TESTIMONY OF
JAMES CASON
ASSOCIATE DEPUTY SECRETARY
U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
COMMITTEE ON NATURAL RESOURCES
HOUSE OF REPRESENTATIVES
HEARING ON
H.R. 3994, TO AMEND THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

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Good morning, Mr. Chairman, Mr. Vice Chairman, and Members of the Committee. I am pleased to be here today to provide the Administration's position on H.R. 3994, the proposed "Department of the Interior Tribal Self-Governance Act of 2007."

Self-governance Tribes have been good managers of the programs they have undertaken. More often than not, Tribes add their own resources to the programs and are able to fashion programs to meet the particular needs of their beneficiaries. They are also well suited to address changing needs. Tribes have said that our current compacts with them reflect a true government-to-government relationship that indicates they are not viewed by the Federal government as just another federal contractor.

The premise behind much of H.R. 3994, however, is that it is prudent to extend the provisions of title V of the Indian Self-Determination and Education Assistance Act, which governs the programs of the Indian Health Service, to the programs of the Department of the Interior. There are functions and responsibilities of Interior that do not lend themselves to compacting or funding agreements under provisions like those in title V.

The legislation before the Committee today goes well beyond the principles of self- determination and self-governance. It poses problems with regard to appropriate management of federal funding and programs, could ultimately end up costing taxpayers more to fund programs, and potentially increases liability on the part of the Federal
government. The Department expressed concerns in 2004 when a similar bill was introduced and considered by the 108th Congress. As a result, the Department opposes the enactment of this bill.

The policy of Indian self-determination is one that has endured for almost forty years. In a message to Congress on March 6, 1968, President Lyndon Johnson said:

> "I propose a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self- determination... The greatest hope for Indian progress lies in the emergence of Indian leadership and initiative in solving Indian problems. Indians must have a voice in making the plans and decisions in programs which are important to their daily life...

In July 1970, President Nixon gave his famous Special message to Congress which stated:

> "It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. ... The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions...

> "Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self- determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered...

And more recently, on October 30, 2006, President Bush declared:

> "My Administration will continue to work on a government to-government basis with tribal governments, honor the principles of tribal sovereignty and the right to self-determination, and help ensure America remains a land of promise for American Indians, Alaska Natives, and all our citizens."

Background

In 1988, Congress amended the Indian Self-Determination and Education Assistance Act (the Act) by adding Title III, which authorized the Self-Governance demonstration project. In 1994, Congress again amended the Act by adding Title IV, establishing a program within the Department of the Interior 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) authorize federally recognized tribes to negotiate funding agreements with the Department of the Interior (Department) for programs, services, functions or activities administered by the Bureau of Indian Affairs (BIA) and, within certain parameters, authorized such funding agreements with other bureaus of the Department. In the year 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 providing for a now-completed study to determine the feasibility of conducting a Self-Governance Demonstration Project in other programs of that Department.

In 1990, the first seven funding agreements were negotiated for about $27 million in total funding. For FY 2007, there are 94 agreements that include 234 federally recognized tribes and approximately $380 million in total funding. Some of these agreements are with tribal consortia, which account for the number of such tribes exceeding the number of agreements. These Department funding agreements allow federally recognized tribes to provide a wide range of programs and services to their members such as law enforcement, education, welfare assistance, and housing repairs just to mention a few.
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. What makes these funding agreements unique is that Title IV allows tribal governments to re-design programs for their members and set their own priorities consistent with Federal laws and regulations. This authority allows tribal leaders the ability to respond to the unique needs of their tribal members without seeking approval by Departmental officials.

Many tribes have been successful implementing Self-governance programs to meet their tribal needs. For example, the Chickasaw Nation accomplishments in 2006 included providing education services to 7,209 students. 945 students participated in remedial education and tutoring and 82% 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. It 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 a team from the BIA central office 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 authorizes other bureaus within the Department of the Interior to enter into funding agreements with Tribes 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 Interior Alaska. The CATG is a consortium representing the Tribal governments of Arctic Village, Beaver, Birch Creek, Canyon Village, Chalkyitsik, Circle, Gwichyaa Zhee Gwich'in Tribal Government of Fort Yukon, Rampart, Stevens Village, 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.

The activities subject to the AFAs have included 1) locating and marking public easements across private lands within the Refuge boundary; 2) assisting with environmental education and outreach in local villages; 3) monitoring wildlife harvest; 4) surveying moose populations (in cooperation with the Alaska Department of Fish and Game); and 5) maintaining Federal property in and around Fort Yukon. Public use (including sport and subsistence hunting, fishing, and trapping) is not affected by these agreements. Management authority remains with the Service as required by the National Wildlife Refuge System Administration Act.

The Bureau of Land Management also has an annual funding agreement with the CATG. Under the agreement, CATG performs preseason refresher training and testing services for Emergency Firefighters within Alaska's Upper Yukon Zone.

In FY 2007, Redwood National and State Parks had three agreements under the Indian Self-Governance Act with the Yurok Tribe for watershed restoration in the South Fork Basin of Lost Man Creek (a boundary area between the Park and the Yurok reservation); the conduct of archeological site condition assessments; and natural resource maintenance. Since 2002, the Lower Elwha Klallam Tribe has been assisting the National Park Service as a Self- Governance tribe in the planning, design, and implementation of mitigation measures for the Elwha River Restoration Project. At Grand Portage National Monument, there have been annual funding agreements for the past nine years. The agreement, re-negotiated, amended and agreed upon by the National Park Service and the Grand Portage Band of Minnesota Chippewa, touches most park operations. The Band and the Park dedicated a new Grand Portage Heritage Center in August 2007. Over nine years, $3.3 million has been transferred to the Band and 34 special projects have been completed in addition to routine maintenance.

The Bureau of Reclamation has also been successful under the current law. In FY 2007, Reclamation had seven annual agreements with six Tribes, totaling more than $18.6 million.

Department of the Interior Non-BIA Program Concerns with H.R. 3994

Our first concern is with the provisions of H.R. 3994 that affect non-BIA bureaus of Interior. H.R. 3994 amends title IV to provide in the new section 405(b)(2) that "[A] funding agreement shall, as determined by the Indian Tribe, authorize the Indian Tribe to plan, conduct, consolidate, administer, and receive full tribal share funding for all programs carried out by the Secretary outside the Bureau

of Indian Affairs" that are for the benefit of Indians because of their status as Indians or that are programs with respect to which Indian Tribes are "primary or significant beneficiaries." Under this provision, the non-BIA bureaus of Interior have no negotiating rights with regard to what is authorized by these agreements. Non-BIA bureau programs that have both Indian and non-Indian significant beneficiaries would be the subjects of funding agreements at the Tribes' discretion. The bill provides no authority for the Secretary to require terms to ensure protection of non-Indian interests. This is particularly troubling combined with the bill's other requirements that –

- the Secretary may not revise subsequent funding agreements without tribal consent;

- funding agreements, at the discretion of the Tribe, may be for more than one year; Tribes may "redesign or consolidate programs or reallocate funds for programs in any manner that the Indian Tribe deems to be in the best interest of the Indian community being served" as long as it does not have the effect of denying services to population groups eligible to be served;

- if a Tribe compacts to carry out a service and then finds the funding is insufficient, the Tribe can suspend services until additional funds are provided; and

- unless the Secretary can show "irreparable harm," a program may only be reassumed if there is a hearing on the record that finds "clear and convincing evidence" that there is "imminent jeopardy to a physical trust asset, natural resources or public health and safety;" or if there is "gross mismanagement" on the part of the Tribe.

Take for example Interior's fuels management program related to wildfire management. Interior is part of a multi-agency collaborative effort with or focused on a common purpose of reducing risks to communities, including Indian communities, while improving and maintaining ecosystem health. Indian Tribes are significant beneficiaries of this program and have a significant stake in it, as evidenced by the recent fires in Southern California. Because of the proximity of federal, State, Indian, and private lands, fuel management activities must be closely coordinated and managed so as to keep the entire ecosystem in mind when funding and planning activities. It would be unwise to require the Bureau of Land Management (BLM) to provide its fuel management monies to Tribes receiving a significant benefit from BLM's program without any negotiations or choice on the part of BLM when so many non-Indian interests receive benefits as well, particularly given the requirements listed above.

We understand some of the impetus for this legislation at this time stems from the agreement between the U.S. Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation regarding the National Bison Range Complex in Montana. While there has been considerable controversy over the 2006 annual funding agreement between the Service and the CSKT, through this process we are gaining a better understanding of what each party needs to make a successful agreement with a non-BIA bureau work well. We believe that ultimately the process will grow stronger as a result of our efforts. We are opposed to simply providing the receiving party unilateral power to determine the terms and length of the agreement as well as the disposition of the funds. This is particularly true where non-BIA bureaus have other statutory mandates with which they must comply.

Current law allows federally recognized Tribes to assume programs administered by the Department's bureaus and offices other than the BIA subject to negotiations and as long as the programs are available to Indian Tribes or Indians. Current law also authorizes the Secretary to include other programs administered by the Secretary which are of special geographic, historical, or cultural significance to the participating Tribe requesting a compact. We believe this authority is sufficient to protect the interests of Indian Tribes in non-BIA programs.

Finally, H.R. 3994 would require non-BIA agencies to commit funds to Tribes for construction projects on a multi-year basis. The Secretary is then required to provide the funding amount in the funding agreement. Most agencies' programs and projects are funded on an annual basis and commitment of funds in future years is illegal. The Secretary should not be required to commit funds that are not yet appropriated.

Other Concerns with H.R. 3994

We also have other concerns with the provisions of H.R. 3994, including serious concerns about Federal liability that could arise under the bill. H.R. 3994 clearly states in the new section 405(b)(8) that a funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian Tribes and individual Indians. Yet, as mentioned above, unless the Secretary can show "irreparable harm," a program may only be reassumed if there is a hearing on the record that finds "clear and convincing evidence" that there is "imminent jeopardy to a physical trust asset, natural resources or public health and safety;" or if there is "gross mismanagement" on the part of the Tribe.

This standard for reassumption in H.R. 3994 is very different than the standard for management of fiduciary trust functions. H.R. 3994 requires clear and convincing evidence of gross mismanagement or imminent jeopardy before a program can be reassumed by the Secretary. What is the expectation of the Congress if trust assets, managed under a compact or funding agreement, are managed in a way that causes jeopardy to them, but not imminent jeopardy, or are negligently mismanaged, but not grossly mismanaged? Under either of those scenarios, the Secretary has no right to reassume management. Yet, the Secretary might be sued for failure to protect these assets.

The Department is also opposed to section 409(l), which would permit a Tribe to cease performance if it appears the expenditure of funds is in excess of the amount of funds transferred under a compact or funding agreement. If the Secretary does not increase the amount of funds transferred under the funding agreement, a Tribe would be permitted to suspend performance of the activity until such time as additional funds are transferred.
We have concerns about the impact this provision may have on numerous DOI programs. Under this provision, if a Tribe contracts with the Department and then runs out of money to carry out the responsibilities under the agreement, the Tribe could simply stop performance. The Tribe should return the function to the Department to administer if it believes the funding level is inadequate rather than have its members suffer if the Tribe decides not to perform.

As mentioned above, the Department is opposed to the reassumption provision contained in section 407. The provision would require that there be a finding, with a standard of clear and convincing evidence, of imminent jeopardy or gross mismanagement before the Secretary can reassume management. Such a finding with a preponderance of the evidence bars the Secretary from reassumption. Even with a finding based on clear and convincing evidence, the Secretary must provide a hearing on the record and provide time for corrective action. The Secretary may only reassume operations without a hearing if the Secretary finds imminent and substantial jeopardy and irreparable harm caused by an act or omission of the Tribe and the jeopardy and harm must arise out of a failure to carry out the funding agreement or compact. Having to meet these latter conditions practically eliminates the ability of the Secretary to quickly reassume a program in those rare instances where immediate reassumption may be necessary, such as instances where serious injury or harm may occur. We recommend that the reassumption standard contained in the current Title IV be retained.

H.R. 3994 also raises constitutional problems. In the new section 413, the bill requires the Secretary to request certain sums of money in the President's annual budget request. It also requires the President to identify "the level of need presently funded and any shortfall in funding (including direct program costs, tribal shares and contract support costs) for each Indian tribe. . ." The Recommendations Clause of the Constitution vests in the President discretion to recommend to Congress "such Measures as he shall judge necessary and expedient." To the extent that this section requires the Secretary to recommend measures to Congress, it violates the Recommendations Clause. Finally, we raise the following other issues:

- Section 405(b)(2)(B) entitled "Federally Reserved Rights." This section does not define what a federally reserved right is. We presume this is intended to cover rights such as water rights which the Federal government reserves for carrying out projects that provide services to both Indians and non-Indians. It is unclear what will happen to those projects if the Federal government is required to provide to an Indian Tribe an amount equal to the proportional share of the resource that is associated with the Tribe's federally reserved right.

- Section 408(a) regarding Construction Projects entitled "Option to Assume Certain Responsibilities." This section allows Indian Tribes to assume all Federal responsibilities with respect to National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). This section needs to make clear that Acts like NEPA and NHPA apply to a construction project. We believe decisionmaking for construction projects under those Acts should remain an inherently federal function.

- Section 408(d) regarding Construction Projects entitled "Codes and Standards; Tribal Assurances." This section should ensure that construction projects meet or exceed federal standards. In addition, the bill provides in section 408(g)(2) that, if an Indian Tribe prepares planning and design documents for a construction project "consistent with the certification by a licensed and qualified architect/engineer" this shall be deemed to be an approval by the Secretary of the construction project planning and design documents. Deeming approval based on a certification from a non-federal party does not provide the Federal government with any protection from tort liability in the event there is deficiency in that party's work. The Secretary needs an approval role in construction projects funded by federal dollars which may have costs in the tens or hundreds of million dollars.

- Section 409(j)(3) entitled "Investment Standard." This paragraph allows Indian Tribes to invest funds transferred to them for programs or projects using the prudent investment standard. This means a Tribe could invest these funds in stocks that could later lose a significant part of their value. Under the bill, the Tribe would then be able either to stop providing services and request more funding or return the program to Interior. The Federal government would then, in essence, pay twice for the program or project. Current law requires that these funds be invested in obligations or securities of the United States or securities that are guaranteed or insured by the United States. We are opposed to changing this standard.

- Section 412 (b) entitled "Discretionary Application." This provision allows Indian Tribes to opt to include any provisions of titles I or V of the Act in an Interior compact or funding agreement. Many of the provisions of H.R. 3994 are derived from title V. We are unclear as to the need for this provision and believe it could result in confusion during development of compacts and funding agreements.

- Time deadlines throughout the bill are too short. For example, it has been our experience that completing a negotiated rulemaking on a complex matter such as this within 18 months has never been successful. The requirement that monies reach Tribes within ten days of apportionment by OMB is unrealistic.

As I stated at the beginning of my testimony, P.L. 93-638, as amended, has, in large part, been a success story. Our interest is in making sure it stays that way. A prudent preliminary analysis of this legislation leads us to raise the aforementioned areas of concern. We are opposed to the bill's enactment. Also, given the relatively short timeframe in which we have had to analyze H.R. 3994, we are continuing to review the impacts of H.R. 3994 on both BIA and non-BIA programs of the Department.

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