

action in a United States district court under section 5331(a) of this title; and

(iv) provide the Indian Tribe the option of entering into the severable portions of a final proposed compact or funding agreement (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

**(B) Effect of exercising certain option**

If an Indian Tribe exercises the option specified in subparagraph (A)(iv)—

(i) the Indian Tribe shall retain the right to appeal the rejection by the Secretary under this section; and

(ii) clauses (i), (ii), and (iii) of subparagraph (A) shall apply only to the portion of the proposed final compact or funding agreement that was rejected by the Secretary.

**(d) Burden of proof**

In any administrative action, hearing, appeal, or civil action brought under this section, the Secretary shall have the burden of proof—

(1) of demonstrating, by a preponderance of the evidence, the validity of the grounds for a reassumption under subsection (b); and

(2) of clearly demonstrating the validity of the grounds for rejecting a final offer made under subsection (c).

**(e) Good faith**

**(1) In general**

In the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy.

**(2) Policy**

The Secretary shall carry out this subchapter in a manner that maximizes the policy of Tribal self-governance.

**(f) Savings**

**(1) In general**

To the extent that programs carried out for the benefit of Indian Tribes and Tribal organizations under this subchapter reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 5368(c) of this title, except for funding agreements entered into for programs under section 5363(c) of this title, the Secretary shall make such savings available to the Indian Tribes or Tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

**(2) Discretionary programs of special significance**

For any savings generated as a result of the assumption of a program by an Indian Tribe under section 5363(c) of this title, such savings shall be made available to that Indian Tribe.

**(g) Trust responsibility**

The Secretary may not waive, modify, or diminish in any way the trust responsibility of the

United States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

**(h) Decision maker**

A decision that constitutes final agency action and relates to an appeal within the Department conducted under subsection (c)(6)(A)(iii) may be made by—

(1) an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or

(2) an administrative law judge.

**(i) Rules of construction**

Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this subchapter and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian Tribe.

(Pub. L. 93-638, title IV, §406, as added Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 866.)

REFERENCES IN TEXT

Section 101(a) of the PROGRESS for Indian Tribes Act, referred to in subsec. (i), is section 101(a) of Pub. L. 116-180, which is set out as a note under section 5361 of this title.

Editorial Notes

PRIOR PROVISIONS

A prior section 5366, Pub. L. 93-638, title IV, §406, as added Pub. L. 103-413, title II, §204, Oct. 25, 1994, 108 Stat. 4277; amended Pub. L. 105-277, div. A, §101(e) [title I, §133], Oct. 21, 1998, 112 Stat. 2681-231, 2681-264, set out disclaimers regarding construction of provisions of this chapter and subchapter. Such action was formerly classified to section 458ff of this title prior to editorial reclassification and renumbering as section 5366.

**§ 5367. Construction programs and projects**

**(a) In general**

Indian Tribes participating in Tribal self-governance may carry out any construction project included in a compact or funding agreement under this subchapter.

**(b) Tribal option to carry out certain Federal environmental activities**

In carrying out a construction project under this subchapter, an Indian Tribe may, subject to the agreement of the Secretary, elect to assume some Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle III of title 54, and related provisions of other law and regulations that would apply if the Secretary were to undertake a construction project, by adopting a resolution—

(1) designating a certifying Tribal officer to represent the Indian Tribe and to assume the status of a responsible Federal official under those Acts, laws, or regulations; and

(2) accepting the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer

assuming the status of a responsible Federal official under those Acts, laws, or regulations.

**(c) Savings clause**

Notwithstanding subsection (b), nothing in this section authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle III of title 54, and other related provisions of law that are inherent Federal functions.

**(d) Codes and standards**

In carrying out a construction project under this subchapter, an Indian Tribe shall—

(1) adhere to applicable Federal, State, local, and Tribal building codes, architectural and engineering standards, and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and

(2) use only architects and engineers who—

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

(B) certify that—

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

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

**(e) Tribal accountability**

**(1) In general**

In carrying out a construction project under this subchapter, an Indian Tribe shall assume responsibility for the successful completion of the construction project and of a facility that is usable for the purpose for which the Indian Tribe received funding.

**(2) Requirements**

For each construction project carried out by an Indian Tribe under this subchapter, the Indian Tribe and the Secretary shall negotiate a provision to be included in the funding agreement that identifies—

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

(B) a general description of the project, including the scope of work, references to design criteria, and other terms and conditions;

(C) the responsibilities of the Indian Tribe and the Secretary for the project;

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

(E) the amount of funds provided for the project;

(F) the obligations of the Indian Tribe to comply with the codes referenced in subsection (d)(1) and applicable Federal laws and regulations;

(G) the agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction; and

(H) the agreement of the Secretary to issue a certificate of occupancy, if requested by the Indian Tribe, based upon the review

and verification by the Secretary, to the satisfaction of the Secretary, that the Indian Tribe has secured upon completion the review and approval of the plans and specifications, sufficiency of design, life safety, and code compliance by qualified, licensed, and independent architects and engineers.

**(f) Funding**

**(1) In general**

Funding appropriated for construction projects carried out under this subchapter shall be included in funding agreements as annual or semiannual advance payments at the option of the Indian Tribe.

**(2) Advance payments**

The Secretary shall include all associated project contingency funds with each advance payment, and the Indian Tribe shall be responsible for the management of such contingency funds.

**(g) Negotiations**

At the option of the Indian Tribe, construction project funding proposals shall be negotiated pursuant to the statutory process in section 5324 of this title, and any resulting construction project agreement shall be incorporated into the funding agreement as addenda.

**(h) Federal review and verification**

**(1) In general**

On a schedule negotiated by the Secretary and the Indian Tribe—

(A) the Secretary shall review and verify, to the satisfaction of the Secretary, that project planning and design documents prepared by the Indian Tribe in advance of initial construction are in conformity with the obligations of the Indian Tribe under subsection (d); and

(B) before the project planning and design documents are implemented, the Secretary shall review and verify to the satisfaction of the Secretary that subsequent document amendments which result in a significant change in construction are in conformity with the obligations of the Indian Tribe under subsection (d).

**(2) Reports**

The Indian Tribe shall provide the Secretary with project progress and financial reports not less than semiannually.

**(3) Oversight visits**

The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian Tribe.

**(i) Application of other laws**

Unless otherwise agreed to by the Indian Tribe and except as otherwise provided in this chapter, no provision of title 41, the Federal Acquisition Regulation, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction program or project carried out under this subchapter.

**(j) Future funding**

Upon completion of a facility constructed under this subchapter, the Secretary shall in-

clude the facility among those eligible for annual operation and maintenance funding support comparable to that provided for similar facilities funded by the Department as annual appropriations are available and to the extent that the facility size and complexity and other factors do not exceed the funding formula criteria for comparable buildings.

(Pub. L. 93-638, title IV, §407, as added Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 870.)

#### Editorial Notes

##### REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (b) and (c), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

This chapter, referred to in subsec. (i), 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.

##### PRIOR PROVISIONS

A prior section 5367, Pub. L. 93-638, title IV, §407, as added Pub. L. 103-413, title II, §204, Oct. 25, 1994, 108 Stat. 4277, related to regulations to carry out this subchapter, prior to repeal by Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 864. See section 5373 of this title. Such section was formerly classified to section 458gg of this title prior to editorial reclassification and renumbering as section 5367.

#### § 5368. Payment

##### (a) In general

At the request of the governing body of an Indian Tribe and under the terms of an applicable funding agreement, the Secretary shall provide funding to the Indian Tribe to carry out the funding agreement.

##### (b) Advance annual payment

At the option of the Indian Tribe, a funding agreement shall provide for an advance annual payment to an Indian Tribe.

##### (c) Amount

###### (1) In general

Subject to subsection (e) and sections 5363 and 5365 of this title, the Secretary shall provide funds to the Indian Tribe under a funding agreement for programs in an amount that is equal to the amount that the Indian Tribe would have been entitled 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 Indian Tribe or its members) without regard to the organization level within the Department at which the programs are carried out.

###### (2) Savings clause

Nothing in this section reduces programs, services, or funds of, or provided to, another Indian Tribe.

#### (d) Timing

##### (1) In general

Pursuant to the terms of any compact or funding agreement entered into under this subchapter, the Secretary shall transfer to the Indian Tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolution.

##### (2) Transfers

Not later than 1 year after October 21, 2020, in any instance in which a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

##### (e) Availability

Funds for trust services to individual Indians shall be available under a funding agreement only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the Indian Tribe.

##### (f) Multiyear funding

A funding agreement may provide for multiyear funding.

##### (g) Limitations on authority of the Secretary

The Secretary shall not—

(1) fail to transfer to an Indian Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under this subchapter for programs eligible under paragraph (1) or (2) of section 5363(b) of this title, except as required by Federal law;

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

(3) reduce the amount of funds required under this subchapter—

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

(B) in subsequent years, except as necessary as a result of—

(i) a reduction in appropriations from the previous fiscal year for the program to be included in a compact or funding agreement;

(ii) a congressional directive in legislation or an accompanying report;

(iii) a Tribal authorization;

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

(v) completion of an activity under a program for which the funds were provided;

(C) to pay for Federal functions, including—

(i) Federal pay costs;