

112TH CONGRESS
2D SESSION

S. 3685

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

IN THE SENATE OF THE UNITED STATES

DECEMBER 17, 2012

Mr. AKAKA (for himself and Mr. BARRASSO) introduced the following bill;
which was read twice and referred to the Committee on Indian Affairs

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

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

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Department of the Interior Tribal Self-Governance Act
6 of 2012”.

7 (b) **TABLE OF CONTENTS.**—The table of contents of
8 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—INDIAN SELF-DETERMINATION

- Sec. 101. Definitions; reporting and audit requirements; application of provisions.
- Sec. 102. Contracts by Secretary of Interior.
- Sec. 103. Administrative provisions.
- Sec. 104. Contract funding and indirect costs.
- Sec. 105. Contract or grant specifications.

TITLE II—TRIBAL SELF-GOVERNANCE

- Sec. 201. Tribal self-governance.
- Sec. 202. Effect of certain provisions.

1 **TITLE I—INDIAN SELF-** 2 **DETERMINATION**

3 **SEC. 101. DEFINITIONS; REPORTING AND AUDIT REQUIRE-** 4 **MENTS; APPLICATION OF PROVISIONS.**

5 (a) DEFINITIONS.—Section 4 of the Indian Self-De-
6 termination and Education Assistance Act (25 U.S.C.
7 450b) is amended by striking subsection (j) and inserting
8 the following:

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

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

20 or

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

4 (b) REPORTING AND AUDIT REQUIREMENTS.—Sec-
5 tion 5(b) of the Indian Self-Determination and Education
6 Assistance Act (25 U.S.C. 450c(b)) is amended—

7 (1) by striking “after completion of the project
8 or undertaking referred to in the preceding sub-
9 section of this section” and inserting “after the re-
10 tention period for the report that is submitted to the
11 Secretary under subsection (a)”;

12 (2) by adding at the end the following: “The re-
13 tention period shall be defined in regulations pro-
14 mulgated by the Secretary pursuant to section
15 414.”.

16 (c) APPLICATION OF OTHER PROVISIONS.—Sections
17 4, 5, 6, 7, 102(c), 104, 105(a)(1), 105(f), 110, and 111
18 of the Indian Self-Determination and Education Assist-
19 ance Act, as amended (25 U.S.C. 450 et seq.) (Public Law
20 93–638; 88 Stat. 2203) and section 314 of the Depart-
21 ment of the Interior and Related Agencies Appropriations
22 Act, 1991 (Public Law 101–512; 104 Stat. 1959), apply
23 to compacts and funding agreements entered into under
24 title IV.

1 **SEC. 102. CONTRACTS BY SECRETARY OF INTERIOR.**

2 Section 102 of the Indian Self-Determination and
3 Education Assistance Act (25 U.S.C. 450f) is amended—

4 (1) in subsection (c)(2), by striking “economic
5 enterprises” and all that follows through “except
6 that” and inserting “economic enterprises (as de-
7 fined in section 3 of the Indian Financing Act of
8 1974 (25 U.S.C. 1452)), except that”; and

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

10 “(f) **GOOD FAITH REQUIREMENT.**—Subject to sec-
11 tion 202 of the Department of the Interior Tribal Self-
12 Governance Act of 2012, in the negotiation of contracts
13 and funding agreements, the Secretary shall—

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

17 “(2) carry out this Act in a manner that maxi-
18 mizes the policy of tribal self-determination, in a
19 manner consistent with the purposes specified in sec-
20 tion 3.

21 “(g) **RULE OF CONSTRUCTION.**—Subject to section
22 202 of the Department of the Interior Tribal Self-Govern-
23 ance Act of 2012, each provision of this Act and each pro-
24 vision of a contract or funding agreement shall be liberally
25 construed for the benefit of the Indian tribe participating

1 in self-determination, and any ambiguity shall be resolved
2 in favor of the Indian tribe.”.

3 **SEC. 103. ADMINISTRATIVE PROVISIONS.**

4 Section 105 of the Indian Self-Determination and
5 Education Assistance Act (25 U.S.C. 450j) is amended—

6 (1) in subsection (b), in the first sentence, by
7 striking “pursuant to” and all that follows through
8 “of this Act” and inserting “pursuant to sections
9 102 and 103”; and

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

11 “(p) INTERPRETATION BY SECRETARY.—Except as
12 otherwise provided by law (including section 202 of the
13 Department of the Interior Tribal Self-Governance Act of
14 2012), the Secretary shall interpret all Federal laws (in-
15 cluding regulations) and Executive orders in a manner
16 that facilitates, to the maximum extent practicable—

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

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

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

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

1 “(3) the achievement of tribal health objec-
2 tives.”.

3 **SEC. 104. CONTRACT FUNDING AND INDIRECT COSTS.**

4 Section 106(a)(3) of the Indian Self-Determination
5 and Education Assistance Act (25 U.S.C. 450j-1(a)(3))
6 is amended—

7 (1) in subparagraph (A)—

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

10 (B) in clause (ii), by striking “expense re-
11 lated to the overhead incurred” and inserting
12 “expense incurred by the governing body of the
13 Indian tribe or tribal organization and any
14 overhead expense incurred”;

15 (2) by redesignating subparagraph (B) as sub-
16 paragraph (C); and

17 (3) by inserting after subparagraph (A) the fol-
18 lowing:

19 “(B) In calculating the reimbursement rate
20 for expenses described in subparagraph (A)(ii),
21 not less than 50 percent of the expenses de-
22 scribed in subparagraph (A)(ii) that are in-
23 curred by the governing body of an Indian tribe
24 or tribal organization relating to a Federal pro-
25 gram, function, service, or activity carried out

1 pursuant to the contract shall be considered to
2 be reasonable and allowable.”.

3 **SEC. 105. CONTRACT OR GRANT SPECIFICATIONS.**

4 Section 108 of the Indian Self-Determination and
5 Education Assistance Act (25 U.S.C. 450l) is amended—

6 (1) in subsection (a)(2), by inserting “subject
7 to subsections (a) and (b) of section 102,” before
8 “contain”; and

9 (2) in subsection (f)(2)(A)(ii) of the model
10 agreement contained in subsection (c), by inserting
11 “subject to subsections (a) and (b) of section 102 of
12 the Indian Self-Determination and Education Assist-
13 ance Act (25 U.S.C. 450f),” before “such other pro-
14 visions”.

15 **TITLE II—TRIBAL SELF-**
16 **GOVERNANCE**

17 **SEC. 201. TRIBAL SELF-GOVERNANCE.**

18 (a) DEFINITIONS.—Section 401 of the Indian Self-
19 Determination and Education Assistance Act (25 U.S.C.
20 458aa) is amended to read as follows:

21 **“SEC. 401. DEFINITIONS.**

22 “In this title:

23 “(1) COMPACT.—The term ‘compact’ means a
24 self-governance compact entered into under section
25 404.

1 “(2) CONSTRUCTION PROGRAM; CONSTRUCTION
2 PROJECT.—The term ‘construction program’ or ‘con-
3 struction project’ means a tribal undertaking relat-
4 ing to the administration, planning, environmental
5 determination, design, construction, repair, improve-
6 ment, or expansion of roads, bridges, buildings,
7 structures, systems, or other facilities for purposes
8 of housing, law enforcement, detention, sanitation,
9 water supply, education, administration, community,
10 health, irrigation, agriculture, conservation, flood
11 control, transportation, or port facilities, or for other
12 tribal purposes.

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

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

18 “(5) GROSS MISMANAGEMENT.—The term
19 ‘gross mismanagement’ means a significant viola-
20 tion, shown by a preponderance of the evidence, of
21 a compact, funding agreement, or statutory or regu-
22 latory requirement applicable to Federal funds—

23 “(A) for a program administered by an In-
24 dian tribe; or

1 “(B) under a compact or funding agree-
2 ment that results in a significant reduction of
3 funds available for the programs assumed by an
4 Indian tribe.

5 “(6) INHERENT FEDERAL FUNCTION.—The
6 term ‘inherent Federal function’ means a Federal
7 function that may not legally be delegated to an In-
8 dian tribe.

9 “(7) PROGRAM.—The term ‘program’ means
10 any program, function, service, or activity (or por-
11 tion thereof) within the Department that is included
12 in a funding agreement.

13 “(8) SECRETARY.—The term ‘Secretary’ means
14 the Secretary of the Interior.

15 “(9) SELF-GOVERNANCE.—The term ‘self-gov-
16 ernance’ means the Tribal Self-Governance Program
17 established under section 402.

18 “(10) TRIBAL SHARE.—The term ‘tribal share’
19 means the portion of all funds and resources of an
20 Indian tribe that—

21 “(A) support any program within the Bu-
22 reau of Indian Affairs, the Office of Special
23 Trustee, or the Office of the Assistant Sec-
24 retary for Indian Affairs; and

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

4 (b) ESTABLISHMENT.—Section 402 of the Indian
5 Self-Determination and Education Assistance Act (25
6 U.S.C. 458bb) is amended to read as follows:

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

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

11 “(b) SELECTION OF PARTICIPATING INDIAN
12 TRIBES.—

13 “(1) IN GENERAL.—

14 “(A) ELIGIBILITY.—The Secretary, acting
15 through the Director of the Office of Self-Gov-
16 ernance, may select up to 50 new Indian tribes
17 per year from those eligible under subsection
18 (c) to participate in self-governance.

19 “(B) JOINT PARTICIPATION.—On the re-
20 quest of each participating Indian tribe, two or
21 more otherwise eligible Indian tribes may be
22 treated as a single Indian tribe for the purpose
23 of participating in self-governance.

24 “(2) OTHER AUTHORIZED INDIAN TRIBE OR
25 TRIBAL ORGANIZATION.—If an Indian tribe author-

1 izes another Indian tribe or a tribal organization to
2 plan for or carry out a program on its behalf under
3 this title, the authorized Indian tribe or tribal orga-
4 nization shall have the rights and responsibilities of
5 the authorizing Indian tribe (except as otherwise
6 provided in the authorizing resolution).

7 “(3) JOINT PARTICIPATION.—Two or more In-
8 dian tribes that are not otherwise eligible under sub-
9 section (c) may be treated as a single Indian tribe
10 for the purpose of participating in self-governance as
11 a tribal organization if—

12 “(A) each Indian tribe so requests; and

13 “(B) the tribal organization itself, or at
14 least one of the Indian tribes participating in
15 the tribal organization, is eligible under sub-
16 section (c).

17 “(4) TRIBAL WITHDRAWAL FROM A TRIBAL OR-
18 GANIZATION.—

19 “(A) IN GENERAL.—An Indian tribe that
20 withdraws from participation in a tribal organi-
21 zation, in whole or in part, shall be entitled to
22 participate in self-governance if the Indian tribe
23 is eligible under subsection (c).

24 “(B) EFFECT OF WITHDRAWAL.—If an In-
25 dian tribe withdraws from participation in a

1 tribal organization, the Indian tribe shall be en-
2 titled to its tribal share of funds and resources
3 supporting the programs that the Indian tribe
4 is entitled to carry out under the compact and
5 funding agreement of the Indian tribe.

6 “(C) PARTICIPATION IN SELF-GOVERN-
7 ANCE.—The withdrawal of an Indian tribe from
8 a tribal organization shall not affect the eligi-
9 bility of the tribal organization to participate in
10 self-governance on behalf of one or more other
11 Indian tribes, if the tribal organization still
12 qualifies under subsection (c).

13 “(D) WITHDRAWAL PROCESS.—

14 “(i) IN GENERAL.—An Indian tribe
15 may, by tribal resolution, fully or partially
16 withdraw its tribal share of any program
17 in a funding agreement from a partici-
18 pating tribal organization.

19 “(ii) NOTIFICATION.—The Indian
20 tribe shall provide a copy of the tribal reso-
21 lution described in clause (i) to the Sec-
22 retary.

23 “(iii) EFFECTIVE DATE.—

24 “(I) IN GENERAL.—A withdrawal
25 under clause (i) shall become effective

1 on the date that is specified in the
2 tribal resolution and mutually agreed
3 upon by the Secretary, the with-
4 drawing Indian tribe, and the tribal
5 organization that signed the compact
6 and funding agreement on behalf of
7 the withdrawing Indian tribe or tribal
8 organization.

9 “(II) NO SPECIFIED DATE.—In
10 the absence of a date specified in the
11 resolution, the withdrawal shall be-
12 come effective on—

13 “(aa) the earlier of—

14 “(AA) 1 year after the
15 date of submission of the re-
16 quest; and

17 “(BB) the date on
18 which the funding agree-
19 ment expires; or

20 “(bb) such date as may be
21 mutually agreed upon by the Sec-
22 retary, the withdrawing Indian
23 tribe, and the tribal organization
24 that signed the compact and
25 funding agreement on behalf of

1 the withdrawing Indian tribe or
2 tribal organization.

3 “(E) DISTRIBUTION OF FUNDS.—If an In-
4 dian tribe or tribal organization eligible to enter
5 into a self-determination contract under title I
6 or a compact or funding agreement under this
7 title fully or partially withdraws from a partici-
8 pating tribal organization, the withdrawing In-
9 dian tribe—

10 “(i) may elect to enter into a self-de-
11 termination contract or compact, in which
12 case—

13 “(I) the withdrawing Indian tribe
14 or tribal organization shall be entitled
15 to its tribal share of unexpended
16 funds and resources supporting the
17 programs that the Indian tribe will be
18 carrying out under its own self-deter-
19 mination contract or compact and
20 funding agreement (calculated on the
21 same basis as the funds were initially
22 allocated to the funding agreement of
23 the tribal organization); and

24 “(II) the funds referred to in
25 subclause (I) shall be withdrawn by

1 the Secretary from the funding agree-
2 ment of the tribal organization and
3 transferred to the withdrawing Indian
4 tribe, on the condition that sections
5 102 and 105(i), as appropriate, shall
6 apply to the withdrawing Indian tribe;
7 or

8 “(ii) may elect not to enter into a self-
9 determination contract or compact, in
10 which case all unexpended funds and re-
11 sources associated with the withdrawing
12 Indian tribe’s returned programs (cal-
13 culated on the same basis as the funds
14 were initially allocated to the funding
15 agreement of the tribal organization) shall
16 be returned by the tribal organization to
17 the Secretary for operation of the pro-
18 grams included in the withdrawal.

19 “(F) RETURN TO MATURE CONTRACT STA-
20 TUS.—If an Indian tribe elects to operate all or
21 some programs carried out under a compact or
22 funding agreement under this title through a
23 self-determination contract under title I, at the
24 option of the Indian tribe, the resulting self-de-
25 termination contract shall be a mature self-de-

1 termination contract as long as the Indian tribe
2 meets the requirements set forth in section
3 4(h).

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

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

8 “(2) request participation in self-governance by
9 resolution or other official action by the tribal gov-
10 erning body; and

11 “(3) demonstrate, for the 3 fiscal years pre-
12 ceding the date on which the Indian tribe requests
13 participation, financial stability and financial man-
14 agement capability as evidenced by the Indian tribe
15 having no uncorrected significant and material audit
16 exceptions in the required annual audit of its self-
17 determination or self-governance agreements with
18 any Federal agency.

19 “(d) PLANNING PHASE.—

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

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

24 “(A) be conducted to the satisfaction of
25 the Indian tribe; and

1 “(B) include—

2 “(i) legal and budgetary research; and

3 “(ii) internal tribal government plan-
4 ning, training, and organizational prepara-
5 tion.

6 “(e) GRANTS.—

7 “(1) IN GENERAL.—Subject to the availability
8 of appropriations, an Indian tribe or tribal organiza-
9 tion that meets the requirements of paragraphs (2)
10 and (3) of subsection (c) shall be eligible for
11 grants—

12 “(A) to plan for participation in self-gov-
13 ernance; and

14 “(B) to negotiate the terms of participa-
15 tion by the Indian tribe or tribal organization
16 in self-governance, as set forth in a compact
17 and a funding agreement.

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

21 (c) FUNDING AGREEMENTS.—Section 403 of the In-
22 dian Self-Determination and Education Assistance Act
23 (25 U.S.C. 458cc) is amended—

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

1 “(a) AUTHORIZATION.—The Secretary shall, on the
2 request of any Indian tribe or tribal organization, enter
3 into a written funding agreement with the governing body
4 of the Indian tribe or the tribal organization in a manner
5 consistent with—

6 “(1) the trust responsibility of the Federal Gov-
7 ernment, treaty obligations, and the government-to-
8 government relationship between Indian tribes and
9 the United States; and

10 “(2) subsection (b).”;

11 (2) in subsection (b)—

12 (A) in paragraph (1)—

13 (i) in the matter preceding subpara-
14 graph (A), by striking “without regard to
15 the agency or office of the Bureau of In-
16 dian Affairs” and inserting “the Office of
17 the Assistant Secretary for Indian Affairs,
18 and the Office of the Special Trustee,
19 without regard to the agency or office of
20 that Bureau or those Offices”;

21 (ii) in subparagraph (B), by striking
22 “and”;

23 (iii) in subparagraph (C), by inserting
24 “and” after the semicolon at the end; and

1 (iv) by adding at the end the fol-
2 lowing:

3 “(D) any other programs, services, func-
4 tions, or activities (or portions thereof) that are
5 provided through the Bureau of Indian Affairs,
6 the Office of the Assistant Secretary for Indian
7 Affairs, or the Office of the Special Trustee
8 with respect to which Indian tribes or Indians
9 are primary or significant beneficiaries;”;

10 (B) in paragraph (2)—

11 (i) by striking “section 405(c)” and
12 inserting “section 413(c)”; and

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

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

17 (D) by striking paragraphs (4) through
18 (9); and

19 (3) by adding at the end the following:

20 “(m) OTHER PROVISIONS.—

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

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

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

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

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

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

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

16 “(3) BASE BUDGET.—A funding agreement
17 shall, at the option of the Indian tribe, provide for
18 a stable base budget specifying the recurring funds
19 (which may include funds available under section
20 106(a)) to be transferred to the Indian tribe, for
21 such period as the Indian tribe specifies in the fund-
22 ing agreement, subject to annual adjustment only to
23 reflect changes in congressional appropriations.

24 “(4) NO WAIVER OF TRUST RESPONSIBILITY.—
25 A funding agreement shall prohibit the Secretary

1 from waiving, modifying, or diminishing in any way
2 the trust responsibility of the United States with re-
3 spect to Indian tribes and individual Indians that ex-
4 ists under treaties, Executive orders, court decisions,
5 and other laws.

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

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

13 “(p) EXISTING AND SUBSEQUENT FUNDING AGREE-
14 MENTS.—

15 “(1) SUBSEQUENT FUNDING AGREEMENTS.—
16 Absent notification from an Indian tribe that the In-
17 dian tribe is withdrawing or retroceding the oper-
18 ation of one or more programs identified in a fund-
19 ing agreement, or unless otherwise agreed to by the
20 parties to the funding agreement or by the nature
21 of any noncontinuing program, service, function, or
22 activity contained in a funding agreement—

23 “(A) a funding agreement shall remain in
24 full force and effect until a subsequent funding
25 agreement is executed, with funding paid annu-

1 ally for each fiscal year the agreement is in ef-
2 fect; and

3 “(B) the term of the subsequent funding
4 agreement shall be retroactive to the end of the
5 term of the preceding funding agreement for
6 the purposes of calculating the amount of fund-
7 ing to which the Indian tribe is entitled.

8 “(2) DISPUTES.—Disputes over the implemen-
9 tation of paragraph (1)(A) shall be subject to section
10 406(c).

11 “(3) EXISTING FUNDING AGREEMENTS.—An
12 Indian tribe that was participating in self-govern-
13 ance under this title on the date of enactment of the
14 Department of the Interior Tribal Self-Governance
15 Act of 2012 shall have the option at any time after
16 that date—

17 “(A) to retain its existing funding agree-
18 ment (in whole or in part) to the extent that
19 the provisions of that funding agreement are
20 not directly contrary to any express provision of
21 this title; or

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

24 “(4) MULTIYEAR FUNDING AGREEMENTS.—An
25 Indian tribe may, at the discretion of the Indian

1 tribe, negotiate with the Secretary for a funding
2 agreement with a term that exceeds 1 year.”.

3 (d) **GENERAL REVISIONS.**—Title IV of the Indian
4 Self-Determination and Education Assistance Act (25
5 U.S.C. 450aa et seq.) is amended by striking sections 404
6 through 408 and inserting the following:

7 **“SEC. 404. COMPACTS.**

8 “(a) **IN GENERAL.**—The Secretary shall negotiate
9 and enter into a written compact with each Indian tribe
10 participating in self-governance in a manner consistent
11 with the trust responsibility of the Federal Government,
12 treaty obligations, and the government-to-government re-
13 lationship between Indian tribes and the United States.

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

16 “(1) specify and affirm the general terms of the
17 government-to-government relationship between the
18 Indian tribe and the Secretary; and

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

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

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

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

3 “(2) another date agreed upon by the parties.

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

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

7 or

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

10 “(f) EXISTING COMPACTS.—An Indian tribe partici-
11 pating in self-governance under this title, as in effect on
12 the date of enactment of the Department of the Interior
13 Tribal Self-Governance Act of 2012, shall have the option
14 at any time after that date—

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

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

21 **“SEC. 405. GENERAL PROVISIONS.**

22 “(a) APPLICABILITY.—An Indian tribe and the Sec-
23 retary shall include in any compact or funding agreement
24 provisions that reflect the requirements of this title.

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

6 “(c) AUDITS.—

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

10 “(2) COST PRINCIPLES.—An Indian tribe shall
11 apply cost principles under the applicable Office of
12 Management and Budget circular, except as modi-
13 fied by—

14 “(A) any provision of law, including section
15 106; or

16 “(B) any exemptions to applicable Office
17 of Management and Budget circulars subse-
18 quently granted by the Office of Management
19 and Budget.

20 “(3) FEDERAL CLAIMS.—Any claim by the Fed-
21 eral Government against an Indian tribe relating to
22 funds received under a funding agreement based on
23 any audit under this subsection shall be subject to
24 section 106(f).

1 “(d) REDESIGN AND CONSOLIDATION.—Except as
2 provided in section 407, an Indian tribe may redesign or
3 consolidate programs or reallocate funds for programs in
4 any manner that the Indian tribe determines to be in the
5 best interest of the Indian community being served, so
6 long as that the redesign or consolidation does not have
7 the effect of denying eligibility for services to population
8 groups otherwise eligible to be served under applicable
9 Federal law, except that, with respect to the reallocation,
10 consolidation, and redesign of programs described in sub-
11 section (b)(2) or (c) of section 403, a joint agreement be-
12 tween the Secretary and the Indian tribe shall be required.

13 “(e) RETROCESSION.—

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

17 “(2) EFFECTIVE DATE.—

18 “(A) AGREEMENT.—Unless an Indian
19 tribe rescinds a request for retrocession under
20 paragraph (1), the retrocession shall become ef-
21 fective on the date specified by the parties in
22 the compact or funding agreement.

23 “(B) NO AGREEMENT.—In the absence of
24 a specification of an effective date in the com-

1 pact or funding agreement, the retrocession
2 shall become effective on—

3 “(i) the earlier of—

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

6 “(II) the date on which the fund-
7 ing agreement expires; or

8 “(ii) such date as may be mutually
9 agreed upon by the Secretary and the In-
10 dian tribe.

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

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

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

22 “(g) RECORDS.—

23 “(1) IN GENERAL.—Unless an Indian tribe
24 specifies otherwise in the compact or funding agree-
25 ment, records of an Indian tribe shall not be consid-

1 ered to be Federal records for purposes of chapter
2 5 of title 5, United States Code.

3 “(2) RECORDKEEPING SYSTEM.—An Indian
4 tribe shall—

5 “(A) maintain a recordkeeping system; and

6 “(B) on a notice period of not less than 30
7 days, provide the Secretary with reasonable ac-
8 cess to the records to enable the Department to
9 meet the requirements of sections 3101 through
10 3106 of title 44, United States Code.

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

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

16 “(b) REASSUMPTION.—

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

22 “(A) imminent jeopardy to a trust asset,
23 natural resources, or public health and safety
24 that—

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

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

5 “(B) gross mismanagement with respect to
6 funds transferred to an Indian tribe under a
7 compact or funding agreement, as determined
8 by the Secretary in consultation with the In-
9 spector General, as appropriate.

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

13 “(A) the Secretary first provides written
14 notice and a hearing on the record to the In-
15 dian tribe; and

16 “(B) the Indian tribe does not take correc-
17 tive action to remedy the mismanagement of
18 the funds or programs, or the imminent jeop-
19 ardy to a trust asset, natural resource, or pub-
20 lic health and safety.

21 “(3) EXCEPTION.—

22 “(A) IN GENERAL.—Notwithstanding para-
23 graph (2), the Secretary may, on written notice
24 to the Indian tribe, immediately reassume oper-
25 ation of a program if—

1 “(i) the Secretary makes a finding of
2 imminent and substantial jeopardy and ir-
3 reparable harm to a trust asset, a natural
4 resource, or the public health and safety
5 caused by an act or omission of the Indian
6 tribe; and

7 “(ii) the imminent and substantial
8 jeopardy, and irreparable harm to the trust
9 asset, natural resource, or public health
10 and safety arises out of a failure by the In-
11 dian tribe to carry out the terms of an ap-
12 plicable compact or funding agreement.

13 “(B) REASSUMPTION.—If the Secretary re-
14 assumes operation of a program under subpara-
15 graph (A), the Secretary shall provide the In-
16 dian tribe with a hearing on the record not
17 later than 10 days after the date of reassump-
18 tion.

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

21 “(1) FINAL OFFER.—If the Secretary and a
22 participating Indian tribe are unable to agree, in
23 whole or in part, on the terms of a compact or fund-
24 ing agreement (including funding levels), the Indian
25 tribe may submit a final offer to the Secretary.

1 “(2) DETERMINATION.—Not more than 60
2 days after the date of receipt of a final offer by the
3 one or more officials designated pursuant to para-
4 graph (4), the Secretary shall review and make a de-
5 termination with respect to the final offer.

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

10 “(4) DESIGNATED OFFICIALS.—

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

15 “(B) NO DESIGNATION.—If no official is
16 designated, the Executive Secretariat of the
17 Secretary shall be the designated official.

18 “(5) NO TIMELY DETERMINATION.—Except as
19 otherwise provided in section 202 of the Department
20 of the Interior Tribal Self-Governance Act of 2012,
21 if the Secretary fails to make a determination with
22 respect to a final offer within the period specified in
23 paragraph (2), the Secretary shall be deemed to
24 have agreed to the offer.

25 “(6) REJECTION OF FINAL OFFER.—

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

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

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

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

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

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

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

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

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

17 “(iii) provide the Indian tribe with—

18 “(I) a hearing on the record with
19 the right to engage in full discovery
20 relevant to any issue raised in the
21 matter; and

22 “(II) the opportunity for appeal
23 on the objections raised (except that
24 the Indian tribe may, in lieu of filing
25 such appeal, directly proceed to ini-

1 tiate an action in a United States dis-
2 trict court under section 110(a)); and

3 “(iv) provide the Indian tribe the op-
4 tion of entering into the severable portions
5 of a final proposed compact or funding
6 agreement (including a lesser funding
7 amount, if any), that the Secretary did not
8 reject, subject to any additional alterations
9 necessary to conform the compact or fund-
10 ing agreement to the severed provisions.

11 “(B) EFFECT OF EXERCISING CERTAIN
12 OPTION.—If an Indian tribe exercises the op-
13 tion specified in subparagraph (A)(iv)—

14 “(i) the Indian tribe shall retain the
15 right to appeal the rejection by the Sec-
16 retary under this section; and

17 “(ii) clauses (i), (ii), and (iii) of sub-
18 paragraph (A) shall apply only to the por-
19 tion of the proposed final compact or fund-
20 ing agreement that was rejected by the
21 Secretary.

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

1 “(1) of demonstrating, by a preponderance of
2 the evidence, the validity of the grounds for a re-
3 assumption under subsection (b); and

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

7 “(e) GOOD FAITH.—

8 “(1) IN GENERAL.—Subject to section 202 of
9 the Department of the Interior Tribal Self-Govern-
10 ance Act of 2012, in the negotiation of compacts
11 and funding agreements, the Secretary shall at all
12 times negotiate in good faith to maximize implemen-
13 tation of the self-governance policy.

14 “(2) POLICY.—Subject to section 202 of the
15 Department of the Interior Tribal Self-Governance
16 Act of 2012, the Secretary shall carry out this title
17 in a manner that maximizes the policy of tribal self-
18 governance.

19 “(f) SAVINGS.—

20 “(1) IN GENERAL.—To the extent that pro-
21 grams carried out for the benefit of Indian tribes
22 and tribal organizations under this title reduce the
23 administrative or other responsibilities of the Sec-
24 retary with respect to the operation of Indian pro-
25 grams and result in savings that have not otherwise

1 been included in the amount of tribal shares and
2 other funds determined under section 408(c), except
3 for funding agreements entered into for programs
4 under section 403(c), the Secretary shall make such
5 savings available to the Indian tribes or tribal orga-
6 nizations for the provision of additional services to
7 program beneficiaries in a manner equitable to di-
8 rectly served, contracted, and compacted programs.

9 “(2) DISCRETIONARY PROGRAMS OF SPECIAL
10 SIGNIFICANCE.—For any savings generated as a re-
11 sult of the assumption of a program by an Indian
12 tribe under section 403(c), such savings shall be
13 made available to that Indian tribe.

14 “(g) TRUST RESPONSIBILITY.—The Secretary may
15 not waive, modify, or diminish in any way the trust re-
16 sponsibility of the United States with respect to Indian
17 tribes and individual Indians that exists under treaties,
18 Executive orders, other laws, or court decisions.

19 “(h) DECISIONMAKER.—A decision that constitutes
20 final agency action and relates to an appeal within the
21 Department conducted under subsection (c)(4) may be
22 made by—

23 “(1) an official of the Department who holds a
24 position at a higher organizational level within the
25 Department than the level of the departmental agen-

1 cy in which the decision that is the subject of the
2 appeal was made; or

3 “(2) an administrative law judge.

4 “(i) RULES OF CONSTRUCTION.—Subject to section
5 202 of the Department of the Interior Tribal Self-Govern-
6 ance Act of 2012, each provision of this title and each
7 provision of a compact or funding agreement shall be lib-
8 erally construed for the benefit of the Indian tribe partici-
9 pating in self-governance, and any ambiguity shall be re-
10 solved in favor of the Indian tribe.

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

12 “(a) IN GENERAL.—Indian tribes participating in
13 tribal self-governance may carry out construction projects
14 under this title.

15 “(b) TRIBAL OPTION TO CARRY OUT CERTAIN FED-
16 ERAL ENVIRONMENTAL ACTIVITIES.—In carrying out a
17 construction project under this title, an Indian tribe may,
18 subject to the agreement of the Secretary, elect to assume
19 some Federal responsibilities under the National Environ-
20 mental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the
21 National Historic Preservation Act (16 U.S.C. 470 et
22 seq.), and related provisions of law and regulations that
23 would apply if the Secretary were to undertake a construc-
24 tion project, by adopting a resolution—

1 “(1) designating a certifying tribal officer to
2 represent the Indian tribe and to assume the status
3 of a responsible Federal official under those Acts or
4 regulations; and

5 “(2) accepting the jurisdiction of the United
6 States courts for the purpose of enforcing the re-
7 sponsibilities of the certifying tribal officer assuming
8 the status of a responsible Federal official under
9 those Acts or regulations.

10 “(c) SAVINGS CLAUSE.—Notwithstanding subsection
11 (b), nothing in this section authorizes the Secretary to in-
12 clude in any compact or funding agreement duties of the
13 Secretary under the National Environmental Policy Act
14 (42 U.S.C. 4321 et seq.), the National Historic Preserva-
15 tion Act (16 U.S.C. 470 et seq.), and other related provi-
16 sions of law that are inherent Federal functions.

17 “(d) CODES AND STANDARDS.—In carrying out a
18 construction project under this title, an Indian tribe
19 shall—

20 “(1) adhere to applicable Federal, State, local,
21 and tribal building codes, architectural and engineer-
22 ing standards, and applicable Federal guidelines re-
23 garding design, space, and operational standards,
24 appropriate for the particular project; and

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

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

3 “(B) certify that—

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

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

10 “(e) TRIBAL ACCOUNTABILITY.—

11 “(1) IN GENERAL.—In carrying out a construc-
12 tion project under this title, an Indian tribe shall as-
13 sume responsibility for the successful completion of
14 the construction project and of a facility that is usa-
15 ble for the purpose for which the Indian tribe re-
16 ceived funding.

17 “(2) REQUIREMENTS.—For each construction
18 project carried out by an Indian tribe under this
19 title, the Indian tribe and the Secretary shall nego-
20 tiate a provision to be included in the funding agree-
21 ment that identifies—

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

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

4 “(C) the responsibilities of the Indian tribe
5 and the Secretary for the project;

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

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

10 “(F) the obligations of the Indian tribe to
11 comply with the codes referenced in subsection
12 (c)(1) and applicable Federal laws and regula-
13 tions;

14 “(G) the agreement of the parties over who
15 will bear any additional costs necessary to meet
16 changes in scope, or errors or omissions in de-
17 sign and construction; and

18 “(H) the agreement of the Secretary to
19 issue a certificate of occupancy, if requested by
20 the Indian tribe, based upon the review and
21 verification by the Secretary, to the satisfaction
22 of the Secretary, that the Indian tribe has se-
23 cured upon completion the review and approval
24 of the plans and specifications, sufficiency of
25 design, life safety, and code compliance by

1 qualified, licensed, and independent architects
2 and engineers.

3 “(f) FUNDING.—

4 “(1) IN GENERAL.—Subject to section 202 of
5 the Department of the Interior Tribal Self-Govern-
6 ance Act of 2012, funding appropriated for con-
7 struction projects carried out under this title shall
8 be included in funding agreements as annual or
9 semiannual advance payments at the option of the
10 Indian tribe.

11 “(2) ADVANCE PAYMENTS.—Subject to section
12 202 of the Department of the Interior Tribal Self-
13 Governance Act of 2012, the Secretary shall include
14 all associated project contingency funds with each
15 advance payment, and the Indian tribe shall be re-
16 sponsible for the management of such contingency
17 funds.

18 “(g) NEGOTIATIONS.—At the option of the Indian
19 tribe, construction project funding proposals shall be nego-
20 tiated pursuant to the statutory process in section 105,
21 and any resulting construction project agreement shall be
22 incorporated into the funding agreement as addenda.

23 “(h) FEDERAL REVIEW AND VERIFICATION.—

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

1 “(A) the Secretary shall review and verify,
2 to the satisfaction of the Secretary, that project
3 planning and design documents prepared by the
4 Indian tribe in advance of initial construction
5 are in conformity with the obligations of the In-
6 dian tribe under subsection (c); and

7 “(B) before the project planning and de-
8 sign documents are implemented, the Secretary
9 shall review and verify to the satisfaction of the
10 Secretary that subsequent document amend-
11 ments which result in a significant change in
12 construction are in conformity with the obliga-
13 tions of the Indian tribe under subsection (c).

14 “(2) REPORTS.—The Indian tribe shall provide
15 the Secretary with project progress and financial re-
16 ports not less than semiannually.

17 “(3) OVERSIGHT VISITS.—The Secretary may
18 conduct onsite project oversight visits semiannually
19 or on an alternate schedule agreed to by the Sec-
20 retary and the Indian tribe.

21 “(i) APPLICATION OF OTHER LAWS.—Unless other-
22 wise agreed to by the Indian tribe and except as otherwise
23 provided in this Act, no provision of the Office of Federal
24 Procurement Policy Act (41 U.S.C. 401 et seq.), the Fed-
25 eral Acquisition Regulations issued pursuant to that Act,

1 or any other law or regulation pertaining to Federal pro-
2 curement (including Executive orders) shall apply to any
3 construction program or project carried out under this
4 title.

5 “(j) FUTURE FUNDING.—Subject to section 202 of
6 the Department of the Interior Tribal Self-Governance Act
7 of 2012, upon completion of a facility constructed under
8 this title, the Secretary shall include the facility among
9 those eligible for annual operation and maintenance fund-
10 ing support comparable to that provided for similar facili-
11 ties funded by the Department as annual appropriations
12 are available and to the extent that the facility size and
13 complexity and other factors do not exceed the funding
14 formula criteria for comparable buildings.

15 **“SEC. 408. PAYMENT.**

16 “(a) IN GENERAL.—At the request of the governing
17 body of an Indian tribe and under the terms of an applica-
18 ble funding agreement, the Secretary shall provide funding
19 to the Indian tribe to carry out the funding agreement.

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

23 “(c) AMOUNT.—

24 “(1) IN GENERAL.—Subject to subsection (e)
25 and sections 403 and 405, the Secretary shall pro-

1 vide funds to the Indian tribe under a funding
2 agreement for programs in an amount that is equal
3 to the amount that the Indian tribe would have been
4 entitled to receive under contracts and grants under
5 this Act (including amounts for direct program and
6 contract support costs and, in addition, any funds
7 that are specifically or functionally related to the
8 provision by the Secretary of services and benefits to
9 the Indian tribe or its members) without regard to
10 the organization level within the Department at
11 which the programs are carried out.

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

15 “(d) TIMING.—

16 “(1) IN GENERAL.—Pursuant to the terms of
17 any compact or funding agreement entered into
18 under this title, the Secretary shall transfer to the
19 Indian tribe all funds provided for in the funding
20 agreement, pursuant to subsection (c), and provide
21 funding for periods covered by joint resolution
22 adopted by Congress making continuing appropria-
23 tions, to the extent permitted by such resolution.

24 “(2) TRANSFERS.—Not later than 1 year after
25 the date of enactment of the Department of the In-

1 terior Tribal Self-Governance Act of 2012, in any in-
2 stance in which a funding agreement requires an an-
3 nual transfer of funding to be made at the beginning
4 of a fiscal year or requires semiannual or other peri-
5 odic transfers of funding to be made commencing at
6 the beginning of a fiscal year, the first such transfer
7 shall be made not later than 10 days after the ap-
8 portionment of such funds by the Office of Manage-
9 ment and Budget to the Department, unless the
10 funding agreement provides otherwise.

11 “(e) AVAILABILITY.—Funds for trust services to indi-
12 vidual Indians shall be available under a funding agree-
13 ment only to the extent that the same services that would
14 have been provided by the Secretary are provided to indi-
15 vidual Indians by the Indian tribe.

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

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

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

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

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

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

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

10 “(i) a reduction in appropriations
11 from the previous fiscal year for the pro-
12 gram to be included in a compact or fund-
13 ing agreement;

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

16 “(iii) a tribal authorization;

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

20 “(v) completion of an activity under a
21 program for which the funds were pro-
22 vided;

23 “(C) to pay for Federal functions, includ-
24 ing—

25 “(i) Federal pay costs;

1 “(ii) Federal employee retirement ben-
2 efits;

3 “(iii) automated data processing;

4 “(iv) technical assistance; and

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

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

10 “(h) FEDERAL RESOURCES.—If an Indian tribe
11 elects to carry out a compact or funding agreement with
12 the use of Federal personnel, Federal supplies (including
13 supplies available from Federal warehouse facilities), Fed-
14 eral supply sources (including lodging, airline transpor-
15 tation, and other means of transportation, including the
16 use of interagency motor pool vehicles), or other Federal
17 resources (including supplies, services, and resources
18 available to the Secretary under any procurement con-
19 tracts in which the Department is eligible to participate),
20 the Secretary shall, as soon as practicable, acquire and
21 transfer such personnel, supplies, or resources to the In-
22 dian tribe under this title.

23 “(i) PROMPT PAYMENT ACT.—Chapter 39 of title 31,
24 United States Code, shall apply to the transfer of funds

1 due under a compact or funding agreement authorized
2 under this title.

3 “(j) INTEREST OR OTHER INCOME.—

4 “(1) IN GENERAL.—An Indian tribe may retain
5 interest or income earned on any funds paid under
6 a compact or funding agreement to carry out gov-
7 ernmental purposes.

8 “(2) NO EFFECT ON OTHER AMOUNTS.—The
9 retention of interest or income under paragraph (1)
10 shall not diminish the amount of funds an Indian
11 tribe is entitled to receive under a funding agree-
12 ment in the year the interest or income is earned or
13 in any subsequent fiscal year.

14 “(3) INVESTMENT STANDARD.—Funds trans-
15 ferred under this title shall be managed by the In-
16 dian tribe using the prudent investment standard,
17 provided that the Secretary shall not be liable for
18 any investment losses of funds managed by the In-
19 dian tribe that are not otherwise guaranteed or in-
20 sured by the Federal Government.

21 “(k) CARRYOVER OF FUNDS.—

22 “(1) IN GENERAL.—Notwithstanding any provi-
23 sion of an appropriations Act, all funds paid to an
24 Indian tribe in accordance with a compact or fund-
25 ing agreement shall remain available until expended.

1 “(2) EFFECT OF CARRYOVER.—If an Indian
2 tribe elects to carry over funding from 1 year to the
3 next, the carryover shall not diminish the amount of
4 funds the Indian tribe is entitled to receive under a
5 funding agreement in that fiscal year or any subse-
6 quent fiscal year.

7 “(1) LIMITATION OF COSTS.—

8 “(1) IN GENERAL.—An Indian tribe shall not
9 be obligated to continue performance that requires
10 an expenditure of funds in excess of the amount of
11 funds transferred under a compact or funding agree-
12 ment.

13 “(2) NOTICE OF INSUFFICIENCY.—If at any
14 time the Indian tribe has reason to believe that the
15 total amount provided for a specific activity under a
16 compact or funding agreement is insufficient, the In-
17 dian tribe shall provide reasonable notice of such in-
18 sufficiency to the Secretary.

19 “(3) SUSPENSION OF PERFORMANCE.—If, after
20 notice under paragraph (2), the Secretary does not
21 increase the amount of funds transferred under the
22 funding agreement, the Indian tribe may suspend
23 performance of the activity until such time as addi-
24 tional funds are transferred.

1 “(4) SAVINGS CLAUSE.—Nothing in this section
2 reduces any programs, services, or funds of, or pro-
3 vided to, another Indian tribe.

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

9 “(n) APPLICABILITY.—Section 202 of the Depart-
10 ment of the Interior Tribal Self-Governance Act of 2012
11 applies to subsections (a) through (m).

12 **“SEC. 409. FACILITATION.**

13 “(a) IN GENERAL.—Except as otherwise provided by
14 law (including section 202 of the Department of the Inte-
15 rior Tribal Self-Governance Act of 2012), the Secretary
16 shall interpret each Federal law and regulation in a man-
17 ner that facilitates—

18 “(1) the inclusion of programs in funding
19 agreements; and

20 “(2) the implementation of funding agreements.

21 “(b) REGULATION WAIVER.—

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

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

3 “(B) the basis for the request.

4 “(2) DETERMINATION BY THE SECRETARY.—
5 Not later than 120 days after receipt by the Sec-
6 retary and the designated officials under paragraph
7 (4) of a request under paragraph (1), the Secretary
8 shall approve or deny the requested waiver in writ-
9 ing to the Indian tribe.

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

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

18 “(5) GROUNDS FOR DENIAL.—The Secretary
19 may deny a request under paragraph (1)—

20 “(A) for a program eligible under para-
21 graph (1) or (2) of section 403(b), only upon a
22 specific finding by the Secretary that the identi-
23 fied text in the regulation may not be waived
24 because such a waiver is prohibited by Federal
25 law; and

1 “(B) for a program eligible under section
2 403(c), upon a specific finding by the Secretary
3 that the waiver is prohibited by Federal law or
4 is inconsistent with the express provisions of
5 the funding agreement.

6 “(6) FAILURE TO MAKE DETERMINATION.—If
7 the Secretary fails to approve or deny a waiver re-
8 quest within the period required under paragraph
9 (2), the Secretary shall be deemed to have approved
10 the request.

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

13 **“SEC. 410. DISCLAIMERS.**

14 “Nothing in this title expands or alters any statutory
15 authority of the Secretary in a manner that authorizes the
16 Secretary to enter into any agreement under section
17 403—

18 “(1) with respect to an inherent Federal func-
19 tion;

20 “(2) in a case in which the law establishing a
21 program explicitly prohibits the type of participation
22 sought by the Indian tribe (without regard to wheth-
23 er one or more Indian tribes are identified in the au-
24 thorizing law); or

1 “(3) that limits or reduces in any way the serv-
2 ices, contracts, or funds that any other Indian tribe
3 or tribal organization is eligible to receive under sec-
4 tion 102 or any other applicable Federal law.

5 **“SEC. 411. DISCRETIONARY APPLICATION OF OTHER SEC-**
6 **TIONS.**

7 “(a) IN GENERAL.—Except as otherwise provided in
8 section 101(c), at the option of a participating Indian tribe
9 or Indian tribes, any of the provisions of title I may be
10 incorporated in any compact or funding agreement under
11 this title.

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

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

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

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

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

23 “(1) be effective immediately; and

24 “(2) control the negotiation and resulting com-
25 pact and funding agreement.

1 **“SEC. 412. ANNUAL BUDGET LIST.**

2 “The Secretary shall list, in the annual budget re-
3 quest submitted to Congress under section 1105 of title
4 31, United States Code, any funds proposed to be included
5 in funding agreements authorized under this Act.

6 **“SEC. 413. REPORTS.**

7 “(a) IN GENERAL.—

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

11 “(2) ANALYSIS.—Any Indian tribe may submit
12 to the Office of Self-Governance and to the appro-
13 priate Committees of Congress a detailed annual
14 analysis of unmet tribal needs for funding agree-
15 ments under this title.

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

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

22 “(2) identify—

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

25 “(B) with particularity, all funds that are
26 specifically or functionally related to the provi-

1 sion by the Secretary of services and benefits to
2 self-governance Indian tribes and members of
3 Indian tribes;

4 “(C) the funds transferred to each Indian
5 tribe and the corresponding reduction in the
6 Federal employees and workload; and

7 “(D) the funding formula for individual
8 tribal shares of all Central Office funds, to-
9 gether with the comments of affected Indian
10 tribes, developed under subsection (d);

11 “(3) before being submitted to Congress, be dis-
12 tributed to the Indian tribes for comment (with a
13 comment period of no less than 30 days);

14 “(4) include the separate views and comments
15 of each Indian tribe or tribal organization; and

16 “(5) include a list of—

17 “(A) all such programs that the Secretary
18 determines, in consultation with Indian tribes
19 participating in self-governance, are eligible for
20 negotiation to be included in a funding agree-
21 ment at the request of a participating Indian
22 tribe; and

23 “(B) all such programs which Indian tribes
24 have formally requested to include in a funding
25 agreement under section 403(c) due to the spe-

1 cial geographic, historical, or cultural signifi-
2 cance of the program to the Indian tribe, indi-
3 cating whether each request was granted or de-
4 nied, and stating the grounds for any denial.

5 “(c) REPORT ON NON-BIA, NON-OST PROGRAMS.—

6 “(1) IN GENERAL.—In order to optimize oppor-
7 tunities for including non-Bureau of Indian Affairs
8 and non-Office of Special Trustee programs in
9 agreements with Indian tribes participating in self-
10 governance under this title, the Secretary shall re-
11 view all programs administered by the Department,
12 other than through the Bureau of Indian Affairs or
13 Office of the Special Trustee, without regard to the
14 agency or office concerned.

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

21 “(3) PUBLICATION.—The lists under subsection
22 (b)(5) and targets under paragraph (2) shall be pub-
23 lished in the Federal Register and made available to
24 any Indian tribe participating in self-governance.

25 “(4) ANNUAL REVIEW.—

1 “(A) IN GENERAL.—The Secretary shall
2 annually review and publish in the Federal Reg-
3 ister, after consultation with Indian tribes par-
4 ticipating in self-governance, revised lists and
5 programmatic targets.

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

13 “(d) REPORT ON CENTRAL OFFICE FUNDS.—Not
14 later than January 1, 2013, the Secretary shall, in con-
15 sultation with Indian tribes, develop a funding formula to
16 determine the individual tribal share of funds controlled
17 by the Central Office of the Bureau of Indian Affairs and
18 the Office of the Special Trustee for inclusion in the com-
19 pacts.

20 **“SEC. 414. REGULATIONS.**

21 “(a) IN GENERAL.—

22 “(1) PROMULGATION.—Not later than 90 days
23 after the date of enactment of the Department of
24 the Interior Tribal Self-Governance Act of 2012, the
25 Secretary shall initiate procedures under subchapter

1 III of chapter 5 of title 5, United States Code, to
2 negotiate and promulgate such regulations as are
3 necessary to carry out this title.

4 “(2) PUBLICATION OF PROPOSED REGULA-
5 TIONS.—Proposed regulations to implement this title
6 shall be published in the Federal Register not later
7 than 21 months after the date of enactment of the
8 Department of the Interior Tribal Self-Governance
9 Act of 2012.

10 “(3) EXPIRATION OF AUTHORITY.—The author-
11 ity to promulgate regulations under paragraph (1)
12 shall expire on the date that is 30 months after the
13 date of enactment of the Department of the Interior
14 Tribal Self-Governance Act of 2012.

15 “(b) COMMITTEE.—

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

21 “(2) LEAD AGENCY.—Among the Federal rep-
22 resentatives described in paragraph (1), the Office of
23 Self-Governance shall be the lead agency for the De-
24 partment.

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

6 “(d) EFFECT.—

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

9 “(2) CONFLICTING PROVISIONS.—Subject to
10 section 202 of the Department of the Interior Tribal
11 Self-Governance Act of 2012, this title shall super-
12 sede any conflicting provision of law (including any
13 conflicting regulations).

14 “(3) EFFECTIVENESS WITHOUT REGARD TO
15 REGULATIONS.—The lack of promulgated regula-
16 tions on an issue shall not limit the effect or imple-
17 mentation of this title.

18 **“SEC. 415. EFFECT OF CIRCULARS, POLICIES, MANUALS,
19 GUIDANCE, AND RULES.**

20 “Unless expressly agreed to by a participating Indian
21 tribe in a compact or funding agreement, the participating
22 Indian tribe shall not be subject to any agency circular,
23 policy, manual, guidance, or rule adopted by the Depart-
24 ment, except for—

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

2 and

3 “(2) regulations promulgated pursuant to sec-

4 tion 414.

5 **“SEC. 416. APPEALS.**

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

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

12 and

13 “(2) the consistency of the decision with the re-

14 quirements and policies of this title.

15 **“SEC. 417. APPLICATION OF OTHER PROVISIONS.**

16 “Section 314 of the Department of the Interior and
17 Related Agencies Appropriations Act, 1991 (Public Law
18 101–512; 104 Stat. 1959), shall apply to compacts and
19 funding agreements entered into under this title.

20 **“SEC. 418. AUTHORIZATION OF APPROPRIATIONS.**

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

23 **SEC. 202. EFFECT OF CERTAIN PROVISIONS.**

24 (a) DEFINITIONS.—In this section:

1 (1) FUNDING AGREEMENT.—The term “fund-
2 ing agreement” means a funding agreement entered
3 into under section 403 of the ISDEAA (25 U.S.C.
4 458cc).

5 (2) ISDEAA.—The term “ISDEAA” means
6 the Indian Self-Determination and Education Assist-
7 ance Act (25 U.S.C. 450 et seq.).

8 (3) NON-BIA PROGRAM.—The term “non-BIA
9 program” means all or a portion of a program, func-
10 tion, service, or activity that is administered by any
11 bureau, service, office, or agency of the Department
12 of the Interior other than through—

13 (A) the Bureau of Indian Affairs;

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

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

18 (4) SECRETARY.—The term “Secretary” means
19 the Secretary of the Interior.

20 (5) SELF-DETERMINATION CONTRACT.—The
21 term “self-determination contract” means a self-de-
22 termination contract entered into under section 102
23 of the ISDEAA (25 U.S.C. 450f).

24 (6) TRIBAL WATER SETTLEMENT.—The term
25 “tribal water settlement” means any settlement,

1 compact, or other agreement entered into by an In-
2 dian tribe and the United States, or by an Indian
3 tribe, the United States, and one or more parties
4 that—

5 (A) settles or quantifies any Federal re-
6 served water rights or any claims relating to
7 those rights of the Indian tribe; and

8 (B) has been authorized by an Act of Con-
9 gress.

10 (b) EFFECT OF PROVISIONS.—Nothing in this Act
11 (including this section) or any amendment made by this
12 Act (including section 414 of the ISDEAA (relating to
13 regulations), as added by section 201)—

14 (1) modifies or affects the meaning, application,
15 or effect of—

16 (A) section 102(a)(1)(E) of the ISDEAA
17 (25 U.S.C. 450f(a)(1)(E)), as in effect on the
18 day before the date of enactment of this Act; or

19 (B) paragraph (2) or (3) of subsection (b)
20 or subsection (c) of section 403 of the ISDEAA
21 (25 U.S.C. 458cc), as in effect on the day be-
22 fore the date of enactment of this Act;

23 (2) increases, limits, modifies, or otherwise af-
24 fects any authority of the Secretary that the Sec-
25 retary held on the day before the date of enactment

1 of this Act under section 403(c) of the ISDEAA (25
2 U.S.C. 458cc(e));

3 (3) authorizes the inclusion of any non-BIA
4 program in—

5 (A) a self-determination contract as a pro-
6 gram under section 102(a)(1)(E) of the
7 ISDEAA (25 U.S.C. 450f(a)(1)(E)) if the in-
8 clusion of that non-BIA program in a self-de-
9 termination contract as a program under that
10 section would not have been authorized under
11 the ISDEAA on the day before the date of en-
12 actment of this Act;

13 (B) a funding agreement as a program
14 under section 403(b)(2) of the ISDEAA (25
15 U.S.C. 458cc(b)(2)) if the inclusion of that non-
16 BIA program in a funding agreement as a pro-
17 gram under that section would not have been
18 authorized on the day before the date of enact-
19 ment of this Act; or

20 (C) a funding agreement as a program
21 under section 403(c) of the ISDEAA (25
22 U.S.C. 458cc(e)) if the inclusion of that non-
23 BIA program in a funding agreement as a pro-
24 gram under that section would not have been

1 authorized under the ISDEAA on the day be-
2 fore the date of enactment of this Act;

3 (4) modifies or otherwise affects the meaning,
4 application, or effect of any provision of law that—

5 (A) is not contained in the ISDEAA; and

6 (B) expressly authorizes or prohibits con-
7 tracting or compacting under title I or title IV
8 of the ISDEAA with respect to a specific pro-
9 gram or project that is identified or otherwise
10 referred to in that provision of law;

11 (5) modifies or otherwise affects the meaning,
12 application, or effect of, or the performance required
13 of a party, or any payment or funding under—

14 (A) a tribal water settlement; or

15 (B) any Act of Congress approving, au-
16 thorizing, or ratifying a tribal water settlement;

17 or

18 (6) authorizes any self-determination contract
19 or funding agreement or approval of any self-deter-
20 mination contract or funding agreement under the
21 ISDEAA (as amended by section 201) that would
22 authorize an Indian tribe to plan, conduct, consoli-
23 date, administer, or receive funding for any pro-
24 gram, project, or activity that is required, author-
25 ized, or funded by a tribal water settlement or an

1 Act of Congress approving, authorizing, or ratifying
2 a tribal water settlement in a manner that is incon-
3 sistent with the terms of that tribal water settlement
4 or that Act of Congress.

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