

TESTIMONY OF HENRY CAGEY

LUMMI INDIAN NATION

BEFORE

THE SENATE INDIAN AFFAIRS COMMITTEE OF THE U.S. SENATE

JULY 28 , 1999

Mr. Chairman, members of the Committee, I wish to thank the Committee for the opportunity to testify today. 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). I am a Business Council member 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.

To begin with, we wish to compliment the Chairman for introducing S. 979, as well as the long-term support of Tribal Self-Governance that the committee and its leadership have continually demonstrated. 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 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. 110-472, 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, were 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; a means to assure that Tribal trust resources were protected; 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, 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 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 a 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

S.979 is a much more detailed legislation than Title IV and that is appropriate. It attempts to provide the full framework for Self-Governance at the IHS and limits the need for rule-making substantially. The Tribes that I am speaking for today support the thrust and policy of S. 979. Key provisions of S. 979 include:

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

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

Describing eligibility criteria for selection of participating Tribes;

We have submitted to the Committee staff our suggested changes and corrections to S. 979. Although most of the recommended changes are technical or drafting clarifications, there are several areas that we need to address today:

Patient records. Section 7 of H.R. 1167 , as amended at markup would amend Title I by clarifying that a participating tribe's patient records may be considered federal records for purposes of storing them at Federal Records Centers. There is no parallel section in S. 979. We understand that the Committee is researching the issue to assure that such a provision would not subject such records to disclosure under the Freedom of Information Act (FOIA). We agree with the Committee's concerns and believe the research will provide important reassurances on this point, but we believe that inclusion of a provision substantively similar to section 7 of H.R. 1167 should be included in S. 979.

Federal Sources of Personnel, Supplies (Sec. 508 (e)). Section 508(e) of S. 979 would require the Secretary to "acquire and transfer" personnel, supplies or resources to tribes that elect to carry out their funding agreements with those resources. The provision, however, limits the Secretary's authority to transfer resources "to the extent allowable under law." While the mandatory language in S. 979 is a welcome improvement over the corresponding provision in H.R. 1167, the S. 979 section does not actually authorize the Secretary to transfer federal resources. Since there is concern in DHHS that the Secretary's current authority is not sufficient to transfer federal resources, and since the IHS/DHHS concurred with the House authorizing language, the phrase "to the extent allowable under law" should be dropped.

Technical Amendment Regarding Contract Payments. As a result of the amendment process to Title I of the ISDEA, an ambiguity exists that has proven to be a problem and that we believe

should be corrected in both S. 979 and H.R. 1167. In 1994, when Congress enacted the detailed funding provisions that appear in Section 108 (25 U.S.C. 450(l), Congress did not repeal the old and inconsistent funding language found in original section 105(b) (25 U.S.C. 450(b)). The 1994 provisions grant tribes the absolute right to receive all their contract funds up front in a single lump sum "notwithstanding any other provision of law." The original 1975 provisions, however, gave the Secretary discretion in how to pay tribes, and also instructed the Secretary to minimize the time between payment to the tribes and expenditure by the tribes. The 1975 provisions should have been repealed when the 1994 provisions were added. The Committee should add a new section to S. 979, making a technical correction to conform 450(b) with 450(l).

De Novo review. In the 1994 amendments to Title I, Congress provided tribes with an expedited and special appeal rights to federal court to review agency actions. Several federal district courts have been reluctant to permit more than the standard APA review of agency decisions; in effect mooting or negating the 1994 amendments. Section 5(b) of H.R. 1833, as introduced last Congress would have amended Title I of the Indian Self-Determination and Education Assistance Act to "clarify" that "de novo" review is the proper judicial review standard for actions brought in federal district court. This important provision should be included in both S. 979 and H.R. 1167.

Annual Reports. The Federal Reports Elimination Act of 1998, P.L. 105-362, eliminated the reporting requirements of section 105(c) of the ISDEA. Section 106(c) had required the Secretaries of the Interior and Health and Human Services to report to Congress on an annual basis direct program and contract support cost deficiencies and indirect cost rates for Indian tribes and Tribal organizations. These reporting requirements are critical to assuring that Congress is kept informed about critical funding issues. The Committee should add a new section to S. 979 that reinstates 106(c).

Mr. Chairman, with these changes we recommend S. 979 will have the full support of our tribal groups and we urge the Committee to move expeditiously to mark-up and Senate passage.

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 the 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 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 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.

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 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 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.

These are exciting and challenging times for Tribal governments. The Lununi 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 Services for service delivery. Tribal governments are pushing the 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.

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.

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 1999, IHS has transferred approximately \$549 million to 254 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 11 years ago within the Department of the Interior. We have now completed seven years of a demonstration project under Self-Governance with IHS. S. 979, 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 S. 979.

Thank you.