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GENERAL MEMORANDUM 20-014

PROGRESS Act to Advance Tribal Self-Governance Enacted into Law

Almost 18 years of tribal efforts have culminated in a historic advance for tribal self-governance. On October 21, 2020, the Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act was signed into law as Public Law 116-180 (Act). The Act, which amends Titles I and IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) had strong bipartisan support in the House and Senate, primarily from Members of Senate Committee on Indian Affairs and the House Natural Resources Committee. It is designed to enhance self-governance for tribes, improve administrative efficiencies, further tribes' ability to govern their own communities, and more. Attached is a copy of the Act.

The Act amends IV of the ISDEAA specific to the Department of the Interior (DOI), to conform it with Title V, the portion of the self-governance statute for the Department of Health and Human Services (HHS). It creates administrative efficiencies by allowing tribes to carry out compacts with both DOI and HHS under a similar statutory framework. Many self-governance tribes manage programs within both IHS and DOI, and the PROGRESS Act will reconcile differences, streamline administration, improve efficiencies, and strengthen tribal economies.

The PROGRESS Act also makes important amendments to Title I which applies to self-determination contracts with either the Secretary of HHS or the Secretary of the DOI for the planning, conduct, and administration of programs, functions, services and activities that are otherwise provided to tribes and their members pursuant to federal law, including clarifying reporting requirements, establishing rules of interpretation, and providing for technical assistance to tribes.

Negotiated Rulemaking. The Act requires the Secretary of Interior to initiate negotiated rulemaking proceedings within 90 days of enactment, which is January 19, 2021, one day before the Presidential Inauguration. Nominations for appointment of tribal representatives to the rulemaking committee will be solicited.

Proposed Regulations. The Act requires that proposed regulations are to be published no later than 21 months after enactment.

Please let us know if we may provide additional information or assistance regarding the PROGRESS Act and the preparations for the rulemaking and regulations processes.

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Inquiries may be directed to:
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One Hundred Sixteenth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Friday,
the third day of January, two thousand and twenty*

An Act

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

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Practical Reforms and Other Goals To Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2019” or the “PROGRESS for Indian Tribes Act”.

(b) **TABLE OF CONTENTS.**—The table of contents of 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.

TITLE I—TRIBAL SELF-GOVERNANCE

SEC. 101. TRIBAL SELF-GOVERNANCE.

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

(1) to modify, limit, expand, or otherwise affect—

(A) the authority of the Secretary of the Interior, as provided for under the Indian Self-Determination and Education Assistance Act (as in effect on the day before the date of enactment of this Act), regarding—

(i) the inclusion of any non-BIA program (as defined in section 401 of the Indian Self-Determination and Education Assistance Act) in a self-determination contract or funding agreement under section 403(c) of such Act (as so in effect); or

(ii) the implementation of any contract or agreement described in clause (i) that is in effect on the day described in subparagraph (A);

(B) the meaning, application, or effect of any Tribal water rights settlement, including the performance

required of a party thereto or any payment or funding obligation thereunder;

(C) the authority, jurisdiction, or responsibility of a State to manage, control, or regulate fish and wildlife under State law (including regulations) on land or water in the State, including Federal public land;

(D) except for the authority provided to the Secretary as described in subparagraph (A), the applicability or effect of any Federal law related to the protection or management of fish or wildlife; or

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

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

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

“SEC. 401. DEFINITIONS.

“In this title:

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

“(2) CONSTRUCTION PROGRAM; CONSTRUCTION PROJECT.—The term ‘construction program’ or ‘construction project’ means a Tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems, or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control, transportation, or port facilities, or for other Tribal purposes.

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

“(4) FUNDING AGREEMENT.—The term ‘funding agreement’ means a funding agreement entered into under section 403.

“(5) GROSS MISMANAGEMENT.—The term ‘gross mismanagement’ means a significant violation, shown by a preponderance of the evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds for a program administered by an Indian Tribe under a compact or funding agreement.

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

“(7) NON-BIA PROGRAM.—The term ‘non-BIA program’ means all or a portion of a program, function, 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 Trustee for American Indians, or the Office of the Assistant Secretary for Indian Affairs; and

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

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

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

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

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

“SEC. 402. TRIBAL SELF-GOVERNANCE PROGRAM.

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

“(b) SELECTION OF PARTICIPATING INDIAN TRIBES.—

“(1) IN GENERAL.—

“(A) ELIGIBILITY.—The Secretary, acting through the Director of the Office of Self-Governance, may select 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

“(B) the Tribal organization itself, or at least one of the Indian Tribes participating in the Tribal organization, is eligible under subsection (c).

“(4) TRIBAL WITHDRAWAL FROM A TRIBAL ORGANIZATION.—

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

“(B) EFFECT OF WITHDRAWAL.—If an Indian Tribe withdraws from participation in a Tribal organization, the Indian Tribe shall be entitled to its Tribal share of funds and resources supporting the programs that the Indian Tribe is entitled to carry out under the compact and funding agreement of the Indian Tribe.

“(C) PARTICIPATION IN SELF-GOVERNANCE.—The withdrawal of an Indian Tribe from a Tribal organization shall not affect the eligibility of the Tribal organization to participate in self-governance on behalf of one or more other Indian Tribes, if the Tribal organization still qualifies under subsection (c).

“(D) WITHDRAWAL PROCESS.—

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

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

“(iii) EFFECTIVE DATE.—

“(I) IN GENERAL.—A withdrawal under clause (i) shall become effective on the date that is specified in the Tribal resolution and mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the Tribal organization that signed the compact and funding agreement on behalf of the withdrawing Indian Tribe or Tribal organization.

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

“(aa) the earlier of—

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

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

“(bb) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the Tribal organization that signed the compact and funding agreement on behalf of the withdrawing Indian Tribe or Tribal organization.

“(E) DISTRIBUTION OF FUNDS.—If an Indian Tribe or Tribal organization eligible to enter into a self-determination contract or a compact or funding agreement fully or

partially withdraws from a participating Tribal organization, the withdrawing Indian Tribe—

“(i) may elect to enter into a self-determination contract or compact, in which case—

“(I) the withdrawing Indian Tribe or Tribal organization shall be entitled to its Tribal share of unexpended funds and resources supporting the programs that the Indian Tribe will be carrying out under its own self-determination contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated to the funding agreement of the Tribal organization); and

“(II) the funds referred to in subclause (I) shall be withdrawn by the Secretary from the funding agreement of the Tribal organization and transferred to the withdrawing Indian Tribe, on the condition that sections 102 and 105(i), as appropriate, shall apply to the withdrawing Indian Tribe; or

“(ii) may elect not to enter into a self-determination contract or compact, in which case all unexpended funds and resources associated with the withdrawing Indian Tribe’s returned programs (calculated on the same basis as the funds were initially allocated to the funding agreement of the Tribal organization) shall be returned by the Tribal organization to the Secretary for operation of the programs included in the withdrawal.

“(F) RETURN TO MATURE CONTRACT STATUS.—If an Indian Tribe elects to operate all or some programs carried out under a compact or funding agreement under this title through a self-determination contract under title I, at the option of the Indian Tribe, the resulting self-determination contract shall be a mature self-determination contract as long as the Indian Tribe meets the requirements set forth in section 4(h).

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

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

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

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

“(d) PLANNING PHASE.—

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

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

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

“(B) include—

“(i) legal and budgetary research; and

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

“(e) GRANTS.—

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

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

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

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

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

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

“(a) AUTHORIZATION.—The Secretary shall, on the request of any Indian Tribe or Tribal organization, negotiate and enter into a written funding agreement with the governing body of the Indian Tribe or the Tribal organization in a manner consistent with—

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

“(2) subsection (b).”;

(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)—

(I) in clause (i), as redesignated by clause (ii), by striking the semicolon at the end and inserting “; and”; and

(II) in clause (ii), as so redesignated, by striking “and” after the semicolon;

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

(vi) in subparagraph (B), as redesignated by clause (v), by striking the semicolon and inserting “; and”; and

(vii) by adding at the end the following:

“(C) any other program, service, function, or activity (or portion thereof) that is provided through the Bureau

of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, or the Office of the Special Trustee for American Indians with respect to which Indian Tribes or Indians are primary or significant beneficiaries;”

(B) in paragraph (2)—

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

(ii) by inserting “and” after the semicolon at the end;

(C) in paragraph (3), by striking the semicolon at the end and inserting a period; and

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

(3) in subsection (f)—

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

(B) by striking “such agreement to—” and all that follows through “Indian tribe” and inserting “such agreement to each Indian Tribe”;

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

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

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

(5) by adding at the end the following:

“(m) OTHER PROVISIONS.—

“(1) EXCLUDED FUNDING.—A funding agreement shall not authorize an Indian Tribe to plan, conduct, administer, or receive Tribal share funding under any program that—

“(A) is provided under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.); or

“(B) is provided for elementary and secondary schools under the formula developed under section 1127 of the Education Amendments of 1978 (25 U.S.C. 2007).

“(2) SERVICES, FUNCTIONS, AND RESPONSIBILITIES.—A funding agreement shall specify—

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

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

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

“(3) BASE BUDGET.—

“(A) IN GENERAL.—A funding agreement shall, at the option of the Indian Tribe, provide for a stable base budget specifying the recurring funds (which may include funds available under section 106(a)) to be transferred to the Indian Tribe, for such period as the Indian Tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations.

“(B) LIMITATIONS.—Notwithstanding subparagraph (A), a funding agreement shall not specify funding associated with a program described in subsection (b)(2) or (c) unless the Secretary agrees.

“(4) NO WAIVER OF TRUST RESPONSIBILITY.—A funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United

States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, court decisions, and other laws.

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

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

“(p) EXISTING AND SUBSEQUENT FUNDING AGREEMENTS.—

“(1) SUBSEQUENT FUNDING AGREEMENTS.—Absent notification from an Indian Tribe that the Indian Tribe is withdrawing or retroceding the operation of one or more programs identified in a funding agreement, or unless otherwise agreed to by the parties to the funding agreement or by the nature of any noncontinuing program, service, function, or activity contained in a funding agreement—

“(A) a funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, with funding paid annually for each fiscal year the agreement is in effect; and

“(B) the term of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement for the purposes of calculating the amount of funding to which the Indian Tribe is entitled.

“(2) DISPUTES.—Disputes over the implementation of paragraph (1)(A) shall be subject to section 406(c).

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

“(A) to retain its existing funding agreement (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title; or

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

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

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

“SEC. 404. COMPACTS.

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

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

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

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

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

“(d) EFFECTIVE DATE.—The effective date of a compact under subsection (a) shall be—

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

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

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

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

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

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

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

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

“SEC. 405. GENERAL PROVISIONS.

“(a) APPLICABILITY.—An Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this title.

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

“(c) AUDITS.—

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

“(2) COST PRINCIPLES.—An Indian Tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by—

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

“(B) any exemptions to applicable Office of Management and Budget circulars subsequently granted by the Office of Management and Budget.

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

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

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

“(2) except that, with respect to the reallocation, consolidation, and redesign of programs described in subsection (b)(2) or (c) of section 403, a joint agreement between the Secretary and the Indian Tribe shall be required.

“(e) RETROCESSION.—

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

“(2) EFFECTIVE DATE.—

“(A) AGREEMENT.—Unless an Indian Tribe rescinds a request for retrocession under paragraph (1), the retrocession shall become effective on the date specified by the parties in the compact or funding agreement.

“(B) NO AGREEMENT.—In the absence of a specification of an effective date in the compact or funding agreement, the retrocession shall become effective on—

“(i) the earlier of—

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

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

“(ii) such date as may be mutually agreed upon by the Secretary and the Indian Tribe.

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

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

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

“(g) RECORDS.—

“(1) IN GENERAL.—Unless an Indian Tribe specifies otherwise in the compact or funding agreement, records of an Indian Tribe shall not be considered to be Federal records for purposes of chapter 5 of title 5, United States Code.

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

“(A) maintain a recordkeeping system; and

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

“SEC. 406. PROVISIONS RELATING TO THE SECRETARY.

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

“(b) REASSUMPTION.—

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

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

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

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

“(B) gross mismanagement with respect to funds transferred to an Indian Tribe under a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.

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

“(A) the Secretary first provides written notice and a hearing on the record to the Indian Tribe; and

“(B) the Indian Tribe does not take corrective action to remedy the mismanagement of the funds or programs, or the imminent jeopardy to a trust asset, natural resource, or public health and safety.

“(3) EXCEPTION.—

“(A) IN GENERAL.—Notwithstanding paragraph (2), the Secretary may, on written notice to the Indian Tribe, immediately reassume operation of a program if—

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

“(ii) the imminent and substantial jeopardy and irreparable harm to the trust asset, natural resource, or public health and safety arises out of a failure by the Indian Tribe to carry out the terms of an applicable compact or funding agreement.

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

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

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

“(2) DETERMINATION.—Not more than 60 days after the date of receipt of a final offer by one or more of the officials designated pursuant to paragraph (4), the Secretary shall review and make a determination with respect to the final offer, except that the 60-day period may be extended for up to 30 days for circumstances beyond the control of the Secretary, upon written request by the Secretary to the Indian tribe.

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

“(4) DESIGNATED OFFICIALS.—

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

“(B) NO DESIGNATION.—If no official is designated, the Director of the Office of the Executive Secretariat and Regulatory Affairs shall be the designated official.

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

“(6) REJECTION OF FINAL OFFER.—

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

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

“(I) the amount of funds proposed in the final offer exceeds the applicable funding level as determined under section 106(a)(1);

“(II) the program that is the subject of the final offer is an inherent Federal function or is subject to the discretion of the Secretary under section 403(c);

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

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

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

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

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

“(iii) provide the Indian Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter, and the opportunity for appeal on the objections raised, except that the Indian Tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a United States district court under section 110(a); and

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

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

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

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

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

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

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

“(e) GOOD FAITH.—

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

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

“(f) SAVINGS.—

“(1) IN GENERAL.—To the extent that programs carried out for the benefit of Indian Tribes and Tribal organizations under this title reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 408(c), except for funding agreements entered into for programs under section 403(c), the Secretary shall make such savings available to the Indian Tribes or Tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

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

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

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

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

“(2) an administrative law judge.

“(i) RULES OF CONSTRUCTION.—Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this title and each provision of a compact or funding agreement shall be liberally

construed for the benefit of the Indian Tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian Tribe.

“SEC. 407. CONSTRUCTION PROGRAMS AND PROJECTS.

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

“(b) **TRIBAL OPTION TO CARRY OUT CERTAIN FEDERAL ENVIRONMENTAL ACTIVITIES.**—In carrying out a construction project under this title, an Indian Tribe may, subject to the agreement of the Secretary, elect to assume some Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle III of title 54, United States Code, and related provisions of other law and regulations that would apply if the Secretary were to undertake a construction project, by adopting a resolution—

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

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

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

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

“(1) adhere to applicable Federal, State, local, and Tribal building codes, architectural and engineering standards, and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and

“(2) use only architects and engineers who—

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

“(B) certify that—

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

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

“(e) **TRIBAL ACCOUNTABILITY.**—

“(1) **IN GENERAL.**—In carrying out a construction project under this title, an Indian Tribe shall assume responsibility for the successful completion of the construction project and of a facility that is usable for the purpose for which the Indian Tribe received funding.

“(2) **REQUIREMENTS.**—For each construction project carried out by an Indian Tribe under this title, the Indian Tribe and the Secretary shall negotiate a provision to be included in the funding agreement that identifies—

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

“(B) a general description of the project, including the scope of work, references to design criteria, and other terms and conditions;

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

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

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

“(F) the obligations of the Indian Tribe to comply with the codes referenced in subsection (d)(1) and applicable Federal laws and regulations;

“(G) the agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction; and

“(H) the agreement of the Secretary to issue a certificate of occupancy, if requested by the Indian Tribe, based upon the review and verification by the Secretary, to the satisfaction of the Secretary, that the Indian Tribe has secured upon completion the review and approval of the plans and specifications, sufficiency of design, life safety, and code compliance by qualified, licensed, and independent architects and engineers.

“(f) FUNDING.—

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

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

“(g) NEGOTIATIONS.—At the option of the Indian Tribe, construction project funding proposals shall be negotiated pursuant to the statutory process in section 105, and any resulting construction project agreement shall be incorporated into the funding agreement as addenda.

“(h) FEDERAL REVIEW AND VERIFICATION.—

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

“(A) the Secretary shall review and verify, to the satisfaction of the Secretary, that project planning and design documents prepared by the Indian Tribe in advance of initial construction are in conformity with the obligations of the Indian Tribe under subsection (d); and

“(B) before the project planning and design documents are implemented, the Secretary shall review and verify to the satisfaction of the Secretary that subsequent document amendments which result in a significant change in construction are in conformity with the obligations of the Indian Tribe under subsection (d).

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

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

“(i) APPLICATION OF OTHER LAWS.—Unless otherwise agreed to by the Indian Tribe and except as otherwise provided in this Act, no provision of title 41, United States Code, the Federal Acquisition Regulation, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project carried out under this title.

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

“SEC. 408. PAYMENT.

“(a) IN GENERAL.—At the request of the governing body of an Indian Tribe and under the terms of an applicable funding agreement, the Secretary shall provide funding to the Indian Tribe to carry out the funding agreement.

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

“(c) AMOUNT.—

“(1) IN GENERAL.—Subject to subsection (e) and sections 403 and 405, the Secretary shall provide funds to the Indian Tribe under a funding agreement for programs in an amount that is equal to the amount that the Indian Tribe would have been entitled to receive under contracts and grants under this Act (including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members) without regard to the organization level within the Department at which the programs are carried out.

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

“(d) TIMING.—

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

“(2) TRANSFERS.—Not later than 1 year after the date of enactment of the PROGRESS for Indian Tribes Act, in any instance in which a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office

of Management and Budget to the Department, unless the funding agreement provides otherwise.

“(e) AVAILABILITY.—Funds for trust services to individual Indians shall be available under a funding agreement only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the Indian Tribe.

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

“(g) LIMITATIONS ON AUTHORITY OF THE SECRETARY.—The Secretary shall not—

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

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

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

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

“(B) in subsequent years, except as necessary as a result of—

“(i) a reduction in appropriations from the previous fiscal year for the program to be included in a compact or funding agreement;

“(ii) a congressional directive in legislation or an accompanying report;

“(iii) a Tribal authorization;

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

“(v) completion of an activity under a program for which the funds were provided;

“(C) to pay for Federal functions, including—

“(i) Federal pay costs;

“(ii) Federal employee retirement benefits;

“(iii) automated data processing;

“(iv) technical assistance; and

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

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

“(h) FEDERAL RESOURCES.—If an Indian Tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation, including the use of interagency motor pool vehicles), or other Federal resources (including supplies, services, and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), the Secretary shall, as soon as practicable, acquire and transfer such personnel, supplies, or resources to the Indian Tribe under this title.

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

“(j) INTEREST OR OTHER INCOME.—

“(1) IN GENERAL.—An Indian Tribe may retain interest or income earned on any funds paid under a compact or funding agreement to carry out governmental purposes.

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

“(3) INVESTMENT STANDARD.—Funds transferred under this title shall be managed by the Indian Tribe using the prudent investment standard, provided that the Secretary shall not be liable for any investment losses of funds managed by the Indian Tribe that are not otherwise guaranteed or insured by the Federal Government.

“(k) CARRYOVER OF FUNDS.—

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

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

“(l) LIMITATION OF COSTS.—

“(1) IN GENERAL.—An Indian Tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement.

“(2) NOTICE OF INSUFFICIENCY.—If at any time the Indian Tribe has reason to believe that the total amount provided for a specific activity under a compact or funding agreement is insufficient, the Indian Tribe shall provide reasonable notice of such insufficiency to the Secretary.

“(3) SUSPENSION OF PERFORMANCE.—If, after notice under paragraph (2), the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian Tribe may suspend performance of the activity until such time as additional funds are transferred.

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

“(m) DISTRIBUTION OF FUNDS.—The Office of Self-Governance shall be responsible for distribution of all Bureau of Indian Affairs funds provided under this title unless otherwise agreed by the parties to an applicable funding agreement.

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

“SEC. 409. FACILITATION.

“(a) IN GENERAL.—Except as otherwise provided by law (including section 101(a) of the PROGRESS for Indian Tribes Act), the Secretary shall interpret each Federal law and regulation in a manner that facilitates—

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

“(b) REGULATION WAIVER.—

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

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

“(B) the basis for the request.

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

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

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

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

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

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

“SEC. 410. DISCRETIONARY APPLICATION OF OTHER SECTIONS.

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

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

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

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

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

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

“(1) be effective immediately; and

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

“SEC. 411. ANNUAL BUDGET LIST.

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

“SEC. 412. REPORTS.

“(a) IN GENERAL.—

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

“(2) ANALYSIS.—Any Indian Tribe may submit to the Office of Self-Governance and to the appropriate committees of Congress a detailed annual analysis of unmet Tribal needs for funding agreements under this title.

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

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

“(2) identify—

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

“(B) with particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to self-governance Indian Tribes and members of Indian Tribes;

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

“(D) the funding formula for individual Tribal shares of all Central Office funds, together with the comments of affected Indian Tribes, developed under subsection (d);

“(3) before being submitted to Congress, be distributed to the Indian Tribes for comment (with a comment period of not less than 30 days);

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

“(5) include a list of—

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

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

“(c) REPORT ON NON-BIA PROGRAMS.—

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

“(2) PROGRAMMATIC TARGETS.—The Secretary shall establish programmatic targets, after consultation with Indian Tribes participating in self-governance, to encourage bureaus of the Department to ensure that an appropriate portion of those programs are available to be included in funding agreements.

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

“(4) ANNUAL REVIEW.—

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

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

“(d) REPORT ON CENTRAL OFFICE FUNDS.—Not later than January 1, 2020, the Secretary shall, in consultation with Indian Tribes, develop a funding formula to determine the individual Tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs and the Office of the Special Trustee for inclusion in the compacts.

“SEC. 413. REGULATIONS.

“(a) IN GENERAL.—

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

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

“(3) EXPIRATION OF AUTHORITY.—The authority to promulgate regulations under paragraph (1) shall expire on the date that is 30 months after the date of enactment of the PROGRESS for Indian Tribes Act.

“(b) COMMITTEE.—

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

“(2) LEAD AGENCY.—Among the Federal representatives described in paragraph (1), the Office of Self-Governance shall be the lead agency for the Department.

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

“(d) EFFECT.—

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

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

“(3) EFFECTIVENESS WITHOUT REGARD TO REGULATIONS.—The lack of promulgated regulations on an issue shall not limit the effect or implementation of this title.

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

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

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

“(2) regulations promulgated pursuant to section 413.

“SEC. 415. APPEALS.

“Except as provided in section 406(d), in any administrative action, appeal, or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof of demonstrating by a preponderance of the evidence—

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

“(2) the consistency of the decision with the requirements and policies of this title.

“SEC. 416. APPLICATION OF OTHER PROVISIONS.

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

“SEC. 417. AUTHORIZATION OF APPROPRIATIONS.

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

TITLE II—INDIAN SELF-DETERMINATION

SEC. 201. DEFINITIONS; REPORTING AND AUDIT REQUIREMENTS; APPLICATION OF PROVISIONS.

(a) DEFINITIONS.—

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

“(j) ‘self-determination contract’ means a contract entered into under title I (or a grant or cooperative agreement used under section 9) between a Tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services that are otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law, subject to the condition that, except as provided in section 105(a)(3), no contract entered

into under title I (or grant or cooperative agreement used under section 9) shall be—

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

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

(2) TECHNICAL AMENDMENTS.—Section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304), as amended by paragraph (1), is further amended—

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

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

(b) REPORTING AND AUDIT REQUIREMENTS.—Section 5 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5305) is amended—

(1) in subsection (b)—

(A) by striking “after completion of the project or undertaking referred to in the preceding subsection of this section” and inserting “after the retention period for the report that is submitted to the Secretary under subsection (a)”; and

(B) by adding at the end the following: “The retention period shall be defined in regulations promulgated by the Secretary pursuant to section 413.”; and

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

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

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

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

SEC. 203. ADMINISTRATIVE PROVISIONS.

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

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

(2) by adding at the end the following:

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

“(1) the inclusion in self-determination contracts and funding agreements of—

“(A) applicable programs, services, functions, and activities (or portions thereof); and

“(B) funds associated with those programs, services, functions, and activities;

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

“(3) the achievement of Tribal health objectives.

“(q)(1) TECHNICAL ASSISTANCE FOR INTERNAL CONTROLS.—In considering proposals for, amendments to, or in the course of, a contract under this title and compacts under titles IV and V of this Act, if the Secretary determines that the Indian Tribe lacks adequate internal controls necessary to manage the contracted program or programs, the Secretary shall, as soon as practicable, provide the necessary technical assistance to assist the Indian Tribe in developing adequate internal controls. As part of that technical assistance, the Secretary and the Tribe shall develop a plan for assessing the subsequent effectiveness of such technical assistance. The inability of the Secretary to provide technical assistance or lack of a plan under this subsection shall not result in the reassumption of an existing agreement, contract, or compact, or declination or rejection of a new agreement, contract, or compact.

“(2) The Secretary shall prepare a report to be included in the information required for the reports under sections 412(b)(2)(A) and 514(b)(2)(A). The Secretary shall include in this report, in the aggregate, a description of the internal controls that were inadequate, the technical assistance provided, and a description of Secretarial actions taken to address any remaining inadequate internal controls after the provision of technical assistance and implementation of the plan required by paragraph (1).”

SEC. 204. CONTRACT FUNDING AND INDIRECT COSTS.

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

(1) in subparagraph (A)—

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

- (B) in clause (ii), by striking “expense related to the overhead incurred” and inserting “expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred”;
- (2) by redesignating subparagraph (B) as subparagraph (C); and
- (3) by inserting after subparagraph (A) the following:
- “(B) In calculating the reimbursement rate for expenses described in subparagraph (A)(ii), not less than 50 percent of the expenses described in subparagraph (A)(ii) that are incurred by the governing body of an Indian Tribe or Tribal organization relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable.”.

SEC. 205. CONTRACT OR GRANT SPECIFICATIONS.

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

- (1) in subsection (a)(2), by inserting “subject to subsections (a) and (b) of section 102,” before “contain”;
- (2) in subsection (f)(2)(A)(ii) of the model agreement contained in subsection (c), by inserting “subject to subsections (a) and (b) of section 102 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321),” before “such other provisions”; and
- (3) in subsection (b)(7)(C) of the model agreement contained in subsection (c), in the second sentence of the matter preceding clause (i), by striking “one performance monitoring visit” and inserting “two performance monitoring visits”.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*