To amend the Indian Self-Determination and Education Assistance Act to make certain technical improvements in the self-governance demonstration project.

IN THE SENATE OF THE UNITED STATES

MARCH 10 (legislative day, MARCH 3), 1993

Mr. McCaIN (by request) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

A BILL

To amend the Indian Self-Determination and Education Assistance Act to make certain technical improvements in the self-governance demonstration project.

1 Be it enacted by the Senate and House of Represent-atives of the United States of America in Congress assembled,

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Tribal Self-Governance Demonstration Project Technical Amendments Act of 1993”. 
SEC. 2. TRIBAL FUNDING SHARES.

Title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f note) is amended by adding at the end thereof the following new sections:

"SEC. 311. (a) Unless directed otherwise by an express provision of law enacted after the date of the enactment of this section, the Secretary of the Interior and the Secretary of Health and Human Services, as the case may be, shall make available, through negotiations, a tribal share of all funds and resources requested by a tribe which are specifically or functionally related to the provision of services and benefits to the tribe or its members, including all funds and resources available to the Department of the Interior or the Department of Health and Human Services, as the case may be, to support the provision of services and benefits to Indian tribes and Indian individuals regardless of the organizational level where the affected Secretary would have otherwise spent the funds or provided the resources, and regardless of the origin of the funds or resources.

"(b) Unless directed otherwise by an express provision of law specific to a distribution or allocation enacted after the date of the enactment of this section, the Secretary of the Interior or the Secretary of Health and Human Services, as the case may be, shall make available, through negotiations, a tribal share of all funds and resources requested by a tribe which are specifically or functionally related to the provision of services and benefits to the tribe or its members, including all funds and resources available to the Department of the Interior or the Department of Health and Human Services, as the case may be, to support the provision of services and benefits to Indian tribes and Indian individuals regardless of the organizational level where the affected Secretary would have otherwise spent the funds or provided the resources, and regardless of the origin of the funds or resources."
sources requested by a tribe which are available to Indian tribes or Indian individuals and which the affected Secretary could have otherwise distributed or allocated by competitive procedure, formula, priority list, or other mechanism. Tribal shares of such funds shall be determined by the Secretary in a manner similar to that used with other funds under this title.

“(c) The Secretary of the Interior and the Secretary of Health and Human Services shall designate the Director of the Office of Self-Governance, established pursuant to section 315 of this title, to be the Federal negotiator for any agreement with each such Secretary, and delegate to the Director authority to initial and execute any agreement authorized under this title. The Director shall determine a specific Federal program residual and a tribe’s tribal share after good faith consideration of the positions of the tribe and the appropriate Federal agency. The Director shall cooperate with the negotiating tribe to prepare and initial the appropriate Federal agency’s and the tribe’s preliminary approval of a negotiated agreement in accordance with section 315 of this title. Upon expiration of the appeal rights provided in subsection (d), the Secretary shall execute the agreement, the tribe shall execute the agreement on its own behalf, and the agreement shall
be forwarded to Congress for review as provided in this title.

“(d) The tribe or the affected Federal agency may appeal the Director’s determination of a specific Federal program residual or a tribe’s tribal share by filing a written appeal to the appropriate Self-Governance Policy Council within 10 days of the initialing of the agreement by the tribe and the Director. The Council shall render a decision within 15 days of receipt of the appeal, after according the Director, the tribe, and the affected Federal agency the opportunity to file responses and make brief oral presentations to the Council. The Director shall have no vote on appeal decisions of the Council. Appeal decisions of the Council shall be final.

“(e) Unless otherwise agreed to by a tribe in negotiations, a tribal share of a tribe shall be determined as follows:

“(1) A residual amount for programs, activities, functions and services directly related to the natural or financial trust resources of a tribe or to the executive direction and administrative services functions of the affected Federal agency shall be determined and subtracted from the total funds estimated to be available for the next fiscal year, which estimate shall be based either upon the total in that agency’s
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budget request for that year or upon the total made available by Congress for the appropriate year. The residual amount shall be that amount which, if all Federal funds benefiting Indian tribes and Indian individuals were administered by tribes under agreements authorized by this title, would be necessary to support an efficiently restructured Federal implementation of the minimum core Federal activities specifically required by law to be carried out by a Federal official.

“(2) The tribal share of a tribe shall be determined in negotiations using factors directly related to the budget account, fund or program being allocated, and shall be separately calculated at each administrative level of the Federal agency using factors specific to that level. In lieu of negotiating a tribal share of funds from the central office or other national-scope administrative level of a Federal agency, a tribe may elect to receive the sum of $45,000 per year.

“(f) In preparing to negotiate a tribe’s third and successive annual agreements under this title, the affected Secretary shall present a base budget to the tribe as the minimum amount to be negotiated. The base budget shall be calculated as the amount the tribe negotiated in the
prior year, plus pay cost adjustment increases related to employee costs identical to those applied to Federal employees, and plus inflation increases on the remaining funds. The affected Secretary shall add to a tribe's base budget further increases and additions sought by the tribe in negotiations under the terms and conditions of this title.

"SEC. 312. (a) Subject to the availability of funds, the affected Secretary shall ensure that the contract support costs associated with a tribe's operation of its annual funding agreement with the Secretary are fully funded by the Secretary. Such costs shall be estimated at the time of negotiation by multiplying the tribe's most recent indirect cost rate negotiated with the inspector general of the tribe's cognizant Federal agency times the total amount of funds included within the annual funding agreement regardless of the origin of the funds and regardless of the purpose for which the funds are spent by the tribe; except that contract support costs shall be separately calculated for direct funds flowing through the tribe to an intertribal organization at the intertribal organization's negotiated indirect cost rate. The estimated contract support funds provided to a tribe shall be subsequently adjusted to a final amount based upon the tribe's final approved indirect cost rate for that funding year. The total amount of funds
other than contract support included within an annual
funding agreement shall be an agreement’s direct funds
base without exclusions.

“(b) Upon request of the appropriate tribe, a mini-
mum of 80 percent of the full amount of such tribe’s esti-
mated annual contract support cost funds shall be made
available to it at the beginning of its funding year and
the remainder made available either at the beginning of
the second half of its funding year or when the tribe’s final
indirect cost rate has been approved for that funding year,
whichever comes later.

“(c) If a tribe’s indirect cost rate negotiated with the
inspector general has not fluctuated more than 10 percent
during the preceding 36-month period, the affected Sec-
retary shall, at the request of a tribe, negotiate a lump
sum of contract support funds equal to the tribe’s most
recent indirect cost rate times the annual funding agree-
ment’s total direct funds base, which lump sum shall be
added to the agreement and shall remain part of the
tribe’s base budget in successive years and be adjusted
under the provisions of section 311(f).

“Sec. 313. (a) The provisions of section 106 of this
Act (25 U.S.C. 450j(b)) shall apply to agreements under
this title.
“(b) The provisions of subsections (c) and (d) of section 102 of this Act (25 U.S.C. 450f (c) and (d)) shall apply to agreements under this title, and in all such cases, an Indian tribe and its employees carrying out an agreement under this title shall be deemed to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian or Public Health Service in the Department of Health and Human Services, as the case may be, while carrying out any such agreement and the tribe’s employees (including those acting on behalf of the tribe as provided in section 2671 of title 28, United States Code) are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the agreement.

“SEC. 314. (a) General Federal program rules, the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), and all Federal acquisition regulations promulgated pursuant to such Act, shall not apply to agreements under this title, nor shall they apply to a tribe’s activities, including construction and a tribe’s contracts or sub-contracts involving such activities, carried out with funds obtained from agreements under this title.

“(b) The Secretary of the Interior or the Secretary of Health and Human Services, as the case may be, shall, within 60 days after receipt of the request from an Indian
tribe, approve the tribe’s request to waive the application of a Federal regulation to the tribe’s carrying out of activities under an agreement unless, within 30 days of receipt of the request, the affected Secretary makes a specific waiver declination finding, based upon a clear and convincing evidence standard, that—

“(1) adequate protection of trust resources will not otherwise be provided under the terms of the agreement; or

“(2) specific language in the regulation sought to be waived is expressly mandated by law.

“(c) Unless specific language in the regulation sought to be waived is expressly mandated by law, a tribe’s request for waiver shall be treated as approved unless declined under the procedures of the foregoing subsection (b). In declining a waiver request, the Secretary shall—

“(1) immediately state all the Secretary’s objections in writing to the tribe;

“(2) within 30 days provide assistance to the tribe to revise its waiver request to overcome the stated objections; and

“(3) within 60 days provide the tribe with a hearing on the record and the opportunity for appeal on the objections raised under rules and regulations
governing hearings and appeals for self-determination contracts.

"SEC. 315. (a) The Secretary of the Interior and the
Secretary of Health and Human Services shall establish
an Office of Self-Governance for the appropriate depart-
ment within the Office of the affected Secretary. The af-
fected Secretary shall consult with all tribes with whom
the affected Secretary has an agreement authorized under
this title before making personnel hiring decisions con-
cerning the Office of Self-Governance. The requirements
of section 2 of Public Law 96-135 (25 U.S.C. 472a) shall
apply to all positions within each Office of Self-Govern-
ance, except that, notwithstanding any provision of the In-
dian preference laws, such laws shall not apply in the case
of any personnel action respecting an applicant or em-
ployee not entitled to Indian preference if a majority of
the tribes with whom the affected Secretary has an agree-
ment authorized under this title at the time the personnel
action is initially implemented concur in writing with sus-
pending the application of such laws with respect to such
personnel action.

"(b) The Secretary of the Interior, with respect to
the Department of the Interior, and the Secretary of
Health and Human Services, with respect to the Depart-
ment of Health and Human Services, shall vest in the Di-
rector all of the functions of the appropriate department
with respect to formulation and establishment of Federal
policy and procedure, and the supervision of Federal pro-
grams and expenditures of Federal funds supporting the
Federal implementation of the self-governance demonstra-
tion project. The Secretary shall carry out such functions
through the Director under the provisions of this title.

"(c) The Secretary of the Interior, with respect to
the Department of the Interior, and the Secretary of
Health and Human Services, with respect to the Depart-
ment of Health and Human Services, shall establish a
Self-Governance Policy Council for each department,
which shall meet in regularly scheduled monthly meetings
to finally resolve departmental policy and administrative
issues during the demonstration project. The Self-Govern-
ance Policy Council of the Department of the Interior shall
be chaired by the Director of the Office of Self-Govern-
ance, with additional members including the Assistant
Secretary for Indian Affairs, a representative of the Sec-
retary of the Interior, the Associate Solicitor for Indian
Affairs, and 2 non-Federal members appointed by the Sec-
retary of the Interior representing tribes with self-govern-
ance agreements with the Department of the Interior. The
Self-Governance Policy Council of the Department of
Health and Human Services shall be chaired by the Direc-
tor of the Office of Self-Governance, with additional mem-
ers including the Director of the Indian Health Service,
a representative of the Secretary of Health and Human
Services, a representative of the Office of General Counsel,
and 2 non-Federal members appointed by the Secretary
of Health and Human Services representing tribes with
self-governance agreements with the Department of
Health and Human Services. In the case of each depart-
ment’s Policy Council, the 2 non-Federal members shall
serve 1-year, nonconsecutive terms, and shall be selected
in such manner as to achieve geographic representation
from among nominations made by tribes having agree-
ments authorized under this title with the department.
The 2 non-Federal members shall have voice but no voting
privileges on all matters before the Self-Governance Policy
Council. Complete minutes of the Council shall be made
and distributed to all tribes having agreements authorized
under this title with the Department.

"Sec. 316. The Secretary of the Interior and the Sec-
retary of Health and Human Services shall ensure that
the Director and all other departmental officials negotiate
agreements under this title in good faith and in a spirit
of cooperation with each negotiating tribe.

"Sec. 317. (a) Shortfall or supplemental funding
shall be used by each such Secretary for two purposes—
“(1) to make additional funds available to a Federal agency organizational level to address the Director’s determination that, based on clear and convincing evidence, the provision of a negotiated tribal share will have an adverse effect on other tribes served by that organizational level; except that such additional funds shall be made available from the shortfall or supplemental funding account for only 1 year, and in successive years shall be met from funds and resources directly derived from restructuring and downsizing on the part of the Federal agency at the particular organizational level affected; and

“(2) to meet the ongoing, additional funding needs of tribes assuming the increased responsibilities and obligations inherent in agreements under this title.

“(b) The restructuring and downsizing on the part of the Federal agency in subsection (a) shall be accomplished in accordance with a plan and time frame that shall be prepared and submitted to the negotiating tribe, to the Committee on Indian Affairs of the Senate, and to the Committee on Natural Resources of the House of Representatives no later than 30 days after the effective

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date of the annual funding agreement giving rise to the restructuring and downsizing.”.

SEC. 3. FUNDS AVAILABLE.

Title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f note) is amended—

(1) in section 303(a)(6), by striking “paragraphs (1) and (2)” and inserting in lieu thereof “paragraph (3)”; and

(2) in section 303(a)(6), by inserting after “amount” the following: “which is, at a minimum,”.

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