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S. 209

[Report No. 116–34]

To amend the Indian Self-Determination and Education Assistance Act to provide further self-governance by Indian Tribes, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 24, 2019

Mr. HOEVEN (for himself, Mr. BARRASSO, Mr. UDALL, Ms. SMITH, Ms. CANTWELL, and Mr. SULLIVAN) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

APRIL 29, 2019

Reported by Mr. HOEVEN, without amendment

A BILL

To amend the Indian Self-Determination and Education Assistance Act to provide further self-governance by Indian Tribes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Practical Reforms and Other Goals To Reinforce the Ef-

1 fectiveness of Self-Governance and Self-Determination for
 2 Indian Tribes Act of 2019” or the “PROGRESS for In-
 3 dian Tribes Act”.

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

Sec. 1. Short title; table of contents.

TITLE I—TRIBAL SELF-GOVERNANCE

Sec. 101. Tribal self-governance.

TITLE II—INDIAN SELF-DETERMINATION

Sec. 201. Definitions; reporting and audit requirements; application of provisions.

Sec. 202. Contracts by Secretary of the Interior.

Sec. 203. Administrative provisions.

Sec. 204. Contract funding and indirect costs.

Sec. 205. Contract or grant specifications.

6 **TITLE I—TRIBAL SELF-** 7 **GOVERNANCE**

8 **SEC. 101. TRIBAL SELF-GOVERNANCE.**

9 (a) EFFECT OF PROVISIONS.—Nothing in this Act,
 10 or the amendments made by this Act, shall be construed—

11 (1) to modify, limit, expand, or otherwise af-
 12 fect—

13 (A) the authority of the Secretary of the
 14 Interior, as provided for under the Indian Self-
 15 Determination and Education Assistance Act
 16 (as in effect on the day before the date of en-
 17 actment of this Act), regarding—

18 (i) the inclusion of any non-BIA pro-
 19 gram (as defined in section 401 of the In-

1 dian Self-Determination and Education
2 Assistance Act) in a self-determination
3 contract or funding agreement under sec-
4 tion 403(c) of such Act (as so in effect);
5 or

6 (ii) the implementation of any con-
7 tract or agreement described in clause (i)
8 that is in effect on the day described in
9 subparagraph (A);

10 (B) the meaning, application, or effect of
11 any Tribal water rights settlement, including
12 the performance required of a party thereto or
13 any payment or funding obligation thereunder;

14 (C) the authority, jurisdiction, or responsi-
15 bility of a State to manage, control, or regulate
16 fish and wildlife under State law (including reg-
17 ulations) on land or water in the State, includ-
18 ing Federal public land;

19 (D) except for the authority provided to
20 the Secretary as described in subparagraph (A),
21 the applicability or effect of any Federal law re-
22 lated to the protection or management of fish
23 or wildlife; or

24 (E) any treaty-reserved right or other right
25 of any Indian Tribe as recognized by any other

1 means, including treaties or agreements with
 2 the United States, Executive orders, statutes,
 3 regulations, or case law; or

4 (2) to authorize any provision of a contract or
 5 agreement that is not consistent with the terms of
 6 a Tribal water rights settlement.

7 (b) DEFINITIONS.—Section 401 of the Indian Self-
 8 Determination and Education Assistance Act (25 U.S.C.
 9 5361) is amended to read as follows:

10 **“SEC. 401. DEFINITIONS.**

11 “In this title:

12 “(1) COMPACT.—The term ‘compact’ means a
 13 self-governance compact entered into under section
 14 404.

15 “(2) CONSTRUCTION PROGRAM; CONSTRUCTION
 16 PROJECT.—The term ‘construction program’ or ‘con-
 17 struction project’ means a Tribal undertaking relat-
 18 ing to the administration, planning, environmental
 19 determination, design, construction, repair, improve-
 20 ment, or expansion of roads, bridges, buildings,
 21 structures, systems, or other facilities for purposes
 22 of housing, law enforcement, detention, sanitation,
 23 water supply, education, administration, community,
 24 health, irrigation, agriculture, conservation, flood

1 control, transportation, or port facilities, or for other
2 Tribal purposes.

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

5 “(4) FUNDING AGREEMENT.—The term ‘fund-
6 ing agreement’ means a funding agreement entered
7 into under section 403.

8 “(5) GROSS MISMANAGEMENT.—The term
9 ‘gross mismanagement’ means a significant viola-
10 tion, shown by a preponderance of the evidence, of
11 a compact, funding agreement, or statutory or regu-
12 latory requirement applicable to Federal funds for a
13 program administered by an Indian Tribe under a
14 compact or funding agreement.

15 “(6) INHERENT FEDERAL FUNCTION.—The
16 term ‘inherent Federal function’ means a Federal
17 function that may not legally be delegated to an In-
18 dian Tribe.

19 “(7) NON-BIA PROGRAM.—The term ‘non-BIA
20 program’ means all or a portion of a program, func-
21 tion, service, or activity that is administered by any
22 bureau, service, office, or agency of the Department
23 of the Interior other than—

24 “(A) the Bureau of Indian Affairs;

1 “(B) the Office of the Assistant Secretary
2 for Indian Affairs; or

3 “(C) the Office of the Special Trustee for
4 American Indians.

5 “(8) PROGRAM.—The term ‘program’ means
6 any program, function, service, or activity (or por-
7 tion thereof) within the Department that is included
8 in a funding agreement.

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

11 “(10) SELF-DETERMINATION CONTRACT.—The
12 term ‘self-determination contract’ means a self-de-
13 termination contract entered into under section 102.

14 “(11) SELF-GOVERNANCE.—The term ‘self-gov-
15 ernance’ means the Tribal Self-Governance Program
16 established under section 402.

17 “(12) TRIBAL SHARE.—The term ‘Tribal share’
18 means the portion of all funds and resources of an
19 Indian Tribe that—

20 “(A) support any program within the Bu-
21 reau of Indian Affairs, the Office of the Special
22 Trustee for American Indians, or the Office of
23 the Assistant Secretary for Indian Affairs; and

1 “(B) are not required by the Secretary for
 2 the performance of an inherent Federal func-
 3 tion.

4 “(13) TRIBAL WATER RIGHTS SETTLEMENT.—
 5 The term ‘Tribal water rights settlement’ means any
 6 settlement, compact, or other agreement expressly
 7 ratified or approved by an Act of Congress that—

8 “(A) includes an Indian Tribe and the
 9 United States as parties; and

10 “(B) quantifies or otherwise defines any
 11 water right of the Indian Tribe.”.

12 (c) ESTABLISHMENT.—Section 402 of the Indian
 13 Self-Determination and Education Assistance Act (25
 14 U.S.C. 5362) is amended to read as follows:

15 **“SEC. 402. TRIBAL SELF-GOVERNANCE PROGRAM.**

16 “(a) ESTABLISHMENT.—The Secretary shall estab-
 17 lish and carry out a program within the Department to
 18 be known as the ‘Tribal Self-Governance Program’.

19 “(b) SELECTION OF PARTICIPATING INDIAN
 20 TRIBES.—

21 “(1) IN GENERAL.—

22 “(A) ELIGIBILITY.—The Secretary, acting
 23 through the Director of the Office of Self-Gov-
 24 ernance, may select not more than 50 new In-
 25 dian Tribes per year from those tribes eligible

1 under subsection (c) to participate in self-gov-
 2 ernance.

3 “(B) JOINT PARTICIPATION.—On the re-
 4 quest of each participating Indian Tribe, 2 or
 5 more otherwise eligible Indian Tribes may be
 6 treated as a single Indian Tribe for the purpose
 7 of participating in self-governance.

8 “(2) OTHER AUTHORIZED INDIAN TRIBE OR
 9 TRIBAL ORGANIZATION.—If an Indian Tribe author-
 10 izes another Indian Tribe or a Tribal organization to
 11 plan for or carry out a program on its behalf under
 12 this title, the authorized Indian Tribe or Tribal or-
 13 ganization shall have the rights and responsibilities
 14 of the authorizing Indian Tribe (except as otherwise
 15 provided in the authorizing resolution).

16 “(3) JOINT PARTICIPATION AS ORGANIZA-
 17 TION.—Two or more Indian Tribes that are not oth-
 18 erwise eligible under subsection (c) may be treated
 19 as a single Indian Tribe for the purpose of partici-
 20 pating in self-governance as a Tribal organization
 21 if—

22 “(A) each Indian Tribe so requests; and

23 “(B) the Tribal organization itself, or at
 24 least one of the Indian Tribes participating in

1 the Tribal organization, is eligible under sub-
 2 section (c).

3 “(4) TRIBAL WITHDRAWAL FROM A TRIBAL OR-
 4 GANIZATION.—

5 “(A) IN GENERAL.—An Indian Tribe that
 6 withdraws from participation in a Tribal orga-
 7 nization, in whole or in part, shall be entitled
 8 to participate in self-governance if the Indian
 9 Tribe is eligible under subsection (c).

10 “(B) EFFECT OF WITHDRAWAL.—If an In-
 11 dian Tribe withdraws from participation in a
 12 Tribal organization, the Indian Tribe shall be
 13 entitled to its Tribal share of funds and re-
 14 sources supporting the programs that the In-
 15 dian Tribe is entitled to carry out under the
 16 compact and funding agreement of the Indian
 17 Tribe.

18 “(C) PARTICIPATION IN SELF-GOVERN-
 19 ANCE.—The withdrawal of an Indian Tribe
 20 from a Tribal organization shall not affect the
 21 eligibility of the Tribal organization to partici-
 22 pate in self-governance on behalf of one or more
 23 other Indian Tribes, if the Tribal organization
 24 still qualifies under subsection (c).

25 “(D) WITHDRAWAL PROCESS.—

1 “(i) IN GENERAL.—An Indian Tribe
2 may, by Tribal resolution, fully or partially
3 withdraw its Tribal share of any program
4 in a funding agreement from a partici-
5 pating Tribal organization.

6 “(ii) NOTIFICATION.—The Indian
7 Tribe shall provide a copy of the Tribal
8 resolution described in clause (i) to the
9 Secretary.

10 “(iii) EFFECTIVE DATE.—

11 “(I) IN GENERAL.—A withdrawal
12 under clause (i) shall become effective
13 on the date that is specified in the
14 Tribal resolution and mutually agreed
15 upon by the Secretary, the with-
16 drawing Indian Tribe, and the Tribal
17 organization that signed the compact
18 and funding agreement on behalf of
19 the withdrawing Indian Tribe or Trib-
20 al organization.

21 “(II) NO SPECIFIED DATE.—In
22 the absence of a date specified in the
23 resolution, the withdrawal shall be-
24 come effective on—

25 “(aa) the earlier of—

1 “(AA) 1 year after the
 2 date of submission of the re-
 3 quest; and

4 “(BB) the date on
 5 which the funding agree-
 6 ment expires; or

7 “(bb) such date as may be
 8 mutually agreed upon by the Sec-
 9 retary, the withdrawing Indian
 10 Tribe, and the Tribal organiza-
 11 tion that signed the compact and
 12 funding agreement on behalf of
 13 the withdrawing Indian Tribe or
 14 Tribal organization.

15 “(E) DISTRIBUTION OF FUNDS.—If an In-
 16 dian Tribe or Tribal organization eligible to
 17 enter into a self-determination contract or a
 18 compact or funding agreement fully or partially
 19 withdraws from a participating Tribal organiza-
 20 tion, the withdrawing Indian Tribe—

21 “(i) may elect to enter into a self-de-
 22 termination contract or compact, in which
 23 case—

24 “(I) the withdrawing Indian
 25 Tribe or Tribal organization shall be

1 entitled to its Tribal share of unex-
2 pended funds and resources sup-
3 porting the programs that the Indian
4 Tribe will be carrying out under its
5 own self-determination contract or
6 compact and funding agreement (cal-
7 culated on the same basis as the
8 funds were initially allocated to the
9 funding agreement of the Tribal orga-
10 nization); and

11 “(II) the funds referred to in
12 subclause (I) shall be withdrawn by
13 the Secretary from the funding agree-
14 ment of the Tribal organization and
15 transferred to the withdrawing Indian
16 Tribe, on the condition that sections
17 102 and 105(i), as appropriate, shall
18 apply to the withdrawing Indian
19 Tribe; or

20 “(ii) may elect not to enter into a self-
21 determination contract or compact, in
22 which case all unexpended funds and re-
23 sources associated with the withdrawing
24 Indian Tribe’s returned programs (cal-
25 culated on the same basis as the funds

1 were initially allocated to the funding
 2 agreement of the Tribal organization) shall
 3 be returned by the Tribal organization to
 4 the Secretary for operation of the pro-
 5 grams included in the withdrawal.

6 “(F) RETURN TO MATURE CONTRACT STA-
 7 TUS.—If an Indian Tribe elects to operate all or
 8 some programs carried out under a compact or
 9 funding agreement under this title through a
 10 self-determination contract under title I, at the
 11 option of the Indian Tribe, the resulting self-de-
 12 termination contract shall be a mature self-de-
 13 termination contract as long as the Indian
 14 Tribe meets the requirements set forth in sec-
 15 tion 4(h).

16 “(c) ELIGIBILITY.—To be eligible to participate in
 17 self-governance, an Indian Tribe shall—

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

20 “(2) request participation in self-governance by
 21 resolution or other official action by the Tribal gov-
 22 erning body; and

23 “(3) demonstrate, for the 3 fiscal years pre-
 24 ceding the date on which the Indian Tribe requests
 25 participation, financial stability and financial man-

1 agement capability as evidenced by the Indian Tribe
 2 having no uncorrected significant and material audit
 3 exceptions in the required annual audit of its self-
 4 determination or self-governance agreements with
 5 any Federal agency.

6 “(d) PLANNING PHASE.—

7 “(1) IN GENERAL.—An Indian Tribe seeking to
 8 begin participation in self-governance shall complete
 9 a planning phase as provided in this subsection.

10 “(2) ACTIVITIES.—The planning phase shall—

11 “(A) be conducted to the satisfaction of
 12 the Indian Tribe; and

13 “(B) include—

14 “(i) legal and budgetary research; and

15 “(ii) internal Tribal government plan-
 16 ning, training, and organizational prepara-
 17 tion.

18 “(e) GRANTS.—

19 “(1) IN GENERAL.—Subject to the availability
 20 of appropriations, an Indian Tribe or Tribal organi-
 21 zation that meets the requirements of paragraphs
 22 (2) and (3) of subsection (c) shall be eligible for
 23 grants—

24 “(A) to plan for participation in self-gov-
 25 ernance; and

1 “(B) to negotiate the terms of participa-
2 tion by the Indian Tribe or Tribal organization
3 in self-governance, as set forth in a compact
4 and a funding agreement.

5 “(2) RECEIPT OF GRANT NOT REQUIRED.—Re-
6 ceipt of a grant under paragraph (1) shall not be a
7 requirement of participation in self-governance.”.

8 (d) FUNDING AGREEMENTS.—Section 403 of the In-
9 dian Self-Determination and Education Assistance Act
10 (25 U.S.C. 5363) is amended—

11 (1) by striking subsection (a) and inserting the
12 following:

13 “(a) AUTHORIZATION.—The Secretary shall, on the
14 request of any Indian Tribe or Tribal organization, nego-
15 tiate and enter into a written funding agreement with the
16 governing body of the Indian Tribe or the Tribal organiza-
17 tion in a manner consistent with—

18 “(1) the trust responsibility of the Federal Gov-
19 ernment, treaty obligations, and the government-to-
20 government relationship between Indian Tribes and
21 the United States; and

22 “(2) subsection (b).”;

23 (2) in subsection (b)—

24 (A) in paragraph (1)—

1 (i) in the matter preceding subpara-
 2 graph (A), by striking “without regard to
 3 the agency or office of the Bureau of In-
 4 dian Affairs” and inserting “the Office of
 5 the Assistant Secretary for Indian Affairs,
 6 and the Office of the Special Trustee for
 7 American Indians, without regard to the
 8 agency or office of that Bureau or those
 9 Offices”;

10 (ii) by redesignating subparagraphs
 11 (A) and (B) as clauses (i) and (ii), respec-
 12 tively, and indenting the margins of such
 13 clauses accordingly;

14 (iii) by striking “including any pro-
 15 gram” and inserting the following: “includ-
 16 ing—
 17 “(A) any program”;

18 (iv) in subparagraph (A)—

19 (I) in clause (i), as redesignated
 20 by clause (ii), by striking the semi-
 21 colon at the end and inserting “;
 22 and”; and

23 (II) in clause (ii), as so redesign-
 24 nated, by striking “and” after the
 25 semicolon;

1 (v) by redesignating subparagraph (C)
 2 as subparagraph (B);

3 (vi) in subparagraph (B), as redesign-
 4 nated by clause (v), by striking the semi-
 5 colon and inserting “; and”; and

6 (vii) by adding at the end the fol-
 7 lowing:

8 “(C) any other program, service, function,
 9 or activity (or portion thereof) that is provided
 10 through the Bureau of Indian Affairs, the Of-
 11 fice of the Assistant Secretary for Indian Af-
 12 fairs, or the Office of the Special Trustee for
 13 American Indians with respect to which Indian
 14 Tribes or Indians are primary or significant
 15 beneficiaries;”;

16 (B) in paragraph (2)—

17 (i) by striking “section 405(c)” and
 18 inserting “section 412(c)”; and

19 (ii) by inserting “and” after the semi-
 20 colon at the end;

21 (C) in paragraph (3), by striking the semi-
 22 colon at the end and inserting a period; and

23 (D) by striking paragraphs (4) through
 24 (9);

25 (3) in subsection (f)—

1 (A) in the subsection heading, by striking
2 “FOR REVIEW”;

3 (B) by striking “such agreement to—” and
4 all that follows through “Indian tribe” and in-
5 serting “such agreement to each Indian Tribe”;

6 (C) by striking “agreement;” and inserting
7 “agreement.”; and

8 (D) by striking paragraphs (2) and (3);

9 (4) in subsection (k), by striking “section
10 405(c)(1)” and inserting “section 412(c)”;

11 (5) by adding at the end the following:

12 “(m) OTHER PROVISIONS.—

13 “(1) EXCLUDED FUNDING.—A funding agree-
14 ment shall not authorize an Indian Tribe to plan,
15 conduct, administer, or receive Tribal share funding
16 under any program that—

17 “(A) is provided under the Tribally Con-
18 trolled Colleges and Universities Assistance Act
19 of 1978 (25 U.S.C. 1801 et seq.); or

20 “(B) is provided for elementary and sec-
21 ondary schools under the formula developed
22 under section 1127 of the Education Amend-
23 ments of 1978 (25 U.S.C. 2007).

24 “(2) SERVICES, FUNCTIONS, AND RESPONSIBIL-
25 ITIES.—A funding agreement shall specify—

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

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

5 “(C) the responsibilities of the Indian
6 Tribe and the Secretary under the funding
7 agreement.

8 “(3) BASE BUDGET.—

9 “(A) IN GENERAL.—A funding agreement
10 shall, at the option of the Indian Tribe, provide
11 for a stable base budget specifying the recur-
12 ring funds (which may include funds available
13 under section 106(a)) to be transferred to the
14 Indian Tribe, for such period as the Indian
15 Tribe specifies in the funding agreement, sub-
16 ject to annual adjustment only to reflect
17 changes in congressional appropriations.

18 “(B) LIMITATIONS.—Notwithstanding sub-
19 paragraph (A), a funding agreement shall not
20 specify funding associated with a program de-
21 scribed in subsection (b)(2) or (c) unless the
22 Secretary agrees.

23 “(4) NO WAIVER OF TRUST RESPONSIBILITY.—
24 A funding agreement shall prohibit the Secretary
25 from waiving, modifying, or diminishing in any way

1 the trust responsibility of the United States with re-
 2 spect to Indian Tribes and individual Indians that
 3 exists under treaties, Executive orders, court deci-
 4 sions, and other laws.

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

9 “(o) EFFECTIVE DATE.—A funding agreement shall
 10 become effective on the date specified in the funding
 11 agreement.

12 “(p) EXISTING AND SUBSEQUENT FUNDING AGREE-
 13 MENTS.—

14 “(1) SUBSEQUENT FUNDING AGREEMENTS.—
 15 Absent notification from an Indian Tribe that the
 16 Indian Tribe is withdrawing or retroceding the oper-
 17 ation of one or more programs identified in a fund-
 18 ing agreement, or unless otherwise agreed to by the
 19 parties to the funding agreement or by the nature
 20 of any noncontinuing program, service, function, or
 21 activity contained in a funding agreement—

22 “(A) a funding agreement shall remain in
 23 full force and effect until a subsequent funding
 24 agreement is executed, with funding paid annu-

1 ally for each fiscal year the agreement is in ef-
2 fect; and

3 “(B) the term of the subsequent funding
4 agreement shall be retroactive to the end of the
5 term of the preceding funding agreement for
6 the purposes of calculating the amount of fund-
7 ing to which the Indian Tribe is entitled.

8 “(2) DISPUTES.—Disputes over the implemen-
9 tation of paragraph (1)(A) shall be subject to section
10 406(c).

11 “(3) EXISTING FUNDING AGREEMENTS.—An
12 Indian Tribe that was participating in self-govern-
13 ance under this title on the date of enactment of the
14 PROGRESS for Indian Tribes Act shall have the
15 option at any time after that date—

16 “(A) to retain its existing funding agree-
17 ment (in whole or in part) to the extent that
18 the provisions of that funding agreement are
19 not directly contrary to any express provision of
20 this title; or

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

23 “(4) MULTIYEAR FUNDING AGREEMENTS.—An
24 Indian Tribe may, at the discretion of the Indian

1 Tribe, negotiate with the Secretary for a funding
2 agreement with a term that exceeds 1 year.”.

3 (e) GENERAL REVISIONS.—Title IV of the Indian
4 Self-Determination and Education Assistance Act (25
5 U.S.C. 5361 et seq.) is amended by striking sections 404
6 through 408 and inserting the following:

7 **“SEC. 404. COMPACTS.**

8 “(a) IN GENERAL.—The Secretary shall negotiate
9 and enter into a written compact with each Indian Tribe
10 participating in self-governance in a manner consistent
11 with the trust responsibility of the Federal Government,
12 treaty obligations, and the government-to-government re-
13 lationship between Indian Tribes and the United States.

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

16 “(1) specify and affirm the general terms of the
17 government-to-government relationship between the
18 Indian Tribe and the Secretary; and

19 “(2) include such terms as the parties intend
20 shall control during the term of the compact.

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

23 “(d) EFFECTIVE DATE.—The effective date of a com-
24 pact under subsection (a) shall be—

1 “(1) the date of the execution of the compact
2 by the parties; or

3 “(2) such date as is mutually agreed upon by
4 the parties.

5 “(e) DURATION.—A compact under subsection (a)
6 shall remain in effect—

7 “(1) for so long as permitted by Federal law;
8 or

9 “(2) until termination by written agreement,
10 retrocession, or reassumption.

11 “(f) EXISTING COMPACTS.—An Indian Tribe partici-
12 pating in self-governance under this title, as in effect on
13 the date of enactment of the PROGRESS for Indian
14 Tribes Act, shall have the option at any time after that
15 date—

16 “(1) to retain its negotiated compact (in whole
17 or in part) to the extent that the provisions of the
18 compact are not directly contrary to any express
19 provision of this title; or

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

22 **“SEC. 405. GENERAL PROVISIONS.**

23 “(a) APPLICABILITY.—An Indian Tribe and the Sec-
24 retary shall include in any compact or funding agreement
25 provisions that reflect the requirements of this title.

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

6 “(c) AUDITS.—

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

10 “(2) COST PRINCIPLES.—An Indian Tribe shall
 11 apply cost principles under the applicable Office of
 12 Management and Budget circular, except as modi-
 13 fied by—

14 “(A) any provision of law, including section
 15 106; or

16 “(B) any exemptions to applicable Office
 17 of Management and Budget circulars subse-
 18 quently granted by the Office of Management
 19 and Budget.

20 “(3) FEDERAL CLAIMS.—Any claim by the Fed-
 21 eral Government against an Indian Tribe relating to
 22 funds received under a funding agreement based on
 23 any audit under this subsection shall be subject to
 24 section 106(f).

1 “(d) REDESIGN AND CONSOLIDATION.—Except as
 2 provided in section 407, an Indian Tribe may redesign or
 3 consolidate programs, or reallocate funds for programs, in
 4 a compact or funding agreement in any manner that the
 5 Indian Tribe determines to be in the best interest of the
 6 Indian community being served—

7 “(1) so long as the redesign or consolidation
 8 does not have the effect of denying eligibility for
 9 services to population groups otherwise eligible to be
 10 served under applicable Federal law; and

11 “(2) except that, with respect to the realloca-
 12 tion, consolidation, and redesign of programs de-
 13 scribed in subsection (b)(2) or (c) of section 403, a
 14 joint agreement between the Secretary and the In-
 15 dian Tribe shall be required.

16 “(e) RETROCESSION.—

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

20 “(2) EFFECTIVE DATE.—

21 “(A) AGREEMENT.—Unless an Indian
 22 Tribe rescinds a request for retrocession under
 23 paragraph (1), the retrocession shall become ef-
 24 fective on the date specified by the parties in
 25 the compact or funding agreement.

1 “(B) NO AGREEMENT.—In the absence of
 2 a specification of an effective date in the com-
 3 pact or funding agreement, the retrocession
 4 shall become effective on—

5 “(i) the earlier of—

6 “(I) 1 year after the date on
 7 which the request is submitted; and

8 “(II) the date on which the fund-
 9 ing agreement expires; or

10 “(ii) such date as may be mutually
 11 agreed upon by the Secretary and the In-
 12 dian Tribe.

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

17 “(1) shall not be entitled to contract with the
 18 Secretary for funds under section 102, except that
 19 the Indian Tribe shall be eligible for new programs
 20 on the same basis as other Indian Tribes; and

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

24 “(g) RECORDS.—

1 “(1) IN GENERAL.—Unless an Indian Tribe
 2 specifies otherwise in the compact or funding agree-
 3 ment, records of an Indian Tribe shall not be consid-
 4 ered to be Federal records for purposes of chapter
 5 5 of title 5, United States Code.

6 “(2) RECORDKEEPING SYSTEM.—An Indian
 7 Tribe shall—

8 “(A) maintain a recordkeeping system; and

9 “(B) on a notice period of not less than 30
 10 days, provide the Secretary with reasonable ac-
 11 cess to the records to enable the Department to
 12 meet the requirements of sections 3101 through
 13 3106 of title 44, United States Code.

14 **“SEC. 406. PROVISIONS RELATING TO THE SECRETARY.**

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

19 “(b) REASSUMPTION.—

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

1 “(A) imminent jeopardy to a trust asset, a
2 natural resource, or public health and safety
3 that—

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

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

8 “(B) gross mismanagement with respect to
9 funds transferred to an Indian Tribe under a
10 compact or funding agreement, as determined
11 by the Secretary in consultation with the In-
12 specter General, as appropriate.

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

16 “(A) the Secretary first provides written
17 notice and a hearing on the record to the In-
18 dian Tribe; and

19 “(B) the Indian Tribe does not take cor-
20 rective action to remedy the mismanagement of
21 the funds or programs, or the imminent jeop-
22 ardly to a trust asset, natural resource, or pub-
23 lic health and safety.

24 “(3) EXCEPTION.—

1 “(A) IN GENERAL.—Notwithstanding para-
2 graph (2), the Secretary may, on written notice
3 to the Indian Tribe, immediately reassume op-
4 eration of a program if—

5 “(i) the Secretary makes a finding of
6 imminent and substantial jeopardy and ir-
7 reparable harm to a trust asset, a natural
8 resource, or the public health and safety
9 caused by an act or omission of the Indian
10 Tribe; and

11 “(ii) the imminent and substantial
12 jeopardy and irreparable harm to the trust
13 asset, natural resource, or public health
14 and safety arises out of a failure by the In-
15 dian Tribe to carry out the terms of an ap-
16 plicable compact or funding agreement.

17 “(B) REASSUMPTION.—If the Secretary re-
18 assumes operation of a program under subpara-
19 graph (A), the Secretary shall provide the In-
20 dian Tribe with a hearing on the record not
21 later than 10 days after the date of reassump-
22 tion.

23 “(c) INABILITY TO AGREE ON COMPACT OR FUND-
24 ING AGREEMENT.—

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

6 “(2) DETERMINATION.—Not more than 60
7 days after the date of receipt of a final offer by one
8 or more of the officials designated pursuant to para-
9 graph (4), the Secretary shall review and make a de-
10 termination with respect to the final offer, except
11 that the 60-day period may be extended for up to 30
12 days for circumstances beyond the control of the
13 Secretary, upon written request by the Secretary to
14 the Indian tribe.

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

19 “(4) DESIGNATED OFFICIALS.—

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

24 “(B) NO DESIGNATION.—If no official is
25 designated, the Director of the Office of the Ex-

1 ecutive Secretariat and Regulatory Affairs shall
2 be the designated official.

3 “(5) NO TIMELY DETERMINATION.—If the Sec-
4 retary fails to make a determination with respect to
5 a final offer within the period specified in paragraph
6 (2), including any extension agreed to under para-
7 graph (3), the Secretary shall be deemed to have
8 agreed to the offer, except that with respect to any
9 compact or funding agreement provision concerning
10 a program described under section 403(c), the Sec-
11 retary shall be deemed to have rejected the offer
12 with respect to such provision and the terms of
13 clauses (ii) through (iv) of paragraphs (6)(A) shall
14 apply.

15 “(6) REJECTION OF FINAL OFFER.—

16 “(A) IN GENERAL.—If the Secretary re-
17 jects a final offer (or one or more provisions or
18 funding levels in a final offer), the Secretary
19 shall—

20 “(i) provide timely written notification
21 to the Indian Tribe that contains a specific
22 finding that clearly demonstrates, or that
23 is supported by a controlling legal author-
24 ity, that—

1 “(I) the amount of funds pro-
2 posed in the final offer exceeds the
3 applicable funding level as determined
4 under section 106(a)(1);

5 “(II) the program that is the
6 subject of the final offer is an inher-
7 ent Federal function or is subject to
8 the discretion of the Secretary under
9 section 403(c);

10 “(III) the Indian Tribe cannot
11 carry out the program in a manner
12 that would not result in significant
13 danger or risk to the public health or
14 safety, to natural resources, or to
15 trust resources;

16 “(IV) the Indian Tribe is not eli-
17 gible to participate in self-governance
18 under section 402(c);

19 “(V) the funding agreement
20 would violate a Federal statute or reg-
21 ulation; or

22 “(VI) with respect to a program
23 or portion of a program included in a
24 final offer pursuant to section
25 403(b)(2), the program or the portion

1 of the program is not otherwise avail-
2 able to Indian Tribes or Indians
3 under section 102(a)(1)(E);

4 “(ii) provide technical assistance to
5 overcome the objections stated in the noti-
6 fication required by clause (i);

7 “(iii) provide the Indian Tribe with a
8 hearing on the record with the right to en-
9 gage in full discovery relevant to any issue
10 raised in the matter, and the opportunity
11 for appeal on the objections raised, except
12 that the Indian Tribe may, in lieu of filing
13 such appeal, directly proceed to initiate an
14 action in a United States district court
15 under section 110(a); and

16 “(iv) provide the Indian Tribe the op-
17 tion of entering into the severable portions
18 of a final proposed compact or funding
19 agreement (including a lesser funding
20 amount, if any), that the Secretary did not
21 reject, subject to any additional alterations
22 necessary to conform the compact or fund-
23 ing agreement to the severed provisions.

1 “(B) EFFECT OF EXERCISING CERTAIN
2 OPTION.—If an Indian Tribe exercises the op-
3 tion specified in subparagraph (A)(iv)—

4 “(i) the Indian Tribe shall retain the
5 right to appeal the rejection by the Sec-
6 retary under this section; and

7 “(ii) clauses (i), (ii), and (iii) of sub-
8 paragraph (A) shall apply only to the por-
9 tion of the proposed final compact or fund-
10 ing agreement that was rejected by the
11 Secretary.

12 “(d) BURDEN OF PROOF.—In any administrative ac-
13 tion, hearing, appeal, or civil action brought under this
14 section, the Secretary shall have the burden of proof—

15 “(1) of demonstrating, by a preponderance of
16 the evidence, the validity of the grounds for a re-
17 assumption under subsection (b); and

18 “(2) of clearly demonstrating the validity of the
19 grounds for rejecting a final offer made under sub-
20 section (c).

21 “(e) GOOD FAITH.—

22 “(1) IN GENERAL.—In the negotiation of com-
23 pacts and funding agreements, the Secretary shall at
24 all times negotiate in good faith to maximize imple-
25 mentation of the self-governance policy.

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

4 “(f) SAVINGS.—

5 “(1) IN GENERAL.—To the extent that pro-
6 grams carried out for the benefit of Indian Tribes
7 and Tribal organizations under this title reduce the
8 administrative or other responsibilities of the Sec-
9 retary with respect to the operation of Indian pro-
10 grams and result in savings that have not otherwise
11 been included in the amount of Tribal shares and
12 other funds determined under section 408(c), except
13 for funding agreements entered into for programs
14 under section 403(c), the Secretary shall make such
15 savings available to the Indian Tribes or Tribal or-
16 ganizations for the provision of additional services to
17 program beneficiaries in a manner equitable to di-
18 rectly served, contracted, and compacted programs.

19 “(2) DISCRETIONARY PROGRAMS OF SPECIAL
20 SIGNIFICANCE.—For any savings generated as a re-
21 sult of the assumption of a program by an Indian
22 Tribe under section 403(c), such savings shall be
23 made available to that Indian Tribe.

24 “(g) TRUST RESPONSIBILITY.—The Secretary may
25 not waive, modify, or diminish in any way the trust re-

1 sponsibility of the United States with respect to Indian
 2 Tribes and individual Indians that exists under treaties,
 3 Executive orders, other laws, or court decisions.

4 “(h) DECISION MAKER.—A decision that constitutes
 5 final agency action and relates to an appeal within the
 6 Department conducted under subsection (c)(6)(A)(iii) may
 7 be made by—

8 “(1) an official of the Department who holds a
 9 position at a higher organizational level within the
 10 Department than the level of the departmental agen-
 11 cy in which the decision that is the subject of the
 12 appeal was made; or

13 “(2) an administrative law judge.

14 “(i) RULES OF CONSTRUCTION.—Subject to section
 15 101(a) of the PROGRESS for Indian Tribes Act, each
 16 provision of this title and each provision of a compact or
 17 funding agreement shall be liberally construed for the ben-
 18 efit of the Indian Tribe participating in self-governance,
 19 and any ambiguity shall be resolved in favor of the Indian
 20 Tribe.

21 **“SEC. 407. CONSTRUCTION PROGRAMS AND PROJECTS.**

22 “(a) IN GENERAL.—Indian Tribes participating in
 23 Tribal self-governance may carry out any construction
 24 project included in a compact or funding agreement under
 25 this title.

1 “(b) TRIBAL OPTION TO CARRY OUT CERTAIN FED-
 2 ERAL ENVIRONMENTAL ACTIVITIES.—In carrying out a
 3 construction project under this title, an Indian Tribe may,
 4 subject to the agreement of the Secretary, elect to assume
 5 some Federal responsibilities under the National Environ-
 6 mental Policy Act of 1969 (42 U.S.C. 4321 et seq.), divi-
 7 sion A of subtitle III of title 54, United States Code, and
 8 related provisions of other law and regulations that would
 9 apply if the Secretary were to undertake a construction
 10 project, by adopting a resolution—

11 “(1) designating a certifying Tribal officer to
 12 represent the Indian Tribe and to assume the status
 13 of a responsible Federal official under those Acts,
 14 laws, or regulations; and

15 “(2) accepting the jurisdiction of the United
 16 States courts for the purpose of enforcing the re-
 17 sponsibilities of the certifying Tribal officer assum-
 18 ing the status of a responsible Federal official under
 19 those Acts, laws, or regulations.

20 “(c) SAVINGS CLAUSE.—Notwithstanding subsection
 21 (b), nothing in this section authorizes the Secretary to in-
 22 clude in any compact or funding agreement duties of the
 23 Secretary under the National Environmental Policy Act
 24 of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle

1 III of title 54, United States Code, and other related pro-
 2 visions of law that are inherent Federal functions.

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

6 “(1) adhere to applicable Federal, State, local,
 7 and Tribal building codes, architectural and engi-
 8 neering standards, and applicable Federal guidelines
 9 regarding design, space, and operational standards,
 10 appropriate for the particular project; and

11 “(2) use only architects and engineers who—

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

14 “(B) certify that—

15 “(i) they are qualified to perform the
 16 work required by the specific construction
 17 involved; and

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

21 “(e) TRIBAL ACCOUNTABILITY.—

22 “(1) IN GENERAL.—In carrying out a construc-
 23 tion project under this title, an Indian Tribe shall
 24 assume responsibility for the successful completion
 25 of the construction project and of a facility that is

1 usable for the purpose for which the Indian Tribe
2 received funding.

3 “(2) REQUIREMENTS.—For each construction
4 project carried out by an Indian Tribe under this
5 title, the Indian Tribe and the Secretary shall nego-
6 tiate a provision to be included in the funding agree-
7 ment that identifies—

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

11 “(B) a general description of the project,
12 including the scope of work, references to de-
13 sign criteria, and other terms and conditions;

14 “(C) the responsibilities of the Indian
15 Tribe and the Secretary for the project;

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

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

20 “(F) the obligations of the Indian Tribe to
21 comply with the codes referenced in subsection
22 (d)(1) and applicable Federal laws and regula-
23 tions;

24 “(G) the agreement of the parties over who
25 will bear any additional costs necessary to meet

1 changes in scope, or errors or omissions in de-
2 sign and construction; and

3 “(H) the agreement of the Secretary to
4 issue a certificate of occupancy, if requested by
5 the Indian Tribe, based upon the review and
6 verification by the Secretary, to the satisfaction
7 of the Secretary, that the Indian Tribe has se-
8 cured upon completion the review and approval
9 of the plans and specifications, sufficiency of
10 design, life safety, and code compliance by
11 qualified, licensed, and independent architects
12 and engineers.

13 “(f) FUNDING.—

14 “(1) IN GENERAL.—Funding appropriated for
15 construction projects carried out under this title
16 shall be included in funding agreements as annual or
17 semiannual advance payments at the option of the
18 Indian Tribe.

19 “(2) ADVANCE PAYMENTS.—The Secretary
20 shall include all associated project contingency funds
21 with each advance payment, and the Indian Tribe
22 shall be responsible for the management of such con-
23 tingency funds.

24 “(g) NEGOTIATIONS.—At the option of the Indian
25 Tribe, construction project funding proposals shall be ne-

1 gotiated pursuant to the statutory process in section 105,
2 and any resulting construction project agreement shall be
3 incorporated into the funding agreement as addenda.

4 “(h) FEDERAL REVIEW AND VERIFICATION.—

5 “(1) IN GENERAL.—On a schedule negotiated
6 by the Secretary and the Indian Tribe—

7 “(A) the Secretary shall review and verify,
8 to the satisfaction of the Secretary, that project
9 planning and design documents prepared by the
10 Indian Tribe in advance of initial construction
11 are in conformity with the obligations of the In-
12 dian Tribe under subsection (d); and

13 “(B) before the project planning and de-
14 sign documents are implemented, the Secretary
15 shall review and verify to the satisfaction of the
16 Secretary that subsequent document amend-
17 ments which result in a significant change in
18 construction are in conformity with the obliga-
19 tions of the Indian Tribe under subsection (d).

20 “(2) REPORTS.—The Indian Tribe shall provide
21 the Secretary with project progress and financial re-
22 ports not less than semiannually.

23 “(3) OVERSIGHT VISITS.—The Secretary may
24 conduct onsite project oversight visits semiannually

1 or on an alternate schedule agreed to by the Sec-
2 retary and the Indian Tribe.

3 “(i) APPLICATION OF OTHER LAWS.—Unless other-
4 wise agreed to by the Indian Tribe and except as otherwise
5 provided in this Act, no provision of title 41, United States
6 Code, the Federal Acquisition Regulation, or any other law
7 or regulation pertaining to Federal procurement (includ-
8 ing Executive orders) shall apply to any construction pro-
9 gram or project carried out under this title.

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

18 **“SEC. 408. PAYMENT.**

19 “(a) IN GENERAL.—At the request of the governing
20 body of an Indian Tribe and under the terms of an appli-
21 cable funding agreement, the Secretary shall provide fund-
22 ing to the Indian Tribe to carry out the funding agree-
23 ment.

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

4 “(c) AMOUNT.—

5 “(1) IN GENERAL.—Subject to subsection (e)
6 and sections 403 and 405, the Secretary shall pro-
7 vide funds to the Indian Tribe under a funding
8 agreement for programs in an amount that is equal
9 to the amount that the Indian Tribe would have
10 been entitled to receive under contracts and grants
11 under this Act (including amounts for direct pro-
12 gram and contract support costs and, in addition,
13 any funds that are specifically or functionally related
14 to the provision by the Secretary of services and
15 benefits to the Indian Tribe or its members) without
16 regard to the organization level within the Depart-
17 ment at which the programs are carried out.

18 “(2) SAVINGS CLAUSE.—Nothing in this section
19 reduces programs, services, or funds of, or provided
20 to, another Indian Tribe.

21 “(d) TIMING.—

22 “(1) IN GENERAL.—Pursuant to the terms of
23 any compact or funding agreement entered into
24 under this title, the Secretary shall transfer to the
25 Indian Tribe all funds provided for in the funding

1 agreement, pursuant to subsection (c), and provide
2 funding for periods covered by joint resolution
3 adopted by Congress making continuing appropria-
4 tions, to the extent permitted by such resolution.

5 “(2) TRANSFERS.—Not later than 1 year after
6 the date of enactment of the PROGRESS for Indian
7 Tribes Act, in any instance in which a funding
8 agreement requires an annual transfer of funding to
9 be made at the beginning of a fiscal year or requires
10 semiannual or other periodic transfers of funding to
11 be made commencing at the beginning of a fiscal
12 year, the first such transfer shall be made not later
13 than 10 days after the apportionment of such funds
14 by the Office of Management and Budget to the De-
15 partment, unless the funding agreement provides
16 otherwise.

17 “(e) AVAILABILITY.—Funds for trust services to indi-
18 vidual Indians shall be available under a funding agree-
19 ment only to the extent that the same services that would
20 have been provided by the Secretary are provided to indi-
21 vidual Indians by the Indian Tribe.

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

24 “(g) LIMITATIONS ON AUTHORITY OF THE SEC-
25 RETARY.—The Secretary shall not—

1 “(1) fail to transfer to an Indian Tribe its full
2 share of any central, headquarters, regional, area, or
3 service unit office or other funds due under this title
4 for programs eligible under paragraph (1) or (2) of
5 section 403(b), except as required by Federal law;

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

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

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

13 “(B) in subsequent years, except as nec-
14 essary as a result of—

15 “(i) a reduction in appropriations
16 from the previous fiscal year for the pro-
17 gram to be included in a compact or fund-
18 ing agreement;

19 “(ii) a congressional directive in legis-
20 lation or an accompanying report;

21 “(iii) a Tribal authorization;

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

1 “(v) completion of an activity under a
 2 program for which the funds were pro-
 3 vided;

4 “(C) to pay for Federal functions, includ-
 5 ing—

6 “(i) Federal pay costs;

7 “(ii) Federal employee retirement ben-
 8 efits;

9 “(iii) automated data processing;

10 “(iv) technical assistance; and

11 “(v) monitoring of activities under
 12 this title; or

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

16 “(h) FEDERAL RESOURCES.—If an Indian Tribe
 17 elects to carry out a compact or funding agreement with
 18 the use of Federal personnel, Federal supplies (including
 19 supplies available from Federal warehouse facilities), Fed-
 20 eral supply sources (including lodging, airline transpor-
 21 tation, and other means of transportation, including the
 22 use of interagency motor pool vehicles), or other Federal
 23 resources (including supplies, services, and resources
 24 available to the Secretary under any procurement con-
 25 tracts in which the Department is eligible to participate),

1 the Secretary shall, as soon as practicable, acquire and
2 transfer such personnel, supplies, or resources to the In-
3 dian Tribe under this title.

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

8 “(j) INTEREST OR OTHER INCOME.—

9 “(1) IN GENERAL.—An Indian Tribe may re-
10 tain interest or income earned on any funds paid
11 under a compact or funding agreement to carry out
12 governmental purposes.

13 “(2) NO EFFECT ON OTHER AMOUNTS.—The
14 retention of interest or income under paragraph (1)
15 shall not diminish the amount of funds an Indian
16 Tribe is entitled to receive under a funding agree-
17 ment in the year the interest or income is earned or
18 in any subsequent fiscal year.

19 “(3) INVESTMENT STANDARD.—Funds trans-
20 ferred under this title shall be managed by the In-
21 dian Tribe using the prudent investment standard,
22 provided that the Secretary shall not be liable for
23 any investment losses of funds managed by the In-
24 dian Tribe that are not otherwise guaranteed or in-
25 sured by the Federal Government.

1 “(k) CARRYOVER OF FUNDS.—

2 “(1) IN GENERAL.—Notwithstanding any provi-
3 sion of an appropriations Act, all funds paid to an
4 Indian Tribe in accordance with a compact or fund-
5 ing agreement shall remain available until expended.

6 “(2) EFFECT OF CARRYOVER.—If an Indian
7 Tribe elects to carry over funding from one year to
8 the next, the carryover shall not diminish the
9 amount of funds the Indian Tribe is entitled to re-
10 ceive under a funding agreement in that fiscal year
11 or any subsequent fiscal year.

12 “(l) LIMITATION OF COSTS.—

13 “(1) IN GENERAL.—An Indian Tribe shall not
14 be obligated to continue performance that requires
15 an expenditure of funds in excess of the amount of
16 funds transferred under a compact or funding agree-
17 ment.

18 “(2) NOTICE OF INSUFFICIENCY.—If at any
19 time the Indian Tribe has reason to believe that the
20 total amount provided for a specific activity under a
21 compact or funding agreement is insufficient, the In-
22 dian Tribe shall provide reasonable notice of such in-
23 sufficiency to the Secretary.

24 “(3) SUSPENSION OF PERFORMANCE.—If, after
25 notice under paragraph (2), the Secretary does not

1 increase the amount of funds transferred under the
 2 funding agreement, the Indian Tribe may suspend
 3 performance of the activity until such time as addi-
 4 tional funds are transferred.

5 “(4) SAVINGS CLAUSE.—Nothing in this section
 6 reduces any programs, services, or funds of, or pro-
 7 vided to, another Indian Tribe.

8 “(m) DISTRIBUTION OF FUNDS.—The Office of Self-
 9 Governance shall be responsible for distribution of all Bu-
 10 reau of Indian Affairs funds provided under this title un-
 11 less otherwise agreed by the parties to an applicable fund-
 12 ing agreement.

13 “(n) APPLICABILITY.—Notwithstanding any other
 14 provision of this section, section 101(a) of the
 15 PROGRESS for Indian Tribes Act applies to subsections
 16 (a) through (m).

17 **“SEC. 409. FACILITATION.**

18 “(a) IN GENERAL.—Except as otherwise provided by
 19 law (including section 101(a) of the PROGRESS for In-
 20 dian Tribes Act), the Secretary shall interpret each Fed-
 21 eral law and regulation in a manner that facilitates—

22 “(1) the inclusion of programs in funding
 23 agreements; and

24 “(2) the implementation of funding agreements.

25 “(b) REGULATION WAIVER.—

1 “(1) REQUEST.—An Indian Tribe may submit
2 to the Secretary a written request for a waiver of
3 applicability of a Federal regulation, including—

4 “(A) an identification of the specific text in
5 the regulation sought to be waived; and

6 “(B) the basis for the request.

7 “(2) DETERMINATION BY THE SECRETARY.—
8 Not later than 120 days after receipt by the Sec-
9 retary and the designated officials under paragraph
10 (4) of a request under paragraph (1), the Secretary
11 shall approve or deny the requested waiver in writ-
12 ing to the Indian Tribe.

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

17 “(4) DESIGNATED OFFICIALS.—The Secretary
18 shall designate one or more appropriate officials in
19 the Department to receive a copy of the waiver re-
20 quest described in paragraph (1).

21 “(5) GROUNDS FOR DENIAL.—The Secretary
22 may deny a request under paragraph (1) upon a
23 specific finding by the Secretary that the identified
24 text in the regulation may not be waived because
25 such a waiver is prohibited by Federal law.

1 “(6) FAILURE TO MAKE DETERMINATION.—If
 2 the Secretary fails to make a determination with re-
 3 spect to a waiver request within the period specified
 4 in paragraph (2) (including any extension agreed to
 5 under paragraph (3)), the Secretary shall be deemed
 6 to have agreed to the request, except that for a
 7 waiver request relating to programs eligible under
 8 section 403(b)(2) or section 403(c), the Secretary
 9 shall be deemed to have denied the request.

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

12 **“SEC. 410. DISCRETIONARY APPLICATION OF OTHER SEC-**
 13 **TIONS.**

14 “(a) IN GENERAL.—Except as otherwise provided in
 15 section 201(d) of the PROGRESS for Indian Tribes Act,
 16 at the option of a participating Indian Tribe or Indian
 17 Tribes, any of the provisions of title I may be incorporated
 18 in any compact or funding agreement under this title. The
 19 inclusion of any such provision shall be subject to, and
 20 shall not conflict with, section 101(a) of such Act.

21 “(b) EFFECT.—Each incorporated provision under
 22 subsection (a) shall—

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

1 “(2) supplement or replace any related provi-
2 sion in this title; and

3 “(3) apply to any agency otherwise governed by
4 this title.

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

8 “(1) be effective immediately; and

9 “(2) control the negotiation and resulting com-
10 pact and funding agreement.

11 **“SEC. 411. ANNUAL BUDGET LIST.**

12 “The Secretary shall list, in the annual budget re-
13 quest submitted to Congress under section 1105 of title
14 31, United States Code, any funds proposed to be included
15 in funding agreements authorized under this title.

16 **“SEC. 412. REPORTS.**

17 “(a) IN GENERAL.—

18 “(1) REQUIREMENT.—On January 1 of each
19 year, the Secretary shall submit to Congress a re-
20 port regarding the administration of this title.

21 “(2) ANALYSIS.—Any Indian Tribe may submit
22 to the Office of Self-Governance and to the appro-
23 priate committees of Congress a detailed annual
24 analysis of unmet Tribal needs for funding agree-
25 ments under this title.

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

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

7 “(2) identify—

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

10 “(B) with particularity, all funds that are
11 specifically or functionally related to the provi-
12 sion by the Secretary of services and benefits to
13 self-governance Indian Tribes and members of
14 Indian Tribes;

15 “(C) the funds transferred to each Indian
16 Tribe and the corresponding reduction in the
17 Federal employees and workload; and

18 “(D) the funding formula for individual
19 Tribal shares of all Central Office funds, to-
20 gether with the comments of affected Indian
21 Tribes, developed under subsection (d);

22 “(3) before being submitted to Congress, be dis-
23 tributed to the Indian Tribes for comment (with a
24 comment period of not less than 30 days);

1 “(4) include the separate views and comments
 2 of each Indian Tribe or Tribal organization; and

3 “(5) include a list of—

4 “(A) all such programs that the Secretary
 5 determines, in consultation with Indian Tribes
 6 participating in self-governance, are eligible for
 7 negotiation to be included in a funding agree-
 8 ment at the request of a participating Indian
 9 Tribe; and

10 “(B) all such programs which Indian
 11 Tribes have formally requested to include in a
 12 funding agreement under section 403(c) due to
 13 the special geographic, historical, or cultural
 14 significance of the program to the Indian Tribe,
 15 indicating whether each request was granted or
 16 denied, and stating the grounds for any denial.

17 “(c) REPORT ON NON-BIA PROGRAMS.—

18 “(1) IN GENERAL.—In order to optimize oppor-
 19 tunities for including non-BIA programs in agree-
 20 ments with Indian Tribes participating in self-gov-
 21 ernance under this title, the Secretary shall review
 22 all programs administered by the Department, other
 23 than through the Bureau of Indian Affairs, the Of-
 24 fice of the Assistant Secretary for Indian Affairs, or
 25 the Office of the Special Trustee for American Indi-

1 ans, without regard to the agency or office con-
2 cerned.

3 “(2) PROGRAMMATIC TARGETS.—The Secretary
4 shall establish programmatic targets, after consulta-
5 tion with Indian Tribes participating in self-govern-
6 ance, to encourage bureaus of the Department to en-
7 sure that an appropriate portion of those programs
8 are available to be included in funding agreements.

9 “(3) PUBLICATION.—The lists under subsection
10 (b)(5) and targets under paragraph (2) shall be pub-
11 lished in the Federal Register and made available to
12 any Indian Tribe participating in self-governance.

13 “(4) ANNUAL REVIEW.—

14 “(A) IN GENERAL.—The Secretary shall
15 annually review and publish in the Federal Reg-
16 ister, after consultation with Indian Tribes par-
17 ticipating in self-governance, revised lists and
18 programmatic targets.

19 “(B) CONTENTS.—In preparing the revised
20 lists and programmatic targets, the Secretary
21 shall consider all programs that were eligible
22 for contracting in the original list published in
23 the Federal Register in 1995, except for pro-
24 grams specifically determined not to be con-
25 tractible as a matter of law.

1 “(d) REPORT ON CENTRAL OFFICE FUNDS.—Not
 2 later than January 1, 2020, the Secretary shall, in con-
 3 sultation with Indian Tribes, develop a funding formula
 4 to determine the individual Tribal share of funds con-
 5 trolled by the Central Office of the Bureau of Indian Af-
 6 fairs and the Office of the Special Trustee for inclusion
 7 in the compacts.

8 **“SEC. 413. REGULATIONS.**

9 “(a) IN GENERAL.—

10 “(1) PROMULGATION.—Not later than 90 days
 11 after the date of enactment of the PROGRESS for
 12 Indian Tribes Act, the Secretary shall initiate proce-
 13 dures under subchapter III of chapter 5 of title 5,
 14 United States Code, to negotiate and promulgate
 15 such regulations as are necessary to carry out this
 16 title.

17 “(2) PUBLICATION OF PROPOSED REGULA-
 18 TIONS.—Proposed regulations to implement this title
 19 shall be published in the Federal Register not later
 20 than 21 months after the date of enactment of the
 21 PROGRESS for Indian Tribes Act.

22 “(3) EXPIRATION OF AUTHORITY.—The author-
 23 ity to promulgate regulations under paragraph (1)
 24 shall expire on the date that is 30 months after the

1 date of enactment of the PROGRESS for Indian
2 Tribes Act.

3 “(b) COMMITTEE.—

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

9 “(2) LEAD AGENCY.—Among the Federal rep-
10 resentatives described in paragraph (1), the Office of
11 Self-Governance shall be the lead agency for the De-
12 partment.

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

18 “(d) EFFECT.—

19 “(1) REPEAL.—The Secretary may repeal any
20 regulation that is inconsistent with this Act.

21 “(2) CONFLICTING PROVISIONS.—Subject to
22 section 101(a) of the PROGRESS for Indian Tribes
23 Act and except with respect to programs described
24 under section 403(c), this title shall supersede any

1 conflicting provision of law (including any conflicting
2 regulations).

3 “(3) EFFECTIVENESS WITHOUT REGARD TO
4 REGULATIONS.—The lack of promulgated regula-
5 tions on an issue shall not limit the effect or imple-
6 mentation of this title.

7 **“SEC. 414. EFFECT OF CIRCULARS, POLICIES, MANUALS,**
8 **GUIDANCE, AND RULES.**

9 “Unless expressly agreed to by a participating Indian
10 Tribe in a compact or funding agreement, the partici-
11 pating Indian Tribe shall not be subject to any agency
12 circular, policy, manual, guidance, or rule adopted by the
13 Department, except for—

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

16 “(2) regulations promulgated pursuant to sec-
17 tion 413.

18 **“SEC. 415. APPEALS.**

19 “Except as provided in section 406(d), in any admin-
20 istrative action, appeal, or civil action for judicial review
21 of any decision made by the Secretary under this title,
22 the Secretary shall have the burden of proof of dem-
23 onstrating by a preponderance of the evidence—

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

1 “(2) the consistency of the decision with the re-
2 quirements and policies of this title.

3 **“SEC. 416. APPLICATION OF OTHER PROVISIONS.**

4 “Section 314 of the Department of the Interior and
5 Related Agencies Appropriations Act, 1991 (Public Law
6 101–512; 104 Stat. 1959), shall apply to compacts and
7 funding agreements entered into under this title.

8 **“SEC. 417. AUTHORIZATION OF APPROPRIATIONS.**

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

11 **TITLE II—INDIAN SELF-**
12 **DETERMINATION**

13 **SEC. 201. DEFINITIONS; REPORTING AND AUDIT REQUIRE-**
14 **MENTS; APPLICATION OF PROVISIONS.**

15 (a) DEFINITIONS.—

16 (1) IN GENERAL.—Section 4 of the Indian Self-
17 Determination and Education Assistance Act (25
18 U.S.C. 5304) is amended by striking subsection (j)
19 and inserting the following:

20 “(j) ‘self-determination contract’ means a contract
21 entered into under title I (or a grant or cooperative agree-
22 ment used under section 9) between a Tribal organization
23 and the appropriate Secretary for the planning, conduct,
24 and administration of programs or services that are other-
25 wise provided to Indian Tribes and members of Indian

1 Tribes pursuant to Federal law, subject to the condition
 2 that, except as provided in section 105(a)(3), no contract
 3 entered into under title I (or grant or cooperative agree-
 4 ment used under section 9) shall be—

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

7 “(2) except as provided in section 107(a)(1),
 8 subject to any Federal procurement law (including
 9 regulations);”.

10 (2) TECHNICAL AMENDMENTS.—Section 4 of
 11 the Indian Self-Determination and Education Assist-
 12 ance Act (25 U.S.C. 5304), as amended by para-
 13 graph (1), is further amended—

14 (A) in subsection (e), by striking “‘Indian
 15 tribe’ means” and inserting “‘Indian tribe’ or
 16 ‘Indian Tribe’ means”; and

17 (B) in subsection (l), by striking “‘tribal
 18 organization’ means” and inserting “‘Tribal or-
 19 ganization’ or ‘tribal organization’ means”.

20 (b) REPORTING AND AUDIT REQUIREMENTS.—Sec-
 21 tion 5 of the Indian Self-Determination and Education As-
 22 sistance Act (25 U.S.C. 5305) is amended—

23 (1) in subsection (b)—

24 (A) by striking “after completion of the
 25 project or undertaking referred to in the pre-

1 ceding subsection of this section” and inserting
2 “after the retention period for the report that
3 is submitted to the Secretary under subsection
4 (a)”;

5 (B) by adding at the end the following:
6 “The retention period shall be defined in regu-
7 lations promulgated by the Secretary pursuant
8 to section 413.”; and

9 (2) in subsection (f)(1), by inserting “if the In-
10 dian Tribal organization expends \$500,000 or more
11 in Federal awards during such fiscal year” after
12 “under this Act,”.

13 (c) EFFECTIVE DATE.—The amendment made by
14 subsection (b)(2) shall not take effect until 14 months
15 after the date of enactment of this Act.

16 (d) APPLICATION OF OTHER PROVISIONS.—Sections
17 4, 5, 6, 7, 102(c), 104, 105(a)(1), 105(f), 110, and 111
18 of the Indian Self-Determination and Education Assist-
19 ance Act (25 U.S.C. 5304, 5305, 5306, 5307, 5321(c),
20 5323, 5324(a)(1), 5324(f), 5331, and 5332) and section
21 314 of the Department of the Interior and Related Agen-
22 cies Appropriations Act, 1991 (Public Law 101–512; 104
23 Stat. 1959), apply to compacts and funding agreements
24 entered into under title IV of the Indian Self-Determina-

tion and Education Assistance Act (25 U.S.C. 5361 et seq.).

SEC. 202. CONTRACTS BY SECRETARY OF THE INTERIOR.

Section 102 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321) is amended—

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

(2) by adding at the end the following:

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

“(1) at all times negotiate in good faith to maximize implementation of the self-determination policy; and

“(2) carry out this Act in a manner that maximizes the policy of Tribal self-determination, in a manner consistent with—

“(A) the purposes specified in section 3;

and

“(B) the PROGRESS for Indian Tribes Act.

1 “(g) RULE OF CONSTRUCTION.—Subject to section
 2 101(a) of the PROGRESS for Indian Tribes Act, each
 3 provision of this Act and each provision of a contract or
 4 funding agreement shall be liberally construed for the ben-
 5 efit of the Indian Tribe participating in self-determination,
 6 and any ambiguity shall be resolved in favor of the Indian
 7 Tribe.”.

8 **SEC. 203. ADMINISTRATIVE PROVISIONS.**

9 Section 105 of the Indian Self-Determination and
 10 Education Assistance Act (25 U.S.C. 5324) is amended—

11 (1) in subsection (b), in the first sentence, by
 12 striking “pursuant to” and all that follows through
 13 “of this Act” and inserting “pursuant to sections
 14 102 and 103”; and

15 (2) by adding at the end the following:

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

21 “(1) the inclusion in self-determination con-
 22 tracts and funding agreements of—

23 “(A) applicable programs, services, func-
 24 tions, and activities (or portions thereof); and

1 “(B) funds associated with those pro-
2 grams, services, functions, and activities;

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

5 “(3) the achievement of Tribal health objec-
6 tives.

7 “(q)(1) TECHNICAL ASSISTANCE FOR INTERNAL
8 CONTROLS.—In considering proposals for, amendments
9 to, or in the course of, a contract under this title and com-
10 pacts under titles IV and V of this Act, if the Secretary
11 determines that the Indian Tribe lacks adequate internal
12 controls necessary to manage the contracted program or
13 programs, the Secretary shall, as soon as practicable, pro-
14 vide the necessary technical assistance to assist the Indian
15 Tribe in developing adequate internal controls. As part of
16 that technical assistance, the Secretary and the Tribe shall
17 develop a plan for assessing the subsequent effectiveness
18 of such technical assistance. The inability of the Secretary
19 to provide technical assistance or lack of a plan under this
20 subsection shall not result in the reassumption of an exist-
21 ing agreement, contract, or compact, or declination or re-
22 jection of a new agreement, contract, or compact.

23 “(2) The Secretary shall prepare a report to be in-
24 cluded in the information required for the reports under
25 sections 412(b)(2)(A) and 514(b)(2)(A). The Secretary

1 shall include in this report, in the aggregate, a description
 2 of the internal controls that were inadequate, the technical
 3 assistance provided, and a description of Secretarial ac-
 4 tions taken to address any remaining inadequate internal
 5 controls after the provision of technical assistance and im-
 6 plementation of the plan required by paragraph (1).”.

7 **SEC. 204. CONTRACT FUNDING AND INDIRECT COSTS.**

8 Section 106(a)(3) of the Indian Self-Determination
 9 and Education Assistance Act (25 U.S.C. 5325(a)(3)) is
 10 amended—

11 (1) in subparagraph (A)—

12 (A) in clause (i), by striking “, and” and
 13 inserting “; and”; and

14 (B) in clause (ii), by striking “expense re-
 15 lated to the overhead incurred” and inserting
 16 “expense incurred by the governing body of the
 17 Indian Tribe or Tribal organization and any
 18 overhead expense incurred”;

19 (2) by redesignating subparagraph (B) as sub-
 20 paragraph (C); and

21 (3) by inserting after subparagraph (A) the fol-
 22 lowing:

23 “(B) In calculating the reimbursement rate
 24 for expenses described in subparagraph (A)(ii),
 25 not less than 50 percent of the expenses de-

1 scribed in subparagraph (A)(ii) that are in-
 2 curred by the governing body of an Indian
 3 Tribe or Tribal organization relating to a Fed-
 4 eral program, function, service, or activity car-
 5 ried out pursuant to the contract shall be con-
 6 sidered to be reasonable and allowable.”.

7 **SEC. 205. CONTRACT OR GRANT SPECIFICATIONS.**

8 Section 108 of the Indian Self-Determination and
 9 Education Assistance Act (25 U.S.C. 5329) is amended—

10 (1) in subsection (a)(2), by inserting “subject
 11 to subsections (a) and (b) of section 102,” before
 12 “contain”;

13 (2) in subsection (f)(2)(A)(ii) of the model
 14 agreement contained in subsection (c), by inserting
 15 “subject to subsections (a) and (b) of section 102 of
 16 the Indian Self-Determination and Education Assist-
 17 ance Act (25 U.S.C. 5321),” before “such other pro-
 18 visions”; and

19 (3) in subsection (b)(7)(C) of the model agree-
 20 ment contained in subsection (c), in the second sen-
 21 tence of the matter preceding clause (i), by striking
 22 “one performance monitoring visit” and inserting
 23 “two performance monitoring visits”.

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S. 209

[Report No. 116-34]

A BILL

To amend the Indian Self-Determination and Education Assistance Act to provide further self-governance by Indian Tribes, and for other purposes.

APRIL 29, 2019

Reported without amendment