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**TESTIMONY BEFORE THE COMMITTEE ON NATURAL RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON H.R. 3994, DEPARTMENT OF THE INTERIOR TRIBAL
SELF-GOVERNANCE ACT OF 2007**

November 8, 2007

Good morning. Thank you for the opportunity to be here today. My name is W. Ron Allen and I am the Tribal Chairman and Chief Executive Officer of the Jamestown S'Klallam Tribe located in Washington State. I am also the Chairman of the Department of the Interior (DOI) Self-Governance Advisory Committee. Today, I offer my testimony in both these capacities.

I am pleased to testify in support of H.R. 3994, a bill to strengthen Indian tribes' opportunities for Self-Governance by amending Title IV of the Indian Self-Determination and Education Assistance Act (P.L., 93-638 as amended). The proposed Title IV amendments advance several important purposes. First, they ensure consistency between Title IV and Title V, the permanent Self-Governance authority within the Department of Health and Human Services enacted in 2000. Second, they broaden and clarify the scope of compactable programs, especially those in DOI agencies other than the Bureau of Indian Affairs (BIA). Third, they introduce clear timelines and criteria under which BIA and other Interior agencies must consider tribal proposals, and the appeal procedures to be followed when a tribe challenges an agency decision declining a proposal.

The true import of these proposed amendments, however, cannot be understood without an appreciation of the unprecedented positive impact Self-Governance has had on Indian tribes over the past almost 20 years.

Background of Title IV

Although it is hard to imagine today, prior to 1975 the federal government administered almost all programs serving American Indian and Alaska Native tribes. In 1975, the ISDEAA was enacted with three primary goals: (1) to place the federal government's Indian programs firmly in the hands of the local Indian people being served; (2) to enhance and empower local tribal governments and their governmental institutions; and (3) to correspondingly reduce the federal bureaucracy.

The original Title I of the Act, still in operation today, allows tribes to enter into contracts with the Department of Health and Human Services (DHHS) and the DOI to assume the management of programs serving Indian tribes within these two agencies. Frustrated at the stifling bureaucratic oversight imposed by BIA and the Indian Health Service (IHS), and the lack of flexibility and cost-effectiveness inherent in Title I contracting, a small group of tribal leaders helped win passage of the Tribal Self-Governance Demonstration Project. In 1988, Congress launched a Demonstration Project authorizing the Jamestown S'Klallam Tribe and nine other tribes to enter into a demonstration phase. Seven of the nine Tribes entered into planning and negotiations grants and in 1991 negotiated compacts with DOI. In 1992, DHHS followed in the planning and negotiations process. Unlike Title I contracts – which subjected tribes to federal micromanagement of assumed programs and forced tribes to expend funds as prioritized by BIA and IHS officials – Self-Governance agreements allowed tribes to make their own determinations of how program funds should be allocated. The Demonstration Project proved to be a tremendous success, and in 1994, Congress enacted Title IV of the Indian Self-Determination Act, thereby implementing a permanent Tribal Self-Governance program within DOI.

The Success of Self-Governance

The increasing number of tribes that have opted to participate in Self-Governance on an annual basis reflects the success of Self-Governance. In Fiscal Year 1991, the first year Self-Governance agreements were negotiated by the BIA with tribes, only seven tribes entered into agreements. At that time, the total dollar amount compacted by Indian tribes was \$27,100,000. By Fiscal Year 2006, 231 tribes and tribal consortia entered into 91 annual funding agreements, operating over \$300 million in programs, functions, services and activities.

The growth in tribal participation in Self-Governance revealed by these numbers is remarkable. The number of tribes and tribal consortia participating in Self-Governance today is ***33 times greater*** than in 1991. While only a tiny fraction of tribes participated during the first year in 1991, ***today approximately 40% of all federally-recognized tribes are Self-Governance tribes and the interest by other tribes is continuing to grow.***

Under Self-Governance, tribes have assumed the management of a large number of DOI programs, including roads, housing, education, law enforcement, social services, court systems, and natural resources management. Why? Simply put, Self-Governance works because it:

- ***Promotes Efficiency.*** Devolving federal administration from Washington, D.C. to Indian tribes across the United States has strengthened the efficient management and delivery of federal programs impacting Indian tribes. As this Committee well knows, prior to Self-Governance, up to 90% of federal funds earmarked for Indian tribes were used by federal agencies for administrative

- ***Strengthens Tribal Planning and Management Capacities.*** By placing tribes in decision-making positions, Self-Governance vests tribes with ownership of the critical ingredient necessary to plan our own futures – information. At the same time, Self-Governance has provided a generation of tribal members with management experience beneficial for the continued effective stewardship of our resources.
- ***Allows for Flexibility.*** Self-Governance allows tribes great flexibility when making decisions concerning allocation of funds. Whether managing programs in a manner consistent with traditional values or allocating funds to meet changing priorities, Self-Governance tribes are developing in ways consistent with their own needs and priorities, not a monolithic federal policy.
- ***Affirms Sovereignty.*** By utilizing signed compacts, Self-Governance affirms the fundamental government-to-government relationship between Indian tribes and the U.S. Government. It also advances a political agenda of both the Congress and the Administration: namely, shifting federal functions to local governmental control.

In short, Self-Governance works, because it places management responsibility in the hands of those who care most about seeing Indian programs succeed: Indian tribes and their members.

Need for Title IV Amendments

As important and successful as the Self-Governance initiative has been for my Tribe and so many others, it is not perfect. Shortly after Title IV was enacted, the DOI began a rulemaking process to develop and promulgate regulations. The process was a failure in many ways. Ultimately, five years after the rulemaking process began, DOI published regulations that, from the tribal perspective, failed to fully implement Congress's intent when Title IV was enacted. Instead of moving the initiative forward, it moved backwards.

Tribal leaders began discussions about how the statute could be amended. At the same time, Congress in 2000 enacted Title V of the ISDEAA which created a permanent Self-Governance authority within DHHS, and which directly addressed many of the issues that proved to be problematic during the Title IV rulemaking process. But many of the improvements and tribal authority reflected in Title V remain absent from Title IV.

Consequently, many Self-Governance tribes are forced to operate under two separate administrative requirements, one for IHS and one for BIA.

Tribal leaders decided that Title IV needed to be amended to incorporate many of Title V's provisions. It has long been a top legislative priority of tribal leaders to amend Title IV. Three years ago, I testified before the Senate Committee on Indian Affairs in support of S. 1715, a bill that would have amended Title IV in many of the same ways as H.R. 3994. Although that bill did not pass, tribes continued to work toward amending Title IV. Numerous meetings and extensive correspondence between tribal and federal representatives sought to narrow the remaining differences. On September 20, 2006, several tribal leaders presented testimony to the Senate Committee on Indian Affairs regarding problems in implementing Self-Governance within DOI under Title IV. These problems, ranging from inadequate funding levels to bureaucratic recalcitrance, have caused participation in tribal Self-Governance to level off and even recede. That is unfortunate since Self-Governance has dramatically improved the efficiency, accountability and effectiveness of programs and services for my Tribe and many other tribes and their members. The Senate hearing reinforced the need to continue the tribal-federal effort to reach agreement on Title IV amendments.

In the past year, the ongoing negotiations between the Tribal Title IV Task Force and DOI representatives intensified. During those discussions, DOI representatives identified concerns with earlier versions of the draft legislation that the tribal technical team sought to address in subsequent versions. The proposed bill incorporates all of the resulting changes that have been agreed upon by tribal and federal representatives. While some points of contention remain, agreement has been reached on 95% of the issues. The vast majority of the proposed amendments are not new or radical ideas—most have been adapted from the DHHS version of Self-Governance in Title V.

Thus, H.R. 3994 reflects nearly six years of discussion, drafting, negotiation, and redrafting. The time has come to pass this legislation, which would significantly advance Congress's policy of promoting Tribal Self-Governance.

Overview of H.R. 3994

The proposed bill will bring Title IV into line with Title V, creating administrative efficiencies for tribes while also importing the beneficial provisions of Title V currently missing in the older Self-Governance statute. Let me quickly summarize a few of the key provisions in H.R. 3994. To address problems in the DOI's implementation of tribal Self-Governance, and to expand tribes' options for pursuing their right to Self-Governance, H.R. 3994 would, among other things:

- Expand the scope of contractible programs from those benefiting Indians exclusively to those of which Indians are "primary or significant beneficiaries";

- Allow tribes to contract their shares of programs involving federally reserved rights of tribes to water or other resources;
- Expand tribal rights to compact non-BIA programs within DOI;
- clarify and limit the reasons for which the agency may decline to enter a proposed agreement, and the time frame for making the decision;
- Protect tribes from DOI attempts to impose unauthorized terms in compacts or funding agreements; and
- Provide a clear avenue of appeal and burden of proof for tribes to challenge adverse agency decisions.

Of course, the DOI does not agree with the way H.R. 3994 addresses all of the issues listed above, and you may hear testimony from Department representatives opposing one or another provision of the bill. In weighing such testimony, I ask that you keep three facts in mind. First, the bill contains the consensus language on 95% of the original points of contention, which federal and tribal representatives were able to work through over the course of several years. The enormous progress made over that time should not be squandered merely because a few disagreements remain.

Second, there is ample precedent for most of the provisions to which DOI has not yet agreed. Title V, which has worked very well in the context of health care services, served as the model for H.R. 3994 and contains most of the contested provisions, none of which has caused the IHS concern over the years.

Finally, to some extent Self-Governance presents an inherent, and perhaps intractable, tension between tribes and the Department. A bureaucracy such as the DOI will inevitably resist yielding its authority—and its funding—to other entities, such as tribes. For this reason, complete agreement between tribal and federal viewpoints is impossible, and Congress should not wait for such agreement before acting. I believe that H.R. 3994 appropriately balances the interests of the federal and tribal governments, and we believe this Committee will too.

Need to Clarify the Applicability of Title IV to the Department of Transportation

None of the provisions presently included in H.R. 3994 are new. Tribal leaders have been advocating them for over six years and many of them come directly from Title V itself. I would like to take a few minutes to discuss a provision that I believe should be added to the bill that would be new. However, a proposed Section 419 would clarify that Title IV applies to agreements entered into by tribes and the Department of Transportation (DOT) to carry out transportation programs such as the Indian Reservation Roads Program. *See* enclosed description of the provision.

Let me explain why this new provision is a good idea. The 2005 highway bill, SAFETEA-LU, authorized tribal governments to receive funding from and participate in

a number of Department of Transportation (DOT) programs as direct beneficiaries without having the BIA or state governments acting as intermediaries. Agreements can be entered directly with the Secretary of Transportation to undertake transportation functions "in accordance with the [ISDEAA]."¹ Some DOT officials have interpreted this language to mean the agreements must be consistent with the ISDEAA but are not really ISDEAA agreements. This erroneous interpretation has caused a great deal of confusion and disagreement over whether, and to what extent, Title IV applies to DOT. The new section 419 would make clear that the negotiation and implementation of tribal funding agreements with DOT will be governed by Title IV.

Conclusion

In conclusion, I would like to step back for a moment and reinforce a broader point. As Chairman of the DOI Self-Governance Advisory Committee, I have had the opportunity to talk regularly with many other tribal leaders regarding Self-Governance. Although they recognize the implementation problems cited above, and the need for the amendments embodied in H.R. 3994, every single tribal leader made a point of praising the overwhelming success of Self-Governance and the positive improvements in their respective communities as a result. That has also been our experience at my Tribe as well. Self-Governance allows us to prioritize our needs and plan our future in a way consistent with the Tribe's distinct culture, traditions, and institutions.

My deepest hope is that this Congress will enact H.R. 3994 so that we can build on the successes of the past 19 years and further the Self-Governance of Indian tribes, in partnership with the United States, to achieve our mission and goals.

Thank you.

¹ 23 U.S.C. § 202(d)(5).

Proposed new Section 419

“SEC. 419 APPLICABILITY OF THE ACT TO THE DEPARTMENT OF TRANSPORTATION

(a) The Secretary of the Department of Transportation shall carry out a program within the Department of Transportation to be known as the Tribal Transportation Self-Governance Program.

(b) Notwithstanding any other provision of law, the Secretary of Transportation shall enter into funding agreements under this title with any Tribe who elects to utilize the authority of this title to govern any funds made available to Indian tribes under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59) or successor authorities.

(c) Notwithstanding any other provision of law, the negotiation and implementation of each funding agreement entered into under this section shall be governed by the provisions of this title. “

Explanation for new Section 419

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) authorized tribal governments to receive funding from and participate in a number of Department of Transportation (DOT) programs as direct beneficiaries without having the Bureau of Indian Affairs or state governments acting as intermediaries. For example, section 1119(g)(4) of SAFETEA-LU [23 U.S.C. § 202(d)(5)] provides for tribal governments to enter into contracts and agreements directly with the Secretary of Transportation to undertake transportation functions "in accordance with the Self-Determination and Education Assistance Act ..." (ISDEAA). Some DOT Federal Highway Administration (FHWA) officials have interpreted this "in accordance with" language to somehow mean that FHWA-Tribe agreements under SAFETEA-LU *are not* ISDEAA agreements, and they have refused to include standard Title IV provisions in their agreements. This erroneous interpretation has sharply limited the number of FHWA-Tribe agreements that have been executed, and has generated a great deal of confusion and disagreement over the scope and extent of the applicability of Title IV to those agreements.

Section 419 will fix these problems by establishing a Tribal Transportation Self-Governance Program within the DOT. It directs DOT, upon the request of an Indian tribe, to enter into funding agreements under Title IV for any programs and funding made available to tribes by SAFETEA-LU. This section makes clear that the negotiation and implementation of those funding agreements will be governed by Title IV. Section 419 would echo existing authority in SAFETEA-LU and clarify in Title IV itself that Title IV applies to these DOT funds and programs.