

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 2036

To specify the terms of contracts entered into by the United States and Indian tribal organizations under the Indian Self-Determination and Education Assistance Act, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

APRIL 20 (legislative day, APRIL 11), 1994

Mr. MCCAIN (for himself and Mr. INOUE) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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## A BILL

To specify the terms of contracts entered into by the United States and Indian tribal organizations under the Indian Self-Determination and Education Assistance Act, and for other purposes.

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 “Indian Self-Determina-  
5       tion Contract Reform Act of 1994”.

1 **SEC. 2. CONTRACT SPECIFICATIONS.**

2 Section 105 of the Indian Self-Determination and  
3 Education Assistance Act (25 U.S.C. 450j) is amended to  
4 read as follows:

5 **“SEC. 105. CONTRACT OR GRANT SPECIFICATIONS.**

6 “Each contract or grant entered into under this Act,  
7 except an agreement entered into pursuant to title III (25  
8 U.S.C. 450f note), shall contain, or incorporate by ref-  
9 erence, the following provisions, with modifications where  
10 indicated and the blanks appropriately filled:

11 “(a) **AUTHORITY AND PURPOSE.**—

12 “(1) **AUTHORITY.**—This agreement, denoted a  
13 Contract of Self-Determination (hereinafter referred  
14 to as the ‘Contract’), is entered into by the Sec-  
15 retary of the Interior (or the Secretary of Health  
16 and Human Services) (hereinafter referred to as the  
17 ‘Secretary’), for and on behalf of the United States  
18 pursuant to the Indian Self-Determination and Edu-  
19 cation Assistance Act and by the authority of the  
20 \_\_\_\_\_ tribal government. Unless other-  
21 wise provided in this agreement, all of the provisions  
22 of the Indian Self-Determination and Education As-  
23 sistance Act are incorporated herein.

24 “(2) **PURPOSE.**—This Contract shall be lib-  
25 erally construed to transfer the funding, functions,  
26 and activities for the following programs from the

1 Federal Government to the \_\_\_\_\_ tribal  
2 government: (List functions, activities, and pro-  
3 grams.)

4 “(3) TRIBAL LAW AND FORUMS.—The laws of  
5 the \_\_\_\_\_ tribal government shall be ap-  
6 plied in the execution of this Contract and the pow-  
7 ers and decisions of the Tribal Court shall be re-  
8 spected to the extent that Federal law, construed in  
9 accordance with the applicable canons of construc-  
10 tion and the Indian Self-Determination and Edu-  
11 cation Assistance Act, is not inconsistent.

12 “(b) TERMS, PROVISIONS AND CONDITIONS.—

13 “(1) TERM.—The term of this Contract shall  
14 not exceed 3 years, unless the Secretary and the  
15 tribe agree on a longer period pursuant to section  
16 106 of the Indian Self-Determination and Education  
17 Assistance Act. The calendar year is the basis for  
18 contracts under this Act, unless the Secretary and  
19 the tribe agree on a different period.

20 “(2) EFFECTIVE DATE.—This Contract shall  
21 become effective upon approval and execution by the  
22 tribe and the Secretary, unless otherwise provided by  
23 law.

24 “(3) FUNDING AMOUNT.—Subject to the appro-  
25 priation of funds by Congress, the Secretary shall

1 make available to the tribe the total amount speci-  
2 fied in the annual agreement incorporated by ref-  
3 erence in subsection (f)(2).

4 “(4) PAYMENT.—

5 “(A) IN GENERAL.—Payments shall be  
6 made as expeditiously as possible in compliance  
7 with applicable Treasury Department regula-  
8 tions and shall include financial arrangements  
9 to cover funding during periods under continu-  
10 ing resolutions to the extent permitted by such  
11 resolutions.

12 “(B) QUARTERLY PAYMENTS.—To the ex-  
13 tent authorized by law, for each fiscal year cov-  
14 ered by this Contract, the Secretary shall make  
15 available the funds specified for the fiscal year  
16 under the annual agreement by paying to the  
17 tribe on a quarterly basis one-quarter of the  
18 total amount provided for in the annual agree-  
19 ment for that fiscal year, or by using an instru-  
20 ment such as a letter of credit, or other method  
21 authorized by law, as may be specified in the  
22 annual agreement. To the extent applicable,  
23 each quarterly payment shall be made on the  
24 first day of each quarter of the fiscal year ex-  
25 cept for the first quarter, for which the quar-

1           terly payment shall be made not later than the  
2           date that is 10 calendar days after the date on  
3           which the Office of Management and Budget  
4           apportions the appropriations for the fiscal year  
5           for the programs, services, functions, and ac-  
6           tivities subject to the Contract.

7           “(5) RECORDS.—(A) Except for previously pro-  
8           vided copies of tribal records that the Secretary  
9           demonstrates are clearly required to be maintained  
10          as part of the recordkeeping system of the Depart-  
11          ment of the Interior, tribal records shall not be con-  
12          sidered Federal records for purposes of chapter 5 of  
13          title 5, United States Code.

14          “(B) The tribe shall maintain a recordkeeping  
15          system, and provide reasonable access to records to  
16          the Secretary that permits the Department of the  
17          Interior to meet its minimum legal recordkeeping  
18          program requirements under chapter 31 of title 44,  
19          United States Code.

20          “(6) PROPERTY.—(A) At the request of the  
21          tribe, the Secretary shall make available to the tribe  
22          reasonably divisible real property, facilities, equip-  
23          ment, and personal property that the Department  
24          had previously utilized to provide the programs,  
25          services, functions, and activities now consolidated

1 by the tribe pursuant to subsection (c)(1) of this  
2 Contract. A mutually agreed upon list specifying the  
3 property, facilities, and equipment so made available  
4 shall also be prepared and periodically revised.

5 “(B) Subject to the agreement of the General  
6 Services Administration, the Secretary shall delegate  
7 to the tribe the authority to acquire such ‘excess’  
8 property as may be appropriate in the judgment of  
9 the tribe to support the programs, services, func-  
10 tions, and activities consolidated under subsection  
11 (c)(1) of this Contract. The Secretary agrees to  
12 make best efforts to assist the tribe in obtaining  
13 such confiscated or excess property as may become  
14 available to tribes or local governments. Subject to  
15 the agreement of the General Services Administra-  
16 tion, a screener identification card (General Services  
17 Administration form 2946) shall be issued to the  
18 tribe not later than the effective date of this Con-  
19 tract. The designated official shall, upon request, as-  
20 sist the tribe in securing the use of the card.

21 “(C) The tribe shall, upon acquisition of excess  
22 United States Government property, provide ade-  
23 quate documentation to the Secretary to facilitate  
24 recordation of the property in the Bureau of Indian  
25 Affairs Property Inventory.

1           “(D) The tribe shall determine what capital  
2           equipment, leases, rentals, property, or services it  
3           shall require to perform its obligations under this  
4           subsection, and shall acquire and maintain records  
5           of such capital equipment, property rentals, leases,  
6           property, or services through tribal procurement pro-  
7           cedures.

8           “(7) SAVINGS.—Notwithstanding any other pro-  
9           vision of law, any funds appropriated pursuant to  
10          the Act of November 2, 1921 (42 Stat. 208, chapter  
11          115; 25 U.S.C. 13) shall remain available until ex-  
12          pended.

13          “(8) TRANSPORTATION.—

14                 “(A) USE OF MOTOR VEHICLES.—Subject  
15                 to the agreement of the General Services Ad-  
16                 ministration, the Secretary hereby authorizes  
17                 the tribe to obtain interagency motor pool vehi-  
18                 cles and related services, if available, for per-  
19                 formance of any activities under this Contract.

20                 “(B) USE OF OTHER TRANSPORTATION  
21                 SERVICES.—The Secretary shall make best ef-  
22                 forts to obtain the concurrence of the General  
23                 Services Administration to provide the tribe and  
24                 its employees with eligibility for services and  
25                 supplies pursuant to General Services Adminis-

1           tration programs and contracts with private en-  
2           tities, including airlines and other transpor-  
3           tation carriers.

4           “(9) REGULATORY AUTHORITY.—The tribe is  
5           not required to abide by Federal program guidelines,  
6           manuals, or policy directives unless otherwise agreed  
7           to by the tribe and the Secretary.

8           “(10) DISPUTES.—(A) Obligations of the Unit-  
9           ed States under this Contract shall be considered to  
10          be ‘duties’ under section 110 of the Indian Self-De-  
11          termination and Education Assistance Act.

12          “(B) Section 110 of the Indian Self-Determina-  
13          tion and Education Act shall apply to disputes under  
14          this Contract.

15          “(C) In addition or as an alternative to rem-  
16          edies and procedures prescribed by section 110 of  
17          the Indian Self-Determination and Education Assist-  
18          ance Act the parties may jointly—

19               “(i) submit disputes under this Contract to  
20               third-party mediation, which for purposes of  
21               this section means that the Secretary and the  
22               tribe nominate a third party who together  
23               choose a third party mediator (‘third-party’  
24               means a person not employed by or significantly



1 involved with either the tribe, the Secretary, or  
2 the Department of the Interior);

3 “(ii) submit the dispute to the Court of the  
4 tribe; or

5 “(iii) submit the dispute to mediation proc-  
6 esses provided for under the law of the tribe.

7 “(D) The Secretary shall accept decisions  
8 reached by mediation processes or the tribal court,  
9 but shall not be bound by any decision that might  
10 be in conflict with the interests of the Indians or the  
11 United States.

12 “(11) TRIBAL ADMINISTRATIVE PROCES-  
13 DURES.—Tribal law and tribal forums shall provide  
14 for administrative due process with respect to pro-  
15 grams, services, functions, and activities that are  
16 provided by the tribe pursuant to this Contract and  
17 pursuant to the Indian Civil Rights Act of 1968 (25  
18 U.S.C. 1301 et seq.).

19 “(12) SUCCESSOR ANNUAL AGREEMENT.—Ne-  
20 gotiations for a successor annual agreement, as pro-  
21 vided for in subsection (f)(2), shall begin not later  
22 than 120 days prior to the conclusion of the preced-  
23 ing annual agreement. The tribe is hereby assured  
24 that future funding of successor annual agreements  
25 shall only be reduced pursuant to section 106(b) of

1 the Indian Self-Determination and Education Assist-  
2 ance Act. The Secretary agrees to prepare and sup-  
3 ply relevant information, and to promptly comply  
4 with any request by the tribe for information reason-  
5 ably needed to determine the funds that may be  
6 available for a successor annual agreement as pro-  
7 vided for in a subsection (f)(2) of this Contract.

8 “(13) SECRETARIAL APPROVAL.—(A) Except as  
9 provided in subparagraph (B), for the term of the  
10 Contract, section 2103 of the Revised Statutes (25  
11 U.S.C. 81) and section 16 of the Act of June 18,  
12 1934 (25 U.S.C. 476), shall not apply to any con-  
13 tract entered into by the tribe in connection with  
14 this Contract.

15 “(B) Each contract entered into by the tribe  
16 shall—

17 “(i) be in writing;

18 “(ii) identify the interested parties, their  
19 authorities, and purposes;

20 “(iii) state the work to be performed; and

21 “(iv) state the basis for any claim, the pay-  
22 ments to be made, and the terms of the con-  
23 tract, which shall be fixed.

24 “(c) OBLIGATION OF THE TRIBE.—

1           “(1) CONSOLIDATION.—Except as provided in  
2 subsection (d)(2), the Tribally Controlled Commu-  
3 nity College Assistance Act of 1978 (25 U.S.C. 1801  
4 et seq.), and title XI of the Education Amendments  
5 of 1978 (25 U.S.C. 2001 et seq.), the tribe shall  
6 perform the programs, services, functions, and ac-  
7 tivities as provided in the annual agreement under  
8 subsection (f)(2) of this Contract.

9           “(2) AMOUNT OF FUNDS.—The total amount of  
10 funds covered by the Contract provided for in para-  
11 graph (1) that the Secretary shall make available to  
12 the \_\_\_\_\_ Indian tribe shall be deter-  
13 mined in an annual agreement between the Sec-  
14 retary and the tribe, which shall be incorporated in  
15 its entirety into this Contract and attached as pro-  
16 vided in subsection (f)(2).

17           “(3) TRIBAL PROGRAMS.—The tribe agrees to  
18 provide the programs, services, functions, and activi-  
19 ties identified in the annual agreement. The tribe  
20 pledges to practice good faith in upholding its re-  
21 sponsibility to provide such programs, services, func-  
22 tions, and activities.

23           “(4) TRUST SERVICES FOR INDIVIDUAL INDI-  
24 ANS.—To the extent that the annual agreement en-  
25 deavors to provide trust services to individual Indi-

1       ans that were formerly provided by the Secretary,  
2       the tribe shall maintain at least the same level of  
3       service as was previously provided by the Secretary,  
4       subject to the availability of appropriated funds for  
5       such services. The tribe pledges to practice good  
6       faith in upholding its responsibility to provide such  
7       service. Trust services for individual Indians means  
8       only services that pertain to land or financial man-  
9       agement connected to individually held allotments.

10      “(d) OBLIGATION OF THE UNITED STATES.—

11           “(1) TRUST RESPONSIBILITY.—The United  
12       States reaffirms its trust responsibility to the  
13       \_\_\_\_\_ Indian tribe of the  
14       \_\_\_\_\_ Indian Reservation to protect and  
15       conserve the trust resources of the \_\_\_\_\_  
16       Indian tribe and of individual Indians of the  
17       \_\_\_\_\_ Indian Reservation. Nothing in  
18       this Contract is intended to, nor shall be construed,  
19       to terminate, waive, modify, or reduce the trust re-  
20       sponsibility of the United States to the tribe or indi-  
21       vidual Indians. The Secretary pledges to practice  
22       good faith in upholding said trust responsibility.

23           “(2) PROGRAMS RETAINED.—As specified in  
24       the annual agreement, the United States hereby re-  
25       tains the programs, services, functions, and activities

1 with respect to the tribe that are not specially as-  
2 sumed by the tribe in the annual agreement.

3 “(e) OTHER PROVISIONS.—

4 “(1) DESIGNATED OFFICIALS.—On or before  
5 the effective date of this Contract, both the United  
6 States and the tribe shall provide each other with a  
7 written designation of a senior official as its rep-  
8 resentative for notices, proposed amendments to the  
9 Contract and other purposes for this Contract.

10 “(2) INDIAN PREFERENCE IN EMPLOYMENT,  
11 CONTRACTING, AND SUBCONTRACTING.—Tribal law  
12 shall govern the provision of Indian preference in  
13 employment, contracting, and subcontracting pursu-  
14 ant to this Contract. Section 5 of the Indian Self-  
15 Determination and Education Assistance Act shall  
16 apply to individuals who leave Federal employment  
17 for tribal employment pursuant to this contract.

18 “(3) CONTRACT MODIFICATIONS OR AMEND-  
19 MENT.—To be effective any modifications of this  
20 Contract shall be in the form of a written amend-  
21 ment to the Contract, and shall require the written  
22 consent of the tribe and the Secretary.

23 “(4) OFFICIALS NOT TO BENEFIT.—No Mem-  
24 ber of Congress, or resident commissioner, shall be  
25 admitted to any share or part of any contract exe-

1 cuted pursuant to this Contract, or to any benefit  
2 that may arise therefrom; but this provision shall  
3 not be construed to extend to any contract under  
4 this Contract if made with a corporation for its gen-  
5 eral benefit.

6 “(5) COVENANT AGAINST CONTINGENT FEES.—

7 The parties warrant that no person or selling agency  
8 has been employed or retained to solicit or secure  
9 any contract executed pursuant to this Contract  
10 upon an agreement or understanding for a commis-  
11 sion, percentage, brokerage, or contingent fee, ex-  
12 cepting bona fide employees or bona fide established  
13 commercial or selling agencies maintained by the  
14 contractor for the purpose of securing business. For  
15 breach or violation of this warranty the Government  
16 shall have the right to annul any contract without li-  
17 ability or, in its discretion, to deduct from the Con-  
18 tract price or consideration, or otherwise recover, the  
19 full amount of such commission, percentage, broker-  
20 age, or contingent fee.

21 “(f) ATTACHMENTS.—

22 “(1) APPROVAL OF CONTRACT.—The resolution  
23 of the \_\_\_\_\_ Indian tribe approving this  
24 Contract is attached hereto as attachment 1.

1           “(2) ANNUAL AGREEMENT.—The negotiated  
2           and duly approved annual agreement with respect to  
3           the \_\_\_\_\_ Indian tribe which shall only  
4           contain terms that identify the programs, services,  
5           functions, and activities to be performed, the general  
6           budget category assigned, the funds to be provided,  
7           the time and method of payment, and a requirement  
8           that all modifications or amendments shall be writ-  
9           ten and signed by both parties, is hereby incor-  
10          porated in its entirety in this Contract and attached  
11          hereto as attachment 2.”.

12 **SEC. 3. REGULATIONS.**

13          “(a) IN GENERAL.—The Secretary of the Interior  
14          and the Secretary of Health and Human Services shall  
15          not promulgate any regulation relating to grants, con-  
16          tracts, or cooperative agreements entered into pursuant to  
17          the Indian Self-Determination and Education Assistance  
18          Act (25 U.S.C. 450 et seq.).

19          “(b) EXISTING REGULATIONS.—The provisions of  
20          this Act shall supersede any conflicting provisions of law  
21          or regulation in existence on the date of enactment of this  
22          Act.

1 **SEC. 4. REPEAL.**

2 “(a) IN GENERAL.—Section 107 of the Indian Self-  
3 Determination and Education Assistance Act (25 U.S.C.  
4 450k) is repealed.

5 “(b) CONFORMING AMENDMENTS.—

6 “(1) Section 104(b) of the Indian Self-Deter-  
7 mination and Education Assistance Act (25 U.S.C.  
8 450h(b)) is amending by striking “, in accordance  
9 with regulations adopted pursuant to section 107,”.  
10 “(2) Section 106(h) of such Act (25 U.S.C.  
11 450j(h)) is amended by striking “and the rules and  
12 regulations adopted by the Secretaries of the Inte-  
13 rior and Health and Human Services pursuant to  
14 section 107”.

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