

known as the Indian Self-Determination Act, which is classified principally to subchapter I (§5321 et seq.) of this chapter. For complete classification of title I to the Code, see Short Title note set out under section 5301 of this title and Tables.

CODIFICATION

Section was formerly classified to section 458bb of this title prior to editorial reclassification and renumbering as this section.

AMENDMENTS

2020—Pub. L. 116-180 amended section generally. Prior to amendment, section related to selection of Indian tribes to participate in Self-Governance.

1996—Subsec. (b)(1). Pub. L. 104-208 amended par. (1) generally. Prior to amendment, par. (1) read as follows: “In addition to those Indian tribes participating in Self-Governance under subsection (a) of this section, the Secretary, acting through the Director of the Office of Self-Governance, may select up to 20 new tribes per year from the applicant pool described in subsection (c) of this section to participate in Self-Governance.”

§ 5363. Funding agreements

(a) Authorization

The Secretary shall, on the request of any Indian Tribe or Tribal organization, negotiate and enter into a written funding agreement with the governing body of the Indian Tribe or the Tribal organization in a manner consistent with—

- (1) the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian Tribes and the United States; and
- (2) subsection (b).

(b) Contents

Each funding agreement shall—

(1) authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, and the Office of the Special Trustee for American Indians, without regard to the agency or office of that Bureau or those Offices within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office functions in accordance with subsection (g)(3) of this section, and including—

- (A) any program, service, function, and activity, or portion thereof, administered under the authority of—
 - (i) the Act of April 16, 1934 (25 U.S.C. 452 et seq.);¹ and
 - (ii) section 13 of this title;

(B) programs, services, functions, and activities or portions thereof administered by the Secretary of the Interior that are otherwise available to Indian tribes or Indians for which appropriations are made to agencies other than the Department of the Interior; and

(C) any other program, service, function, or activity (or portion thereof) that is provided through the Bureau of Indian Affairs,

the Office of the Assistant Secretary for Indian Affairs, or the Office of the Special Trustee for American Indians with respect to which Indian Tribes or Indians are primary or significant beneficiaries;

(2) subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, that are otherwise available to Indian tribes or Indians, as identified in section 5372(c) of this title, except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law; and

(3) subject to the terms of the agreement, authorize the tribe to redesign or consolidate programs, services, functions, and activities, or portions thereof, and reallocate funds for such programs, services, functions, and activities, or portions thereof, except that, with respect to the reallocation, consolidation, and redesign of programs described in paragraph (2), a joint agreement between the Secretary and the tribe shall be required.

(c) Additional activities

Each funding agreement negotiated pursuant to subsections (a) and (b) of this section may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.

(d) Provisions relating to Secretary

Funding agreements negotiated between the Secretary and an Indian tribe shall include provisions—

- (1) to monitor the performance of trust functions by the tribe through the annual trust evaluation, and
- (2) for the Secretary to reassume a program, service, function, or activity, or portions thereof, if there is a finding of imminent jeopardy to a physical trust asset, natural resources, or public health and safety.

(e) Construction projects

(1) Regarding construction programs or projects, the Secretary and Indian tribes may negotiate for the inclusion of specific provisions of division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of title 41 and Federal acquisition regulations in any funding agreement entered into under this chapter. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply.

(2) In all construction projects performed pursuant to this subchapter, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements.

(f) Submission

Not later than 90 days before the proposed effective date of an agreement entered into under

¹ See References in Text note below.

this section, the Secretary shall submit a copy of such agreement to each Indian Tribe that is served by the Agency that is serving the tribe that is a party to the funding agreement.

(g) Payment

(1) At the request of the governing body of the tribe and under the terms of an agreement entered into under this section, the Secretary shall provide funding to the tribe to carry out the agreement.

(2) The funding agreements authorized by this subchapter and title III of this Act shall provide for advance payments to the tribes in the form of annual or semi-annual installments at the discretion of the tribes.

(3) Subject to paragraph (4) of this subsection and paragraphs (1) through (3) of subsection (b) of this section, the Secretary shall provide funds to the tribe under an agreement under this subchapter for programs, services, functions, and activities, or portions thereof, in an amount equal to the amount that the tribe would have been eligible to receive under contracts and grants under this chapter, including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the tribe or its members, without regard to the organization level within the Department where such functions are carried out.

(4) Funds for trust services to individual Indians shall be available under an agreement entered into under this section only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the tribe.

(h) Civil actions

(1) Except as provided in paragraph (2), for the purposes of section 5331 of this title, the term "contract" shall include agreements entered into under this subchapter.

(2) For the period that an agreement entered into under this subchapter is in effect, the provisions of section 81 of this title, section 5123 of this title, and the Act of July 3, 1952 (25 U.S.C. 82a), shall not apply to attorney and other professional contracts by Indian tribal governments participating in Self-Governance under this subchapter.

(i) Facilitation

(1) Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that will facilitate—

(A) the inclusion of programs, services, functions, and activities in the agreements entered into under this section; and

(B) the implementation of agreements entered into under this section.

(2)(A) A tribe may submit a written request for a waiver to the Secretary identifying the regulation sought to be waived and the basis for the request.

(B) Not later than 60 days after receipt by the Secretary of a written request by a tribe to waive application of a Federal regulation for an agreement entered into under this section, the Secretary shall either approve or deny the requested waiver in writing to the tribe. A denial

may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. The Secretary's decision shall be final for the Department.

(j) Funds

All funds provided under funding agreements entered into pursuant to this chapter, and all funds provided under contracts or grants made pursuant to this chapter, shall be treated as non-Federal funds for purposes of meeting matching requirements under any other Federal law.

(k) Disclaimer

Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under subsection (b)(2) of this section and section 5372(c) of this title with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe: *Provided*, however an Indian tribe or tribes need not be identified in the authorizing statute in order for a program or element of a program to be included in a compact under subsection (b)(2) of this section.

(l) Incorporate self-determination provisions

At the option of a participating tribe or tribes, any or all provisions of subchapter I of this chapter shall be made part of an agreement entered into under title III of this Act or this subchapter. The Secretary is obligated to include such provisions at the option of the participating tribe or tribes. If such provision is incorporated it shall have the same force and effect as if set out in full in title III or this subchapter.

(m) Other provisions

(1) Excluded funding

A funding agreement shall not authorize an Indian Tribe to plan, conduct, administer, or receive Tribal share funding under any program that—

(A) is provided under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.); or

(B) is provided for elementary and secondary schools under the formula developed under section 2007 of this title.

(2) Services, functions, and responsibilities

A funding agreement shall specify—

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

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

(C) the responsibilities of the Indian Tribe and the Secretary under the funding agreement.

(3) Base budget

(A) In general

A funding agreement shall, at the option of the Indian Tribe, provide for a stable base budget specifying the recurring funds (which may include funds available under section 5325(a) of this title) to be transferred to the

Indian Tribe, for such period as the Indian Tribe specifies in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations.

(B) Limitations

Notwithstanding subparagraph (A), a funding agreement shall not specify funding associated with a program described in subsection (b)(2) or (c) unless the Secretary agrees.

(4) No waiver of trust responsibility

A funding agreement shall prohibit the Secretary from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, court decisions, and other laws.

(n) Amendment

The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian Tribe, unless such terms are required by Federal law.

(o) Effective date

A funding agreement shall become effective on the date specified in the funding agreement.

(p) Existing and subsequent funding agreements

(1) Subsequent funding agreements

Absent notification from an Indian Tribe that the Indian Tribe is withdrawing or retroceding the operation of one or more programs identified in a funding agreement, or unless otherwise agreed to by the parties to the funding agreement or by the nature of any noncontinuing program, service, function, or activity contained in a funding agreement—

(A) a funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, with funding paid annually for each fiscal year the agreement is in effect; and

(B) the term of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement for the purposes of calculating the amount of funding to which the Indian Tribe is entitled.

(2) Disputes

Disputes over the implementation of paragraph (1)(A) shall be subject to section 5366(c) of this title.

(3) Existing funding agreements

An Indian Tribe that was participating in self-governance under this subchapter on October 21, 2020, shall have the option at any time after that date—

(A) to retain its existing funding agreement (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this subchapter; or

(B) to negotiate a new funding agreement in a manner consistent with this subchapter.

(4) Multiyear funding agreements

An Indian Tribe may, at the discretion of the Indian Tribe, negotiate with the Secretary

for a funding agreement with a term that exceeds 1 year.

(Pub. L. 93-638, title IV, §403, as added Pub. L. 103-413, title II, §204, Oct. 25, 1994, 108 Stat. 4272; amended Pub. L. 104-109, §19, Feb. 12, 1996, 110 Stat. 766; Pub. L. 105-244, title IX, §901(d), Oct. 7, 1998, 112 Stat. 1828; Pub. L. 106-568, title VIII, §812(b), Dec. 27, 2000, 114 Stat. 2917; Pub. L. 110-315, title IX, §941(k)(2)(H), Aug. 14, 2008, 122 Stat. 3467; Pub. L. 116-180, title I, §101(d), Oct. 21, 2020, 134 Stat. 862; Pub. L. 116-260, div. DD, §13(a)(3), Dec. 27, 2020, 134 Stat. 3033.)

Editorial Notes

REFERENCES IN TEXT

Act of April 16, 1934 (25 U.S.C. 452 et seq.), referred to in subsec. (b)(1)(A)(i), is act Apr. 16, 1934, ch. 147, 48 Stat. 596, popularly known as the Johnson-O'Malley Act, which was classified generally to section 452 et seq. of this title prior to editorial reclassification as section 5342 et seq. of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

This chapter, referred to in subsecs. (e)(1), (g)(3), and (j), was in the original "this Act", meaning Pub. L. 93-638, Jan. 4, 1975, 88 Stat. 2203, known as the Indian Self-Determination and Education Assistance Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

Title III of this Act, referred to in subsecs. (g)(2) and (l), is title III of Pub. L. 93-638, as added by Pub. L. 100-472, title II, §209, Oct. 5, 1988, 102 Stat. 2296, which was set out as a note under former section 450f of this title prior to repeal by Pub. L. 106-260, §10, Aug. 18, 2000, 114 Stat. 734.

The Act of July 3, 1952, referred to in subsec. (h)(2), is act July 3, 1952, ch. 549, 66 Stat. 323, which enacted section 82a of this title and provisions set out as a note under section 82a of this title.

Subchapter I of this chapter, referred to in subsec. (l), was in the original "title I of this Act", meaning title I of Pub. L. 93-638, known as the Indian Self-Determination Act, which is classified principally to subchapter I (§5321 et seq.) of this chapter. For complete classification of title I to the Code, see Short Title note set out under section 5301 of this title and Tables.

The Tribally Controlled Colleges and Universities Assistance Act of 1978, referred to in subsec. (m)(1)(A), is Pub. L. 95-471, Oct. 17, 1978, 92 Stat. 1325, which is classified principally to chapter 20 (§1801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of this title and Tables.

CODIFICATION

Section was formerly classified to section 458cc of this title prior to editorial reclassification and renumbering as this section.

In subsec. (e)(1), "division B (except sections 1123, 2303, 2304, and 2313) of subtitle I of title 41" substituted for "the Office of Federal Procurement and Policy Act" on authority of Pub. L. 111-350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

AMENDMENTS

2020—Subsec. (a). Pub. L. 116-180, §101(d)(1), added subsec. (a) and struck out former subsec. (a). Prior to amendment, text read as follows: "The Secretary shall negotiate and enter into an annual written funding agreement with the governing body of each participating tribal government in a manner consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people."

Subsec. (b)(1). Pub. L. 116-180, §101(d)(2)(A), in introductory provisions, substituted “the Office of the Assistant Secretary for Indian Affairs, and the Office of the Special Trustee for American Indians, without regard to the agency or office of that Bureau or those Offices” for “without regard to the agency or office of the Bureau of Indian Affairs” and “and including—” for “and including”, inserted subpar. (A) designation before “any program”, added subpar. (C), and redesignated former subpars. (A), (B), and (C) as subpars. (A)(i), (A)(ii), and (B), respectively, and realigned margins.

Subsec. (b)(2). Pub. L. 116-180, §101(d)(2)(B), substituted “section 5372(c) of this title” for “section 5365(c) of this title” and inserted “and” at end.

Subsec. (b)(3). Pub. L. 116-180, §101(d)(2)(C), substituted period for semicolon at end.

Subsec. (b)(4). Pub. L. 116-260, which directed amendment of par. (4) by adding “and” at end of subpar. (A), striking out “and” at end of subpar. (B), and striking out subpar. (C), could not be executed due to intervening amendment by Pub. 116-180, §101(d)(2)(D). See note below.

Pub. L. 116-180, §101(d)(2)(D), struck out par. (4) which read as follows: “prohibit the inclusion of funds provided—

“(A) pursuant to the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.);

“(B) for elementary and secondary schools under the formula developed pursuant to section 2008 of this title; and

“(C) the Flathead Agency Irrigation Division or the Flathead Agency Power Division, except that nothing in this section shall affect the contract authority of such divisions under section 5321 of this title;”.

Subsec. (b)(5) to (9). Pub. L. 116-180, §101(d)(2)(D), struck out pars. (5) to (9) which set out various requirements and responsibilities related to funding agreements.

Subsec. (f). Pub. L. 116-180, §101(d)(3), struck out “for review” after “Submission” in heading, substituted “such agreement to” for “such agreement to—”, struck out par. (1) designation before “each Indian tribe”, substituted “agreement.” for “agreement;”, and struck out pars. (2) and (3) which read as follows:

“(2) the Committee on Indian Affairs of the Senate; and

“(3) the Subcommittee on Native American Affairs of the Committee on Natural Resources of the House of Representatives.”

Subsec. (k). Pub. L. 116-180, §101(d)(4), substituted “section 5372(c) of this title” for “section 5365(c)(1) of this title”.

Subsecs. (m) to (p). Pub. L. 116-180, §101(d)(5), added subsecs. (m) to (p).

2008—Subsec. (b)(4)(A). Pub. L. 110-315 substituted “the Tribally Controlled Colleges and Universities Assistance Act of 1978” for “the Tribally Controlled College or University Assistance Act of 1978”.

2000—Subsec. (h)(2). Pub. L. 106-568 struck out “and” before “section 5123 of this title” and substituted “and the Act of July 3, 1952 (25 U.S.C. 82a), shall not apply” for “shall not apply”.

1998—Subsec. (b)(4)(A). Pub. L. 105-244 substituted “Tribally Controlled College or University Assistance Act of 1978” for “Tribally Controlled Community College Assistance Act of 1978”.

1996—Subsec. (l). Pub. L. 104-109 added subsec. (l).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-244 effective Oct. 1, 1998, except as otherwise provided in Pub. L. 105-244, see section 3 of Pub. L. 105-244, set out as a note under section 1001 of Title 20, Education.

§ 5364. Compacts

(a) In general

The Secretary shall negotiate and enter into a written compact with each Indian Tribe participating in self-governance in a manner consistent with the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian Tribes and the United States.

(b) Contents

A compact under subsection (a) shall—

(1) specify and affirm the general terms of the government-to-government relationship between the Indian Tribe and the Secretary; and

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

(c) Amendment

A compact under subsection (a) may be amended only by agreement of the parties.

(d) Effective date

The effective date of a compact under subsection (a) shall be—

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

(2) such date as is mutually agreed upon by the parties.

(e) Duration

A compact under subsection (a) shall remain in effect—

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

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

(f) Existing compacts

An Indian Tribe participating in self-governance under this subchapter, as in effect on October 21, 2020, shall have the option at any time after that date—

(1) to retain its negotiated compact (in whole or in part) to the extent that the provisions of the compact are not directly contrary to any express provision of this subchapter; or

(2) to negotiate a new compact in a manner consistent with this subchapter.

(Pub. L. 93-638, title IV, §404, as added Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 864.)

Editorial Notes

PRIOR PROVISIONS

A prior section 5364, Pub. L. 93-638, title IV, §404, as added Pub. L. 103-413, title II, §204, Oct. 25, 1994, 108 Stat. 4275, related to identification of funds in annual budget request, prior to repeal by Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 864. See section 5371 of this title. Such section was formerly classified to section 458dd of this title prior to editorial reclassification and renumbering as section 5364.

§ 5365. General provisions

(a) Applicability

An Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this subchapter.