

DOI SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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Docket Name: Tribal Transportation Self-Governance Program

Docket Number: (DOT-OST-2018-0104)

December 2, 2019

Office of the Secretary
U.S. Department of Transportation
Docket Operations
M-30, West Building Ground Floor, Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590

**Re: Department of the Interior Self-Governance Advisory Committee Comments
Regarding Proposed DOT Self-Governance Program Regulations 49 CFR 29,
DOT-OST-2018-0104, RIN 2105-AE71**

Dear Sir/Madam:

On behalf of the Department of the Interior Self-Governance Advisory Committee (SGAC), we write to provide our comments to the U.S. Department of Transportation's proposed rule to establish and implement the Tribal Transportation Self-Governance Program (TTSGP or Program), as authorized by Section 1121 of the Fixing America's Surface Transportation (FAST) Act, 49 C.F.R. 29.

The SGAC is comprised of Tribes and Tribal organizations from across the United States, who operate Self-Governance compacts and contracts under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638 within the U. S. Departments of Interior (DOI) and Health and Human Services (HHS). Many Self-Governance Tribes perform transportation planning, design, construction and maintenance activities through the Bureau of Indian Affairs Transportation Department, or in partnership with the (DOT) through the Federal Highways Administration (FHWA) Program Agreements. Self-Governance Tribes have supported and advocated for the DOT Self-Governance Program in the latest statutory FAST Act authorization and are excited to see its inclusion.

This new Self-Governance program within DOT is an important step forward for expanding Tribal Self-Governance and Tribal sovereignty and we commend the DOT's efforts to develop and support this new program. The SGAC supports the proposed rule as it has been developed through a close working relationship between DOT and Tribes in the negotiated rulemaking process. The draft rule reflects most Self-Governance principles carried over from DOI and IHS Self-Governance principles and regulations, and improves on some of these processes.

A hallmark of Self-Governance is the ability of tribes to redesign/reprogram and reallocate programs, services, functions and activities (PSFAs) without interference or approval by federal agencies. However, the self-governance provisions in the FAST Act require that tribes administering DOT Self-Governance Programs can only redesign/reprogram or reallocate PSFAs on projects identified in a tribal transportation improvement program, which must be approved by the DOT Secretary (See 23 U.S.C. § 207 (e)(1)(A)(ii)(I)). The SGAC believes the practice of submitting program plans for any reason to the DOT for approval undermines Tribal Self-Governance; such program flexibility allows tribes to adjust PSFAs based on what their community, rather than what the agency, needs. The language proposed in Section 310 allows for redesign/reprogram and reallocation, provided that such funds are expended on projects identified in a tribal transportation improvement program (TIP) approved by the Department “where statutorily required.” We urge the Department to implement this provision so that the Department is complying with Section 2(a) and (g) which provide that the Department shall “support Tribal sovereignty and self-determination” and “liberally construe this part to effectuate 23 U.S.C. 207 for the benefit of Tribes participating in this Program.” This means that the Department’s only involvement will be to approve the TIP, and not to otherwise be involved in a Tribe’s decisions regarding redesign, reprogram, and reallocation of tribal PSFAs and associated funding.

Our understanding is that during the rulemaking negotiations, the Department advised that there are instances where it may not be possible for the Department to disburse funding as quickly as the ISDEAA requires, particularly where the statute requires the transfer of funding not more than ten days from the time the funding is made available for the Department. 25 U.S.C. § 5388(a). Consequently, Sections 403 and 404 as written allow for a 30-day time period in this regulation, with the understanding that the Department work to improve its system such that they are able to meet a 10-day requirement. However, the statutory terms require that the transfer of funds “shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, ***unless the funding agreement provides otherwise.***” *Id.* Rather than adopt a regulation inconsistent with the statutory requirements, the Department should comply with the ten-day requirement, unless a tribe agrees to a different time frame in its individual funding agreement. For this reason, Section 403 should be modified to match the statutory requirements and to read as follows:

“...the Department will make the first transfer no later than ~~30~~ **ten** days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.”

The Preamble to the proposed rule includes four areas of disagreement: 1) whether to establish an Office of Self-Governance in the DOT and create a Self-Governance advisory committee; 2) whether Tribes should be entitled to contract support costs as additional funding to the direct funding they receive under this program; 3) whether Tribes should be able to receive lease payments for facilities a Tribe makes available to the program; and, 4) whether the DOT may require that a Tribe exhaust administrative remedies for pre-award decisions, other than final offers, as a pre-condition to the Tribe filing suit in Federal court.

The SGAC strongly supports the Tribal view reflected in the Preamble on these four disagreement items, for the reasons provided in the Preamble expressed by the Tribal representatives on the Negotiated Rulemaking Committee.

To the extent DOT is making an effort to identify those who will liaison with Tribes internally for the DOT Self-Governance Program, and express that they might at some point develop an Office of Self-Governance, we support those efforts. We believe though, that such an Office should be created and maintained immediately so that it is a resource for Tribes as this program continues to be established and becomes operational. Tribes need to have one office and staff within DOT to work with them as they consider what programs to assume.

The SGAC believes contract support costs and lease payments, and the provisions allowing Tribes to receive these payments that are incorporated into Section 207, are not in conflict with the statute. We know from experience that without a separate pool of contract support funding to pay for administrative costs of running transportation programs, Tribes will have to cannibalize program funding, and the result is less resources for infrastructure development for our regions.

Though there are still disagreement items, as mentioned in the Preamble, there was consensus among the Tribal and Federal officials on the Negotiated Rulemaking Committee on 25 major issue areas that now comprise the vast majority of the tentatively agreed upon provisions in the proposed rule. This is a major accomplishment. The SGAC appreciates the work and the product as reflected in the proposed rule.

Thank you for your consideration.

Sincerely,



W. Ron Allen, Tribal Chairman/CEO
Jamestown S'Klallam Tribe
Chairman, Self-Governance Advisory Committee