

103^D CONGRESS
1ST SESSION

S. 550

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 Representa-*
2 *tives 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
5 Demonstration Project Technical Amendments Act of
6 1993”.

1 **SEC. 2. TRIBAL FUNDING SHARES.**

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

5 “SEC. 311. (a) Unless directed otherwise by an ex-
6 press provision of law enacted after the date of the enact-
7 ment of this section, the Secretary of the Interior and the
8 Secretary of Health and Human Services, as the case may
9 be, shall make available, through negotiations, a tribal
10 share of all funds and resources requested by a tribe which
11 are specifically or functionally related to the provision of
12 services and benefits to the tribe or its members, including
13 all funds and resources available to the Department of the
14 Interior or the Department of Health and Human Serv-
15 ices, as the case may be, to support the provision of serv-
16 ices and benefits to Indian tribes and Indian individuals
17 regardless of the organizational level where the affected
18 Secretary would have otherwise spent the funds or pro-
19 vided the resources, and regardless of the origin of the
20 funds or resources.

21 “(b) Unless directed otherwise by an express provi-
22 sion of law specific to a distribution or allocation enacted
23 after the date of the enactment of this section, the Sec-
24 retary of the Interior or the Secretary of Health and
25 Human Services, as the case may be, shall make available,
26 through negotiations, a tribal share of all funds and re-

1 sources requested by a tribe which are available to Indian
2 tribes or Indian individuals and which the affected Sec-
3 retary could have otherwise distributed or allocated by
4 competitive procedure, formula, priority list, or other
5 mechanism. Tribal shares of such funds shall be deter-
6 mined by the Secretary in a manner similar to that used
7 with other funds under this title.

8 “(c) The Secretary of the Interior and the Secretary
9 of Health and Human Services shall designate the Direc-
10 tor of the Office of Self-Governance, established pursuant
11 to section 315 of this title, to be the Federal negotiator
12 for any agreement with each such Secretary, and delegate
13 to the Director authority to initial and execute any agree-
14 ment authorized under this title. The Director shall deter-
15 mine a specific Federal program residual and a tribe’s
16 tribal share after good faith consideration of the positions
17 of the tribe and the appropriate Federal agency. The Di-
18 rector shall cooperate with the negotiating tribe to prepare
19 and initial the appropriate Federal agency’s and the
20 tribe’s preliminary approval of a negotiated agreement in
21 accordance with section 315 of this title. Upon expiration
22 of the appeal rights provided in subsection (d), the Sec-
23 retary shall execute the agreement, the tribe shall execute
24 the agreement on its own behalf, and the agreement shall

1 be forwarded to Congress for review as provided in this
2 title.

3 “(d) The tribe or the affected Federal agency may
4 appeal the Director’s determination of a specific Federal
5 program residual or a tribe’s tribal share by filing a writ-
6 ten appeal to the appropriate Self-Governance Policy
7 Council within 10 days of the initialing of the agreement
8 by the tribe and the Director. The Council shall render
9 a decision within 15 days of receipt of the appeal, after
10 according the Director, the tribe, and the affected Federal
11 agency the opportunity to file responses and make brief
12 oral presentations to the Council. The Director shall have
13 no vote on appeal decisions of the Council. Appeal deci-
14 sions of the Council shall be final.

15 “(e) Unless otherwise agreed to by a tribe in negotia-
16 tions, a tribal share of a tribe shall be determined as
17 follows:

18 “(1) A residual amount for programs, activities,
19 functions and services directly related to the natural
20 or financial trust resources of a tribe or to the exec-
21 utive direction and administrative services functions
22 of the affected Federal agency shall be determined
23 and subtracted from the total funds estimated to be
24 available for the next fiscal year, which estimate
25 shall be based either upon the total in that agency’s

1 budget request for that year or upon the total made
2 available by Congress for the appropriate year. The
3 residual amount shall be that amount which, if all
4 Federal funds benefiting Indian tribes and Indian
5 individuals were administered by tribes under agree-
6 ments authorized by this title, would be necessary to
7 support an efficiently restructured Federal imple-
8 mentation of the minimum core Federal activities
9 specifically required by law to be carried out by a
10 Federal official.

11 “(2) The tribal share of a tribe shall be deter-
12 mined in negotiations using factors directly related
13 to the budget account, fund or program being allo-
14 cated, and shall be separately calculated at each ad-
15 ministrative level of the Federal agency using factors
16 specific to that level. In lieu of negotiating a tribal
17 share of funds from the central office or other na-
18 tional-scope administrative level of a Federal agency,
19 a tribe may elect to receive the sum of \$45,000 per
20 year.

21 “(f) In preparing to negotiate a tribe’s third and suc-
22 cessive annual agreements under this title, the affected
23 Secretary shall present a base budget to the tribe as the
24 minimum amount to be negotiated. The base budget shall
25 be calculated as the amount the tribe negotiated in the

1 prior year, plus pay cost adjustment increases related to
2 employee costs identical to those applied to Federal em-
3 ployees, and plus inflation increases on the remaining
4 funds. The affected Secretary shall add to a tribe's base
5 budget further increases and additions sought by the tribe
6 in negotiations under the terms and conditions of this
7 title.

8 “SEC. 312. (a) Subject to the availability of funds,
9 the affected Secretary shall ensure that the contract sup-
10 port costs associated with a tribe's operation of its annual
11 funding agreement with the Secretary are fully funded by
12 the Secretary. Such costs shall be estimated at the time
13 of negotiation by multiplying the tribe's most recent indi-
14 rect cost rate negotiated with the inspector general of the
15 tribe's cognizant Federal agency times the total amount
16 of funds included within the annual funding agreement re-
17 gardless of the origin of the funds and regardless of the
18 purpose for which the funds are spent by the tribe; except
19 that contract support costs shall be separately calculated
20 for direct funds flowing through the tribe to an intertribal
21 organization at the intertribal organization's negotiated
22 indirect cost rate. The estimated contract support funds
23 provided to a tribe shall be subsequently adjusted to a
24 final amount based upon the tribe's final approved indirect
25 cost rate for that funding year. The total amount of funds

1 other than contract support included within an annual
2 funding agreement shall be an agreement's direct funds
3 base without exclusions.

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

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

22 “SEC. 313. (a) The provisions of section 106 of this
23 Act (25 U.S.C. 450j(b)) shall apply to agreements under
24 this title.

1 “(b) The provisions of subsections (c) and (d) of sec-
2 tion 102 of this Act (25 U.S.C. 450f (c) and (d)) shall
3 apply to agreements under this title, and in all such cases,
4 an Indian tribe and its employees carrying out an agree-
5 ment under this title shall be deemed to be part of the
6 Bureau of Indian Affairs in the Department of the Inte-
7 rior or the Indian or Public Health Service in the Depart-
8 ment of Health and Human Services, as the case may be,
9 while carrying out any such agreement and the tribe’s em-
10 ployees (including those acting on behalf of the tribe as
11 provided in section 2671 of title 28, United States Code)
12 are deemed employees of the Bureau or Service while act-
13 ing within the scope of their employment in carrying out
14 the agreement.

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

23 “(b) The Secretary of the Interior or the Secretary
24 of Health and Human Services, as the case may be, shall,
25 within 60 days after receipt of the request from an Indian

1 tribe, approve the tribe's request to waive the application
2 of a Federal regulation to the tribe's carrying out of activi-
3 ties under an agreement unless, within 30 days of receipt
4 of the request, the affected Secretary makes a specific
5 waiver declination finding, based upon a clear and convinc-
6 ing evidence standard, that—

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

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

12 “(c) Unless specific language in the regulation sought
13 to be waived is expressly mandated by law, a tribe's re-
14 quest for waiver shall be treated as approved unless de-
15 clined under the procedures of the foregoing subsection
16 (b). In declining a waiver request, the Secretary shall—

17 “(1) immediately state all the Secretary's objec-
18 tions in writing to the tribe;

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

22 “(3) within 60 days provide the tribe with a
23 hearing on the record and the opportunity for appeal
24 on the objections raised under rules and regulations

1 governing hearings and appeals for self-determina-
2 tion contracts.

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

22 “(b) The Secretary of the Interior, with respect to
23 the Department of the Interior, and the Secretary of
24 Health and Human Services, with respect to the Depart-
25 ment of Health and Human Services, shall vest in the Di-

1 rector all of the functions of the appropriate department
2 with respect to formulation and establishment of Federal
3 policy and procedure, and the supervision of Federal pro-
4 grams and expenditures of Federal funds supporting the
5 Federal implementation of the self-governance demonstra-
6 tion project. The Secretary shall carry out such functions
7 through the Director under the provisions of this title.

8 “(c) The Secretary of the Interior, with respect to
9 the Department of the Interior, and the Secretary of
10 Health and Human Services, with respect to the Depart-
11 ment of Health and Human Services, shall establish a
12 Self-Governance Policy Council for each department,
13 which shall meet in regularly scheduled monthly meetings
14 to finally resolve departmental policy and administrative
15 issues during the demonstration project. The Self-Govern-
16 ance Policy Council of the Department of the Interior shall
17 be chaired by the Director of the Office of Self-Govern-
18 ance, with additional members including the Assistant
19 Secretary for Indian Affairs, a representative of the Sec-
20 retary of the Interior, the Associate Solicitor for Indian
21 Affairs, and 2 non-Federal members appointed by the Sec-
22 retary of the Interior representing tribes with self-govern-
23 ance agreements with the Department of the Interior. The
24 Self-Governance Policy Council of the Department of
25 Health and Human Services shall be chaired by the Direc-

1 tor of the Office of Self-Governance, with additional mem-
2 bers including the Director of the Indian Health Service,
3 a representative of the Secretary of Health and Human
4 Services, a representative of the Office of General Counsel,
5 and 2 non-Federal members appointed by the Secretary
6 of Health and Human Services representing tribes with
7 self-governance agreements with the Department of
8 Health and Human Services. In the case of each depart-
9 ment's Policy Council, the 2 non-Federal members shall
10 serve 1-year, nonconsecutive terms, and shall be selected
11 in such manner as to achieve geographic representation
12 from among nominations made by tribes having agree-
13 ments authorized under this title with the department.
14 The 2 non-Federal members shall have voice but no voting
15 privileges on all matters before the Self-Governance Policy
16 Council. Complete minutes of the Council shall be made
17 and distributed to all tribes having agreements authorized
18 under this title with the Department.

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

24 “SEC. 317. (a) Shortfall or supplemental funding
25 shall be used by each such Secretary for two purposes—

1 “(1) to make additional funds available to a
2 Federal agency organizational level to address the
3 Director’s determination that, based on clear and
4 convincing evidence, the provision of a negotiated
5 tribal share will have an adverse effect on other
6 tribes served by that organizational level; except that
7 such additional funds shall be made available from
8 the shortfall or supplemental funding account for
9 only 1 year, and in successive years shall be met
10 from funds and resources directly derived from re-
11 structuring and downsizing on the part of the Fed-
12 eral agency at the particular organizational level af-
13 fected; and

14 “(2) to meet the ongoing, additional funding
15 needs of tribes assuming the increased responsibil-
16 ities and obligations inherent in agreements under
17 this title.

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

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

3 **SEC. 3. FUNDS AVAILABLE.**

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

6 (1) in section 303(a)(6), by striking “para-
7 graphs (1) and (2)” and inserting in lieu thereof
8 “paragraph (3)”; and

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

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