered the bill, without amendments, to be reported favorably to the Senate by voice vote.

#### OVERVIEW OF THE BILL

This legislation, S. 209, 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. 209, contains two titles. The first 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 101 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, state authority to regulate fish and wildlife under state law, applicability of federal law related to management of fish and wildlife (except for the authority described in subparagraph (A) of this Section), and any tribal treaty-reserved or other rights 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 bill leaves this discretionary authority unchanged. 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.

The second 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 adds 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.

#### SUMMARY OF KEY PROVISIONS OF S. 209

This bill, S. 209, 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 101. The bill was reorganized by switching the two titles (Title II became Title I and vice versa). It also sets forth additional subsections reflecting negotiations between the Indian tribal governments and the Association of Fish and Wildlife Agencies.

*Title I.* The first title of the bill is intended to mirror the IHS self-governance program in several respects by codifying several regulations, clarifying procedures, and minimizing opportunities for the Secretary to delay compacting or funding. These provisions amend Title IV of the *Indian Self-Determination and Education Assistance Act of 1975*. A few of the key sections (as amended by Section 101(e) of the bill) are summarized below.

Sections 404 and 405 set forth requirements and procedures for amendments to compacts, retrocession of programs<sup>2</sup> 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 407 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 408 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

<sup>2</sup>Retrocession 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.

other ways by the Secretary, contrary to the Act. They further contend that the Secretary has held back funding as leverage in compact negotiations.

Section 409 requires the Secretary to act on a compacting tribe's regulatory waiver request within 120 days or the waiver is deemed approved, except for section 403(b)(2) or (c) programs (current law provides no alternative for tribes when the Secretary fails to act, except to sue for performance).

Section 412 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 415 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 grounds for the decision, except for "final offers" to compact, which require a higher standard of clearly demonstrating the validity of the grounds for the decision.

*Section 101 Amendments.* One important change in S. 209 (also included in S. 2515 from the 115th Congress, S. 286 from the 114th Congress, and S. 919 from the 113th Congress) from the prior bills is a new Section 101(a) that includes a "savings clause." Section 101(a) 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 subsection 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 101(a) 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, (2) Congressionally approved water settlements, (3) state authority to manage fish and wildlife under state law, (4) except as in subparagraph (A), the application of federal law to fish and wildlife management, and (5) tribal treaty or other rights.

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."

*Title II.* Other technical amendments were made in Title II 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 201 clarifies that 638 contracts are subject to the Act's procurement rules, but remain exempt from other Federal procurement rules.

Section 202 requires the Secretary to negotiate 638 contracts in good faith.

Section 204 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.”<sup>3</sup>

SECTION-BY-SECTION ANALYSIS OF S. 209, AS ORDERED REPORTED

*Section 1—Short title; Table of contents*

Section 1 states that the Act may be cited as the ‘*Practical Reforms and Other Goals To Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2018*’ or the ‘PROGRESS for Indian Tribes Act.’

TITLE I—TRIBAL SELF-GOVERNANCE

*Section 101. Tribal self-governance*

Section 101 amends the Act by revising several provisions of Title IV which govern the tribal self-governance program.

Section 101(a) provides that nothing in the PROGRESS for Indian Tribes Act increases, limits, or modifies the Secretary’s authority regarding including non-BIA programs in 638 contracts or compacts held the day before the enactment of the Act. Further, (1) no tribal water settlement or Congressional Act expressly ratifying or approving such water settlement, (2) state authority to manage fish and wildlife under state law, (3) except as in subparagraph (A), the application of Federal law to fish and wildlife management, and (4) tribal treaty or other rights are affected by the enactment of this Act.

Section 101(b) 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 101(c) amends Section 402 of the Act and provides 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 101(d) amends Section 403 of the 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 fund-

<sup>3</sup>The “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).

ing 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, re-assumption, 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, except for programs described in subsections (b)(2) or (c), in that case the Secretary's agreement is required. 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 101(e) amends Title IV, Sections 404 through 418, of the Act by mirroring for the Department of the Interior those self-governance provisions found in Title V of the Act which governs tribal self-governance within the Indian Health Service and clarifying any distinctions that are needed for the Department of the Interior differences.

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, this section requires that Title IV compacts and funding agreements be construed for the benefit of tribes and any ambiguities be resolved in favor of tribes.

Section 407 provides that Indian tribes participating in tribal self-governance may carry out construction projects under Title IV and sets forth the responsibilities and procedures of tribes undertaking these construction projects. Tribes may, subject to the Secretary's agreement, choose to carry out certain federal responsibilities under the National Environmental Policy Act, the National Historic Preservation Act, and related Federal laws that are applicable if the Secretary undertakes a construction project.

Further, tribes must adhere to building codes and standards in carrying out a construction project, and must be accountable for successful completion of a project. This section provides that funding for construction projects must be included in funding agreements as annual or semi-annual advance payments. Section 407 provides the Secretary with at least one opportunity to review and approve a tribe's project planning and design documents. Finally, Federal laws pertaining to procurement do not apply to a construction program or project absent tribal consent.

Section 408 authorizes multi-year funding agreements. It directs the Secretary to transfer tribal shares and resources to a tribe in a timely fashion. The Secretary may not reduce funding from year-to-year unless one of five narrowly defined exceptions applies. A tribe may carry over funding, interest, or income from year to year without diminishing its future entitlements. A tribe need not continue to perform a compact or a funding agreement with insufficient funds and may suspend its performance (after providing reasonable notice of such insufficiency to the Secretary) until funds are adequate.

Section 409 requires the Secretary to interpret Federal laws in a manner that facilitates the implementation of, and the inclusion of programs in, funding agreements. It provides that an Indian tribe may submit a written request for a waiver of Federal regula-

tions 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, except for programs described in Sections 403(b)(2) or (c), then the request is deemed denied.

Section 410 provides a tribe with the discretion to incorporate any provision of Title I into a compact or a funding agreement, except as provided in Section 201(d) and to the extent that such inclusions do not conflict with Section 101(a) of the *PROGRESS for Indian Tribes Act*.

Section 411 requires the Secretary to identify in a report to accompany the annual budget request submitted to Congress any funds proposed to be included in funding agreements authorized under this Act.

Section 412 requires the Secretary to submit an annual report to Congress regarding the administration of Title IV. Tribes may submit to the Office of Self-Governance and Congress an analysis of unmet tribal needs, whether the tribe is served directly by the Secretary or under compacts and funding agreements. 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 412 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 and the Office of the Special Trustee for inclusion in compacts.

Section 413 requires negotiated rulemaking and, within 21 months of the enactment of this legislation, 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 the *PROGRESS for Indian Tribes Act*. Finally, it provides that the lack of promulgated regulations shall not limit the effect or implementation of this title.

Section 414 provides that except for the eligibility provisions of section 105(g) and regulations of section 413 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 415 provides that, except as provided Section 406(d), 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 416 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 417 authorizes the appropriation of such sums as may be necessary to carry out Title IV—Tribal Self-Governance.

## TITLE II—INDIAN SELF-DETERMINATION

*Section 201. Definitions; reporting and audit requirements; application of provisions*

Section 201(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) of the Act, no contract shall be subject to any Federal procurement law, including regulations (e.g., the Federal Acquisition Regulations).

Section 105(a)(3) of the Act 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) of the Act 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 201(b) provides for the retention period of records for auditing purposes to be defined in regulations promulgated by the Secretary.

Section 201(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 202. Contracts by the Secretary of Interior*

Section 202(1) amends the Act to simplify a reference to the *Indian Financing Act of 1974*. Section 202(2) provides that the Secretary shall at all times negotiate in good faith and, subject to section 101(a) of the *PROGRESS for Indian Tribes Act*, that the provisions of contracts or funding agreements should be liberally construed for the benefit of the Indian tribe.

*Section 203. Administrative provisions*

Section 203 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, except as otherwise provided by law, 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 health objectives. This section also requires the Secretary, in considering proposals or amendments to contracts, to provide technical assistance to a tribe that lacks adequate internal controls.

*Section 204. Contract funding and indirect costs*

Section 204 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 205. Contract or grant specifications*

Section 205 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.

## COST AND BUDGETARY CONSIDERATIONS

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, March 25, 2019.*

Hon. JOHN HOEVEN,  
*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. 209, the PROGRESS for Indian Tribes Act.

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

Sincerely,

KEITH HALL,  
*Director.*

Enclosure.

*S. 209—PROGRESS for Indian Tribes Act*

Summary: S. 209 would modify eligibility requirements for tribes participating in the Tribal Self-Governance (SG) program, which authorizes Indian tribes to assume responsibility for certain programs, functions, and services or activities that would otherwise be carried out by the federal government for the benefit of tribal governments. The bill also would amend the process for negotiating agreements between the tribes and the Bureau of Indian Affairs (BIA) and would establish new guidelines for how to administer the program. In particular, the bill would allow tribes to correct significant errors (known as material exceptions) in annual financial audits when they apply to participate in the program. Under current law, a tribe must achieve three consecutive years of audits with no material exceptions in order to be eligible to enter into an SG contract with the federal government.

Under the bill, CBO expects, the number of tribes that enter into SG agreements with the federal government would increase by

about 25 each year, beginning in 2021. (Currently, 285 tribes participate.) Using information from BIA, CBO estimates that the Office of Self Governance (OSG) would require additional employees over the 2020–2024 period to work on audits, contracts, and negotiations with tribes. At the same time, CBO expects that the workload under BIA’s Self Determination (SD) program would result in a decrease of a comparable number of employees because tribes would exit SD agreements and enter into SG agreements.<sup>4</sup> On balance, CBO estimates, the increased personnel and benefits costs under the SG program would be offset by reduced costs to operate the SD program.

In addition, CBO estimates that OSG would need \$500,000 over two years to upgrade computers and software for the increased administrative activities required under the bill. CBO also estimates that a rulemaking required in the bill would cost \$1 million over two years, primarily to cover the costs of travel to meet with the different tribes involved in the rulemaking.

The CBO staff contact for this estimate is Jon Sperl. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 209.

#### 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. 209 will have a minimal impact on regulatory or paperwork requirements.

#### CHANGES IN EXISTING LAW

In accordance with Committee Rules, subsection 12 of rule XXVI of the Standing Rules of the Senate is waived. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule XXVI of the Standing Rules of the Senate to expedite the business of the Senate.

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<sup>4</sup>Under the Indian Self-Determination and Education Assistance Act, tribal governments may enter into either SD contracts or SG contracts with BIA to implement federal programs that provide services to tribal communities. Under SG contracts, tribes receive annual funding in the form of block grants that allow tribes greater autonomy in making decisions over how to use funds. SD contracts govern individual programs and entail greater federal oversight.