

**TESTIMONY
OF
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U.S. DEPARTMENT OF THE INTERIOR
BEFORE THE
HOUSE NATURAL RESOURCES COMMITTEE
ON
H.R. 4347 THE DEPARTMENT OF THE INTERIOR
TRIBAL SELF-GOVERNANCE ACT**

JUNE 9, 2010

Good morning, Chairman Rahall, Ranking Member Hastings, 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 Governance program and H.R. 4347, the Department of the Interior Tribal Self-Governance Act. 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 and he is committed to working to fully enable tribal self-governance.

This Administration believes in Indian self-determination. Furthermore, we believe that Indian leadership is critical in facing and solving the problems of today, and that Indians must have a voice in programs and government efforts which are important to their lives. During the opening remarks delivered by President Obama at the Tribal Nations Conference held on November 5, 2009, the President affirmed that he is "absolutely committed to moving forward with [Tribes] and forging a new and better future together. It's a commitment that's deeper than our unique nation-to-nation relationship. It's a commitment to getting this relationship right, so that you can be full partners in the American economy, and so your children and your grandchildren can have a equal shot at pursuing the American Dream." In the spirit of our ongoing efforts to get this relationship right, we hope that this statement can lead to productive dialogue and perhaps to improvements in our application of the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. 450 et seq.).

I want to begin by underscoring that in general, the Department of the Interior (Department) supports ISDEAA. We appreciate the ways that funding agreements under this Act have helped to strengthen the government-to-government relationship with Tribes. We support appropriate strengthening of the existing ISDEAA to make it work better for the Federal government and for Tribes. Self-governance Tribes have been good managers of the programs they have undertaken. Many times, Tribes add their own resources to the programs and are able to fashion programs to meet their needs and the particular needs of their members. Tribes are also better suited to address the changing

needs of their members. Tribes 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.

However, while our support for the principles of self-determination and self-governance is unequivocal, H.R. 4347 as currently drafted poses significant practical and legal problems with regard to appropriate management of federal funding and programs. This legislation deals not only with funding agreements between Tribes and BIA, but also funding agreements between tribes and non-BIA bureau programs within Interior. We are interested in discussing how to improve and increase the frequency of these agreements, but under this legislation as drafted there is very little ability on the part of the Secretary to maintain appropriate levels of control over the programs that would be subject to self-governance contracting. Given the breadth of the Department's responsibilities, this legislation could significantly hinder the Department's ability to accomplish its statutory mandates by limiting Secretarial discretion and allowing for the transfer of certain functions that should appropriately be maintained at the Federal level.

The Administration continues to analyze this complex bill. Nevertheless, the Department has identified significant concerns with this bill as drafted. We would like to work with the Committee and tribal representatives to discuss Departmental concerns with this legislation. We also note the bill as introduced reflects efforts by the bill proponents to address some of the issues raised by the Department when we testified on a similar bill two years ago. 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 certain 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 adding Title IV, establishing a program within the Department of the Interior to be known as Tribal Self-Governance. The addition of Title IV made Self-Governance a permanent option for tribes. These amendments, in section 403(b), authorize federally recognized tribes that meet criteria established for the program to negotiate funding agreements with the Department for programs, services, functions or activities administered by the Bureau of Indian Affairs (BIA) and, within certain parameters, 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 providing for a now-completed study to determine the feasibility of

conducting a Self-Governance Demonstration Project in other programs of that department.

Current law allows federally recognized Tribes and tribal consortiums to assume programs administered by the Department's bureaus and offices other than the BIA, 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 administered by the Secretary which are of special geographic, historical, or cultural significance to the participating Tribe 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 also fund agreements under the authority of 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, tribes 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, tribes have authority for BIA programs to redesign or consolidate programs, services, functions, and activities other than construction. In addition, self-governance tribes can reallocate funds during the year and carry over unspent funds into the next fiscal year without Secretarial approval. As a result, these funds can be used with relative flexibility to address each tribe'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 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.

Because the Administration recognizes the need to fund Tribes for the work they do on behalf of the Federal government, the President's proposed 2011 budget for the Bureau of Indian Affairs provides an increase of \$19.5 million for Contract Support. This is one of the highest priorities for the Tribes. Current appropriations fund the majority of direct and indirect costs needed by Tribes to administer programs under P.L. 93-638. The

budget also addresses one-time start up costs for new funding agreements with an additional \$2 million for the Indian Self Determination Fund. There is also an increase of \$3.0 million for Small and Needy Tribes, which is intended in part to encourage a more diverse group of Tribes to enter into contracts.

The budget also increases funding for Tribal Grant Support Costs in the Bureau of Indian Education, raising the support to approximately 66 percent of total direct and indirect costs. This program fosters self-determination by providing resources for Tribes to directly operate BIE-funded schools under contract or grant authorization.

Successes

Many Tribes have been successful implementing Self-Governance programs to meet their tribal needs. A few of the many success stories will be mentioned here. For example, the Chickasaw Nation accomplishments in 2006 included providing education services to 7,209 students. 945 students participated in remedial education and tutoring and 82% of the students receiving tutoring gained one grade level or more. Scholarships were provided to 181 undergraduate students and 43 graduate students. The Tribe's tribal district court heard 1,118 cases. It collected almost \$50,000 in court fees and over \$32,000 for restitution and child support. In January 2006, the Tribe's Supreme Court and district court were audited by a team from the BIA central office and received excellent ratings. The Tribe also provided career counseling, skills assessment, aptitude testing, and other employment readying services to 1,320 clients. The Tribe coordinated a job fair that attracted 53 vendors and over 500 job seekers. The Tribe's police department implemented a new computer system which has aided in multiple dispatching methods and improved data collection, investigation, and crime analysis and reporting. This example is just one of many where Tribes have been successful in directly administering federal programs.

Section 403(b)(2) of Title IV of ISDEAA authorizes other bureaus within the Department to enter into funding agreements with Tribes subject to such terms as may be negotiated between the parties. The Council of Athabascan Tribal Governments (CATG) has successfully implemented Annual Funding Agreements (AFAs) since 2004 to perform activities in the Yukon Flats National Wildlife Refuge in 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.

Activities subject to the AFAs include: 1) wildlife harvest data collection; 2) Yukon Flats moose management, including estimating moose populations (in cooperation with the Alaska Department of Fish and Game) and establishing the Yukon Flats Moose

Management Steering Committee to enhance outreach efforts and increase communications with local residents regarding Yukon Flats National Wildlife Refuge moose management activities; and (3) maintaining 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.

A true partnership and spirit of cooperation has developed from the history of controversy between the FWS and the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation over the National Bison Range Complex in Montana. Effective on October 1, 2008, a funding agreement for fiscal years 2009–2011 provides for an on-the-ground partnership in the management of programs by the CSKT on 4 units of the Refuge System, located on the Flathead Indian Reservation in Montana. In January 2009, under the direction and decision-making authority of the Refuge Manager, CSKT assumed management of the biological, maintenance, fire management and portions of the visitor services programs. CSKT staff have participated in a variety of FWS sponsored trainings and the bison round-up event in October 2009 was highly successful. In fiscal year 2009, FWS provided approximately \$1.7 million to CSKT, including a \$650,000 for a ARRA-funded bridge replacement project. Approximately \$986,000 will be transferred to the CSKT for operations in fiscal year 2010.

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. 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 completed.

The Bureau of Reclamation has also had successes implementing the current law. In FY2009, Reclamation had five annual funding agreements with five Tribes, totaling about \$67 million, which includes ARRA funds. 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 P.L. 93-638 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 (CCCC), 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.

One of the most exciting demonstrations of the success of Tribes that participate in Self-Governance programs has been their recognition from Harvard's Kennedy School of Government through the Honoring Nations Award, which celebrates outstanding examples in Tribal Governance. One recipient of the Award was the Cherokee Nation. The Nation received an award for the history course that is required for all employees. The course provides employees with a strong sense of pride and a solid understanding of self-governance. It has changed their self-perception from being service recipients to that of service providers and active citizens. Another recipient was the Oneida Nation (Wisconsin). They were recognized for their achievement in creating an Oneida Nation Farm and Agricultural Center which merged land use and sustainable development. The Farm and Agricultural Center provides for economic development and the use of the land in a manner that recognizes and respects traditional and cultural values.

Recently, the Osage Nation received "High Honors" from Harvard's Honoring Nations program for its successful efforts toward achieving governmental reform. The Osage Nation's Government Reform Initiative was recognized for its successful design of a new government that could better represent and serve all Osages. The Gila River Indian Community is another Self-Governance tribe that received a past Honoring Nations Award for dramatically improving its capacity in law enforcement and public safety. Since compacting for tribal control, the Gila River Indian community police improved effectiveness and efficiency of service to their community.

Major Concerns with H.R. 4347

I will highlight a number of our specific concerns, although there are others that we would like to discuss with Tribes and this Committee. First, and of concern from the perspective of the overall Departmental budget are provisions of this legislation that would potentially reduce the Secretary's discretion to reallocate funds among different programs as a result of changing priorities and the emergence of new critical needs. As we interpret various provisions of this bill, including section 413 as proposed in title II, programs or projects that are funded through Title IV funding agreements under H.R. 4347 would have to be specifically identified in the President's budget submissions to Congress. Further, the bill potentially limits the discretion of the Secretary or the President to make a determination about the relative priority of programs for budget purposes, and may give an advantage to the programs funded through Title IV

agreements. This could result in the reduction of important programs, such as law enforcement and education.

Second we are concerned about several of the provisions in the bill concerning construction, several of which will be identified here. One concern is provisions allowing the “redesign and consolidation” of projects, found in sections 103 and 406(d) (as proposed in title II). Read together with section 408 (as proposed in title II), which allows Tribes to carry out construction projects under self-governance funding agreements, the provisions on “redesign and consolidation” appear to give Tribes the ability to unilaterally change construction project design. Construction projects may be subject to very specific authorizations and the Secretary needs to retain an appropriate level of oversight to ensure that the construction is carried out in accordance with the Congressional authorization.

We also have concerns about the potential lack of flexibility to negotiate adequate oversight of planning and design, as well as construction inspection, for construction projects over which the Secretary maintains long-term responsibilities, or which have public safety implications, such as dam construction activities or other activities related to safety of dams. Additionally, we are concerned that section 408 (as proposed in title II) does not adequately deal with various construction contingencies and that as a result there are potential liabilities for both the Secretary and the contracting tribes. For example, section 408 does not deal with the possibility of a construction project being started but not completed, perhaps due to lack of funds or some other unforeseen circumstance. At the very least, concerns about the respective liabilities of the Secretary and the Tribes in such circumstances should be dealt with up front, as part of the agreement relating to the construction project.

Third, we want to draw the Committee’s attention to section 408(b) as proposed in title II of this legislation, under which Tribes carrying out construction projects under self-governance funding agreements have the option of assuming “Federal responsibilities” under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and “related provisions of law that would apply if the Secretary were to undertake a construction project.” The bill language requires that the Tribe accept the jurisdiction of Federal courts to enforce the responsibilities of the responsible Federal agency under the relevant law. We are aware that this authority exists for the Indian Health Service at 25 USC 458aaa-8 and that similar authority exists under the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA), such that tribes assume federal NEPA responsibility for NAHASDA and Indian Community Block Grant projects funded by the federal Department of Housing and Urban Development (HUD). While we understand that the delegation of authority has worked in these contexts, we are concerned that NEPA decision-making in the context of the Department’s natural-resource management missions involves more complex balancing of missions and requires very specialized policy expertise. We want to discuss ways of involving Tribes more closely in environmental and other types of compliance for relevant projects consistent with the regulations of the Council on Environmental Quality implementing NEPA, the regulations of the Advisory Council on Historic Preservation

implementing the NHPA, and other government-wide requirements. We have concerns with and do not support language delegating to Tribes the Federal responsibility for making a determination of policy under NEPA, the NHPA, and related environmental and cultural compliance requirements for Department bureaus. This is particularly the case for some of the larger construction projects sometimes undertaken by Department bureaus which have the potential to affect many diverse communities, threatened and endangered species, and cultural treasures.

Fourth, we note that Section 405(b)(2) as proposed in title II of this legislation would establish three demonstration projects, for each of which the Department would be required to make available designated programs, functions, services, activities, or portions thereof to designated tribes for the period 2011-2015 under Title I or Title IV of P.L. 93-638. We have met four times with the Tribal Self-Governance Title IV Task Force, including the tribes who would undertake the demonstration projects, with the most recent meeting occurring on April 8, 2010. In one of the meetings with this group, the demonstration projects were discussed with the respective tribes. Each tribe provided a brief description of the planned demonstration projects and identified certain goals. However, the legislation does not include measures for success in the proposed demonstration projects, nor is the purpose of selecting these particular projects as demonstration projects specified. Since there are already many examples of successful operations of self-governance programs, which are discussed later in this statement, we question the need for the inclusion of these particular projects as mandatory demonstration projects.

Moreover, we object to the requirement described in Section 405(b)(2)(A) that the Bureau of Reclamation make available to the Hoopa Valley Tribe all programs, functions, services and activities “carried out under Public Law 102-575 for the purpose of restoring the Trinity River fishery.” Under P.L. 102-575, Reclamation works with multiple entities to restore Trinity River fisheries to their pre-dam levels. These include the Hoopa Valley Tribe and the Yurok Tribe, with whom Reclamation entered into Title IV funding agreements in FY2009 in the amounts of \$1.5 and \$1.4 million respectively. These funding agreements constituted about one-third of FY 2009 Trinity River project funding. The scope of the Trinity River restoration program is large; in addition to working with the tribes, Reclamation also works with the states of California and Oregon, Trinity County, power companies; Central Valley water districts; other federal bureaus, and numerous private landowners along the Trinity River. The Department believes that, given this broad range of interests, it is important for the effectiveness of the program for the Federal role to be maintained. While we consider Hoopa Valley Tribe an important partner in the Trinity River Restoration, we must be mindful of the Federal responsibility to a broad range of stakeholders in the basin.

Conclusion

While we appreciate the effort made to address some of the concerns raised by the Department two years ago, we have significant concerns with the bill. We would like to

continue to work with this Committee and Tribes 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 Tribes. Many challenges face our Native American communities. This Administration is committed to working with this Committee and with Tribes 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.