

# Committee on Resources

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## Witness Testimony

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**TESTIMONY OF HENRY CAGEY  
CHAIRMAN, THE LUMMI INDIAN NATION  
BEFORE THE RESOURCES COMMITTEE  
OF THE U.S. HOUSE OF REPRESENTATIVES  
MARCH 17, 1998**

Mr. Chairman, members of the Committee, I wish to thank the Committee for the opportunity to testify today. I am the Chairman of the Lummi Indian Nation, which has Self-Governance Compacts and Funding Agreements with both the Department of the Interior and the Department of Health and Human Services. The Lummi Indian Nation also administers the Self-Governance Education and Communication Project on behalf of a Six Tribe Consortium under grants from both departments. In addition, I am appearing as the Chairman of the Title V Tribal Task Force. This Task Force was designated by Self-Governance Tribes at a national Self-Governance conference to work on the development of permanent legislative authority (known as Title V) for Tribal Self-Governance in the Indian Health Service (IHS).

To begin with, we wish to compliment Chairman Young and Congressman Miller for the leadership they have shown in introducing H.R. 1833, as well as their long-term support of Tribal Self-Governance. This Bill reflects many of the elements that have characterized the evolution of Self-Governance. It is a Tribally developed and driven initiative produced with bipartisan Congressional support.

### **Background**

We believe it is important to reflect on why we developed Self-Governance and to keep in clear focus the policy goals that we seek to achieve. Self-Governance is fundamentally designed to provide Tribal governments with control and decision-making authority over the Federal financial resources provided for the benefit of Indian people.

Tribal societies were self-sufficient for thousands of years prior to western European exploration and colonization of this continent. Tribal cultures and governing systems contributed to the basic democratic philosophies embodied in the United States Constitution. Valuable Tribal resources changed European civilization. Through the course of dealings with the United States, often through formal treaties, Tribes relinquished ownership to millions of acres of land, containing invaluable natural resources. In exchange, the United States, as Trustee for Tribes, was to protect Tribal sovereignty or self-governing status, protect Tribal lands and other resources and rights, as well as provide services to Indian people.

At best, these promises were not well kept. Instead, Tribal self-sufficiency was replaced as the United States, particularly through its Federal bureaucracy, transformed, sometimes brutally, independent Tribal status into virtual Tribal dependency. However, in each generation, Tribal spiritual elders and Tribal leaders reminded Indian people of their rightful role as Self-Governing Indian Nations in a government-to-government relationship with the United States.

In the nineteenth century, the removal of Tribes to Reservations, accompanied by the suppression of traditional governance and customs, the imposition of Federal military or Indian agents, the Bureau of Indian Affairs (BIA) police, and the use of rations to replace traditional work and food, induced great Tribal dependency on the Federal bureaucracy. It almost became the norm for the Federal government to regulate or determine (often by inaction) most governmental matters on Reservations.

In the twentieth century, with the exception of the notorious "termination era" of the 1950's and 1960's, Federal Indian policy, albeit not very effective or consistent, has been to support the revitalization of Tribal Governments. The 1921 Snyder Act and the 1934 Indian Reorganization Act reflect this imperfect effort.

In 1975, Congress enacted P.L. 93-638 that set a fundamental turning point in modern Federal Indian policy. This legislation, the Indian Self-Determination and Education Assistance Act, envisioned a critical change - Tribes would be allowed to operate Federal programs on their Reservations through what has become known as Self-Determination contracts. The process of returning decision-making and funds to local Tribal governments had begun in earnest.

Some Tribes, however, were concerned that the Self-Determination Act would cause or result in the termination of or a diminution of the Federal Trust Responsibility. These fears have not come to pass. Neither, however, did Self-Determination contracting result in the scope of transfer of power and resources to Tribes as originally envisioned. Instead of reducing bloated Federal bureaucracies, the agencies used Self-Determination contracting to support a new Federal industry -- contract compliance. By the mid-1980's, Self-Determination contracts, originally conceived as simple documents, had evolved to literally hundreds of pages -- with every variety of oversight requirements, reports, and forms; a true bureaucratic nightmare. Clearly reform was required. As Tribal advocates and Congress struggled with how to fix Self-Determination contracting, a series of 1987 articles in the Arizona Republic focused attention on severe bureaucratic abuse in both the IHS and the BIA.

These articles served as a catalyst to action. The then-Chairman of the House Appropriations Subcommittee on Interior and Related Agencies, Sidney Yates, invited the Department of the Interior Assistant Secretary for Indian Affairs and Tribal leaders to propose new solutions or options. Although Chairman Yates and the Tribal leaders thought a consensus had been struck on streamlining the delivery of funds and decision-making to Reservation communities, the Department proposed an amendment to the Self-Determination Act to provide "revenue sharing" to Reservations in exchange for a waiver of the Federal Trust responsibility to Indians. Tribal leaders opposed this action and instead developed their own legislative proposals -- proposals that became Self-Governance.

### **The Self-Governance Demonstration Project**

Tribes, cognizant that so-called "good" ideas of previous laws and reforms had produced some unexpected disastrous results, opted to proceed cautiously. We designed a Project that began with research, allowed experimentation, and was limited to a few (10) volunteer Tribes to determine the best mechanism(s) for delivering financial resources and decision-making to the Reservation. Chairman Yates provided the funds for these Tribes to begin the planning. The Authorization Committees developed, with substantial Tribal input, a Bill that became P.L. 100-472, which provided for some reform of Self-Determination contracting. Title III of that law authorized the establishment of the Demonstration Project. Initially, Departmental opposition was fierce. For example, the appropriations planning funds specifically designed for 10 Tribes was published as grant applications for 50 Tribes. The efforts of Tribal leaders, with able assistance from Chairman Yates and the support of Secretary Manuel Lujan, was critical in getting the Demonstration

Project to move forward. Critical progress was made; a model compact outlining the government-to-government relationship was developed. Simple, straight-forward documents for funding transfers termed "Funding Agreements" were developed to replace contracts; a means to assure that Tribal trust resources were protected was negotiated; and, fundamentally the concept was developed that once a Tribe established its fiscal and planning eligibility, it had unequivocal right to its "Tribal share" of the financial resources that Congress had provided for Indians. Gone was contract compliance; gone was "big brother" second guessing Tribes at every turn. In 1991, the Indian Health Service was added to the Demonstration Project by Congress in P.L. 102-184.

### **Permanent Legislation -- Department of the Interior**

In 1994, after six years of research and actual experience, Tribes were determined and Congress was receptive to making Self-Governance a permanent part of the Bureau of Indian Affairs (BIA) within the Department of the Interior. At the suggestion of the Secretary, Congress also provided for funding agreements with other agencies within the Department with terms to be negotiated where the Indian Tribe had an historical, cultural or geographic association with the program. Congress had determined that Self-Governance was an "effective way to implement the Federal policy of government-to-government relations with Indian Tribes," and that "transferring control to Tribal governments, upon request, over funding and decision-making for Federal programs, services, functions, and activities, strengthens the Federal policy of Indian Self-Determination."

This permanent authority, known as Title IV, was contained in P.L. 103-413; amendments to the Self-Determination Act to again reform Self-Determination Contracting. Interestingly, Title IV reflected some of the reforms designed for contracting and the contracting amendments, likewise contained many of the concepts developed in Self-Governance. Today, some 206 Tribes (including consortia and Tribal organizations) have Compacts and or funding agreements, accounting for \$180 million in fund transfers to Tribes from the Department of the Interior.

Title IV was skeletal legislation requiring rule-making to fill in the details for implementation. The Title IV rule-making effort, which had no enforceable deadlines, no mechanisms for resolving agency-Tribal disputes, and no limitations on Secretarial rule-making authority, has proven to be quite conflicted and very difficult to resolve.

### **Permanent Legislation - Indian Health Service**

H.R. 1833 is much more detailed legislation than Title IV and that is appropriate. It attempts to provide the full framework for Self-Governance at IHS and limits the need for rule-making substantially. The Tribes that I am speaking for today support the thrust and policy of H.R. 1833. We also support the vast majority of the Bill as currently drafted. We are also submitting resolutions of support from various Tribal entities under separate cover. Key provisions of H.R. 1833 include:

Establish the Self-Governance Initiative as a permanent part of IHS;

Provide authorization of "demonstration" projects for other non-IHS programs administered by the DHHS (subject to terms that the Tribe and Secretary may agree upon);

Describe eligibility criteria for selection of participating Tribes;

Authorize Tribes to negotiate Compacts and Funding Agreements with the Secretary and identify the contents of these compacts and agreements;

Set out mandatory and non-mandatory provisions relating to both the Secretary's and Tribes' obligations;

Provide for the transfer of responsibilities and funds to Tribes;

Provide for the establishment of annual mandatory reporting requirements; and,

Give the Secretary limited authority to promulgate regulations implementing Title V.

We will be submitting to the Committee our recommendations for amendments to H.R. 1833. We have worked with due diligence with the IHS and DHHS to resolve the concerns and issues that they have identified to us. We believe that we have been essentially successful. If issues remain, we will endeavor within the goals and policies of Self-Governance to resolve those issues. There are, however, a few areas of concern that we need to address today.

H.R. 1833 does not contain the concept of "*Stable Base Funding*". This is an important concept that allows Tribes some certainty in their year-to-year funding. We have experimented with this successfully during the demonstration phase and believe it would be a valuable addition to the Bill.

"*Subsequent Funding Agreements*" are also not provided for in H.R. 1833. This provision would allow a funding agreement to remain in place until a new agreement is successfully negotiated. The provision is designed to prevent gaps in authority (e.g., Federal tort claims coverage) or funding.

Section 507(a)(2), *Reassumption*, provides for two standards upon which the Secretary may reassume the responsibilities of programs operated by Tribes pursuant to Compacts or funding agreements. These standards include concepts such as "violation of rights of....any persons," "endangerment of the health, safety, or welfare" or "mismanagement in the performance of the compact or funding agreement". While no one is advocating any level of mal-performance of any governmental responsibilities, the standards are broad concepts, with no clear legal meaning. Two decades of experience with contract compliance under Title I have shown that agencies have a superhuman capacity for abuse of vague standards.

We recommend the standard of "*imminent endangerment of the public health caused by an act or omission of the Indian Tribe...*" to govern Reassumption. This is the standard adapted for public health that we had developed in the Demonstration Project and it is the concept adopted in Title IV. While we are willing to discuss this matter, it is important to clearly indicate that we are steadfastly opposed to any Departmental discretion to effect unilateral decisions with respect to IHS programs.

In section 517, a subsection should be added to clarify that the whole variety of circulars, rules, and array of instructions that have not been duly promulgated under the Administrative Procedures Act, do not apply to Compacts or funding agreements absent of Tribal consent. This whole category of pseudo legal "requirements" has beleaguered the Self-Determination Act since its inception and should be clearly barred.

Sections 102 and 110 of the Self-Determination Act require Congressional clarification. It makes no legislative sense for Congress to have labored to provide specific Federal court relief for Tribes from adverse agency decisions if those provisions provide no more than has previously existed under the Administrative

Procedures Act. Our recommended clarifications specify that trial de novo is required in Federal court and that plaintiff Tribes should have full discovery rights.

Section 105 (k) of the Self-Determination Act should also be clarified to allow Tribal health programs to stretch limited Federal dollars to purchase pharmaceuticals and other supplies as if they were the IHS.

A final comment on the Bill relates to the very tight *Rule-making* requirements contained in H.R. 1833 with which we understand the Administration may be concerned, but which we strongly support. Recently, after years of frustration, Title I Rule-making was successfully concluded under very similar strictures as proposed in H.R. 1833. These narrow rules, with their constraints on Departmental discretion, evolved after a decade long experience of frustration and failure at rule-making; an experience that at one point required Congressional intervention to prohibit the Agencies from promulgating regulations. Our own experience in Title IV suggests that without the removal of authority to promulgate regulations outside of the Rule-making process, there is no imperative to reach compromise or consensus.

As noted above, the fact that we will be providing additional detailed comments and recommendations for amendments to H.R. 1833 does not detract from our support for the work that has been done and our appreciation to the Committee for aggressively moving forward to make Self-Governance permanent at the Indian Health Service.

The balance of my testimony will focus on my Tribes' experiences concerning how Self-Governance has improved health care delivery at the Lummi Indian Reservation.

### **Lummi Nation Experience with IHS Self-Governance**

Following are some of the improvements that have been possible for the Lummi Nation under Self-Governance. We fully believe that the benefits to Tribal members realized under Tribal Self-Governance will be preserved and enhanced through the proposed Title V Legislation.

#### **End of the IHS Deferred Services Lists**

Under IHS management, the Lummi Nation Health Clinic maintained lists of patients whose diagnosed health services needs could not be provided due to budget constraints. Deferred services lists were common for dental, optical, and even chronic conditions such as diabetes. During the traditional end-of-the-year budget crunch, diabetics were required to save and re-use disposable syringes in order to save funds. After only three (3) years of Tribal management, with literally the same level of funding, there are no deferred services lists for the Lummi Indian Nation. This is a major improvement in the basic health available to the Nation which was only possible through the Self-Governance Initiative.

This does not mean an end to the development of the Lummi Nation Health Care System. It is, however, the beginning of a new era of Tribally-directed development which holds the promise of reaching the level of health care service now enjoyed by most Americans. This promise was not fulfilled by IHS.

#### **Tribal Veterans Services Office**

In 1991, the Lummi Nation utilized its authority under the Self-Governance Initiative to fund the development and operation of a Tribal Veterans office. As some of you may know, a U.S. Veterans Administration study in the late 1980's determined that less than five percent (5%) of Native Americans

Veterans received the benefits they earned through service to the United States of America. The Lummi Indian Nation is proud that nearly 25% of its members are either Veterans or dependents of Veterans. The IHS does not provide funds to assist Tribal Veterans to access these services. While Lummi Nation funds were controlled by the IHS, it could not address the problems of its veterans. Under the Self-Governance Initiative, the Lummi Nation has the flexibility to address the real needs of its membership.

### Public Health Initiative

Under the Self-Governance Initiative, the Lummi Nation has assumed the Public Health functions of IHS. We have entered into negotiations with the State of Washington, Public Health System to perform these functions through the State system at the local level.

### Lummi Health Care and Status Planning

Under Self-Governance, the Lummi Nation has been able to take the lead in assessing and planning for the health care and health status of Lummi people. The Lummi Nation Health Department has completed an adult and adolescent behavioral risk survey. This is the first time that the Lummi Nation has enjoyed the flexibility to study ourselves and to determine for ourselves what services our health care program will provide. Based on our own planning information, we are now developing a twenty (20) year plan to continuously monitor, assess and provide for positive impacts on the health care and health status of Lummi people.

### Health Promotion Center

The Lummi Nation has been able to fund the development and construction of a Health Promotion Center. This Center will enable Lummi Nation patients to receive physical therapy on the reservation in a familiar setting in conjunction with medical providers.

### Seniors Assisted Living Center

The Lummi Nation has secured funding from a variety of sources including HUD, IHS, Private bond funding and Washington State Housing Trust Funds to support the construction of a 28 unit Seniors Assisted Living Center. The Lummi Nation has also secured funding from Washington State to operate the facility, once constructed, and rented out. Services will include limited medical and comprehensive support services designed to provide the least restrictive environment possible.

### Tribal Member Participation Increased

Tribal participation in the operation of Tribal government has significantly increased due to the Self-Governance Initiative. Under Self-Governance, the Tribe is able to factor in Tribal members' preferences in allocating resources. Bringing government and services closer to the people results in more democratic participation. The number of eligible voters actually voting in Tribal elections has more than doubled. Many jurisdictions in the United States do not have this level of voter turn out. Participation by Tribal members in Tribal elections have also translated into increased Tribal voter turnout for general elections.

### Increased Accountability and Responsibility of Tribal Government

Due to the increased participation of Tribal members, the Tribal government has become more accountable

to its constituency than in the past. Because of Self-Governance, we are able to incorporate Tribal members' needs into their plans. Previously, Tribal members' input would result in an explanation that IHS does not provide funding for their needs.

The Lummi Nation has reorganized to ensure that Tribal members can participate in the budget development process. Tribal members are able to participate through three different public hearings and through membership on the Tribal Budget Committee which is responsible for development of the first draft of the budget which is finally approved by the Tribal Council. The Tribal Budget Ordinance requires that the Tribal Council only approve a balanced budget, which is a subject of considerable discussion within the Tribe.

### Challenges for Change and Continued Development

These are exciting and challenging times for Tribal governments. The Lummi Nation and many other Tribes have demonstrated their willingness to develop the changes that are needed to meet future and present challenges. In many cases, the Tribal governments have initiated these changes. However, Tribal governments are not able to implement change without adequate financial support.

### Reduced Need for Service Delivery Systems

With the growth of Tribal services delivery systems, Tribal governments have become less dependent on the assistance of IHS for service delivery. Tribal governments are pushing IHS, to perform more administrative tasks such as:

- Assisting Tribal governments to get their needs to factor equitably into the President's budget request and into final Congressional appropriations;

- Assisting Tribal governments' efforts to waive, modify or change Federal regulations consistent with Tribal resource needs and opportunities;

- Requesting apportionment of funding appropriated by Congress and authorizing distribution of funds to Tribal governments consistent with current funding agreements; and,

- Monitoring Tribal management of Trust resources and authorizing corrective action, as needed.

Tribes have yet to see these agencies actually reorganize to support these functions which will have continuing value for Tribal governments as they increasingly assume the service delivery functions of these two agencies. The hesitancy of both of these agencies to develop to meet the changing needs of their client groups is both puzzling and frustrating for Tribal governments. We believe the limit has been reached by bureaucracies in their willingness to yield authority and financial resources to Tribal governments.

The aforementioned experiences of the Lummi Indian Nation reflect the significant advances we have made under Self-Governance with both BIA and IHS. Self-Governance is working for the Lummi Indian Nation.

Simultaneously, we are faced with major challenges which have serious impacts on the health and health status of Tribal members at Lummi:

Welfare reform, which challenges our ability to provide job training and creation on an unprecedented scale, with fewer resources to support job training and creation than we had previously.

Housing: While housing needs on the Lummi Reservation are at an all-time high, funding for Housing and Urban Development has decreased over the past few years. Through the new Native American Self-Determination Housing Act, we are now challenged to develop comprehensive housing plans and programs.

## **Conclusion**

The foregoing demonstrates the considerable development in the governmental, legal, administrative and programmatic structures needed to support and implement Tribal Self-Governance within IHS and within the Tribal governments. Substantial information has also been presented that significant costs savings available through Tribal government operations have been used to expand programs and services consistent with health needs of Tribal communities. Tribal Self-Governance works for those Tribal governments which have participated.

In FY 1998, IHS has transferred approximately \$400 million to 250 Tribal governments (including consortia and organizations) under the IHS Self-Governance Demonstration Project. In keeping with the permanent legislation passed for the Department of the Interior, Tribal governments are ready to move forward to establish Self-Governance as a permanent option with IHS. We are eager to extend the Self-Governance initiative to other programs within DHHS and are ready to work cooperatively with the Departmental representatives to effect a successful demonstration project.

Self-Governance began as a demonstrative effort 10 years ago within the Department of the Interior. We have now completed four years of a demonstration project under Self-Governance with IHS. H.R. 1833, is the next logical step to continue the advancement of Self-Governance. This legislation affords Tribal governments the local control necessary to evolve from a successful demonstration project to permanent implementation.

I thank the Committee for the continued non-partisan support we have enjoyed under Tribal Self-Governance this past decade.

Finally, I seek your full consideration of the Tribal amendments proposed to H.R.1833.

Thank you.

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