

Calendar No. 804

108TH CONGRESS }
2d Session }

SENATE

{ REPORT
108-413

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

NOVEMBER 16, 2004.—Ordered to be printed

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

R E P O R T

[To accompany S. 1715]

The Committee on Indian Affairs, to which was referred the bill (S. 1715) to amend the Indian Self-Determination and Education Assistance Act to provide for further self-governance by Indian tribes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

PURPOSE

The primary purpose of S. 1715, the Department of the Interior Tribal Self-Governance Act of 2004, is to clarify and expand the provisions of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638 (the “ISDEAA”), applicable to the Department of the Interior (“DoI”). This legislation is necessary to make amendments to the ISDEAA so that participating Indian tribes may better govern themselves and serve their members.

BACKGROUND

A. History of Tribal Self-Governance

In 1970 President Nixon issued his famous “Special Message to Congress on Indian Affairs”, July 8, 1970, and laid out the rationales for a new, more enlightened Federal Indian policy: Indian Self-Determination. He stated in part that:

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian’s sense of autonomy without threatening his sense of community.

We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. * * *

In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency.

With the passage of the ISDEAA in 1975, Congress reaffirmed President Nixon's policy shift and began the transition from the Federal domination of programs and services for the benefit of Indians and for the first time authorized the Indian tribes to design and implement these programs and services in a manner that is more responsive to the specific needs of their members. In the 30 years since the enactment of the ISDEAA, every succeeding Congress and Administration have sought to strengthen and expand Indian Self Determination.

In 1984 Congress significantly strengthened the ISDEAA when it enacted Pub. L. 98-250, which provided, in part, for an exemption from the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224, for contracts and cooperative agreements under the ISDEAA. Significant amendments were made again in 1988, when Congress enacted Pub. L. 100-472, which amended the ISDEAA and created a Self-Governance Demonstration Project within the Department of Health and Human Services.

In 1994 Congress enacted the Tribal Self-Governance Act, Pub. L. 103-413, building on the success of the original ISDEAA and made Self-Governance compacts permanent for the Department of Interior. The Tribal Self-Governance Act provides compacting tribes the flexibility to re-design programs and re-allocate funds among the various DoI programs they choose to operate.

The hallmarks of Self Governance are tribal-specific program design, implementation flexibility and expansion of services by compacting tribes and the Act has enabled these tribes to achieve significant benefits in terms of service quality enhancement and development of administrative acumen.

B. S. 1715, The Department of Interior Tribal Self Governance Act of 2004

The Department of Interior Tribal Self Governance Act of 2004, (S. 1715) will expand the provisions of the Tribal Self Governance Act that are applicable to the DoI. The legislation is integral to the steady progress and success of Self Governance for Indian tribes, as there are many Bureau of Indian Affairs ("BIA") and non-BIA programs within the DoI that affect the ability of Indian tribes to better serve their members.

It is the Committee's intention in amending the ISDEAA through S. 1715 to address identified statutory obstacles hindering the efforts of Self Governance tribes seeking to compact programs and services provided by agencies other than the BIA. It is also the Committee's intention to ensure that the provisions of Title IV—including construction and transportation projects—are comparable

and consistent with the provisions of Title V, as amended by Pub. L. 106–260.

The process of developing amendments to Title IV of the ISDEAA began shortly after passage of Pub. L. 106–260 in 2000. For over three years, a team of tribal leaders and technical advisors developed and refined proposed amendments. The team consulted with the BIA to the maximum extent possible to derive solutions to existing problems acceptable to the agency, and consistent with that agency’s statutory and trust responsibilities to Indian tribes. The product of these discussions and consultations were presented to the Committee for consideration to resolve existing statutory problems within Title IV of the ISDEAA.

On October 3, 2003, Senator Campbell, for himself and for Senator Inouye, introduced S. 1715 to address the identified statutory problems in implementing Title IV of the ISDEAA. The bill, as introduced, reflected in substantial part the multi-year consultations between the BIA and tribes with regard to ways to improve the ISDEAA as it applies to the DoI.

On May 12, 2004, the Committee held a legislative hearing on S. 1715. Witnesses at the hearing included the Assistant Secretary-Indian Affairs, on behalf of the DoI, various Indian tribes and tribal organizations, and a recognized Indian Tribal Self Governance expert.

All of the witnesses concurred that the basic purposes of S. 1715 were desirable. The Assistant Secretary-Indian Affairs indicated specific concerns of the DoI regarding re-assumption standards, the definition of “inherent Federal function”, and limits placed on the Secretary’s discretion to decide on the eligibility of programs. These concerns prevented the DoI from supporting the bill at the time of the hearing. The tribal witnesses were uniformly supportive of the bill as introduced.

On June 16, at a business meeting duly noticed, the Committee adopted amendments to S. 1715, and, as amended, reported the bill to the full Senate, with a favorable recommendation that the bill do pass.

SUMMARY OF MAJOR PROVISIONS

1. Overview

The purpose in amending Pub. L. 93–638 through S. 1715 is to reaffirm the original intent of the ISDEAA, and strengthen and expand the Federal policy of Tribal Self Governance. S. 1715 extends the benefits realized by tribes and the Federal government from “Indian-only” programs and services to include non-BIA programs within the DoI for which, in the Secretary’s discretion, a compacting or contracting tribe has a special geographic, historical or cultural interest. The bill also amends Title IV of the ISDEAA to make it more consistent with current Title V of the ISDEAA. It is the Committee’s intent that S. 1715 be broadly interpreted to accomplish these purposes.

2. Definitions

S. 1715 adds new definitions to the ISDEAA, such as “construction project,” “tribal share,” “inherent Federal functions,” and “gross mismanagement”.

Construction Project: S. 1715 adds a new definition of “construction project”, which refers to a specific project or undertaking pursuant to a construction program compacted under Title IV.

Gross Mismanagement: The term “gross mismanagement” is defined to provide a legal standard for re-assumption by the Secretary under new Section 407(b). “Gross mismanagement” is defined as a significant, clear, and convincing violation of compact, funding agreement, regulatory or statutory requirements related to the transfer of Self-Governance funds to the tribe that results in a significant reduction of funds to the tribe’s Self-Governance program.

The Committee believes that the inclusion of a definition of “gross mismanagement” is an appropriate performance standard, and failure to meet that standard is appropriate ground for re-assumption. This definition is narrowly tailored and is intended by the Committee to require a high degree of proof by the Secretary. The Committee is well aware of tribal concerns and agrees that the inclusion of this performance standard must not be utilized by the Secretary in such a manner as to needlessly impose monitoring and auditing requirements that hinder the efficient operation of tribal programs. Requiring intrusive and over-burdensome monitoring and auditing activities are antithetical to the goals of Self-Governance and the intent of the Committee.

Inherent Federal Function: S. 1715 adds a new definition for “inherent Federal function”, and defines such to be functions which cannot be legally delegated to Indian tribes. “Inherent Federal functions” are those which the Executive Branch cannot by law delegate to other branches of governments, or non-governmental entities. The Committee’s definition is consistent with the Department of the Interior Solicitor’s Memorandum of May 17, 1996 entitled “Inherently Federal Functions under the Tribal Self-Governance Act of 1994.”

At the May 12 hearing, the DoI requested that the Committee provide further clarification to the DoI and tribes by defining exactly which Federal functions are “inherent” and thus subject to the United States’ “trust responsibility.” The Committee declined to further specify what DoI functions and responsibilities are inherent or trigger the trust responsibility and, instead, the Committee’s definition is expressly intended to provide flexibility so as to allow the Secretary and the tribes to come to agreement on which functions are inherently Federal on a case-by-case basis.

Tribal Share: S. 1715 adds a new definition for “Tribal Share”, which are defined as residual funds “that support secretarial included programs that are not required by the Secretary for the performance of inherent Federal functions.” All funds appropriated under the Indian Self Determination and Education Assistance Act are either tribal shares or agency residual funds necessary for the performance of inherent Federal functions.

3. Removal of Annual Cap on New Tribes Eligible for Compacts

One of the most important provisions in S. 1715 is contained in new section 403 which removes the annual cap on new tribes entering Self Governance compacts. Instead, any tribe meeting the eligibility requirements can participate. It the Committee’s belief that this provision is both substantively and symbolically important as

a benchmark in the Federal and tribal relationship. Removing artificial barriers, such as annual caps on the number of new tribes that can enter Self Governance compacts, is indicative of the joint maturation and mutual capacity of the DoI and tribes to enter into government-to-government agreements under the Act.

4. Funding Agreements Expanded

Current section 403 is renumbered section 405 and is amended to expand authority for a tribe to include within annual funding agreements programs within or outside of the BIA or Office of Special Trustee that are provided for in the Act of April 16, 1934, the Johnson-O'Malley Act (25 U.S.C. 452, et seq.), the Act of November 2, 1921, the Snyder Act (25 U.S.C. 13), or that the Secretary administers for the benefit of Indians with appropriations made to agencies other than the DoI, or are provided for the benefit of Indians because of their status as Indians.

These programs specifically include all programs with respect to which Indians are the primary or significant beneficiaries. The Committee believes, and expressly intends, that the DoI should, in keeping with its trust responsibilities, give special consideration to including these programs within annual funding agreements.

New section 405 also contains new authority whereby a funding agreement may, in the Secretary's discretion, contain programs within any agency of DoI that are of a special geographic, historical, or cultural significance to the Indian tribes. It is the specific intent of the Committee that the DoI give special consideration, appropriate under the circumstances, including the Secretary's trust responsibility and in keeping with the significance to the requesting tribe, to including these programs within annual funding agreements.

These two provisions are central to S. 1715 and the continued advancement of Tribal Self Governance. The Committee believes that Federal programs of which Indians are the primary or significant beneficiary, substantially impact the daily lives of Indian tribes and Indian peoples, regardless of whether the word "Indian" appears in the program title or mission statement. Therefore, it is the intent of the Committee that these provisions be broadly and liberally interpreted to fully effectuate the policy of Tribal Self Governance. The Committee further strongly urges the Secretary to work with the tribes to develop funding agreements that fully implement this policy.

To allay concerns that these new authorities given to the DoI may conflict with other statutory provisions, section 405 contains a disclaimer which provides that nothing in the section is to be construed as overriding any express statutory requirement for competitive bidding, or as prohibiting the inclusion in a funding agreement of a program in which non-Indians have an incidental or legally identifiable interest. In addition, certain programs are specifically ineligible for inclusion in funding agreements.

The last provision in section 405 is intended to improve the effectiveness of existing and subsequent funding agreements by providing that funding agreements remain in full force and effect until a new funding agreement is executed, and further providing for the negotiation of multi-year funding agreements.

5. Expanded Accountability

Section 406 provides for expanded accountability provisions, including development of measures for conflict of interest, greater specificity in application of the Federal Single Agency Audit Act, application of cost principles, and maintenance of more detailed record-keeping systems. It is the Committee's belief that the extraordinary success of the Tribal Self Governance policy is largely based on principles of good governance, and that these provisions are in keeping with those principles. It is the intent of the Committee that these provisions be interpreted by the DoI in a manner that continues to encourage good governance practices by the tribes and the Federal government, and that will continue to foster a mutually respectful government to government relationship. The Committee specifically disavows any intent or interpretation of these provisions that would impose unnecessary bureaucratic burdens on Self Governance tribes.

6. Duties of the Secretary Specified

Section 407 specifies the duties of the Secretary in more detail than under the current law. Included within these duties is an expansion of the procedures and standards for re-assumption of a program by the Secretary. Important among those procedures, is the inclusion of new language providing tribes an opportunity to take corrective action and obviate the need for re-assumption.

During the May 12, 2004, hearing, the Assistant Secretary-Indian Affairs testified that the language of S. 1715, as introduced, for "immediate re-assumption" placed too high a hurdle for the DoI to fulfill its trust responsibilities. Therefore, at the business meeting at which S. 1715 was approved, an amendment was offered which provided that "immediate re-assumption" is appropriate in cases of "imminent, substantial and irreparable harm" to a physical trust asset, natural resource or public health and safety. The DoI also indicated at the May 12, 2004, hearing that such amended language would satisfy the DoI's concerns regarding its trust responsibilities.

Section 407 also contains new provisions detailing procedures for resolution of non-agreement between a tribe and the Secretary on compacts or funding agreements. The grounds for denial of a compact or funding agreement are strictly circumscribed to those listed in paragraph (c)(4) of section 407. Additionally, due to the significant impact of these programs on the tribal communities served, strict time lines are provided so that decisions can be made in a timely manner.

The role of the Secretary is central to the successful implementation of the Tribal Self Governance policy. It is the Committee's intent that all of the provisions of section 407 be interpreted liberally by the Secretary, consistent with the trust responsibility, to most effectively implement the overall purposes of the Tribal Self Governance policy.

7. Compact Requirements Detailed

Construction projects are currently addressed in Section 403(e). New section 408 provides significantly greater detail than the current provisions, as to the requirements of compacts involving construction programs, and the constructions projects developed pur-

suant to those programs. This section authorizes construction programs, and the associated projects, to be compacted similar to any other program or service eligible under Title IV.

Section 408 elaborates and clarifies the responsibilities and procedures for tribes undertaking construction projects under Title IV. Specifically, provision is made for the Secretary and a tribe to negotiate in detail the duties of the tribe with regard to construction projects and the standards and laws applicable to construction projects and agreements.

As part of the tribal construction program, Federal responsibilities under the National Environmental Protection Act, 42 U.S.C. 4321 et seq., and the National Historic Preservation Act, 16 U.S.C. §470 et seq., except for inherent Federal functions, are eligible for inclusion in annual funding agreements.

8. Payment Procedures

New section 409 describes in more detail the payment procedures for funding a compact or funding agreement, such as new time limitations on apportionment of funds to tribes. Limitations are also placed on the Secretary for transferring, withholding, and reducing payment of funds, and for payment of Federal functions.

Section 409 provides additional authority for the Secretary to approve multi-year funding agreements. It also provides that tribes may carry over unexpended funds into subsequent fiscal years, without diminishing the entitlement for funding in that or any subsequent year.

It is the Committee's intent that all of the provisions of section 409 be interpreted liberally by the Secretary, consistent with the trust responsibility, to most effectively implement the overall purposes of the Tribal Self Governance policy.

9. Amendments Made to S. 1715 as Introduced

During the business meeting at which S. 1715 was approved by the Committee, several amendments to the bill as introduced were adopted. The primary amendments are as follows:

1. Section 1, setting forth the name of the bill as enacted, "the Department of Interior Tribal Self Governance Act of 2003", was amended to read "the Department of Interior Tribal Self-Governance Act of 2004". Further amendments were made throughout the bill to conform to this change.

2. Subsection 415(c) provides for a report to be submitted to Congress on "January 1, 2004". This date was amended to read "January 1, 2005". Similarly, subsection 415(d) provides for the development of a report by the Secretary not later than "January 1, 2004". That date was amended to read "January 1, 2005".

3. Subparagraph (3) of subsection 407(b), dealing with standards for "immediate re-assumption" of programs or services by the Secretary, originally required that the Secretary find *both* "imminent and substantial jeopardy" *and* "irreparable harm" before "immediate re-assumption".

In the Secretary's opinion, this drafting error would not have afforded the Department the ability to fulfill its trust responsibility to protect tribal trust assets or the public health and safety. The provision was amended to provide that "immediate re-assumption" is appropriate in cases of "imminent, substantial and irreparable

harm” to a physical trust asset, natural resource or public health and safety.

LEGISLATIVE HISTORY

S. 1715 was introduced on October 3, 2003, by Senator Campbell for himself and for Senator Inouye, and was referred to the Committee on Indian Affairs.

On May 12, 2004, the Committee held a legislative hearing on S. 1715. Witnesses at the hearing included the Assistant Secretary-Indian Affairs, on behalf of the DoI, various Indian tribes and tribal organizations, and a recognized Indian Tribal Self Governance expert. All of the tribes and tribal organizations, and the Self Governance expert testified strongly in favor of S. 1715. The DoI expressed some minor concerns with the bill, which prevented it from fully supporting the bill at that time. These concerns were partially addressed in amendments to the bill.

On June 16, at a business meeting duly noticed, the Committee adopted amendments to S. 1715, and, as amended, passed the bill for consideration by the full Senate, with a favorable recommendation that the Senate pass the bill.

SECTION-BY-SECTION ANALYSIS

Sec. 401. Definitions

Definitions are added, such as “construction project,” “tribal share,” “inherent Federal functions,” and “gross mismanagement”.

Sec. 402. Establishment

Authorizes the Secretary of the Interior (DoI) to establish a “Tribal Self Governance Program”.

Sec. 403. Selection of Participating Indian Tribes

Section 403 expands the number of tribes eligible to participate in self-governance. Tribal withdrawal procedures from a consortium have been added and tribes are made eligible for planning grants.

Sec. 404. Compacts

Section 404 requires the Secretary to negotiate and enter compacts with participating tribes, and authorizes tribes with existing compacts to retain the current compact, in whole or in part, or to negotiate a new compact.

Sec. 405. Funding Agreements

Section 405 expands the DoI programs which tribes may include in Funding Agreements (FA) to encompass non-BIA programs, services, functions and activities. The new authority to compact does not override any statutory requirement for competitive bidding. Each FA specifies the services, functions, and responsibilities of each of the parties. Each FA may, at the tribe’s option, provide for a stable budget specifying recurring funds. The section also provides tribes with existing FAs more options with subsequent FAs, and allows for the negotiation of multi-year FAs.

Sec. 406. General Provisions

This section would require compacting tribes to have measures in place to avoid conflicts of interest, to have audit reports and makes it easier for tribes to consolidate or redesign programs and reallocate funds by eliminating the need for joint agreement with Secretary for such reconfiguration. Tribal records also would not be subject to the *Freedom of Information Act* or the *Administrative Procedures Act*.

Sec. 407. Provisions Related to the Secretary

Section 407 would (1) provide tribes with notice and opportunity to correct problems before the Secretary can reassume a program, (2) limit the grounds on which the Secretary can reject a tribe's final offer, (3) place the burden of proof on the Secretary to show the validity of rejecting an offer or re-assumption of a program, and (4) require liberal interpretation of compacts and FAs for the benefit of tribes.

Sec. 408. Construction Programs and Projects

This section clarifies responsibilities and procedures for tribes undertaking construction projects under Title IV, including compliance with building codes, reporting requirements, prevailing wage laws, the *National Environmental Policy Act*, and other applicable federal laws.

Sec. 409. Payment

Section 409 clarifies a number of payment issues, authorizes multi-year FAs, and allows tribes to carry over unexpended funds without reducing their entitlement in the next year.

Sec. 410. Civil Actions

This section includes FAs within the definition of "contract", and provides that tribes do not have to obtain Secretarial approval to hire attorneys or other professionals.

Sec. 411. Facilitation

This section requires the Secretary to interpret Federal laws in a manner that facilitates inclusion of programs and implementation of FAs. It also provides for waivers of regulations, unless such a waiver would be prohibited by statute.

Sec. 412. Disclaimers

Section 412 provides that nothing in Title IV will be construed to authorize the Secretary to enter into a FA with respect to inherent Federal functions, if a statute prohibits participation in a program by a non-federal entity, or negatively impacts another tribe.

Sec. 413. Application of Other Sections of the Act

Section 413 would provide tribes with the option of incorporating into Title IV compacts any provisions of Title I or V.

Sec. 414. Budget Request

This section would revise the budget request process so that the President identifies all funds necessary to fully fund FAs author-

ized by Title IV, and Secretary must ensure the request includes funds for planning and negotiation grants and identified shortfalls.

Sec. 415. Reports

This section makes more specific the required contents of the Secretary's annual Title IV report, including unmet needs, methodologies and amount spent on inherent federal functions, and requires an annual report on non-BIA programs, services, and funding agreements eligible for compacting. Reporting would occur with tribal consultation.

Sec. 416. Regulations

This section repeals the current 25 C.F.R. Part 1000, requires publication of proposed rules in Federal Register, and specifies negotiated rule-making to be conducted by Federal and tribal representatives. The Office of Self-Governance shall be lead agency for DoI.

Sec. 417. Effect of Circulars, Policies, Manuals, Guidances, and Rules

This section provides that, unless expressly agreed to by the tribe, it is not bound by any internal agency policies, except for the eligibility provision of § 105(g) and regulations promulgated under § 416.

Sec. 418. Appeals

This section provides that on any appeal, the Secretary must show proof, by clear and convincing evidence, the validity of the grounds for a decision made and to show that decision is consistent with the policies of this title.

Sec. 419. Authorization of Appropriations

This section authorizes appropriations to carry out this title.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On June 16, 2004, the Committee, in an open business session, considered S. 1715 and approved amendments to the bill, and ordered S. 1715, as amended, favorably reported to the full Senate with a recommendation that the bill do pass.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 1715 as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 10, 2004.

Hon. BEN NIGHTHORSE CAMPBELL,
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. 1715, the Department of the Interior Tribal Self-Governance Act of 2004.

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

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 1715—Department of the Interior Tribal Self-Governance Act of 2004

Summary: S. 1715 would amend title IV of the Indian Self-Determination and Education Assistance Act (ISDEA) to make it more consistent with the provisions of title V of the act. Under ISDEA, tribes enter into agreements with federal agencies to administer federal programs that benefit the tribes. Title IV of ISDEA generally is concerned with agreements between tribes and agencies of the Department of the Interior, while title V of the act governs agreements between tribes and the Department of Health and Human Services. Significant provisions would:

- Remove the current program participation limit of 50 new tribes per year;
- Expand self-governance funding agreements to include non-BIA programs;
- Clarify the circumstances under which the Secretary of the Interior may resume administration of programs; and
- Establish a rulemaking committee of federal and tribal representatives to replace existing regulations implementing title IV.

Based on information from the Bureau of Indian Affairs (BIA), CBO expects that implementing most provisions of the bill would have no significant budgetary impact. One provision, however, would require that funds retained by BIA for project management and oversight of highway construction projects that are carried out by tribes under self-governance agreements be used for project costs. Based on information from BIA, CBO estimates that the agency would need about \$15 million a year to continue its management responsibilities for the highway program. Assuming appropriation of the necessary funds, CBO estimates that implementing the bill would cost \$73 million over the 2005–2009 period. Enacting S. 1715 would not affect direct spending or revenues.

S. 1715 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates reform Act (UMRA) and would impose no costs on state, local, or tribal governments. Many of the changes made by this legislation would benefit tribes that participate in self-governance compacts with the Department of the Interior.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1715 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Program Management & Oversight for Indian Reservation Roads Program:					
Estimated Authorization Level	14	15	15	15	16

	By fiscal year, in millions of dollars				
	2005	2006	2007	2008	2009
Estimated Outlays	13	15	15	15	16

Basis of estimate: CBO estimates that implementing S. 1715 would cost \$73 million over the five-year period, subject to the appropriation of the necessary amounts. For this estimate, CBO assumes that S. 1715 will be enacted near the beginning of fiscal year 2005 and that outlays will follow historical patterns of similar programs.

Annual appropriation acts for the Department of the Interior have authorized the BIA to withhold up to 6 percent of the amounts available for road construction under the Indian Reservation Roads (IRR) program for management and oversight activities. Section 408 of S. 1715 would authorize all funds available to the IRR program to be used for road projects. Based on information from BIA, CBO estimates that the agency would need about \$15 million a year to continue its management and oversight responsibilities under the bill to fill the gap that would be created by devoting all IRR construction funds to road projects.

Intergovernmental and private-sector impact: S. 1715 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments. Many of the changes made by this legislation would benefit tribes that participate in self-governance compacts with the Department of the Interior.

Estimate prepared by: Federal Costs: Mike Waters. Impact on State, Local, and Tribal Governments: Marjorie Miller. Impact on the Private Sector: Karen Raupp.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee has concluded that S. 1715 will reduce regulatory or paperwork requirements and impacts.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 1715.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 1715, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Public Law 93-638

AN ACT To provide maximum Indian participation in the Government and education of the Indian People; to provide for the full participation of Indian Tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own education activities; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

* * * * *

TITLE IV—TRIBAL SELF-GOVERNANCE

SEC. 401. [ESTABLISHMENT] DEFINITIONS.

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

In this title:

(1) *COMPACT.*—The term “compact” means a compact under section 404.

(2) *CONSTRUCTION PROGRAM.*—The term “construction program” means a tribal undertaking to complete any or all included programs 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) *CONSTRUCTION PROJECT.*—The term “construction project” means a tribal undertaking that constructs 1 or more 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.

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

(5) *FUNDING AGREEMENT.*—The term “funding agreement” means a funding agreement under section 405(b).

(6) *GROSS MISMANAGEMENT.*—The term “gross mismanagement” means a significant violation, shown by clear and convincing evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds transferred to an Indian tribe by a compact or funding agreement that results in a significant reduction of funds being made available for the included programs assumed by an Indian tribe.

(7) *INCLUDED PROGRAM.*—The term “included program” means a program that is eligible for inclusion under a funding

agreement (including any portion of such a program and any function, service, or activity performed under such a program).

(8) *INDIAN TRIBE.*—The term “Indian tribe”, in a case in which an Indian tribe authorizes another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out an included program on its behalf in accordance with section 403(a)(3), includes the other authorized Indian tribe, inter-tribal consortium, or tribal organization.

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

(10) *INTER-TRIBAL CONSORTIUM.*—

(A) *IN GENERAL.*—The term “inter-tribal consortium” means a coalition of 2 more separate Indian tribes that join together for the purpose of participating in self-governance.

(B) *INCLUSION.*—The term “inter-tribal organization” includes a tribal organization.

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

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

(13) *TRIBAL SHARE.*—The term “tribal share” means an Indian tribe’s portion of all funds and resources that support secretarial included programs that are not required by the Secretary for the performance of inherent Federal functions.

SEC. 402. [SELECTION OF PARTICIPATING INDIAN TRIBES] ESTABLISHMENT.

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

[(b) *ADDITIONAL PARTICIPANTS.*—

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

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

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

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

[(2) has requested participation in Self-Governance by resolution or other official action by the tribal governing body; and

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

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

[(1) legal and budgetary research; and

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

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

SEC. 403. [FUNDING AGREEMENTS] SELECTION OF PARTICIPATING INDIAN TRIBES.

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

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

[(1) authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs, without regard to the agency or office of the Bureau of Indian Affairs within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office functions in accordance with subsection (g)(3), and including any program, service, function, and activity, or portion thereof, administered under the authority of—

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

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

[(C) programs, services, functions, and activities or portions thereof administered by the Secretary of the Interior that are otherwise available to Indian tribes or Indians for which appropriations are made to agencies other than the Department of the Interior;

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

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

[(4) prohibit the inclusion of funds provided—

[(A) pursuant to the Tribally Controlled Community College Assistance Act of 1978 1 (25 U.S.C. 1801 et seq.);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[(B) Not later than 60 days after receipt by the Secretary of a written request by a tribe to waive application of a Federal regulation for an agreement entered into under this section, the Secretary shall either approve or deny the requested waiver in writing to the tribe. A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. The Secretary's decision shall be final for the Department.]

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

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

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

[(a) IN GENERAL.—

[(1) CONTINUING PARTICIPATION.—*An Indian tribe that was participating in the Tribal Self-Governance Demonstration Project at the Department under title III on October 25, 1994, may elect to participate in self-governance under this title.*

[(2) ADDITIONAL PARTICIPANTS.—

[(A) IN GENERAL.—*In addition to Indian tribes participating in self-governance under paragraph (1), an Indian tribe that meets the eligibility criteria specified in subsection (b) shall be entitled to participate in self-governance.*

[(B) NO LIMITATION.—*The Secretary shall not limit the number of additional Indian tribes to be selected each year from among Indian tribes that are eligible under subsection 1(b).*

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

[(4) JOINT PARTICIPATION.—*Two or more Indian tribes that are not otherwise eligible under subsection (b) may be treated*

as a single Indian tribe for the purpose of participating in self-governance as a consortium if—

(A) if each Indian tribe so requests; and

(B) the consortium itself is eligible under subsection (b).

(5) **TRIBAL WITHDRAWAL FROM A CONSORTIUM.**—

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

(B) **EFFECT OF WITHDRAWAL.**—If an Indian tribe withdraws from participation in an inter-tribal consortium or tribal organization, the Indian tribe shall be entitled to its tribal share of funds and resources supporting the included programs that the Indian tribe will be carrying out under the compact and funding agreement of the Indian tribe.

(C) **PARTICIPATION IN SELF-GOVERNANCE.**—The withdrawal of an Indian tribe from an inter-tribal consortium or tribal organization shall not affect the eligibility of the inter-tribal consortium or tribal organization to participate in self-governance on behalf of 1 or more other Indian tribes.

(D) **WITHDRAWAL PROCESS.**—

(i) **IN GENERAL.**—An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its tribal share of any included program that is included in a compact or funding agreement.

(ii) **EFFECTIVE DATE.**—

(I) **IN GENERAL.**—A withdrawal under clause (I) shall become effective on the date specified in the resolution that authorizes transfer to the participating tribal organization or inter-tribal consortium.

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

(aa) the earlier of—

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

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

(bb) such date as may be agreed on by the Secretary, the withdrawing Indian tribe, and the tribal organization or inter-tribal consortium that signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, 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 inter-tribal consortium or 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 funds and resources supporting the included 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 inter-tribal consortium or tribal organization); and

(II) the funds referred to in subclause (I) shall be withdrawn by the Secretary from the funding agreement of the inter-tribal consortium or 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 funds not obligated by the inter-tribal consortium associated with the withdrawing Indian tribe's returned included programs, less closeout costs, shall be returned by the inter-tribal consortium to the Secretary for operation of the included programs included in the withdrawal.

(F) RETURN TO MATURE CONTRACT STATUS.—If an Indian tribe elects to operate all or some included 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.

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

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

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

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

(c) PLANNING PHASE.—

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

(2) ACTIVITIES.—The planning phase—

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

(B) shall include—

(i) legal and budgetary research; and

(ii) internal tribal government planning and organizational preparation.

(d) GRANTS.—

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

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

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

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

SEC. 404. [BUDGET REQUEST] COMPACTS.

【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.】

(a) *IN GENERAL.*—The Secretary shall negotiate and enter into a written compact with an Indian tribe participating in self-governance in a manner that is 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 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 year after year.

(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 Indian tribe; or

(2) another date agreed to by the parties.

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

(f) *EXISTING COMPACTS.*—An Indian tribe participating in self-governance under this title, as in effect on the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2004, 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. [REPORTS] FUNDING AGREEMENTS.

【(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.】

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

(b) INCLUDED PROGRAMS.—

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

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

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

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

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

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

(B) INCLUSIONS.—Programs described in subparagraph

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

(2) *OTHER AGENCIES.*—A funding agreement under subsection (a) shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for all programs carried out by the Secretary outside the Bureau of Indian Affairs, without regard to the agency or office within which the program is performed, including funding for agency, area, and central office functions in accordance with subsection 409(c), to the extent that the included programs are within the scope of paragraph (1).

(3) *DISCRETIONARY PROGRAMS.*—A funding agreement under subsection (a) may, in accordance with such additional terms as the parties consider to be appropriate, include programs administered by the Secretary, in addition to programs described in paragraphs (1) and (2), that are of special geographical, historical, or cultural significance to the Indian tribe.

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

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

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

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

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

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

(C) is provided for the Flathead Agency Irrigation Division or the Flathead Agency Power Division (except that nothing in this section affects the contract authority of the Flathead Agency Irrigation Division or the Flathead Agency Power Division under section 102).

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

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

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

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

(7) *BASE BUDGET.*—A funding agreement shall, at the option of the Indian tribe, provide for a stable base budget specifying the recurring funds (including funds available under section 106(a)) to be transferred to the Indian tribe, for such period as the Indian tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations.

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

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

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

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

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

(A) a funding agreement shall remain in effect until a subsequent funding agreement is executed; and

(B) the term of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.

(2) *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 2004 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.

(3) *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.

SEC. 406. [DISCLAIMERS] GENERAL PROVISIONS.

[(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 1 6, 102(c), 104, 105(f), 110, and 111 of this Act shall apply to agreements provided under this title.]

(a) *APPLICABILITY.*—An Indian tribe may 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 included 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) section 106 of this Act or any other provision of law;

or

(B) any exemptions to applicable Office of Management and Budget circulars 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 an audit under this subsection shall be subject to section 106(f).

(d) *REDESIGN AND CONSOLIDATION.*—An Indian tribe may redesign or consolidate included programs or reallocate funds for included programs in any manner that the Indian tribe determines to be in the best interest of the Indian community being served, so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

(e) *RETROCESSION.*—

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

(2) *EFFECTIVE DATE.*—

(A) *AGREEMENT.*—Unless the Indian tribe rescinds a request for retrocession, 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 such a specification, the retrocession shall become effective on—*

(i) *the earlier of—*

(I) *the date that is 1 year after the date of submission of the request; or*

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

(ii) *such date as may be agreed on 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 enter into a contract with the Secretary for funds under section 102, except that the Indian tribe shall be eligible for new included programs on the same basis as other Indian tribes; and*

(2) *shall be responsible for the administration of included 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 treated as agency records for purposes of chapter 5 of title 5, United States Code.*

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

(A) *maintain a recordkeeping system; and*

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

SEC. 407. [REGULATIONS] PROVISIONS RELATING TO THE SECRETARY.

[(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.]

(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 an included pro-*

gram and associated funding if there is a specific finding relating to that included program of—

(A) imminent jeopardy to a physical trust asset, 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 by 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 an included program 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 gross mismanagement or the imminent jeopardy to a physical trust asset, natural resource, or public health and safety.

(3) *EXCEPTION.*—

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

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

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

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

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

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

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

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

(4) *REJECTION OF FINAL OFFER.*—

(A) *IN GENERAL.*—If the Secretary rejects a final offer (or 1 or more provisions or funding levels in a final offer), the Secretary shall—

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

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

(II) the included program that is the subject of the final offer is an inherent Federal function;

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

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

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

(iii) provide the Indian tribe a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised (except that the Indian tribe may, in lieu of filing an appeal, directly proceed to bring a civil action in 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 (1), (ii), and (iii) of that subparagraph shall apply only to the portion of the proposed final compact or funding agreement that was rejected by the Secretary.

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

(e) *GOOD FAITH.*—

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

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

(f) *SAVINGS.*—To the extent that included programs carried out by Indian tribes under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 409(c), the Secretary shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and included programs.

(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 brought under subsection (c)(4) may be made—

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

(2) by an administrative law judge.

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

SEC. 408. [AUTHORIZATION OF APPROPRIATIONS] CONSTRUCTION PROGRAMS AND CONSTRUCTION PROJECTS.

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

(a) *IN GENERAL.*—An Indian tribe participating in self-governance may carry out a construction program or construction project under this title in the same manner as the Indian tribe carries out other included programs under this title, consistent with the provisions of all applicable Federal laws.

(b) *FEDERAL FUNCTIONS.*—An Indian tribe participating in self-governance may, in carrying out construction projects under this title, elect to assume all 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 that would apply if the Secretary were to carry out a construction project, by adopting a resolution—

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

(2) accepting the jurisdiction of the Federal courts for the purpose of enforcement of the responsibilities of the responsible Federal official under applicable environmental law.

(c) *NEGOTIATIONS.*—

(1) *IN GENERAL.*—In accordance with all applicable Federal laws, a construction program or construction project shall be treated in the same manner and be subject to all provisions of this Act as are all other tribal assumptions of included programs under this Act.

(2) *CONSTRUCTION PROJECTS.*—A provision shall be included in the funding agreement that, for each construction project—

(A) states the approximate start and completion dates of the construction project, which may extend for 1 or more years;

(B) provides a general description of the construction project;

(C) states the responsibilities of the Indian tribe and the Secretary with respect to the construction project;

(D) describes—

(i) the ways in which the Indian tribe will address project-related environmental considerations; and

(ii) the standards by which the Indian tribe will accomplish the construction project; and

(E) the amount of funds provided for the construction project.

(d) *CODES AND STANDARDS; TRIBAL ASSURANCES.*—A funding agreement shall contain a certification by the Indian tribe that the Indian tribe will establish and enforce procedures designed to ensure that all construction-related included programs carried out through the funding agreement adhere to building codes and other codes and architectural and engineering standards (including public health and safety standards) identified by the Indian tribe in the funding agreement, which codes and standards shall be in conformity with nationally recognized standards for comparable projects in comparable locations.

(e) *RESPONSIBILITY FOR COMPLETION.*—The Indian tribe shall assume responsibility for the successful completion of a construction project in accordance with the funding agreement.

(f) *FUNDING.*—

(1) *IN GENERAL.*—At the option of an Indian tribe, full funding for a construction program or construction project carried out under this title shall be included in a funding agreement as an annual advance payment.

(2) *ENTITLEMENT.*—Notwithstanding the annual advance payment provisions or any other provision of law, an Indian tribe shall be entitled to receive in its initial funding agreement all funds made available to the Secretary for multiyear construction programs and projects carried out under this title.

(3) *CONTINGENCY FUNDS.*—The Secretary shall include associated project contingency funds in an advance payment described in paragraph (1), and the Indian tribe shall be responsible for the management of the contingency funds included in the funding agreement.

(4) *REALLOCATION OF SAVINGS.*—

(A) *IN GENERAL.*—Notwithstanding any other provision of an annual Act of appropriation or other Federal law, an Indian tribe may reallocate any financial savings realized by the Indian tribe arising from efficiencies in the design, construction, or any other aspect of a construction program or construction project.

(B) *PURPOSES.*—A reallocation under subparagraph (A) shall be for construction-related activity purposes generally similar to those for which the funds were appropriated and

distributed to the Indian tribe under the funding agreement.

(g) APPROVAL.—

(1) IN GENERAL.—If the planning and design documents for a construction project are prepared by an Indian tribe in a manner that is consistent with the certification given by the Indian tribe as required under subsection (d), approval by the Secretary of a funding agreement providing for the assumption of the construction project shall be deemed to be an approval by the Secretary of the construction project planning and design documents.

(2) REPORTS.—The Indian tribe shall provide the Secretary with construction project progress and financial reports not less than semiannually.

(3) INSPECTIONS.—The Secretary may conduct onsite project inspections at a construction project semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

(h) WAGES.—

(1) IN GENERAL.—All laborers and mechanics employed by a contractor or subcontractor in the construction, alteration, or repair (including painting and decorating) of a building or other facility in connection with a construction project funded by the United States under this title shall be paid wages at not less than the amounts of wages prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.

(2) AUTHORITY.—With respect to construction, alteration, or repair work to which that subchapter is applicable under this subsection, the Secretary of Labor shall have the authority and functions specified in the Reorganization Plan numbered 14, of 1950.

(3) APPLICABILITY OF SUBSECTION.—Notwithstanding any other provision of law, this subsection does not apply to any portion of a construction project carried out under this Act—

(A) that is funded from a non-Federal source, regardless of whether the non-Federal funds are included with Federal funds for administrative convenience; or

(B) that is performed by a laborer or mechanic employed directly by an Indian tribe or tribal organization.

(4) APPLICABILITY OF TRIBAL LAW.—This subsection does not apply to a compact or funding agreement if the compact, self-determination contract, or funding agreement is otherwise covered by a law (including a regulation) adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe.

(i) APPLICABILITY OF OTHER LAW.—Unless otherwise agreed to by the Indian tribe, no provision of the Office of Federal Procurement Policy Act (41 U.S.C. 401 21 et seq.), the Federal Acquisition Regulation, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project conducted under this title.

SEC. 409. PAYMENT.

(a) *IN GENERAL.*—At the request of the governing body of the Indian tribe and under the terms of a 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.*—Subject to subsection (e) and sections 405 and 406 of this title, the Secretary shall provide funds to the Indian tribe under a funding agreement for included programs in the 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 Federal agency in which the included programs are carried out.

(d) *TIMING.*—Unless the funding agreement provides otherwise, the transfer of funds shall be made not later than 10 days after the apportionment of funds by the Office of Management and Budget to the Department.

(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) *LIMITATION 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 Act, 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 Act—

(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 an included 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 Act; or*

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

(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 acquire and transfer such personnel, supplies, or resources to the Indian tribe.*

(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 Act.*

(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 that an Indian tribe is entitled to receive under a funding agreement in the year in which the interest or income is earned or in any subsequent fiscal year.*

(3) *INVESTMENT STANDARD.—Funds transferred under this title shall be managed using the prudent investment standard.*

(k) *CARRYOVER OF FUNDS.—*

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

(2) *EFFECT OF CARRYOVER.—If an Indian tribe elects to carry over funding from 1 year to the next, the carryover shall not diminish the amount of funds that 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 an 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 the insufficiency to the Secretary.*

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

SEC. 410. CIVIL ACTIONS.

(A) *INCLUSION AS CONTRACT.*—Except as provided in subsection (b), for the purposes of section 110, the term ‘contract’ shall include a funding agreement.

(b) *CONTRACTS WITH PROFESSIONALS.*—For the period during which a funding agreement is in effect, section 2103 of the Revised Statutes (25 U.S.C. 81), and section 16 of the Act of June 18, 1934 (25 U.S.C. 476) shall not apply to a contract between an attorney or other professional and an Indian tribe.

SEC. 411. FACILITATION.

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

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

(b) *REGULATION WAIVER.*—

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

(2) *DETERMINATION BY THE SECRETARY.*— Not later than 60 days after the date of receipt by the Secretary of a request under paragraph (1), the Secretary shall approve or deny the requested waiver in writing to the Indian tribe.

(3) *GROUND FOR DENIAL.*—The Secretary may deny a request for a waiver only on 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.

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

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

SEC. 412. DISCLAIMERS.

Nothing in this title expands or alters any statutory authority of the Secretary so as to authorize the Secretary to enter into any funding agreement under section 405(b)(2) or 415 (c)(1)—

- (1) with respect to an inherent Federal function;
- (2) in a case in which the statute establishing a program does not authorize the type of participation sought by the Indian tribe (without regard to whether 1 or more Indian tribes are identified in the authorizing statute); or
- (3) 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. 413. APPLICABILITY OF OTHER PROVISIONS.

(a) *MANDATORY APPLICATION.*—Sections 5(d), 6, 102(c), 104, 105(f), 110, and 111 apply to compacts and funding agreements under this title.

(b) *DISCRETIONARY APPLICATION.*—

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

(2) *EFFECT.*—Each incorporated provision—

(A) shall have the same effect as if the provision were set out in full in this title; and

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

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

(A) shall be effective immediately; and

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

SEC. 414. BUDGET REQUEST.

(a) *REQUIREMENT OF ANNUAL BUDGET REQUEST.*—

(1) *IN GENERAL.*—The President shall identify in the annual budget request submitted to Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title.

(2) *DUTY OF SECRETARY.*—The Secretary shall ensure that there are included, in each budget request, requests for funds in amounts that are sufficient for planning and negotiation grants and sufficient to cover any shortfall in funding identified under subsection (b).

(3) *TIMING.*—All funds included within funding agreements shall be provided to the Office of Self-Governance not later than 15 days after the date on which funds are apportioned to the Department.

(4) *DISTRIBUTION OF FUNDS.*—The Office of Self-Governance shall be responsible for distribution of all funds provided under this title.

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

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

SEC. 415. 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.*—A report under paragraph (1) shall include a detailed analysis of tribal unmet need for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this subchapter.

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

(b) *CONTENTS.*—*A report under subsection (a) 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 bureaucracy;*

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

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

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

(4) *before being submitted to Congress, be distributed to the Indian tribes for comment (with a comment period of not less than 30 days); and*

(5) *include the separate views and Indian tribe or tribal organization.*

(c) *REPORT ON NON-BIA PROGRAMS.*—

(1) *IN GENERAL.*—*In order to optimize comments of each opportunities for -52 including non-Bureau of Indian Affairs included programs in agreements with Indian tribes participating in self governance under this title, the Secretary shall—*

(A) *review all included programs administered by the Department, other than through the Bureau of Indian Affairs, without regard to the agency or office concerned;*

(B) *not later than January 1, 2005, submit to Congress—*

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

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

(2) *PROGRAMMATIC TARGETS.*—*The Secretary shall establish programmatic targets, after consultation with Indian tribes participating in self-governance, to encourage bureaus of the*

Department to ensure that a significant portion of those included programs are included in funding agreements.

(3) *PUBLICATION.*—The lists 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.

(4) *ANNUAL REVIEW.*—

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

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

(d) *REPORT ON CENTRAL OFFICE FUNDS.*—Not later than January 1, 2005, 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.

SEC. 416. REGULATIONS.

(a) *IN GENERAL.*—

(1) *PROMULGATION.*—Not later than 90 days after the date of the enactment of the Department of the Interior Tribal Self-Governance Act of 2004, the Secretary shall initiate procedures under subchapter III of chapter 5, of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out the amendments made by that Act.

(2) *PUBLICATION OF PROPOSED REGULATIONS.*—Proposed regulations to implement the amendments shall be published in the Federal Register not later than 1 year after the date of enactment of that Act.

(3) *EXPIRATION OF AUTHORITY.*—The authority to promulgate regulations under paragraph (1) shall expire on the date that is 18 months after the date of enactment of that Act.

(b) *COMMITTEE.*—

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

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

(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.*—All regulatory provisions under part 1000 of title 25, Code of Federal Regulations, are repealed on the date of enactment of the Department of the Interior Tribal Self-Governance Act of 2004.

(2) *EFFECTIVENESS WITHOUT REGARD TO REGULATIONS.*—The lack of promulgated regulations shall not limit the effect of this Act.

(3) *INTERIM PROVISION.*— *Notwithstanding this subsection, any regulation under part 1000 of title 25, Code of Federal Regulations, shall remain in effect, at an Indian tribe's option, in implementing compacts until regulations are promulgated.*

SEC. 417. EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCES, 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 under section 416.11.*

SEC. 418. APPEALS.

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

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

SEC. 419. AUTHORIZATION OF APPROPRIATIONS.

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

