



United States Department of the Interior

BUREAU OF RECLAMATION
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IN REPLY REFER TO:

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W. Ron Allen
Tribal Chairman
Chief Executive Officer
Jamestown S'Klallam Tribe
Board Chairman, Self-Governance
Communication & Education Tribal
Consortium (SGCETC)
303 South Fifth Street
McAlester, OK 74501

Subject: Response to SGCETC Comments on the Draft Best Practices Handbook for
Implementation of the Indian Self-Determination and Education Assistance Act
(P.L. 93-638)

Dear Chairman Allen:

The Bureau of Reclamation (Reclamation) appreciates your review and feedback on Reclamation's draft Best Practices Handbook (Handbook) for Implementation of the Indian Self-Determination and Education Assistance Act (P.L. 93-638). Your recommendations are excerpted below, with Reclamation's responses following.

SGCETC Recommendation 1: Collaborate with key offices within DOI in order to reduce the administrative burden placed on Tribal Nations.

In reviewing the participants included on the steering committee responsible for developing the Handbook we noticed that key offices within the Department of the Interior, such as the Office of Self-Governance, were not included in the development of the document. We are concerned that the lack of internal collaboration within the Department of the Interior (DOI) may result in differing processes and requirements that create an administrative burden on Tribal Nations that elect to use Self-Determination or Self-Governance across DOI bureaus and agencies. As such, we encourage Reclamation to seek input from the Office of Self-Governance and officials within BIA that implement Self-Determination.

Reclamation Response: Reclamation opted to provide the draft Handbook directly to our tribal partners before anyone outside the agency at this stage because our focus is on the direct relationship with tribes and involving them in this 'best practices' process at the earliest stage possible. We agree with the importance of being consistent across the Department, and fully intend to incorporate any input from the Office of Self Governance

(OSG) as well as the Bureau of Indian Affairs (BIA). To that end, Reclamation's P.L. 93-638 Steering Committee has provided a copy of the draft Handbook to the Department's OSG and the BIA for their review.

SGCETC Recommendation 2: Emphasize that agreements under ISDEAA are NOT procurement contracts and Federal contracting laws are generally not relevant.

The Handbook notes that agreements entered into under ISDEAA are "not traditional procurement contracts." We encourage Reclamation to further emphasize that this means Federal contracting laws (including the FAR) generally do not apply to ISDEAA agreements. We have found that this is an area of confusion for some Federal officials given that agreements entered into under Title I are referred to as "contracts."

Reclamation Response: We have made some additional revisions at appropriate locations in the Handbook to further emphasize that P.L. 93-638 contracts, agreements, and Annual Funding Agreements (AFAs) are not traditional procurement contracts.

SGCETC Recommendation 3: Clearly distinguish between Title I and Title IV in the Handbook and ensure "best practices" align with Self-Governance principles.

Self-Determination contracting (Title I) and Self-Governance Compacting (Title IV) are significantly different. In some sections of the Handbook, Reclamation clearly identifies this difference and notes when a statement pertains to Title I or Title IV. However, other sections of the handbook are less clear and we encourage Reclamation to clarify whether requirements and "best practices" pertain to contracts pursued under Title I or agreements pursued under Title IV.

Title I (Self-Determination) is more restrictive than Title IV (Self-Governance) and Tribal Nations with existing Self-Governance agreements have already demonstrated significant governmental capacity in the delivery and management of Federal resources. Reclamation should consider if the Handbook acknowledges the extensive capacity of many Tribal Nations and the undeniable success of Tribal Nations administering Federal programs, activities, and resources to their communities and citizens. In some cases, we believe Reclamation's "best practices" may place additional burdens on Tribal governments without justification. For instance, Reclamation states that one reason for a post-award review to be triggered is to mitigate performance, reporting or financial management concerns. This seems like a broad and subjective standard to include in an agreement to "mitigate" issues that may not exist. We again encourage Reclamation to collaborate with the Office of Self-Governance to ensure that the Handbook aligns with the principles of Self-Governance.

Furthermore, we believe Reclamation should not require or encourage Tribes to adhere to Reclamation's guidelines and standards. One of the factors that has contributed to the success of Self-Governance is that Tribal Nations administer the delivery of Federal resources under

their own guidelines and policies in a manner that is best for their local communities. Requiring, or even encouraging, Tribal governments to operate under Reclamation's regulations and policies is inconsistent with the key principles that have made Self-Governance a success for more than 30 years.

Reclamation Response: We welcome input from the Consortium and the Department's OSG as we finalize our draft Handbook to further address Title IV of P.L. 93-638. Although we were careful to distinguish Title I from Title IV 'best practices' when developing the Handbook, we will remain open to further distinctions as necessary.

Recommendation 4: Develop a "best practice" that calls for sharing key information with Tribal governments prior to the pre-award meeting.

Reclamation's Handbook identifies the collection and review of information on Tribal Management systems prior to the pre-award meeting as a best practice. We concur that negotiations and meetings between the Federal and Tribal governments can benefit from sharing information in a timely manner prior to discussions. However, we did not see a "best practice" in the Handbook that calls for Reclamation to provide Tribal Nations with key information prior to the pre-award meeting.

We believe this recommendation is important to include in the Handbook, particularly because the GAO recently reported to Congress that another bureau within DOI, the Bureau of Indian Affairs (BIA), does not consistently provide Tribal governments with key information prior to negotiations. Without access to key information prior to entering into negotiations, tribal leaders are at a disadvantage in making sound decisions regarding the feasibility of taking over the administration of federal programs. Again, we encourage Reclamation to include a "best practice" that calls for the bureau to provide Tribal governments with requested information prior to the pre-award meeting so that Tribal leaders have time to review and consider this information.

Reclamation Response: In practice, Reclamation does provide key information to tribal governments prior to negotiations. However, this recommendation is being further developed in the draft Handbook consistent with the Consortium's comments.

Recommendation 5: Develop a "best practice" that ensures consistency and transparency identifying Inherently Federal Functions.

Reclamation states on page 38 of the Handbook that "Negotiations shall include a discussion with the Tribe on funding necessary to be retained by Reclamation to perform project oversight and inherently Federal functions. The basis and justification for these retained funds shall be shared with the Tribe." We appreciate that Reclamation identified the need to share the basis and justification for retaining funds with the Tribe but we encourage Reclamation to ensure consistency and transparency in determining inherently Federal functions by sharing all

determinations of inherent Federal functions with all Tribal Nations prior to negotiations. GAO recently reported to Congress that providing tribes with documentation on activities and functions previously determined to be inherently federal and the basis for making these determinations can increase transparency and helps to facilitate self-determination and self-governance. We believe that including such a process as a “best practice” will prove beneficial for both Tribal governments and Reclamation—as it also helps to assure determinations are made consistently across the bureau.

Reclamation Response: We have further developed the emphasis placed on documenting and sharing information with tribal governments for those activities determined to be inherently federal in nature.

Recommendation 6: Training and continuing education should identify opportunities to enhance cultural understanding and building effective relationships.

Reclamation states on page 20 of the Handbook that “Bureaus with authority to award these contracts and agreements must establish supplementary procedures to delegate authority and establish minimum training, experience, and continuing education requirements.” We encourage Reclamation to require AOs to seek external training opportunities that increase knowledge of cultural skills needed to effectively work with Tribal Nations.

Several organizations offer training and workshops throughout the year that can provide AOs with the opportunity to enhance cultural awareness. For instance, SGCETC routinely offers training and educational resources to Federal agencies and we hold an annual Self-Governance conference, in coordination with DOI and Indian Health Service, that includes numerous workshops and sessions focused on the implementation of Self-Governance. We are happy to work with your office to identify additional training opportunities that we believe could help the bureau with this recommendation.

Reclamation Response: Reclamation’s draft Handbook currently contains ‘best practices’ on protocol, outreach, and technical assistance in working with tribal nations. As for training, that is an ongoing and long-term commitment within Reclamation. Reclamation’s P.L. 93-638 Steering Committee has been actively involved on arranging trainings on P.L. 93-638 and sharing resources on working with Tribes on a government-to-government basis, including on the topic of tribal consultation. These efforts will continue in 2019 and beyond. Additionally, Reclamation’s Native American and International Affairs Office will continue to participate in or attend the annual Self-Governance conference hosted by the Department’s OSG.

In conclusion, Reclamation emphasizes our commitment to assuring maximum Indian participation in Federal services offered to Indian communities, to render such services more responsive to the needs and desires of those communities. We also recognize that the administration of P.L. 93-638 is a living partnership between the United States and Indian Tribes

and we strive to uphold the highest standards of Federal fiduciary responsibility in administering P.L. 93-638 contracts and agreements.

Thank you for your comments on Reclamation's draft Best Practices Handbook. Your involvement will help make the document a more useful resource for our management and staff, and ultimately improve Reclamation's implementation of the Act. If you have any questions or comments, please do not hesitate to contact me at (202) 513-0569.

Sincerely,



Mathew Maucieri
Assistant Deputy Commissioner for Operations