

TESTIMONY OF HENRY M. CAGEY  
CHAIRMAN, LUMMI INDIAN NATION AND  
TITLE V TRIBAL LEGISLATIVE TASK FORCE  
BEFORE  
THE INDIAN AFFAIRS COMMITTEE OF THE U.S. SENATE

OCTOBER 7, 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. In addition, the Lummi Indian Nation houses the Tribal Self-Governance Communication and Education Project on behalf of a Six Tribe Consortium. I am also appearing as 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 (I.H.S.).

To begin with, we wish to compliment Chairman Campbell and Vice-Chairman Inouye for the leadership that they have shown in holding this hearing on H.R. 1833 in the U.S. Senate, as well as their long-term support of Tribal Self-Governance. I also want to thank Senator McCain for agreeing to chair today's hearing. 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. The Tribes have been working on this bill for over two years. Chairman Don Young and Vice-Chairman George Miller of the House Committee on Resources, through their nonpartisan efforts, co-sponsored H.R. 1833 which has made it possible for all of us to be here today. We commend them for their hard work and support of Tribal Self-Governance. Additionally, the Senate Indian Affairs staff and House Resources staff have worked closely with Tribal leaders and we compliment all of them for the patience they have displayed throughout this process,

The Federal-Tribal consultative process has been put through a stringent test with this legislative measure, Tribal, Congressional, Departmental and Agency representatives have met on many occasions and have conducted numerous conference calls to work through disagreements over various provisions in the bill. I am pleased to say for the record that this bill reflects the majority of the concerns and needs of all involved. We have ensured adequate protections for non-Self-Governance Tribes, maintained the Trust responsibility of the Federal government, opened new doors for the advancement of Tribal Self-Governance, and most importantly, we have ensured the individual beneficiaries of their access to health care. The Tribal consultative process has worked because of the commitment of all of the individuals involved and I commend each of them.

We were able to reach a consensus on most of the provision contained in H.R. 1833. Unfortunately, the Department of the Interior- has reached across our negotiations with D.H.H.S. and I.H.S. to insist on amendments to the bill which are contrary to our agreements. Although

Interior never approached the Tribes to consult with us on their areas of concern, in a good-faith effort to appease Interior concerns with this bill, we offered to accept a disclaimer proposed by Interior that specifically states that Title V does not apply to other Titles of the Act. We continue to stress that H.R. 1833 applies to D.H.H.S. and I.H.S., yet Interior has continued to object to a fair compromise, and to provisions agreed to by the D.H.H.S. and I.H.S. representatives and Tribes. We believe Interior's position is arbitrary.

We also understand that some Senators are reluctant to support H.R. 1833 while the Contract Support Costs (CSC) funding issue remains unresolved, and while we understand the Congress' concerns on CSC, we do not believe H.R. 1833 effects to the CSC dilemma one way or another. H.R. 1833 authorizes additional Tribes to participate in Tribal Self-Governance and provides for inclusion of additional programs, services and activities. This authority already exists under current law for contracts and compacts in Title I, Title III and Title IV. As an authorizing bill, H.R.1833 would be equally subject to the decisions of the appropriators for CSC as well as other funding issues. Efforts are underway to meet with these Senators to address their specific individual concerns.

## **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 Tribes 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 (B.I.A.) 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 decide (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 legislation 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 grown 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 I.H.S. and the B.I.A.

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 mechanisms 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. 102-472, 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 the ten named 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 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 funds transfers termed "Funding Agreements" were developed to replace contracts produced; 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. The Indian Health Service was added to the Demonstration Project by Congress in 1991 in Public Law 102-184.

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

In 1994, after six years of research and actual experience, Congress determined to make Self-Governance a permanent part of the Bureau of Indian Affairs (B.I.A.) 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 administered. 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.

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 the I.H.S. 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. Key provisions of H.R. 1833 include:

Establish the Self-Governance Initiative as a permanent part of I.H.S.;

Provide authorization to proceed with a study and consultative process for "demonstration" authority for other non-I.H.S. programs administered by the D.H.H.S. (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 the Secretary's and Tribal obligations;*

*Provide for the transfer of responsibilities and funds to Tribes;*

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

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

We will be submitting to the Committee our recommendations for amendments to H.R. 1833, as passed by the U.S. House of Representatives. As I mentioned earlier in my testimony, we have worked with due diligence with the I.H.S. and D.H.H.S to resolve many of the concerns and issues that they have raised. The amendments to

H.R. 1833 reflect the success of the many negotiations and discussions. A few issues remain, however, and within the goals and policies of Self-Governance we recommend the tribal perspective on these issues.

A Tribal concern has been the Department's resistance to embarking on a Demonstration Project to determine how non-I.H.S. agencies within the Department can be brought into Self-Governance. The Tribes understand the nervousness of the agencies and their general unfamiliarity with Indian issues, which is exactly why we proposed a Demonstration Phase rather than proceeding directly to Self-Governance. The Department, however, has only agreed to a study. In our view, a study is the first step in Demonstration and the second and equally important step is experimentation through pilot or demonstration agreements.

Another continuing issue is whether the 1994 amendments to Section 102 and 110 of the Act provided for de novo review in federal court of the decisions of the Department with respect to matters under the Act. We believe that de novo review is required and that it would be preferable if H.R. 1833 would clarify this matter. It makes no legislative sense for Congress to have labored to provide specific Federal court relief for Tribes from adverse agency decisions, if these provisions provide no more than had previously been provided under the Administrative Procedures Act. We recommend clarification that trial de novo is required in federal court and that plaintiff Tribes should have full discovery rights.

GSA has fully implemented Sec. 105 (k) for tribal access to federal government fares on the same basis as an executive agency for the purposes of P.L. 93-638. However, this section applies only to those Tribes and tribal organizations with compacts, contracts, grants, cooperative agreements and funding agreements under P.L. 93-638 and traveling strictly for "638" purposes. Section 105 (k) does not allow Tribes to use federal government fares for travel in conjunction with other federal departments and agencies. For example, a tribal nutritionist or physician working for a "638" contract or "compact" may be traveling to a U.S.D.A. training session to improve their skills for women, infants and children nutrition, however, they will have to pay full fare if the travel and training session is authorized and paid for by the Tribal U.S.D.A.W.I.C. program. In addition, the proposed FY 1999 Interior appropriations measure provides a mechanism for Tribes to voluntarily return funds to the Federal government, therefore, 105(k) would not be applicable to Tribes who discontinue contracting and elect to leave their funds with the BIA and IHS for redistribution to other Tribes; nor, does it currently apply to direct services Tribes. We propose an amendment as follows:

Section 516. Application of Other Sections of the Act

Insert new subsection " (c) for purposes of 105 (k) , it includes any federally recognized Indian Tribe receiving funds or services pursuant to this Act or any other federal statute."

Such an amendment would create significant savings for tribal governments by allowing them to utilize travel savings to provide more direct services to their constituents. Additionally, Tribes who elect to join the GSA Task Order system would create additional savings overall for GSA and Tribes through the bulk purchasing power under the GSA "SmartPay" program points system. GSA would also receive points for administering the Task Order on behalf of Tribes which would cover GSA's costs of administering the SmartPay program for Tribes.

A final comment on the Bill relates to the time-limited 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 time lines for completion, 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.

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

**Lummi Indian Nation Experience with I.H.S. Self-Governance**

Following are some of the improvements that have been possible for the Lummi Indian 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 I.H.S. Deferred Services Lists

Under I.H.S. management, the Lummi Indian 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 Indian 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 I.H.S.

### Tribal Veterans Services Office

In 1991, the Lummi Indian Nation utilized its authority under the Self-Governance Initiative to fund the development and operation of a Tribal Veterans office. As some of you many 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 I.H.S. does not provide funds to assist Tribal Veterans to access these services. While Lummi Indian Nation funds were controlled by the I.H.S., it could not address the problems of its veterans. Under the Self-Governance Initiative, the Lummi Indian Nation has the flexibility to address the real needs of its membership.

### 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 turnout. Participation by Tribal members in Tribal elections has 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, Tribal government has become more accountable to its constituency than in the past. Because of Self-Governance, Tribal governments are able to incorporate Tribal members' needs into their plans. Previously, Tribal members' input would result in an explanation that the I. H.S. does not provide funding for their needs.

The Lummi Indian 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 the 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 Indian 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 the Indian Health Service for service delivery. Tribal governments are pushing I.H.S. 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.

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

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; and,



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.

At the same time, Tribes across the nation are faced with major challenges that interface with the health and health status of Native American people. Welfare Reform, which challenges our ability to provide jobs and training is in demand at an unprecedented scale. With fewer resources to support job training and creation that we previously had, we must move forward to implement the challenges that welfare reform brings. Housing needs continue to escalate while funds continue to diminish. Changing regulatory language and congressional initiatives have always been a challenge for tribal governments as Native American Policy has never been consistent with respect to the needs of Tribes.

### **Conclusion**

In FY 1998, approximately \$400 million has been transferred to 251 Tribal governments and Tribal organizations under the I.H.S. Self-Governance Demonstration Project. In keeping with the permanent legislation passed for the Department of the Interior, Tribal governments and Tribal Organizations are ready to move forward to establish Self-Governance as a permanent option within I.H.S., and to begin the demonstration phase of administering other D.H.H.S. programs under Self-Governance.

I thank the Committee for the continued non-partisan support we have enjoyed under Tribal Self-Governance, and I seek your full consideration of the Tribal amendments proposed in H.R. 1833