

116TH CONGRESS
1ST SESSION

S. 209

AN ACT

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,*

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

2 (a) SHORT TITLE.—This Act may be cited as the
 3 “Practical Reforms and Other Goals To Reinforce the Ef-
 4 fectiveness of Self-Governance and Self-Determination for
 5 Indian Tribes Act of 2019” or the “PROGRESS for In-
 6 dian Tribes Act”.

7 (b) TABLE OF CONTENTS.—The table of contents of
 8 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 provi-
 sions.

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.

9 **TITLE I—TRIBAL SELF-**
 10 **GOVERNANCE**

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

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

14 (1) to modify, limit, expand, or otherwise af-
 15 fect—

16 (A) the authority of the Secretary of the
 17 Interior, as provided for under the Indian Self-
 18 Determination and Education Assistance Act

1 (as in effect on the day before the date of en-
2 actment of this Act), regarding—

3 (i) the inclusion of any non-BIA pro-
4 gram (as defined in section 401 of the In-
5 dian Self-Determination and Education
6 Assistance Act) in a self-determination
7 contract or funding agreement under sec-
8 tion 403(c) of such Act (as so in effect);
9 or

10 (ii) the implementation of any con-
11 tract or agreement described in clause (i)
12 that is in effect on the day described in
13 subparagraph (A);

14 (B) the meaning, application, or effect of
15 any Tribal water rights settlement, including
16 the performance required of a party thereto or
17 any payment or funding obligation thereunder;

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

23 (D) except for the authority provided to
24 the Secretary as described in subparagraph (A),
25 the applicability or effect of any Federal law re-

1 lated to the protection or management of fish
2 or wildlife; or

3 (E) any treaty-reserved right or other right
4 of any Indian Tribe as recognized by any other
5 means, including treaties or agreements with
6 the United States, Executive orders, statutes,
7 regulations, or case law; or

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

11 (b) DEFINITIONS.—Section 401 of the Indian Self-
12 Determination and Education Assistance Act (25 U.S.C.
13 5361) is amended to read as follows:

14 **“SEC. 401. DEFINITIONS.**

15 “In this title:

16 “(1) COMPACT.—The term ‘compact’ means a
17 self-governance compact entered into under section
18 404.

19 “(2) CONSTRUCTION PROGRAM; CONSTRUCTION
20 PROJECT.—The term ‘construction program’ or ‘con-
21 struction project’ means a Tribal undertaking relat-
22 ing to the administration, planning, environmental
23 determination, design, construction, repair, improve-
24 ment, or expansion of roads, bridges, buildings,
25 structures, systems, or other facilities for purposes

1 of housing, law enforcement, detention, sanitation,
2 water supply, education, administration, community,
3 health, irrigation, agriculture, conservation, flood
4 control, transportation, or port facilities, or for other
5 Tribal purposes.

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

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

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

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

22 “(7) NON-BIA PROGRAM.—The term ‘non-BIA
23 program’ means all or a portion of a program, func-
24 tion, service, or activity that is administered by any

bureau, service, office, or agency of the Department of the Interior other than—

“(A) the Bureau of Indian Affairs;

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

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

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

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

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

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

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

“(A) support any program within the Bureau of Indian Affairs, the Office of the Special

1 Trustee for American Indians, or the Office of
 2 the Assistant Secretary for Indian Affairs; and

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

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

10 “(A) includes an Indian Tribe and the
 11 United States as parties; and

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

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

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

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

21 “(b) SELECTION OF PARTICIPATING INDIAN
 22 TRIBES.—

23 “(1) IN GENERAL.—

24 “(A) ELIGIBILITY.—The Secretary, acting
 25 through the Director of the Office of Self-Gov-

ernance, may select not more than 50 new Indian Tribes per year from those tribes eligible under subsection (c) to participate in self-governance.

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

“(2) OTHER AUTHORIZED INDIAN TRIBE OR TRIBAL ORGANIZATION.—If an Indian Tribe authorizes another Indian Tribe or a Tribal organization to plan for or carry out a program on its behalf under this title, the authorized Indian Tribe or Tribal organization shall have the rights and responsibilities of the authorizing Indian Tribe (except as otherwise provided in the authorizing resolution).

“(3) JOINT PARTICIPATION AS ORGANIZATION.—Two or more Indian Tribes that are not otherwise eligible under subsection (c) may be treated as a single Indian Tribe for the purpose of participating in self-governance as a Tribal organization if—

“(A) each Indian Tribe so requests; and

1 “(B) the Tribal organization itself, or at
 2 least one of the Indian Tribes participating in
 3 the Tribal organization, is eligible under sub-
 4 section (c).

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

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

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

20 “(C) PARTICIPATION IN SELF-GOVERN-
 21 ANCE.—The withdrawal of an Indian Tribe
 22 from a Tribal organization shall not affect the
 23 eligibility of the Tribal organization to partici-
 24 pate in self-governance on behalf of one or more

1 other Indian Tribes, if the Tribal organization
2 still qualifies under subsection (c).

3 “(D) WITHDRAWAL PROCESS.—

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

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

13 “(iii) EFFECTIVE DATE.—

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

24 “(II) NO SPECIFIED DATE.—In
25 the absence of a date specified in the

1 resolution, the withdrawal shall be-
2 come effective on—

3 “(aa) the earlier of—

4 “(AA) 1 year after the
5 date of submission of the re-
6 quest; and

7 “(BB) the date on
8 which the funding agree-
9 ment expires; or

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

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

1 “(i) may elect to enter into a self-de-
2 termination contract or compact, in which
3 case—

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

16 “(II) the funds referred to in
17 subclause (I) shall be withdrawn by
18 the Secretary from the funding agree-
19 ment of the Tribal organization and
20 transferred to the withdrawing Indian
21 Tribe, on the condition that sections
22 102 and 105(i), as appropriate, shall
23 apply to the withdrawing Indian
24 Tribe; or

1 “(ii) may elect not to enter into a self-
2 determination contract or compact, in
3 which case all unexpended funds and re-
4 sources associated with the withdrawing
5 Indian Tribe’s returned programs (cal-
6 culated on the same basis as the funds
7 were initially allocated to the funding
8 agreement of the Tribal organization) shall
9 be returned by the Tribal organization to
10 the Secretary for operation of the pro-
11 grams included in the withdrawal.

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

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

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

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

4 “(3) demonstrate, for the 3 fiscal years pre-
5 ceding the date on which the Indian Tribe requests
6 participation, financial stability and financial man-
7 agement capability as evidenced by the Indian Tribe
8 having no uncorrected significant and material audit
9 exceptions in the required annual audit of its self-
10 determination or self-governance agreements with
11 any Federal agency.

12 “(d) PLANNING PHASE.—

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

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

17 “(A) be conducted to the satisfaction of
18 the Indian Tribe; and

19 “(B) include—

20 “(i) legal and budgetary research; and

21 “(ii) internal Tribal government plan-
22 ning, training, and organizational prepara-
23 tion.

24 “(e) GRANTS.—

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

6 “(A) to plan for participation in self-gov-
7 ernance; and

8 “(B) to negotiate the terms of participa-
9 tion by the Indian Tribe or Tribal organization
10 in self-governance, as set forth in a compact
11 and a funding agreement.

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

15 (d) FUNDING AGREEMENTS.—Section 403 of the In-
16 dian Self-Determination and Education Assistance Act
17 (25 U.S.C. 5363) is amended—

18 (1) by striking subsection (a) and inserting the
19 following:

20 “(a) AUTHORIZATION.—The Secretary shall, on the
21 request of any Indian Tribe or Tribal organization, nego-
22 tiate and enter into a written funding agreement with the
23 governing body of the Indian Tribe or the Tribal organiza-
24 tion in a manner consistent with—

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

“(2) subsection (b).”;

(2) in subsection (b)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by striking “without regard to the agency or office of the Bureau of Indian Affairs” and inserting “the Office of the Assistant Secretary for Indian Affairs, and the Office of the Special Trustee for American Indians, without regard to the agency or office of that Bureau or those Offices”;

(ii) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and indenting the margins of such clauses accordingly;

(iii) by striking “including any program” and inserting the following: “including—

“(A) any program”;

(iv) in subparagraph (A)—

1 (I) in clause (i), as redesignated
2 by clause (ii), by striking the semi-
3 colon at the end and inserting “;
4 and”; and

5 (II) in clause (ii), as so redesign-
6 nated, by striking “and” after the
7 semicolon;

8 (v) by redesignating subparagraph (C)
9 as subparagraph (B);

10 (vi) in subparagraph (B), as redesign-
11 nated by clause (v), by striking the semi-
12 colon and inserting “; and”; and

13 (vii) by adding at the end the fol-
14 lowing:

15 “(C) any other program, service, function,
16 or activity (or portion thereof) that is provided
17 through the Bureau of Indian Affairs, the Of-
18 fice of the Assistant Secretary for Indian Af-
19 fairs, or the Office of the Special Trustee for
20 American Indians with respect to which Indian
21 Tribes or Indians are primary or significant
22 beneficiaries;”;

23 (B) in paragraph (2)—

24 (i) by striking “section 405(c)” and
25 inserting “section 412(c)”; and

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

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

5 (D) by striking paragraphs (4) through
 6 (9);
 7 (3) in subsection (f)—

8 (A) in the subsection heading, by striking
 9 “FOR REVIEW”;

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

13 (C) by striking “agreement;” and inserting
 14 “agreement.”; and

15 (D) by striking paragraphs (2) and (3);
 16 (4) in subsection (k), by striking “section
 17 405(c)(1)” and inserting “section 412(c)”; and

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

19 “(m) OTHER PROVISIONS.—

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

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

4 “(B) is provided for elementary and sec-
 5 ondary schools under the formula developed
 6 under section 1127 of the Education Amend-
 7 ments of 1978 (25 U.S.C. 2007).

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

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

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

14 “(C) the responsibilities of the Indian
 15 Tribe and the Secretary under the funding
 16 agreement.

17 “(3) BASE BUDGET.—

18 “(A) IN GENERAL.—A funding agreement
 19 shall, at the option of the Indian Tribe, provide
 20 for a stable base budget specifying the recur-
 21 ring funds (which may include funds available
 22 under section 106(a)) to be transferred to the
 23 Indian Tribe, for such period as the Indian
 24 Tribe specifies in the funding agreement, sub-

1 ject to annual adjustment only to reflect
2 changes in congressional appropriations.

3 “(B) LIMITATIONS.—Notwithstanding sub-
4 paragraph (A), a funding agreement shall not
5 specify funding associated with a program de-
6 scribed in subsection (b)(2) or (c) unless the
7 Secretary agrees.

8 “(4) NO WAIVER OF TRUST RESPONSIBILITY.—
9 A funding agreement shall prohibit the Secretary
10 from waiving, modifying, or diminishing in any way
11 the trust responsibility of the United States with re-
12 spect to Indian Tribes and individual Indians that
13 exists under treaties, Executive orders, court deci-
14 sions, and other laws.

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

19 “(o) EFFECTIVE DATE.—A funding agreement shall
20 become effective on the date specified in the funding
21 agreement.

22 “(p) EXISTING AND SUBSEQUENT FUNDING AGREE-
23 MENTS.—

24 “(1) SUBSEQUENT FUNDING AGREEMENTS.—
25 Absent notification from an Indian Tribe that the

1 Indian Tribe is withdrawing or retroceding the oper-
2 ation of one or more programs identified in a fund-
3 ing agreement, or unless otherwise agreed to by the
4 parties to the funding agreement or by the nature
5 of any noncontinuing program, service, function, or
6 activity contained in a funding agreement—

7 “(A) a funding agreement shall remain in
8 full force and effect until a subsequent funding
9 agreement is executed, with funding paid annu-
10 ally for each fiscal year the agreement is in ef-
11 fect; and

12 “(B) the term of the subsequent funding
13 agreement shall be retroactive to the end of the
14 term of the preceding funding agreement for
15 the purposes of calculating the amount of fund-
16 ing to which the Indian Tribe is entitled.

17 “(2) DISPUTES.—Disputes over the implemen-
18 tation of paragraph (1)(A) shall be subject to section
19 406(c).

20 “(3) EXISTING FUNDING AGREEMENTS.—An
21 Indian Tribe that was participating in self-govern-
22 ance under this title on the date of enactment of the
23 PROGRESS for Indian Tribes Act shall have the
24 option at any time after that date—

1 “(A) to retain its existing funding agree-
 2 ment (in whole or in part) to the extent that
 3 the provisions of that funding agreement are
 4 not directly contrary to any express provision of
 5 this title; or

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

8 “(4) MULTIYEAR FUNDING AGREEMENTS.—An
 9 Indian Tribe may, at the discretion of the Indian
 10 Tribe, negotiate with the Secretary for a funding
 11 agreement with a term that exceeds 1 year.”.

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

16 **“SEC. 404. COMPACTS.**

17 “(a) IN GENERAL.—The Secretary shall negotiate
 18 and enter into a written compact with each Indian Tribe
 19 participating in self-governance in a manner consistent
 20 with the trust responsibility of the Federal Government,
 21 treaty obligations, and the government-to-government re-
 22 lationship between Indian Tribes and the United States.

23 “(b) CONTENTS.—A compact under subsection (a)
 24 shall—

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

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

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

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

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

12 “(2) such date as is mutually agreed upon by
13 the parties.

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

16 “(1) for so long as permitted by Federal law;
17 or

18 “(2) until termination by written agreement,
19 retrocession, or reassumption.

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

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

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

7 **“SEC. 405. GENERAL PROVISIONS.**

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

11 “(b) CONFLICTS OF INTEREST.—An Indian Tribe
12 participating in self-governance shall ensure that internal
13 measures are in place to address, pursuant to Tribal law
14 and procedures, conflicts of interest in the administration
15 of programs.

16 “(c) AUDITS.—

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

20 “(2) COST PRINCIPLES.—An Indian Tribe shall
21 apply cost principles under the applicable Office of
22 Management and Budget circular, except as modi-
23 fied by—

24 “(A) any provision of law, including section
25 106; or

1 “(B) any exemptions to applicable Office
2 of Management and Budget circulars subse-
3 quently granted by the Office of Management
4 and Budget.

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

10 “(d) REDESIGN AND CONSOLIDATION.—Except as
11 provided in section 407, an Indian Tribe may redesign or
12 consolidate programs, or reallocate funds for programs, in
13 a compact or funding agreement in any manner that the
14 Indian Tribe determines to be in the best interest of the
15 Indian community being served—

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

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

25 “(e) RETROCESSION.—

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

4 “(2) EFFECTIVE DATE.—

5 “(A) AGREEMENT.—Unless an Indian
6 Tribe rescinds a request for retrocession under
7 paragraph (1), the retrocession shall become ef-
8 fective on the date specified by the parties in
9 the compact or funding agreement.

10 “(B) NO AGREEMENT.—In the absence of
11 a specification of an effective date in the com-
12 pact or funding agreement, the retrocession
13 shall become effective on—

14 “(i) the earlier of—

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

17 “(II) the date on which the fund-
18 ing agreement expires; or

19 “(ii) such date as may be mutually
20 agreed upon by the Secretary and the In-
21 dian Tribe.

22 “(f) NONDUPLICATION.—A funding agreement shall
23 provide that, for the period for which, and to the extent
24 to which, funding is provided to an Indian Tribe under
25 this title, the Indian Tribe—

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

5 “(2) shall be responsible for the administration
 6 of programs in accordance with the compact or
 7 funding agreement.

8 “(g) RECORDS.—

9 “(1) IN GENERAL.—Unless an Indian Tribe
 10 specifies otherwise in the compact or funding agree-
 11 ment, records of an Indian Tribe shall not be consid-
 12 ered to be Federal records for purposes of chapter
 13 5 of title 5, United States Code.

14 “(2) RECORDKEEPING SYSTEM.—An Indian
 15 Tribe shall—

16 “(A) maintain a recordkeeping system; and

17 “(B) on a notice period of not less than 30
 18 days, provide the Secretary with reasonable ac-
 19 cess to the records to enable the Department to
 20 meet the requirements of sections 3101 through
 21 3106 of title 44, United States Code.

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

23 “(a) TRUST EVALUATIONS.—A funding agreement
 24 shall include a provision to monitor the performance of

1 trust functions by the Indian Tribe through the annual
2 trust evaluation.

3 “(b) REASSUMPTION.—

4 “(1) IN GENERAL.—A compact or funding
5 agreement shall include provisions for the Secretary
6 to reassume a program and associated funding if
7 there is a specific finding relating to that program
8 of—

9 “(A) imminent jeopardy to a trust asset, a
10 natural resource, or public health and safety
11 that—

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

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

16 “(B) gross mismanagement with respect to
17 funds transferred to an Indian Tribe under a
18 compact or funding agreement, as determined
19 by the Secretary in consultation with the In-
20 spector General, as appropriate.

21 “(2) PROHIBITION.—The Secretary shall not
22 reassume operation of a program, in whole or part,
23 unless—

1 “(A) the Secretary first provides written
2 notice and a hearing on the record to the In-
3 dian Tribe; and

4 “(B) the Indian Tribe does not take cor-
5 rective action to remedy the mismanagement of
6 the funds or programs, or the imminent jeop-
7 ardly to a trust asset, natural resource, or pub-
8 lic health and safety.

9 “(3) EXCEPTION.—

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

14 “(i) the Secretary makes a finding of
15 imminent and substantial jeopardy and ir-
16 reparable harm to a trust asset, a natural
17 resource, or the public health and safety
18 caused by an act or omission of the Indian
19 Tribe; and

20 “(ii) the imminent and substantial
21 jeopardy and irreparable harm to the trust
22 asset, natural resource, or public health
23 and safety arises out of a failure by the In-
24 dian Tribe to carry out the terms of an ap-
25 plicable compact or funding agreement.

1 “(B) REASSUMPTION.—If the Secretary re-
2 assumes operation of a program under subpara-
3 graph (A), the Secretary shall provide the In-
4 dian Tribe with a hearing on the record not
5 later than 10 days after the date of reassump-
6 tion.

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

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

14 “(2) DETERMINATION.—Not more than 60
15 days after the date of receipt of a final offer by one
16 or more of the officials designated pursuant to para-
17 graph (4), the Secretary shall review and make a de-
18 termination with respect to the final offer, except
19 that the 60-day period may be extended for up to 30
20 days for circumstances beyond the control of the
21 Secretary, upon written request by the Secretary to
22 the Indian tribe.

23 “(3) EXTENSIONS.—The deadline described in
24 paragraph (2) may be extended for any length of

1 time, as agreed upon by both the Indian Tribe and
2 the Secretary.

3 “(4) DESIGNATED OFFICIALS.—

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

8 “(B) NO DESIGNATION.—If no official is
9 designated, the Director of the Office of the Ex-
10 ecutive Secretariat and Regulatory Affairs shall
11 be the designated official.

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

24 “(6) REJECTION OF FINAL OFFER.—

1 “(A) IN GENERAL.—If the Secretary re-
2 jects a final offer (or one or more provisions or
3 funding levels in a final offer), the Secretary
4 shall—

5 “(i) provide timely written notification
6 to the Indian Tribe that contains a specific
7 finding that clearly demonstrates, or that
8 is supported by a controlling legal author-
9 ity, that—

10 “(I) the amount of funds pro-
11 posed in the final offer exceeds the
12 applicable funding level as determined
13 under section 106(a)(1);

14 “(II) the program that is the
15 subject of the final offer is an inher-
16 ent Federal function or is subject to
17 the discretion of the Secretary under
18 section 403(c);

19 “(III) the Indian Tribe cannot
20 carry out the program in a manner
21 that would not result in significant
22 danger or risk to the public health or
23 safety, to natural resources, or to
24 trust resources;

1 “(IV) the Indian Tribe is not eli-
2 gible to participate in self-governance
3 under section 402(c);

4 “(V) the funding agreement
5 would violate a Federal statute or reg-
6 ulation; or

7 “(VI) with respect to a program
8 or portion of a program included in a
9 final offer pursuant to section
10 403(b)(2), the program or the portion
11 of the program is not otherwise avail-
12 able to Indian Tribes or Indians
13 under section 102(a)(1)(E);

14 “(ii) provide technical assistance to
15 overcome the objections stated in the noti-
16 fication required by clause (i);

17 “(iii) provide the Indian Tribe with a
18 hearing on the record with the right to en-
19 gage in full discovery relevant to any issue
20 raised in the matter, and the opportunity
21 for appeal on the objections raised, except
22 that the Indian Tribe may, in lieu of filing
23 such appeal, directly proceed to initiate an
24 action in a United States district court
25 under section 110(a); and

“(iv) provide the Indian Tribe the option of entering into the severable portions of a final proposed compact or funding agreement (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

“(B) EFFECT OF EXERCISING CERTAIN OPTION.—If an Indian Tribe exercises the option specified in subparagraph (A)(iv)—

“(i) the Indian Tribe shall retain the right to appeal the rejection by the Secretary under this section; and

“(ii) clauses (i), (ii), and (iii) of subparagraph (A) shall apply only to the portion of the proposed final compact or funding agreement that was rejected by the Secretary.

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

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

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

4 “(e) GOOD FAITH.—

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

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

12 “(f) SAVINGS.—

13 “(1) IN GENERAL.—To the extent that pro-
14 grams carried out for the benefit of Indian Tribes
15 and Tribal organizations under this title reduce the
16 administrative or other responsibilities of the Sec-
17 retary with respect to the operation of Indian pro-
18 grams and result in savings that have not otherwise
19 been included in the amount of Tribal shares and
20 other funds determined under section 408(c), except
21 for funding agreements entered into for programs
22 under section 403(c), the Secretary shall make such
23 savings available to the Indian Tribes or Tribal or-
24 ganizations for the provision of additional services to

1 program beneficiaries in a manner equitable to di-
 2 rectly served, contracted, and compacted programs.

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

8 “(g) TRUST RESPONSIBILITY.—The Secretary may
 9 not waive, modify, or diminish in any way the trust re-
 10 sponsibility of the United States with respect to Indian
 11 Tribes and individual Indians that exists under treaties,
 12 Executive orders, other laws, or court decisions.

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

17 “(1) an official of the Department who holds a
 18 position at a higher organizational level within the
 19 Department than the level of the departmental agen-
 20 cy in which the decision that is the subject of the
 21 appeal was made; or

22 “(2) an administrative law judge.

23 “(i) RULES OF CONSTRUCTION.—Subject to section
 24 101(a) of the PROGRESS for Indian Tribes Act, each
 25 provision of this title and each provision of a compact or

1 funding agreement shall be liberally construed for the ben-
 2 efit of the Indian Tribe participating in self-governance,
 3 and any ambiguity shall be resolved in favor of the Indian
 4 Tribe.

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

6 “(a) IN GENERAL.—Indian Tribes participating in
 7 Tribal self-governance may carry out any construction
 8 project included in a compact or funding agreement under
 9 this title.

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

20 “(1) designating a certifying Tribal officer to
 21 represent the Indian Tribe and to assume the status
 22 of a responsible Federal official under those Acts,
 23 laws, or regulations; and

24 “(2) accepting the jurisdiction of the United
 25 States courts for the purpose of enforcing the re-

1 sponsibilities of the certifying Tribal officer assum-
 2 ing the status of a responsible Federal official under
 3 those Acts, laws, or regulations.

4 “(c) SAVINGS CLAUSE.—Notwithstanding subsection
 5 (b), nothing in this section authorizes the Secretary to in-
 6 clude in any compact or funding agreement duties of the
 7 Secretary under the National Environmental Policy Act
 8 of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle
 9 III of title 54, United States Code, and other related pro-
 10 visions of law that are inherent Federal functions.

11 “(d) CODES AND STANDARDS.—In carrying out a
 12 construction project under this title, an Indian Tribe
 13 shall—

14 “(1) adhere to applicable Federal, State, local,
 15 and Tribal building codes, architectural and engi-
 16 neering standards, and applicable Federal guidelines
 17 regarding design, space, and operational standards,
 18 appropriate for the particular project; and

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

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

22 “(B) certify that—

23 “(i) they are qualified to perform the
 24 work required by the specific construction
 25 involved; and

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

4 “(e) TRIBAL ACCOUNTABILITY.—

5 “(1) IN GENERAL.—In carrying out a construc-
6 tion project under this title, an Indian Tribe shall
7 assume responsibility for the successful completion
8 of the construction project and of a facility that is
9 usable for the purpose for which the Indian Tribe
10 received funding.

11 “(2) REQUIREMENTS.—For each construction
12 project carried out by an Indian Tribe under this
13 title, the Indian Tribe and the Secretary shall nego-
14 tiate a provision to be included in the funding agree-
15 ment that identifies—

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

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

22 “(C) the responsibilities of the Indian
23 Tribe and the Secretary for the project;

24 “(D) how project-related environmental
25 considerations will be addressed;

1 “(E) the amount of funds provided for the
2 project;

3 “(F) the obligations of the Indian Tribe to
4 comply with the codes referenced in subsection
5 (d)(1) and applicable Federal laws and regula-
6 tions;

7 “(G) the agreement of the parties over who
8 will bear any additional costs necessary to meet
9 changes in scope, or errors or omissions in de-
10 sign and construction; and

11 “(H) the agreement of the Secretary to
12 issue a certificate of occupancy, if requested by
13 the Indian Tribe, based upon the review and
14 verification by the Secretary, to the satisfaction
15 of the Secretary, that the Indian Tribe has se-
16 cured upon completion the review and approval
17 of the plans and specifications, sufficiency of
18 design, life safety, and code compliance by
19 qualified, licensed, and independent architects
20 and engineers.

21 “(f) FUNDING.—

22 “(1) IN GENERAL.—Funding appropriated for
23 construction projects carried out under this title
24 shall be included in funding agreements as annual or

1 semiannual advance payments at the option of the
2 Indian Tribe.

3 “(2) ADVANCE PAYMENTS.—The Secretary
4 shall include all associated project contingency funds
5 with each advance payment, and the Indian Tribe
6 shall be responsible for the management of such con-
7 tingency funds.

8 “(g) NEGOTIATIONS.—At the option of the Indian
9 Tribe, construction project funding proposals shall be ne-
10 gotiated pursuant to the statutory process in section 105,
11 and any resulting construction project agreement shall be
12 incorporated into the funding agreement as addenda.

13 “(h) FEDERAL REVIEW AND VERIFICATION.—

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

16 “(A) the Secretary shall review and verify,
17 to the satisfaction of the Secretary, that project
18 planning and design documents prepared by the
19 Indian Tribe in advance of initial construction
20 are in conformity with the obligations of the In-
21 dian Tribe under subsection (d); and

22 “(B) before the project planning and de-
23 sign documents are implemented, the Secretary
24 shall review and verify to the satisfaction of the
25 Secretary that subsequent document amend-

1 ments which result in a significant change in
2 construction are in conformity with the obliga-
3 tions of the Indian Tribe under subsection (d).

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

7 “(3) OVERSIGHT VISITS.—The Secretary may
8 conduct onsite project oversight visits semiannually
9 or on an alternate schedule agreed to by the Sec-
10 retary and the Indian Tribe.

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

18 “(j) FUTURE FUNDING.—Upon completion of a facil-
19 ity constructed under this title, the Secretary shall include
20 the facility among those eligible for annual operation and
21 maintenance funding support comparable to that provided
22 for similar facilities funded by the Department as annual
23 appropriations are available and to the extent that the fa-
24 cility size and complexity and other factors do not exceed
25 the funding formula criteria for comparable buildings.

1 **“SEC. 408. PAYMENT.**

2 “(a) IN GENERAL.—At the request of the governing
3 body of an Indian Tribe and under the terms of an appli-
4 cable funding agreement, the Secretary shall provide fund-
5 ing to the Indian Tribe to carry out the funding agree-
6 ment.

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

10 “(c) AMOUNT.—

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

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

1 “(d) TIMING.—

2 “(1) IN GENERAL.—Pursuant to the terms of
3 any compact or funding agreement entered into
4 under this title, the Secretary shall transfer to the
5 Indian Tribe all funds provided for in the funding
6 agreement, pursuant to subsection (c), and provide
7 funding for periods covered by joint resolution
8 adopted by Congress making continuing appropria-
9 tions, to the extent permitted by such resolution.

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

22 “(e) AVAILABILITY.—Funds for trust services to indi-
23 vidual Indians shall be available under a funding agree-
24 ment only to the extent that the same services that would

1 have been provided by the Secretary are provided to indi-
2 vidual Indians by the Indian Tribe.

3 “(f) MULTIYEAR FUNDING.—A funding agreement
4 may provide for multiyear funding.

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

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

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

14 “(3) reduce the amount of funds required under
15 this title—

16 “(A) to make funding available for self-
17 governance monitoring or administration by the
18 Secretary;

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

21 “(i) a reduction in appropriations
22 from the previous fiscal year for the pro-
23 gram to be included in a compact or fund-
24 ing agreement;

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

3 “(iii) a Tribal authorization;

4 “(iv) a change in the amount of pass-
5 through funds subject to the terms of the
6 funding agreement; or

7 “(v) completion of an activity under a
8 program for which the funds were pro-
9 vided;

10 “(C) to pay for Federal functions, includ-
11 ing—

12 “(i) Federal pay costs;

13 “(ii) Federal employee retirement ben-
14 efits;

15 “(iii) automated data processing;

16 “(iv) technical assistance; and

17 “(v) monitoring of activities under
18 this title; or

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

22 “(h) FEDERAL RESOURCES.—If an Indian Tribe
23 elects to carry out a compact or funding agreement with
24 the use of Federal personnel, Federal supplies (including
25 supplies available from Federal warehouse facilities), Fed-

1 eral supply sources (including lodging, airline transpor-
2 tation, and other means of transportation, including the
3 use of interagency motor pool vehicles), or other Federal
4 resources (including supplies, services, and resources
5 available to the Secretary under any procurement con-
6 tracts in which the Department is eligible to participate),
7 the Secretary shall, as soon as practicable, acquire and
8 transfer such personnel, supplies, or resources to the In-
9 dian Tribe under this title.

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

14 “(j) INTEREST OR OTHER INCOME.—

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

19 “(2) NO EFFECT ON OTHER AMOUNTS.—The
20 retention of interest or income under paragraph (1)
21 shall not diminish the amount of funds an Indian
22 Tribe is entitled to receive under a funding agree-
23 ment in the year the interest or income is earned or
24 in any subsequent fiscal year.

1 “(3) INVESTMENT STANDARD.—Funds trans-
 2 ferred under this title shall be managed by the In-
 3 dian Tribe using the prudent investment standard,
 4 provided that the Secretary shall not be liable for
 5 any investment losses of funds managed by the In-
 6 dian Tribe that are not otherwise guaranteed or in-
 7 sured by the Federal Government.

8 “(k) CARRYOVER OF FUNDS.—

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

13 “(2) EFFECT OF CARRYOVER.—If an Indian
 14 Tribe elects to carry over funding from one year to
 15 the next, the carryover shall not diminish the
 16 amount of funds the Indian Tribe is entitled to re-
 17 ceive under a funding agreement in that fiscal year
 18 or any subsequent fiscal year.

19 “(l) LIMITATION OF COSTS.—

20 “(1) IN GENERAL.—An Indian Tribe shall not
 21 be obligated to continue performance that requires
 22 an expenditure of funds in excess of the amount of
 23 funds transferred under a compact or funding agree-
 24 ment.

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

7 “(3) SUSPENSION OF PERFORMANCE.—If, after
8 notice under paragraph (2), the Secretary does not
9 increase the amount of funds transferred under the
10 funding agreement, the Indian Tribe may suspend
11 performance of the activity until such time as addi-
12 tional funds are transferred.

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

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

21 “(n) APPLICABILITY.—Notwithstanding any other
22 provision of this section, section 101(a) of the
23 PROGRESS for Indian Tribes Act applies to subsections
24 (a) through (m).

1 **“SEC. 409. FACILITATION.**

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

6 “(1) the inclusion of programs in funding
7 agreements; and

8 “(2) the implementation of funding agreements.

9 **“(b) REGULATION WAIVER.—**

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

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

15 “(B) the basis for the request.

16 **“(2) DETERMINATION BY THE SECRETARY.—**

17 Not later than 120 days after receipt by the Sec-
18 retary and the designated officials under paragraph
19 (4) of a request under paragraph (1), the Secretary
20 shall approve or deny the requested waiver in writ-
21 ing to the Indian Tribe.

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

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

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

10 “(6) FAILURE TO MAKE DETERMINATION.—If
11 the Secretary fails to make a determination with re-
12 spect to a waiver request within the period specified
13 in paragraph (2) (including any extension agreed to
14 under paragraph (3)), the Secretary shall be deemed
15 to have agreed to the request, except that for a
16 waiver request relating to programs eligible under
17 section 403(b)(2) or section 403(c), the Secretary
18 shall be deemed to have denied the request.

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

21 **“SEC. 410. DISCRETIONARY APPLICATION OF OTHER SEC-**
22 **TIONS.**

23 “(a) IN GENERAL.—Except as otherwise provided in
24 section 201(d) of the PROGRESS for Indian Tribes Act,
25 at the option of a participating Indian Tribe or Indian

1 Tribes, any of the provisions of title I may be incorporated
 2 in any compact or funding agreement under this title. The
 3 inclusion of any such provision shall be subject to, and
 4 shall not conflict with, section 101(a) of such Act.

5 “(b) EFFECT.—Each incorporated provision under
 6 subsection (a) shall—

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

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

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

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

16 “(1) be effective immediately; and

17 “(2) control the negotiation and resulting com-
 18 pact and funding agreement.

19 **“SEC. 411. ANNUAL BUDGET LIST.**

20 “The Secretary shall list, in the annual budget re-
 21 quest submitted to Congress under section 1105 of title
 22 31, United States Code, any funds proposed to be included
 23 in funding agreements authorized under this title.

24 **“SEC. 412. REPORTS.**

25 “(a) IN GENERAL.—

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

4 “(2) ANALYSIS.—Any Indian Tribe may submit
5 to the Office of Self-Governance and to the appro-
6 priate committees of Congress a detailed annual
7 analysis of unmet Tribal needs for funding agree-
8 ments under this title.

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

11 “(1) be compiled from information contained in
12 funding agreements, annual audit reports, and data
13 of the Secretary regarding the disposition of Federal
14 funds;

15 “(2) identify—

16 “(A) the relative costs and benefits of self-
17 governance;

18 “(B) with particularity, all funds that are
19 specifically or functionally related to the provi-
20 sion by the Secretary of services and benefits to
21 self-governance Indian Tribes and members of
22 Indian Tribes;

23 “(C) the funds transferred to each Indian
24 Tribe and the corresponding reduction in the
25 Federal employees and workload; and

1 “(D) the funding formula for individual
2 Tribal shares of all Central Office funds, to-
3 gether with the comments of affected Indian
4 Tribes, developed under subsection (d);

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

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

10 “(5) include a list of—

11 “(A) all such programs that the Secretary
12 determines, in consultation with Indian Tribes
13 participating in self-governance, are eligible for
14 negotiation to be included in a funding agree-
15 ment at the request of a participating Indian
16 Tribe; and

17 “(B) all such programs which Indian
18 Tribes have formally requested to include in a
19 funding agreement under section 403(c) due to
20 the special geographic, historical, or cultural
21 significance of the program to the Indian Tribe,
22 indicating whether each request was granted or
23 denied, and stating the grounds for any denial.

24 “(c) REPORT ON NON-BIA PROGRAMS.—

1 “(1) IN GENERAL.—In order to optimize oppor-
2 tunities for including non-BIA programs in agree-
3 ments with Indian Tribes participating in self-gov-
4 ernance under this title, the Secretary shall review
5 all programs administered by the Department, other
6 than through the Bureau of Indian Affairs, the Of-
7 fice of the Assistant Secretary for Indian Affairs, or
8 the Office of the Special Trustee for American Indi-
9 ans, without regard to the agency or office con-
10 cerned.

11 “(2) PROGRAMMATIC TARGETS.—The Secretary
12 shall establish programmatic targets, after consulta-
13 tion with Indian Tribes participating in self-govern-
14 ance, to encourage bureaus of the Department to en-
15 sure that an appropriate portion of those programs
16 are available to be included in funding agreements.

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

21 “(4) ANNUAL REVIEW.—

22 “(A) IN GENERAL.—The Secretary shall
23 annually review and publish in the Federal Reg-
24 ister, after consultation with Indian Tribes par-

1 ticipating in self-governance, revised lists and
2 programmatic targets.

3 “(B) CONTENTS.—In preparing the revised
4 lists and programmatic targets, the Secretary
5 shall consider all programs that were eligible
6 for contracting in the original list published in
7 the Federal Register in 1995, except for pro-
8 grams specifically determined not to be con-
9 tractible as a matter of law.

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

17 **“SEC. 413. REGULATIONS.**

18 “(a) IN GENERAL.—

19 “(1) PROMULGATION.—Not later than 90 days
20 after the date of enactment of the PROGRESS for
21 Indian Tribes Act, the Secretary shall initiate proce-
22 dures under subchapter III of chapter 5 of title 5,
23 United States Code, to negotiate and promulgate
24 such regulations as are necessary to carry out this
25 title.

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

6 “(3) EXPIRATION OF AUTHORITY.—The author-
7 ity to promulgate regulations under paragraph (1)
8 shall expire on the date that is 30 months after the
9 date of enactment of the PROGRESS for Indian
10 Tribes Act.

11 “(b) COMMITTEE.—

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

17 “(2) LEAD AGENCY.—Among the Federal rep-
18 resentatives described in paragraph (1), the Office of
19 Self-Governance shall be the lead agency for the De-
20 partment.

21 “(c) ADAPTATION OF PROCEDURES.—The Secretary
22 shall adapt the negotiated rulemaking procedures to the
23 unique context of self-governance and the government-to-
24 government relationship between the United States and
25 Indian Tribes.

1 “(d) EFFECT.—

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

4 “(2) CONFLICTING PROVISIONS.—Subject to
5 section 101(a) of the PROGRESS for Indian Tribes
6 Act and except with respect to programs described
7 under section 403(c), this title shall supersede any
8 conflicting provision of law (including any conflicting
9 regulations).

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

14 **“SEC. 414. EFFECT OF CIRCULARS, POLICIES, MANUALS,**
15 **GUIDANCE, AND RULES.**

16 “Unless expressly agreed to by a participating Indian
17 Tribe in a compact or funding agreement, the partici-
18 pating Indian Tribe shall not be subject to any agency
19 circular, policy, manual, guidance, or rule adopted by the
20 Department, except for—

21 “(1) the eligibility provisions of section 105(g);
22 and
23 “(2) regulations promulgated pursuant to sec-
24 tion 413.

1 **“SEC. 415. APPEALS.**

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

7 “(1) the validity of the grounds for the decision;
 8 and

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

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

12 “Section 314 of the Department of the Interior and
 13 Related Agencies Appropriations Act, 1991 (Public Law
 14 101–512; 104 Stat. 1959), shall apply to compacts and
 15 funding agreements entered into under this title.

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

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

19 **TITLE II—INDIAN SELF-**
 20 **DETERMINATION**

21 **SEC. 201. DEFINITIONS; REPORTING AND AUDIT REQUIRE-**
 22 **MENTS; APPLICATION OF PROVISIONS.**

23 (a) DEFINITIONS.—

24 (1) IN GENERAL.—Section 4 of the Indian Self-
 25 Determination and Education Assistance Act (25

1 U.S.C. 5304) is amended by striking subsection (j)
2 and inserting the following:

3 “(j) ‘self-determination contract’ means a contract
4 entered into under title I (or a grant or cooperative agree-
5 ment used under section 9) between a Tribal organization
6 and the appropriate Secretary for the planning, conduct,
7 and administration of programs or services that are other-
8 wise provided to Indian Tribes and members of Indian
9 Tribes pursuant to Federal law, subject to the condition
10 that, except as provided in section 105(a)(3), no contract
11 entered into under title I (or grant or cooperative agree-
12 ment used under section 9) shall be—

13 “(1) considered to be a procurement contract;
14 or

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

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

22 (A) in subsection (e), by striking “‘Indian
23 tribe’ means” and inserting “‘Indian tribe’ or
24 ‘Indian Tribe’ means”; and

1 (B) in subsection (l), by striking “‘tribal
2 organization’ means” and inserting “‘Tribal or-
3 ganization’ or ‘tribal organization’ means”.

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

7 (1) in subsection (b)—

8 (A) by striking “after completion of the
9 project or undertaking referred to in the pre-
10 ceding subsection of this section” and inserting
11 “after the retention period for the report that
12 is submitted to the Secretary under subsection
13 (a)”; and

14 (B) by adding at the end the following:
15 “The retention period shall be defined in regu-
16 lations promulgated by the Secretary pursuant
17 to section 413.”; and

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

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

1 (d) APPLICATION OF OTHER PROVISIONS.—Sections
 2 4, 5, 6, 7, 102(c), 104, 105(a)(1), 105(f), 110, and 111
 3 of the Indian Self-Determination and Education Assist-
 4 ance Act (25 U.S.C. 5304, 5305, 5306, 5307, 5321(c),
 5 5323, 5324(a)(1), 5324(f), 5331, and 5332) and section
 6 314 of the Department of the Interior and Related Agen-
 7 cies Appropriations Act, 1991 (Public Law 101–512; 104
 8 Stat. 1959), apply to compacts and funding agreements
 9 entered into under title IV of the Indian Self-Determina-
 10 tion and Education Assistance Act (25 U.S.C. 5361 et
 11 seq.).

12 **SEC. 202. CONTRACTS BY SECRETARY OF THE INTERIOR.**

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

15 (1) in subsection (c)(2), by striking “economic
 16 enterprises” and all that follows through “except
 17 that” and inserting “economic enterprises (as de-
 18 fined in section 3 of the Indian Financing Act of
 19 1974 (25 U.S.C. 1452)), except that”; and

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

21 “(f) GOOD FAITH REQUIREMENT.—In the negotia-
 22 tion of contracts and funding agreements, the Secretary
 23 shall—

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

4 “(2) carry out this Act in a manner that maxi-
5 mizes the policy of Tribal self-determination, in a
6 manner consistent with—

7 “(A) the purposes specified in section 3;
8 and

9 “(B) the PROGRESS for Indian Tribes
10 Act.

11 “(g) RULE OF CONSTRUCTION.—Subject to section
12 101(a) of the PROGRESS for Indian Tribes Act, each
13 provision of this Act and each provision of a contract or
14 funding agreement shall be liberally construed for the ben-
15 efit of the Indian Tribe participating in self-determination,
16 and any ambiguity shall be resolved in favor of the Indian
17 Tribe.”.

18 **SEC. 203. ADMINISTRATIVE PROVISIONS.**

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

21 (1) in subsection (b), in the first sentence, by
22 striking “pursuant to” and all that follows through
23 “of this Act” and inserting “pursuant to sections
24 102 and 103”; and

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

1 “(p) INTERPRETATION BY SECRETARY.—Except as
 2 otherwise provided by law, the Secretary shall interpret
 3 all Federal laws (including regulations) and Executive or-
 4 ders in a manner that facilitates, to the maximum extent
 5 practicable—

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

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

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

12 “(2) the implementation of self-determination
 13 contracts and funding agreements; and

14 “(3) the achievement of Tribal health objec-
 15 tives.

16 “(q)(1) TECHNICAL ASSISTANCE FOR INTERNAL
 17 CONTROLS.—In considering proposals for, amendments
 18 to, or in the course of, a contract under this title and com-
 19 pacts under titles IV and V of this Act, if the Secretary
 20 determines that the Indian Tribe lacks adequate internal
 21 controls necessary to manage the contracted program or
 22 programs, the Secretary shall, as soon as practicable, pro-
 23 vide the necessary technical assistance to assist the Indian
 24 Tribe in developing adequate internal controls. As part of
 25 that technical assistance, the Secretary and the Tribe shall

1 develop a plan for assessing the subsequent effectiveness
 2 of such technical assistance. The inability of the Secretary
 3 to provide technical assistance or lack of a plan under this
 4 subsection shall not result in the reassumption of an exist-
 5 ing agreement, contract, or compact, or declination or re-
 6 jection of a new agreement, contract, or compact.

7 “(2) The Secretary shall prepare a report to be in-
 8 cluded in the information required for the reports under
 9 sections 412(b)(2)(A) and 514(b)(2)(A). The Secretary
 10 shall include in this report, in the aggregate, a description
 11 of the internal controls that were inadequate, the technical
 12 assistance provided, and a description of Secretarial ac-
 13 tions taken to address any remaining inadequate internal
 14 controls after the provision of technical assistance and im-
 15 plementation of the plan required by paragraph (1).”.

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

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

20 (1) in subparagraph (A)—

21 (A) in clause (i), by striking “, and” and
 22 inserting “; and”; and

23 (B) in clause (ii), by striking “expense re-
 24 lated to the overhead incurred” and inserting
 25 “expense incurred by the governing body of the

1 Indian Tribe or Tribal organization and any
2 overhead expense incurred”;

3 (2) by redesignating subparagraph (B) as sub-
4 paragraph (C); and

5 (3) by inserting after subparagraph (A) the fol-
6 lowing:

7 “(B) In calculating the reimbursement rate
8 for expenses described in subparagraph (A)(ii),
9 not less than 50 percent of the expenses de-
10 scribed in subparagraph (A)(ii) that are in-
11 curred by the governing body of an Indian
12 Tribe or Tribal organization relating to a Fed-
13 eral program, function, service, or activity car-
14 ried out pursuant to the contract shall be con-
15 sidered to be reasonable and allowable.”.

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

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

19 (1) in subsection (a)(2), by inserting “subject
20 to subsections (a) and (b) of section 102,” before
21 “contain”;

22 (2) in subsection (f)(2)(A)(ii) of the model
23 agreement contained in subsection (c), by inserting
24 “subject to subsections (a) and (b) of section 102 of
25 the Indian Self-Determination and Education Assist-

1 ance Act (25 U.S.C. 5321),” before “such other pro-
2 visions”; and

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

Passed the Senate June 27, 2019.

Attest:

Secretary.

116TH CONGRESS
1ST Session

S. 209

AN ACT

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