

**TESTIMONY
OF
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FOR INDIAN AFFAIRS
U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
H.R. 4347 THE DEPARTMENT OF THE INTERIOR
TRIBAL SELF-GOVERNANCE ACT**

NOVEMBER 18, 2010

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;
- Email 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% 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 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.

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

¹ See H. REPT. 111-603 at 18 (Sept. 16, 2010).

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 differences in the Department's responsibilities. For example, the Reclamation'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

² See <http://info.ihs.gov/TrblSlfGov.asp> (last visited Nov. 12, 2010).

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).

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 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

⁷ 25 U.S.C. § 458aaa-6(c)(1)(A).

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.