S. HRG. 111–923

H.R. 4347, TO AMEND THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT TO PROVIDE FURTHER SELF-GOVERNANCE BY INDIAN TRIBES, AND FOR OTHER PURPOSES

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

NOVEMBER 18, 2010

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H.R. 4347, TO AMEND THE INDIAN SELF–DETERMINATION AND EDUCATION ASSISTANCE ACT TO PROVIDE FURTHER SELF-GOVERNANCE BY INDIAN TRIBES, AND FOR OTHER PURPOSES

THURSDAY, NOVEMBER 18, 2010

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:42 a.m. in room 628, Dirksen Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. We will now turn to the hearing. The hearing itself that we have scheduled for today will come to order. This Committee is holding a hearing on H.R. 4347, the Department of the Interior Tribal Self-Governance Act of 2010. This is a piece of legislation that makes changes in the self-governance program at the Department of the Interior.

The Indian Self-Determination Act I think has been one of the most important pieces of legislation for tribes and for tribal sovereignty. This legislation allows tribes to take control of programs that were previously administered by the Federal Government. When tribes administer these programs, it gives them the ability to provide jobs in their communities and decide themselves the best way to deliver services and programs to their tribal members.

Today we have over 300 Indian tribes that are participating in the self-governance program with either the Department of the Interior or the Indian Health Service at Health and Human Services. Although the program has been successful for tribes over the past several years, Congress, tribes and the Administration have been discussing ways to improve the self-governance process. H.R. 4347 is the result of many of those discussions.

The bill would improve the contract negotiation process between the tribes and the Department of the Interior. It would streamline funding processes and it would provide deadlines for the Department to respond to tribes.

The bill passed the House of Representatives by unanimous consent in September and appears to have a good level of support from both Congress and the tribes. The Administration has expressed

still a few outstanding concerns about the bill. So I thought it was important to hold a hearing to get their views. But I hope we will be able to move quickly on this bill following the hearing, because time is running very short in this session.

Mr. George Skibine is here with us today on behalf of the Department of the Interior to present the agency's views on the bill. We will also hear from Ron Allen, who represents several self-governance organizations and who has been working on this issue for a number of years. Finally, we will hear from Will Micklin, who will represent the Central Council of Tlingit and Haida Tribes of Alaska. The Central Council was one of the earliest groups to take advantage of self-governance, and will discuss their experiences with the program and make recommendations for how to proceed and how this process could be improved through this legislation.

I want to mention that I have a statement for the record from Congressman Dan Boren who introduced the bill in the House. He has been a big supporter in making changes to the self-governance program. Congressman Boren's statement will be entered in the official record, and I will also encourage any other interested parties who wish to include written comments or even submit written comments here to this Committee to do so.

We will keep the hearing record open for two weeks from today.

And with that, I want to welcome the witnesses. I know that my colleague, Senator Barrasso, has some comments. I would recognize comments from anyone else on the Committee as well. Senator Barrasso?

STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING

Senator BARRASSO. Thank you very much, Mr. Chairman, for holding what may be your last hearing as Chairman of this Committee. I want to begin by thanking you, Mr. Chairman, for your many years of public service and for your dedication to the people of North Dakota and Indian Country.

In all my time in this Committee, and it has only been a little over three years, you have consistently demonstrated the strongest possible commitment and dedication to our often complex and challenging business. While we have not always agreed on the methods for meeting the challenges of Indian Country, we have always agreed on the fundamental goal: improving the health, the safety and the lives of our Nation's Indian people. And recognizing our common goal, you have always embraced the non-partisan, bipartisan spirit which has become a part of the institutional history of the Senate Committee on Indian Affairs.

And I want you to know, Mr. Chairman, that I really appreciate that. I appreciate your hard work. I congratulate you on your many successes as Chairman of this Committee. And those include, but are by no means limited to your work in advancing public safety, in advancing health and education in Indian Country. It has truly been an honor to work with you on those issues. Although I know that there is still work to do in the last days of this Congress and in your office, I just want to express my heartfelt thanks and my appreciation to you today. I would ask that the members of this

Committee, as well as the members of the audience, join me in thanking you for your incredible service.

[Applause.]

The CHAIRMAN. Well, Senator Barrasso, now I am profoundly embarrassed at those excessive—does anyone else have any comments, other than about the Chairman?

[Laughter.]

The CHAIRMAN. Thank you very much. I would just say to you, I have had the opportunity to work with Senator McCain as either Chair or Vice Chair, Senator Murkowski, Senator Barrasso. But more importantly, with so many other members of this Committee, who come to this Committee really understanding that we have the First Americans living in third world conditions in too many parts of this Country. We are dedicated and determined and have been for a long, long while to make changes that give them opportunity.

So it has been a very proud moment for me in this part of my life to work on these issues. I intend in other ways to continue the work with Native Americans. I really appreciate the work of the people who have come to this Committee and made a big difference on the Committee.

Senator Franken?

STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA

Senator FRANKEN. I was going to make a similar statement about the Chairman, though not one that would pull applause and a standing ovation, which the Ranking Member so effectively did. But similar sentiments.

I would like to talk about the principles of self-determination and self-governance. They are a major cornerstone of Federal Indian policy today. There is no question about it. No one knows the needs of a sovereign Indian tribe better than the tribe itself.

Minnesota tribes are the national leaders in self-determination and self-governance. Mille Lacs and Red Lake were two of the first ten tribes to establish self-governance compacts with the Federal Government in the 1980s. They have been running their own programs for years.

The first meeting I ever had was with Fond du Lac, and the first with the tribes in Minnesota. Karen Diver, the Chair of Fond du Lac, the first thing she said to me was, you got to know sovereignty. And she pointed me to a study written at the Kennedy School, which I went home and immediately read, about all the benefits of sovereignty.

We need to make sure that the Federal Government is an effective partner to tribes like Red Lake and Mille Lacs. This means everything from providing technical support, appropriating adequate funding for contract support costs and making sure the Bureau of Indian Affairs and the Indian Health Service makes decisions and responds to tribes within a reasonable amount of time.

The bill under consideration today seeks to address some longstanding issues that have made it difficult for tribes in Minnesota to run their own programs effectively. Mille Lacs, the Mille Lacs band and the Red Lake Nation helped craft this legislation language in earlier Congresses. They are eager to see this bill move

forward, and I am looking forward to hearing your thoughts on the bill today.

I apologize, I am going to have to leave early because I have to go to another hearing. But I will submit my questions for the record.

Thank you, Mr. Chairman, and again, not to embarrass you, but it has really been an honor being on this Committee with you as Chair.

The CHAIRMAN. Senator Franken, thank you very much.

Before I call on Senator Tester, let me just say that I neglected to mention Senator Inouye and Senator Ben Nighthorse Campbell. I should have. I have been enormously proud to serve with them while they were Chair of this Committee. All of them have done a wonderful job. It is part of the wonderful privilege of serving here to be able to serve with people like that. So let me be sure to mention Senator Inouye and Senator Campbell.

Senator Tester?

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Thank you, Mr. Chairman. I do also want to associate myself with the remarks of the Ranking Member. I think he said it very well. On behalf of the seven reservations in Montana and the eight, nine, ten or eleven tribes, depending on how we want to count, I want to say thank you. When I go back to Montana, they say thank you to you, and for the good work that you have done.

I remember the hearing we had on Crow on health care, and the little girl that was, well, enough said. I will just say that I appreciate your work in the many, many areas on this Committee as Chairman. I think if you look at the work that was accomplished by this Committee under your leadership, it is very, very impressive.

I also want to talk about self-governance, self-determination, the bill we are going to hear about today. It has had a positive effect in Indian Country, but that does not mean we do not need to work to make it better. Absolutely, unequivocally, there are some issues with it, I think, that Native Americans have, that taxpayers have, that quite frankly the folks that implement it have. I look forward to hearing from our witnesses today. I want to thank you for taking time to be here, so that we can make this better.

I always think back to Chairman Carl Venne of the Crow, who passed away here a year or maybe it has been two now, who said, all I want is the tools to be able to be successful, and then I want you to just get out of the road, and we will go. I think that is what this is about, giving Indian Country the tools they need to be successful, and they will solve the problems.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Cantwell?

STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman, and I too want to add my thanks for the many visits that you paid to the Pacific Northwest. I think you ate a lot of salmon, and we appreciate that.

[Laughter.]

Senator CANTWELL. And you visited many of our Indian Country sites with the leadership from surrounding tribes participating. There is nothing that really replaces that on the ground visit and experience, to see some of the challenges. I want to personally thank you for your dedication to Indian health care, and the fact that we were able to be successful in moving very important legislation there, and for your continued dedication on making sure that we improve the governance of Indian Country.

I want to thank the witnesses for being here today, particularly Ron Allen from the Jamestown S'Klallam. They were one of the first of nine tribes to really take advantage of Indian self-determination. And today, that small group has now grown to something like 282 federally-recognized tribes. The number could be even higher, if this legislation is passed and the barriers to expand self-governance that are in the Title IV of the Self-Determination and Education Assistance Act are eliminated.

So while there are a large number of tribes taking advantage of the flexibility and efficiency of these compacts with the Department, we obviously have to do more in this area. So I look forward to hearing from the witnesses today and their input on this. The changes that this bill would make to Title IV, including the requirement of the BIA to respond to final offers within 60 days, negotiate in good faith and require amendments to compacts should be agreed to. I think these provisions and many other changes are common sense changes needed to fully implement the original goals that we had for self-determination.

Again, I thank the Chairman for holding this hearing, and moving this legislation through the process.

The CHAIRMAN. Thank you.

Senator Udall?

STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Dorgan. Let me also associate myself with all the comments that have been made from our colleagues, including Ranking Member Barrasso, on your performance and your accomplishments here. I think you should be incredibly proud. The 12 years I have been in Congress, Chairman Dorgan, we have been fighting for that Indian Health Care Improvement Act, and always back and forth between the House and the Senate.

I think you and the members of this Committee have finally gotten that done, and the Tribal law and Order Act and water settlements. And I know that you are still working now to the very end to see that we get some of these other things done, which are kind of pending out there in the lame duck.

So congratulations on what I think has been one of the most productive periods for Native American legal and legislative accomplishments.

Let me just say on the issue of self-governance, I really look forward to the witnesses. This is a good set of witnesses that I think can tackle this issue.

One of the major points for me on self-governance is how far we have come. If you look, Ron, we were just at the National Congress of American Indians in Albuquerque. That Congress was started as a result of the assimilation and termination policies of the Federal Government back in 1944. If you look over the years, we have had dramatic improvements in self-governance, the development of tribal leaders. The tribes should be so, so proud of that. We look forward to working with all of you to further improve and make sure that we give you the tools to move forward.

So thank you very much, Chairman Dorgan, once again.

The CHAIRMAN. Senator Udall, thank you very much.

Mr. Skibine, welcome. You have testified many times before this Committee on a range of issues. You have done a lot of good work down at the Department and we welcome you today.

You are accompanied by Sharee Freeman, who is the Director of the Office of Self-Governance. You are the Acting Principal Deputy Assistant Secretary for Indian Affairs. We appreciate both of you being here. We will hear your testimony. The written testimony of all three of the witnesses will be included in the record in full, and we would ask all to summarize.

Mr. Skibine, you may proceed.

STATEMENT OF GEORGE SKIBINE, ACTING PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY SHAREE FREEMAN, DIRECTOR, OFFICE OF SELF-GOVERNANCE

Mr. SKIBINE. Thank you, Mr. Chairman, Vice Chairman Barrasso, members of the Committee.

It is a pleasure for me to be here today to appear before you and discuss the Department of Interior's views on H.R. 4347, the Tribal Self-Governance Act, H.R. 4347, which seeks to amend both Title I and Title IV of the Indian Self-Determination and Education Assistance Act.

Let me begin by saying that the Administration and Secretary Salazar and Assistant Secretary Echo Hawk are very strong supporters of the self-determination and self-governance program and what it has done for Indian tribes. As stated earlier, the program started with just a few tribes, not that long ago, and now it has 260 some tribes that participate.

At Interior, Sharee Freeman, our Director of Self-Governance, administers the program out of her office here in D.C. with fairly limited staff. I think she has done an incredible job in doing that, given the amount of millions of dollars that pass through her office to go to Indian tribes.

So the Administration's strong support has meant that we tried over the years, and I have at numerous times met with Chairman Allen and members of his Title IV task force to essentially try to

come to agreements in amending Title IV for the purposes that the tribes want them to do. We started in the middle of the Bush Administration to have meetings. They weren't really going anywhere for a while, and then we made a push for it, and I think we almost got there after numerous meetings with the self-governance tribal group.

But at the time, the Bush Administration was really opposed to making mandatory compacts with non-BIA agencies. That was really one of the pushes of the initial bill. It was a non-started for the Bush Administration, so we were really unable to do that. When the bill was re-introduced in the House here, I think that provision was gone in terms of that. And many, many of the provisions that we objected to were taken out. There was a pilot project that the Administration opposed when we testified in front of the House. That has been removed. So I think we have come a long way.

At the end of the session, the House passed a substitute bill that although taking some of our objections into consideration injected additional provisions which we had not agreed to. As a result, there have always been a few of the provisions in there on which the tribes and the Administration have simply not come to agreement. So we were not very far, but essentially there is still some work to do.

So even though today we cannot support the bill as passed by the House, I think that we are fairly close and I think we would like to work with the tribes to be able to come to an agreement. We met with members of the staff here before this hearing and essentially articulated to the staff what our concerns were, concerns with the bill as passed by the House. So essentially, that is where we are right now. It is close, but it is not quite there.

The CHAIRMAN. Mr. Skibine, in your testimony, you say you met with our staff, told us what the concerns were. Summarize the concerns.

Mr. SKIBINE. Yes, I will summarize some of the concerns that we have. For instance, we have a concern with the fact that the declination criteria of Title V that pertains to IHS were inserted in the bill. And that in fact, there is a 60-day time frame imposed on the government in order to approve a funding agreement, or list why, under the IHS declination criteria, it cannot go forward with it.

Right now, for BIA, the tribe can choose to include in its funding agreement any provisions of Title I. So usually the declination criteria in Title I are included. On this bill, we have 90 days to approve or not. And it is deemed approved if we don't do anything after 90 days. We believe that the 90 day time frame that we have used for the past 25, 30 years in self-governance, the determination that was passed is more appropriate.

I think the problem that we have with the IHS criteria is that right now, for non-BIA agencies, the entering into self-governance compact and funding agreement is discretionary, by and large discretionary. So if it doesn't work, they don't do it. But I think that by requiring those agencies to, at 60 days, to disapprove or approve a final offer under specific declination criteria really makes it quite quasi-mandatory for them to do something.

So I think there is some real concern, especially with the non-BIA agencies, over the import of that particular provision. I think in Indian Affairs, we prefer having the existing declination criteria and I think we also prefer to have the 90 days.

Some of the other concerns we have are that the bill requires a turnaround of 10 days from apportionment of the funds to the tribe. And although we understand that IHS does that, at the Department, our financial system is not geared up or designed to be able to do that. So we would not be able to comply with that provision. We think that it is not, at this point, essentially, we can't really support something that we cannot comply with because of the way our financial systems are devised.

Another provision that is an issue is the issue with regulations. I think one of the time frames in the regulation says that the authority to regulate, to issue regulation, expires after, I think it is 24 months. I think that we have 18 months to come up with proposed regs. So we think it will be impossible, based on past experience, to come up with final regulations six months after coming up with proposed regulations.

Our experience with negotiated rulemaking, both with 638 and self-governance, is that it takes an incredible amount of time to come up with these regs based on consultation with tribes. And that in effect, we would like to have a broader time frame.

I remember that when I was involved in the negotiation rulemaking with 638 tribes, we also had a deadline in the Act, and we couldn't meet it. We had to come back to Congress to amend the Act just to provide more time. So that is a problem.

Now, we also, I think, we have a problem with some of the reports that are required in the legislation. One of these reports, which I have told the self-governance tribes is a problem, is that we have to come up with a report identifying the amount of funds that we spend for inherently Federal functions. I think that practically, we would never be able to come up with this figure. Plus, it would be costly.

So we think that to minimize cost and to make it more acceptable to the Administration, a provision that requires that and some other reports is unnecessary.

Finally, although we have identified to the staff some other provisions, we have a concern from the non-BIA agencies in the section on construction. I think that with non-BIA agencies, especially Bureau of Reclamation, that the Bureau would like more involvement and ability to monitor construction contracts.

So with that, I think that will essentially summarize my comments, unless, Sharee, you have anything to add at this point. And Sharee will be pleased to answer any of the questions that you may have.

The CHAIRMAN. I have a lot of questions, actually.

[The prepared statement of Mr. Skibine follows:]

PREPARED STATEMENT OF GEORGE SKIBINE, ACTING PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Good morning, Chairman Dorgan, Vice-Chairman Barrasso, and Members of the Committee. Thank you for the opportunity to appear before you today to discuss the Department of the Interior's Tribal Self-Determination and Self-Governance programs and H.R. 4347, the Department of the Interior Tribal Self-Governance Act.

H.R. 4347 seeks to amend both Title I and Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA or Act) (25 U.S.C. 450 *et seq.*). While the Administration supports the principles of self-determination and self-governance, we cannot support the bill, H.R. 4347, as passed by the House, as it poses significant practical and legal problems with regard to appropriate management of federal funding and programs.

President Obama recognizes that federally recognized Indian tribes are sovereign, self-governing political entities that enjoy a government-to-government relationship with the United States government, as expressly recognized in the U.S. Constitution. Secretary Salazar too is a strong supporter of the principle of tribal self-determination, the principles of ISDEAA, and is committed to working to fully enable tribal self-governance.

Funding agreements under this Act have helped to strengthen government-to-government relationship with Indian tribes. We support appropriate strengthening of the existing ISDEAA to make it work better for the Federal government and for Indian tribal governments. Self-governance tribes have been good managers of the programs they have undertaken. Many times, tribal governments add their own resources to the programs and are able to fashion programs to meet their needs and the particular needs of their members. Tribal governments are often better suited than the Federal Government to address the changing needs of their members. Indian tribal governments have often observed that, when they are working under self-governance compacts and funding agreements, they are not viewed by the Federal government as just another Federal contractor, and that their work under funding agreements reflects a true government-to-government relationship characterized by mutually agreed-to responsibilities and tribal empowerment to make a program work.

On June 9, 2010, the House Natural Resources Committee held a hearing on H.R. 4347, and on September 22, 2010 the bill passed the U.S. House of Representatives. This legislation deals, not only with funding agreements between tribal governments and the Bureau of Indian Affairs (BIA), but also funding agreements between tribal governments and non-BIA bureaus and offices within the Department. We are interested in discussing how to improve Title I and Title IV, but under this legislation, as passed by the House, the Secretary has little ability to maintain appropriate oversight of the programs that tribal governments assume from the Federal Government.

The Department recognizes and appreciates that Indian tribal governments have worked diligently over the past decade to amend and improve Title IV of the ISDEAA. We recognize the need for this program to evolve to improve and increase the frequency of funding agreements. Since the House hearing in June on H.R. 4347, the Department has met and cooperated with legislative staff and tribal government representatives to discuss the Department's concerns with the bill. These efforts include:

- Four meetings or conference calls with legislative staff;
- E-mail correspondence with legislative staff;
- Two conference calls with representatives of tribal governments, and;
- One meeting with both legislative staff and tribal government representatives.

We note, and appreciate, that the bill, as passed by the House, addresses some of the issues raised by the Department in earlier testimony. We request an opportunity to continue working with the Committee and tribal government representatives to discuss the Department's concerns. With further dialogue and information exchanges, this bill could be significantly improved.

My statement will begin with a brief discussion of the history of the ISDEAA. I will then discuss some examples of successes that the Department has recently had under the enacted ISDEAA. Finally, I will conclude with a discussion of general and specific concerns with the bill.

Background

In 1988, Congress amended the ISDEAA by adding Title III, which authorized the self-governance demonstration project. In 1994, Congress again amended the Act by including Title IV, which established a program within the Department to be known as Tribal Self-Governance. The addition of Title IV made self-governance a permanent option for tribes. These amendments, in section 403(b), authorized federally recognized tribes that meet criteria established for the program, to negotiate funding agreements with the Department for programs, services, functions or activities administered by the BIA. Within certain parameters, the amendments authorized funding agreements with other bureaus of the Department. In 2000, the Act was

amended again to include Titles V and VI, making self-governance a permanent option for tribes to negotiate compacts with the Indian Health Service (IHS) within the Department of Health and Human Services and provided for a study to determine the feasibility of conducting a Self-Governance Demonstration Project in other programs of that department.

In total, current law allows federally recognized Tribes and tribal consortiums to assume programs administered by the Department's bureaus and offices, subject to negotiations, when the programs are available to Indian tribes or Indians because of their status as Indians. The law also provides the Secretary with discretion to include other programs under his administration which are of special geographic, historical, or cultural significance to the participating tribal government requesting a compact.

Tribal participation in self-governance has progressed from seven tribes and total obligations of about $27 million in 1991 to an expected 100 agreements including 260 federally recognized tribes and obligations in excess of $420 million in FY 2011. This figure includes funding from BIA and other Federal funds that pass through BIA. Other Department bureaus and offices also fund agreements under the authority of the ISDEAA, also known as P.L. 93–638.

These self-governance funding agreements allow federally recognized tribes to plan, conduct, consolidate, and administer programs, services, functions, and activities according to priorities established by tribal governments. Under these agreements, tribal governments provide a wide range of programs and services to their members such as law enforcement, education, and welfare assistance. Many of the funding agreements include trust related programs such as real estate services, appraisals, probates and natural resource programs such as forestry, fisheries, and agriculture. Under tribal self-governance, tribal governments have authority to redesign or consolidate many BIA programs, services, functions, and activities other than construction. In addition, self-governance tribes can reallocate certain funds during the year and spend carry-over funds in the next fiscal year without Secretarial approval. As a result, these funds can be used with relative flexibility to address each tribal government's unique condition. Self-governance tribes are subject to annual trust evaluations to monitor the performance of trust functions they perform. They are also subject to annual audits pursuant to the Single Audit Act Amendments (P.L. 104–156) and OMB Circular A–133. In addition, most self-governance tribes have included language in their funding agreements indicating that they will work with the Department to provide applicable data and information pursuant to the Government Performance and Results Act of 1993.

What makes these funding agreements unique is that Title IV of ISDEAA allows participating tribal governments to re-design many programs for their members and set their own priorities consistent with Federal laws and regulations. This authority allows tribal leaders to respond to the unique needs of their tribal members without seeking approval by Departmental officials.

Successful Departmental Self-Governance programs

Many tribal governments have successfully implemented self-governance programs to meet their unique needs. For example, the Chickasaw Nation in 2006 provided education services to over 7,200 students. In addition, 945 students participated in remedial education and tutoring and 82 percent of the students receiving tutoring gained one grade level or more. Scholarships were provided to 181 undergraduate students and 43 graduate students. The Tribe's tribal district court heard 1,118 cases, and collected almost $50,000 in court fees and over $32,000 for restitution and child support. In January 2006, the Tribe's Supreme Court and district court were audited by BIA and received excellent ratings. The Tribe also provided career counseling, skills assessment, aptitude testing, and other employment readying services to 1,320 clients. The Tribe coordinated a job fair that attracted 53 vendors and over 500 job seekers. The Tribe's police department implemented a new computer system which has aided in multiple dispatching methods and improved data collection, investigation, and crime analysis and reporting. This example is just one of many where Tribes have been successful in directly administering federal programs.

Section 403(b)(2) of Title IV of ISDEAA authorizes other bureaus within the Department to enter into funding agreements with tribal governments subject to such terms as may be negotiated between the parties. The Council of Athabascan Tribal Governments (CATG) has successfully implemented Annual Funding Agreements (AFAs) since 2004 to perform activities in the Yukon Flats National Wildlife Refuge in the interior of Alaska. The CATG is a consortium that represents the Tribal governments of Arctic Village, Beaver, Birch Creek, Canyon Village, Chalkyitsik, Circle, Gwichyaa Zhee Gwich'in Tribal Government of Fort Yukon, Rampart, Stevens Vil-

lage, and Venetie. Members of these Tribes live near or within the Yukon Flats National Wildlife Refuge, the third largest of the more than 540 conservation units in the National Wildlife Refuge System. The Refuge was established in 1980, and includes more than 8.5 million acres of wetland and boreal forest habitat along 300 miles of the Yukon River, north of Fairbanks, Alaska. It is internationally noted for its abundance of migratory birds.

CATG has been able to successful negotiate agreements to fund activities including: (1) wildlife harvest data collection; (2) Yukon Flats moose management; and (3) maintenance of Federal property in and around Fort Yukon. Public use (including sport and subsistence hunting, fishing, and trapping) is not affected by these agreements. Consistent with Title IV, management authority remains with the U.S. Fish and Wildlife Service (FWS) as required by the National Wildlife Refuge System Administration Act.

The agreements between the Grand Portage Band of Chippewa and Grand Portage National Monument show how the self-governance program works in the National Park Service (NPS). Grand Portage National Monument and Grand Portage Band of Chippewa have had 11 years of successive base contracts for all maintenance, design and construction at the monument. There have been 13 amendments to the base contract plus 68 additional projects for GIS, sewage lift stations, trail work, exhibits, parking lots, landscaping, signage, mortar work, generator and roof repair, and more. The tribe manages roughly one quarter of the annual appropriations made to NPS for the Grand Portage National Monument. As of September 2009, $4,514,173 has been transferred and used for projects

The Bureau of Reclamation (Reclamation) also presents case examples of successful implementation of Self-governance compacts under the current law. In FY 2009, Reclamation had annual funding agreements with five Tribes, totaling about $67 million, which includes funding from the American Recovery and Reinvestment Act (Public Law 111–5). One of these funding agreements is with the Chippewa Cree Tribe (CCT) of the Rocky Boy's Reservation. Reclamation's Montana Area Office in the Great Plains Region and the CCT have been working together under a series of self-governance Annual Funding Agreements (AFAs) under Title IV of ISDEAA to implement on-reservation water resource development as provided for in the CCT's 1999 water rights settlement act. Under these AFAs, the CCT assumed responsibility for planning, designing, and constructing dam enlargement and rehabilitation for Bonneau, Brown's, and East Fork Dams and Towe Ponds, as well as providing for future water development. The CCT created the Chippewa Cree Construction Company, which has successfully completed much of the work carried out under these AFAs, providing training and jobs for tribal members in the process. Reclamation's role has been to provide administrative oversight and technical assistance. The working relationship between the CCT and Reclamation has been cordial, productive, and carried out in a professional manner. As of August 2009, the CCT completed all of the work at Bonneau, Browns, East Fork Dams and Towe Ponds. At this time, all of the facilities are operational and are full or substantially full. Another successful working relationship between Reclamation and the CCT under Title IV involves ongoing work on features of the Rocky Boys/North Central Montana Water Project, a rural water system.

Department Concerns with H.R. 4347

Over the past decade, Indian tribal governments have been diligently seeking to amend and improve Title IV of the ISDEAA Tribal self-governance program. The Department recognizes the need for this program to evolve so as to build on these successful efforts and to increase the number of funding agreements.

The goal of H.R. 4347 is to make the administration of the Department's Tribal Self-Governance program consistent with the administration of the IHS Self-Governance program.[1] Less apparent are the reasons for insisting that the Interior Department's and IHS's Tribal Self-Governance programs be consistent.

Congress extended the self-governance program to IHS programs so that tribal governments would have more autonomy in the management and delivery of tribal health care programs that serve tribal members.[2] IHS's primary mission is to provide federal health services to American Indians and Alaska Natives. Additionally, the IHS provides other services to American Indians and Alaska Natives, including facilities construction, water and sanitation services, scholarships for health professionals, and health services to urban Indians. The Department's responsibilities are also multifaceted and vary with the mission of the bureau or office. However, there are distinct different in the Department's responsibilities. For example, the Rec-

[1] *See* H.R. 111–603 at 18 (Sept. 16, 2010).
[2] *See http://info.ihs.gov/TrblSlfGov.asp* (last visited Nov. 12, 2010).

lamation's mission is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.[3] The National Park Service's mission is to preserve unimpaired the natural and cultural resources and values of the national park system for the enjoyment, education, and inspiration of this and future generations.[4] While the U.S. Fish and Wildlife Service's mission is to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.[5] Unlike IHS, which is dedicated to providing health services to American Indians and Alaska Natives, these non-BIA bureaus serve many constituent groups and interests through diverse programs and projects, which affects how these other bureaus are structured and how they carry out their programs.

A fundamental question is whether Title V is the appropriate model for administering Title IV programs. The Department believes that the way Title V programs are administered would not work well for Title IV programs.

For example, Title V has limited grounds for declination of a funding agreement. The enumerated list is also known as "declination reasons." Currently, Title IV uses the declination reasons set forth in Title I. H.R. 4347 would change the declination reasons for Title IV to the declination reasons provided in Title V.[6] This is problematic because the declination reasons in Title V may work for health care programs but do not necessarily work well for programs administered by the Department. The four declinations permitted under Title V include:

1. If the "the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this part," or
2. If the "the program, function, service or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe"
3. If the or "the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health" or
4. If "the Indian tribe is not eligible to participate in self-governance."[7]

The Secretary, in analyzing tribal government's proposals to carry out programs, may have valid grounds, beyond these four declination reasons, for rejecting the tribal government's final offer. The Secretary may determine, for example, that the final offer does not adequately fulfill the mission of the non-BIA bureau or office. The Title V declination reasons do not acknowledge such a concern.

In fact, the first declination reason in Title V does not apply to non-BIA programs, where there is no "applicable funding level to which the Indian tribe is entitled." Moreover, the third declination reason in Title V permits declination only if the proposed manner of carrying out the non-BIA program would "result in significant danger or risk to the public health." While that may be a valid criterion for evaluating tribal proposals to assume health care programs from IHS, it is an inadequate criterion for evaluating tribal proposals to assume programs to construct dams or irrigation projects, survey endangered species or to administer national parks. The only declination reasons that H.R. 4347 offers to non-BIA bureaus and offices are that the tribal government proposes to assume an inherently Federal function or that the tribe is not eligible to participate in self-governance. This severe limitation on the Secretary's ability to reject a tribe's final offer deprives the Secretary of the necessary authority to influence how Federal programs that are not for the benefit of Indians because of their status as Indians are to be carried out.

Other provisions that the Department finds problematic include, but are not limited to:

Section 405. Funding Agreements

> The Department is concerned with the reduced ability for the Secretary to provide adequate safeguards, particularly in construction carried out for Title I eligible programs by non-BIA bureaus. When Reclamation is responsible for the construction of, or major repairs to, a large dam, whether the effort is carried out under Title IV or otherwise, the Secretary should have the flexibility to require reasonable measures to ensure tribal and public safety. To address this, Section 405(b)(3) should be modified to closely parallel Section 405(b)(2) providing the Secretary the discretion to require additional terms for construction

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[3] See http://www.usbr.gov/main/about/mission.html (last visited Nov. 12, 2010).
[4] See http://www.nps.gov/legacy/mission.html (last visited Nov. 12, 2010).
[5] See http://www.fws.gov/midwest/alpena/mission.html (last visited Nov. 12, 2010).
[6] *See* 25 U.S.C. § 458aaa–6(c)(1)(A).
[7] 25 U.S.C. § 458aaa–6(c)(1)(A).

under Section 408, especially when there are potential health and safety concerns or post-construction Secretarial liabilities or responsibilities, such as liability under the Safety of Dams Act.

Section 407. Provisions related to the Secretary

Section 407(d)(2) requires the Secretary to show by clear and convincing evidence the grounds for rejecting a final offer from a tribal government. This heightened burden of proof handicaps the Secretary's ability to negotiate agreements with tribal governments that best fulfill the missions of non-BIA bureaus and offices. This burden should be "by a preponderance of the evidence."

Section 408. Construction

The legislation should be clarified to state that specific construction provisions under Section 408 provisions in Section 405 (Funding Agreements), Section 406 (General Provisions) and Section 409 (Payment).

Construction projects can vary from very simple to very complex. Thus the minimum amount of oversight, reviews and inspections should be subject to negotiations for each project. As such we recommend that the minimum amounts be removed from the legislation.

Section 413. Funding Needs.

The Department expressed concern with this provision in its testimony on June 9, 2010. As a result, the House Natural Resources Committee made slight changes to this section. Nonetheless, the Department remains concerned with this provision because it could potentially limit the discretion of the Secretary to reallocate funds among different programs as a result of changing priorities and the emergence of new critical needs. Furthermore, identifying shortfalls could make the Department vulnerable to lawsuits for the identified funding shortfalls.

Conclusion

While we appreciate the effort made to address some of the concerns raised by the Department, we continue to have significant concerns with the bill. In particular, given the breadth of the Department's responsibilities, this legislation could significantly hinder the Department's ability to accomplish its statutory mandates through its multiple bureaus and offices by limiting Secretarial discretion and allowing for the transfer of certain functions that should appropriately be maintained at the Federal level. We would like to continue to work with this Committee and tribal governments to expand compacting opportunities and improve our program.

On a broader note, I would like to reiterate this Administration's commitment to restoring the integrity of the government-to-government relationship with Indian tribal governments. Many challenges face our Native American communities. This Administration is committed to working with this Committee and with tribal governments so that, together, we can create opportunities for these communities to thrive and flourish.

Mr. Chairman, this concludes my statement and I will be happy to answer any questions you may have.

The CHAIRMAN. Mr. Allen, welcome. Ron Allen is the Tribal Chairman and CEO of James S'Klallam Tribe, the Chairman of the Board of the Self-Governance Communication and Education Tribal Consortium, and a couple of other chairmanships. You have been very active, and you have been in front of this Committee many times. We appreciate your coming back.

STATEMENT OF HON. W. RON ALLEN, TRIBAL CHAIRMAN/CEO, JAMESTOWN S'KLALLAM TRIBE; CHAIRMAN OF THE BOARD, SELF–GOVERNANCE COMMUNICATION AND EDUCATION TRIBAL CONSORTIUM; AND CHAIRMAN, TITLE IV—DOI AMENDMENTS TRIBAL WORKGROUP; ACCOMPANIED BY: GEOFFREY STROMMER, PARTNER, HOBBS, STRAUSS, DEAN AND WALKER

Mr. ALLEN. Thank you, Mr. Chairman and Senators. I definitely appreciate the opportunity to come and testify on this self-govern-

ance legislation. I too share the Indian Country's deep appreciation for your leadership. So we thank you, and you heard our deep appreciation to you when you talked to us at NCAI. We definitely are looking forward to working with you further after you move on to the next chapter in your career.

Self-governance is one of the best success stories of the Federal Government with respect to advancing tribal sovereignty. Senator Franken made the comment about the Minnesota tribes saying start with sovereignty and move from there. Yes, we are sovereign governments.

How do you implement the sovereignty in terms of advancing the interests of our people? This legislation started in its pilot phase in 1988. And yes, my tribe was one of them. Now, we have 260 or so tribes in the BIA, 330 some odd tribes in IHS. It is a movement. And it is not a program. There is one thing you need to understand: it is not a program. It is implementing our governmental authority over all programs that we serve our community. We are acting as governments.

We are no longer contracting with you because of some treaty obligation or some moral or ethical obligation you have to the Indian people of this Nation. We are governments, and we have always been governments. What we want is control over our destiny. We want control over our ability to become self-reliant again. We always were in historical times and we want to be here in modern times, in the 21st century.

We have nothing but success. I could be waving a book that we wrote with all kinds of examples, from Alaska to Florida, crisscrossing Indian Country, of the success of self-governance.

So this legislation is simply an amendment, a technical amendment, to require the Federal Government, in terms of how we are able to negotiate with them and to take over these Federal programs that are intended for the benefit of our tribes and our people. That is what this is about.

I appreciate your accepting our testimony. We have addressed a lot of the issues that the Bureau of Indian Affairs and Department of Interior have raised. We feel we have answered it. This subject matter, for this amendment, for Title IV, has been going on for 10 years. And we deeply appreciate the fact that we are really close, finally close to matching in principle the Title V and moving the agenda forward.

I think it is important to recognize, as we talk about these different issues within this legislation, this amending legislation, that we have worked diligently with the Committee on both the Republican side and the Democratic leadership staff, as well as the Administration. To the credit of George Skibine and his leadership, we have gotten a lot of traction on this over the last year and a half or so. That is good. A lot of those issues are off the plate. There were a lot of them. We have spent countless hour working through these issues.

I am a little frustrated as I hear issues that I felt that we put to rest that are back here on the table. We don't feel they should be. Our answer to that real quick question would be that we urge that the Committee actually consider that we feel we have answered these questions and issues that are being raised by the Bu-

reau, because the majority of this is the BIA and not the non-BIA. And if there are legitimate issues that the Administration wants to raise, then we feel we can come back in a technical amendment and correct it.

You have never passed a perfect bill. It has never happened in the history of America. So why is it that we have to have the perfect bill to address Indian Country? Why is it? We have consistently said to you that we are the most regulated people of America. Why is that? Why do we have to have a higher standard in terms of how the Federal Government meets its obligations to our communities?

So when you talk about the final determination, we just want a very clear determination on in terms of when we negotiate. You have an obligation to get back to us. With regard to Prompt Payment Act, well, quite frankly, yes, 10 days, IHS can do it. We have over a billion dollars that are contracted out with the tribes. They do it, and you have the Prompt Payment Act. So it is not 10 days, it is 10 days plus 14 days. So there is no reason why you can't get the money.

We carry those Federal programs out. So we have to go borrow money to carry out Federal functions. I don't see you giving us any recourse on that issue. So we will get the money to you when we can get the money to you, but meanwhile, you guys go out there and do your job that you are supposed to be doing.

So there are those kinds of issues that are out there. Reporting requirements, the Federal Government and its agencies report to you all the time. All we are doing is asking them to report to you how well this program is being administered and implemented. We think it is very reasonable that the stuff that we are asking with regard to self-governance is being admitted into the record.

I see my time is up, Mr. Chairman. I am definitely here to answer questions. As a chairman of one of the lead tribes, I am very dedicated to making this happen. I am very dedicated to finding common ground. Indian Country knows common ground is essential for success. All we want to do is keep moving this agenda forward to allow us to move our agenda forward to take care of our future generations.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Allen follows:]

PREPARED STATEMENT OF HON. W. RON ALLEN, TRIBAL CHAIRMAN/CEO, JAMESTOWN S'KLALLAM TRIBE; CHAIRMAN, SELF-GOVERNANCE COMMUNICATION AND EDUCATION TRIBAL CONSORTIUM; AND CHAIRMAN, TITLE IV—DOI AMENDMENTS TRIBAL WORKGROUP

My name is W. Ron Allen and I am the Tribal Chairman and Chief Executive Officer of the Jamestown S'Klallam Tribe, located in Washington State. I am also the Chairman of the Board for the Self-Governance Communication and Education Tribal Consortium (SGCETC), Chairman of the Title IV Tribal Team as well as the Chairman of the Department of the Interior (DOI) Self-Governance Advisory Committee (SGAC), and I submit my testimony on H.R. 4347 in all of these capacities. Collectively, I am representing the 260 Tribes in DOI and 331 Tribes in the Indian Health Service of the Department of Health and Human Services participating in Self-Governance.

I testified on H.R. 4347 before the House Committee on Natural Resources on June 9, 2010. During my testimony, I shared the Self-Governance story and the experiences and successes that the past 20 years in Self-Governance represent. The number of Tribes and Tribal consortia participating in Self-Governance today is 33 times greater than in 1991. Approximately 50-60% of all Federally recognized Tribes are Self-Governance Tribes, and the interest shown by other Tribes is continuing to grow.

Self-Governance has been a huge success. Self-Governance works because it promotes efficiency and accountability; strengthens Tribal planning and management capacities; invests in our local resources to strengthen reservation economies; allows for flexibility; and affirms sovereignty.

Success can be a very costly accomplishment and Self-Governance Tribes know this all too well. Self-Governance Tribes have consistently supported appropriation requests increases for BIA programs and services that impact American Indians and Alaska Natives. The current

regulations require that Self-Governance Tribes share equally in Congressional appropriation increases. However, our experience has been that when Indian Affairs has received these increases, oftentimes Self-Governance Tribes did not consistently receive our relative share (see attachment to this testimony: Analysis of Self-Governance Funding Increases vs. Overall Indian Affairs Budget).

I emphatically emphasized the need for amendments to Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) (P.L. 93-638 as amended) and a brief overview of the proposed amendments in my comments to the House Committee on Natural Resources. And, today I reiterate the same message to this Committee. H.R. 4347 contains several proposed amendments to Title IV that advance important purposes. Most significantly, they create consistency between Title IV Self-Governance in DOI and Title V Self-Governance in the Department of Health and Human Services (DHHS).

Tribal, Congressional and Federal representatives have met dozens of times to discuss the provisions and have spent hundreds of hours negotiating the details of H.R. 4347's provisions. The Title IV Tribal Team has been especially active in meeting with DOI and Bureau and Indian Affairs (BIA) officials over the last few months. Significant agreement has been reached on the vast majority of the provisions in this bill. Tribes have made significant concessions in order to ensure that this important legislation is enacted in this session of Congress.

Since I testified on June 9, major progress has been made towards the goal of passage of H.R. 4347. On July 22, the House Committee on Natural Resources held a markup session, during which the House Committee unanimously approved an Amendment in the Nature of a Substitute (ANS) to H.R. 4347, which had been offered by Representative Dan Boren (D-OK). During the session, Chairman Nick Rahall (D-WV) and Representative Boren noted that the ANS resolved many of DOI's concerns after significant concessions by Tribal representatives.

On September 22, the House of Representatives considered under suspension of the rules and passed by voice vote H.R. 4347. For the most part, the House passed bill was the same as the bill marked up and reported out of the House Committee on Natural Resources on July 22.

Concerns Raised by DOI and Tribal Responses

In the past, DOI has raised concerns with respect to several of the provisions in the amendments. I will briefly describe the main concerns that DOI discussed with the Title IV Tribal Team and the Tribal responses that demonstrate how these concerns have been addressed in the current provisions of H.R. 4347:

- ***Section 403 – Selection of Participating Indian Tribes.***
    - DOI Concern. DOI expressed concern regarding the process of Tribal withdrawal from a Tribal organization, as outlined in Section 403(a)(4). DOI is concerned about the possibility of withdrawal occurring during mid-cycle of a current funding

agreement and the effect that this would have on the Federal government being able to retrieve funds necessary to keep Tribes remaining in the Tribal organization operating.

- Tribal Response. Section 403(a)(4)(D)(iii) explains the effective date of a withdrawal. The provisions were drafted to ensure that withdrawal (and the resulting withdrawal of funds) occurs when the parties agree or during the transition between fiscal years. Additionally, in practice, the Office of Self-Governance (OSG), Tribal organizations, and withdrawing Tribes agree upon a date of withdrawal. Finally, the Director of OSG negotiated the details of this provision to reflect the process that OSG currently uses.

- ***Section 407(c)(1), (2), and (5) – Inability to Agree on Compact or Funding Agreement: Final Offer, Determination, and No Timely Determination.***

  - DOI Concern. DOI expressed concern with subsections (1) and (2), which cover final offers and determinations on final offers. Under the bill, if the Secretary and a Tribe are unable to agree on terms, the Tribe may submit a final offer to the Secretary. The Secretary is required to make a determination with respect to the final offer not more than 60 days after delivery of a final offer. DOI believes that the provision should allow for 90 days for the determination.

    DOI has also expressed concern with subsection (5), which states that if the Secretary fails to make a determination with respect to a final offer within 60 days, the Secretary shall be deemed to have agreed to the offer. DOI would prefer that if there is no action taken by the Secretary within the required timeframe, then the Secretary would be deemed to have *disagreed* to the offer.

  - Tribal Response. The deemed approval/agreement concept has been fundamental to ISDEAA contracting since its inception. This concept levels the playing field and ensures that BIA acts in a timely manner with respect to contract proposals. The concept has also applied to Title IV agreements for those Tribes that have opted – as a matter of right – to incorporate the Title I declination process and criteria into their Title IV compacts and funding agreements. This concept is absolutely essential.

- ***Section 407(c)(6)(A)(iii)(I) – Inability to Agree on Compact or Funding Agreement: Rejection of Final Offer.***

  - DOI Concern. This subsection provides that if the Secretary rejects a final offer (or one or more provisions or funding levels in a final offer), the Secretary shall provide the Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter. DOI has indicated that they believe that discovery should not be permitted in the appeal process. Instead, DOI would prefer

that review occur under the Administrative Procedure Act (APA) and that this review be limited to the administrative record compiled by the agency.

- Tribal Response. This provision would bring another aspect of Title IV into line with Title V. Significantly, Section 507(c)(1)(C) of ISDEAA provides a Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter. It is important for Tribes to have access to all relevant information in a hearing to facilitate a review process that is adequate and fair to Tribes.

- ***Section 407(d)(2) – Burden of Proof.***

  - DOI Concern. DOI has expressed concern with the burden of proof incorporated in this subsection. The provision states that in any action, hearing, or appeal, the Secretary shall have the burden of demonstrating by clear and convincing evidence the grounds for rejecting a final offer.

  - Tribal Response. It is critical that the provision incorporates a clear and convincing evidence standard for the protection of Tribes. This provision would bring a key aspect of Title IV into line with Title V. In appeals involving Title V, the Secretary has the burden of demonstrating by clear and convincing evidence the validity of the grounds for the decision made.

- ***Section 409(d)(2) – Payment: Timing: Transfers.***

  - DOI Concern. This subsection provides that one year after enactment, in any instance requiring an annual transfer of funding to be made at the beginning of a fiscal year or requiring 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 to DOI, unless the funding agreement provides otherwise. DOI has taken issue with the 10-day payment period; DOI would prefer a minimum of 30 days.

  - Tribal Response. Again, this provision would bring Title IV into line with Title V, thereby creating administrative efficiencies for Tribes. Section 508(a) provides that transfers are to be made not later than 10 days after the apportionment of funds to IHS. DOI has not adequately explained why this requirement should not be incorporated into Title IV.

- ***Section 413 – Funding Needs.***

  - DOI Concern. DOI has stated that the agency would like Section 413 to be removed from the bill. DOI has expressed frustration with the possibility of being required to

generate an additional report and also suggested that this provision might increase the Congressional Budget Office (CBO) score of the bill.

- Tribal Response. This report, which is required to accompany the annual budget request, is imperative. Without this report, Congress will not have a true understanding of the needs of Self-Governance Tribes. The cost of preparing the report was built into the CBO score that the bill received. BIA officials have stated publicly at the last Self-Governance Advisory Committee meeting that the BIA has sufficient funds available from year end funds to offset the full amount necessary to cover the cost of implementing the bill, including this reporting requirement. To reflect this BIA commitment we suggest that language be included in the Committee report on H.R. 4347 or in the SCIA Chairman's or Vice Chairman's floor statement upon Senate passage of this bill that makes clear that DOI has assured the Committee that the bill can and will be implemented without requiring any new or additional appropriations.

- ***Section 414(b)(2)(E) – Reports.***

  - DOI Concern. This subsection outlines what must be included in the annual report submitted by the Secretary to Congress regarding the administration of Title IV. The report must specify the amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of inherent Federal functions. DOI has in the past expressed concerns that implementation of this provision will be challenging because DOI does not have a system in place for this and has never gathered this type of information.

  - Tribal Response. This exact report requirement is included in Section 514(b)(2)(E) of ISDEAA. The provision will allow for consistency between Titles IV and V. When Title V was enacted in 2000 IHS did not have the infrastructure in place to implement Section 514(b)(2)(E) but the IHS made the necessary changes administratively to implement this section. We are confident that DOI will do the same after Section 414(b)(2)(E) is enacted.

- ***Section 417 – Appeals.***

  - DOI Concern. DOI has expressed concern that the appeals process included in H.R. 4347 does not fit the discretionary programs.

  - Tribal Response. First, the appeals process should apply to all non-BIA programs, whether they are mandatory or discretionary. The standard for discretionary programs is whether the Secretary has not properly exercised his discretion, which is a very high burden for Tribes to challenge. It is unlikely that Tribes will bring litigation as a result of the high burden.

Conclusion

In conclusion, I urge the Committee to enact a bill identical to H.R. 4347 as soon as possible. The bill contains provisions that have been carefully crafted and negotiated over the course of nearly ten (10) years. The final step on the path toward increased Tribal Self-Governance and self-reliance is for the Senate to pass H.R. 4347.

The success of Self-Governance has been demonstrated by the overwhelming number of Tribes in Self-Governance and those Tribes who are seeking to become a part of this phenomenon. That has also been our experience at Jamestown. Self-Governance allows us to prioritize our needs and plan our future in a way consistent with the Tribe's distinct culture, traditions, and institutions.

My deepest hope is that this Congress will enact these Title IV amendments so that we can build on the successes of the past 20 years and further Tribal Self-Governance in partnership with the United States, to achieve our mission and our goals.

Thank you.

Attachment

Analysis of Self-Governance Funding Increases vs. Overall Indian Affairs Budget

Background on Issue: Over the past 5-8 years, Self-Governance Tribes have voiced concern over the failure to receive their fair share of subsequent BIA funding increases. As identified during the TBAC presentation at the SG Conference held in May 2010:

- Allocation of Self-Governance Increases has **NOT** been transparent.
- Clearly, BIA has been making allocation decisions without Tribal (TBAC) Input.
- Increases have **NOT** been shared equally with Self-Governance Tribes (e.g. Law Enforcement).
- Tribes do **NOT** know the allocation results (or methodology) for most other BIA Programmatic increases: Education, Natural Resources, Economic Development. (CSC is known).
- Allocation of Carryover funds is **NOT** transparent and *MAY* be inequitable as well.
- Rescissions, on the other hand, have always been shared across the board.

Many Tribes have compact language stating that the Tribe "shall be eligible for increases and new programs on the same basis as other tribes". If Self-Governance Tribes have not been eligible on the same basis as 638 tribes, this is in non-compliance with these Agreements. Further, it is difficult--if not impossible--for a Tribe to determine if it has been treated equitably when the Department has not been transparent on what "basis" funds have been allocated.

Analysis/Charts: The first graph visually shows the increase in Self-Governance Tribes since it began in 1991. The first 5 years of self governance had explosive growth, and the last fifteen years have had steady growth each year. The total number of federally recognized tribes is 565, with 564 as of the notice published in 2009 (74 FR 40218) plus the Shinnecock Indian Nation, which was published in June 2010 (75 FR 34760). Self-Governance Tribes comprise 44% of all Federal Recognized Tribes as of August 2010.

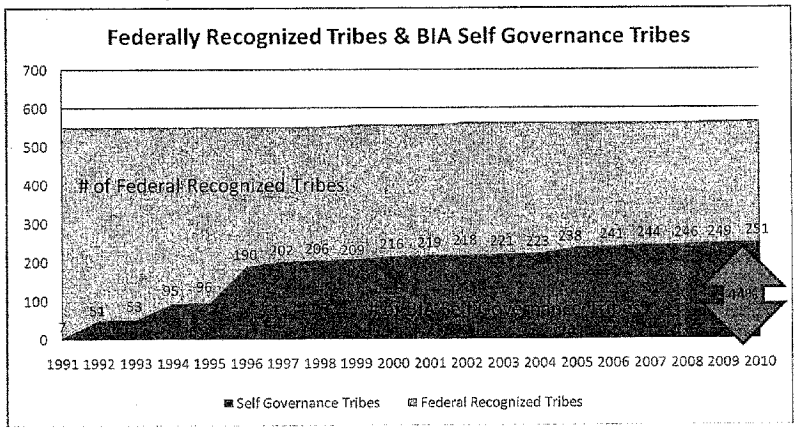


Figure 1: Figure 1: Number of tribes covered each year under BIA Funding Agreements. OSG data obtained July 20, 2010.

Even with these increases (in the number of SG tribes and funding levels), the transfers to Self-Governance Tribes has not increased proportionately over time at the same pace as the total BIA appropriations. This graph indicates the Self-Governance proportion of the BIA Total Appropriations over the last 22 years. The first Self-Governance compacts and funding agreements were in place in 1990. The data from the last 10 years was pulled and verified through the OSG and Green Book. Dollars are nominal and do not account for inflation.

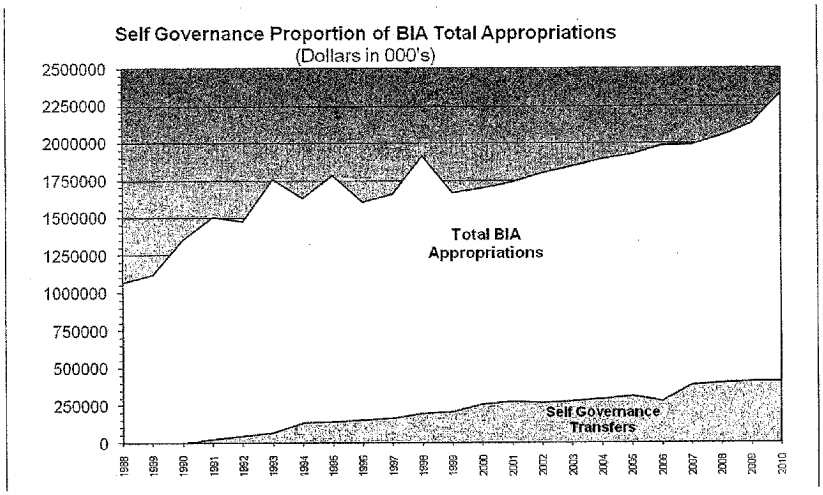
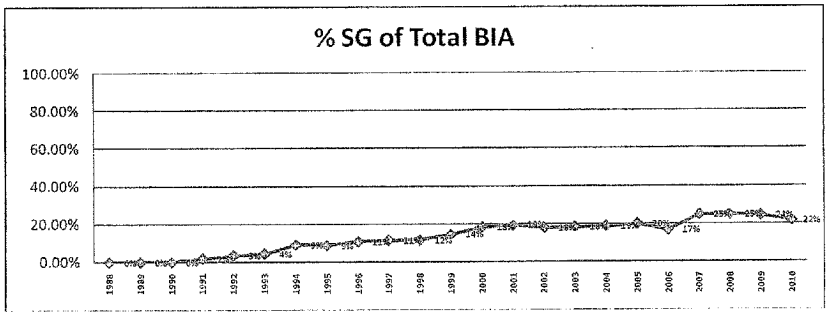


Figure 2: Data OSG, 2010 SG figure is estimate. Dollars are nominal and do not account for inflation.

Another way of looking at the transfers to Self-Governance Tribes is as a percentage of the total BIA Appropriations. The following graph shows that compared with the total BIA Appropriations, the Self-Governance Transfers climbed to 9.23% in 1995, had slow growth in 2005, a decline in 2006, followed by another increase and then decrease in 2009. The data from 2010 is still an estimate.



Dave Connor provided the following law enforcement analysis. Based on the 2005 budget, BIA law enforcement programs received nearly 145% increases by FY 2009, while 638 programs received 129% and Self-Governance Tribes lagged behind, actually receiving decreases from FY2008 to FY2009, to a total increase of 106%.

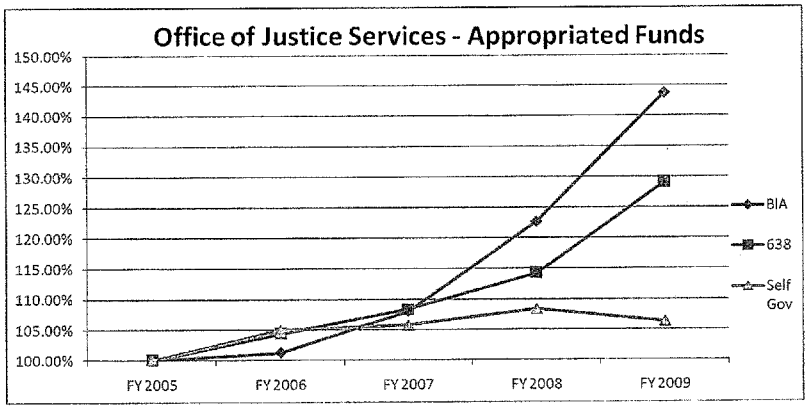
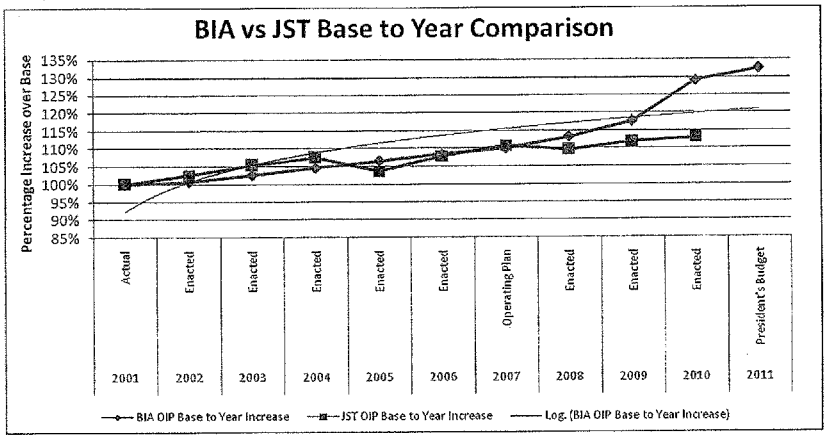


Figure 3: Increase to program per year with 2005 as base budget.

Kogi Naidoo from the Jamestown S'KlallamTribe completed a 10-year comparison of the Tribe's TPA base compared with the BIA TPA increase over the same period of time. For FY2010, the BIA base budget increased 129% from the base year, whereas the Tribe's base budget only increased 113% from the base year.



In addition to the graphic analysis, other examples where SG Tribes were either excluded or unfairly treated for funding increases include:

1. In FY 2006, BIA had end of year natural resources funds that they wanted to distribute on short notice. No Self Governance Tribes were included in this distribution. When this was questioned by the Tribes, the Central Office program manager responded that in his experience, OSG was not efficient enough to process fund transfers on short notice, so he specifically excluded Self Governance Tribes from consideration.

2. In the 2007 TBAC discussions on how to distribute FY 2006 carryover funds, the TBAC recommended that the available amounts should be distributed pro rata for Tribes' scholarship programs. It was subsequently agreed to by the Assistant Secretary that $4 million in FY 2006 carryover funds would go to Tribes for their scholarship programs. Prior to distribution of the funds, Mary Jane Miller made mention in a TBAC budget subcommittee email, that the $4 million distribution would not include Self Governance Tribes, as they are not subject to decreases like 638 Tribes. In a follow up email and subcommittee conference call, Mary Jane subsequently agreed to include Self Governance Tribes in the distribution.

3. During the December 2009 TBAC meeting, it was made aware by a BIA employee that Self Governance Tribes were specifically excluded from sharing in the $2 million CY 2010 increase for fish hatchery operations (there was also a 2010 increase of $2 million for fish hatchery maintenance, which Self Governance Tribes would be eligible for along with 638 Tribes). The reason given for excluding Self Governance Tribes from sharing in the fish hatchery operations increase was that they were no longer included in the Greenbook section describing the program. The paperwork was completed for this distribution to the 638 Tribes. However, once Self-Governance raised their concerns in being excluded, the BIA rescinded all of the funding documents they had **already** sent to the 638 Tribes for their fish hatchery operations increases, so that they could reallocate the $2 million fairly.

4. During April 2010 TBAC Budget Subcommittee meeting, the BIA provided FY 2012 Over Target budget justification for $5 million in new program funding for Conservation Enforcement positions in Indian Country. The justification states that "Increased funding will be incorporated into P.L. 93-638 contracts with fish and wildlife resources tribes to allow them to hire and provide credible certification for their CLEO personnel". It was noted by the Tribal members that this needed to be corrected to include Self-Governance Tribes.

Recommendations:

Several possible solutions have been discussed, including:

- **REDEFINE REGIONAL/TRIBAL RELATIONSHIP TO MAINTAIN PROGRAM INTEGRITY, SHARE IN PROGRAM INCREASES, AND TO SHARE IN YEAR END CARRYOVER FUNDS.** It is important that a relationship between Self-Governance Tribes and the Regional Offices/Agencies be maintained relative to program funds. Self-Governance Tribes are running programs on behalf of the federal government. Too often, the longstanding culture at the BIA has left Self-Governance Tribes out of program increases as well as carryover because BIA staff have stated that "the Tribe has received full funding and the BIA is 'finished' with it." When program fund increases and carryover are not shared equally with the Self-Governance Tribes, SG Tribal citizens do not receive the benefit of funding provided by Congress on their behalf.
- **EASE FUND TRANSFER THROUGH OSG—REDESIGN PROCESSES, ESTABLISH "FAST TRACK" TRANSFER PROCESS, INCREASED STAFFING.** Carryover funds must move quickly or they will be lost. Therefore, fund transfers through the Office of Self-Governance must be timely. At the regional level, funding is added to an open 638 contract. A similar method should be available through Self-Governance. Most likely, a combination of process redesign or "a fast track system" will need to be developed along with

increased staffing. Self-Governance Tribes have been requesting additional staffing to effectively move IRR and fire funds.

- **STRONGER SELF-GOVERNANCE ADVOCACY IN TBAC.** The BIA looks to the Tribal Budget Advisory Committee (TBAC) for direction and priorities on budgets. Without Self-Governance representation on the Committee, it is easy to overlook the specific issues faced by Self-Governance Tribes. The TBAC generally assumes that funding increases and carryover is distributed equally between direct, contracting, and Self-Governance compacting Tribes. However, history has demonstrated that technical barriers such as difficulty in transfer of funds have resulted in unequal distribution of funds.
- **PROGRAMMATIC FORMULAS FOR NEW FUNDS.** Consultation with Tribes is paramount in the development of programmatic funding formulas. Consistent, objective, and readily available variables should be used in a straightforward formula that is relatively simple to implement. Data collection is the key. Presently, even where there are formulas, the data used to calculate the distributions is inconsistent and unreliable, and often there is no formula, in which case distributions are made on a discretionary basis that is not predictable and often based on the limited personal knowledge of the Federal official. Examples of complex formulas/data collection can be seen in the allocation of IRR funds and the implementation of the CSC policy. While these two examples have been fraught with complications, (IRR and CSC funding formulas), at least Self-Governance Tribes share in funds on an equal footing. **Self-Governance Tribes recommend that BIA:**
    - Make information regarding its decision making process for each category of funding available to all Tribes, including all formulas upon which it relies, the methods for obtaining all data relied upon in the formulas, and the factors relied upon for any decision making that is not formula based;
    - Consult with Tribes regarding the formulas and other decision-making processes relied upon by BIA;
    - provide opportunities for Tribes to evaluate and comment on the accuracy of all data relied upon in any formula that BIA uses; and
    - Routinely update all information relied upon for making funding decisions and provide reasonable opportunities for Tribes to verify the data.

The CHAIRMAN. Mr. Allen, thank you very much.

Finally, we will hear from the honorable Will Micklin, who is the First Vice-President of the Central Council of Tlingit and Haida Tribes of Alaska in Juneau, Alaska. Mr. Micklin, thank you very much. You may proceed.

STATEMENT OF HON. WILL MICKLIN, FIRST VICE-PRESIDENT, CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIANS TRIBES OF ALASKA

Mr. MICKLIN. Greetings from Alaska. My name is Will Micklin, my Tlingit name is Yaan Yaan Eesh. I am of the Wolf Tribe, Teikweidee Clan of the Kaat Hit House of the Tongass Tribe of Ketchikan. I am a Sealaska shareholder and a member of the Alaska Native Brotherhood Camp 14.

I am elected Vice-President of the Central Council of Tlingit Haida Indian Tribes of Alaska, federally-recognized tribe from Southeast Alaska with 28,000 enrolled members. Our 18 communities in Southeast Alaska span Hydaburg in the south of Prince of Wales Island to Yakutat near Mt. Saint Elias in the north. Our headquarters are in Juneau, Alaska.

I am an eight-term tribal Assemblyman and two terms on the Executive Council. Today I am Acting President in place of President Edward Thomas, who is outside the Country on vacation.

Tribal self-governance is a goal for which the Congress and Indian tribes long have expressed strong support. Amending Federal law to increase tribal self-governance authority creates many benefits for all parties involved, ranging from reduced reporting costs to increased program flexibility and innovation and implementation.

The key to meaningful tribal self-governance is the respect for the capacity of tribal governments to carry out Federal functions and implement Federal policies. If it is authentic, a Federal policy that honors government to government relations with Indian tribes is one that trusts the corrections inherent in elected tribal leadership. Tribal accountability and effectiveness is enhanced if Federal officials properly restrain their role in tribal self-governance. All of this improves the services delivered to our people.

Central Council is deeply invested in making tribal self-governance a success. In 1987, Central Council was among the initial group of 10, the so-called demonstration tribes, who worked with the Congress to draft what became the self-governance statute. Central Council's President Thomas, along with Chairman Ron Allen here today, shaped the original law at each stage of its development, from the study and planning language in the fiscal year 1988 appropriations bill to the Title III demonstration language that originated with this Committee in the early 1990s to Title IV, which likewise originated here in 1994.

Tlingit and Haida was the first tribe to enter into a multi-agency agreement under Public Law 103–477, more or less the son of self-governance, which allowed us to consolidate employment and training funding from various Federal sources into a single, coordinated tribal program. We are proud of the active role our tribe has been able to play in the movement toward expanded self-governance, and our people are eager to make every contribution we can toward furthering that movement.

In 1992, our initial compact and funding agreement, one of the first in the Country, and the first in Alaska, completely closed an entire agency office of the Bureau of Indian Affairs and transferred its funding and responsibility to Central Council and other tribes in our region. Where the BIA employees before delivered our services, we assumed responsibility to serve ourselves. Central Council did step into the shoes of the Federal Government.

Ours was the very first multi-tribal compact that provided, by mutual agreement, with some of the IRA tribes in Southeast Alaska, Central Council administration of programs that directly benefitted these tribes and their tribal members. For the past 25 years, Central Council has pushed hard to see self-governance fulfill its promise of devolving paternal Federal power and conveying resources to the tribal government level where they can be exercised most efficiently and cost-effectively with the greatest accountability to the tribal citizen and public taxpayer. In our experience, tribal self-governance is the cure for debilitating Federal dependence, giving rise to healthy tribal governments that fulfill the promise of self-sufficiency.

Tlingit Haida's experience with tribal self-governance has not been without challenges. An unfounded fear on the part of the Federal bureaucracy has fueled bureaucrats' constant battles with tribes' advance guard in negotiations of our agreements and battles with our rear guard to compel bureaucrats to honor our agreements. Rules have been changed by Federal officials arbitrarily and capriciously, without notice or consultation. Negotiations have simply stalled without end or consequence for bad faith actions.

Payments have been delayed for months and years. For example, between 1996 and 2000, Interior failed to deliver to us a total of $953,781 in contract support cost funding that its own negotiators, in applying the Uniform Federal Rules, had determined were due us for our operation of BIA-funded programs. We had to meet the shortfall with earnings from our tribal trust fund. Using tribal trust fund dollars to meet Federal contractual obligations resulted in lost opportunities to address the many problems facing our people. Every year, Interior has failed to delivery timely the funding it agreed to deliver, forcing us to borrow funds n order to meet even our basic payroll obligations.

We have to fight every step of the way, because the law provides very little language to a tribe and oceans of discretion to the Federal bureaucrats that enable them to delay, obstruct, frustrate and eventually diminish tribal initiatives. These fights are costly for us in terms of time, money and opportunity. The delays in time and loss of opportunity for our tribal self-help efforts are so significant that we are compelled to seek a fix for each problem.

Tlingit Haida joined with other tribes over the past 10 years to shape and reshape this bill to blunt objections from wave after wave of Federal bureaucrats. We began a decade ago with what we thought would be a simple task of asking Congress to replicate the law reforms regarding health self-governance, which Congress imposed on the Indian Health Service in Title V in the year 2000. If it worked for IHS, why not for BIA? That remains our central message.

And it is the basis of our request today. We have worked for years with each Administration to pare down this bill to the bare minimum. Today the House-passed bill reflects great compromise on the part of tribes. We have conceded point after point to the Interior Department.

If there are any changes to the House-passed H.R. 4347, which the Senate or the Department believe are necessary, they can be made in the form of technical amendments next year after enactment of this bill this year, but not now. It is imperative that in the coming days, the Senate pass and send on to the President the House-passed H.R. 4347.

In conclusion, Mr. Chairman and members of the Committee, thank you very much for the opportunity to present this testimony on behalf of Central Council and its tribal citizens we serve. We commend you and this very distinguished Committee for the valuable time you are dedicating to this very important issue in the final hours of Congress.

On a personal note, and on behalf of President Ed Thomas, I thank you, Chairman Dorgan, for your years of service and commitment that you have given to Indian Country, among your other commitments in the United States Senate. Your dedication and that of your most able staff will be long-remembered. And as you leave for us in Indian Country a legacy of significant accomplishments, including, I hope, Senate passage of H.R. 4347, I wish you well as you move on to ever-greater success and personal satisfaction. Tribal self-governance is the single most important Federal Indian law reform that I have seen in my lifetime. I hope you and

your colleagues see fit to lay H.R. 4347 on the President's desk for signature into law before the end of this year.

[The prepared statement of Mr. Micklin follows:]

PREPARED STATEMENT OF HON. WILL MICKLIN, FIRST VICE-PRESIDENT, CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

Introduction. GREETINGS FROM ALASKA! *L'ingit X'neix Yaan Yaan Eesh yoo xat duwa'saak.* My name is Will Micklin. My Tlingit name is Yaan Yaan Eesh. I am of the Wolf Tribe, Teikweidee or Brown Bear Clan of the Kaat Hit House of the Tongass Tribe of Ketchikan, Sealaska Corporation shareholder and member of the Alaska Native Brotherhood Camp 14. I am the elected First Vice-President of the Central Council of Tlingit and Haida Indian Tribes of Alaska, a federally recognized Indian tribe from Southeast Alaska with 28,000 members. Our 18 communities in southeast Alaska span Hydaburg in the south of Prince of Wales Island to Yakutat near Mt. Saint Elias in the north, and our headquarters are in Juneau, Alaska.

I am today acting President and testifying for my Tribe in the place of our President, the Honorable Edward K. Thomas, who is on travel outside the country. I am very familiar with Tribal Self-Governance, having served for the past 16 years as an elected Assemblyman to Tlingit & Haida with the last two terms on the Executive Council, and 15 years as the Chief Executive Officer for another self-governance Tribe, the Ewiiaapaayp Band of Kumeyaay Indians.

Summary. The House-passed H.R. 4347 would apply sorely-needed improvements to the existing Tribal Self-Governance statute, codified as Title IV of the Indian Self-Determination and Education

Assistance Act of 1975. Tlingit and Haida Central Council is pleased to testify today in strong support of quick Senate passage of the House-passed bill before the end of the year.

Because it is within reach, Senate passage of the House-passed bill should be your highest priority for the coming days. More on that in a few minutes, but first, some background.

Background. Tribal self-governance is a goal for which Congress and Indian tribes long have expressed strong support. Amending federal law to increase tribal self-governance authority creates many benefits for all parties involved, ranging from reduced reporting costs to increased program flexibility and innovation in implementation. The key to meaningful tribal self-governance is a respect for the capacity of tribal governments to carry out federal functions and implement federal policies.

If it is authentic, a federal policy that honors government-to-government relations with Indian tribes is one that trusts the corrections inherent in an elected tribal leadership. Tribal accountability and effectiveness is enhanced -- if federal officials properly restrain their role in tribal self-governance. All of this improves the services delivered to our people.

Tlingit Haida as Self-Governance Leader. Central Council is deeply invested in making Tribal Self-Governance a success. In 1987, Central Council was among the initial group of ten, so-called "demonstration" Tribes who worked with the Congress to draft what became the self-governance statute. Central Council's President Thomas, along with Chairman Ron Allen here today, shaped the original law at each stage of its development, from the study and planning language in the FY 1988 appropriations bill to the Title III demonstration language that originated with this Committee in the early 1990s to Title IV which likewise originated here in 1994. Tlingit and Haida was the first Tribe to enter into a multi-agency agreement under Public Law 103-477, more or less the son of self-governance, which allowed us to consolidate employment and training funding from various federal sources into a single, coordinated tribal program. We are proud of the active role our Tribe has been able to play in the movement towards expanded tribal self-governance, and our people are eager to make every contribution we can towards furthering that movement.

In 1992, our initial Compact and Funding Agreement, one of the first in the country and the first in Alaska, completely closed an entire Agency Office of the Bureau of Indian Affairs and transferred its funding and responsibility to Central Council and other Tribes in our region. Where before our services were delivered by BIA employees, we assumed the responsibility to serve ourselves. Central Council truly did "step into the shoes" of the federal government. Ours was the very first multi-tribal compact that provided, by mutual agreement with some of the IRA Tribes in southeast Alaska, Central Council administration of programs for the benefit these Tribes and their Tribal members.

For the past twenty-five years, Central Council has pushed hard to see Tribal Self-Governance fulfill its promise of devolving paternal federal power and conveying resources to the tribal government level where they can be exercised most efficiently and cost effectively, with the greatest accountability to the Tribal citizen and public taxpayer. In our experience, Tribal self-governance is the cure for debilitating federal dependence, giving rise to healthy tribal governments that fulfill the promise of self-sufficiency.

Why Title IV Reforms Are Long Overdue. Tlingit and Haida's experience with Tribal Self-Governance has not been without its challenges. An unfounded fear of change on the part of the federal bureaucracy

has fueled bureaucrats' constant battles against Tribes advance guard in negotiations of our agreements and battles with our rear guard to compel bureaucrats to honor our agreements. Rules have been changed by federal officials arbitrarily and capriciously without notice or consultation. Negotiations have simply stalled without end or consequence for bad faith actions. Payments have been delayed for months and years. For example, between 1996 and 2000, Interior failed to deliver to us a total of $953,781 in contract support cost funding that its own negotiators, in applying uniform federal rules, had determined were due us for our operation of BIA-funded programs. We had to meet this shortfall with the earnings from our Tribal Trust Fund. Using Tribal Trust Fund dollars to meet federal contractual obligations resulted in lost opportunities to address the many problems facing our people. Every year, Interior has failed to timely deliver the funding it has agreed to deliver, forcing us to borrow funds in order to meet even basic payroll obligations. Last year, we were awarded "emergency" funds for families in hardship but the self-governance pipeline was so twisted, clogged and mis-managed that these urgently-needed funds arrived a full year after they were promised.

We must fight each step of the way because the current law provides very little leverage to a Tribe and oceans of discretion to the federal bureaucrats that enable them to delay, obstruct, frustrate, and eventually diminish Tribal initiative. These fights are costly for us in terms of time, money and opportunity. The delays in time and loss of opportunity for our Tribal self-help efforts are so significant that we are compelled to seek a fix to each problem. But as problem follows after problem, our costs in advocates and experts are squeezing us dry and nullifying the benefit of our initiatives. This negotiation and implementation process has become a war without end that is unfair to Tribes.

The amendments made by the House-passed H.R. 4347 to Title IV will restore fairness to federal Tribal Self-Governance policy and practice. The "final offer" provision in the bill, on its own, will dramatically streamline negotiations. The new definitions, the common sense provisions for construction, investment flexibility, payment procedures, and other provisions, will make Tribal efforts to administer our agreements much more efficient and productive. These amendments will allow us to avoid most of the bureaucratic battles Tlingit and Haida has encountered over the past two decades.

Why Quick Passage of H.R. 4347 is Vitally Necessary. Tlingit and Haida joined with other Tribes over the past 10 years to shape and reshape this bill to blunt objections from wave after wave of federal bureaucrats. We began a decade ago with what we thought would be a simple task of asking Congress to replicate the law reforms regarding health self-governance which Congress imposed on the Indian Health Service in Title V in the year 2000. If it worked for IHS, why not for BIA? That remains our central message. And it is the basis of our request today. We have worked for years with each Administration to pare down this bill to the bare minimum. Today the House-passed bill reflects great compromise on the part of the Tribes. We have conceded point after point to the Interior Department. For example, H.R. 4347 leaves essentially unchanged the existing limited authority to negotiate non-BIA programs, because we were unable to dissuade non-BIA interests at Interior of their irrational fear that Tribes would destroy their mission if we administered their programs despite Tribes proven management expertise and historical, spiritual and economic ties to public lands and their resources, especially where such lands and resources were in just my grandparents memories, wholly tribal. Rather than allow the non-BIA controversy to again hold hostage the rest of the bill's BIA provisions, we sacrificed one of our goals for the sake of securing other goals.

The House-passed bill is about as refined and perfected as legislation can be after years of scrutiny and revision and hearing and negotiation. So now, as another Congress draws to a close, we are at the finish line with this Committee and this Senate, and you hold it within your power to send it on to the President. On behalf of Tlingit and Haida, and the many other Self-Governance Tribes who have invested a great deal of time and effort on it, we urge you to report the House-passed bill out of this Committee immediately and actively secure Senate adoption of it before the end of the lame-duck session. If there are any changes to the House-passed H.R. 4347 which the Senate or the Department believe are necessary, they can be made in the form of technical amendments next year after enactment this year, but not now. It is imperative that in the coming days the Senate pass and send on to the President the House-passed H.R. 4347.

Conclusion. Mr. Chairman and Members of the Committee, "*Anklein Gunalcheesh*" and "*Howah*", thank you very much for the opportunity to present this testimony on behalf of Central Council of Tlingit and Haida Indian Tribes of Alaska and the Tribal citizens we serve. I commend you and this very distinguished committee for the valuable time you are dedicating to this very important issue in the final hours of this Congress.

On a personal note, and on behalf of President Ed Thomas, I thank you, Chairman Dorgan, for the years of service and commitment you have given to Indian Country among your other commitments as a United States Senator. Your dedication, and that of your most able staff, will long be remembered, and as you leave for us in Indian Country a legacy of significant accomplishments, including, I hope, Senate passage of H.R. 4347, I wish you well as you move on to ever greater success and satisfaction.

Tribal Self-Governance is the single-most important federal Indian law reform that I have seen in my lifetime, and I hope you and your colleagues see fit to lay H.R. 4347 on the President's desk for signature into law before the end of this year.

Anklein Gunalcheesh! Howah!

The CHAIRMAN. Mr. Micklin, thank you very much. That too is my hope. My hope is that we are able to move on this legislation. We will have several weeks, perhaps, in December in the lame duck session. My hope is that we will resolve whatever remaining controversy exists and pass this legislation. This is a very important piece of legislation.

Mr. Skibine, you have come before this Committee in many different ways. I was thinking as you were speaking of the times when Senator McCain was Chairman and I was Vice Chairman and you would come, and I actually felt sorry for you from time to time. You are smart, you are dedicated, but you would come to us and you would have to explain to us why things weren't happening when we were told they were going to happen.

You explained to me one day in a hearing why, after 17 years, there were not yet rules and regulations on off-reservation gaming. And I said, I don't understand, 17 years? I can understand missing things by a month or a week or perhaps a year. But 17 years?

A couple of years ago, actually five years ago, on the issue of Federal recognition, you came to this Committee and indicated that you felt that you would move forward on rules and regulations on the issue of tribal recognition, Federal recognition of Indian tribes. And I think two years ago you said to us that you had specific ideas moving through the pipeline.

I tell you that because that is why it seems to me those who wish to advance the interests of self-determination and make it work are not persuaded at all that they can be protected, unless in law we impose time limits on Interior. They have simply experienced unacceptable practices with respect to not getting things done.

So when I asked you during your testimony specifically to tell me what are the differences and what do you object to, and you went through the list of being required to by 60 days, being required to by 90 days, being required to in a certain period of time to develop rule and regulations, I thought, well, man, I am on their side on that. I would want to require you too as well.

So give me, if you can, the defense of the Department in meeting time deadlines, in doing things necessary in a timely way. We appreciate working with you, but this Committee has never been very impressed with the glacial pace of the Department on a whole range of issues.

Mr. SKIBINE. Thank you, Senator Dorgan. First, I want to say, we did pass off-reservation gaming regulations.

The CHAIRMAN. And I know why you passed them, because we put a lot of heat on the chair you were sitting on. When I asked the question, why has it taken 17 years, but I appreciate the fact that once we prodded and prodded, it got done.

Mr. SKIBINE. Yes, that is true. And we are very close on moving forward on Federal acknowledgment regulations, amending that, too. So that was a pledge that hopefully we can fulfill before too long.

On the time frame, I think that we in Indian Affairs, we have a time frame. Because usually the funding agreements include the declination criteria in Title I, which is a 90-day time frame. I think what we wanted it to be is to stay consistent with what the Bureau of Indian Affairs does now with respect to self-determination contracts.

The problem I think we are concerned with for the time frame is because often, if the documents or the proposal goes somewhere where it is not supposed to go, another agency, and does not reach the Office of Self-Governance, then we will have a problem in that, by the time we get it, we might have much fewer time. And that I think is something that, first of all, I have certainly experienced that with the approval of compacts on gaming, where we have 45 days, and if not, it is deemed approved.

And if that is sent to an agency or it is misplaced somewhere, we can altogether miss it. And in fact, we did that, and it got us into a lot of hot water with respect to some California compacts a few years ago.

So we prefer, just to be on the safe side, to have a longer time frame. I think overall with respect to the 90 days that self-determination contracts operate on, that pretty much has worked. Right, Sharee?

The CHAIRMAN. Well, but the only point I am making, I won't go beyond this, is that I have sat here in this chair, and my colleagues have as well. I know that on tribal recognition, you have applications down there from 25 years ago that have never been acted on. On the issue of taking land into trust, you have things down there that have been sitting on your desk for 15 years with no action. And I have had to hold hearings to find out what is going on.

So the only point I am making is, the objections you raised about imposing time deadlines on the Interior Department come from a long line of failures of the Department proceeding expeditiously to make thoughtful and constructive judgments about issues that

have been presented to it. So I really think that the record that has been compiled, I don't want to injure your opportunity to make the right decision. But the evidence suggests that it takes far too long in virtually every area.

So to the extent that we pass legislation, the House already has, to the extent that we pass legislation, if there are really substantive objections other than, this is going to press us to have to move ahead with some dispatch, that is not much of an objection to me. I say, do it, do it right and do it expeditiously so that we can get some answers on some of these issues.

I have a couple of other questions as well, but I have to step in the back to take a conference call. It is only going to take about eight minutes, but it is very important. One of my two colleagues will chair, just for a moment. Senator Tester indicated he would be willing to chair.

Let me call on Senator Cantwell to inquire and then Senator Tester will follow, and I will be back to ask additional questions. Senator Tester, thank you very much. Senator Cantwell, why don't you proceed.

Senator CANTWELL. Thank you, Mr. Chairman.

Chairman Allen, in the Northwest we have some of the first tribes, as I mentioned, to be included in the program. We also have tribes that want the compact to be more flexible, as you were discussing. But they haven't because of those barriers that exist in Title IV.

What do you think is the number one barrier to tribes in thinking about taking over those BIA functions under Title IV? And how does the legislation help us with that?

Mr. ALLEN. Thank you, Senator, and thank you for always being supportive of our effort on self-governance. Of our 29 tribes in Washington State, I think it is somewhere in the neighborhood of 18 to 20 of them are self-governance. There are a couple who are wanting to negotiate.

But if there is an impediment, the subject matter that Mr. Skibine is raising is one of the examples of the final determination. We go into negotiations, we identify what we think is our fair share in each of these categories and negotiate until either we get to a common ground or we get a difference of opinion, and then we make a final offer.

If we don't have a definitive time frame for them to respond to us, or to decline it, then it doesn't allow us to move in negotiation forward. So on the one hand, we have less, I think we have less trouble in the Northwest than some of our sister tribes elsewhere in terms of identifying what the numbers are. But that is a big issue. We would say to you that on this declination time frame, over at IHS, theirs is 45 days. And they wanted the 90 too, then they wanted 60. And we appealed to you for 45. You concurred with us. It has not been a problem over there.

The issue is that the law allows for us to mutually extend it if we require more time. So sometimes you get caught up in the dates and the time frames, and it is more the legal argument coming from the Department or the Administration than it is necessarily the programmatic people. Because we have worked out many of these issues.

But that declination process and burden of proof are issues that help us move the agenda forward. So if you look at the 260 tribes that are in today and ask, why aren't there more, why aren't more jumping in, this is part of the problem. It is the process and the definitive requirements of the Department to negotiate with the tribes and respond to us, so that we can move the negotiations forward.

Senator CANTWELL. Could you describe what you think self-governance has meant economically, how many jobs have been created, what it has done for the economic opportunities within Indian Country?

Mr. ALLEN. I always refer to self-governance as empowering the tribes to move our governmental affairs forward to serve our people. A good example would be my tribe. When we negotiated back in the early 1990s, when the law became permanent, we negotiated for a number that probably had had us at around a very small staff of 35 or so FTEs. Over the years, we have taken on more and more programs, and we probably increased our base by maybe 30 percent or something along that line.

But today, because of the flexibility of self-governance and the ability to move these resources and leverage these resources, our budget has increased exponentially. We currently have a staff of around 180 people. Our economic development has flourished as a result of our ability to move money into categories that will allow us to plan and develop economic development, plan and development programs that serve our community, leverage other resources that are out there, whether it is Federal or State or private sector, to allow us to expand our governmental base.

So our governmental base, because of self-governance, which is simply a base, rarely for most of us it is a small component of our base, but it has allowed us to leverage and increase jobs and create stability, which is, for us, it has increased jobs, but it has also stabilized our FTEs with our operation.

Senator CANTWELL. What do you think that is, time, predictability? What elements allowed you to use self-governance to grow economically? What attributes of that? Is it predictability? Is it the ability to plan and be able to jump on economic opportunities in a more rapid fashion?

Mr. ALLEN. It is mostly the flexibility of the resources. The Federal Government historically has categorized where they feel that the tribes need assistance. They have all these different categories of where these resources can be available. And historically, it is like a silo. So you can only use these monies for this program or that program or that program or that program, A, B, C, D. Then it did not allow the tribes to use those monies where they really needed them or how they could use them with more creativity to be able to expand our operation.

That is probably the greatest benefit. So if we need to develop our political or legal infrastructure to create economic development on our reservation, so it creates better certainty for the private sector to conduct business on an Indian reservation, then the infrastructure is that certainty they are looking for, the due recourse with regard to investment on a tribal reservation. It allowed us to use monies that we may not, that were dedicated for one area, we

can use it for another area more effectively, to advance that particular program.

Often, I do want to footnote here, a lot of people were concerned, including people in our respective communities, you are going to take natural resources, you are going to put it over in economic development. You are going to take social and community monies and you are going to put it over in economic development. So you are going to undermine those programs and services, education and so forth.

That is not what has happened. If you look at all our different programs, you will see they have been enhanced. But it is little kinds of tweaks that allow us that flexibility in how we use those resources, relative to the other resources that are available to the tribe, to allow us to advance economic development and other agenda items, including cultural enhancement. Cultural enhancement, which has always been very difficult for tribes to restore and preserve and advance, and those programs have flourished immensely.

Senator CANTWELL. Thank you. Thank you, Mr. Chairman.

Senator TESTER. [Presiding] Mr. Skibine, I want to follow up a little bit on what the Chairman was talking about. You had expressed some concern for the time frames in the bill and the accountability, you didn't say this, I did, the accountability that those time frames are going to require if passed. I just want to reiterate that the record is there, you are not the only agency, by the way, there are others, but the record is there to indicate that we in the legislative branch of Government need to do something to make sure that things get done.

And I don't know if it falls on you or people you supervise or people above you that supervise. But quite honestly, I think the reason that language is in here is because there are plenty of examples to show that we haven't moved like we should.

Now, I know the last Administration didn't fill a lot of positions that needed to be filled. But we are not in the last Administration any more. We are in this Administration. I think they have done a good job of filling and putting some good quality people, yourself included, in the Department.

I have a question for you, not related to that, but others. I am just saying, it is not going away. There is no reason that Indian tribes should have to suffer because we have people in the agencies that aren't buckled down and getting after it.

The bill includes a provision to require the Secretary to negotiate in good faith. Isn't that required in every negotiation that Government enters in? Why is that language specifically in here? Can you give me an idea?

Mr. SKIBINE. Well, of course, it is a requirement for the Department and the Government to negotiate in good faith.

Senator TESTER. Yes.

Mr. SKIBINE. So I am not sure why that provisions would be in there.

Senator TESTER. Are you aware of any violations where your agency did not negotiate in good faith?

Mr. SKIBINE. No.

Senator TESTER. How about you, Mr. Allen? Do you know why that is in there?

Mr. ALLEN. Yes. It will vary from region to region, but with self-governance, it is about transferring Federal functions to the tribal government.

Senator TESTER. I got you. Go ahead, keep going.

Mr. ALLEN. But the Federal Government does not want to let go. The reality is, it doesn't want to let go of those programs. It believes it is essential to protect our interests.

The problem is that, George referred earlier to the inherent Federal functions, or essential governmental functions that only the Federal Government can administer, versus what we can administer. Now the question for a tribe, we are negotiating in good faith, we want them to put the numbers on the table and the programs that we should have access to in good faith, so that we can actually negotiate for the numbers. If they resist, or they don't provide us the information, or they withhold information, how can we negotiate in good faith? We don't know what we are negotiating for.

Senator TESTER. But this provision requires the Secretary to negotiate in good faith. You are going to negotiate in good faith, the Secretary is going to negotiate in good faith. I just don't understand why that language is in there. I just don't get it. I think it is a given, that is all.

We talked about non-BIA programs, the BOR in particular was concerned about their ability to monitor. Is there some contracts that have gone awry? Is it just that they don't want to, and I know you can't answer for BOR or any other agency outside of yours, but is it just what Mr. Allen said, that they don't want to give up, they want to keep their finger on it? Or is there a reason? Is there some examples where there has been——

Mr. SKIBINE. I don't think there are some examples. But I think that essentially, what I think the Bureau of Reclamation feels is that building dams may be very different from building detention facilities. Whereas in Indian Affairs, our director of facilities I think is comfortable with the provisions in the current bill, I think in BOR, they feel that they need more input.

Senator TESTER. I want to give either Mr. Micklin or Mr. Allen an opportunity to respond to that. Because building a dam is different than building a detention facility or school or whatever it might be. Do you want to respond to that, either one of you?

Mr. ALLEN. I will lead off, and then Willie can add to the response. First of all, when we first began this negotiation, we wanted clarifications on the non-BIA agencies with regard to what our ability to access those resources are. It became too complicated and political, quite frankly. So we chose to step away from the non-BIA agencies and left it as the current law is. So the majority of this bill, 90 percent of this bill, if not more, is in the BIA and not the non-BIA.

But going to your point, the compacts that currently exist with Bureau of Reclamation, Land Management, Fish and Wildlife and Parks, there aren't very many of them, because it has been very difficult for us to negotiate those compacts. They have been very resistant to that happening. But there have been no problems that we know of, no managerial mismanagement problems. Every one that the tribe has taken over has been run exceptionally well with

no discernible problems at all. But that arena is very difficult for us to penetrate.

On construction, there are very clear requirements to meet the Federal standards and the EPA requirements.

Senator TESTER. Can I ask what happens if you don't meet those standards?

Mr. ALLEN. Just like any other contract, it stops until you meet the requirement.

Senator TESTER. All right, sounds good.

Mr. Micklin, do you want to respond to that, about non-BIA agencies, and if there has been problems in your neck of the woods?

Mr. MICKLIN. I can say that in H.R. 4347, the tribes have conceded this point, in that there is no mandatory contracting provisions in here. This is almost entirely a BIA bill. But our contacts with the non-BIA agencies, when we have approached them about doing those things that come naturally to us with our historical expertise, our cultural ties and affinity with public lands, they have looked back to us across the table as though they were stricken.

And our feeling is that they are very jealous of their discretion and they are wanting to retain their inherent discretion to do what they like with their own programs, and not bother with tribes who are trying to contract programs and services that not only benefit the Federal Government by accomplishing those works, as well as any other Federal contractor or the public agency, but benefit the tribe and the tribal citizens as well.

So we think there is much to be gained down the road with additional contracting. But we have let them keep their discretion, because it is not part of H.R. 4347 today. I wish it was, but it is not.

Senator TESTER. Right.

Mr. ALLEN. Can I add one more point? On this topic, in construction, which confuses a lot of people, the way the current law reads and the way the current regulations read, and these amendments allow for the resumption. If an agency, BOR, has gone awry and we are not meeting certain standards, then they can reassume it.

Senator TESTER. Okay, very good point. First of all, I want to thank the witnesses for testifying today, and your answers to the questions. I, as the Chairman has expressed, would love to see this get done now. I think it is important. I think any time we can empower Indian Country, it is beneficial to everybody. And I think it is a decent bill.

Although you say it may not be perfect, Mr. Allen, you are right, it may not be perfect. But with the exception of the ones I write, that is always the way it is.

[Laughter.]

Senator TESTER. I would just say, remind you that the record will remain open for two weeks for further comments. I look forward to working with the Chairman and with the folks on this panel and others to get this bill across the finish line.

With that, we will adjourn the hearing. Thank you.

[Whereupon, at 10:45 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. DAN BOREN, U.S. REPRESENTATIVE FROM OKLAHOMA

Chairman Dorgan, Vice Chairman Barrasso, Members of the Indian Affairs Committee:

Thank you for setting this House-passed legislation for hearing. I hope it leads to greater understanding of this very important piece of legislation. The issue of Tribal Self-Governance is crucial to many Indian tribes, but as a Representative of more than 200,000 Native Americans it is personal to me. I've devoted many hours to shaping and pushing this legislation through the House process, and discussing with tribal representatives and Department of the Interior officials the changes that were needed to remove objections and get it passed. I hope the Senate will now see fit to pass it before the year's end and send it on to the President for signature into law.

H.R. 4347 amends Title IV of the Indian Self-Determination and Education Assistance Act of 1975 to provide greater legal authority to Native American tribes as they pursue, at each tribe's option, tribal self-governance. It transfers authority and responsibility from the federal program bureaucracy to the tribal program administration. This bill gives tribes the ability to better negotiate with the Department of the Interior, strengthening the self-governance program and eliminating wasteful practices in the Federal Government.

The self-determination approach was born in the late 1980s upon the revelation that only a small percentage of federal money appropriated for the benefit of Indian country actually made it out of the bureaucracy and into the hands of the tribes. The result was a myriad of well-intentioned approaches that culminated in 1994 with the birth of Title IV of the Indian Self Determination and Education Assistance Act. Title IV was enacted to accomplish three primary goals: (1) to place the Federal Government's Indian programs firmly in the hands of the local Indian people being served; (2) to enhance and empower local tribal governments and their governmental institutions; and (3) to correspondingly reduce the federal bureaucracy. Title IV was designed to reduce federal micromanagement and to empower tribes, at their choosing, by giving them the control necessary to maximize the services to their people. We now have an opportunity to amend the language of this program to more efficiently and effectively run the self-governance program.

The self-governance program has been a tremendous success for participating tribes across the country. In 2004 the Government Accountability Office noted in a prepared report on Indian economic development that those tribes that participated in self-governance programs had greater gains in employment levels from 1990 to 2000. Through years of rule making and implementation, it is clear that self-governance works, and works well.

The self-governance program has worked so well, in fact, that many of its principles were applied to the Indian Health Services Title V program. The result of that application has been higher quality medical access, lower costs, and more efficiency. Despite all the evidence that the principles of Title V work, the Federal Government has yet to make them applicable to the Bureau of Indian Affairs' Title IV program. H.R. 4347 brings parity between the two programs, applying lessons learned in Title V to the relevant areas of Title IV. It will streamline the self-governance system and eliminate wasteful spending on the part of the Federal Government.

The core principles of this bill are simple. First, tribal sovereignty and the right of a nation to control its own destiny is the most efficient approach to federal spending dollars. It takes money out of government bureaucracy and puts it directly in the hands of the Indian Tribes, allowing them to create jobs and invest in the infrastructure from which we all benefit. Second, the enormous rewards that come from allowing local control over local programs far outweigh the concerns about paring down government control. These points, in addition to the fact that H.R. 4347 gives Indian Tribes more control of their own destiny, make it an immensely important piece of legislation.

H.R. 4347 is the result of years of negotiation between many concerned parties and stands to benefit both the Indian Tribes and the Federal Government. In fact, this bill reflects significant compromise on the part of both the tribes and the Federal Government. To quote the late, great Cherokee Nation Chief Wilma Mankiller, "The success of self-governance has been nothing short of astounding." I sincerely hope that we can work together to improve and protect this landmark program.

Chairman Dorgan, Vice Chairman Barrasso, and Members of this Committee, thank you for the opportunity to provide this statement to your committee. I look forward to working with you to see that the amendments to the Indian Self-Determination and Education Assistant Tribal Self-Governance Act, which is of great importance to Indian Country, are soon enacted into law.

PREPARED STATEMENT OF WILLIAM C. REFFALT, VICE PRESIDENT/ISSUES COORDINATOR, BLUE GOOSE ALLIANCE

Mr. Chairman and members of the Senate Indian Affairs Committee, the Blue Goose Alliance (BGA) appreciates this opportunity to submit testimony for the record regarding H.R. 4347, a bill to amend the Indian Self-Determination and Education Assistance Act (ISDEAA) and for other purposes. We confine our comments to the provisions in Title 4 affecting Annual Funding Agreements (AFAs) with non-BIA agencies of the U.S. Department of the Interior.

We make note that testimony given on behalf of the Department of the Interior raised serious concerns regarding the non-BIA portion of H.R. 4347 but they did not elaborate on those concerns. The primary concerns of the BGA were made known to the committee prior to the November hearing conducted on the bill. We requested that the bill be amended to 1) remove the definition stated in Section 401(7) and, 2) delete the provisions contained in Section 411 of H.R. 4347 and insert the disclaimer language from Section 403(k) of the current Self-Governance Act.

The requested amendments would retain current law, which provisions were inserted in 1994 as a safeguard of the public interest in assuring that inherently federal functions of the U.S. Government would remain fully under control of federal officials charged by law to implement them and, in addition, that when the laws governing the missions and functions of the agencies to be involved in an ISDEAA Annual Funding Agreement do not permit the type of agreement provisions sought by the tribe, then they shall not be allowed. The provisions of H.R. 4347 would insert a new legal standard that, frankly, does not exist in current laws governing conservation of lands and renewable resources on the public lands of America.

Further, the primary law governing the National Wildlife Refuge System was modified in 1976 and again in 1997 with restrictions on joint management and delegation of management programs within units of the Refuge System. We believe those restrictions are vital to the long-term integrity of the Refuge System and its ability to provide a perpetual stream of benefits to the American people.

Mr. Chairman, the provisions that permit annual funding agreements between qualified Indian tribes and non-BIA agencies in the Department of the Interior have already resulted in an aggressive implementation within the Department that has at times gone beyond having tribal *participation* in functions, activities, services, etc., and delegated a level of control to them that intruded on inherent federal functions, or at a minimum delegated a level of participation that exceeded the intent of authorizing legislation of the agency.

Given that the programs, functions, services and activities involved in the non-BIA agencies were established to benefit all Americans, including Indian peoples, it is very important that an appropriate, nationally coordinated federal role is continued. As an example, major programs of the National Wildlife Refuge System involve multiple international treaty obligations that were intended to be fulfilled through the operation of the System. Thus, provisions assuring that inherently federal functions remain under full control of federal employees are vital to those long-standing international commitments of our Nation.

We further believe that the Senate Committees having jurisdiction directly affecting those non-BIA agencies should have continuing opportunities to review provisions in the ISDEAA that could have far-reaching effects on the missions involved as well as on the expenditures of appropriated moneys. Inserting a new and additional administrative overhead onto the programs involved in AFAs might bring inefficiencies at a time when all federal expenditures require the closest scrutiny to assure maximum efficiency.

In conclusion, Mr. Chairman, the Blue Goose Alliance, a private, non-profit organization dedicated to the integrity and welfare of the National Wildlife Refuge System, urges the Committee to restore the protective language it previously inserted

and passed in the non-BIA title of the self-governance statute. We believe the public interest would best be served by the amendments we have proposed.

Thank you, again, for this opportunity to submit comments. We appreciate your efforts to gather information on the proposed bill and hope that our comments are received in the constructive and beneficial manner intended.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. W. RON ALLEN

DOI and IHS titles

One of the major proposals that tribes have made, and that is in H.R. 4347, is to make the Bureau of Indian Affairs title work like the Indian Health Service title. The Department has testified today that they think this won't work.

Question: Do you have any comment on the issues raised by the Department?

Response: Amending Title IV to make Self-Governance in the Department of the Interior (DOI) parallel to Title V in the Department of Health and Human Services will promote the efficient use of federal funds by allowing tribes to assume and administer programs under a uniform set of rules. DOI has completely failed to present any persuasive rebuttal to this common-sense proposition. In his testimony, Mr. Skibine pointed out that the Indian Health Service (IHS) has a focused mission of providing health services to Indians, while DOI has many bureaus that operate diverse programs for a variety of constituencies. This ignores the fact that the overwhelming majority of the programs and funds compacted through Title IV are, and will continue to be, from the Bureau of Indian Affairs (BIA), which has the same constituency as IHS. As for non-BIA agencies, H.R. 4347 does not fundamentally change the current Title IV process. The Secretary retains the discretion to negotiate terms and conditions appropriate to the particular programs and missions of those agencies. See § 405(b)(2). Mr. Skibine also objects to importing into Title IV the Title V criteria for rejecting final offers (what he calls "declination reasons"), but the objection is based entirely on hypothetical offers that do not fulfill the missions of non-BIA bureaus or offices. Again, H.R. 4347 does not change the current Title IV with respect to the Secretary's discretion to require appropriate terms in agreements to carry out non-BIA programs.

Timelines

One of the provisions of the bill deals with giving the Secretary timelines to make a determination on a final contract offer. If the Secretary does not make a determination within that timeframe, the compact will be "deemed" approved.

Question: What impact do the current delays in approving final offers have on the tribes' ability to carry out their self-governance programs?

Response: Title IV currently provides no time limit on the Secretary's review of an offer. Unless a tribe has incorporated the review provisions of Title I, the agency has no formal deadline to meet, and apparently feels free to delay indefinitely. Often a tribe or tribal organization will negotiate, sign, and submit what it believes to be a final version of a compact or funding agreement, yet not receive back a final copy executed by the federal official for months, if at all. This creates problems ranging from delayed funding to questions about Federal Tort Claims Act coverage and the enforceability of agreements. As Vice-President Micklin testified, tribes may even be forced to borrow funds to meet basic payroll obligations. Without a firm statutory deadline, the agency simply has no incentive to review offers in a timely fashion, and bureaucratic inertia too often prevails.

Next Steps

You mentioned in your testimony that self-governance tribes have been negotiating with the Department for over ten years to make recommendations on improving the implementation of the self-governance program.

Question 1: Do you agree with Mr. Micklin that the bill should be passed during this session of Congress and any tweaks can be made in a technical amendment bill during the next session of Congress?

Response: Yes, absolutely. After so much effort on the part of tribes, the Department, and Congressional staff during the past two years—and the four Congresses before that—it would be a shame to come out of this Congressional Session with nothing. Tribes have already conceded on very significant key issues, such as mandatory compacting of non-BIA programs (and even agreed to remove a very limited pilot project related to such programs). The fundamental principles guiding H.R. 4347 are all sound, as proven by the success of Title V over the last decade. The rest of the details can be ironed out as the bill is implemented if indeed there are any issues that warrant a technical amendment.

Question 2: If H.R. 4347 does not pass this session of Congress what do you see as the next step in the process in negotiation amendments to the program?

Response: As demonstrated over the last ten years, tribes are committed to obtaining these amendments. If H.R. 4347 is not enacted, we will continue to pursue similar legislation in the next Congress. It will not be easy to re-boot the legislative process with new leadership in the House, turnover in committee membership and staff, and an unpredictable political climate. While DOI and tribes are not in perfect harmony over H.R. 4347, this is probably as close as the parties will get to a mutually acceptable bill. Thus, we urge the Committee to press for enactment of H.R. 4347 in this session. If that cannot be accomplished, the Committee can expect tribes to continue pushing for a similar bill next year.

Tribe's Self-Governance Program

The Self-Governance program has been one of the most important and effective programs for tribe's and their sovereignty.

Question: In what ways would this legislation help tribes to further exercise that sovereignty and provide the services their tribal members need?

Response: Most fundamentally, H.R. 4347 would make Title IV consistent with Title V. This would create administrative efficiencies for self-governance tribes, virtually all of which carry out both BIA and IHS programs. This in turn would promote improved services through the efficient use of federal funds—as well as tribal, state, and other resources devoted to these programs and services. The bill would also promote tribal sovereignty by leveling the playing field somewhat in negotiations with the DOI. The agency would have statutory criteria and timelines for evaluating tribal offers, and tribes would have a clear avenue of appeal for challenges to agency actions. In short, H.R. 4347 would significantly improve the Tribal Self-Governance Program, which, as you note, has dramatically improved the efficiency, accountability, and effectiveness of programs and services for so many tribes and their citizens.

Response to Written Questions Submitted by Hon. John Barrasso to Hon. W. Ron Allen

Deemed Approved and Delays in Decision-Making

The Department has raised concerns regarding the provisions which "deem approved" tribal proposals for compacts or a request for waiver of regulations if a decision is not made within a certain time frame. For example, the Department is concerned that a compact might include inherent federal functions or some other provision that violates federal law, and yet the provision would nevertheless be "deemed approved" if the Department inadvertently failed to deny a final offer on a timely basis.

Question: How would you address those situations where a compact is inadvertently deemed approved but includes such contrary provisions?

Response: This Department concern is a red herring for several reasons. First, this hypothetical situation can be avoided entirely by reasonable competence and diligence, which is hardly too much to ask of a federal agency. The scenario sketched above has never been a problem, to my knowledge, for the IHS, which presumably has no monopoly on reliable procedures and competent personnel. Second, Title IV agreements are negotiated by tribes with trained negotiators in the Office of Self-Governance who understand federal law and inherent federal functions. The vast majority of agreements do not reach the final offer stage, and those that do should be red flags for the DOI and not ignored or overlooked. Finally, if an agreement contains a term that violates federal law, section 405(e) provides that the Secretary may unilaterally amend terms in the agreement to the extent required by federal law.

Non-BIA Programs

Under current law, tribes may compact for two types of non-BIA programs— programs "otherwise available to Indian tribes or Indians," and programs of "special geographic, historical, or cultural significance" to the Indian tribe.

Question 1: In what ways would this bill change current law regarding the compact process for non-BIA programs?

Response: Although the structure and the wording of the bill's non-BIA provisions differ somewhat from those in Title IV current law, substantively there is very little change. Both discretionary and non-discretionary non-BIA programs may be compacted. See §§ 405(b)(2) (programs "of special geographical, historical, or cultural significance") and 405(b)(3) (programs "otherwise available"). Programs of special significance remain discretionary, meaning the Secretary is not obligated to transfer them upon tribal request and has discretion to negotiate appropriate terms and conditions (for example, to deny a tribe the usual right under Title IV to redesign or consolidate programs). As in Title IV, programs "otherwise available"—that is, those that are eligible for contracting under section 102 of Title I —must be included upon tribal request, but this is a very narrow subset of programs given that Title I applies almost exclusively to BIA and IHS. Again, this provision is consistent with the current Title IV and its regulations. See 25 U.S.C. § 458cc(b)(2); 25 C.F.R. § 1000.23. Expanding mandatory compacting rights to at least some non-BIA programs benefiting Indians was a major objective of tribes. However, tribes were willing to sacrifice this expansion in order to advance the bill.

Question 2: What non-BIA programs do tribes typically seek to include in their compacts?

Response: Typically, tribes do not seek to include *any* non-BIA programs in their compacts or funding agreements. Most tribes have no interest in such programs and few agreements include them. For those that do, DOI's interpretation of inclusion of non-BIA programs of "special significance" as discretionary, combined with the resistance of non-BIA bureaus to working with tribes, has made it very difficult to negotiate such agreements. Only a handful of agreements are currently in place, to my knowledge, and H.R. 4347 neither requires nor encourages more of them. The DOI's repeated claims that the bill would wreak havoc with non-BIA agencies, place national parks under tribal control, etc., are misleading and disingenuous.

Under H.R. 4347, by definition, "tribal share" does not apply to non-BIA funding. However, under section 405(b)(3), a funding agreement "shall... authorize" the Indian tribe to receive "full tribal share funding" for non-BIA programs otherwise available to tribes under Section 102 of the *Indian Self-Determination and Education Assistance Act*.

Question: If "tribal share," by definition, does not apply to non-BIA programs, then what will be the method for funding a compact's non-BIA programs in light of the phrase "full tribal share funding"?

Response: The bureau will determine, and transfer, the amount the Secretary would otherwise have expended on the tribe's portion of the program (plus allowable contract support costs), just as Title I and Title IV have always required. See 25 U.S.C. § 450j-1(a)(1) (tribe entitled to Secretarial amount); *id.* § 458cc(g)(3) (tribe entitled, under Title IV funding agreement, to same amount as under Title I contract).[1] This amount is subject to negotiation and objective measures can often be found (for example, how much the Secretary spent the previous year on the program).

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[1] *See also* 25 C.F.R. § 1000.137 (explaining how amount of funding for non-BIA programs will be determined).

Construction Safety

This bill would authorize the compacting of various types of construction projects, including irrigation and dam construction, which involve significant technical and safety requirements and substantial expertise to construct. However, the bill generally appears to put limits on the negotiation, oversight, and approval authority of the Department.

Question 1: Shouldn't the applicable Federal agencies have oversight authority for these kinds of projects?

Response: The Secretary does have oversight authority for construction projects. Section 408(h) mandates that "[t]he Secretary shall have" opportunities to review the planning and design documents and to review any subsequent amendments that result in a significant change in construction. The tribe must provide the Secretary with progress and financial reports, and the Secretary may conduct "onsite project oversight visits."

Question 2: As written, would the bill allow the non-BIA agency to impose Federal standards or requirements for construction of facilities as a condition to approving a compact?

Response: Yes. Section 408(e)(2) requires that the tribe and the Secretary negotiate a provision in the construction funding agreement that identifies "design criteria," "other terms and conditions," and other "responsibilities" of the Indian tribe. See also § 405(b)(2)(B)(ii) ("[N]otwithstanding section 408, the Secretary may require special terms and conditions regarding a construction program or project assumed under this paragraph"—i.e., the paragraph on non-BIA programs of "special significance").

Question 3: How does the bill provide an adequate level of Federal oversight to both protect public safety and ensure Federal funds are expended appropriately?

Response: The provisions in section 408(e) authorizes the Secretary to negotiate acceptable terms and conditions, including those for cost runovers, and the provisions of section 408(h) requiring federal review and verification adequately protect public safety and ensure fiscal prudence.

Before leaving the issue of construction safety, two additional points should be made. First, few if any tribes, to my knowledge, have sought to assume responsibility to construct dams or other major works from non-BIA agencies such as the Bureau of Reclamation (BOR). As discussed above, H.R. 4347 would not make such an assumption any easier. Second, if a tribe did compact such a project, it would hire engineering and construction companies comparable to those the agency would have used, so concerns about technical expertise are misplaced, especially in light of the continuing federal oversight function.

Legally Identifiable Interests

The legislation, H.R. 4347, allows tribes to compact programs, for example irrigation construction, in which non-Indians may have an incidental or legally identifiable interest.

Question: Can you explain how the non-Indian interests or participation in these programs are accommodated when tribes operate the programs?

Response: This question appears to refer to section 405(b)(4), which states that "[n]othing in this section ... prohibits the inclusion in a funding agreement of a program in which non-Indians have an incidental or legally identifiable interest." This language codifies case law holding that a program does not have to be targeted exclusively for the benefit of Indians in order to be included in a contract or compact.[2] In carrying out such programs, tribes are bound by the same laws as the agency would have been; the rights of non-Indians remain intact. In the case of irrigation construction, which presumably would be compacted from the BOR under the discretionary authority of section 405(b)(2), the tribe would have to comply not only with applicable federal laws but also any contractual terms and conditions the Secretary may negotiate in order to further safeguard non-Indian interests or accommodate non-Indian participation, should the agency think such provisions necessary.

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[2] *See, e.g., Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005) (BOR activities).

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO WILL MICKLIN

Self-Governance: In your testimony, you mentioned that the Central Council was one of the leaders in developing and implementing self-governance for its members.

Question: (a) What challenges have you faced in implementing the self governance program and (b) how do you think the bill we are considering today, H.R. 4347, will help you improve your current program?

(a) For the past two decades, we have encountered three main challenges -- negotiation stalemates, funding delays, and changing rules. (1) Negotiation Stalemates. Our bargaining position in negotiation has been limited by the fact that the law does not restrain the BIA and OSG from simply declining our offers by ignoring them or delaying responses. (2) Funding Delays. Since the beginning, we have suffered from crippling funding disruptions and delays that have been particularly painful because CCTHITA has no substantial alternative revenue source and because CCTHITA uses most of its self-governance funding to meet payroll for staff personnel who provide critically needed services to tribal members. (3) Changing Rules. Time and time again in the past two decades, the BIA and OSG have unilaterally changed the rules of the game. Central Office controlled funds were declared off limits for all negotiations. General Assistance and HIP and roads funds, among others, were removed from negotiations. Pub.L. 102-477 consolidated funds from other agencies have been delayed or held off limits. Reimbursement policy for certain indirect costs have been restricted without notice or consultation.

(b) How will the House-passed bill, H.R. 4347, improve upon our Tribe's self-governance administration? It will impose upon the BIA and OSG a statutory standard of conduct that will greatly facilitate our administration of self-governance authorities. Its "final offer" provisions will give us the tools we need to end negotiation stalemates and ensure balanced negotiation power. Its "prompt payment" provisions will give us a reliable payment structure with which we can plan and manage more effectively. Its "no unilateral changes" will ensure, in statute, our right to negotiate and insist upon agreement.

Question: How many jobs have been created and what type of training opportunities have resulted from the Tribes taking over many of the federal functions that were previously delivered by the federal government?

CCTHITA's tribal staff has grown from about 85 employees in 1992 to 207 employees in 2010, largely due to our assumption of federal programs, functions, services and activities under self-governance authorities. But where those workers are working is more important than the number of jobs that have resulted from the shift in self-governance power and authority to our Tribe. In other words, what's most important is that the funds appropriated for the benefit of our Tribal citizens are being spent in our Native communities. In contrast to the pre-self-governance days where, like with the federal forts of old, the federal employees huddled in federal compounds located in cities far from our Native communities, today under Tribal self-governance our Tribal employees live and work in the Native communities which they serve. CCTHITA's leadership has made the training and continuing education of its employees and citizens a top priority, because a well-trained tribal workforce simultaneously produces better tribal service and expands employment opportunities in the broader job market beyond tribal circles. Our training has ranged from document production, spreadsheet and graph presentations, accounting and bookkeeping, to records management, and legal and policy issues.

BIA and IHS programs: In your testimony, you state that in H.R. 4347 you seek to replicate the reforms made in the Indian Health Service portion of the bill and to apply those reforms to the Bureau of Indian Affairs section of the bill.

Question: Why do you think the IHS program reforms will work for the BIA programs, when, as Mr. Skibine pointed out, the two agencies perform two very different functions?

The two agencies, BIA and IHS, do not perform very different functions in negotiating a self-governance agreement and overseeing its implementation by a Tribe. In fact, the functions of BIA and IHS are very similar in the context of Tribal Self-Governance.

I and many other Self-Governance tribal leaders fought hard ten years ago to persuade the Congress to enact the reforms that are in Title V of the Act and which, as you point out in the question, govern how IHS negotiates and implements its self-governance agreements with Tribes. Ten years ago, IHS testimony in opposition to what was ultimately enacted ten years ago as Title V, sounded the same concerns raised in the BIA testimony of its concerns about H.R. 4347. IHS worried it might

erroneously lose track of a final offer and allow itself to be cornered into accepting terms it deems unlawful. IHS worried it would be unable to transfer funds to tribes in a timely fashion. IHS insisted it must retain a right to unilateral change agreements. For all these and many more reasons, IHS insisted there would be a parade of horrible calamities if the tribal amendments were enacted and imposed by Congress on IHS.

Ten years ago, the Congress evaluated the credibility of the IHS arguments and decided to trust the viewpoint of the Tribes. In the ten years since, IHS has complied with the requirements of Title V and has done so with what appears to be grudging gratitude since the provisions have streamlined negotiations and simplified and focused federal administration and oversight.

Today, Self-Governance Tribes, many of whom administer both IHS and BIA agreements, are convinced that the same result will flow from your enactment of the Title IV amendments. The issues are nearly identical. They involve the same federal responsibility to negotiate a fair tribal share with each Tribe, to fairly allocate benefit among all Tribes, to timely make decisions and transfer funds, and to negotiate on a government to government basis without unilateral federal decision-making. While the BIA and IHS do provide very different "services", their federal functions in a self-governance context are virtually identical. Both BIA and IHS must negotiate, transfer funds and authority, and then provide minimal oversight during tribal implementation. The remaining role of the BIA in a self-governance context is quite similar to the remaining role of the IHS in a self-governance context.

Quick passage of "H.R. 4347: You note that passage of H.R. 4347 is vitally necessary and that you feel tribes have made many concessions over the years in an effort to move legislative reforms forward.

Question: If H.R. 4347 is not passed in this session of Congress, what do you see as the next step in those talks with the Department?

After so many next steps over so many years, involving so many good faith efforts by Tribes to resolve or concede to every concern of program bureaucrats at the Interior Department in order to make a bill beneficial to Tribes and the Department, these same bureaucrats would contrive another next step by raising additional concerns. Regardless of which political party has been in charge of the Department, the scheme has been to endlessly expand the boundaries of the discussion and raise new demands, issues and objections. Congress must not permit

the federal bureaucracy to run out the clock, year after year, session after session, and frustrate Congressional oversight and reform.

Question: Are there Departmental improvements that could be made absent legislation and have you sensed a willingness by the Department to engage in those discussions?

No and no. The Department is governing Tribal Self-Governance on the basis of the Department's longstanding, narrow and pinched interpretation of the current Title IV statute. The Department has long construed Title IV not in favor of the Tribes who are its intended beneficiaries, but in favor of the interests of the status quo federal bureaucracy. Neither this current nor prior Departments have shown any interest in good faith negotiating or constructive administrative reform. The federal bureaucracy's behavior is precisely why these statutory reforms are necessary and why Congress must act before the end of the year. It is doubtful the bureaucracy will reform itself unless Congress legislates reform of the bureaucracy, as it has in this House-passed H.R. 4347; and if the Congress lets this opportunity slip away from it, as is implied in your question, the bureaucrats' strategy will be validated. This is precisely why the House-passed bill must be enacted this year by the Senate.

Question: If this legislation is passed what is the "on the ground" impact that these changes will have on your tribes?

Senate passage of the House-passed H.R. 4347 would mean, if signed into law before January 1, 2011, that Central Council might, for the first time in years, timely receive its annual lump sum payment and avoid having to borrow funds again in order to meet tribal payroll. Passage would also make our negotiation process far more time and cost efficient for us in the next and each succeeding year. And we expect it will reduce the amount of time we would otherwise have to devote to removing obstacles to implementation of our funding agreement.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN BARRASSO TO WILL MICKLIN

Construction Safety: This bill would authorize the compacting of various types of construction projects, including irrigation and dam construction, which involve significant technical and safety requirements and substantial expertise to construct. However, the bill generally appears to put limits on the negotiation, oversight, and approval authority of the Department.

Question: Shouldn't the applicable Federal agencies have oversight authority for these kinds of projects?

Yes. Each Federal agency funding a construction project will retain oversight authority in the House-passed H.R. 4347 legislation. Nothing in the legislation would alter that oversight authority. They can visit, monitor, and insist on conditions, and, with regard to non-BIA projects, decline as a matter of the Secretary's discretion to enter into the agreement or to continue with it. In each instance, the Secretary can reassume administration of a construction project.

Question: As written, would the bill allow the non-BIA agency to impose Federal standards or requirements for construction of facilities as a condition to approving a compact?

Yes. A non-BIA agency enters into such an agreement at its own discretion, and it is entirely within the purview of that non-BIA agency's authority to require, as a condition of the agreement, that certain terms be included. That is precisely what "discretionary" must mean, as opposed to "mandatory."

Question: How does the bill provide an adequate level of Federal oversight to both protect public safety and ensure Federal funds are expended appropriately?

Federal oversight is assured through site visits and review of plans and specifications for adherence to industry standards and requirements. Moreover, a Tribe must produce certification of compliance with such standards and requirements by appropriately licensed architect and engineer professionals, whose certification is made at risk of their licensure. Because of this certification, public safety is protected under the bill more so than in any other setting in which such standards are required. As to the proper expenditure of federal funds, the Single Audit Act provisions apply to construction funds no differently than to program funds, as do the reassumption provisions.

Legally Identifiable Interests: The legislation, H.R. 4347, allows tribes to compact programs, for example irrigation construction, in which non-Indians may have an incidental or legally identifiable interest.

Question: Can you explain how the non-Indian interests or participation in these programs are accommodated when tribes operate the programs?

The interests of non-Indians, who may have an incidental or legally identifiable stake in a program or project assumed by an Indian Tribe, are well-protected under H.R. 4347. By definition, these would be "discretionary" programs or projects, which necessarily mean the Department can insist on protective terms as a condition of its willingness to enter into the agreement.

WRITTEN QUESTIONS SUBMITTED TO GEORGE SKIBINE *

Questions from Senator Dorgan

Health Self-Governance v. Department of Interior Self Governance programs: We have heard in testimony today that the basis for many of the provisions that tribes support in the self-governance bill come from the processes used by the Indian Health Service in their self-governance program. As Mr. Micklin stated in his testimony, "If it worked for the IHS, why not for the BIA?"

> **Question:** Do you disagree with the fundamental concept that the DOI and IHS titles of the self-governance bill should be made to mirror each other more or do you suggest that minor tweaks could be made to make them more consistent?

Technical Amendments: The Congress is being urged by many Tribes to take action on this bill by the end of this Congressional session. Tribes recommend that the bill be passed "as is" in this session and that any necessary tweaks be made next session in the form of technical amendments.

> **Question:** What is the Department's view on this?

Discussions with Tribes: In your testimony you noted that the Department has worked diligently with tribes, organizations and legislators over the past decade to amend and improve the self-governance program. Yet, no agreement has been reached between tribes and the Department on legislation and tribes say they have made numerous concessions.

> **Question:** If Congress does not act on the self-governance bill this session, how would you propose Congress, the Administration and Tribes move forward to make sure there is a resolution to this issue so that the self-governance process can be improved?

* Response to written questions was not available at the time this hearing went to press.

Department's Recommendations: In your written testimony, you stated that the Department "supports appropriate strengthening" of the self-governance program to make it work better for the federal government and Indian tribes.

> **Question:** Has the Department ever developed a position paper or a proposal to tribes on what changes the Department would propose to strengthen the self-governance process?

Funding Increases in the Indian Affairs Budget: In Mr. Allen's testimony, he mentioned that there is a lack of transparency on how funds have been allocated for self-governance programs. This has resulted in tribes not being able to determine if they have been treated fairly and in compliance with their agreements.

> **Question**: Is there a way the Department can make this allocation process more transparent?

Questions from Senator Barrasso, M.D.

Deemed Approved and Delays in Decision-Making:

The legislation, H.R. 4347, pending before the Committee requires the Secretary to take action on tribal proposals for compacts or waivers of regulations within a certain time frame; otherwise, if no action is taken in that time, the requests are "deemed approved." These provisions are intended to provide certainty in concluding the negotiation process and to avoid delays in obtaining a final decision. However, the Department raised concerns about the "deemed approved" provisions and even the time frames involved.

> **Question:** Do you have an alternative way(s) of avoiding delays on these decisions? If so, please describe your alternative(s).

Legally Identifiable Interests:

The legislation, H.R. 4347, allows tribes to compact programs, including BIA and non-BIA programs, in which non-Indians may have an incidental or legally identifiable interest.

> **Question:** Can you explain how the non-Indian interests or participation in these programs are accommodated when tribes operate programs in which non-Indians have such interests?

Burden of Proof:

The bill states that the Department must have clear and convincing evidence to deny a tribe's final offer to compact. However, the Department has raised concerns about this burden of proof.

> **Question:** Can you explain exactly why "clear and convincing evidence" poses a problem for the Department as a standard for denying a final offer?
>
> (In your answer, please describe, for each of the bases for denying a tribe's final offer under section 407(c)(6) of the bill, how or why this standard poses a problem to the Department.)

Additional Oversight:

The Department has proposed to include in the legislation additional terms and conditions for the non-BIA programs, particularly construction programs. The current law authorizes compacting of many of these same programs, yet many of the details are not included in the statute. The tribes have contended that these details can be worked out through the negotiated rule-making process which is authorized under the bill.

> **Question:** What special terms and conditions are needed for this legislation that cannot be worked out through the negotiated rule-making process?

Tribal Shares and Administrative Expenses:

H.R. 4347 would require that tribes receive the full tribal share funding when compacting a program, function, or activity. The Department has indicated that the funding for particular projects, such as dam construction, is not provided as "tribal shares" so that this provision would not be workable. In addition, the Department has also raised concerns that H.R. 4347 limits the Secretary's ability to reserve funds for administration of these projects.

Question: Please explain the method of funding and how it is distributed for those types of projects for which funding is not based on "tribal shares."

Question: If tribal shares are not the method of funding distribution so that the Secretary is not required to provide tribes the full tribal shares, then please explain how H.R. 4347 would limit the Secretary's ability to receive funding for administration expenses?

Question: What provisions in the bill would require the Secretary to provide all of the funding appropriated for a particular non-BIA "project-based," non-recurring activity so that no administrative or oversight funding remains for the Secretary?

Question: What are some non-BIA programs where tribal shares might be used as a method for determining funding under a compact?

Stable Base Budgets:

Section 405(b)(7) of H.R. 4347 would require stable base budgets for certain non-BIA programs. The Department has expressed concerns that stable base budgets do not apply to certain non-BIA program activities since these activities are "project-based" and have non-recurring expenses and funding, such as for dam construction.

The Department has also indicated that, if signed into law, H.R. 4347 might obligate the Department to continue paying for these activities. However, language in sections 405(e)(1) ("by the nature of any noncontinuing program, service, function, or activity") and 409(g)(3) ("completion of an activity under a program for which the funds were provided") would suggest otherwise.

Question: Please explain why these provisions do not prevent an interpretation that a compact would create a stable base requirement for a finite project with finite funding.

Administration Position:

We have reviewed the written testimony of the Department of Interior and the statement of Mr. George Skibine at the Committee hearing. In addition, there have been several discussions between Committee staff and representatives of the Department of the Interior. However, I would like to know the Administration's position on this bill.

Question: Does the Administration support or oppose this bill?

Questions from Senator Coburn, M.D.

Savings: Would you agree that this legislation, if true to its purposes in shifting duties to tribes that were previously performed by the federal government, should score as a savings for the federal government?

Surplus: The passage of this legislation would result in federal agencies, namely, the Bureau of Indian Affairs, being absolved from some of their previous responsibilities as tribes would plan, conduct, consolidate, and administer federal programs after entering into self-governance compacts.

Question: Should this transition result in a surplus of federal resources and number of federal employees at the Bureau of Indian Affairs as the report in sec. 414 of the bill implies by requiring reporting on the "...corresponding reduction in federal employees and workload"?

Budget: Similarly, what changes, if any, should Congress expect in the budget requests in subsequent years of the Bureau of Indian Affairs that will have their responsibilities significantly reduced as it relates to tribal self-governance compacts?

Reporting: As written, Sec. 413 of the proposed legislation requires comments on current funding levels and shortfalls but does not acknowledge the possibility of excess funding.

> **Question:** Especially considering the nature of this legislation, should the report also include the documentation of any funding surpluses?

Report Comments: Why is the report in Sec. 414 of the bill required to be distributed to tribes for comment when the reporting topics are inherently related to congressional oversight and unrelated to tribal commentary and potential edits?

Programs: Which programs specifically, outside of those currently administered by the Bureau of Indian Affairs, would be subject to self-governance agreements?

Accountability: What accountability measures does the legislation include to ensure that tribes receive only what would have been attributed to them under the programs' current operation?

Questions from Senator McCain

A provision in H.R. 4347, Section 408(d)(1), aims to increase tribal self-governance in certain construction projects. The language of that subsection requires Indian tribes to "adhere to applicable Federal, State, local, and tribal building codes" in carrying out these construction projects.

> **Question:** How would the Administration interpret this provision if there's a conflict between the federal and tribal building codes? For example, BIA requires the projects it funds to use the National Fire Protection Association (NFPA) 5000 Building Code while many local or tribal governments have adopted the International Building Code.

> **Question:** Does this provision create a policy conflict, and if so, can it be overcome administratively and how?

> **Question:** Under this provision, would tribes be forced to take on additional construction costs by having to simultaneously or retroactively comply with multiple building codes adopted by multiple jurisdictions?

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