

DOI SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

P.O. Box 1734, McAlester, OK 74501

Telephone (918) 302-0252 ~ Facsimile (918) 423-7639 ~ Website: www.tribalselfgov.org

DOI Self-Governance Advisory Committee and Technical Workgroup

Quarterly Meeting

Tuesday, January 23, 2018 (8:00 am to 5:00 pm)

Wednesday, January 24, 2018 (8:00am to 12:45 pm)

Embassy Suites

900 10th Street NW

Washington, DC 20001

Phone: (202) 739-2001

AGENDA

January 23, 2018 (8:00am to 5:00pm)

Meeting of the SGAC and Technical Workgroup Members

-
- 8:00 am** **Tribal Caucus**
*Facilitated by W. Ron Allen, Chairman/CEO, Jamestown S’Klallam Tribe and
Chairman, Department of Interior (DOI) Self-Governance Advisory Committee
(SGAC)*
- *DOI Reorganization (status update)*
 - *OST Office of Trust Review and Audit of SG Tribes (Funding Agreement language)*
 - *OST Proposal to Move Back Under Indian Affairs – Impact to SG Agreement and Responsibilities*
 - *DOI Land into Trust Consultation overall-conflicts with SG Meeting*
 - *DOI Strategic Plan (no consultation and material changes)*
 - *DOT award contracts for the Tribal TTAP Centers to University of VA and its subcontractors (no consultation w/ Tribes)*
 - *Shrinking of National Monuments (Bears Ears)*
 - *March 2019 Quarterly Meeting Topics*
 - *Letter on Regulations*
- 9:00 am** **Invocation**
Roll Call
Introductions – (All Participants and Invited Guests)
- 9:15 am** **Opening Remarks**
*W. Ron Allen, Tribal Chairman/CEO, Jamestown S’Klallam Tribe and
Chairman, Self-Governance Advisory Committee (SGAC)*
- SGAC Committee Business**
- Approval of Meeting Minutes (October 25-26, 2017)
 - Approval of SGAC Alternate Member for Oklahoma Area
 - Approval of SGAC Alternate Member for Southwest Region
- 9:30 am** **Office of Self-Governance Update**
- OSG Update
 - Update on Tribal Tort Claims Compacts and Compact Language
 - TIWAHE Update

- Indian Trader Act Update
- Indian Trust Asset Reform Act

Sharee Freeman, Director, Office of Self-Governance, DOI

10:15 am Break

10:30 am 115TH Congress First Session Enacted Legislation

- P.L. 115-93, Indian Employment, Training and Related Services Consolidation Act of 2017 (signed 12/18/17)
- P.L. 115-97, Tax Cuts and Jobs Act (signed 12/22/17)
- U.S. Department of the Treasury - Tribal Treasury Advisory Committee Update

W. Ron Allen, Tribal Chairman/CEO, Jamestown S’Klallam Tribe and Chairman, Self-Governance Advisory Committee (SGAC)

Geoff Strommer, Partner, Hobbs, Straus, Dean and Walker, LLP

Mary Pavel, Partner, Sonosky, Chambers, Sachse, Endreson & Perry, LLP

10:50 am 115th Congress Second Session Pending Legislation

- Title IV, Department of the Interior Self-Governance Amendments
- Tribal Labor Sovereignty Act
- S. 1870, Securing Urgent Resources Vital to Indian Victim Empowerment Act (SURVIVE Act) (Hoeven-R-ND)
- S. 1953, Tribal Law and Order Reauthorization and Amendments Act of 2017 (Hoeven-R-ND) H.R. 3864 (Pearce-R-NM), S. 1895 (Udall-D-NM) Native American Housing Assistance and Self-Determination Reauthorization Act of 2017
- Carcieri

Geoff Strommer, Partner, Hobbs, Straus, Dean and Walker, LLP

Mary Pavel, Partner, Sonosky, Chambers, Sachse, Endreson & Perry, LLP

11:20 am Budget Update

- FY2018 Appropriations Update
- FY2019 Budget Status
- FY2020 Budget Formulation Update
- Tribal Interior Budget Committee Update
- Identify all Funding Streams for SG Base Funding

Dave Conner, Director, Natural Resources, Red Lake Band of Chippewa Indians

George Bearpaw, Director, Office of Budget Management, Indian Affairs (invited)

Amber Ebarb, Budget/Policy Analyst, National Congress of American Indians (invited)

12:00 pm Lunch

1:30 pm DOJ & OJS Update

- Roadmap of Funding Distribution
- Funding mechanism for funding distribution
- Coordination between agencies

Virginia Davis, Senior Policy Advisor, National Congress of American Indians

(invited)

- 2:15 pm U.S. Department of Transportation Update**
Kay Rhoads, Principal Chief, Sac and Fox Nation; Tribal Co-Chair, DOT TTSGP Negotiated Rulemaking Committee
Anthony R. Bedell, Deputy Assistant Secretary for Intergovernmental and Tribal Affairs, Office of the Secretary, USDOT (invited)
Erin Kenley, Director, Office of Tribal Transportation, FHWA; Designated Federal Official (DFO) for TTSGP Negotiated Rulemaking Committee, USDOT (invited)
- 3:00 pm Break**
- 3:15 pm Discussion - Annual Conference - 30th Anniversary (Albuquerque, NM, April 22-26, 2018)**
 - VIP
 - Special Events
 - Breakout Session Topics
- 4:15 pm Preparation of Issues to Discuss with Acting Assistant Secretary – Indian Affairs**
- 5:00 pm Adjourn Meeting**

Wednesday, January 24, 2018 (8:00 am to 12:45 pm)

Meeting of the SGAC & Technical Workgroup with Acting Assistant Secretary – Indian Affairs

(Only Members of the SGAC and Proxies to be seated at the table)

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- 8:00 am Welcome & Introductions**
W. Ron Allen, Tribal Chairman/CEO, Jamestown S’Klallam Tribe and Chairman, Self-Governance Advisory Committee (SGAC)
- 8:30 am SGAC Joint Discussion with Acting Assistant Secretary – Indian Affairs**
John Tahsuda, Principal Deputy Assistant Secretary – IA, DOI (invited)
Bryan Rice, Director, Bureau of Indian Affairs, DOI (invited)
 - Strategic Plan all agencies within DOI
 - January 12, 2018 Follow-up Issues SGAC Quarterly Meeting October 25-26, 2018
 - New Business
- 9:45 am Break**
- 10:00 am SGAC Joint Discussion with Acting Assistant Secretary – Indian Affairs**
- 11:30 pm SGAC Members Executive Session with Acting Assistant Secretary - Indian Affairs**
- 11:30 pm Technical Workgroup Work Session**

- Agenda Topics for March SGAC Quarterly Meeting
*Jennifer McLaughlin, SGAC, Tribal Technical Co-Chair, Self-Governance
Legislative Associate, Jamestown S’Klallam Tribe
Ken Reinfeld, SGAC, Federal Technical Co-Chair, OSG Senior Policy Analyst*

12:45 pm Adjourn the SGAC Meeting

2018 Calendar

Date	Event	Location
January 23-25, 2018	1 st Quarterly Meeting	Washington, DC-Embassy Suites DC Convention Center
March 27-29, 2018	2 nd Quarterly Meeting	Washington, DC Embassy Suites DC Convention Center
April 22-26, 2018	Tribal Self-Governance Annual Consultation Conference	Albuquerque Convention Center Albuquerque, NM
July 17-19, 2018	3 rd Quarterly Meeting	Washington, DC-Embassy Suites DC Convention Center
September 11-12, 2018 (Tentative)	Tribal Self-Governance Strategy Session	Doubletree Downtown St. Paul, Minnesota
October 1-4, 2018	4 th Quarterly Meeting	Washington, DC-Embassy Suites DC Convention Center

2019 Proposed Calendar

Date	Event	Location
January 22-24, 2019	1 st Quarterly Meeting	Washington, DC-Embassy Suites DC Convention Center
March 26-28, 2019	2 nd Quarterly Meeting	Washington, DC-Embassy Suites DC Convention Center
April 21-25, 2019	Tribal Self-Governance Annual Consultation Conference	Grand Traverse Resort and Spa, Traverse City, Michigan
July 16-18, 2019	3 rd Quarterly Meeting	Washington, DC-Embassy Suites DC Convention Center
September 10-12, 2019	Tribal Self-Governance Strategy Session	TBD
October 1-3, 2019	4 th Quarterly Meeting	Washington, DC-Embassy Suites DC Convention Center

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SGAC MEMBERSHIP LIST

(July 27, 2017)

AREA	MEMBER (Name/Title/Organization)	STATUS	CONTACT INFORMATION
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	William Micklin, 1st Vice President Central Council Tlingit and Haida Indian Tribes of Alaska	Alternate	320 W Willoughby Avenue, Suite 300 Juneau, AK 99801 C: (619) 368-4382 E: wmicklin@ccthita.org
Eastern	Cheryl Andrews-Maltais, Chairwoman Wampanoag Tribe of Gay Head (Aquinnah)	Primary	20 Black Brook Road Aquinnah, MA 02535-1546 P: (508) 645-9265 E: chairwoman@wampanoagtribe.net
	VACANT	Alternate	
Eastern Oklahoma	Bill John Baker, Principal Chief Karen Ketcher, Proxy Cherokee Nation	Primary	PO Box 948 Tahlequah, OK 74465 P: (918) 772-4130 E: karen-ketcher@cherokee.org
	Gary Batton, Chief Mickey Peercy, Proxy Choctaw Nation	Alternate	PO Box 1210 Durant, OK 74702-1210 P: (580) 924-8280 ext. 2322 E: mpeercy@choctawnation.com
Midwest	Annette Johnson, Treasurer Red Lake Band of Chippewa Indians	Primary	PO BOX 550 Red Lake, MN 56671 P: (218) 679-3341 E: annette.johnson@redlakenation.org
	Jane Rohl, Tribal Council Secretary Grand Traverse Band of Ottawa & Chippewa Indians	Alternate	2605 N West Bay Shore Drive Peshawbestown, MI 49682-9275 P: (231) 534-7494 E: jane.rohl@gtbindians.com
Northwest	W. Ron Allen, Tribal Chairman/CEO Jamestown S'Klallam Tribe SGAC Chairman	Primary	1033 Old Blyn Highway Sequim, WA 98382 P: (360) 681-4621 F: (360) 681-4643 E: rallen@jamestowntribe.org
	Tyson Johnston, Council Member Quinault Indian Nation	Alternate	P.O. Box 189 (1214 Aalis Drive) Taholah, WA 98382 P: (360) 276-8211 F: (360) 276-4191 E: tjohnston@quinault.org
Pacific	Ryan Jackson, Chairman Hoopa Valley Tribe	Primary	PO Box 1348 Hoopa, CA 95546 E: cbfdistrict@gmail.com
	Scott Sullivan, Council Secretary Tolowa Dee-ni' Nation	Alternate	140 Rowdy Creek Road Smith River, CA 95567 P: (707) 487-9255 ext. 1224 E: Scott.Sullivan@tolowa.com

SGAC & Technical Work Group Membership List
(July 27, 2017)

Rocky Mountain	Beau Mitchell, Council Member Chippewa Cree Tribe	Primary	PO Box 544 Box Elder, MT 59521 P: (406) 395-5705 ext. 205 E: beau@cct.rockyboy.org
	VACANT	Alternate	
Southern Plains	John Barrett, Jr., Chairman Rhonda Butcher, Director Citizen Potawatomi Nation	Primary Proxy	1601 S. Gordon Cooper Dr. Shawnee, OK 74801 P: (405) 275-3121 ext. 1157 F: (405) 275-4658 E: rbutcher@potawatomi.org
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Southwest	Ruben A. Romero, Governor Taos Pueblo Shawn Duran SGAC, Vice Chairwoman	Primary	P.O. Box 1846 Taos, NM 87571 P: (575) 758-8626 ext. 115 F: (575) 758-8831 E: SDuran@taospueblo.com
	Chris Gomez, Lt. Governor Ysleta del Sur Pueblo	Alternate	119 S. Old Pueblo Road El Paso, TX 79907 P: (915) 859-8053 E: cgomez@ydsp-nsn.gov
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	VACANT	Alternate	

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SGAC TECHNICAL WORKGROUP TRIBAL TECHS

AREA	MEMBER (Name/Title/Organization)	STATUS	CONTACT INFORMATION
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Eastern	Dee Sabattus United South and Eastern Tribes	Tech Rep	711 Stewarts Pike Ferry, Suite 100 Nashville, TN 37214 E: dsabattus@usetinc.org
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SGAC & Technical Work Group Membership List
(July 27, 2017)

AREA	MEMBER (Name/Title/Organization)	STATUS	CONTACT INFORMATION
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Southwest	Clyde M. Romero, Jr. Taos Pueblo	Tech Rep	P.O. Box 1846 Taos, N.M. 87571 P: (575) 758-8626 ext. 111 E: Romeroc@taospueblo.com
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SGAC & Technical Work Group Membership List
(July 27, 2017)

Additional Technical Resources

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SGAC TECHNICAL WORKGROUP ASSIGNMENT MATRIX

Quarterly Meeting

October 26, 2017

Technical Workgroup Co-Chairs:

Jennifer McLaughlin, Tribal Co-Chair

Kenneth Reinfeld, Federal Co-Chair

	Assignment	Person(s) Responsible	Date Task Originated	Status
1.	Develop a Self-Governance Educational tool for new members of the Administration	SGCE	October 26, 2017	
2.	Draft recommendations for improving the budget distribution process/Greenbook	Budget Workgroup	October 25, 2016	On hold pending TIBC Budget Subcommittee Budget Process Workgroup Recommendations
3.	Host call to discuss follow up on /BIA Strategic Plan (these changes will support the DOI Strategic Plan)	Jennifer McLaughlin Pitt Clyde Terra	March 30, 2017	On hold – pending DOI initiation of consultation.
4.	Offer technical assistance and training for Government Accountability Office (GAO) analysts	Sharee Freeman Terra	March 30, 2017	Director Freeman touched base and is moving forward with plans.
5.	Develop a Self-Governance Legislative Package for Tribes to download.	SENSE & SGCE	March 30, 2017	
6.	Letter regarding regulatory changes and that all proposals need to go through Tribal consultation	Terra	October 26, 2017	Completed.
7.	Letter EO on Tribal Consultation and Proposed Reorganization Efforts	SENSE (Cyndi)	October 26, 2017	Completed.
8.	Letter on Land Buy Back	Kasie & Jeremy	October 26, 2017	Completed.
9.	Letter John/Gavin/Bryan – thank you for attending – looking forward to continued discussion of the issues – schedule for FY2018 SGAC QM – attach talking points	Jenn	October 26, 2017	Completed.
10.	Broadcast alert to SG Tribes regarding the hearing on restricted lands and inform them of timeframe for submission of testimony or comments/Indian Trader Act last opportunity to submit comments	SGCE	October 26, 2017	

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DOI Self-Governance Advisory Committee and Technical Workgroup

Quarterly Meeting

Wednesday, October 25, 2017 (1:00pm to 5:30pm)

Thursday, October 26, 2017 (8:30am to 2:00pm)

Embassy Suites Washington DC - DC Convention Center

900-10th Street NW

Washington, DC 20001

Phone: (202) 739-2001

AGENDA

Wednesday, October 25, 2017 (1:00pm to 5:30pm)

Meeting of the SGAC and Technical Workgroup Members

SGAC Tribal Caucus

Facilitated by: Shawn Duran, Tribal Program Administrator, Taos Pueblo and Vice-Chairwoman, SGAC
(Send items for discussion to Jennifer McLaughlin, SGAC, Tribal Technical Co-Chair at

Jmclaughlin@jamestowntribe.org)

- *Burial Assistance*
 - *Having some disagreements with interpretation regional office applying to social services. Nation subsidizes burial assistance with Tribal appropriated dollars and regional office is asking for specific details and say if we subsidize the program we cannot use BIA funds. We received a waiver to \$3000 and they interpreted the rule in a narrow form. The regulations were written in 2000 prior to SG and allows regional offices to interpret them in a very narrow way. If subsidizing with anything other than judgment fund it is considered a resource and cannot do it. Regulations are clearly inconsistent with SG.*
- *Preparing for the 30th Anniversary of Self-Governance – Need some themes and Tribal showcases from the regions and nationally*
 - *Marketing the message of Self-Governance and how we sell that idea. What is the key value of SG in how we manage it – who are we? What do we do and how do we do it? We are at a good time to start crafting that message. What is the best way to promote that message? In Strategy Session they mentioned packaging ideas. How do we package it to folks that don't understand it? Part of it is the partnerships created by Tribes taking on programs for themselves. Tribes bring a lot to the table and we should look at the benefits in crafting a message. It brings together the last 30 years. Look at two pieces promotion of sovereignty and growth of SG. Tribal control- reduces bureaucracy – advocacy and creation of legacy – better service – better use of resources. It creates capacity within our communities – effective programming and building stronger Tribal economies. When Tribes succeed America benefits. What is our message?*
 - *Self-governance 30 years strong sovereignty, responsibility and prosperity*
 - *Take control of our future – we have a vested interest in taking care of our own*
 - *“Sovereignty has to mean something” – so we may want to make a statement on what it means. Quantum physics has to mean something – don't know what it means. We need to make ISDEAA relevant to the Administration. Dr. Clarkson Indian Trader Regulations – Department is not against it nor are they committed to it. New AS-IA nomination Tara Sweeney and it will be a task to educate her on SG. She comes from the corporate side and was co-chair of Alaska Federation of Natives on the corporate side. Almost every Tribe in AK is SG and corporate side is not familiar with what that is. Sat down with Clarkson and Tahsuda to talk about Trust Modernization and Tax Reform – Trader Regulations may not be the vehicle and what arose was opportunity as Self-Determination Agreements to serve as a model where Tribes can assert Federal supremacy over state and local government*

laws. They need to know what it is to craft and develop a successful mechanism for us. Fee to Trust proposed rules is a huge backwards step and we don't want to get trapped in the narrative. It talks about improving Tribal authority but every measure proposed is a significant step backwards. Helpful to propose initiatives that serve that process. CSC full pay is still an issue and tax reform will be an issue. We need to make it clear so it gets out to the Administration in a way that is helpful to our interests.

- Now that there is a change in Department leadership we need to get educational tools out to those folks as well.
- Measuring the success of SG and incorporate it into the showing of the positive, successful impacts
- DOJ Tribal Consultation & Listening Sessions on Tribal Grants
 - Required by 2017 Appropriation to figure out how to fund Tribes. CTAS is very cumbersome and considering justice funding as broken and competing against other Tribes for justice systems – DOJ has a lot of money and if they have a formula – DOJ is not super receptive. OVW are very concerned about anything that takes away their oversight of their grant programs. They block grant to states we should at least have parity. TLOA is being reauthorized – we should respond as SGAC.
 - Provide Tribal share information – SW went through a whole bunch of Appropriation meeting and they were not forthcoming with information.
- BIA Regulations –
 - Solicitation for Comments Indian Trader Act and Dual Taxation – how it can be amended to address dual taxation and other jurisdictional matters (Indian Self-Determination Act as the nexus) – Deadline for submitting comments was extended. NCAI and NAFOA put out draft comments that Tribes can use. Dual taxation is a significant issue whenever state and local governments seek to impose their taxes. There is now a tax on non-tribal improvements – possessory interest tax. There is an opportunity for Tribes to retain those taxes. We did a study and showed that out of all tax proceeds that flow to the state taxes 20% goes back to San Diego county but not one cent goes to the Tribe. Wind Farm Tribe is the largest tax payer and get zero back. The opportunity is for the Tribe to retain that money. We did a study on the net value – include sales, possessory interest and participatory rent the possessory interest tax is 35%, sales is 29% and rent is 35% so essentially triple the revenues. The question of taxation is important and Indian Trader Regulations are an opportunity to assert supremacy over state and local governments. Tribes have the supreme right to all tax proceeds that are incident on their lands.
- OST Trust Services Review & Audit – broad canvass target of small and medium Tribes (restrictions against reallocation) Over-reach? – There was going to be an audit finding with our agricultural leases. They are evaluating small Tribes on traditional practices are being called into question.
- DOI Strategic Plan Update –
 - Plan must be related to the Reorganization initiative and Tribes have been asked to be consulted and were told it was a reorganization of the Department. Charter of the SGAC is to the Department – send letter to Secretary assert we are an advisory body to the Department and should be involved in consultation until it is done. After the fact is not helpful. There is a duty to engage us on this process. It is reasonable if there is any reassignment of positions it has a material effect on the Tribes. They may decline the invitation so we need to put down the placeholder – they should not ignore our charter or their duty as trustee.
 - OSG
 - Include OSG on notices that go out to RD
 - Consultation – what do you want to say about consultation is being handled?
 - Told 638 Tribes that they drafted language on tort claims and Justice is saying if Tribal police is asked to assist off reservation they are not covered by Tort claims. They are going

to change the model policy and put language in it but have not seen what they are going to do for SG Tribes. Push OJS to engage with Tribes. If Tribal police has Special Law Enforcement Commission he would be covered but not all Tribal officers have it.

Tribal Comment

- *Consultation – land buy back took Tribes on the list and extend it to 2020 – trying to figure out if SG issue. Citizen Potawatomi wrote a letter. Mention of consultation but it was an annual report update where there may have been some update.*
- *OSG – lot of items you want to bring up then bring it up.*
- *Non coverage of Tribal police off reservation – does it relate to the Lewis v, Clark decision?*
- *Communication – we need to know about what is happening*
- *Tribes assisting Tribes in disaster situations. Tribes should get together for an intergovernmental agreement they should put a stop gap in.*
- *Charlie Addington is now the Acting – OSG needs to have a conversation to know what is happening.*
- *Land Buy Back Program – John McClanahan schedule changed – posed two questions to the group and would be interested in Admins - Tribes own resources use to leverage immediate trust acquisition – if Tribes interested in it. If have appraisals in area access it through regional office and if request denied reach out to him. When they run out of money would Tribes support an additional appropriation request for the program. Clarify something – although survey tool used in AK entire TIBC supported the idea. This is something that needs to be addressed because it doesn't address what the Tribes are identifying.*
- *Spend a lot of time doing the work and expect you to use our priorities. Expect it to be reflected in the President's budget whenever possible.*
- *Does TIBC have a relationship with Congress? It is something we should consider if we are not getting results from the Administration. TIBC guides the Department of Interior.*
- *AS-IA was on AFN and the Tribes voted against her and now she is charge of BIA. There needs to be an education.*

Legislative Update

Mary Pavel, Sonosky Chambers

Caroline Mayhew

Geoff Strommer, Partner, Hobbs, Straus, Dean & Walker

Mathew Jaffe, Partner, Sonosky, Chambers, Sachse, Endreson & Perry, LLP

- *Committee is hosting a hearing on a couple of bills related to law enforcement VOCA, Missing and Murdered People and TLOA & S.1986 to expand VAWA jurisdiction to include other crimes such as crimes of sexual violence (Fraken introduced) Goodlatte raised point of order to strike VOCA language in Appropriations Bill. Depending on who becomes next Chairman if Republicans still in control Issa would be in control and he is supportive. Continue to talk to congress but in the 116th congress it will get done.*
- *Johnson O'Malley Bill – force an update of the student count because right now they say not sure how many students eligible and how money is allocated so there is a lot of pressure to put up foundational support for Johnson O'Malley. Congress wants metrics to support funding request. We need to put some foundational metric support behind the need for that program.*
- *Survive Act*
- *477 – Program allows Tribes to coordinate employment training funds from number of different offices into one package and it is successful but legislation is pushed to get agencies to cooperate. House passed bill in December 2016 and they removed provision on burden of proof on the part of the Secretary for denying a plan. They changed it for more deference to the agency. The Senate adjourned without taking up the bill. On first day of this session HR228 introduced by young and Senator Murkowski and Sullivan S. 91 – virtually identical to the House bill but change made to not include competitive grants but*

amended by Young to expand it – passed by House vote – CBO released a report SCIA favorable report but the bill is stalled, No specific objections to the bill and it will eventually pass. Workgroup is renewing efforts to get it passed.

- Tribal Labor Sovereignty – It should pass the House this year. They are waiting to find time on the House floor. Tax is taking up a lot of the time. We are trying to secure 60 in the Senate. It should pass the House. Democrats are listening but there is also competing labor interests.
- Tax Reform – Bill in the House that has a number of the issues that have been floating around since 1992 (5 priorities) – enhance Tribal access to new market and low income tax credits. Senate Bill was introduced so there are lots of discussions to get these included and some of these don't cost anything. Tribal tax exempt bonds has a lot of support. The people who want to oppose tax exempt bonding reference how Tribes didn't use it under the stimulus package. When stimulus happened it was at the bottom of our economy and banks were not lending money for Tribal development and if they were lending the interest rate was north of 15%. It was the worst time to borrow money for projects.
- Title IV DOI Amendments – effort has been going on for nearly 15 years to strengthen Title IV and bring it in line with Title V. It came close to passage in the last Congress. After bill passed by Senate Associated Fish and Wildlife Agencies raised concerns about discretionary programs and Tribes spent a year working with the agencies. Effort was successful and the association was satisfied but House Committee staff concern with legal interpretation of ISDEAA and remaining BOR issues. Addressed legal interpretation. Things moving slowly – there are discussions on the Senate side and efforts underway and nothing introduced yet. Members expressed support but no one committed to working on it as a must pass priority. Administration side – last congress had complete support and there are efforts now to get the Administration support. Cason and Tahsuda both have histories of working with SG Tribes. Sweeney comes from a corporate background and will need more education. Key part of effort is to get the Administrations solid support.
- S.1935, Tribal Patents and Waivers of Tribal Sovereign Immunity – This is an argument of parity and there was a lot of outrage directed at St. Regis Mohawk. It is something to watch.

Tribal Comments

Tax Reform – where can we find the priorities?

National Congress of American Indians have a Resolution and one pager on it.

Oppose Senator McCaskill's Bill – many state universities hold patents. The patent review process is broken. Try to stall her bill because what arises is memories of battles we fought that may be taken up again. Arm of the Tribe –all issues that could harm our interests and put us at a distinct disadvantage. Improvements in Tribal interests are likely to be made at the state level – state fisheries and wildlife opposition to Title IV – we saw it in Federal Fish and Wildlife Service Federal Indian Policy and their belief that Tribes interests were adverse to their interests. It will be difficult to get this bill passed until Chairman Bishop is out of that Chair role. Tribes may be looking at bi-lateral or multi-lateral agreements to effect these. Working on Trust Asset Reform Act to get these done.

When we first looked at tax reform legislation it had good stuff on the House side but not parity with states and dual taxation addressed.

They are not in there because some state governors have raised concerns on the Indian Trader Regulations so it put a bit of a speed bump on it.

Curious about strategic issues and DOI Reorganization and tying Title IV into this conversation. The last Administration was upsizing BIA and it sounds like DOI Reorganization is downsizing. Our strategic initiative – we may need legislation to counteract the Administration.

Appropriation is bigger than the budget but there is some concern that the money will not get allocated in a way that is beneficial to Indian country. It is a great soundbite to get rid of the fat but there are great people in public service that need to be there to do their job and make sure the government remains effective.

Invocation – (All Participants and Invited Guests)

Raymond Loretta

Roll Call

Alaska:

Eastern:

Eastern Oklahoma:

Midwest:

Northwest:

Pacific:

Rocky Mountain:

Southern Plains:

Southwest:

Western:

Welcome and Opening Remarks

Shawn Duran, Tribal Program Administrator, Taos Pueblo and Vice-Chairwoman, SGAC

SGAC Committee Business

Shawn Duran, Tribal Program Administrator, Taos Pueblo and Vice-Chairwoman, SGAC

- Approval of Meeting Minutes (July 19-20, 2017) – Correction to minutes
MOTION
Wampanoag Tribe of GayHead (Aquinnah) to approve with corrections
Quinault Indian Nation seconded the motion
The minutes approved with editorial amendments
- Recap Strategy Session (Jennifer McLaughlin)

Office of Self-Governance Update

Sharee Freeman, Director, Office of Self-Governance, DOI

- New Principal Deputy Assistant Secretary Tahsuda – Bryan Rice Director BIA – New AS-IA nominated but not yet on board. Excited about the team. Tyler Scribner is moving into the Office of Budget and Performance Management and work on IT issues. He has been working for OSG for 3 years and is an evening law student. Looking for candidates for an Office Manager (GS 5,7,9) opportunity to learn about SG Tribes – if have recommendations of people forward those to Sharee.
- Office of SG Budget – money was added to OSG budget \$800,000 in July so able to pay off trip to SG Annual Conference. Used all the money except \$200,000 and may need assistance this year to support staff if the money is not allocated to support staff. Need to shift money from the Bureau from places where they go down and we go up. More Tribes entering SG away from 638 – explore this a little more this year.
- Proposed 2018 Internal Budget – asked for an internal Administrative transfer within the Bureau.
- Office of SG moved to the main interior building. On 2nd floor 2071 and it is an open space. 900 people from Park Service moved into Main Bldg Interior. Told they would be moving them again. Clarkson is talking about moving OSG to 4th floor closer to the AS-IA office. Before they

were in South Interior Bldg. Have space for meeting. Work 9:30am to 6:00pm. Welcome calls. Will meet with Tribes for coffee before start day and at 5:30 or 6:00 before you end your day.

- Distributions FY2017 – Base money and then on top a lot of funds transfer from other places: OST, OID, 477, etc. \$476 million coming into SG for FY2017. Breakdown is in the handout.
- CSC \$93 million to date and last year at \$98 million. Run has a number of Tribes that still need to submit information. FY2016 \$98 million and overpayments \$217,000 (4 Tribes). Reconciled it to 2% overpayments. If underpayments invite Tribes to notify OSG immediately and they will take care of it. Tom and Miles out of Vancouver Office address CSC. When have an overpayment send letter out to the Tribes.
- CSC data call was August 1st – 55% of Tribes responded to letter. 52 Tribes have yet to respond. OSG did the data call. Sheet for CSC is on the database or you can call Tom or Miles.
- Suggested changes to SG Agreements – SG Tribes have received money and carrying out trust function but not the whole trust function just a portion of it. There is a lack of clarity what the Tribe is doing with regard to trust functions and they want greater specificity in Agreement. They want all FA to include compact language on trust evaluation.

GWU Center for Indigenous Politics and Policy

Wendy Helgemo, Director & Associate Professor, AT&T Center for Indigenous Politics and Policy, The George Washington University

- GWU and ATT established the Center this year and they are building on the Native American Political Leadership Program – semester in WA program for Native Americans – involves full scholarship for up to 9 credits and students can do internship – congressional offices, agencies and national Tribal organizations.
- Work with student to find out interests and work towards setting up the internship where they would like to be. Good way to emphasize Natives are some of most legislated people in the country and we need to be here to learn policy and show them they can have a career here in WA.
- 8 alumni work in DC
- Other areas that we are building upon are geared towards policy and getting involved in other issues developing white papers on issues, etc.
- Packets have new brochures so getting social media established.
- Elizabeth Rule Assistant Director citizen of Chickasaw and Nick citizen of the Makah Nation.
- Outreach to all the National Tribal Organizations – looking for partners in the areas of advocacy or research if we have areas identified with gaps we would like to talk to you about it and any ideas for National Policy Center based in DC.
- Left the US Senate after 7 years – Senator Harry Reid staffer and imbedded in the SCIA Committee – worked with several of the Senators. Worked within the Committee system at the leadership level and pre- introduction of the bill – and through the legislative process in passing the bill. Cobell Settlement, VAWA, Lands package – for 6 of the Nevada Tribes; Government Affairs at NAIHC was there during the last NAHASDA Reauthorization Experience as in-house council for several Tribes as well as my own.
- Recruit college students, graduate and high school students (3 weeks in the summer)
- Tribal Comments
- Importance of sending the message about sovereignty and self-Governance to those that may not understand it.

Government Accountability Office

Mickey Peercy, Director of Self-Governance, Choctaw Tribal Nation of Oklahoma

Jay Spaan, Senior Analyst, GAO

- High Risk – How it works – the focus of high risk is on management weakness within the federal agencies that administer programs that serve Tribes.

Contacts -

- How Tribes can manage visits and data calls
- Regulatory and other Barriers to Self-Governance
- Four hearings held on GAO Reports on Federal Indian Programs so there is quite a bit of attention on it.

Tribal Comments

- Make distinction between SG Tribes implementing the programs and the agencies is important. It does show a benefit to SG Tribes that have taken on programs v. federal agencies.
- This group requested a training with GAO with Tribal representatives and OSG. We started that dialogue. We are looking at dates now. Terra is available to assist with the training.
- GAO is probably requesting interviews and data – it is important that we speak with you. Make sure tell individual how we are going to use the information. We run it by Tribes to make sure they are comfortable using the information or name in the report. If there are sensitivities make sure to state those things because it is not a policy. Make sure those things are clear.
- Tribes are linked back to this and it is a concern for us so at what point are they reassessed to get off of the list.
- Every two years we do a progress update. In the back of the report there are a number of recommendations. There are five criteria we look at.
- Current work – US Committee on Homeland Security SG Mechanisms and how Tribes are using these mechanisms compacts, contracts, etc. to see how Tribes are using them and what factors could hinder Tribes and what could facilitate it?
- Plan to issue the report late spring or early summer
- Met with GAO (Citizen Potawatomi and Choctaw) Senator Lankford has been supportive of their Tribe and SG. Always advocating for SG across the federal government. Chose not to go into SG for the money. There is a funding problem for the Bureau and a lot of unmet need for Indian country. Land into trust is very important and it is not an easy process. While compacted it doesn't make land into trust easier. Even though SG Tribe get all the decreases to base funding but have to fight for increases. Dave Conner did great job on SG equity. Praised OSG efforts with TIWAHE funding. There are a lot of advantages to SG but the Bureau is still problematic and tries to hinder it. Experience in full support of the Hearsh Act – supportive of any authority we can adopt and manage ourselves. Helpful if think about taking over federal agency programs by statute or any authority use SG as a funding mechanism in the future. Accountable to our own people.
- Part of what may help –when statutes are written congress intent they are supposed to be applicable to all Tribes but agencies are selective in which Tribes to apply it to – congress fixed it in 1994 all Tribes treated equally and any other regulations no force or effect but they are still using a system as to who they want to work for and the extent they want to work with them. We fought for years that we should get services never aware of funding increases or year end money. Whenever increase we were unaware because they were not sharing it with OSG. It is really frustrating. TIWAHE was a heroic exercise because they were carving out SG Tribes from that money unless it was listed as a line item in their compact. If congress says everyone should receive the increase it means everybody. We had to go back to 1997 in our own records to get the increase and that shouldn't be our job. All agencies should be eligible for compact like agreements with Tribes. If don't spend all money we get penalized.
- In 1987 or 1986 there was a GAO Congressional Report that said 14 cents of the dollar made it to the intent and purpose and after that SG was born in 1988. Tribes are not funded at their level of need and they find funds to invest into the program. We put more of our money into a lot of programs.
- Pueblo of Jemes – live north of Albuquerque and the National Park Service has taken over the area. We try to work with them to contract if there is work to be done. Cultural properties are very important.

- Part of the challenge is that we are part of discretionary funding. We are the only human condition the federal government is required to care for but we have to vie for the same dollars as plants and animals and it is so disrespectful to us. We should be a priority. The money should be coming directly to the Tribes and not through the state because often the Tribes never see those dollars at all.
- Within Interior we are one of the lower funded Departments
- When the feds fall short on funding Tribes have to pick up the slack. There are some challenges with that – when the money goes to the state and we have to play by the state rules to get the money. We shouldn't have to follow state rules. People fought and died for the trust relationship and it is disrespectful to go back. We can quantify it. If we were able to take compact dollars and invest.
- GAO Reviews – share it with SGCE and she can send it out.

Department of Transportation – Update on Section 207 of the FAST Act, Tribal Transportation Self Governance Program (TTSGP) Negotiated Rulemaking Committee

Kay Rhoads, Principal Chief, Sac and Fox Nation, Tribal Co-Chair, TTSGP Negotiated Rulemaking Committee

Anthony Bedell, Deputy Assistant Secretary, Intergovernmental Affairs and Deputy Assistant Secretary, Tribal Government Affairs, DOT

Ada Valaitis, Congressional and Tribal Affairs Liaison, DOT

Robert W. Sparrow, Jr., Director, Tribal Transportation Program, DOT

- *Background – been doing governmental relations. We have about 80 appointees in. Duties - Deputy Assistant Secretary for Tribal Affairs.*
- *New Regulations for Tribal Transportation Roads program – people are impeding on tribal roads.*
- *More creative ways to get more funding for Tribal roads and work on ways to get more work done. Have to pay for engineer to come on site \$20,000 to something that should have been simple. These are small, repairs. It seems there are a lot of additional layers and burdensome requirements.*
- *Robert Sparrow is getting ready to leave – working with the group since its inception and has a lot of knowledge and great advocate to the negotiated rulemaking committee – only have a few more months.*
- *Plan is to reconvene committee to develop the rule for establishing a SG office at DOT. We have been on hold here for a number of months due to transition. Tribal transportation is better than it was 15 years ago.*
- *We were invited by federal highways for a meeting and we had a large presence.*

Budget Update

Dave Conner, Director, Natural Resources, Red Lake Band of Chippewa Indians

Jeannine Brooks, Deputy Director, Budget and Performance Management, Office of Management and Budget, Indian Affairs, DOI

Jack Sullivan, Office of Management and Budget, Indian Affairs, DOI Affairs, DOI

Amber Ebarb, Budget/Policy Analyst, National Congress of American Indians

- *FY2018 President's Budget Request - (See handout)*
- *FY2018 Appropriations Update – Presidents budget – action in House on Interior Appropriations but larger debate is happening now. NCAI adopted a resolution last week. Tax Reform will impact budget process. Reduction and House restored most of those cuts. We haven't seen what is in the Senate Interior Approps bill it was supposed to happen last week at markup. Busy fall – CR until December 8th and punts debate over border wall and dreamers and will see what congress will decide on the Omnibus. We are hoping the Senate bill is better than what is in the House. Graphic overall BIA budget since 2003 – 13% reduction in nominal dollars and much lower than any years all the way back to 2003. Tax Reform will impact what the federal*

budget can do in the next 10 years – it will affect what congress can appropriate in the next 10 years. House is thinking about the Senate version which would be filibuster proof. We would have a framework we can look at. Two steps important to keep in mind – tax cuts that could lead to deficits – add 1 and ½ trillion dollars to the deficit. Resolution call for full funding of the trust. Have to look at impacts of what congress can spend on non-defense discretionary – are AI worse or better off? Is the deficit being run up which will lead to spending cuts in the future. Non-defense discretionary by 2027 in ten years it would be 18% below 2017 level and don't know where those cuts will fall. It will be hard for discretionary budgets to handle this kind of pressure.

- FY2019 Budget Status – embargoed – submitted proposal and it is now at OMB received submission on August 28th and focus on the same things. OMB briefings with all of the programs. Pass back after Thanksgiving
- FY2020 Budget Formulation Process – National Roll Out and planning one additional webinar next Friday. Changes that we have for 2020 – 5% increase instead of an 8% increase. No separate table submission. Present the package at TIBC and make it part of 5% table that comes forward. December 15th deadline. All regions must hold a budget meeting. Encouraging the regions to do a webinar but hold meetings after so you are part of the consolidation process. Sticking with due dates – survey preferred program November 20th and the unfulfilled obligations on December 18th. Tribes must provide a point of contact for survey submissions. Must choose ten preferred program so it doesn't skew the statistics and you cannot duplicate program choices. How will spread out 5% increase? In past apply it to priorities and then distribute it to discretionary. TIBC should approve the budget before presentation to the AS-IA. Meet the last week of February (Subcommittee). Survey – two separate surveys because too cumbersome – focus on one piece and then the next piece. Unfunded obligations released on November 20th because still trying to get the calculations down. BIE schools are doing their own – preferred programs and unfunded obligations. New format to the surveys – pdf format. It allows you to complete it without a web connection and unlimited characters. You can save it at any point and not lose your data. Once it is completed – POCs will send it into email address and regions will keep track of missing surveys. They will export all survey data into a database and each of the folks at the regional level will have access to it. IT will develop reports for them. We are trying to move ahead and there is an evaluation form that you can fill out to let us know what works and what doesn't. Unfunded obligation – all that needs to be provided is the variables and the calculations can be done on the backend so you don't have to worry about it.
- Tribal Interior Budget Committee Update (OVW Update & Listening Session)

Tribal Comments

- What happens to pilot programs that Tribes began and how can Tribes maintain these programs.
- BIA – It was something we were told we have to do. It is primary TIWAHE and Climate Change (\$10 million). We have folks looking at it to form partnerships to move on and make it successful. Hope House restore it. It is based on President's effort to balance the budget.
- Whoever is asked to testify make it clear Tribes are not happy.
- The focus of this Administration is infrastructure. We try to defend the priorities that come out of TIBC.
- On the POC – we sent an email to Gail – you have another webinar next week? Friday 2 at 1:30pm eastern time.
- Not thrilled with Tribes must choose 10 programs. Why forced to select something that will take dollars away from our region. If we decide we have only 3 priorities we expect our voice will be heard.
- Problem is that it comes in at the roll-up – you will lose something in the roll-up. By not voting you let others rise up.
- If Region doesn't need it as a priority why would we displace it as a priority.

- Out of 127 only 3 priorities from a region.
- When we get the money we distribute it as we see appropriate.
- Cookie cutter doesn't work in Indian country – sovereign nations have the right to choose and select the priorities. It cannot be across the board blended. We need to work on how we better serve the needs of the Tribes.
- Southern Plains submitted 3 priorities last year because when we looked at the increase we said it wasn't much money so what are we going to do with this. Scholarships and higher education are so important to us and we have 24 Tribes so it comes to this amount. We were thinking hard numbers and dollars. We did a formula.
- When you do the preferred survey the dollars are not included.
- We went through the same process and it was really detailed last year and when you get to the regions and see the priorities nationally it takes a lot of time to go through it. This process doesn't really work or reflect the Tribal priorities because different needs in different regions.
- How many areas hold face to face meetings – in Phoenix area we don't. We have questions on the survey –ditto. Miss the good old days when we were face to face discussing our issues. We would get together and talk. Disappointed that area directors are not mandated to hold these sessions. We don't know our regional representatives or tribal representatives for TIBC. Area directors need to be held accountable.
- We mandated it. They will hold a meeting and bring you together to discuss it.
- Have issues in Albuquerque area and the financial person shows up to give us guidance.
- Methodology for this doesn't seem to work so you can do what is best for the Tribes. The methodology really needs to be looked at. You need to invest a lot of time into this. Public Safety is the number one issue for our region. We need to figure out a strategy that adds value to the process. All of Tribes select public safety but it is not funded in AK.

Bureau of Indian Education

Melanie Fourkiller, Policy Analyst, Choctaw Nation Health Services Authority

Bill Nuttle, Program Specialist, DOI, Bureau of Indian Education

- Johnson O'Malley
- Had a BIE meeting in Oklahoma and he has been assigned the project to update the JOM account.

When was the last student count conducted – one conducted in 2012 and one in 2014 and the one in 2012 didn't have a lot of planning behind it. Great they are going to do this but only talking about the existing contractors and we also wanted to know about students that were not counted. Public schools that didn't respond or an interest in responding – no real initiative for them to respond. 1995 student count –

- 2012 increased by
- 2014 still didn't have all existing contractors respond – so the count is not accurate.
- BIE has been meeting with the Tribes and the Johnson O'Malley Association to come up with a system to take to congress so they can fund JOM up to the level it needs to be. We said lets go with the Census data. Stats fro National Center of Education – been meeting with Census and DOE and National Center for Education Stats – 57,000 schools 516,238 count 52% increase over 1995 count. It is hard to get out to areas to meet with the Tribes and get a valid count and we want to give Tribes opportunity to discuss it.
- We got a directive from congress and we concluded a Report and it will come out in a DTL letter. What we are doing now is trying to get the preliminary report in so we can have information that is realistic for appropriations.
- Objectives was where are we at with the new student count – steps BIE is taking – meeting with Census, meeting with Tribes, meeting with National partners and now SG Advisory Committee – take information back and emphasize the importance to Tribal leaders. Identify a point of contact.
- Initiatives from Congress directs BIA, DOE, and Census feasibility of using census. We need to come up with some ideals and get those people involved with the program directors, awarding

directors and resource officers in order to come up with a workable system. We need people in the field. Program Directors are going out now and there has to be a student roster on site to verify. They had to split up to do it over 3 years.

- Anticipate conduct consultations and listening sessions throughout FY2018 and conduct count in FY2018 – come up with a mechanism to develop a student count.
- Report will be coming out but we will address the mechanism we will propose. Tribes think about a Point of contact to represent the ideas that you may come forward with?
- Q – when do you take that count? When I was a principal we had a set date to report it but once they got the count the public schools dismissed their kids and they transferred into our schools.
- There is a mechanism in place that tracks these kids. They have infinite campus and other mechanisms that track these students. We need to make sure we put in a mechanism that identifies these students.
- Q – Do they have to be enrolled Tribal students. Some are full blood Indians but cannot enroll so can they be counted.
- We said if they are Indian and you can validate a quarter degree of Indian blood with a birth certificate it can be used to verify it. It can be an enrolled member or Tribal descendent.
- JOM opportunity for enrollment has been closed forever and don't recall a notice that makes us eligible for inclusion. BIE dollars should go to Tribes on the list that goes out every year. DOE money should include definition of descendency.
- The program is based on student success but from 1934 we should be looking at basing appropriations on academic success. It may be something to think about.
- For future listening sessions it would be appropriate to bring it up.

Preparation of Issues to Discuss with Acting Assistant Secretary – Indian Affairs

Adjourn for the Day

Thursday, October 26, 2017 (8:30 am to 2:00 pm)

**Meeting of the SGAC & Technical Workgroup with Acting Assistant Secretary – Indian Affairs
(Only Members of the SGAC and Proxies to be seated at the table)**

Welcome & Introductions

Shawn Duran, Tribal Program Administrator, Taos Pueblo and Vice-Chairwoman, SGAC

The American Indian Empowerment Act: An Option to Restore Ownership and Freedom From Federal Land Regulation Act H.R.215

Henry Cagey, Lummi Nation

Rob Porter

Support for the Bill (Young-AK)

Testified on Hill Navajo, Lummi, BIA, Land Tenure Chris Teambrook, Harvard Project

- In NY Tribes have restricted fee lands – two kinds of land trust and restricted fee – boils down to whether you want total control of your land use.
- Allows Tribes to convert some or all of its trust land into restricted fee land.
- SG proceeding for 30 years and it is a new opportunity for greater control over land use
- There will be a workgroup on this issue
- Request someone from the SGAC sit on their task force

Tribal Comments

- We will raise the request with the Chairman of this Committee
- It is great to provide Tribes choices. If you already surrendered aboriginal title would you be able to take advantage of it. Yes – you can if you have anything considered to be Indian country. Most Tribes may have restricted fee anyway.
- It will not change the jurisdiction if it is limited on trust land already.

- It doesn't change things in any way. If you own your own land and in a stronger position to self regulate you position yourself to gain more control over other issues in the future.
- The first section states the Secretary would convey lands into restricted fee status sounds similar to fee to trust regulations. We know proposed rules for fee to trust are a step backwards. Why would the Department be in favor of this when they created a regulatory regime that would have all the challenges with fee to trust.
- I don't think these folks know what they are doing and we have to get it higher than the Bureau. SG Tribes better take control of this – we represent half of the Tribes. Lummi are not afraid to be strong.

Indian Economic Development, Labor and Population Data

Kasie Nichols, Self-Governance Director, Citizen Potawatomi Nation

Hyon B. Shin, Chief of Racial Statistics Branch, Population Statistics, US Census Bureau, Department of Commerce

Thomas Krolak, Data Economist, Bureau of Labor Statistics, Department of Labor

Benjamin Simon, Chief DOI Economist and Assistant Director, Economics, Office of Policy Analysis (Labor Force Report), DOI Census

- *Census 2000 the last time collected race and ethnicity questions and it also on the ACS as well.*
- *We are working on updating the Code list to make sure any Tribal name changes are accurately collected and tabulated*
- *Data Products 2010 Census Summary File 2 will give you the most detailed information*
- *Released ACS 5 year release – the next set of detailed information that provides you more information*
- *Conducted four test focus groups led to field test*
- *2014 Focus groups – evaluate wording and descriptions were understood*
- *A new design for race and ethnicity was recommended - mirrored the categories for all other race groups – used 6 major Tribes; version two had three categories with general categories AI/AN/Central or South American Indian and write in to provide Tribal affiliation*
- *Desire to report complex and diverse racial identity*
- *2015 National content test – 1.2 million housing units tested began in 2014 and ran through October 1, 2015*
- *Two versions for AI/AN – simple checkbox with a write in line – similar to current race question. Second version have checkbox as well as the write in line*
- *Census for 2020 there will also be an electronic version (mirrors the paper version) On internet more flexibility to collect information and separated out three write in lines to list all identities.*
- *2017 Census test – made a design change to collect the most detailed information but fewer people who wrote in Tribal affiliation. On internet there was the most detail.*
- *AI/AN coding and classification – in process of sending out a survey to all Tribes held 18 consultations – want to make sure capture all changes and allow Tribes to review the list and let them know if they haven't coded it properly.*

Labor Force and Unemployment for Reservation Areas

- *Federal/state cooperative program – offers technical assistance for states to produce monthly reports*
- *Data consistent with concepts of US data*
- *Synonymous with Geography – states, OMB, All counties, Cities with pops of 25,000 or more, minor civil divisions in New England*
- *Have not required states or funded states to produce estimates for reservations*
- *Use four basic data measures – employed and unemployed civilian labor force*

- *Concepts based on pop survey developed in the 1940s – activity based concepts reference period week*
- *Employed people are defined as those who do any work for pay or profit*
- *Unemployed – no job, actively searched for work and currently available for work (active job search criteria is generous – talk to friends and family, registering with unemployment office, etc. anything you actively do to search for a job)*
- *Administer unemployment is survey – uses hierarchy of methodologies based on available input – administrative data, wages, unemployment insurance claims*
- *Blending data from 9 different sources*
- *ACS – Census Bureau Survey of 3.5 million households and produces one year estimates for areas with 65,000 or more; five year estimates for all areas*
- *Provides on a more frequent basis socio economic data*
- *Reservations – recommended technique ACS sharing adapting an actual input use for city inputs – take employment level from city and county and index it to the latest population data to carry forward the most recent read on employment. Reservation areas are not included in population estimates.*
- *Take 46% of Big Horn County and attribute it to the reservation area*
- *Disadvantage – no current info specific to reservation being used, five year period and conditions could have changed over five year period, averages shares over the 5-year base period may not be representative of the current relationship,*
- *Advantages – data easily generated, consistent with concepts of employment and unemployment*
- *In March 2015, Montana requested BLS's assistance to produce estimates for its seven reservation areas to meet the needs of Tribal communities for their benefit and the benefit of the state*
- *Contacted partners and pointed them to the ACS share ratios and told them to add them into state specific areas*
- *Montana data – show unemployment rates for their 7 reservation areas – show an economic distress in certain areas and the rate is four times the state rate in some reservations (Crow)*
- *Contacted BIA Office of Policy Analysis and in April of this year ran data for 692 reservation areas and provided them to*
- *What would we need to do if the data is useful to get it into production across the country? You need to follow the Montana model. Fund states and haven't historically funded data for reservations. We need to get states to buy into it and make the data available.*

Panel on Economic Development, Labor and Population Data

- *Interior is data users rather than data producers. So the function of producing data belongs to other agencies.*
- *Rely on Census and BLS data*
- *Labor Force Report – produced at varying intervals and has relied on different data sources or a combo of all over time*
- *Going forward it would be desirable to coordinate with Census and Labor more*
- *One of the key things is defining geography – not just within the reservation boundary but also nearby*
- *Entered into an MOU with Census to improve data quality and availability*
- *Would like to expand it to all of the other agencies that may have interest in AI/AN data*
- *Tried to inventory all federal data – held a workshop and bring together everyone in federal family and inventory all of the data sets. Had a lot of discussion about next steps*
- *Two Reports – Data Inventory identifies all the data sets and identifies how accessible they are and what they are – there are many challenges with availability to the public*
- *Produced a summary report as well to identify next steps*

- *Workshop on economic development data and tried to highlight options to overcome deficiencies – clear there are resource constraints that helped us to think about core set of data that may be helpful*
- *Workshop presentations – website*

Tribal Comments:

- *There is an extensive list of Indian data not a lot is available to the public*
- *Census data is important to us for funding so we want to make sure it is accurate. It bleeds into all of all formulas. Piece of the Labor Force is still used for Indian Housing Block Grant needs portion of the formula. Information is used by Transportation as well for their formula. Labor Force is still used and we need accurate information.*
- *Send data out in a couple of different ways to get the information out to Tribes and in the right*
- *We are going to share it with all participants – address it to all the Tribal leaders but we will broadcast it widely and we have been working with NCAI to broadcast it. We want to make sure we have the widest reach and if you have questions happy to put it on our email.*
- *We work closely with tribal affairs coordinator it is her list that we use and that is who we collaborate with.*
- *In terms of the Montana project and funding we hear you and in terms of working through the state we want to explore it because some have a hard time working with the state. We would like to know what some of the requests are for our data.*
- *Recommend that as we develop any sort of sharing of information or move forward with a Labor Force Report that we have some Tribal reps on a workgroup.*
- *All information is important Tribes need to work with workforce boards.*
- *Census information guides the formulas and there is some concern because what are you using for the codes some of the Tribes long names.*
- *Next Census will there be a Tribal track like 2010 when Indian country directly involved? We want information as early as possible.*
- *Mentioned more information on the internet but some rural places we don't always have internet – although technology is there Indian country has been left off.*
- *If no longer collecting you are no longer engaged with unemployment office*
- *Why are Tribes not a specific category as governments.*
 - *You may be able to work with Regional Directors at BIA to reach out to Tribes.*
 - *First thing I want to point out there is a misconception about our data that once drop out of unemployment system not counted – current population data doesn't include information about unemployment insurance. Unemployment insurance is neither a necessary or sufficient basis for unemployment.*
- *Structure of federal state – provide technical assistance and state department of labor produce them. Montana was very proactive and wanted data for their reservation areas. If we say we require you to produce data their question to us is well where is our funding. We try to get buy in from states*
- *CA Tribe appealed Census count in 2000 and 2010 and in the LUCA program this year but we are under-represented so we invite people back. Remote Tribes*
- *In the Census documents there is a section on Tribal governments do not meet definition so not counted in the category of governments but if you look at the statute it says Secretary shall publish for census of government and the definition section includes Indian Tribes in definition of governments you need to fix it – this is important to us we live and die on data.*
- *Tribal Labor Force is a mess and the Bureau has no resources to make it useable*
- *Corporations have better addresses than Tribes because hand out dividends.*
- *A lot of funding they always ask for certified data and certified data is US Census Data – issue regarding income data. HUD requires certified data. We need to provide medium income data and Pueblo data 2010 \$54,000 per household – we may have 4-5 families in a household so it*

should be delineated out. So when we go after HUD money our income is higher than the state of New Mexico. Get agencies to understand the data collected by the Census may not be right.

- *Group needs a workgroup.*

SGAC Joint Discussion with Acting Assistant Secretary - Indian Affairs

Bryan Rice, Director, Bureau of Indian Affairs, DOI (invited)

John Tahsuda, Principal Deputy Assistant Secretary – IA, DOI (invited)

Introductions:

- John Tahsuda - Been in and around Indian country for most of adult life. SG has been a success. Principal Deputy for Indian Affairs. High level priorities – overall reorganization of the Department. Know anytime change in status there are concerns. Good working for Trump and Zinke. Zinke grew up in Indian country and understands Tribes and have to do better because sovereignty has to mean something. Desire to look at the Department to see if there is a better way to serve the American people. Are we matching resources with obligations in the best way possible? We think there will be good ideas coming out of it and then we will meet with Indian country. Right now we are talking about concepts and once get concrete we will come to you for your information. Bryan Rice is newly installed as our Director and has a lot of experience in other Departments and has an ability to reach across the Department. What can we do in our office and out in the field to better serve Indian country.
- Tribal Comments: Support SG Tribes and the Office of SG – we have heard about cuts but to keep the office in tact it is important to keep the support there. Keep regional offices intact. Support capacity of Tribal governments because they deal with day to day. Thank you for making the rounds out to Indian country. Reemphasize what you heard at AFN and NCAI – fee to trust is a big issue for Tribes and greatly concerned with any measures that would challenge an already challenged process – Tribes administer lands acquired during process – empower and fund Tribes and Tribal courts and make sure jurisdiction over non-Tribal members. Experience problem with Opioid crisis but five states have highest prescriptions close to 10 million in those states and in five top states only to Tribes in those states one in Alabama and one in Mississippi – we do have issue but not dispositive of if we have ability to manage it. Provide tax exemption to preclude dual taxation – 465 is a mechanism.

Tribal Comment:

We are still looking if there will be a consultation with the Eastern Tribes on the land regulations. Distressing to hear and hope we can reverse it – the SG program is a model for Indian country but Director Freeman is not in the loop and part of the distribution of information. She has 50% of Tribes under her. We worked hard to get SG additional funding which we have been out of the loop for years. Use your position to bridge the gap with other agencies outside of Interior – assist with coordination across federal family including the White House council so we can move these things forward.

Response-

John Tahsuda – We are trying to identify priorities and align our strengths and human capital with what we have in place. We are looking at reorganization and SG is a big priority for us all the way to the Secretary's office. Prior Administration didn't make SG a priority and there is a conception are we favoring Direct Service over SG – it seems there was a refocus on Direct Service and less focus on SG. We want a strong focus on SG and we want to support you and encourage more Tribe to join SG. We are going through it now and hope to reinvigorate our program. It aligns with some of our budget decisions. There has been a slower than usual ramp up of leadership in the Department. If you don't have leadership the folks making decisions are either not accustomed to it or do not want to make the cuts. It is incumbent on us to look at our budget and it is a tough budget

time and we need to make cuts. Prioritize big impact prioritize and work our way down. Federal budget stuff is a mystery and hope that we can reinvigorate the SG program.

Bryan Rice – Spent career working BIA and US Forest Service. Working in Forestry on Indian and National Forest lands. Focus on jobs, land management and economic development. Was the Deputy Bureau Director for Trust Services. Some of the things we were working on fee to trust, hearth act, moving money through the system quickly whether SD contracts or SG compacts – made great success. Managed timber sales at Forestry – for every forester in BIA you see 5 in other agencies - equity issue – how do we improve partnerships and leverage capabilities. We started see issues of commonality without having to double invest. Part of being in forest service started to institute Tribal Forest Protection Act – there is an education component that comes with how we do things on Indian lands. We need to discuss the differences, why it is important and why it is of value. Working in the office of wildland fire. Moved to DC in 2009 and John alluded to differences with leadership being in place. It took nearly two years to get things moving. We still have window where Senior leadership is still coming on board. Hearing on Tribal Law and Order Act on the Hill.

Tribal Comment:

Burial Assistance Program – concern of the way Regions are interpreting the regulations. Social Services regulations finalized in 2000 prior to SG regulations and if you read them very convoluted and difficult to interpret and leaves it open for regions to interpret differently. They fail to recognize the effort Tribes make to subsidize the federal obligation. Eastern Oklahoma trouble interpreting the regulation. This is a very regulated part of the Bureau and cumbersome for SG Tribes when Regional people inject themselves in our day to day operations. If you want Tribes to participate in SG it is a barrier because treated inconsistently across regions. There are a lot of programs that are over regulated. If opportunity to work with you or Hankie there is an interest to make this happen. Appreciate that everyone was hear to start the meeting. It has been a long time since we had all three leaders. Ask for a commitment that you attend all the meetings. We meet quarterly and the dates are already set.

Response:

Bryan Rice – Seen different bureaucratic process and some are very hierarchical. We have a new team Jim James overseas regional directors. Actively working to make sure the message is aligned. We are looking at streamlining and reducing the amount of red tape and bureaucratic oversight that is out there. We want to put decision making at the local level. There are 12 regional offices and there are little tweaks that need to happen but shouldn't be that much inconsistency.

- Under SG there was authority for waivers for burial assistance there must be waivers unless it is statutorily prohibited.
- The regs state cannot waive that portion of the regulation.
- It is being interpreted two different ways in the same region.
- Inconsistency in Budget Formulation Process – Tribes are diverse but feds need to be more consistent in how they work for us.
- Indian Trader Regulations – amend regulations so Tribes have more authority to address
- David Bernhardt spoke to it and it wasn't an endorsement which gives us pause. Whether it is acted upon or not it addresses a significant issue for Tribes and the heart of it is dual taxation and how it is adverse to economic development. Inherent sovereign authority of Tribes within jurisdiction to take advantage of tax. Hearth Act was a huge advance for Tribes and provides advantage of Tribes. Indian Trust Asset Reform Act provides additional opportunity – there is operative language for Secretary to approve plans for Tribes and waive federal regulation. We have long been under regulations. Encourage you to work with AS-IA, Deputy Principal and provide opportunity to Tribes for flexibility. We have tools from Hearth Act to ITARA that provide that opportunity. Our concern is there has been too much attention on Direct Service Tribes.

We really need to hold up SG and SD because support Tribes with Capacity. Hold up small and needy because they have been hammered since sequestered and it is leading to real problems.

- Office of Special Trustee – conducting audits in Indian country looking more at SG model. Issue with one of the Pueblos where they were issued a finding with traditional agricultural leases.
- The Bureau is asking us – some of traditional (trust) lands they have been asking us for leases and in our traditional way we do not establish this. When we took over via SG this is something they didn't pass onto us.
- Response: Happy to look into it.

Tribal Comment:

Indian Trust Asset Reform Act sunsets the Office of Special Trustee and in a day and age where Tribes are developing more capability to become better partner with Bureau the OST tells us not follow regulation. They are trying to find place in world of partnership – it is time to rethink these control points when OST doesn't have staff to do survey so they develop self certification. Perfect opportunity Indian Tribe has a plan to use asset in a way they have chosen to do it. What kind of regulations do you want ITARA says identify regulations we need to supercede. We are trying to figure out how to convert over to a partnership mode with Tribes. Indian Tribe should tell the trustee what sovereignty should be.

Response:

It is important to have that conversation with all of us at the table.

Tribal Comment:

ITARA – the component missed was consultation on the Under Secretary and it was almost an after thought. Mainly it was about regulations. Key component was the Under Secretary and we got no answers if in place of AS-IA or with AS-IA and it has dropped off of the radar. For years we have been talking about getting out of Interior into our own Cabinet. Department of Interior Strategic Plan – asked to be part of the process but told internal matter and they will seek our feedback after the fact. SGAC tasked with advising the Secretary of Interior so there is a duty to engage us. How may we get better involved in the process.

Response:

Bryan Rice – Strategic Plan – having been in the fire program we spent time looking at metrics and I wasn't aware how Indian Affairs was engaging an happy to help and be the conduit. At the moment not a lot of in-depth information to share.

Tribal Comment:

Reorganization of the Executive Branch – we want to be included in the process. Changes at the regional level they are switching directors and sore point for Tribes because they know our issues and it is problematic. Consistency across regions is important. There is a level of frustration because we haven't heard much just seeing the outcomes.

Response:

Bryan Rice – Had an opportunity to talk to the Secretary with respect to the Fire program and we discussed personnel across the Department. There are roughly 5,000 employees across DOI including Tribes and employee base there is a small amount at lower pay base fire fighters and then move up the ranks it is higher pay grade. Want to bring new people into the system and try to push more resources to the field and get the technical skill on the ground where it is needed. In terms of the Regional Leadership the difference that I see – as a career employee and member of the Executive Service you sign a mobility agreement that says in a moments notice at the behest of the Secretary he can reassign you to another position and we all sign it. At any time the Secretary can say he wants to adjust how do work and he has authority to move all senior Executives across all DOI. (240?) The intent you have generalists that can apply skill sets in other places. In the perfect world work several years do high performance and move to another place and build up those skills sets. See it as an opportunity in some places to have Executives with Tribal experience. We want to share resources and skill sets across the board. The caveat is federal employees cannot talk about some personnel actions.

Tribal Comment:

Overall Tribes want to know what is happening and what the plan is it leaves us guessing and waiting. Know all plans were due in last months and we haven't heard anything about it.

Response:

Bryan – I am just coming up to speed on much of it – happy to share as it comes out.

Tribal Comment:

Glad you mentioned fire. Fire is a big issue for us – it use to be we would get consistent funding that allowed us to abate the potential for fires and a lot of money disappeared and gone up to fire fighting teams that are employed throughout the country, Yes we need fire fighters but we need money for reservations to protect themselves from fire. Hazard is significant and will cause loss of life – push money down to Tribes. Coordinate with BLM there is a problem with regulating and permitting. Projects cut fire breaks. To have those as a cause to denial of permit because of fire hazard. Policies are contrary to initiative and we need to talk about it.

- there was a list given some years back on the list of fire issues and you may want to look at it. Some of the new people are not familiar with working with Tribes and there was a lot of questioning and it was difficult for Tribes to be reimbursed so there are underlying issues we need to look at again.
- Back 9 years ago the Administration got rid of our Director and we provided input on selection choice and we have a vacancy now. We need someone with Alaska experience rather than someone from lower 48. We have been pushing Title IV amendments for while now and it would help with some of the issues with other agencies. There has been some resistance. We need to be flexible but we need consistency at the same time and the current system is not conducive to that.

Response:

Bryan – AK regional director will be signed off on soon. Expect a person in place soon. Fire is a big deal and a couple points – Fire Subcommittee there is opportunity there to reform it. In terms of where fire is at now nationally in DOI the fire appropriation is 945 million forest service is 2.4 billion and there are some other smaller appropriations that focus on hazard but they are brought in to assist with fires. OMB and Hill is looking at it and said the fires are getting bigger and more destructive so throw more money at it or make changes. There has been ½ dozen legislation introduced. To make it easier for land management activities and looking at the other budgetary components It is important to see land status around you how can you have joint investments to make the dollars go further. Now is the time to have those conversations not May, June, July when smoke is in the air.

Tribal Comment:

EO for Reorganization – it is running afoul of the previous EO on consultation – the structure of how it would look like should be consulting with Tribes. In Northeast we have a different experience prior to US government and we are not included so a lot of things being developed are being developed in a vacuum. Our territory is Maine to Texas – various Tribes and different than any other region. We need to be engaged in the discussion and dialogue. There needs to be representation from all over Indian country. Disasters – we have hurricanes and blizzards and we need to keep our people safe.

- Support OSG – small staff and handle half of the Tribes. Make sure funding and there is new folks coming in who need training on SG 101 and it is paramount importance.
- SG has been a perfect vehicle for Tribes to serve our people.
- Authorities of SG really need to be recognized. Even out budget process is program by program and it is time to update it and recognize the authorities under SG.
- Issues with the OJS – we are not given Tribal shares or information and told shares not available for detention. Recently, officers who are asked to assist off reservation police activities will not be covered by the federal tort claims act and cross jurisdictional policies in place with counties and states and we have a lot of different types of land we deal with. It puts a liability heavy on tribes and inhibits in how they deal with criminal activities. Share information

and on funding and how they work with Tribes. There needs to be more conversation with Tribes with OJS and what they are doing.

- We operate a juvenile detention center and it is a regional center ;and limited funds. 60 bed facility. Other Tribes limited on how much money they have for incarceration fees so the juveniles are not being placed. State is taking over those cases because the juveniles have to be placed somewhere. Then there is an issue that impacts Tribal sovereignty because courts look at how much money is available to incarcerate so how does it impact courts and police are making arrests and nothing is being done with prisoners and it is a real burden and it impacts Tribal sovereignty and depletes impact of our police and courts because we cannot enforce the laws without the funds. We were just asked to support VAWA but there are not any money to implement it. We cannot pay the incarceration fees.*
- Potential withdrawal of federal tort protections is extremely concerning and cause of concern arises from court case in CA where a paramedic was found not to possess the sovereign immunity of the Tribe while acting within the performance of their duties and cause of injury was the action of San Diego County police officer and was immune from suit because official of county. We have an issue with ruling of court. Do not compound it by withdrawing tort protection because we are exposed to significant liability not the Tribe the employee.*

Response:

Bryan – Testified on this TLOA and tort issue DOJ has not come out to support the bill as written but the Bureau is supportive of it.

Tribal Comment:

Under TIWAHE Initiative learn individual incarcerated or treated when come out there will just be relapse if don't change their behavioral. When there is incarceration there needs to be more work with the individual.

- November 9th roundtable with SCIA and meat of conversation is what is the whole package – mental health, social values, housing, drugs – all organizations and funding lines going with it. Collectively for enterprise we need better alignment to connect the dots.*
- JOM told Tribal leaders to be prepared to do another count.*
- Disaster situations – Tribes should have the right for intergovernmental agreements Tribe to Tribe.*
- OJS programs said individual officer said officers not covered under tort claims. No reason Tribes cannot deploy people and intergovernmentally provide services to each other. Is the DOJ trying to do knee jerk reaction to Lewis v. Clark in Mohegan?*
- Budgetary reductions for Tribes – already severely underfunded trust and treaty obligations and Tribes should be a priority and there should be mandatory and not discretionary. Budget formulation process told need to choose 10 priorities out of 127 line items and there was a lot of discussion and if a region decides to select 3 it is not being recognized.*
- Consideration for restoration for sequestration cuts – over time we have taken every cut and there is a misconception by congress that these cuts have been restored. We need to send clear message that cuts were not restored and these cuts were to our base budgets. We rarely receive increases to our base. A lot of initiatives come in the form of grants and we don't like them – grant away SG.*

Response:

Bryan – In terms of budget – top line numbers have stayed relatively stagnant it hasn't gone up or down but everything underneath it has changed. Management has remained steady so don't know if staff work done to see if regional staff are required or not. What are the management functions we need to have. One of the areas we can realize benefit is looking at how many people are in high level positions? What is the need we have to deliver the service you all expect.

Tribal Comment:

Recurring funding is preferred because build capacity to operate programs for an extended period of time.

- *We want to get out of the discretionary funding lane. We don't have all these line items in SG – we roll it up. We don't have 10 in our region we prioritize what is our priority and if we don't have 10 we are not going to do 10.*

Response:

Bryan – We need to improve communication and coordination. At the end of the day this is all about dollars.

Tribal Comment:

Budget caps required across the board rescissions every time enacted CR so we continue to get rescission by percentage and it erodes baseline funding. Move of funds to grants – by and large exclude indirect rates so if we accept the funding we don't recover against it. Congress is talking about \$1.5 trillion dollar deficit.

- Role and Responsibilities of Principal Deputy Assistant Secretary - IA
- Summary of Listening Sessions on E.O. 13781 Comprehensive Plan for Reorganizing the Executive Branch. Will consultation occur prior to action being taken?
- Update on Comments Received on ANPRM on the Traders with Indians Regulations
- Land-into-Trust Discussion

Tribal Assignments

SGAC Members Executive Session with Acting Assistant Secretary - Indian Affairs

Technical Workgroup Work Session

Jennifer McLaughlin, SGAC, Tribal Technical Co-Chair, Self-Governance Legislative Associate, Jamestown S'Klallam Tribe

Ken Reinfeld, SGAC, Federal Technical Co-Chair, OSG Senior Policy Analyst, DOI

Adjourn the SGAC Meeting



Muscogee (CREEK) Nation

January 04, 2018

W. Ron Allen, Chairman
Self-Governance Advisory Committee
c/o Self-Governance Communication & Education
PO BOX 1734
McAlester, OK 74502

RE: Department of the Interior Self-Governance Advisory Committee – Eastern Oklahoma Alternate Representative

Dear Chairman Allen,

On behalf of Muscogee (Creek) Nation, I request the Department of the Interior Self-Governance Advisory Committee's ("SGAC") consideration to serve as the Eastern Oklahoma Region's Alternate Representative.

Muscogee (Creek) Nation ("MCN") signed its first Self-Governance Compact and Funding Agreement in 1996. Since then, MCN has worked to reduce federal bureaucracy and oversight of tribal programs. Permitting MCN to join the Committee would allow us to continue pursuit of these efforts and partner nationally to improve and strengthen Self-Governance.

I have provided my contact information below in addition to that of my technical representative for your use if this nomination is approved.

Eastern Oklahoma Alternate Representative

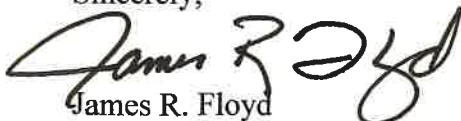
James R Floyd, Principal Chief
Muscogee (Creek) Nation
PO BOX 580
Okmulgee, OK 74447
(918) 732-7600

Technical Workgroup Member

Terra Branson, Self-Governance Coordinator
Muscogee (Creek) Nation
PO BOX 580
Okmulgee, OK 74447
tbranson@mcn-nsn.gov
(918) 549-2408

Thank you for considering this nomination. I look forward to hearing from the Committee in the future.

Sincerely,


James R. Floyd
Principal Chief



Ysleta del Sur Pueblo

119 South Old Pueblo Road • P.O. Box 17579 • El Paso, Texas 79907 (79917) • (915) 859-7913 • Fax: (915) 859-2988

January 8, 2018

W. Ron Allen, Chairman
Self-Governance Advisory Committee
C/O: Self-Governance Communication & Education
PO BOX 1734
McAlester, OK 74501

RE: Nomination to the Self-Governance Advisory Committee

Dear Chairman Allen,

In accordance with the U.S. Department of the Interior's Self-Governance Advisory Committee (SGAC) Protocols approved on April 22, 2014, the Ysleta del Sur Pueblo would like to submit the substitution of Carlos Hisa, Governor, to represent the Southwest Region as the alternate SGAC member, replacing former Lt. Governor Chris Gomez.

Below is my contact information:

Mailing Address: 119 S. Old Pueblo Road, El Paso, TX 79907

E-mail Address: hisac@ydsp-nsn.gov

Phone Number: (915) 859-8053

If you have any questions concerning this request, please contact Linda Austin at laustin@ydsp-nsn.gov.

Sincerely,

Carlos Hisa
Tribal Governor

cc: Ms. Sharee M. Freeman, Director, DOI Office of Self-Governance



Self-Governance

Office of Self Governance Update – January 2018





Self-Governance

Charles Addington – Office of Justice Services (OJS) Deputy Bureau Director



- Deputy Director Addington is the former Deputy Associate Director for OJS's Drug Enforcement Division,
- Member of the Cherokee Nation.



Self-Governance

James Schock – BIA Southern Plains Regional Director

- The new Regional Director Jim Schock is the former Chief Financial Officer (CFO) for the Bureau of Indian Affairs and, prior to his work as CFO, worked in the Office of the Special Trustee for American Indians.
- Regional Director Schock is a member of the Standing Rock Sioux Tribe.



Self-Governance

Other Indian Affairs Designations and Announcements

- Kevin Bearquiver – (Acting) Alaska Regional Director.
- Twyla Stange – (Acting) Northwest Regional Director.
- Gregory Mehojah – (Acting) Southwest Regional Director.
- Mr. Gavin Clarkson has resigned as the Deputy Assistant Secretary – Policy and Economic Development.



Self-Governance

OSG Operational Update

- The new OSG Headquarters address is:
Office of Self Governance
U.S. DOI – Indian Affairs
1849 C Street, NW, Mail Stop: MIB-2071
Washington, DC 20240
- OSG is still running a deficit internal Budget.
– Unable to travel.



Self-Governance

Office of Self Governance – Finance

- To date, OSG has received and obligated approximately \$76,155,857 in FY 2018 funding for distribution.



Self-Governance

OSG Finance - FY 2018

Program	Description
Child Care Development Fund	Discretionary
Community Services Block Grant	
Child Care Development Fund	Mandatory
Temporary Assistance for Needy Families/Native Employment Works	
Operation of Indian Programs	2-year
Contract Support Costs	



Self-Governance

OSG Finance - FY 2018

Program	Description
Department of the Interior	Wildland Fire
Operation of Indian Programs	Annual
Department of Transportation	



Self-Governance

Contract Support Cost (CSC) 2017 Data Call due August 1, 2017

- In a Dear Tribal Leader Letter dated April 14, 2017, all Self-Governance Tribes were requested to submit information necessary to calculate the Tribe's CSC need **no later than August 1, 2017.**
- 65 of 116 or 56% of Tribes responded to the letter and received payment. We continue to reach out to the 51 Tribes that did not respond.



Self-Governance

Tiwahe Update

- Self-Governance Tribes eligible for Tiwahe ICWA and Social Services funding have been completed and paid for prior years.
- Office of the Inspector General review of Self-Governance Tiwahe funding is still ongoing.
- Tribes in the Tiwahe demonstration group:
 - AVCP
 - Red Lake
 - Spirit Lake
 - Ute Mountain
 - Pascua Yaqui
 - Fort Belknap



Indian Trader Regulations

- The Office of the Assistant Secretary – Indian Affairs is reviewing input it received from the series of Consultation sessions held in 2017.
- Principal Deputy Assistant Secretary Tahsuda is expected to make the policy decision as to what the next steps will be.
- If a decision is made to propose a rule, the Office of Regulatory Affairs and Collaborative Action (RACA) will more than likely take the lead.
- Comments from the sessions are posted at:
<https://www.bia.gov/as-ia/raca/indian-traders-25-cfr-140>



Self-Governance

Indian Affairs Strategic Plan - OSG

- OSG had two Strategic Plan Performance Measures. One measure has been eliminated for FY 2018.
- The currently active performance measure is:
 - Percent of Single Audit Act reports submitted during the reporting year for which management action decisions on audit or recommendations are made within 180 days.
 - The 2018 Target for OSG is 99% of the management decisions to be completed within 180 days.
- OSG no longer reports on the following Strategic Plan Performance Measure:
 - Percent of P.L. 93-638 Title IV compacts with clean audits.



Self-Governance

Cooperative and Collaborative Partnerships with Tribes

- Secretarial Order 3342, dated October 21, 2016 requires the DOI Bureaus and Agencies to produce an annual report of opportunities for co-management partnerships with tribes.
- These reports may now be completed and submitted to the Deputy Secretary.
- Handouts include a copy of the Order.



Self-Governance

Indian Trust Asset Reform Act (ITARA) Single Entity Appraisal Transition Project

- Documents posted to <https://www.doi.gov/ost/itara>

Objectives include:

- Address the requirements set forth by Section 305(a) of ITARA
- Align the Department's appraisal functions with Executive Order 13781 and OMB Directive (Reorganization)

Transition Team in Place:

- OSG is represented.
- A communication regarding the Project is forthcoming
- Frequently Asked Questions (FAQ) documents to be developed.



Self-Governance

- Tribal Court Claims Language
- Trust Evaluations – OST Issue



Self-Governance

The End

Federal Register

Presidential Documents

Vol. 82, No. 50

Thursday, March 16, 2017

Title 3—

Executive Order 13781 of March 13, 2017

The President

Comprehensive Plan for Reorganizing the Executive Branch

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. This order is intended to improve the efficiency, effectiveness, and accountability of the executive branch by directing the Director of the Office of Management and Budget (Director) to propose a plan to reorganize governmental functions and eliminate unnecessary agencies (as defined in section 551(1) of title 5, United States Code), components of agencies, and agency programs.

Sec. 2. Proposed Plan to Improve the Efficiency, Effectiveness, and Accountability of Federal Agencies, Including, as Appropriate, to Eliminate or Reorganize Unnecessary or Redundant Federal Agencies. (a) Within 180 days of the date of this order, the head of each agency shall submit to the Director a proposed plan to reorganize the agency, if appropriate, in order to improve the efficiency, effectiveness, and accountability of that agency.

(b) The Director shall publish a notice in the *Federal Register* inviting the public to suggest improvements in the organization and functioning of the executive branch and shall consider the suggestions when formulating the proposed plan described in subsection (c) of this section.

(c) Within 180 days after the closing date for the submission of suggestions pursuant to subsection (b) of this section, the Director shall submit to the President a proposed plan to reorganize the executive branch in order to improve the efficiency, effectiveness, and accountability of agencies. The proposed plan shall include, as appropriate, recommendations to eliminate unnecessary agencies, components of agencies, and agency programs, and to merge functions. The proposed plan shall include recommendations for any legislation or administrative measures necessary to achieve the proposed reorganization.

(d) In developing the proposed plan described in subsection (c) of this section, the Director shall consider, in addition to any other relevant factors:

- (i) whether some or all of the functions of an agency, a component, or a program are appropriate for the Federal Government or would be better left to State or local governments or to the private sector through free enterprise;
- (ii) whether some or all of the functions of an agency, a component, or a program are redundant, including with those of another agency, component, or program;
- (iii) whether certain administrative capabilities necessary for operating an agency, a component, or a program are redundant with those of another agency, component, or program;
- (iv) whether the costs of continuing to operate an agency, a component, or a program are justified by the public benefits it provides; and
- (v) the costs of shutting down or merging agencies, components, or programs, including the costs of addressing the equities of affected agency staff.

(e) In developing the proposed plan described in subsection (c) of this section, the Director shall consult with the head of each agency and, consistent with applicable law, with persons or entities outside the Federal

Government with relevant expertise in organizational structure and management.

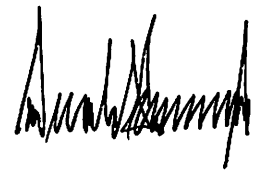
Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 13, 2017.



THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3342

Subject: Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources

Sec. 1 Purpose. The purposes of this Order are to: a) encourage cooperative management agreements and other collaborative partnerships between Department of the Interior (Department) resource managers and tribes that will further shared interests in the management of Federal lands and resources; and b) establish a process and provide institutional support to ensure that land and resource managers evaluate and develop opportunities to further establish partnerships that benefit tribes and Federal agencies.

The Department has broad management responsibilities for Federal lands and resources, including permitting authorized development activities; managing vegetation, fish, wildlife, and other resources; protecting cultural resources; and providing recreational and educational opportunities on Federal lands and waters. Within the Department, the Bureau of Land Management (BLM), National Park Service (NPS), Fish and Wildlife Service (FWS), Bureau of Ocean Energy Management (BOEM), and Bureau of Reclamation (BOR) all have responsibility for managing these public resources for the benefit of current and future generations.

There are currently 567 federally recognized Indian tribes (tribes) in the United States, the ancestors of which inhabited the land that forms the present-day United States for millennia. This Order recognizes that tribes have special geographical, historical, and cultural connections to Federal lands and waters, and that tribes have traditional ecological knowledge and practices regarding resource management that have been handed down through generations. Federal land and resource managers value this traditional knowledge, which enhances Federal management decisionmaking and ensures a continued connection between tribes and Federal lands and waters.

Across the country, the Department has a wide variety of cooperative-management and collaborative-partnership arrangements with tribes – from providing technical assistance to formal agreements. Such successful arrangements are not only valued by the Department and tribes, but are also a benefit to the public at large. This Order articulates the principles and legal foundation for interactions between bureau land managers and tribes as those interactions relate to shared interests in managing, conserving, and preserving natural and cultural resources under the primary responsibility of Federal land and water managers. As described later in this Order, there are already numerous examples of cooperative-management agreements and other collaborative arrangements between Federal agencies and tribes that demonstrate the value of collaboration by furthering the interests of tribes while also enhancing the ability of Federal agencies to carry out their missions.

Sec. 2 Background.

a. The Department's Natural Resource Management Responsibility. This Order addresses partnership opportunities in the context of management and mission responsibilities of BLM, NPS, FWS, BOEM, BOR, and potentially other bureaus and offices (collectively, bureaus).

(1) NPS. The NPS manages units of the National Park System under and in accordance with what is commonly known as the NPS Organic Act, Act of August 25, 1916, ch. 408, 39 Stat. 535, codified as amended in various sections of Title 54 of the United States Code. The Organic Act directs the Secretary to "promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wildlife in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wildlife in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. 100101(a). Put another way, the fundamental purpose of the National Park System is conservation of park resources and values, and the NPS's principal responsibility is to manage park units to avoid impairment of those resources and values. *See generally* NPS Management Policies 2006 §1.4.

(2) BLM. The BLM manages the Nation's public lands pursuant to its organic act, the Federal Land Policy and Management Act of 1976 (FLPMA). 43 U.S.C. 1701 et seq., and other statutes. The FLPMA directs the Secretary, through the BLM, to manage the public lands "on the basis of multiple use and sustained yield," which requires management of the public lands and resources for a variety of uses, including but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural, scenic, scientific and historical values to achieve and maintain in perpetuity output of various renewable resources of the public lands. 43 U.S.C. 1701(a). The BLM also manages some of the West's most spectacular landscapes, many of which are found in the BLM's 32 million-acre National Conservation Lands System. In sustaining the health, diversity, and productivity of America's public lands for the use and enjoyment of present and future generations, BLM administers more public land – more than 45 million surface and 700 million sub-surface acres – than any other Federal agency in the United States.

(3) FWS. With 565 national wildlife refuges, 38 wetland management districts, and 5 national monuments, the National Wildlife Refuge System (NWRS) manages more than 850 million acres of lands and waters. The FWS manages the NWRS pursuant to various laws, including the National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife System Improvement Act of 1997, 16 U.S.C. 668dd-668ee, and, for refuges in Alaska, the Alaska National Interest Lands Conservation Act of 1980, as amended. 16 U.S.C. 3101-3233. Under the Administration Act, the "mission of the System is to administer a national network of lands and waters for conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. 668dd(a)(2). Each refuge is managed to fulfill the mission of the NWRS, the specific purpose for which each refuge was established, and for compatible wildlife-dependent recreation. 16 U.S.C. 668dd(a)(3).

(4) BOR. The BOR manages, develops, and protects water and related resources in an environmentally and economically sound manner in the interest of the American public. It is the Nation's largest wholesale water supplier. Under the Reclamation Act of 1902, BOR's work initially focused on the construction of dams and facilities to store and convey water, and has been expanded to include hydropower production, flood control, municipal and industrial water, recreation, and fish and wildlife enhancement. Areas operated by BOR often include important cultural and natural resources and provide unique educational and interpretive opportunities.

(5) BOEM. The BOEM manages the development of the U.S. Outer Continental Shelf (OCS) energy and mineral resources in an environmentally and economically responsible way. Under the authority provided by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331, et seq., BOEM's responsibilities include managing oil and gas resources as well as hard minerals and the development of renewable energy on the OCS; and environmental studies of the impacts of OCS development.

(6) In addition to the responsibilities outlined above, BLM, NPS, and FWS have specific and unique responsibilities associated with the Federal Subsistence Management Program in Alaska pursuant to Title VIII of the Alaska National Interest Lands Conservation Act. 16 U.S.C. 3101 et seq.

b. Government-to-Government Relationships with Tribes.

(1) Central to the Department's mission is honoring and supporting the United States government-to-government relationships with tribes. Underlying this relationship is the Department's obligation to uphold the Federal trust responsibility to tribes. This trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and tribes. The legal and trust relationship with tribal governments has been set forth in the United States Constitution, treaties, statutes, executive orders, and numerous court decisions, and serves as the foundation for the Department's interaction with tribes. Further examination of these authorities most recently resulted in the Department's issuance of Secretary's Order 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries, dated August 20, 2014.

(2) This government-to-government relationship leads us to further consider how the Department can collaborate with tribes to better integrate tribal knowledge and concerns into the management of Federal lands and waters under the Department's charge, while also making better use of tribal capabilities and resources to enhance the ability of bureaus to accomplish their missions.

c. Partnership in Managing Federal Lands and Resources.

(1) By way of this Order, the Department intends to increase the opportunity for tribes to participate in the management of Federal lands and waters within the Department's jurisdiction and the integration of traditional ecological knowledge and practices into management and operations. This may include new opportunities for access to these resources if

such access is in keeping with the bureau's mission. Of course, tribes will be responsible for deciding whether or not a cooperative agreement or other collaborative partnership with a bureau is in its interest. Each bureau will be responsible for assessing what activities will be suited to provide these opportunities for collaboration and cooperation.

(2) Such arrangements may vary widely depending on the circumstances and may range from agreements that improve sharing of technical expertise; to arrangements that make the knowledge, experience, and perspectives of tribes and their members integral to the public's experience with Federal lands; to arrangements that combine tribal and bureau capabilities to improve resource management and help advance the responsibilities and interests of both a tribe and a bureau; to annual funding agreements under the Tribal Self-Governance Act. There is a broad array of cooperative and collaborative opportunities available to bureaus and the tribes pursuant to the various general authorities referenced below.

(3) This Order focuses on developing cooperative and collaborative opportunities with tribes and does not address "co-management" which the Department defines as a situation where there is a specific legal basis that requires the delegation of some aspect of Federal decisionmaking or that makes co-management otherwise legally necessary. For example, in some instances, such as management of the salmon harvest in the Pacific Northwest, co-management has been established by law.

Sec. 3 Authorities. This Order is issued in accordance with the authority provided by 25 U.S.C. Sections 2 and 9 and Section 2 of the Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended. Each bureau has available authorities that authorize cooperative agreements, collaborative partnerships, and other similar arrangements with tribes for various purposes. Some authorities may authorize funding tribes to perform particular activities while others may authorize tribal participation without Federal funding or by using financial and other resources provided by the tribe. Bureau-specific authorities supporting agreements and partnerships contemplated by this Order include, but may not be limited to:

a. NPS - 54 U.S.C. 101702(d). Authorizes the Secretary to enter into cooperative agreements with tribal governments for the purpose of protecting natural resources of units of the NPS System through collaborative efforts on land inside and outside the units.

b. BLM - 43 U.S.C. 1737. Authorizes BLM to (1) enter into cooperative agreements regarding the management, protection, and sale of public lands; (2) conduct investigations, studies, and experiments regarding the same in cooperation with others, and; (3) accept contributions or donations of money, services and property for the management, protection, development, acquisition, and conveying of the public lands.

c. FWS - 16 U.S.C. 661 Fish and Wildlife Coordination Act. Authorizes FWS to enter into agreements to assist in the protection of fish and wildlife and their habitats.

d. BOR - U.S.C. 373d. Authorizes BOR to enter into grants and cooperative agreements with tribes to promote the development, management, and protection of their water resources.

e. BOEM - 43 U.S.C. 1346. Authorizes BOEM to enter into agreements to carry-out environmental studies on the impacts of OCS development and to obtain information for such studies from any person.

Sec. 4 **Limitations.**

a. Cooperation and collaboration must take place within the framework of the Department's legal responsibilities and authorities. In exercising their legal authorities to implement this Order, bureaus should be mindful of legal limits on the delegation of inherently Federal functions to non-Federal entities. The bureaus should consult with the Office of the Solicitor for further guidance on the question of whether a particular program, service, function, or activity is inherently Federal.

b. In addition to legal constraints, the implementation of this Order must occur within the financial resources available to bureaus through the standard budget and appropriations process. Typically, it takes additional resources to work with tribes in evaluating, developing, and entering into a cooperative agreement or collaborative partnership. The bureaus should have candid discussions with tribes regarding the need and availability of financial resources associated with any proposal.

Sec. 5 An Approach to Cooperative and Collaborative Partnerships. Pursuant to this Order, bureaus must identify opportunities for cooperative management arrangements and collaborative partnerships with tribes and undertake efforts, where appropriate, to prepare their respective bureau staffs to partner with tribes in the management of the natural and cultural resources over which the bureaus maintain jurisdiction and responsibility. Although this Order is intended to encourage cooperative management agreements and collaborative partnerships consistent with the principles contained herein, it is not expected that all areas managed by the various bureaus, such as units of the National Park System, will provide such an opportunity. The bureau efforts shall include, but are not limited to, identification of key personnel to explore such opportunities, development of bureau-specific guidance for cooperative and collaborative partnerships with tribes, and, where requested, engagement in consultation with tribal governments at regional, and unit-specific levels to better understand tribal interests in specific cooperative and collaborative opportunities. Further, the Office of the Solicitor will develop a working group to advise bureaus on legal issues associated with exploring opportunities for and entering into cooperative agreements and collaborative partnerships with tribes.

a. Scope. The scope of the activities subject to this Order include, but are not limited to:

- (1) Delivery of specific programs and services.
- (2) Management of fish and wildlife resources.
- (3) Identification, protection, preservation, and management of culturally significant sites, landscapes, and resources.
- (4) Management of plant resources, including collection of plant material.

(5) Management and implementation of maintenance activities.

(6) Management of information related to tribal, cultural, and/or educational materials related to bureau units.

b. Principles. Tribes offer significant knowledge and experience in the management of natural resources, including traditional ecological knowledge and practices, which can enhance the bureaus' management of Federal resources and better protect tribal rights and interests. The bureaus shall abide by the following guiding principles in identifying opportunities for and implementing cooperative management opportunities and collaborative partnerships with tribes:

(1) Bureaus may choose to prioritize potential cooperative arrangements and collaborative partnerships that have been the subject of ongoing discussions prior to the effective date of this Order.

(2) Cooperative agreements and collaborative partnerships with tribes can help ensure effective management of Federal lands and resources, including managing resources according to the purpose for which the resources are set aside.

(3) Respect of the government-to-government relationship between the United States and tribes.

(4) Seeking cooperative management opportunities and collaborative partnerships, where appropriate in furtherance of the United States trust responsibility to tribes and support of Indian self-determination and self-governance.

Sec. 6 Examples. The bureaus already partner with tribes across the country in cooperative management and collaborative partnerships in many instances. The following are existing examples of the types of arrangements anticipated by this Order.

a. FWS Region 7 (Alaska). The FWS has a Memorandum of Understanding with the Kuskokwim River Intertribal Fisheries Commission. This group functions in an advisory capacity to help formulate management strategies and actions for the Kuskokwim River subsistence salmon fishery, increasing the ability of Alaska Native villages to have meaningful input into the active management of subsistence resources.

b. FWS Region 8 (Nevada). The Desert National Wildlife Refuge Complex collaborates with seven bands of Nuwuvi (Southern Paiute) on various activities, including protecting and managing cultural resources, planning restoration projects that incorporate traditional knowledge, and collaborating on interpretive displays, among other activities.

c. BLM. The BLM entered into a cooperative management agreement in 2012 with the Paiute Shoshone Indians of the Bishop Community to manage the Volcanic Tablelands in central California. The agreement identifies opportunities for cooperation on range management, cultural resource protection, recreation programs, and youth engagement initiatives.

d. BLM. The BLM manages the Kasha-Katuwe Tent Rocks National Monument, located in north-central New Mexico, in close cooperation with the Pueblo de Cochiti to protect the Monument's resources and sustain the cultural diversity of the Pueblo and surrounding communities. An agreement between BLM and the Tribe details mutual management responsibilities which range from trail maintenance and visitor services work to coordinating law enforcement with BLM.

e. BOEM. The BOEM's Environmental Studies Program has worked closely with Inupiat whalers on Alaska's North Slope to map subsistence harvest hunting areas for use in the environmental studies associated with offshore oil and gas activities.

f. NPS. The NPS Unit, Redwoods National Park, has an annual funding agreement in place with the Yurok Tribe under which the Tribe conducts watershed restoration and rehabilitation, culvert replacement, cultural resources inventories and assessments, oral histories, invasive plant removal, air quality monitoring, and scientific research related to California Condor recovery. The Tribe has also conducted large-scale demolition and restoration of a former NPS maintenance facility, maintained water systems, and has established a youth partnership program for trail maintenance.

g. NPS. The NPS, Grand Portage National Monument, and Isle Royale National Park have an annual funding agreement with the Grand Portage Band of the Lake Superior Chippewa Tribes for the maintenance and construction at the National Monument, interpretive services and planning, resource management, basic cultural and natural resource research, and the mainstay of repair and rehabilitation of Park facilities.

h. BOR. The BOR and the Pyramid Lake Paiute Tribe (PLPT) are jointly developing Truckee River Operating Agreement (TROA) modeling tools. The PLPT is a signatory party to TROA and responsible for scheduling releases of Stampede Dam project water for fish and wildlife purposes. The BOR then makes the releases. In addition, PLPT is using funds provided by BOR for managing invasive species on the reservation around BOR's Marble Bluff Dam with primary benefits to reservation land and water and ancillary benefits to BOR facilities.

i. BOR. The BOR currently has a contract with the Confederated Tribes of the Colville Reservation for law enforcement services to enforce laws on BOR land within the exterior boundary of the Colville Reservation. Tribal police officers must be certified, and the delegation does not include enforcement of any hunting, fishing, or boating regulations. In addition, BOR regularly contracts with the Confederated Tribes of the Colville Reservation and Spokane Tribe of Indians to inspect, or recover eroding burials through professional archeological excavation and in accordance with tribal traditions.

Sec. 7 Implementation. The Deputy Secretary is responsible for implementing all aspects of this Order, in coordination with the Assistant Secretaries and heads of bureaus. This responsibility may be delegated as appropriate. This Order does not alter or affect any existing duty or authority of the bureaus. In addition, all heads of bureaus are directed to immediately begin implementing Section 5 of this Order by identifying opportunities for cooperative management agreements and collaborative partnerships, and outlining any specific steps

(e.g., instructions to field staff, identification of key personnel, development of bureau-specific guidance, engaging in tribal consultation) to be undertaken.

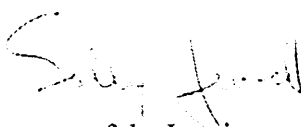
Sec. 8 Planning and Reporting Requirements.

a. Within 75 days of the effective date of this Order, each bureau will provide a report to the Deputy Secretary summarizing a strategy for achieving the directive in Section 5, with elements as specified in Section 7 above, and the overall purposes articulated herein. The report should identify any efforts underway for engaging in new cooperative management opportunities and collaborative partnerships with tribes.

b. Annually thereafter, each bureau will report to the Deputy Secretary on completed arrangements between the bureaus and tribes, as well as on any arrangements then under consideration. Annual reports should also include any arrangements that were declined and the reasons for such declination. Annual reports should include any benefits the public receives from the arrangements entered into by the bureaus beyond monetary benefits, including, but not limited to, benefits resulting from the use of traditional ecological knowledge, and tribal resources.

Sec. 9 Effect of the Order. This Order is intended to improve the internal management of the Department. This Order and any resulting report or recommendation are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officer or employees, or any other person. To the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control.

Sec. 10 Expiration Date. This Order is effective immediately and will remain in effect until its provisions are converted to the Departmental Manual or until it is amended, superseded, or revoked, whichever occurs first.


Secretary of the Interior

Date: OCT 21 2016

accordance with section 12 of the Act of June 18, 1934 (25 U.S.C. 472).

SEC. 304. OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS.

25 USC 5634.

(a) **INFORMATION TO CONGRESS.**—Notwithstanding sections 302 and 303 of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4042 and 4043), not later than 1 year after the date of enactment of this Act, the Secretary shall prepare and, after consultation with Indian tribes and appropriate Indian organizations, submit to the Committee on Natural Resources of the House of Representatives, the Committee on Indian Affairs of the Senate, and the Committees on Appropriations of the House of Representatives and the Senate—

Deadline.
Consultation.

(1) an identification of all functions, other than the collection, management, and investment of Indian trust funds, that the Office of the Special Trustee performs independently or in concert with the BIA or other Federal agencies, specifically those functions that affect or relate to management of nonmonetary trust resources;

(2) a description of any functions of the Office of the Special Trustee that will be transitioned to other bureaus or agencies within the Department prior to the termination date of the Office, as described in paragraph (3), together with the timeframes for those transfers; and

(3) a transition plan and timetable for the termination of the Office of the Special Trustee, to occur not later than 2 years after the date of submission, unless the Secretary determines that an orderly transition cannot be accomplished within 2 years, in which case the Secretary shall include—

Plan.
Deadline.
Determination.

(A) a statement of all reasons why the transition cannot be effected within that time; and

(B) an alternative date for completing the transition.

(b) **FIDUCIARY TRUST OFFICERS.**—Subject to applicable law and regulations, the Secretary, at the request of an Indian tribe or a consortium of Indian tribes, shall include fiduciary trust officers in a contract, compact, or other agreement under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).

Contracts.

(c) **EFFECT OF SECTION.**—Nothing in this section or the submission required by this section—

(1) shall cause the Office of the Special Trustee to terminate; or

(2) affect the application of sections 302 and 303 of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. 4042 and 4043).

SEC. 305. APPRAISALS AND VALUATIONS.

Deadlines.
Trust property.
25 USC 5635.
Consultation.

(a) **IN GENERAL.**—Notwithstanding section 304, not later than 18 months after the date of enactment of this Act, the Secretary, in consultation with Indian tribes and tribal organizations, shall ensure that appraisals and valuations of Indian trust property are administered by a single bureau, agency, or other administrative entity within the Department.

(b) **MINIMUM QUALIFICATIONS.**—Not later than 1 year after the date of enactment of this Act, the Secretary shall establish and publish in the Federal Register minimum qualifications for individuals to prepare appraisals and valuations of Indian trust property.

Federal Register,
publication.

(c) SECRETARIAL APPROVAL.—In any case in which an Indian tribe or Indian beneficiary submits to the Secretary an appraisal or valuation that satisfies the minimum qualifications described in subsection (b), and that submission acknowledges the intent of the Indian tribe or beneficiary to have the appraisal or valuation considered under this section, the appraisal or valuation—

(1) shall not require any additional review or approval by the Secretary; and

(2) shall be considered to be final for purposes of effectuating the transaction for which the appraisal or valuation is required.

25 USC 5636.

SEC. 306. COST SAVINGS.

(a) IN GENERAL.—For any program, function, service, or activity (or any portion of a program, function, service, or activity) of the Office of the Special Trustee that will not be operated or carried out as a result of a transfer of functions and personnel following enactment of this Act, the Secretary shall—

(1) identify the amounts that the Secretary would otherwise have expended to operate or carry out each program, function, service, and activity (or portion of a program, function, service, or activity); and

List.

(2) provide to the tribal representatives of the Tribal-Interior Budget Council or the representative of any other appropriate entity that advises the Secretary on Indian program budget or funding issues a list that describes—

(A) the programs, functions, services, and activities (or any portion of a program, function, service, or activity) identified under paragraph (1); and

(B) the amounts associated with each program, function, service, and activity (or portion of a program, function, service, or activity).

Deadline.

(b) TRIBAL RECOMMENDATIONS.—Not later than 90 days after the date of receipt of a list under subsection (a)(2), the tribal representatives of the Tribal-Interior Budget Council and the representatives of any other appropriate entities that advise the Secretary on Indian program budget or funding issues may provide recommendations regarding how any amounts or cost savings should be reallocated, incorporated into future budget requests, or appropriated to—

(1) the Secretary;

(2) the Office of Management and Budget;

(3) the Committee on Appropriations of the House of Representatives;

(4) the Committee on Natural Resources of the House of Representatives;

SGAC Brief- ITARA Single Entity Appraisal Transition Project

Indian Trust Asset Reform Act ("ITARA"), Pub. L. 114-178

Title III of this Act:

- Allows the Secretary of the Interior to establish an Under Secretary for Indian Affairs who is to report directly to the Secretary of the Interior and coordinate with the Office of the Special Trustee for American Indians ("OST") to ensure an orderly transition of OST functions to an agency or bureau within Interior;
- Requires Interior to prepare a transition plan and timetable for how identified OST functions might be moved to one other entity within the Department of the Interior;
- Requires appraisals and valuations of Indian trust property to be administered by a single administrative entity within Interior; and
- Requires Interior to establish minimum qualifications for individuals to prepare appraisals and valuations of Indian Trust property and allow an appraisal or valuation by a qualified person to be considered final without being review or approved by Interior.

Single Entity Appraisal Transition Project:

Background

- 12/10/2013 Report of the Commission on Indian Trust Administration and Reform
- 06/22/2016 President Obama signed ITARA
- 07/13/2016 Dear Tribal Leader Letter announcing Listening Sessions and Consultation
- 01/18/2017 Secretary letter to Congress Section 304(a)
- 03/13/2017 President Trump Executive Order 13781 and OMB
- Directive on a Comprehensive Plan for Reorganizing the Executive Branch
- 06/20/2017 Appraisal Transition Team Agency Stakeholder Meeting

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January, 2018

I. PUBLIC SAFETY AND JUSTICE ISSUES

- ❖ SURVIVE ACT, S. 1870. Before the end of the Session, the Senate Committee on Indian Affairs approved SURVIVE Act, S. 1870, which would provide a 5% tribal set aside of the Victims of Crime Fund.
- ❖ Tribal Law and Order Act, Savanna's Act, Justice for Native Survivors of Sexual Violence Act. The Committee also held hearings on the reauthorization of the Tribal Law and Order Act, S. 1953 and Savanna's Act, S. 1942, which is intended to improve the reporting of missing and murdered Indian people. In addition, Senator Franken (D-MN) and Senator Murkowski (R-AK) have introduced the Justice for Native Survivors of Sexual Violence Act, S. 1986, which would expand the 2013 VAWA special tribal jurisdiction to include crimes of sexual violence, sex trafficking and stalking committed by non-Indians within a tribe's special jurisdiction. Currently, the special tribal jurisdiction can only be exercised for domestic violence crimes.

II. HEALTH CARE ISSUES

- ❖ SPDPI, THC, SCHIPS. Congress extended the authorizations for these programs until March, 2018. Congress continues to work on these issues in connection with the FY 2018 funding measures.
- ❖ VA-CHOICE Reforms. On December 5, 2017, Veterans Affairs Committee Chairman Johnny Isakson introduced S. 2193 (“The Caring for Our Veterans Act”). The bill was introduced on behalf of the Veterans Affairs Committee and was therefore immediately placed on the Senate calendar. The bill includes a provision that would authorize a medical residency program between, Tribal and IHS facilities and the VA.

However, Title I of the bill because it is of most immediate concern, which would establish the VA Community Care Program by amending existing Section 1703 of the Veterans Act.

Of particular note are these elements:

- Under 1703(b), covered health care providers would be any Medicare provider, DOD, IHS, and FQHC, and any other provider that meets criteria to established by the VA. This section does not mention tribes or tribal organizations.
- Subsection 1703(d) sets for the conditions under which the VA must use non-VA providers (such as when the VA doesn’t offer the care; the covered veteran was eligible under the 2014 Choice Act under the 40-mile rule; or – under “criteria” to be developed by the VA – the veteran and the veteran’s primary care provider agree that non-VA care “would be in the best medical interest of the covered veteran”).
 - The VA’s criteria must consider distance, nature of the care required, frequency of the required care, availability of VA care, whether the veteran “faces an unusual or excessive burden to access” care (including driving, geographic or environmental factors, and whether VA care is “reasonably accessible”[among other factors])
- Subsection 1703(e) sets conditions under which the VA may use non-VA providers. This situation will arise if the VA determines that the VA care “is not providing care that meets such quality and access standards as the

Secretary shall develop.” In making this judgment the secretary would be required to compare VA care with non-VA provider care.

- Subsection 1703(j) authorizes the VA to establish provider networks through a competitive bid process.
- Subsection 1703(k) sets as a maximum reimbursement rate the amounts the Medicare amounts the government pays under 42 U.S.C. §1395x(u) and §1395x(d), unless the veteran resides “in a highly rural area” that has fewer than 7 people per square mile.
 - Under subparagraph (3), in Alaska “the Alaska Fee Schedule of the Department of Veterans Affairs shall be followed, except for when another payment agreement, including a contract or provider agreement, is in effect.”
 - Under subparagraph (5), the VA may, but is not required to, employ “value-based reimbursement models.”
- **Section 101(d) addresses continuity of care with existing agreements:**
 - (d) Continuity of Existing Agreements.—
 - (1) In general.--Notwithstanding section 1703 of title 38, United States Code, as amended by subsection (a), the Secretary of Veterans Affairs shall continue all contracts, memorandums of understanding, memorandums of agreements, and other arrangements that were in effect on the day before the date of the enactment of this Act between the Department of Veterans Affairs and the American Indian and Alaska Native health care systems as established under the terms of the Department of Veterans Affairs and Indian Health Service Memorandum of Understanding, signed October 1, 2010, the National Reimbursement Agreement, signed December 5, 2012, and agreements entered into under sections 102 and 103 of the Veterans Access, Choice, and Accountability Act of 2014 (Public Law 113-146).

(2) Modifications. --Paragraph (1) shall not be construed to prohibit the Secretary and the parties to the contracts, memorandums of understanding, memorandums of agreements, and other arrangements described in such paragraph from making such changes to such contracts, memorandums of understanding, memorandums of agreements, and other arrangements as may be otherwise authorized pursuant to other provisions of law or the terms of the contracts, memorandums of understanding, memorandums of agreements, and other arrangements.

III. 477 IMPLEMENTATION

MOU between agencies must be in place within one year of enactment (December, 2019).



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MEMORANDUM

December 7, 2017

TO: TRIBAL 477 CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *PL 477 Amendment with President Trump for Signature*

A comprehensive amendment to the Indian Employment, Training and Related Services Demonstration Act of 1992 (as amended) is one step from becoming law.¹ It was formally presented to President Trump for signature on December 6, 2017. This legislation is codified at 25 U.S.C. §§ 3401–3417 and more commonly referred to as PL 477. Several years in the making, the amendment legislation makes the PL 477 program permanent, expands the range of programs and funds eligible for integration in PL 477 plans, clarifies the plan approval process, and makes other improvements to strengthen tribal employment and training programs.

PURPOSE AND NEED FOR LEGISLATION

The PL 477 program allows tribal organizations to combine formula-funded federal grants that come from varied sources but all pertain to employment, training, or related services into a single plan with a single budget and reporting system. The PL 477 program allows tribal organizations more flexibility in deciding how to spend their federal funds. They are able to design programs that are more successful based on the unique needs of their own community members. It also allows them to streamline administrative processes, including program applications and federal reporting, thereby lowering administrative costs and making more funds available for direct services.

The amendment legislation serves multiple important purposes in strengthening the PL 477 program. First, it reauthorizes the PL 477 program as permanent rather than as a demonstration project. Second, it expands the types of programs and funding that may be integrated in PL 477 plans, including integration beyond only the Department of the Interior (DOI), the Department of Health and Human Services (HHS), the Department of Labor (Labor), and the Department of Education (DOE). Third, it clarifies that PL 477 plans require only one annual report or audit and do not require reporting dollar-for-

¹ The amendment legislation is entitled “A bill to amend the Indian Employment, Training and Related Services Demonstration Act of 1992 to facilitate the ability of Indian tribes to integrate the employment, training, and related services from diverse Federal sources, and for other purposes.”

dollar by program—as some federal officials had insisted. Fourth, it creates strict deadlines and processes for review and approval of PL 477 plans, as some federal officials have wrongly disapproved or delayed approval of eligible programs’ integration within PL 477 plans. Last, it clarifies the process for agencies to waive requirements of integrated programs. The amendment legislation also makes other helpful changes to the PL 477 program.

SECTION-BY-SECTION ANALYSIS OF H.R. 228 AMENDMENT LEGISLATION

Summarized below are the significant substantive changes the amendment legislation makes to PL 477. The amendment legislation affects all but two Sections of PL 477.

Section 9 of PL 477 (25 U.S.C. § 3408), entitled “Job creation activities authorized,” is not affected by the amendment legislation. This Section authorizes tribal governments to expend a certain percentage of PL 477 funds for the creation of employment opportunities and development of the economic resources of the tribal government or individual Indian people.

Section 18 of PL 477 (25 U.S.C. § 3417), entitled “Assignment of Federal personnel to State Indian economic programs,” is also not affected by the amendment legislation. This Section mandates a state with an economic development program targeted to tribal organizations is eligible to receive federal personnel assignments made by DOI.

Section 1. Short title

- This Section cites the amendment legislation as the “Indian Employment, Training and Related Services Consolidation Act of 2017.”

Section 2. Amendment of short title

- This Section amends Section 1 of PL 477 (25 U.S.C. § 3401 note), pertaining to PL 477’s short title.
- The amendment removes the word “demonstration,” thereby changing the PL 477 program from a demonstration project to a permanent program. References to PL 477 as a demonstration project are likewise removed throughout the remainder of PL 477.

Section 3. Statement of purpose

- This Section amends Section 2 of PL 477 (25 U.S.C. § 3401), entitled “Statement of purpose.”
- The amendment emphasizes that services eligible for integration into PL 477 plans may come from diverse federal sources and that one goal of the PL 477 program is reducing administrative, reporting, and accounting costs.

Section 4. Definitions

- This Section amends Section 3 of PL 477 (25 U.S.C. § 3402), entitled “Definitions.”
- The amendment emphasizes the term “Indian tribe” includes tribal organizations.
- The amendment cross-references the broader types of programs eligible for integration in a PL 477 plan listed in amended Section 5 of PL 477.

Section 5. Integration of services authorized

- This Section amends Section 4 of PL 477 (25 U.S.C. § 3403), entitled “Integration of services authorized.”
- The amendment emphasizes that, upon approval of a PL 477 plan, tribal organizations may integrate the included programs and funds into one consolidated plan, including but not limited to consolidating administrative functions.

Section 6. Programs affected and transfer of funds

- This Section significantly amends Section 5 of PL 477 (25 U.S.C. § 3404), entitled “Programs affected,” regarding the types of programs and funds eligible for integration in PL 477 plans.
- The amendment expands the types of programs that may be integrated into a PL 477 plan by providing a more detailed list of the purposes of programs eligible for integration. Although included in previous drafts of the amendment legislation, the House ultimately removed higher education from the list. Before passage by the Senate, statements were made on the record asserting that the Head Start program is not eligible for inclusion in a PL 477 plan.
- The amendment expands the types of programs eligible for integration by listing as agencies with which DOI should cooperate when approving PL 477 plans the Departments of Justice, Agriculture, Commerce, Energy, Homeland Security, Housing and Urban Development, Transportation, and Veterans Affairs, and DOE, Labor, and HHS. Previously, PL 477 throughout its Sections only referenced DOI, Labor, HHS, and DOE. Therefore, the amendment implies programs administered by these additional agencies may be integrated into PL 477 plans. Any language referencing only DOI, Labor, HHS, and DOE has likewise been removed or expanded to include the additional agencies throughout the remainder of PL 477.
- The amendment expands the types of funding that may be integrated into a PL 477 plan by adding—in addition to those made available under a statutory or administrative formula— funds to which tribal organizations are eligible due to their status as Indians under federal law or that they secured as a result of a noncompetitive process. Although included in previous drafts of the amendment legislation, the House ultimately removed funds secured as a result of a competitive process from the types of funding sources eligible for integration. In an effort to maintain competitive grants’ eligibility for integration, tribal advocates insisted on language stating that any

funds for which tribal organizations or members are eligible based solely, or even in part, on their status as Indians under federal law may be integrated.

- The amendment also clarifies that block grant funds may be integrated.
- The amendment emphasizes that DOI is the ultimate arbiter of whether a program and its funds are eligible for integration.

Section 7. Plan requirements

- This Section amends Section 6 of PL 477 (25 U.S.C. § 3405), entitled “Plan requirements.”
- The amendment does not make significant substantive changes.

Section 8. Plan review; waiver authority; and dispute resolution

- This Section significantly amends Section 7 of PL 477 (25 U.S.C. § 3406), entitled “Plan review,” regarding agencies’ authority to waive statutory or regulatory requirements associated with a program requested for integration into a PL 477 plan.
- The amendment emphasizes the existence of agencies’ waiver authority under PL 477. Other references to the process for plan approval are likewise amended to refer to waiver authority throughout the remainder of PL 477.
- The amendment states an agency shall use its waiver authority unless specific circumstances exist, replacing more permissive language that said an agency “shall have the authority to waive” requirements.
- The amendment formalizes the process for a tribal organization to request that an agency use its waiver authority, which involves a timeline for approval, deemed approval for requests not acted upon, DOI review of agencies’ denials, and an interagency dispute resolution process if DOI and the affected agency disagree on whether the waiver is appropriate.
- The amendment clarifies that the agency affected by the waiver request has final authority regarding whether it will issue a waiver if the interagency dispute resolution process fails to resolve the issue.

Section 9. Plan approval; secretarial authority; review of decision

- This Section significantly amends Section 8 of PL 477 (25 U.S.C. § 3407), entitled “Plan approval,” regarding the process for approval and review of disapprovals of PL 477 plans.
- The amendment emphasizes that DOI has exclusive authority to approve or disapprove a PL 477 plan in whole, notwithstanding that an affected agency has ultimate authority regarding whether to waive statutory or regulatory requirements associated with a program it administers that is requested for integration into a PL 477 plan. It also states that DOI must consult with each agency providing funds to be used to implement the PL 477 plan when approving or disapproving a plan.

- The amendment creates a timeline for review and approval of submitted PL 477 plans, stating such decision making must take place within 90 days after receipt of the plan unless an extension is granted. If a decision is not made within this timeframe, the plan is deemed approved.
- The amendment provides for approvals of only part of a submitted PL 477 plan.
- The amendment states that, if a PL 477 plan is disapproved, DOI must provide the tribal organization a written notification of disapproval of the plan that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that the plan does not meet the requirements of PL 477. This language is similar to that found in the Indian Self-Determination and Education Assistance Act (ISDEAA).
- The amendment creates a process for seeking review within DOI of a disapproval, including requesting a hearing on the record.
- The amendment provides for jurisdiction in federal court for civil actions brought by tribal organizations challenging a disapproval.

Section 10. Employer training placements

- This Section amends Section 10 of PL 477 (25 U.S.C. § 3409), entitled “Private sector training placements.”
- The amendment increases the period of allowable placement from 12 months to 24 months (which need not be consecutive) when tribal organizations with PL 477 plans use program funds to pay an allowance to participants in training positions with employers.
- The amendment allows placements with any employers, not just private sector employers as in the past.
- The amendment removes the requirement that the employer guarantee permanent employment and instead requires only prioritization of permanent employment.

Section 11. Federal responsibilities

- This Section significantly amends Section 11 of PL 477 (25 U.S.C. § 3410), entitled “Federal responsibilities,” regarding the responsibilities of federal agencies to facilitate and oversee PL 477 plans.
- The amendment calls on DOI to develop a model report for use by tribal organizations utilizing PL 477 plans and clarifies that the model report may not require a tribal organization to report on the expenditure of funds expressed by fund source or single agency code.
- The amendment requires DOI to distribute funds to tribal organizations not later than 45 days after the date of receipt of the funds from the appropriate agency, thereby clarifying that DOI serves as the hub of fund receipt and disbursement and requiring DOI to act within a specific timeframe.
- The amendment requires DOI to establish an interagency dispute resolution process.

- The amendment requires DOI, Labor, HHS, DOE, and the Departments of Justice, Agriculture, Commerce, Energy, Homeland Security, Housing and Urban Development, Transportation, and Veterans Affairs to enter into an interdepartmental memorandum of agreement (MOA) providing for the implementation of PL 477 within one year of the amendment legislation's enactment. The MOA must provide for an annual meeting between agencies and tribal organizations, a forum to identify and resolve interagency conflicts and conflicts between tribal organizations and agencies, and an annual review of implementation of the PL 477 program.

Section 12. No reduction in amounts

- This Section amends Section 12 of PL 477 (25 U.S.C. § 3411), entitled "No reduction in amounts."
- The amendment emphasizes that the PL 477 program shall not affect tribal organizations' eligibility for funding. It states approval or implementation of a PL 477 plan does not reduce funding available to tribal organizations.
- The amendment states that integration of a program in a PL 477 plan does not affect its eligibility for ISDEAA contracting or the applicability of any of that Act's provisions (such as the eligibility of Bureau of Indian Affairs programs for contract support costs).

Section 13. Transfer of funds

- This Section amends Section 13 of PL 477 (25 U.S.C. § 3412), entitled "Interagency fund transfers authorized."
- The amendment requires that, not later than 30 days after the date of apportionment to an agency, the agency overseeing a program identified in a PL 477 plan must transfer the funds to DOI for distribution.
- The amendment states that, at the request of the tribal organization, program funds incorporated into a PL 477 plan shall be transferred to the tribal organization pursuant to an existing ISDEAA contract, compact, or funding agreement.

Section 14. Administration of funds

- This Section significantly amends Section 14 of PL 477 (25 U.S.C. § 3413), entitled "Administration of funds and overage," regarding record keeping on and treatment of funds integrated into PL 477 plans.
- The amendment highlights that tribal organizations are not required to maintain separate records or conduct audits that trace services conducted to the program for which funds were initially authorized.
- The amendment states DOI may use accounting procedures that conform to accepted accounting principles and auditing procedures.
- The amendment emphasizes that program funds incorporated into a PL 477 plan may be consolidated and reallocated, including commingling of administrative costs.

- The amendment states funds used to carry out a PL 477 plan must be administered in such a manner as DOI determines to be appropriate to ensure the funds are spent on activities authorized under the approved PL 477 plan.
- The amendment states funds transferred under a PL 477 plan are treated as non-federal funds for purposes of meeting matching requirements under federal law, except for funds from Labor and HHS.
- The amendment states funds transferred under PL 477 that are not obligated or expended in that fiscal year remain available.
- The amendment mandates tribal organizations may earn interest on their PL 477 plan funds, and funds must be managed according to the prudent investment standard.
- The amendment states tribal organizations are entitled to recover 100 percent of any indirect costs incurred as a result of the transfer of funds under a PL 477 plan and are also entitled to the full amount of administrative costs under each program or department's regulations.
- The amendment makes the Federal Tort Claims Act applicable to approved PL 477 plans.

Section 15. Labor market information on Indian work force

- This Section amends Section 17(a) of PL 477 (25 U.S.C. § 3416(a)), entitled "Labor market information on Indian workforce."
- The amendment requires Labor, instead of DOI, to develop—in consultation with DOI, tribes, and the Bureau of the Census—a biennial report on the population eligible for the services that DOI provides to Indian people.

Section 16. Repeals; conforming amendments

- This Section repeals Section 15 of PL 477 (25 U.S.C. § 3414), entitled "Fiscal accountability."
- This Section repeals Section 16 of PL 477 (25 U.S.C. § 3415), entitled "Report on statutory obstacles to program integration."
- This Section re-designates the remaining Sections of PL 477.

Section 17. Effect of act

- This Section states that nothing in the amending legislation affects already-approved PL 477 plans, requires resubmittal of PL 477 plans, or modifies the effective period of existing PL 477 plans.

NEXT STEPS

The amendment legislation is now officially with President Trump awaiting signature before it becomes law. It will become law if it is either signed by President Trump or ten days pass while Congress is in session. The White House may choose to

hold a signing ceremony. However, if Congress adjourns during the 10-day period and the President has not yet signed the legislation or the President vetoes the legislation, it will not become law. We have been in contact with White House representatives, and they will keep us updated on any movement.

Once the amendment legislation is enacted, the agencies have a statutory deadline of one year from enactment to develop and enter into an interdepartmental MOA on implementation of the new PL 477 legislation. Tribal organizations may want to push the agencies to include the PL 477 Work Group in these discussions and to engage in formal tribal consultation on the resulting draft MOA.

If you have any questions about this memorandum, please do not hesitate to contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745), or Katie Klass (kklass@hobbsstrauss.com or 202-822-8282).

TIBC Budget Update for BIA

Last year was a difficult year budget-wise.

One of our concerns early in the year was that the Trump Administration tried to weigh in on the 2017 budget, by requesting significant cuts to domestic programs, to provide additional funding for the border wall and more money for defense.

Fortunately, Congress spared the BIA from cuts that Trump asked for, and provided \$2.86 Billion for the BIA, which was \$67 Million more than 2016. Modest increases were provided for Road Maintenance, Small & Needy Tribes, the Tiwahe Initiative, Natural Resources, Public Safety & Justice, and Education programs.

Our worst fears were realized when President Trump released his first budget request, for 2018. His budget called for a massive \$375 million cut to the BIA, a 14% overall cut! Programs that serve children, families, and education were hit the hardest. For instance, Social Services was cut 33%, ICWA was cut 22%, Human Services overall was cut 22%, Tribal Courts was cut 29%, Scholarships and Adult Education was cut 28%, and the Johnson O'Malley Education program was cut 28%. And, a total of 15 important tribal programs were completely eliminated, including the Housing program and Tiwahe Initiative.

The good news to report is that so far, Congress has rejected President Trump's 2018 budget proposal. The House adopted a 2018 BIA budget of \$2.87 Billion, \$11 Million more than 2017. And the Senate Interior Appropriations Committee just recently proposed a 2018 BIA budget of \$2.867 Billion, which is just \$3 Million less than the House. So the House and Senate are very close in their proposals, which basically restore the Trump budget cuts, and provide small increases in a few programs such as Law Enforcement, Road Maintenance, and Economic Development.

So for now, we must rely on Congress to spare us from President Trump's disastrous budget proposal. We are currently operating at 2017 funding levels on a Continuing Resolution, which expires on January 19. We will have to see if Congress can complete its work on the Spending Bills, or if they will enact another Continuing Resolution.

As we go forward with the 2020 Budget Formulation process, we must continue to be on our guard and engage the Administration, because the requested budget cuts will continue. It is our understanding that the 2019 Trump Budget, slated to be released next month, will be worse than 2018, with a requested budget cut to BIA of up to \$500 Million!

And finally, we need to be concerned about the future ability of Congress to spare us from the Administration's budget cuts. This is because the recently enacted Tax Reform bill, which is generous to the wealthy and corporations, will undoubtedly require future cuts to Domestic Spending programs.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 06 2017

Dear Tribal Leader:

In October, the Department held a listening session at NCAI's annual conference in Milwaukee regarding potential revisions to the trust acquisition regulations at 25 C.F.R. Part 151. The session was well attended and we received important feedback from tribal leaders. During the session, we heard repeated calls for additional time and sessions to consult on the draft revisions. In response to your requests and in light of other scheduling conflicts, I am announcing a new, revised consultation to begin in January 2018. The previously scheduled sessions in November will be held in January and February instead.

The new schedule is as follows:

Date	Time (Local)	Location
Tuesday, January 16, 2018	9:00 a.m. – 1:00 p.m.	Sacramento Convention Center Complex 1030 15th Street Sacramento, CA 95814
Thursday, January 18, 2018	9:00 a.m. – 1:00 p.m.	Mystic Lake Casino Hotel 2400 Mystic Lake Boulevard Prior Lake, MN 55372
Tuesday, January 23, 2018	9:00 a.m. – 1:00 p.m.	Foxwoods Resort Casino 350 Trolley Line Boulevard Mashantucket, CT 06338
Thursday, January 25, 2018	9:00 a.m. – 1:00 p.m.	DoubleTree by Hilton Portland 1000 N.E. Multnomah Portland, OR 97232
Tuesday, February 20, 2018	9:00 a.m. – 1:00 p.m.	Heard Museum 2301 N Central Avenue Phoenix, AZ 85004
Thursday, February 22, 2018	9:00 a.m. – 1:00 p.m.	Miccosukee Resort & Casino 500 S.W. 177th Avenue Miami, FL 33194

Please RSVP to consultation@bia.gov if you plan on attending any of these sessions.

Additionally, based on the initial input received in response to the draft revisions provided with my October 4 letter to you, a broader discussion about the direction of updates to Part 151 may be more appropriate. In that vein, I suggest we consult instead on a list of questions, some of which were included in my October 4 letter:

1. What should the objective of the land-into-trust program be? What should the Department be working to accomplish?

2. How effectively does the Department address on-reservation land-into-trust applications?
3. Under what circumstances should the Department approve or disapprove an off-reservation trust application?
4. What criteria should the Department consider when approving or disapproving an off-reservation trust application?
5. Should different criteria and/or procedures be used in processing off-reservation applications based on:
 - a. Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings, or Tribal health care, or Tribal housing)?
 - b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?
 - c. Whether the application involves no change in use?
6. What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?
7. Should pending applications be subject to new revisions if/when they are finalized?
8. How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?
9. Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?
10. What recommendations would you make to streamline/improve the land-into-trust program?

I hope you are able to attend one of the above consultation sessions and look forward to your input. If you would like to provide written input, please email the input to consultation@bia.gov by midnight Eastern Time on **February 28, 2018**. Please feel free to contact Elizabeth Appel at (202) 273-4680 if you would like any additional information on this effort and be sure to check the following website for updates to the schedule and transcripts of sessions as they become available:

<https://www.indianaffairs.gov/as-ia/raca/regulations-development-andor-under-review/fee-trust-regulations-25-cfr-151>

I look forward to our consultation on this topic and appreciate your flexibility in adapting to this new schedule.

Sincerely,

A handwritten signature in blue ink, appearing to read 'John Tahsuda', with a stylized, cursive script.

John Tahsuda
Principal Deputy Assistant Secretary –
Indian Affairs

**TESTIMONY
OF
JOHN TAHSUDA III
ACTING ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON
DOUBLING DOWN ON INDIAN GAMING: EXAMINING NEW ISSUES AND OPPORTUNITIES FOR
SUCCESS IN THE NEXT 30 YEARS
OCTOBER 4, 2017**

Good afternoon Chairman Hoeven, Vice Chairman Udall, and Members of the Committee. My name is John Tahsuda and I am the Acting Assistant Secretary for Indian Affairs at the Department of the Interior (Department of Interior). Thank you for the opportunity to testify before this Committee on the Department's role in Indian gaming.

The framework for Indian gaming both on and off reservation was established by Congress with the passage of the Indian Gaming Regulatory Act (IGRA) [Pub.L. 100–497, 25 U.S.C. § 2701 et seq.] in 1988. The regulatory scheme codified into law assigns the Department certain responsibilities for regulating gaming on Indian lands. As laid out in IGRA, Class I gaming is regulated exclusively by Indian tribal governments; Class II gaming regulation is reserved to tribal governments in cooperation with the federal government; and, Class III gaming is regulated primarily by tribal governments in cooperation with the federal government and, to the extent negotiated in an approved compact, a state government. Under IGRA, Interior reviews and determines whether to approve tribal-state gaming compacts and fee-to-trust applications for gaming.

The passage of IGRA serves as recognition on behalf of Congress that well-regulated gaming provided a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. Indian gaming has resulted in considerable financial resources for a wide range of tribal services and programs, from education and housing to law enforcement and health care, and has bolstered jobs in local and tribal communities.

That said, the Department is mindful that, while gaming has great potential to improve economic conditions for tribal and non-tribal communities, it can also introduce new complications to communities, including a drain on local resources, increased traffic, visitation, and crime, such as drugs and prostitution. The Department, under Secretary Zinke's leadership, firmly believes there needs to be a thoughtful and thorough consideration of all factors relating to gaming applications. Given our commitment to being a good neighbor and steward, we believe local voices must have a fair opportunity to provide insight and input into these decisions.

This emphasis on a balanced process is also critical for the acquisition of trust lands located off reservation, which the Department firmly believes should move forward in tandem with federal consideration of tribal gaming. The Department previously testified during the 115th Congress about its role in the fee-to-trust process, which can be further complicated by the prospect of off reservation gaming. Off-reservation lands that are acquired through the Fee-to-Trust process

have the potential to raise jurisdictional uncertainties in local communities, as well as complicating land-use planning and the provision of services. Moreover, non-Indian communities may experience tax revenue consequences if payments in lieu of taxes are not agreed upon. Ultimately, the Department has received comments that taking land located off reservation into trust for gaming can introduce economic or other conditions that can have significant impacts on the immediate and surrounding communities. As a result, the Department's off-reservation trust regulations require particular attention to issues of jurisdiction and taxation.

Off-reservation trust acquisitions also raise the possibility that a tribe may initiate gaming operations once the land is held in trust by the federal government, even though that was not in the original plan. This matter continues to complicate and isolate some communities near these facilities. In those instances, local communities that may have offered support or participated in the process could now need to engage in a new public input process.

Collectively, this is why an in-depth and balanced consideration of all factors will be at the core of the Department's decision making process for any off reservation gaming or land into trust applications. The Department will closely adhere to the law when reviewing tribal gaming matters as detailed in IGRA, but also plans to put more emphasis on all of the applicable criteria. No single criteria by itself will be considered dispositive in these intricate proposals, nor will local communities be denied an opportunity to voice their concerns. We are committed to striking a balance between differing interests, which we fully recognize are prevalent in these matters, while following the provisions of the law.

In addition to being more thoughtful when considering gaming and fee-to-trust proposals, Interior is also committed to providing tribes realistic expectations during the formal review process. For instance, in the case of off reservation land into trust efforts, the commitment of time and resources required can be exorbitant, particularly if that proposal is denied. Therefore, we believe it is important to be upfront about proposals that may not be acceptable. As a result, we are considering changes to our land-into-trust process [25 CFR § 151] to provide feedback earlier in the process.

The Department recognizes that the equities may be different for restored tribes and landless tribes when it comes to off reservation gaming and land into trust proposals. For example, the Department is currently reviewing the Shawnee Tribe of Oklahoma's fee-to-trust. The Shawnee are a landless tribe and, given the unavailability of land in close proximity to its members, the Tribe elected to explore other alternatives. They have worked closely in collaboration with other Oklahoma tribes, the Governor of Oklahoma, the local community, and a number of Members of the Congressional delegation to identify and secure a potential location. While a decision on that acquisition is pending with the Department, Interior is committed to reviewing all factors and seeking broad input in its decision making.

As this Committee looks ahead at the next thirty years of Indian gaming, the Department sees an opportunity to think strategically about its own role. Our commitment is to be thorough and balanced in our considerations for both trust land acquisitions and gaming proposals. The Department will closely adhere to the law when reviewing these matters, putting emphasis on all

the applicable criteria and ensuring that local communities will not be denied an opportunity to voice concerns. The Department welcomes the opportunity to work with this Committee and the Congress on Indian gaming matters, recognizing the plenary authority Congress holds in all tribal matters. If there is interest in further discussing these issues, we stand ready and able to work with you.

This concludes my written statement. Thank you for the opportunity to testify today and I am pleased to answer any questions you may have.



NATIONAL CONGRESS OF AMERICAN INDIANS

November 30, 2017

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable John Tahsuda
Acting Assistant Secretary-Indian
Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

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Re: Workplan and Process for Consultation on Land into Trust Regulations

Dear Secretary Zinke and Acting Assistant Secretary Tahsuda:

On behalf of the National Congress of American Indians, we write to thank you for the decision to postpone and reformulate the consultation process with tribal leaders on the Department's Consultation Draft amendments to 25 C.F.R. Part 151. We believe the consultation process will be more productive with an expanded consultation process, with confirmation of Ms. Tara Sweeney as Assistant Secretary-Indian Affairs, and with a Deputy Solicitor General of Indian Affairs. With your leadership and collaboration with tribal governments, we hope to find a strong path to move forward on the issue of tribal land restoration.

With this in mind, we would like to make four recommendations for the consultation process moving forward:

- 1) Conduct a survey/study of tribal land needs, along with the strengths and weaknesses in the current land acquisition process, in cooperation with tribal governments.
- 2) Allow time for the NIGA-NCAI Gaming Task Force to discuss the issue of off-reservation gaming, and develop alternative proposals.
- 3) Consider streamlining the NEPA process through alternatives, such as categorical exclusions.
- 4) Meet with tribal leaders in every BIA region, and allow sufficient time.

In the following, we briefly explain the reasoning behind each of these four requests.

- 1) **Conduct a survey/study of tribal land needs, along with the strengths and weaknesses in the current land acquisition process, in cooperation with tribal governments.**

Land to trust acquisition is one of the most important powers that the Secretary of Interior has to assist Indian tribes and Indian people. The authority is intended to redress the effects of land loss and impacts every area of Indian life – tribal government authority, culture and sacred sites, economic development, agriculture, trust management, natural resources protection and environmental issues – to name just a few.

The original Consultation Draft appears to be built on an assumption that tribes generally have adequate reservation land bases, and off-reservation acquisitions are needed only for a handful of unusual cases. These are not the facts. Many

tribes have only scattered trust parcels and no reservation boundary, many have extremely small or diminished reservations, many are landless, and many have a reservation insufficient as a viable land base for their people. For most tribes, off-reservation acquisitions are vital, since on-reservation acquisitions are not an option. Creating a heavy presumption against taking land into trust off-reservation would have a devastating impact on the majority of Indian tribes. This is clearly not what Congress intended in the IRA. We believe that Interior should develop a fuller picture of tribal lands needs and the impediments they face.

The Consultation Draft also appears to be developed with an assumption that off-reservation acquisitions are usually controversial and require intense vetting at central office. This is perhaps a misperception created by structure. Senior Interior officials sit atop a pyramid of decision-making where a handful of controversial land acquisitions decisions arrive at the top, and the vast majority of applications are not controversial and are easily resolved in the regions. Most are for conservation of natural and cultural resources, and in very rural areas, but a small number are in more populated areas. We are concerned that a focus on a handful of controversial cases will drive the policy, when these issues are only a small part what restoration of land means to Indian tribes and what was intended by Congress in the Indian Reorganization Act.

Taking up a general revision of the land to trust regulations will set off intense interest by every Indian tribe, states and local governments, the media, Congress and higher levels of the Administration. Given the stakes, we believe that the process should be based on a strong understanding of the actual land resource needs in Indian country, and how those needs interact with the current 151 process. Interior has the best data on existing tribal lands within its records, but tribes have the knowledge of how those lands are frequently inadequate, and the impediments they face to land recovery.

We propose that Interior would work collaboratively with tribal governments to conduct a study of land acquisition needs in Indian country as a starting point for this consultation effort. The study would have two features. First, the existing fee-to-trust process can be very burdensome to tribes, and take many years to complete. The study would analyze the fee-to-trust process to identify its strengths and weaknesses from the perspective of the Department and tribal applicants. Second, the study would look carefully at existing reservation boundaries and the degree to which “on reservation” and “off reservation” are an accurate way to categorize tribal land holdings across all 567 federally recognized tribal governments.

2) Allow time for the NIGA-NCAI Gaming Task Force to discuss the issue of off-reservation gaming, and develop alternative proposals.

The Indian Gaming Regulatory act prohibits gaming on Indian lands acquired after 1988, and sets out certain exceptions. IGRA also explicitly states “Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.” 25 USC 2719(c). The Consultation Draft raises concerns about whether the proposal violates § 2719(c) by inserting gaming matters into the general land to trust regulations. The application requirements are strikingly similar to requirements that already exist at 25 C.F.R. Part 292—*Gaming on Trust Lands Acquired After October 17, 1988*.

We understand that acquisitions that trigger the decision making process in 25 U.S.C. § 2719 can be controversial, as Congress struck a balance between limiting off-reservation gaming and allowing it in certain circumstances. NCAI suggests that the Department allow time for tribal leaders to

discuss the complex issues of off-reservation gaming among ourselves in an effort to propose a path forward. If agreeable, the NIGA-NCAI Task Force on Indian Gaming will convene with Tribes and tackle this issue head-on. We stress the importance of this issue because NCAI feels strongly that the federal trust responsibility, and the federal government's policy of tribal self-governance, dictates that any issue significantly affecting the Indian Reorganization Act or the Indian Gaming Regulatory Act, both statutes of great importance to Indian tribes, must come from the Tribes themselves. [Note we need to talk with NIGA and if NIGA agrees with this approach, perhaps propose a timeline for meetings.]

3) Consider streamlining the NEPA process through alternatives, such as categorical exclusions.

The Consultation Draft would create a two-step review segmenting environmental considerations into a documentation requirement after an initial decision. We greatly appreciate the effort to eliminate unnecessary NEPA review, but both the statute and 40 C.F.R. § 1501.2 require that environmental review be integrated into the decision-making process. Integrated NEPA decision-making is important for some tribal applicants, because it addresses critical environmental and social impacts affecting the decision. NCAI believes the Department should begin its approach by asking the Solicitor's Office, in conjunction with BIA environmental review staff, to explore possible categorical exclusions that may be helpful in reducing cost and delays in the fee to trust process. We note that, over the years, Tribes have supported additional categorical exclusions to help reduce the burden on applicants and assist the Department with its National Environmental Policy Act compliance. Proposing additional categorical exclusions falls within the Department's current initiatives to reduce regulatory barriers, streamline processes and reduce cost to Tribes for the land acquisition process.

4) Meet with tribal leaders in every BIA region, and allow sufficient time.

After preliminary matters are addressed, this issue will demand an intensive consultation process because of the great significance of the issues. Tribes were greatly concerned that the process suggested for the original Consultation Draft involved only three regional meetings of three hours each. We believe that the Department will need to first meet informally with tribal leaders to talk about the process. Best practice for consultation includes the development of a framing paper that will focus the issues and questions for consultation, while allowing space for tribal concerns to enter the process before a regulation is drafted. As an example, tribal leaders are often concerned that land acquisitions tend to stall on the environmental review or the title opinion. In a true government-to-government consultation, tribal government concerns should be considered in developing the scope of any regulatory proposal before it is drafted.

When the consultation process starts, considering how important this issue is for Indian Country and how land issues vary so much by region, we believe that you will need to develop regional meetings to talk with tribes in every BIA region. We believe a tribal workgroup will very helpful in synthesizing tribal comments into a cohesive plan.

In the following, we provide responses to the questions posed by Acting Asst. Secretary John Tahsuda in his letter of October 4, 2017.

1. Under what circumstances should the Department approve or disapprove an off-reservation trust application?

THE DEPARTMENT SHOULD APPROVE OFF-RESERVATION TRUST APPLICATIONS WHERE THERE ARE NO ENVIRONMENTAL CONCERNS, NO ENCUMBRANCES ON TITLE & THE APPLICATION IS CONSISTENT WITH THE CURRENT PART 151 REGULATIONS.

The DOJ Title Standards correctly state, with respect to Part 151 acquisitions, that “[a]cquiring title to real property as a fiduciary presents challenges and responsibilities distinct from those applicable to lands purchased for use and possible eventual disposal by federal agencies.” U.S. Department of Justice, Environment and Natural Resources Divisions, Land Acquisition Section, *Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions*, at 1.5.2 (2016) (emphasis added). The critical points in this statement are: 1) that when the Secretary acquires title to lands under Part 151, he does so as a fiduciary; and 2) that Part 151 acquisitions rarely require the Department to purchase or otherwise acquire the underlying lands for the Tribe, but rather only request that the Department take title to fee lands already held by the Tribe and hold it in trust on behalf of the Tribe.

That being said, the Secretary of the Interior has a duty to place land into trust for Indian tribes where there are no underlying environmental issues with the land, where there are no encumbrances that might defeat title, and where the application is submitted in accordance with the BIA’s land into trust regulations and the Tribe’s own internal governing process.

It is important to underscore that in the majority of trust applications, the Tribe already owns title to the lands. So, in fact, what the Tribe is seeking through a trust acquisition is a federal layer of protection – or an affirmative exercise of the federal trust responsibility, consistent with the Department’s policy to promote tribal self-governance.

2. What criteria should the Department consider when approving or disapproving an off-reservation trust application?

THE DEPARTMENT SHOULD CONTINUE TO USE THE CURRENT CRITERIA CONSIDERED AT 25 C.F.R. § 151.11.

The Secretary should continue to use the current considerations at Part 151.11, but we recommend developing categorical exclusions for fee-to-trust applications to help facilitate the NEPA process.

The current regulations strike a good balance between the Secretary’s fiduciary duty to Indian tribes and the need to take into consideration comments from state and local governments on what impact the removal of the acquisition parcel from their respective tax rolls and regulatory jurisdiction may have. However, it must be noted that the Department has a trust responsibility to Indian tribes and not to state and local governments. This trust responsibility is delegated from Congress, through the Indian Commerce Clause, which clearly established the federal-tribal relationship, leaving no room for state regulatory authority in Indian affairs absent affirmative acts of Congress.

Further, land acquisitions are unlike Executive Order actions, because they do not withdraw land from the public domain, or from lands otherwise held by the state. Instead, as discussed in response to the first question, the land acquisition process merely transfers title already held by the Tribe in fee, to be held by the United States on behalf of the tribe and in trust status. In other words, the state is not losing title to any lands through the land acquisition process. Furthermore, the removal from the state's tax rolls is vital to the acquisition process because once held in trust, the applicant tribe is required to exercise full regulatory authority over the newly acquired lands which may not be infringed upon by state taxes or other like encumbrances.

3. Should different criteria and/or procedures be used in processing off-reservation applications based on:

- a. Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings, or Tribal health care, or Tribal housing)?**
- b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?**
- c. Whether the application involves no change in use?**

THE NATIONAL ENVIRONMENTAL POLICY ACT APPROPRIATELY ADDRESSES VARYING LAND USES, BUT INTERIOR SHOULD CONSIDER ELIMINATING THE DISTANCE ANALYSIS CURRENTLY AT 25 C.F.R. 151.11(B) AND REPLACING IT WITH A MORE FAVORABLE ECONOMIC BENEFITS ANALYSIS.

With respect to 3 (a), (b), and (c) we submit that these questions are largely NEPA questions. The NEPA analysis must analyze the proposed use and determine whether there are any significant effects to the human environment which would affect Interior's decision to acquire the land in trust status. That being said, the NEPA analysis for (a) and (b) are sometimes time-consuming, and rightfully so depending on the multiple factors involved in those types of uses. However, depending on the land use at the time of the request for trust status, (c) could often qualify for categorical exclusions thereby reducing the costs associated with NEPA compliance and significantly speeding up the acquisition process.

However, if Interior is considering changes to this framework, it should strike the current language at 25 C.F.R. § 151.11(b) and replace it with explicit language that states that "as the intended economic benefits of the acquisition to the Tribe increase, the Secretary will give lesser weight to concerns raised pursuant to paragraph (d) of this section." This would be consistent with Interior's trust relationship to Indian tribes, BIA's policy of promoting greater economic sufficiency for Tribes, and the congressional intent of the Indian Reorganization Act. Further, as Tribes are growing their citizenry, the federal budget supporting Indian Affairs has remained relatively stagnant. For this reason, Interior should strongly support any efforts to bolster tribal economies, including championing trust acquisitions, both on-reservation and off-reservation, that help tribal economies.

If Interior is unwilling to remove distance as a criterion, it should at least consider amending 25 C.F.R. § 151.11(b) as follows:

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

In consideration of Interior's trust responsibility to Tribes, and the BIA's policy toward promoting self-determination and strong tribal economies, Interior should never deter from its policy of promoting stronger economies of tribes under any circumstances. By stating that as the distance of an acquisition from a Tribe's homeland increases, its economic justification for the project will face more scrutiny and second-guessing, Interior creates a framework where tribal economic development projects become arguably less relevant as the distance increases from their homelands. Sometimes, for instance, a tribe may receive lands through gift or donation, which are situated further from the tribe's reservation than usual off-reservation acquisitions, but still present great economic opportunities for the tribe. In these instances, the tribe's proposed land use should not be any less relevant if it helps to supplement dwindling federal resources in any way.

4. Should pending applications be subject to new revisions if/when they are finalized?

CURRENT AND PENDING APPLICATIONS SHOULD BE SUBJECT TO CURRENT REGULATIONS AND PROCESSED WITHOUT DELAY.

This question is concerning because it insinuates that pending applications are currently in a holding pattern until Interior decides how to process them. Interior has consistently stated that its goal is to reduce barriers and improve efficiency. If true, current pending applications should be processed under the current regulations. If any changes are finalized, only applications submitted after the date those regulatory changes are final and in effect should be processed under such new regulations.

5. Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?

MEMORANDA OF UNDERSTANDING ARE ALWAYS HELPFUL IN FACILITATING INTERGOVERNMENTAL RELATIONSHIPS, BUT MOUS SHOULD NOT BE INCLUDED IN THE OFF-RESERVATION APPLICATION PROCESS.

MOUs and similar agreements always assist relationships between tribes and state/local governments, particularly with respect to law enforcement and other emergency services. However, Interior should not include MOUs within the land into trust framework as a requirement or a consideration. This is critical because a mention of MOUs in this context would severely undercut tribal interests during negotiations of such agreements.

In other words, if Interior regulations mention MOUs as a consideration or requirement for fee-to-trust acquisitions, state and local governments will be able to withhold their acquiescence to such agreements until the Tribe has met all of their concerns. Under the current framework, state and

local governments are more willing to work with Tribes and enter into agreements on equal footing, and on a government-to-government basis. This should not be changed.

Thank you again for your decision to postpone regulatory changes until after the Department has a confirmed AS-IA, an appointed Deputy Solicitor-Indian Affairs, and after engaging in full, meaningful consultation with all of Indian Country. If you have any questions, please contact NCAI Executive Director Jacqueline Pata, jpata@ncai.org, or John Dossett, NCAI General Counsel, at jdossett@ncai.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jacqueline Pata". The signature is fluid and cursive, with the first name "Jacqueline" written in a larger, more prominent script than the last name "Pata".

Jacqueline Pata

Background:

Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyaqatu Nukavachi, Ansh An Lashokdiwe, or “Bears Ears.” For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States. Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe. – Presidential Proclamation – Establishment of the Bears Ears National Monument (Dec. 28, 2016)



Bears Ears at Sunset. Photo credit: Tim Peterson.

Bears Ears has been home to Native peoples since time immemorial, and is cherished by Native peoples for its cultural, spiritual, and archaeological importance. Our presence, much in evidence today, covered the whole region and is manifested in migration routes, ancient roads, great houses, villages, granaries, hogans, wickiups, sweat lodges, corrals, petroglyphs and pictographs, tipi rings, and shade houses. Bears Ears contains hundreds of thousands of objects of historic and scientific importance, many traditional cultural properties, and many sacred sites.

Tribes in the region continue to use the Bears Ears region to collect plants, minerals, objects, and water for religious and cultural ceremonies and medicinal purposes. Native people hunt, fish, and gather within Bears Ears, and they provide offerings and conduct ceremonies on the land. In fact, Bears Ears is so culturally and spiritually significant that some ceremonies use items that can only be harvested from Bears Ears. Bears Ears is in every way a home to the region's Native people.

Sadly, as they began planning to protect this landscape to which they hold such a deep connection, many Native Americans in the area also expressed a fear that speaking out about the significance of the land would lead to another loss – something else taken away from Native people. However, doing nothing was not an option. Looting, vandalism, and development were well underway. The desecration of these lands already was happening. Something had to be done to protect what was left.

In 2010, the grassroots nonprofit organization, Utah Diné Bikéyah (UDB) was formed to help coordinate the Bears Ears Proposal, which sought protections for the Bears Ears region. UDB spent the next several years developing a comprehensive cultural mapping of the area. Using that information, detailed maps were prepared to show why 1.9 million acres should be set aside as a cultural landscape. Their work showed that the Bears Ears landscape is one discrete unit, bound together in numerous ways, and blending perfectly with other protected federal and tribal lands.

Around the same time, more tribes in the region began to express their support the Bears Ears Proposal. The Hopi sent a letter of support, the Ute Mountain Ute Tribe, the Ute Indian Tribe, the Hualapai Tribal Council, the Pueblo Council of Governors, and others expressed support for the Bears Ears Proposal and the protection of the sacred landscape. And, in late 2014, after a series of town hall meetings and open houses, the Bears Ears proposal won 64% of support from San Juan County residents. The San Juan County Commissioners, however, chose to adopt an alternative proposal that received less than 1% of support.

In January 2015, the San Juan County commissioners refused to work with UDB. So, tribal representatives contacted Utah Congressmen Bishop and Chafetz, explained their exclusion, and requested to be included in Representative Bishop's ongoing Public Land Initiative. Subsequently, in February, the San Juan County Commissioners did agree to a series of meeting with the Navajo Nation, Ute Mountain Ute Tribe, and UDB. However, only one month later, the San Juan Commissioners urged the Utah State Legislature to pass HB 3931, which undermined the Bears Ears proposal by designating large areas of the region as "Energy Zones" that would be fast-tracked for grazing, energy, and mineral development. Although the meetings between the county and Tribes did continue, they did not produce any results. And, for the final meeting, tribal representatives were told that they did not need to attend because the county commissioners did not require any further information from them. A final proposal was adopted by the county commissioners in August 2015, without input from the Tribes.



Having been completely frozen out of the local land management process, the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Pueblo of Zuni, and Ute Indian Tribe, formally united

to create the historic Bears Ears Inter-Tribal Coalition to protect and preserve the homeland area they all care so deeply about. This was the first time that a coalition of sovereign, Native tribes had worked together for land protections. The Coalition proposed a National Monument designation for 1.9 million acres of ancestral land. With more than 100,000 archaeological sites, 1.9 million acres of land, and only one full-time law enforcement officer, the area represented the country's most significant unprotected cultural landscape.



Bears Ears Gathering, Summer 2016.

In January 2016, Congressman Bishop released his Public Land Initiative (PLI) that included protection for 1.39 million acres of Bears Ears. While it did include land protections, it did not include tribal management of the area, which was a key tenet of the tribe's Bears Ears Proposal. The Bears Ears Inter-Tribal Coalition did not support the PLI for several reasons, but one of the reasons was that the PLI Bill would have taken Ute tribal land and given it to the state of Utah. The Bears Ears Inter-Tribal Coalition continued to petition for their Bears Ears Proposal, and, in July 2016, federal officials, including Secretary of Interior Sally Jewell, met with Utah Governor Herbert's office and made an official visit to the Bears Ears region. During that visit, Jewell attended a public meeting to hear comments from local residents. At that meeting, thousands of people attended, and more than 50 people commented. A majority of attendees spoke in favor of the Bears Ears designation.

In December 2016, Congress adjourned without voting on Bishop's PLI. With this lack of legislative action, President Obama released his Bears Ears National Monument proclamation on December 28, 2016. The form of Obama's monument was a compromise between Bishop's Public Land Initiative and the Coalition's Bears Ears Proposal. At 1.35 million acres, the monument's boundaries were closely aligned to those of the PLI, but the proclamation also included a management plan that empowered tribal leaders to provide guidance and recommendations on care of their ancestral lands. The designation was the culmination of local activism, coordinated outreach, and collaborative land-use management.



Pictographs. Photo credit: Jonathan Bailey.

President Obama proclaimed the Monument pursuant to his authority under the Antiquities Act, just as all presidents since Theodore Roosevelt had established national monuments. It was the culmination of more than six years of active effort on the part of five Native nations, local tribal people, and their allies to obtain protections for a region that is a sacred source of spiritual traditions and place of origin.

On April 26, 2017, President Trump attacked this important designation. Trump signed an executive order directing Interior Secretary Ryan Zinke to conduct a review of the Bears Ears National Monument to determine if it was created without “public outreach and proper coordination.” However, the suggestion that the monument’s designation lacked outreach and coordination is disingenuous. The Bears Ears National Monument was created after years of advocacy and many public meetings in the region and in Washington, DC. The effort to protect Bears Ears was very long, very public, and very robust.

That lengthy process over many years, sits in stark contrast to Secretary Zinke’s cursory 3-month review that introduced no new facts or analysis and completely ignored public sentiment. On August 24, 2017, Zinke submitted to the White House recommendations to shrink monuments, including Bears Ears. Despite Zinke’s claim to be giving the people their voice back, his recommendation to shrink the monuments ignored an outpouring of public support for Bears Ears and other monuments. More than 95% of comments received by the Department of the Interior supported keeping the national monuments, including 65% of comments from Utah residents. It did not matter. The only voices that were heard were those calling for increased development, increased exploitation, and reduced protections for a national treasure.

Now, President Trump sits with Zinke’s recommendations in hand. However, the recommendations are pointless. Although Trump has stated that he will shrink the Monument, he does not have the authority to take such action. Under the Antiquities Act, the president may *create* national monuments. That is all. He or she may not diminish or revoke existing monuments—only Congress has that ability. Beginning with Theodore Roosevelt, Presidents have designated more than one hundred monuments throughout our country. No President has ever previously sought to abolish one by Executive Order because the Antiquities Act does not authorize the President to do so. If this unprecedented and unlawful action is allowed, the 129

national monuments across the United States will be at risk. The historic and cherished national monument system will be destabilized. Congress clearly did not intend for that result. It enacted the Antiquities Act to preserve America's historic and scientific heritage for the benefit of current and future generations. Congress reserved to itself the authority to revoke or modify those monuments, and granted the President only the power to create them. The Native American Rights Fund (NARF) stands ready to defend that legal reality. NARF represents three of the five tribes in the Inter-Tribal Coalition—the Hopi Tribe, Pueblo of Zuni, and Ute Mountain Ute Tribe.



Currently, members of Congress are trying to push through legislation to give the President the authority he seeks, ignoring standard legislative procedure as they maneuver bills through without comment or debate. If the diminishment or abolishment of the Bears Ears National Monument is allowed to proceed, the Bears Ears area will be subject to the devastating damage of oil and gas drilling, uranium and potash mining, mineral exploration, uncontrolled off-road vehicle use, widespread vandalism and looting, and grave robbing. Furthermore, invaluable archaeological, paleontological, and faunal information will be lost to science and history. However, NARF is ready to fight for the Native nations who have spent years to protect their sacred, ancestral lands and the millions of people who declared their support for our national monuments. We will not allow the rights of our Native nations and our local people to be willfully pushed to the side for the benefit of corporate interests. We will stand firm for justice. Donate now to help protect Bears Ears National Monument.

Protect Bears Ears



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HOBBSSTRAUS.COM

MEMORANDUM

January 16, 2018

TO: TRIBAL TRANSPORTATION CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Tribal Transportation Self-Governance Program Negotiated Rulemaking Committee Meets***

The Tribal Transportation Self-Governance Program Negotiated Rulemaking Committee met January 8-12, 2018 in the Federal Highway Administration offices in Sterling, VA. The Committee's meeting was its first since December 2016, as the Committee's work to develop the content of the rule was put on hold by the Trump Administration in January 2017. This meeting was the first opportunity for tribal Committee members to meet new federal Committee members and to see the federal representatives' revisions to the regulations prepared by the Committee.

Deputy Assistant Secretary of Transportation for Governmental and Tribal Affairs, Anthony Bedell transmitted the federal draft to tribal Committee members and advocates on the afternoon of January 5, the Friday before the meeting started. Given that very short timeline, tribal Committee members did not have an opportunity to review the proposed federal language in detail prior to the meeting, nor could they compare the federal draft to tribal drafts of the rule presented to federal Committee members over a year earlier in December 2016. Tribal Committee members called for tribal caucus time to review the federal draft of the rule and compare it to earlier language, as well as to flag any areas where there was disagreement over the language.

Prior to working on the draft rule language, the Committee received Department of Transportation General Counsel, Steven G. Bradbury as a guest to its meeting. Mr. Bradbury spoke to the Committee, and answered several questions. Bradbury had presented a draft "framework for the final version of the regulation," which included sections of the rule organized so as to summarize and condense regulatory language. Bradbury stated that his preference was to submit a rule in shortened form so as to include "only those provisions that are necessary to initiate the program" given that a proposed rule is due to be published by March 5, 2018 to meet congressional deadlines for the rulemaking. Bradbury also stated that it was his interpretation of the FAST Act's language that the program would be applicable to four "funding streams":

1. Tribal share funding due to the tribe under the Tribal Transportation Program in 23 U.S.C. § 202;
2. Tribal transit formula funding provided to a tribe under 49 U.S.C. § 5311;

3. Discretionary and competitive grants administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. code or chapter 53 of title 49 of the U.S. Code [transportation and transit programs]; or
4. Any discretionary or competitive grants administered by the Department for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.

Mr. Bradbury explained that these “funding streams” were his interpretation of the law’s scope for the TTSGP, but neither he nor other federal Committee members explained how, if at all, these streams limited the types of programs, services, functions and activities (PSFAs) a tribe would be able to assume under the TTSGP. Tribal Committee members made clear that they believed the statute enables tribes to assume PSFAs across all of the Department’s “modal administrations,” and sought assurances along these lines. Tribal representatives also sought to ensure that federal-aid and other transportation funds that states seek to transfer to tribes would be included within a DOT self-governance funding agreement.

The tribal Committee members spent most of two days going through the federal draft of the rule. Since the federal members did not provide the Committee with a redline of the tribal draft, it was impossible to easily and quickly see what had been changed or deleted. Accordingly, the tribal caucus attempted to locate major changes. From the federal draft, the tribal caucus identified several areas of concern, though it did not have enough time to create a “response” draft. Instead, after the tribal caucus was able to finish its review, all tribal and federal Committee members met together to discuss the areas of concern and to go over the draft rule as revised by the federal representatives. The following bullets summarize the tribal concern and the federal response.

- Tribes were concerned the “funding streams” identified by General Counsel Bradbury and listed in the rule would be interpreted narrowly or in a way that would otherwise limit the applicability of the TTSGP to the Department, and that it would not allow for transfer of federal-aid and state funding under certain legal mechanisms. DOT did propose to change the language to respond to the tribal caucus’s requests. For instance, the federal side confirmed that discretionary and competitive grants administered by the Department for programs administered by the Secretary would apply to all grants throughout the Department. DOT also agreed to include language acknowledging that the transportation funds a state transfers to a tribe may be included in a tribe’s self-governance funding agreement. Tribal Committee members will continue to review the language once it is finalized and shared.
- Tribes were concerned some language was included in the federal draft that would increase reporting requirements, or otherwise impose administrative burdens on tribes contrary to the law’s language and intent. The federal members noted this tribal concern, but did not offer specific terms that would ensure the TTSGP streamlines and reduces bureaucratic administrative burdens.
- Tribes sought to ensure the rule’s definitions of terms were consistent with the statute, and not either new or limited definitions. Federal members agreed to look at definitions at a later date after other drafting had occurred.

- Tribal members objected to the federal members' inclusion of language stating that contract support costs would not be paid in support of tribal compacts and funding agreements unless specifically funded by Congress. This will likely remain a point of contention between tribal and federal Committee members throughout the remainder of the rulemaking process.
- Tribal members sought removal of language that would limit tribes' ability to consolidate, redesign, or restructure transportation programs under the TTSGP according to tribal priorities. Redesign and consolidation is a core feature of self-governance programs, and tribes impressed upon federal members that this must be part of the TTSGP as well. Federal members noted the tribes' requests.
- Tribal Committee members demanded that terms the federal side had deleted regarding transfers of state and federal-aid funds be reinserted throughout the draft rule. Federal members noted they believed such transfers were allowed even without specific language in the regulations, but tribal Committee members preferred to have clear language on the matter.
- Federal members had several concerns about the structure and process for administrative hearings in the event "pre-award" disputes arose during administration of the TTSGP. DOT currently does not have a structure in place for such hearings, so work remains to be done to align the rule language with DOT's process. Tribal members recommended strongly that DOT replicate the processes already in place in the Department of Interior and the Indian Health Service, as they are familiar to tribes.
- Tribes requested that the Department create an Office of Self-Governance within the Office of the Secretary. Deputy Assistant Secretary Bedell said the Department was open to this, but noted it would be difficult to create such an institutional entity without funding. In the meantime, he committed to having a tribal self-governance office function from within the DOT's Intergovernmental Affairs branch with one or two staffers designated to assist with this program's work.

There were several narrower issues that the Committee addressed as well, such as: the extent of consultation required by the FAST Act and incorporated ISDEAA provisions; ensuring that contracts were fully funded but also that DOT would be able to provide funds commensurate with any continuing funding resolution imposed by Congress; and making sure the "final offer" process hewed to that used under Title V regulations. The tribal members also made clear to the federal officials that there was language from the tribal draft that had been deleted (sometimes including whole draft subparts), and that tribal Committee members might seek restoration of the language.

In an effort to streamline drafting of the law, the tribal caucus identified ten areas where it believed the rule could simply point to existing ISDEAA Title I or Title V regulations, rather than creating new regulatory provisions that mirror those already in place. The federal members stated that the Department would not accept cross-references to existing rules of other federal agencies. Tribal Committee members pointed out that the Departments of Interior and Health & Human Services share these cross-departmental references already, and that such cross-referencing was the most viable method for shortening the length of the rule. We expect tribal

Committee members may continue to recommend cross-references in an interest to make the self-governance programs function similarly across the federal departments.

Throughout the week, tribal Committee members impressed upon their federal counterparts the importance of following the Committee's protocols that call for negotiation of all terms—right up to the time prior to publication for comment—and that the Committee come to consensus on terms. This was in response to statements from federal Committee members that the regulations were “the Secretary’s,” and that both Departmental counsel and the Office of Management and Budget may make changes to the draft rule without tribal input. Tribal Committee members pointed to the law’s requirements that the rule be drafted under the negotiated rulemaking process, and that the Committee’s own protocols state the Department or Office of Management and Budget would refrain from making changes unless the language in question was contrary to law. Deputy Assistant Secretary Bedell agreed that the Committee would be able to review the language prior to its publication for comment.

At the end of the Thursday, January 11, session of the Committee, the Committee had reviewed all but eight pages of the sixty-page working draft. At that time, federal counsel assisting with drafting stated that they hoped the next steps of drafting would be identifying the portions of the rule that could be excised as unnecessary to the rule. Tribal Committee members expressed their dismay that federal officials were still operating under the assumption that the rule would be simplified, and several noted the need for a comprehensive rule to guide agency officials and tribal representatives in implementing the program. In support of this, tribal representatives pointed out that the regulations were based upon the lessons learned and adapted from prior rules that had been clarified after being found too vague; they also stated that the rule must be usable by “lay” users, and a sketch or outline of a rule would not help those who must comply with it. In response, Committee co-chairs Joe Garcia (Ohkay Owingeh) and Kay Rhoads (Sac & Fox) directed a letter to be drafted that identifies the Committee’s process concerns and set forth clear expectations that the Committee’s work product be respected as the proposed rule moves toward publication for notice and comment. The letter makes explicit the tribal Committee members’ opposition to a condensed rule or moving rule language to a departmental handbook or other guidance. They also made clear that they sought another in-person meeting before publication occurs, recommending a meeting in Washington, D.C. in February. A copy of this letter addressed to Deputy Assistant Secretary Bedell is attached.

The next steps for the Committee are the work through the draft to negotiate specific language about provisions that remain of concern. The working document draft (which has been approved by the Committee as the draft to work from), General Counsel Bradbury’s draft framework, and the letter from the tribal co-chairs to Deputy Assistant Secretary Bedell are attached. If you have questions, please feel free to contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), Michael Willis (mwillis@hobbsstrauss.com or 202-822-8282), or Adam Bailey (abailey@hobbsstrauss.com or 916-442-9444).

**DEPARTMENT OF TRANSPORTATION
TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM
NEGOTIATED RULEMAKING COMMITTEE
*TRIBAL REPRESENTATIVES***

January 12, 2018

The Honorable Anthony R. Bedell
Deputy Assistant Secretary for Intergovernmental and Tribal Affairs
United States Department of Transportation
West Building, W85-316
1200 New Jersey Avenue, SE
Washington, D.C. 20590-9898

Re: Tribal Transportation Self-Governance Negotiated Rulemaking Process

Dear Deputy Assistant Secretary Bedell:

Thank you for attending and participating in the January 8-12, 2018 meeting of the Department of Transportation's Tribal Transportation Self-Governance Negotiated Rulemaking Committee in Sterling, Virginia, the first meeting of the Committee under the Trump Administration. Your personal attendance, on behalf of Secretary Elaine L. Chao, attests to the commitment of the Secretary and the Administration to the government-to-government relationship between the United States and the Tribal nations. We are also appreciative of your inviting General Counsel Steven Bradbury to address the Rulemaking Committee. His interest in this rulemaking process is greatly appreciated as is his commitment to work collaboratively with the Committee to honor the statutory timeframes for publication of a draft consensus rule (Notice of Proposed Rulemaking (NPRM)) by March 3, 2018 and a final rule by December 1, 2018, the extended deadlines as authorized under section 207 of the FAST Act.

We write with regard to the content of the proposed rule, the statutory time frames for publication of the NPRM, and the Committee protocols which were drafted and adopted at the very first work session, that govern our work and work product. The Committee was established in August 2016 and met on five occasions during 2016 to develop a proposed rule to extend the Tribal Self-Governance Program to the Department and all its modal administrations. In Section 1121 of the FAST Act, Congress directed the Department to "adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes." 23 U.S.C. 207(n)(2)(C). The protocols reflect our strong desire that the Office of the Secretary, the Office of General Counsel, and the Office of Management and Budget honor the work product of the Committee unless contrary to statute, as the draft represents decades of self-governance experience and hundreds of hours of effort, and thoughtful deliberation and compromise. These regulations should be clear and easy to understand to minimize uncertainty and the possibility of litigation. The Tribal

representatives wish to be clear; a condensed NPRM, a program handbook, or departmental guidance are all unacceptable alternatives to comprehensive regulatory language implementing legislation enacted for the benefit of tribes.

The joint Tribal-Federal Committee made a great deal of progress over the five months we met. The 13-month break in the work of the Rulemaking Committee, from December 2016 to January 2018, forces us all to work quickly and in good faith to complete our respective components of the NPRM; namely, the preamble, the draft rule, and the regulatory impact analysis. But in doing so, we must acknowledge and honor the protocols which were negotiated and accepted by the Committee, Federal partners, and the Designated Federal Official (DFO).

The first proposed regulatory provision in the draft rule we reviewed this week, section 663.1 (Authority, purpose and scope), states that the regulations are “prepared, issued and maintained with the active participation and representation of Tribes and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by 23 U.S.C. 207(n).” This provision will only be true, however, if we, the Tribal representatives, are afforded the opportunity by the Department to review changes the Department and the Office of Management and Budget (OMB) may make to the draft rule during the agency vetting process after this week and prior to publication of the NPRM in the Federal Register.

We therefore greatly appreciate your commitment to convene additional meetings of the Negotiated Rulemaking Committee after January 12, 2018, to ensure that the Tribal representatives to the Rulemaking Committee remain integral to this process and are provided changes in the NPRM made by the Office of the Secretary (OST) and OMB, and to negotiate further revisions if necessary. In order to realize the goal of a final rule acceptable to tribes, we believe that an additional face-to-face meeting of the Committee must be convened prior to the publication of the NPRM to review the Department’s final draft. If the Department declines to make further changes to the NPRM in response to our request, we ask the Secretary recognize our right to note and outline our disagreements within the preamble to the NPRM prior to submittal and publication in the Federal Register. Articles IV.B and V.A of the Committee’s protocols reflect our mutual agreement to such review and comment by the Tribal representatives to the Committee.

Like the Department officials involved in the rulemaking, we have obligations to our respective Tribes and Regions to report on the content of the draft rule and the nature of our exchanges and interactions with Department officials as we work toward a consensus rule reflecting our mutual obligations and responsibilities under the Self-Governance Program. It is in this same representative role that Tribal committee members seek a rule that provides clarity to Tribes and other transportation officials, comports with the way Tribes carry out Self-Governance, and avoids the problems of the past that have already been remedied through prior negotiation and existing regulations. We believe you share our goal of producing a rule that is both beneficial to users of the rule and that furthers the goals of Self-Governance.

We appreciate the professionalism and dedication in how you, General Counsel Bradbury, and your respective staff are approaching the Negotiated Rulemaking process. The extension of the Tribal Self-Governance Program to the Department of Transportation presents a unique opportunity to streamline and improve the delivery of transportation programs and services to American Indian and Alaska Native citizens and further empower the Tribal Nations which promotes the inherent right for Sovereign Nations to self-govern.

We look forward to continuing our work toward reaching consensus on draft language for a useful rule in good faith and mutual respect.

Sincerely,



Kay Rhoads, Tribal Co-Chair
Principal Chief, Sac and Fox Nation



Joe A. Garcia, Tribal Co-Chair
Head Councilman, Ohkay Owingeh

cc: General Counsel Steven Bradbury
DFO Erin Kenley, FLH, FHWA
Assistant Chief Counsel, FHWA, Vivian Philbin
W. Ron Allen, Tribal Self-Governance Advisory Committee

TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM

Proposed Regulations of OST [To be codified as 49 CFR Part 29]

§ 29.1 Purpose and authority.

The regulations in this part implement the tribal transportation self-governance program required by 23 U.S.C. 207. These regulations are issued pursuant to the Secretary's authority under 23 U.S.C. 207(n) with the active participation and representation of tribes, inter-tribal consortia, tribal organizations, and individual tribe members. [Unless otherwise directed by the Secretary or the context requires a different understanding, the authorities of the Secretary described in this part will be carried out by [TBD by the Department].]

§ 29.2 Relation to formula funding and discretionary grant authorities.

Subject to the conditions set forth in 23 U.S.C. 207 and described in these regulations, a compact and annual funding agreement negotiated between the Department and an eligible Indian tribe as part of this program will provide an alternative procedural framework within which the eligible tribe may elect to receive and manage specified funding streams otherwise provided or awarded to the Indian tribe under separate authorities administered by the Department. Nothing in this part entitles an Indian tribe to the award of a grant or other funding. All decisions to award any discretionary grant that may be included in a funding agreement will be made in accordance with and subject to the standards, conditions, criteria, and procedures otherwise applicable to such decisions under the relevant grant authorities.

§ 29.3 Eligibility to participate in program.

An Indian tribe is eligible to participate in this program if—

(a) the tribe has requested participation in the program by resolution or other official action by the governing body of the tribe, and

(b) the Secretary has determined that over the most recent three fiscal years the tribe has demonstrated a record of financial stability, financial management capability, and transportation program management capability in accordance with the criteria specified in 23 U.S.C. 207(b).

§ 29.4 Compact.

At the request of an eligible Indian tribe, the Secretary will negotiate and enter into a written compact with the eligible tribe. The compact will set forth the general terms of the government-to-government relationship between the eligible tribe and the Department that will govern the tribe's participation in the program. The compact may be amended at any time by the mutual agreement of the Indian tribe and the Secretary. There must be a compact in effect between the Department and the eligible tribe before the tribe may enter into an annual funding agreement with the Department.

§ 29.5 Annual funding agreement.

(a) After an eligible tribe has entered into a written compact with the Department, the Secretary will negotiate and enter into an annual funding agreement with the eligible tribe.

(b) [The annual funding agreement will set forth the terms and conditions under which the eligible tribe may receive, use, and manage the specified funding streams that the tribe elects to include in the funding agreement, subject to all applicable legal requirements and in accordance with 23 U.S.C. 207, this part, and any regulations issued by the Secretary establishing terms and conditions for flexible financing, as authorized by 23 U.S.C. 207(d)(2)(C)(ii)(I).]

(c) [Describe provisions for the term and effective dates of funding agreements, renewals of agreements, amendments, termination by the Secretary, withdrawal by the tribe, and retrocession of funds at the election of the tribe. It is anticipated that the eligible tribe and the Department will enter into a renewed funding agreement each year.]

§ 29.6 Specified funding streams.

An eligible Indian tribe may elect to include in its annual funding agreement the Indian tribe's portion of one or more of the following four categories of specified funding streams:

(a) the full tribal share funding provided to the tribe under the Tribal Transportation Program identified in 23 U.S.C. 202;

(b) any tribal transit formula funding provided to the tribe under the Tribal Transit Program identified in 49 U.S.C. 5311;

(c) any discretionary and competitive grant administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and

(d) any other discretionary and competitive grant for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.

§ 29.7 Transfer of specified funding streams.

[Set forth regulations providing for the transfer of the eligible tribe's portion of specified funding streams into the funding agreement, including regulations implementing transfers of State funds at the election of a State, as authorized in 23 U.S.C. 207(d)(2)(A)(ii).]

§ 29.8 Cost principles and audits.

[Set forth regulations ensuring the applicability of relevant OMB cost-management principles and exceptions in accordance with 23 U.S.C. 207(g) and addressing potential audits of the tribe's use and management of specified funding streams.]

§ 29.9 Standards for construction projects and monitoring.

[Set forth regulations providing standards for construction projects carried out by the eligible tribe under the funding agreement and for the monitoring of those projects by the Secretary as required by 23 U.S.C. 207(i).]

[Include other topics as needed, resulting from Committee meeting discussions.]

§ 29.10 Applicability of Indian Self-Determination and Education Assistance Act.

[As provided for in 23 U.S.C. 207(l), set forth regulations specifying the applicability to this program of the particular provisions of the ISDEAA identified in that subsection.]

§ 29.11 Definitions.

As used in this part—

Department means the Department of Transportation.

Eligible Indian tribe or *eligible tribe* means an Indian tribe determined by the Secretary to be eligible for participation in a compact or funding agreement in accordance with section 29.3 of this part.

Indian tribe or *tribe* has the meaning given in 23 U.S.C. 207(m)(1)(E).

Program means the tribal transportation self-governance program required by 23 U.S.C. 207 and described in this part.

Secretary means the Secretary of Transportation.

Specified funding or *specified funding streams* means one or more of the four categories of funding specified in section 29.6 of this part that an eligible Indian tribe may elect to include in its annual funding agreement in accordance the requirements of this part.

Subpart A – General Provisions

§ 663.1 Authority, purpose and scope.

(a) Authority. These regulations are prepared, issued and maintained with the active participation and representation of Tribes and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by 23 U.S.C. 207(n).

(b) Purpose. These regulations codify rules for the Department of Transportation's (Department) Self-Governance Program including self-governance compacts and funding agreements between the Department and Self-Governance Tribes in accordance with 23 U.S.C. 207.

(c) Scope. These regulations apply to the Department and to Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs), as applicable, under the Tribal Transportation Self-Governance Program ~~except as otherwise specifically authorized by a waiver under 23 U.S.C. 207(j)(2)(A).~~ This program shall apply to the following:

- (i) the full tribal share funding provided to the tribe under the Tribal Transportation Program identified in 23 U.S.C. 202;;
- (ii) any tribal transit formula funding provided to the tribe under the Tribal Transit Program identified in 49 U.S.C. 5311;
- (iii) any discretionary or competitive grant administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and
- (iv) any discretionary or competitive grant administered by the Department for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.

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Tribal request to delete strikethrough; update funding stream language.

§ 663.2 Congressional policy.

(a) As stated in section 1121 of Pub. L. 114-94, Congress directed the Secretary to establish and carry out a program to be known as the Tribal Self-Governance within the Department.

(b) According to 25 U.S.C. 5392(a), except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:

(1) The inclusion of applicable PSFAs and funds associated therewith, in the agreements entered into under this section;

(2) The implementation of compacts and funding agreements entered into under this part; and

(3) The achievement of Tribal transportation, infrastructure, and highway safety goals and objectives.

(c) According to 25 U.S.C. 5392(d), funds provided under compacts, funding agreements, or grants made pursuant to this section, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program, **unless otherwise prohibited by law statute.**

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(d) According to 25 U.S.C. 5392(f), each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Tribe participating in self-governance and any ambiguity shall be resolved in favor of the Tribe.

(e) According to 25 U.S.C. 5395(b), nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(f) According to 25 U.S.C. 5387(e), in the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this part in a manner that maximizes the policy of Tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000.

Tribe proposes deletion as above.

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§ 663.3 Effect on existing Tribal rights.

Nothing in this part shall be construed as:

- (a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Tribes;
- (b) Terminating, waiving, modifying or reducing the trust responsibility of the United States to the Tribe(s) or individual Indians. The Secretary will act in good faith in upholding this trust responsibility;
- (c) Mandating a Tribe to apply for a compact or funding agreement; or
- (d) Impeding awards by other Departments and agencies of the United States to Tribes to administer Indian programs under any other applicable law.

§ 663.4 May the TTSGP be construed to limit or reduce in any way the funding for any program, project, or activity serving a Tribe under this or other applicable Federal law?

Funds made available to a Tribe through a compact or funding agreement for a statutory formula or the award of a discretionary grant shall not limit or reduce any other funding from a formula or awarded amount. If a Tribe alleges that a compact or funding agreement reduces the amount available, the Tribe may apply the provisions of 25 U.S.C. 5331.

§ 663.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Subject to 23 U.S.C. 207(e)(1) and as identified in Subpart H, unless negotiated and agreed to by the Self-Governance Tribe and the Department in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except for regulations promulgated under 23 U.S.C. 207. ~~However, any guidance, policy, or circular required by law cannot be waived. In addition, the Department reserves the right to impose additional safety requirements to the TTSGP that are not part of this rulemaking.~~

Item to be discussd with DOT GC – conceptual agreement with deletion

§ 663.6 Secretarial policy.

In carrying out Tribal Transportation Self-Governance Program, the Secretary recognizes the right of Tribes to self-government and supports Tribal sovereignty and self-determination. The Secretary recognizes a unique legal relationship with Tribal governments as set forth in the Constitution of the United States, treaties, Federal statutes, Executive Orders, and court decisions. The Secretary supports the self-determination choices of each Tribe and will continue to work with all Tribes on a government-to-government basis to address issues concerning Tribal self-determination.

§ 663.7 What definitions apply to this part?

Unless otherwise provided in this part:

Act means sections 1 through 9 and Titles I and V of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, as amended, but only to the extent as incorporated by and not in conflict with 23 U.S.C. 207.

Administrator means the ~~FHWA or FTA Administrator~~ from which the funds are being received. To revise

Appeal means a request by a Tribe for an administrative review of an adverse decision by the Secretary.

Compact means a legally binding and mutually enforceable written agreement, including such terms as the parties intend shall control year after year, that affirms the government-to-government relationship between a Tribe and the United States.

Construction means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of any project ~~eligible for assistance under 23 U.S.C. 202 or 49 U.S.C. §311~~. Such term includes but is not limited to-

(1) Preliminary engineering, engineering, and design-related services directly relating to the construction of the eligible project including engineering, design, project development and

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Construction Programs
--Construction Project Agreement
--Maintenance
--Mature Contract
--Program
--Project Planning
--Proposed Road or facility
--Public authority
--Public Road
--Rehabilitation
--Retained Tribal Share
--STIP
--Tribal Organization
--Tribal Transportation Office of Self Governance

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management, construction project management and inspection, surveying, mapping (including establishing temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration), and architectural-related services;

(2) Reconstruction, resurfacing, restoration, rehabilitation and preservation;

(3) Acquisition of rights-of-way;

(4) Relocation assistance, acquisition of replacement housing sites, and acquisition and rehabilitation, relocation, and construction of replacement housing;

(5) Elimination of hazards of railway-highway grade crossings;

(6) Elimination of roadside hazards;

(7) Improvements that directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas; and

(8) Capital improvements that directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses.

Consultation means the process by which the Department shall provide Tribes the opportunity to engage in timely and meaningful government-to-government communication, collaboration and participation with the Department, in accordance with the Federal trust responsibility and the principles of self-governance, before any action is taken which will have Tribal implications as defined by Executive Order 13175, in accordance with the Department's Tribal Consultation Plan, Executive Order 13175, and all subsequent Presidential Memoranda regarding Tribal consultation, and applicable Federal law.

Contractor – means a third-party who has entered into a legally binding agreement with a Tribe to perform services.

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Design means services related to preparing drawings, specifications, estimates, and other design submissions specified in the contract or agreement, as well as services provided by or for licensed design professionals during the bidding/negotiating, construction and operational phases of the project.

Department means the Department of Transportation.

Discretionary or competitive grant means a grant in which the Federal awarding agency may select the recipient from among all eligible recipients in light of the legislative and regulatory requirements and published selection criteria established for a program, and can decide the amount of funding to be awarded.

Eligible Tribe means a Tribe that is eligible to participate in the Tribal transportation self-governance program.

FAST Act means the "Fixing America's Surface Transportation Act," Pub. L. 114-94.

Funding Agreement means a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Tribe will carry out, ~~the funds being transferred from FHWA and FTA all modal administrations~~ in support of those applicable PSFAs and such other terms as are required, or may be agreed upon, pursuant to the Tribal transportation self-governance program.

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Gross Mismanagement means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds transferred to a Tribe by a compact or funding agreement that results in a significant reduction of funds available for the PSFAs assumed by a Tribe.

Imminent Jeopardy means an immediate threat and likelihood of significant devaluation, degradation, damage, or loss of a trust asset, or the intended benefit from the asset caused by the actions or inactions of a Tribe ~~Consortium~~ in performing trust functions. This includes disregarding Federal trust standards and/or Federal law while performing trust functions if the disregard creates such an immediate threat.

Indian means a person who is a member or citizen of a Tribe ~~[consistent to stat def]~~.

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Indirect Cost Rate means the rates arrived at through negotiation between a Tribe and the appropriate Federal agency for a Tribe's allowable indirect costs.

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Indirect Costs means costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved.

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Inherent Federal functions means those Federal functions which cannot legally be delegated to a non-Federal entity, including Tribes.

Intertribal consortium or consortium means a coalition of two or more separate Tribes that join together for the purpose of participating in self-governance.

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Project means any undertaking determined as being eligible under the Title and Program for which funds are being provided.

PSFA means programs, services, functions, and activities (or portions thereof), as applicable.

Real Property means any interest in land together with the improvements, structures, and fixtures and appurtenances.

Reassumption means rescission, in whole or part, of a funding agreement and assuming or resuming control or operation of the PSFAs and funding pursuant to 23 U.S.C. 207(f)(2)(A)

Retrocession means the voluntary return of a self-governance program, service, function or activity (or portion thereof) for any reason, before or on the expiration of the term of the funding agreement.

Secretary means the Secretary of Transportation.

Secretaries means the Secretary of Transportation and the Secretary of the Interior.

Self-Determination Contract means a contract (or grant or cooperative agreement) entered into pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321) between a Tribe and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Tribes.

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Self-governance means the program of self-governance established under the Tribal Transportation Self-Governance Program.

State means any of the 50 States, the District of Columbia, or Puerto Rico.

State Transportation Department means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction and/or maintenance as defined in 23 U.S.C. 101(a)(28).

Transit means regular, continuing shared ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income

Transportation planning means developing land use, economic development, traffic demand, public safety, health and social strategies to meet transportation current and future needs.

Transportation Programs means all programs administered or financed under ~~23 U.S.C. 202 and 49 U.S.C. 5311~~, United States Code.

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Tribal Program means the Tribal transportation self-governance program established under the FAST Act (Pub. L. 114-94, 23 U.S.C. § 207).

Tribal share means a Tribe's portion of all eligible funds and resources that support applicable PSFAs (or portions thereof) provided through a compact or funding agreement between the Tribe and the Department ~~that are not required by the Secretary for the performance of inherent federal functions.~~

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Tribal Transportation Planning funds means funds referenced in 23 U.S.C. 202(c).

Tribal Transportation Program (TTP) means a program established in Section 1119 of Moving Ahead for Progress in the 21st Century (MAP-21), Pub. L. 112-141 (July 6, 2012), and codified in 23 U.S.C. 201 and 202 to address transportation needs of Tribes. This program was continued under Fixing America's Surface Transportation Act (FAST ACT), Pub. L. 114-94 (December 4, 2015).

Tribal Transit Program means a program authorized in 49 U.S.C. 5311(j) as a set aside from

the Formula Grants for Rural Areas Program.

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Tribe means any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. In any case in which a Tribe has authorized another Tribe or an Intertribal consortium to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this section, the authorized Tribe or Intertribal consortium shall have the rights and responsibilities of the authorizing Tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term ‘Tribe’ as used in this section shall include such other authorized Tribe or Intertribal consortium.

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§ 663.8 Acronyms

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AASHTO—American Association of State Highway and Transportation Officials.
 ADR—Alternate dispute resolution
 ANCSA—Alaska Native Claims Settlement Act
 BIA—Bureau of Indian Affairs, Department of the Interior.
 BIADOT—Bureau of Indian Affairs, Indian Services—Division of Transportation—Central Office.
 CFR—Code of Federal Regulations.
 DOI—Department of the Interior.
 DOT—Department of Transportation.
 FHWA—Federal Highway Administration, Department of Transportation.
 FTA—Federal Transit Administration, Department of Transportation.
 ISDEAA—Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.
 MUTCD—Manual ~~of-on~~ Uniform Traffic Safety Control Devices
 NEPA—National Environmental Policy Act
 NTTFI—National Tribal Transportation Facility Inventory.
 OMB – Office of Management and Budget
 PM&O—Program management and oversight.
 PS&E—Plans, specifications and estimates
 PSFA - Programs, Services, Functions, and Activities (or portions thereof).
 STIP—Statewide Transportation Improvement Program.
 TTP—Tribal Transportation Program.
 TTSGP - Tribal Transportation Self–Governance Program
 U.S.C.—United States Code

TO BE FURTHER COMPLETED. ALSO, CAN SOME OF THE ABOVE DEFINITIONS BE PULLED INTO THIS SECTION?

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Subpart B - ELIGIBILITY

§ 663.50 Who may participate in Tribal Transportation Self–Governance Program (TTSGP)?

In accordance with 23 U.S.C. 207(b), a Tribe shall be eligible to participate in the TTSGP if the Tribe:

- (a) requests participation in the TTSGP by resolution or other official action by the governing body of the Tribe; and
- (b) demonstrates ~~to the satisfaction of FHWA and FTA~~ for the preceding three (3) fiscal years, financial stability and financial management capability, and transportation program management capability.

OK

§ 663.51 How does a Tribe demonstrate financial stability and financial management capability?

(a) A Tribe demonstrates financial stability and financial management capability by providing evidence that, during the preceding three (3) fiscal years, it had no uncorrected significant and material audit exceptions in the required annual audit of the Tribe's self-determination contracts, self-governance funding agreements, or Tribal Transportation Program Agreement.

(b) If a Tribe is not required to submit an annual audit for any or all of the three (3) previous years, the Tribe may demonstrate financial stability and financial management capacity by demonstrating that it has, during the prior three (3) fiscal years, assumed the responsibility to deliver, without sanctions or actions taken against the Tribe for findings of financial management issues, transportation services, projects or programs ~~under a~~

~~(1) Self-determination, self-governance, or government-to-government funding agreement with the Bureau of Indian Affairs;~~

~~(2) Tribal Transportation Program Funding Agreement with the Federal Highway Administration; or~~

~~(2) (3) a grant award with the Federal Transit Administration.~~

Federal members note tribal objection.

(c) Tribes not meeting the above financial stability and financial management capability requirements but who can demonstrate that steps have been taken to address the identified audit exceptions or findings may request consideration by the ~~FHWA and FTA Administrators~~ that the Tribe has demonstrated their ability to meet the eligibility requirements of this section.

§ 663.52 How does a Tribe demonstrate transportation program management capability?

- (a) A Tribe demonstrates transportation program management capability if:
 - (1) it has previously assumed responsibility and successfully delivered transportation services, projects or programs under a:
 - (i) ~~self-determination, self-governance, or government-to-government funding agreement with the Bureau of Indian Affairs;~~

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- (ii) Tribal Transportation Program Agreement with the Federal Highway Administration; or
- (iii) funding grant award with the Federal Transit Administration.

(2) Evidence of the successful delivery of transportation services, programs and projects may include:

- (i) a staffed and operational transportation program or department (identifying personnel, job descriptions and years of experience); or
- (ii) documentation showing the successful completion of transportation projects or operation of a program that is related or similar to the program for which funding is being requested for inclusion into the self-governance agreement.

(b) The ~~FHWA and FTA~~ Department may consider any other criteria that a Tribe may propose that demonstrates transportation program management capability.

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SUBPART C – COMPACTS and FUNDING AGREEMENTS

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Compacts

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§ 663.100 What is included in a compact?

A compact shall set forth the general terms of the government-to-government relationship between the Tribe and the United States under the program and other terms that will continue to apply in future fiscal years consistent with the Federal Government's trust responsibility and statutory and treaty obligations.

§ 663.101 Is a compact required to participate in self-governance?

Yes. Tribes must have a compact in place to participate in self-governance.

§ 663.102 What is the term of a self-governance compact?

Upon approval and execution of a self-governance compact, the compact remains in effect for so long as permitted by Federal law or until terminated by mutual written agreement, or retrocession, or reassumption of all PSFAs.

§ 663.103 May more than one Tribe enter into a single compact and funding agreement?

Yes. In accordance with 23 U.S.C. 207(m)(1)(E), if each Tribe requests, two or more otherwise eligible Tribes may be treated as a single Tribe for the purpose of participating in self-governance as a consortium.

§ 663.104 How may a compact be amended?

Compacts may only be amended by mutual written agreement of the Tribe and the Secretary.

Funding Agreements

§ 663.150 What is a funding agreement?

A funding agreement is a legally binding and mutually enforceable written agreement between the Secretary and a Tribe that identifies the funds being transferred for the applicable PSFAs or projects that the Tribe will carry out under the Compact with such funds, and such other terms as are required or may be agreed upon by the Secretary and the Tribe pursuant to 23 U.S.C. 207.

§ 663.151 What funds may be included in a funding agreement?

(a) In accordance with 23 U.S.C. 207(d)(2)(A)(i), the funds eligible for inclusion in a funding agreement, at the option of the Tribe, are:

- (a) ~~the full tribal share funding provided to the tribe under the Tribal Transportation Program identified in 23 U.S.C. 202;~~
- (b) ~~any tribal transit formula funding provided to the tribe under the Tribal Transit Program identified in 49 U.S.C. 5311;~~
- (c) ~~any discretionary or competitive grant administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and~~
- (d) ~~any discretionary or competitive grant administered by the Department for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.~~

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Federal members to draft language to reflect statute at (e)(1)(B).

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~~(b) No additional funding, including funds for any costs associated with administrative or contract support costs will be made available to Tribes unless specifically authorized and explicitly provided for through Congressional appropriations.~~

(c) The Secretary shall provide funding proportionately for periods covered by joint resolution adopted by Congress making continuing appropriations and authorization extensions, to the extent permitted by such resolutions.

~~(d) The funds provided in a funding agreement may only be consolidated to the extent allowed by and in accordance with the statutes and regulations of the programs from which the funds originated.~~

§ 663.152 May a Tribe negotiate a funding agreement at the same time it is negotiating a compact?

Yes, provided that a tribe has or will have a compact in place before the terms of the funding agreement go into effect. No. In accordance with 23 U.S.C. 207(d)(1), Tribes must have a compact in place before negotiating and entering into a written annual funding agreement.
Ok, understood.

§ 663.153 May a funding agreement be executed without negotiating a compact?

No. A compact is a separate document from a funding agreement, and the compact must be executed before or at the same time as a funding agreement.

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§ 663.154 Which entity is responsible for the transferred funds?

The Tribe shall be responsible for implementing all projects and PSFAs identified on and using the funds received under a funding agreement and for administering and supervising the project and funds in accordance with this section. In addition, the Tribe must carry out the project or PSFAs in accordance with the funding agreement, the statutes, and the regulations in this part or identified in the funding agreement.

§ 663.155 May a funding agreement include provisions for the Secretary to perform certain activities associated with the PSFAs performed by the Tribe?

Yes. In accordance with 23 U.S.C. 207(d)(3)(B)(iv) and (v), a funding agreement must set forth the responsibilities of the Secretary and the Tribe and may include any other provision agreed to by the parties. If the Tribe elects and the Secretary agrees, the funding agreement may include provisions for the Secretary to perform certain activities associated with the PSFAs included in the funding agreement. The Tribe may use eligible funds to pay for (i.e., buyback) such activities.

Commented [APB40]: Federal members ask if this provision can be cut. Tribal members to consider.

Tribes provided examples

Terms in a Funding Agreement

§ 663.160 What terms must be included in a funding agreement?

- (a) In accordance with 23 U.S.C. 207(d)(3), a funding agreement shall set forth terms that generally identify the PSFAs (or portions thereof) to be performed or administered by the Tribe; and for those PSFAs identified:
- (1) the general budget category assigned;
 - (2) the funds to be provided, including those funds to be provided on a recurring basis;
 - (3) the time and method of transfer of the funds;
 - (4) the responsibilities of the Secretary and the Indian Tribe; and
 - (5) any other provision agreed to by the Indian Tribe and the Secretary.
- (b) In addition, a provision authorizing the Secretary to terminate the compact or funding agreement (or a portion thereof) and reassume the remaining funding associated with the reassumed PSFAs as provided in 23 U.S.C. 207(f)(2)(A) will also be included unless such provision is included in the compact required under this part.

§ 663.161 May additional terms be included in a funding agreement?

Yes. In accordance with 23 U.S.C. 207(d)(3)(B), any other provision agreed to by the Tribe and

the Secretary may be included in the funding agreement.

§ 663.162 What provisions of Pub. L. 93-638 apply to compacts and funding agreements negotiated under 23 U.S.C. 207?

Except to the extent in conflict with other provisions of 23 U.S.C. 207 (as determined by the Secretary), only the provisions of the Indian Self-Determination and Education Assistance Act (ISDEAA) identified in Subpart L of this part shall apply to compacts and funding agreements (except that any reference to the Secretary shall be treated as a reference to the Secretary of Transportation.)

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Commented [APB42]: Tribes seek that this provision be revised to ensure the provisions listed in Subpart L and the provisions referenced by subpart L will apply.

Federal members will redraft.

§ 663.163 What if a Tribe requests incorporation of an additional provision of Pub. L. 93-638 at the negotiation stage of a compact or funding agreement?

Only the provisions identified in 663.162 above can be requested for incorporation into a compact or funding agreement. If both parties agree to the incorporation of an additional provision during the negotiation stage of a compact or funding agreement, such provision shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

Commented [APB43]: Issue 5 / Cross-Reference 7

Tribes request that this be updated to be consistent with Sec. 516 of ISDEAA

Term of a Funding Agreement

§ 663.165 What is the term of a funding agreement? _____

A funding agreement shall have the term mutually agreed to by the parties. As provided in 23 U.S.C. 207(d)(4)(A), absent notification from a Tribe that it is withdrawing or retroceding the operation of one or more PSFAs (or portions thereof) identified in the funding agreement, termination of the funding agreement by the Secretary under 23 U.S.C. 207(f)(2), or unless agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

§ 663.166 Does a funding agreement remain in effect after the end of its term?

Yes. The provisions of a funding agreement, including all recurring increases received for Tribal shares and continuing eligibility for other increases, remain in full force and effect until a subsequent funding agreement is executed unless the funding agreement is terminated by the Secretary as provided in 23 U.S.C. 207(f)(2). As provided in 23 U.S.C. 207(d)(4)(B), upon execution of a subsequent funding agreement by the Secretary and a Tribe, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

§ 663.167 How is a funding agreement amended?

A funding agreement may be amended by the parties as provided for in the funding agreement, or as identified in 23 U.S.C. 207(d)(5).

SUBPART D - FUNDING

General

§ 663.250 What funds must the Secretary transfer to a Tribe in a funding agreement?

- (a) Subject to the terms of any compact or funding agreement, ~~and the availability of funds~~, the Secretary must transfer to a Tribe all funds provided for in the funding agreement.
- (b) A funding agreement shall authorize the Tribe to receive funds made available to Tribes through:
- (1) ~~the full tribal share funding provided to the tribe under the Tribal Transportation Program identified in 23 U.S.C. 202;~~
 - (2) ~~any tribal transit formula funding provided to the tribe under the Tribal Transit Program identified in 49 U.S.C. 5311;~~
 - (3) ~~any discretionary or competitive grant administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and~~
 - (4) ~~any discretionary or competitive grant administered by the Department for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.~~
- (c) As prescribed in 23 U.S.C. 207(d)(2)(B), with respect to Tribal shares included in a funding agreement, such funds shall be provided without regard to the agency or office of the Department within which the PSFA (or portion thereof) is performed.
- (d) The Secretary shall provide funding to the Tribes for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.
- ~~(e) No additional funding, including funds for any costs associated with administrative or contract support costs will be made available to Tribes unless specifically authorized and explicitly provided for through Congressional appropriations.~~
- (f) Pursuant to 23 U.S.C. 207(h), the Secretary must include funds in a funding agreement in an amount equal to:
- (1) the sum of the funding that the Tribe would otherwise receive for the PSFA in accordance with a funding formula or other allocation method established under title 23 or chapter 53 of title 49, United States Code; and
 - ~~(2) such additional amounts as the Secretary determines equal the amounts that would have been withheld for the costs of the Bureau of Indian Affairs for administration of the program or project.~~
 - ~~(3) any other funds required by section 516(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 5396), as made applicable to the Program by~~

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Tribal members to provide language with reference to 202(a)(9)/federal aid transfers.

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23 U.S.C. § 207(d)(8);

~~(2)~~

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§ 663.251 When must the Secretary transfer to a Tribe the funds identified in a funding agreement?

When a funding agreement requires an annual transfer of funding to be made by the Secretary at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made to the Tribe, the first such transfer shall be made by the Secretary not later than 30 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise ~~but only to the level of funds made available.~~

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§ 663.252 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment (or initial periodic payment)?

The Secretary must transfer any funds that were not paid in the initial lump sum payment (or initial periodic payment) within 30 days after the apportionment of such funds by OMB to the Department and the distribution methodologies and other decisions regarding payment of those funds have been made by the Department.

§ 663.253 May a Tribe negotiate a funding agreement for a term longer or shorter than one year?

Yes. Upon the Tribe's request, the Secretary and the Tribe may negotiate a funding agreement for a term longer or shorter than a year. All references in these regulations to funding agreements shall also include funding agreements for a term longer or shorter than one year.

§ 663.254 May the Secretary increase the funds made available under the funding agreement?

Yes. In accordance with 25 U.S.C. 5388(d)(2), the Secretary may increase the funds provided in the funding agreement. However, the Tribe and the Secretary must agree to any transfer of funds to the Tribe unless otherwise provided for in the funding agreement.

Flexible Financing

§663.255 May a funding agreement include provisions pertaining to flexible or innovative financing?

- (a) In accordance with 23 U.S.C. 207(d)(2)(C), if agreed upon by both parties, a funding agreement shall include provisions pertaining to flexible financing and innovative financing.
- (b) The Secretary shall establish the terms and conditions relating to the flexible and innovative financing provisions which shall be consistent with:
 - (1) agreements entered into by the Department under 23 U.S.C. 202(b)(7) and 23 U.S.C.

202(d)(5); or

(2) regulations of the Department of the Interior relating to flexible financing contained in 25 CFR 170.

§663.256 Can a Tribe use funds made available under a Funding Agreement to leverage other funds or to pay back loans?

Yes. A Tribe can use funds made available under a Funding Agreement to leverage other funds or to pay back transportation related loans unless the use of such funds for such purposes is prohibited by law.

§663.257 Can a Tribe apply for loans or credit from a State infrastructure bank?

Yes. A Tribe can apply for loans or credit from a State infrastructure bank. Upon the request of a Tribe, the Department will provide necessary documentation to a State infrastructure bank to facilitate obtaining loans and other forms of credit for a Tribal Transportation Program or other eligible project.

Interest

§ 663.260 May a Tribe keep interest earned on funding identified in a Funding Agreement?

Yes. A Tribe may keep interest earned on funding identified in a Funding Agreement.

§ 663.261 How may a Tribe use interest earned on funding identified in a Funding Agreement?

Interest earned on such funds may be used by the Tribe to carry out eligible transportation related projects and activities.

Prohibitions

§ 663.265 What prohibitions apply to the Secretary's transfer of funds identified on a funding agreement?

In accordance with 25 U.S.C. 5388(d)(1)(A) and (B), the Secretary is expressly prohibited from:

- (a) Failing or refusing to transfer to a Tribe its full share of funds due under the Tribal Transportation Self-Governance Program, except as required by Federal law, and
- (b) From withholding portions of such funds for transfer over a period of years.

§ 663.266 May the Secretary reduce the amount of funds made available to a Tribe in a funding agreement to make funding available for monitoring or administration by the Department?

No. In accordance with 25 U.S.C. 5388(d)(1)(C)(i), the Secretary is prohibited from reducing the

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Sec 508 paragraph h.

amount of funds identified for transfer on a Funding Agreement to make funding available for self-governance monitoring or administration.

§ 663.267 May the Secretary reduce the amount of formula funds due under the Tribal Transportation Self-Governance Program in subsequent years?

No. In accordance with 25 U.S.C. 5388(d)(1)(C)(ii), the Secretary is prohibited from reducing the amount of funds required under the Program in subsequent years, except pursuant to:

- (a) a reduction in appropriations or change in the funding formula results from the previous fiscal year for the PSFAs or award included in a compact or funding agreement;
- (b) a congressional directive in legislation or accompanying report;
- (c) a Tribal authorization;
- (d) a change in the amount of pass-through funds subject to the terms of the funding agreement; or
- (e) completion of a project, activity, or program for which such funds were provided.

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§ 663.268 May the Secretary reduce the amount of funds identified in a funding agreement to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?

No. In accordance with 25 U.S.C. 5388(d)(1)(c)(iii), the Secretary may not reduce the amount of funds identified in a Funding Agreement to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Tribal Transportation Self-Governance Program.

§ 663.269 May the Secretary reduce the amount of funds required under 23 U.S.C. 207 to pay for costs of Federal personnel displaced by self-governance compacts and funding agreements under the Tribal Transportation Self-Governance Program?

No. In accordance with 25 U.S.C. 5388(d)(1)(C)(iv), the Secretary may not reduce the amount of funds required under the Tribal Transportation Self-Governance Program to pay for costs of Federal personnel displaced by Self-Governance compacts and funding agreements.

Prompt Payment Act

§ 663.272 Does the Prompt Payment Act apply to funds transferred to a Tribe in a compact or funding agreement?

Yes. In accordance with 25 U.S.C. 5388(g), the Prompt Payment Act, 39 U.S.C. 3901 *et seq.*, applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to the Self-Governance Program.

*Financial Standards***§ 663.276 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?**

- (a) A Self-Governance Tribe is under a duty to invest and manage the funds as a prudent investor would, in light of the purpose, terms, distribution requirements, and provisions in the compact or funding agreement. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the Self-Governance Tribe. In making and implementing investment decisions, the Self-Governance Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so.
- (b) The Self-Governance Tribe must:
- (1) Conform to fundamental fiduciary duties of loyalty and impartiality;
 - (2) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and
 - (3) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Self-Governance Tribe.

§ 663.277 May a Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

Yes. ~~Except as identified for discretionary and competitive grants within the funding program made available, pursuant~~ Pursuant to section 25 U.S.C. 5388(i), all funds paid to a Tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that a Tribe elects to carry over funding from one year to the next, such carryover shall not diminish the amount of funds the Tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

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Commented [APB57]: Tribes think this language can be more precise. Federal officials to propose language.

§ 663.278 Is a Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

In accordance with 25 U.S.C. 5388(k), made applicable to the Tribal Transportation Self-Governance Program by 23 U.S.C. 207(l)(3), a Tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement ~~except for any required local match~~. If at any time the Tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Tribe may suspend performance of the activity until such time as additional funds are transferred.

Commented [APB58]: Unnecessary. Tribes understand the need to provide any local match.

Federal members ok in concept in taking this out.

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§ 663.279 Will the Compacts and Funding Agreements be affected by subsequent

transportation authorization Acts?

Unless Congress explicitly revokes the Secretary's authority to carry out compacts and funding agreements or the funding program under this section is no longer authorized, existing compacts and funding agreements will be unaffected by subsequent transportation authorization Acts. Compacts and funding agreements will continue in force in accordance with 23 U.S.C. 207(d)(4) and will not end due to operation of law or any other default mechanisms.

Subpart E – FINAL OFFER

Commented [APB60]: Cross-Reference 9; 25 CFR 137.130-.155

§ 663.300 What is covered by this subpart?

This subpart explains the final offer process for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.

§ 663.301 When should a final offer be submitted?

A final offer should be submitted when the Secretary and a Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels).

§ 663.302 How does the Tribe submit a final offer?

(a) A written final offer should be submitted:

- (1) During negotiations to the agency lead negotiator *or*
- (2) Thereafter to the Secretary or his/her delegated official.

(b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a "Final Offer."

§ 663.303 What does a final offer contain?

A final offer contains a description of the disagreement between the Secretary and the Tribe, the Tribe's final proposal to resolve the disagreement, and the person authorized to act on behalf of the Tribe.

§ 663.304 How long does the Secretary have to respond to a final offer?

In accordance with 25 U.S.C. 5387(b), the Secretary will have 45 days to respond to the final offer. The 45-day review period begins from the date the DOT receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

§ 663.305 May the Secretary request and obtain an extension of time of the 45-day review period?

Yes. The Secretary may request an extension of time before the expiration of the 45-day review period. The Tribe may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person

authorized by the Tribe to grant the extension before the expiration of the 45-day review period as identified in xxx.304

§ 663.306 What happens if the agency takes no action within the 45-day review period (or any extensions thereof)?

The final offer is accepted automatically by operation of law.

§ 663.307 If the 45-day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law, are there any exceptions to this rule?

No. There are no exceptions to this rule if the 45-day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law.

§ 663.308 Once the Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

After the Tribe's final offer is accepted or deemed accepted, the terms of the Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

Rejection of Final Offers

§ 663.310 On what basis may the Secretary reject a Tribe's final offer?

In accordance with 25 U.S.C. 5387(c), the Secretary may reject a Tribe's final offer for one of the following reasons:

- (a) the ~~number-amount~~ of funds proposed in the final offer exceeds the applicable funding level to which the Tribe is entitled to;
- (b) the PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to a Tribe;
- (c) the Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health and safety; or
- (d) the Tribe is not eligible to participate in self-governance under section 23 U.S.C. 207(b).

§ 663.311 How does the Secretary reject a final offer?

The Secretary must reject a final offer by providing written notice to the Tribe based on the criteria in § 663.310 not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Tribe consistent with this subpart.

§ 663.312 Is technical assistance available to a Tribe to avoid rejection of a final offer?

Yes. Upon receiving a final offer, the Secretary must provide technical assistance and share all relevant information with the Tribe so as to attempt avoid rejection of a final offer.

§ 663.313 Who has authority to make a decision that relates to an appeal of the rejection of a final offer by the Department?

- (a) The procedures for appeals are found in subpart N of this part.
- (b) In accordance with 23 U.S.C. 207(f)(1), a decision that relates to an appeal of the rejection of a final offer by the Department shall be made by either:
 - (1) an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or
 - (2) an administrative judge.

§ 663.314 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?

Yes, subject to 25 U.S.C. 5387(c)(1)(D).

§ 663.315 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement, or amendment?

No. Appealing the decision of the Secretary does not prevent entering into the compact, funding agreement, or amendment.

§ 663.316 What is the burden of proof in an appeal from rejection of a final offer?

The burden of proof for an appeal shall be as identified in Subpart N.

Subpart F – General Provisions

Redesign

§ 663.400 May a Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?

~~Only the formula or Tribal share funding identified in xxx.250(b)(1) and (2) and made available to a Tribe through a funding agreement may be redesigned or consolidated by the Tribe, but only to the extent allowed by and in accordance with the statutes and regulations of those programs.~~

Conflict of Interest

§ 663.405 How does the Secretary address a perceived or actual conflict between provisions of the Indian Self-Determination and Education Assistance Act and 23 U.S.C. 207?

If the Secretary determines there is a conflict between 23 U.S.C. 207 and the provisions of ISDEAA that are identified in 23 U.S.C. 207(l), ~~23 U.S.C. 207 the Secretary shall resolve the conflict in a manner most favorable to the tribe shall apply.~~

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Tribes ask this provision be redrafted to comply with statute.

Tribal members to send draft of previous language to Committee.

_____(207)

1) REDESIGN AND CONSOLIDATION - An Indian tribe, in any manner that the Indian tribe considers to be in the best interest of the Indian community being served, may-
(i) redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement; and

(ii) reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof), if the funds are-

(I) expended on projects identified in a transportation improvement program approved by the Secretary; and

(II) used in accordance with the requirements in-

(aa) appropriations Acts;

(bb) this title and chapter 53 of title 49; and

(cc) any other applicable law.

(B) EXCEPTION.-Notwithstanding subparagraph (A), if, pursuant to subsection (d), an Indian tribe receives a discretionary or competitive grant from the Secretary or receives State apportioned funds, the Indian tribe shall use the funds for the purpose for which the funds were originally authorized.

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§ 663.406 Are Tribes required to address potential conflicts of interest?

Yes. Tribes participating in self-governance under TTPSG must ensure that internal measures and controls, are in place to address conflicts of interest in the administration of self-governance PSFAs.

*Records***§ 663.410 Is a Tribe required to maintain a recordkeeping system?**

Yes. Tribes are required to maintain records and provide Federal agency access to those records as provided in 25 U.S.C. 5386(d) and the statutory ~~or regulatory~~ requirements of the funding being received.

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Tribes request striking. Federal members note objections.

§ 663.411 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?

No. As identified in 25 U.S.C. 5386(d) except to the extent that a Tribe specifies otherwise in its compact or funding agreement, the records of the Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

§ 663.412 Is the Tribe required to make its records available to the Secretary?

Yes. After 30 days advance written notice from the Secretary, the Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system and audit requirements, ~~as well as to other records as identified in the regulations for the program for which the funds were received.~~

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Tribes request striking. Federal members note request.

§ 663.413 How long must a Tribe keep management system records?

The Tribe must retain records ~~for three years as required in 2 C.F.R. 200.333.~~

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*Cost Principles***§ 663.415 Are Self-Governance Tribes required to undertake annual audits?**

Self-Governance Tribes that meet the applicable thresholds under the OMB Circular, 2 C.F.R. 200.501, as updated by the Director of the Office of Management and Budget must undertake annual audits pursuant to those regulations.

§ 663.416 Are there exemptions to the audit requirements?

Yes. The exemptions to the audit requirements are contained and described in 2 C.F.R. 200.

§ 663.417 What cost principles must a Self-Governance Tribe follow?

A Self-Governance Tribe must apply the cost principles of the applicable OMB circular, except as modified by:

Commented [APB65]: Tribal and federal members to review this provision with more scrutiny.

- (a) Section 106(k) of the Indian Self Determination and Education Assistance Act 25 U.S.C. 5325(a)-(k), except that the eligibility of contract support costs does not authorize or appropriate additional funds for these expenditures.
- (b) Other provisions of law, or
- (c) Any subsequent exemptions granted by OMB to applicable OMB circulars.

§ 663.418 May the Secretary require audit or accounting standards other than those specified in § 663.xxx?

Commented [APB66]: 415?

No. No other audit or accounting standards shall be required by the Secretary.

§ 663.419 How much time does the Federal Government have to make a claim against a Tribe relating to any disallowance of costs, based on an audit conducted under § 663.800?

In accordance with 25 U.S.C. 5325(f), any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

§ 663.420 When does the 365 day period commence?

In accordance with 25 U.S.C. 5325(f), for the purpose of determining the 365-day period, an audit report is deemed received on the date of electronic submission to the Federal Audit Clearinghouse, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the audit report as insufficient due to non-compliance with the applicable OMB Circular, United States Code or noncompliance with any other applicable law.

§ 663.421 Where do Tribes send their audit reports?

Any required audits must be submitted to the Federal Audit Clearinghouse pursuant to OMB procedures; ~~with a copy provided to the agency from which funds have been provided.~~

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Commented [APB68]: Tribes seek striking of this provision.

DOT notes request.

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Non-Duplication

§ 663.425 If a Tribe receives 23 U.S.C. 202 funding under a compact and funding agreement, is it entitled to enter into a separate program agreement with the Secretary for such funds?

No. For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Tribe is not entitled to contract with the Secretary for the same funds or PSFAs under 23 U.S.C. 202(b)(6) or 23 U.S.C. 202(b)(7) or under agreements with the Secretary of Interior.

Federal Tort Claims Act (FTCA)

Commented [APB69]: Cross Reference 1 – 25 CFR 900.180-210.

§ 663.430 Are Tribes and their employees carrying out a project or PFSA funded through a Funding Agreement covered by the Federal Tort Claims Act (FTCA)?

Yes. In accordance with 25 U.S.C. 5396 and section 314 of Public Law 101-512 [25 U.S.C. 5321 note] and 25 U.S.C. 5321(d), Tribes and their employees carrying out projects or PSFAs are covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

Include the name of the DOT contact for FTCA notice here, but cross-reference of Part 900 Subpart M is sufficient and simplifies these provisions.

§ 663.431 Do Tribes need to be aware of areas which FTCA does not cover?

Yes. There are claims against Tribes which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. The regulations under this sub-heading are not intended as a definitive description of coverage, which is subject to review by the Department of Justice and the courts on a case-by-case basis.

§ 663.432 What claims are expressly barred by FTCA and therefore may not be made against the United States, a Tribe, or Consortium?

Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

§ 663.433 What claims may not be pursued under FTCA?

The following claims may not be pursued under FTCA:

- (a) Claims against subcontractors arising out of the performance of subcontracts with a Tribe;
- (b) Claims for on-the-job injuries which are covered by workmen's compensation;
- (c) Claims for breach of contract rather than tort claims; or
- (d) Claims resulting from activities performed by an employee which are outside the scope of employment.

§ 663.434 What remedies are expressly excluded by FTCA and therefore are barred?

The following remedies are expressly excluded by FTCA and barred:

- (a) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and
- (b) Other remedies not permitted under applicable State law.

§ 663.435 Is there a deadline for filing FTCA claims?

Yes. Pursuant to 28 U.S.C. 2401, claims shall be filed within 2 years of the date of accrual.

§ 663.436 How long does the Federal government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

The Federal government has 6 months to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed.

§ § 663.437 Does FTCA apply to a self-governance compact and funding agreement if FTCA is not referenced in the compact or funding agreement?

Yes, FTCA applies even though clauses regarding FTCA are optional in a compact or funding agreement.

§ § 663.438 To what extent shall the Tribe cooperate with the Federal government in connection with tort claims arising out of the Tribe's performance?

- (a) The Tribe shall designate an individual to serve as tort claims liaison with the Federal government.
- (b) As part of the notification required by 28 U.S.C. 2679(c), the Tribe shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the Tribe or any of its employees that relates to performance of a self-governance compact and funding agreement or subcontract.
- (c) The Tribe, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased factual report of the incident so that the claim may be properly evaluated. This report shall be completed within 60 days of notification of the filing of the tort claim and include the following, as appropriate:
 - (1) The date, time, and exact place of the accident or incident;
 - (2) A concise and complete statement of the circumstances of the accident or incident;
 - (3) The names and addresses of Tribal and/or Federal employees involved as participants or witnesses;

- (4) The names and addresses of all other eyewitnesses;
 - (5) An accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;
 - (6) A statement as to whether any person involved was cited for violating a Federal, State or Tribal law, ordinance, or regulation;
 - (7) The Tribe's determination as to whether any of its employees (including Federal employees assigned to the Tribe) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the contract at the time the incident occurred;
 - (8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency; and
 - (9) Insurance coverage information, copies of medical bills, and relevant employment records.
- (d) The Tribe shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.
- (e) If requested by the Secretary, the Tribe shall make an assignment and subrogation of all the Tribe's rights and claims (except those against the Federal government) arising out of a tort claim against the Tribe.
- (f) If requested by the Secretary, the Tribe shall authorize representatives of the Secretary to settle or defend any claim and to represent the Tribe in or take charge of any action.

(g) If the Federal government undertakes the settlement or defense of any claim or action, the Tribe shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

~~(h) Failure by a Tribe to assist the Federal government in this work may affect its future eligibility to participate in this program.~~

§ § 663.439 Does FTCA extend to a Tribe's subcontractors under a compact?

No. Subcontractors or sub-grantees providing services to a Tribe are generally not covered. Accordingly, a Tribe shall include in any construction contracts entered into with funds provided under a compact and funding agreement a requirement that Tribal contractors maintain workers compensation, auto, and general liability insurance coverage consistent with statutory minimums and local construction industry standards.

§ § 663.440 Does FTCA cover employees of the Tribe who are paid by the Tribe from funds

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Federal officials note the request.

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other than those provided through the self-governance compact and funding agreement?

Subject to FTCA limitations, the FTCA covers employees of the Tribe who are not paid from compact and funding agreement funds as long as the services out of which the claim arose were performed in carrying out the self-governance compact and funding agreement.

§ § 663.441 May persons who are not Indians or Alaska Natives assert claims under FTCA?

Yes. Non-Indian individuals served under the self-governance compact and funding agreement, may assert claims under this Subpart.

§ § 663.442 If the Tribe's employee receives a notification, including but not limited to a summons and/or a complaint alleging a tort covered by FTCA, what should the Tribe do?

As part of the notification required by 28 U.S.C. 2679(c), if the Tribe's employee receives a summons and/or complaint alleging a tort covered by FTCA, the Tribe should immediately:

- (a) Inform the POC identified in the compact or funding agreement;
- (b) Inform the Tribe's tort claims liaison;
- (c) XXX at US DOT; and
- (d) Forward all of the materials identified in § 663.1916(c) to the contacts given above.

Commented [DOT71]: TBD by DOT

§ 663.443 Does the year PSFA's are funded affect FTCA coverage?

No, the year funding was provided has no effect on the application of FTCA.

Retention of Federal employee coverage, rights and benefits by employees of Tribes

§ 663.445 Do provisions allowing for Federal employees who change jobs to work for Tribes to provide services under compacts and funding agreements under this section retain Federal employee rights and benefits?

The provisions available to Federal employees who leave Federal employment to work for Tribes as described in 25 U.S.C. 5323 apply equally to eligible Federal employees who leave for employment by Tribes in connection with governmental activities under the TTSGP. For the purposes of this provision, "employee" means an employee as defined in 5 U.S.C. 2105.

Civil Actions

§ 663.450 Must the Secretary review attorney or other professional contracts entered into by Tribes?

No. Further, neither 25 U.S.C. 81 nor 25 U.S.C. 476 shall apply to attorney or professional

service contracts entered into by Tribes.

Federal Examinations and Audits

§ 663.455 How long must Tribes make records available for Federal examination or audit?

Tribes shall keep books, documents, papers, and records of funding, grants, and State-provided funds for three years such that the Secretary or the Comptroller General may have access to the records for audit and examination related to grants, contracts, compacts subcontracts, sub-grants, or other arrangements.

§ 663.456 Who is responsible for compiling, copying, and paying for materials for any audit or examination?

The agency or entity undertaking the exam or audit shall be responsible for all costs associated with an audit or exam of Tribal records. Tribes are responsible to make records available during regular business hours, and may prevent removal of the records from Tribal offices. Tribes may charge the examining agency reasonable per-page fees for photocopying or scanning of documents and records.

§ 663.457 What penalties apply for embezzlements, willful misapplication of funding, thefts, or fraud connected to recipients of Federal funding?

In accordance with 25 U.S.C. 5306, any person, officer, director, agent, employee, or person otherwise connected with a recipient of a contract, subcontract, grant, or sub-grant who embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property provided to the recipient shall be fined not more than \$10,000 or imprisoned for not more than 2 years, or both. If the amount of funds in question does not exceed \$100, then the fine shall be not more than \$1,000 and imprisonment not more than 1 year, or both.

Prevailing Wages

§ 663.460 Do the wage and labor standards in the Davis-Bacon Act apply to employees of the Tribes ~~and Tribal Consortia~~?

No. Wage and labor standards of the Davis-Bacon Act do not apply to employees of Tribes ~~or Tribal Consortia~~. However, Davis Bacon wage rates apply to all Tribal contractor and subcontractors.

Commented [APB72]: Perhaps combine with .820.

§ 663.461 Does Indian preference apply to services, activities, programs, and functions performed under a self-governance compact and funding agreement?

Tribal law must govern Indian preference in employment, where permissible, in contracting and subcontracting, and employment and training, in performance of a compact and funding agreement. To the extent feasible, preference in the award of subcontracts and sub-grants in connection with the administration of compacts and funding agreements shall be given to Indian

organizations and to Indian-owned economic enterprises, as defined in 25 U.S.C. 1542.

§ 663.462 When do Tribal employment law and contract preference laws govern?

When a compact or funding agreement is intended to benefit one Tribe, the Tribal employment or contract preference laws adopted by such Tribe shall govern with respect to the administration of the compact, funding agreement (or portion thereof).

Supply and Leases

§ 663.465 Can a Tribe use Federal supply sources in the performance of a compact and funding agreement?

Yes. A Tribe and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) that must be available to the Tribe and to its employees to the same extent as if the Tribe were a Federal agency. While implementation of this provision is the responsibility of the General Services Administration, the Department shall assist the Tribes to resolve any barriers to full implementation that may arise to the fullest extent possible.

§ ~~##~~663.466 Can a Tribe lease Tribal property back to the Secretary?

Yes. Leasing processes will follow the provisions of 25 U.S.C 2507(a)(7) and 25 C.F.R. 900.69 through 900.74.

Commented [APB73]: Federal members request this reference be stricken, and add q's and a's here.

Consultation

§ 663.470 Must the Secretary consult with Tribes regarding budget of programs, grants, services, and initiatives that affect Tribes and Tribal transportation interests?

Yes. The Secretary shall consult on an annual basis with, and solicit the participation of Tribes in the development of the budgets for program, grants, services, initiatives, or other departmental functions that affect Tribes and Tribal transportation interests.

Commented [APB74]: Federal members ask for source of requirement.

§ 663.471 Must the Secretary consult with Tribes regarding proposed changes to funding formulas, fees, taxes, or other means of revenue creation the Department may suggest to Congress, or similar proposals to which the Department plans to respond?

Yes. When statutorily allowed, the Secretary will consult with Tribes when the Department is formulating revenue creation strategies for Tribal programs, including proposed changes to program formulas. Consultation should be carried out as early as possible in the process of formulating strategies or formulating responses to proposed strategies.

Commented [APB75]: Issue 11.

Tribal members seek clarification of how "when statutorily allowed" operates, if as a limitation or others.

Federal officials are not sure that budget is included.

Reporting

§ 663.475 Are there reporting requirements for Tribes participating in the TTSGSP?

~~Compacts and funding agreements negotiated between the Secretary and a Self Governance Tribe may include a provision that requires the Self Governance Tribe to report on program status and~~

~~services delivered. These reports shall include reporting from each program assumed under a Compact and Funding Agreement. Reports will be limited to data required by statute and applicable regulations. Tribes shall provide reports mandated by statute for the PSFAs performed under the compact and funding agreement, together with the reporting requirements set out in this regulation. No additional reporting is required under this part.~~

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~~§ 663.476 What are the purposes of the Tribal reporting requirements?~~

~~Tribal reports enable the Secretary to confirm that the Tribe is complying with the statutory reporting requirements of each of the programs assumed by the Tribe. This information will be used to assist the Secretary in advocating for Tribal transportation systems, budget formulation, other reporting required by statute, and sharing of best practices.~~

Commented [APB76]: Issue 4

Tribes propose replacing reporting requirements under these q&a's with this statement.

Federal members note proposal.

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~~§ 663.477 Must a Tribe identify submit confidential, proprietary, or commercial information in its reporting?~~

~~Yes. No. The Tribe must. Unless required by statute, a tribe need not submit identify all confidential, proprietary or commercial information so that the Secretary can treat it accordingly.~~

~~§ 663.478 Where do Tribes submit the required reports?~~

~~Tribes shall submit the required reports to the DOT XXX or on a nationwide data base system as set forth in the funding agreement.~~

Commented [DOT77]: TBD by DOT

~~§ 663.479 Are there any other reports a Tribe must submit to other DOT administrations, bureaus or programs?~~

~~No. Unless authorized by statute, or an applicable regulation referenced and included in a Compact or Funding Agreement, no additional reporting is required.~~

~~§ 663.480 May a Self-Governance Tribe participate in a voluntary transportation data collection effort with the DOT?~~

~~Yes. In order to share information with the Secretary about Tribal unmet needs, potential program improvements, best practices and budget formulation, Tribes may participate, at their option, in transportation data collection efforts.~~

Financial, Procurement, and Property Management Systems and Standards

General

Commented [APB78]: Cross Reference 25 CFR 900.35-60

~~§ 663.481— What is the purpose of this section?~~Financial, Procurement, and Property Management Systems and Standards apply to the TTSGP?

~~This section contains the minimum standards for the management systems used by Tribes or Intertribal consortiums when carrying out TTSGP compact or funding agreement. It provides standards for a Tribe or Intertribal consortium's financial management system, procurement management system, and property management system. Applicable financial, procurement, and property management systems and standards are listed in 25 C.F.R. 900.42 to 900.60.~~

Commented [APB79]: Issue 4

§ 663.482 What provisions of the Uniform Grant Guidance (2 CFR 200) apply to TTSGP compacts and funding agreements?

Tribes and Intertribal consortiums are required to comply with the provisions of 2 C.F.R 200, including the provisions that make special accommodation for the operation of programs under the ISDEAA. Tribes are not required to comply with any provisions of 2 CFR 200 that are not made expressly applicable to Tribes administering PSFAs under the ISDEAA, including but not limited to 2 CFR 1201.

Commented [APB80]: Federal and tribal members to review to make sure references are correct.

§ 663.483 What program management requirements apply to Tribes or Intertribal consortiums participating in the TTSGP?

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When carrying out TTSGP compact or funding agreement, Tribes and Intertribal consortiums shall develop, implement, and maintain systems that meet the minimum standards set forth in this subpart, unless one or more of the standards have been waived, in whole or in part.

§ 663.484 Do these standards apply to the contractors of a Tribe or Intertribal consortium?

A Tribe or Intertribal consortium is authorized to require that its contractors comply with some or all of the standards in this subpart when contractors are retained to assist the Tribe or Intertribal consortium in carrying out a TTSGP compact or funding agreement.

§ 663.485 What is the difference between a standard and a system?

(a) Standards are the minimum baseline requirements for the performance of an activity. Standards establish the “what” that an activity should accomplish.

(b) Systems are the procedural mechanisms and processes for the day-to-day conduct of an activity. Systems are “how” the activity will be accomplished.

§ 663.486 How are a Tribe's or Intertribal consortium's management standards and management systems evaluated?

Management systems are evaluated by an independent auditor through the annual single agency audit report that is required by the Single Agency Audit Act and 2 CFR Part 200.

§ 663.487 When does the Secretary review the management systems of a Tribe or Intertribal consortium participating in the TTSGP?

When the Tribe or Intertribal consortium submits an initial request to enter into a TTSGP ~~contract~~ compact, the Tribe or Intertribal consortium shall demonstrate, to the Secretary's satisfaction, that it has the management systems in place to meet the standards set forth in this subpart. The Secretary shall confirm in writing within 60 days that the Tribe or Intertribal consortium's management systems are or are not sufficient to meet the standards in this subpart.

Financial Management Systems and Standards

§ 663.490 What are the general financial management system standards that apply to a Tribe carrying out a TTSGP compact or funding agreement?

A Tribe shall expend and account for TTSGP funds in accordance with the ~~regulations~~ statutory requirements of the funds being provided as well as applicable Tribal laws and procedures.

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Federal members note request.

§ 663.491 What are the general financial management system standards that apply to a Intertribal consortium carrying out a TTSGP compact or funding agreement?

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An Intertribal consortium shall expend and account for TTSGP funds in accordance with the procedures of the Intertribal consortium.

§ 663.492 What minimum general standards apply to Tribes or Intertribal consortium financial management systems when carrying out a TTSGP compact or funding agreement?

The fiscal control and accounting procedures of a Tribe or Intertribal consortium shall be sufficient to:

- (a) Permit preparation of reports required by a TTSGP compact or funding agreement and the Act; and
- (b) Permit the tracing of TTSGP funds to a level of expenditure adequate to establish that they have not been used in violation of any restrictions or prohibitions contained in any statute that applies to the TTSGP compact or funding agreement.

§ 663.493 What specific minimum requirements shall a Tribe or Intertribal consortium's financial management system contain to meet these standards?

A Tribe or Intertribal consortium's financial management system shall include provisions for the following elements.

- (a) Financial reports. The financial management system shall provide for accurate, current, and complete disclosure of the financial results of TTSGP compact or funding agreement activities.
- (b) Accounting records. The financial management system shall maintain records sufficiently detailed to identify the source and application of TTSGP compact or funding agreement funds received by the Tribe or Intertribal consortium. The system shall contain sufficient information to identify contract awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income.
- (c) Internal controls. The financial management system shall maintain effective control and accountability for all TTSGP funds received and for all Federal real property, personal property, and other assets furnished for use by the Tribe or Intertribal consortium under the TTSGP compact or funding agreement.

(d) Budget controls. The financial management system shall permit the comparison of actual expenditures or outlays with the amounts budgeted by the Tribe or Intertribal consortium for each TTSGP compact or funding agreement.

(e) Allowable costs. The financial management system shall be sufficient to determine the reasonableness, allowability, and allocability of TTSGP compact or funding agreement costs based upon the terms of the TTSGP compact or funding agreement.

§ 663.494 What requirements are imposed upon the Secretary for the transfer of funds by these standards?

The Secretary shall establish procedures, consistent with statutory requirements and in compliance with the TTSGP compact and funding agreement, for the transfer of funds to the Tribe or Intertribal consortium.

Procurement Management Systems and Standards

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§ 663.495 When procuring property or services with TTSGP funds, can a Tribe or Intertribal consortium follow the same procurement policies and procedures applicable to other Tribe or Intertribal consortium funds?

Tribes and Intertribal consortiums shall have standards that conform to the standards in this subpart. If the Tribe or Intertribal consortium relies upon standards different than those described below, it shall identify the standards it will use as a proposed waiver in the initial TTSGP compact proposal or as a waiver request to an existing compact.

§ 663.496 If the Tribe or Intertribal consortium does not propose different standards, what basic standards shall the Tribe or Intertribal consortium follow?

(a) The Tribe or Intertribal consortium shall ensure that its vendors and contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase agreements or orders.

(b) The Tribe or Intertribal consortium shall maintain written standards of conduct governing the performance of its employees who award and administer contracts funded by a TTSGP compact or funding agreement.

(1) No employee, officer, elected official, or agent of the Tribe or Intertribal consortium shall participate in the selection, award, or administration of a procurement supported by Federal funds if a conflict of interest, real or apparent, as defined in the Tribe or Intertribal consortiums conflict of interest policies, would be involved.

(2) An employee, officer, elected official, or agent of a Tribe or Intertribal consortium, or of a subcontractor of the Tribe or Intertribal consortium, is not allowed to solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, with the following exemptions. The Tribe or Intertribal

consortium may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.

(3) These standards shall also provide for penalties, sanctions, or other disciplinary actions for violations of the standards.

(c) The Tribe or Intertribal consortium shall review proposed procurements to avoid buying unnecessary or duplicative items and ensure the reasonableness of the price. The Tribe or Intertribal consortium should consider consolidating or breaking out procurement to obtain more economical purchases. Where appropriate, the Tribe or Intertribal consortium shall compare leasing and purchasing alternatives to determine which is more economical.

(d) The Tribe or Intertribal consortium shall conduct all major procurement transactions by providing full and open competition, to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.

(1) Tribes or Intertribal consortiums shall develop their own definition for “major procurement transactions.”

(2) 25 U.S.C 5307(b) regarding Indian preference and Tribal preference, shall be applied to any procurement award in accordance with that section.

(e) The Tribe or Intertribal consortium shall make procurement awards only to responsible entities who have the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Tribe or Intertribal consortium will consider such matters as the contractor's integrity, its compliance with public policy, its record of past performance, and its financial and technical resources.

(f) The Tribe or Intertribal consortium shall maintain records on the significant history of all major procurement transactions. These records may include, but are not limited to, the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the contract price.

(g) The Tribe or Intertribal consortium is solely responsible, using good administrative practice and sound business judgment, for processing and settling all contractual and administrative issues arising out of a procurement. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

(1) The settlement of any protest, dispute, or claim shall not relieve the Tribe or Intertribal consortium of any obligations under a TTSGP compact or funding agreement.

(2) Violations of law shall be referred to the Tribal or Federal authority having proper jurisdiction.

§ 663.497 What procurement standards apply to contracts?

Each contract funded by a TTSGP compact or funding agreement shall at a minimum:

- (a) Be in writing;
- (b) Identify the interested parties, their authorities, and the purposes of the contract;
- (c) State the work to be performed under the contract;
- (d) State the process for making any claim, the payments to be made, and the terms of the contract; and
- (e) Be subject to 25 U.S.C 5307(b) to the extent identified in xxx.496.

§ 663.498 Do Federal laws, regulations, and Executive Orders apply to a Tribe's or Intertribal consortium's contractors or subcontractors?

Federal laws and regulations may apply to contracts funded by TTSGP compacts and funding agreements. As a result, contracts should contain a provision informing the recipient that their award is funded with TTSGP funds and that the recipient is responsible for identifying and ensuring compliance with applicable Federal laws and regulations. The Secretary and the Tribe or Intertribal consortium may, through negotiation, identify all or a portion of such requirements in the TTSGP compact or funding agreement and, if so identified, these requirements should be identified in the Tribe's or Intertribal consortium's contracts funded from TTSGP compacts and funding agreements.

Property Management Systems and Standards

§ 663.500 What is a Tribe or Intertribal consortium's property management system expected to do?

- (a) A Tribe or Intertribal consortium's property management system shall account for all property furnished or transferred by the Secretary for use under a TTSGP compact or funding agreement or acquired with TTSGP compact funds.
- (b) The property management system shall contain requirements for the use, care, maintenance, and disposition of Federally-owned and other property as follows:
 - (1) Where title vests in the Tribe, in accordance with Tribal law and procedures; or
 - (2) In the case of an Intertribal consortium, according to the internal property procedures of the Intertribal consortium.

§ 663.501 What type of property is the property management system required to track?

The property management system of the Tribe or Intertribal consortium shall track:

Commented [APB82]: Items 663.500-539 are in a parking lot to determine applicability to DOT.

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Commented [APB83]: FTA on rolling stock. Want to make sure that what's being tracked is real prop, personal prop, and rolling stock.

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(a) Personal property and/or rolling stock, with an acquisition value in excess of \$5,000 per item;

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(b) Sensitive personal property, which is all personal property that is subject to theft and pilferage, as defined by the Tribe or Intertribal consortium. All firearms shall be considered sensitive personal property; and

(c) Real property provided by the Secretary for use under the ~~contract~~compact and funding agreement.

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§ 663.502 What kind of records shall the property management system maintain?

The property management system shall maintain records that accurately describe the property, including any serial number, vehicle identification number, or other identification number. These records should contain information such as the source, titleholder, acquisition date, cost, share of Federal participation in the cost, location, use and condition of the property, and the date of disposal and sale price, if any.

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§ 663.503 Should the property management system prescribe internal controls?

Yes. Effective internal controls should include procedures:

(a) For the conduct of periodic inventories;

(b) To prevent loss or damage to property; and

(c) To ensure that property is used for a Tribe or Intertribal consortium's TTSGP compact or funding agreement(s) until the property is declared excess to the needs of the PSFAs assumed under the TTSGP compact, consistent with the Tribe or Intertribal consortium's property management system.

§ 663.504 What are the standards for inventories?

(a) A physical inventory should be conducted at least once every 2 years.

(b) The results of the inventory shall be reconciled with the Tribe or Intertribal consortium's internal property and accounting records.

§ 663.505 What maintenance is required for property?

Required maintenance includes the performance of actions necessary to keep the property in good working condition, the procedures recommended by equipment manufacturers, and steps necessary to protect the interests of the Tribe or Intertribal consortium and the Secretary in any express warranties or guarantees covering the property.

Commented [APB84]: Look at these provisions further.
part 200 provisions on title being vested in non-federal entity.

Is this question necessary?

§ 663.506 What if the Tribe or Intertribal consortium chooses not to take title to property furnished or acquired under the TTSGP compact or funding agreement?

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If the Tribe or Intertribal consortium chooses not to take title to property furnished by the government or acquired with TTSGP funds, title to the property remains vested in the Secretary and appropriate disposition procedures will apply. A list of Federally-owned property to be used under the TTSGP compact shall be included in the funding agreement.

§ 663.507 Do the same accountability and control procedures described above apply to Federal property?

Yes, except that requirements for the inventory and disposal of Federal property are different.

§ 663.508 How are the inventory requirements for Federal property different than for Tribal property?

There are three additional requirements for Federal property:

- (a) The Tribe or Intertribal consortium shall conduct a physical inventory of the Federally-owned property and reconcile the results with the Tribe or Intertribal consortium's property records annually;
- (b) Within 90 days following the end of an annual funding agreement, the Tribe or Intertribal consortium shall certify and submit to the Secretary an annual inventory of all Federally-owned real and personal property used in the contracted program; and
- (c) The inventory shall report any increase or decrease of \$5,000 or more in the value of any item of real property.

§ 663.509 What action must the Tribe undertake prior to disposing any Federal personal property?

Prior to disposing of any Federally owned personal property, including rolling stock, the Tribe shall report to the Secretary in writing of its status (IE: worn out, lost, stolen, damaged beyond repair, or no longer needed for the performance of the PSFAs assumed under the TTSGP compact).

Commented [APB85]: Parked item with discussion about federally owned property.

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Surplus and Excess Equipment

Commented [APB86]: Cross Reference Item 4.

§ 663.510 What is the purpose of this section?

This section provides information and requirements for the transfer of title for Federal property and equipment, the donation of Federal excess and surplus property to Tribes ~~or Intertribal consortiums~~ carrying out TTSGP compacts and funding agreements, as well as the procedures used for the acquisition of property with funds provided under such agreements.

§663.511 How will the Secretary exercise discretion to acquire and donate excess and surplus Federal property to a Tribe ~~or intertribal consortium~~?

The Secretary will exercise discretion in a way that gives maximum effect to the requests of Tribes ~~or intertribal consortium~~ for donation of excess or surplus Federal property, provided that the requesting Tribe shall state how the requested property is appropriate for use for any purpose for which a TTSGP compact and funding agreement is authorized. The Secretary shall assist the Tribes to resolve any barriers to full implementation that may arise to the fullest extent possible.

Government-Furnished Equipment

§663.515 How does a Tribe or Intertribal consortium obtain title to property furnished by the Federal government, where such property is available, for use in the performance of a TTSGP compact or funding agreement?

(a) If the Tribe or Intertribal consortium is assuming a USDOT program that has property or equipment:

- (1) The Secretary, in consultation with each Tribe or Intertribal consortium, shall develop a list of the property used in a TTSGP compact or funding agreement.
- (2) The Tribe or Intertribal consortium shall indicate any items on the list to which the Tribe or Intertribal consortium wants the Secretary to retain title.
- (3) The Secretary shall provide the Tribe or Intertribal consortium with any documentation needed to transfer title to the remaining listed property to the Tribe or Intertribal consortium.

(b) For government-furnished real and personal property made available to a Tribe or Intertribal consortium on or after October 25, 1994:

- (1) The Tribe or Intertribal consortium shall take title to all property unless the Tribe or Intertribal consortium requests that the United States retain the title.
- (2) The Secretary shall determine the presence of any hazardous substance activity, as defined in 41 CFR 10147.202.2(b)(10).

§663.516 Is government-furnished property received from the Department of the Interior to which a Tribe or Intertribal consortium holds title eligible for facilities operation and maintenance funding from the Secretary of the Interior?

Yes, in accordance with 25 U.S.C. 450j-1(f)(1)-(2).

Property Purchased with TTSGP Funds

Commented [APB87]: Transit considerations.

Commented [DOT88]: The Department seeks an opportunity to discuss further with the Committee and workgroups the provisions dealing with Government-issued equipment (663.515 and 663.516). Please identify what USDOT programs have property or equipment that is available for transfer to the tribe or consortium.

Commented [APB89]: Ongoing discussion about applicability of equipment and property items to DOT.

Commented [APB90]: Cross Reference Item 4

Commented [APB91]: Tribal proposal to address federal concerns.

Commented [APB92]: Cross-Reference Item 4

§ 663.520 Who takes title to property purchased with funds under a TTSGP compact or funding agreement?

The Tribe ~~or Intertribal consortium~~ takes title to such property, unless the Tribe ~~or Intertribal consortium~~ chooses to have the United States take title. In that event, the Tribe ~~or Intertribal consortium~~ must inform the Secretary of the purchase and identify the property and its location in such manner as the Tribe or ~~Intertribal consortium~~ and the Secretary deem necessary. A request for the United States to take title to any item of ~~Tribally~~tribally-purchased property may be made at any time. A request for the Secretary to take fee title to real property shall be expeditiously processed in accordance with applicable Federal law and regulation.

Commented [APB93]: Federal folks have the same concerns about property purchased and title with the Secretary.

Parking lot

§ 663.521 May the Secretary acquire title to property purchased from funds provided under a TTSGP compact or funding agreement?

(a) Yes. But only when a TTSGP compact, or portion thereof, is retroceded, reassumed, terminated, or expires, and the Secretary is required to transfer control of the compacted program to the Secretary of the Interior for continued service to the affected Tribe. For these cases, the property must be for a PSFA that the Secretary of the Interior would normally perform or undertake. Under such circumstances, the Secretary of Interior shall have the option to take title to any item of property purchased with funds provided under a TTSGP compact or funding agreement:

Commented [APB94]: Parking lot

- (1) Whose title has been transferred to a Tribe ~~or Intertribal consortium~~;
- (2) That is still in use in the program; and
- (3) That has a current fair market value, less the cost of improvements borne by the Tribe ~~or Intertribal consortium~~, in excess of \$5,000.

(b) If property referred to in [paragraph \(a\)](#) of this section is shared between one or more ongoing portions of the compact and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the Tribe ~~or Intertribal consortium~~ using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

USDOT Excess Property

§ 663.525 What is USDOT excess property?

USDOT excess property means property under the jurisdiction of the USDOT that is excess to any USDOT modal administrations' needs and the discharge of their responsibilities.

Commented [DOT95]: The Department does not have property. The DOT seeks an opportunity to revisit this issue and seek further clarification in workgroup.

Commented [APB96]: Cross-Reference Item 4

Commented [APB97]: Federal members note that these provisions may be stricken

Tribal members note.

§ 663.526 How can Tribes ~~or Intertribal consortiums~~ learn about USDOT excess property?

The Secretary shall not less than annually send to Tribes ~~and Intertribal consortiums~~ a listing of all excess USDOT personal property before reporting the property to GSA or to any other Federal

agency as excess. The listing shall identify the agency official to whom a request for donation shall be submitted.

§ 663.527 How can a Tribe ~~or Intertribal consortium~~ acquire excess USDOT property?

(a) The Tribe ~~or Intertribal consortium~~ shall submit to the Secretary a request for specific property that includes a statement of how the property is intended for use in connection with a TTSGP compact or funding agreement. The Secretary shall expeditiously process the request and shall exercise discretion in a way that gives maximum effect to the request of Tribes ~~or Intertribal consortiums~~ for the donation of excess USDOT property.

(b) If more than one request for the same item of personal property is submitted, the Secretary shall award the item to the requestor whose request is received on the earliest date. If two or more requests are received on the same date, the Secretary shall award the item to the requestor with the lowest transportation costs to deliver the excess USDOT property for use by the Tribe ~~or Intertribal consortium~~. The Secretary shall make the donation as expeditiously as possible.

(c) If more than one request for the same parcel of real property is submitted, the Secretary shall award the property to the Tribe ~~or Intertribal consortium~~ whose reservation, trust land, restricted fee or fee land is closest to the real property requested.

Commented [APB98]: .525, .526, and .527 are parking lot items.

§ 663.528 Who takes title to excess USDOT property donated to a Tribe ~~or Intertribal consortium~~?

The Tribe ~~or Intertribal consortium~~ takes title to donated excess USDOT property. The Secretary shall provide the Tribe ~~or Intertribal consortium~~ with all documentation needed to vest title in the Tribe ~~or Intertribal consortium~~.

Commented [DOT99]: DOT wishes to review further to consider requiring notice to potentially impacted Tribes.

Tribes note request

§ 663.529 Who takes title to any land that is part of excess USDOT real property donated to a Tribe ~~or Intertribal consortium~~?

(a) If a Tribe ~~or Intertribal consortium~~ requests donation of fee title to excess real property that includes land not held in trust for a Tribe, the Tribe ~~or Intertribal consortium~~ shall so specify in its request for donation. The Secretary shall take the necessary action under Federal law and regulations to transfer the title to the Tribe ~~or Intertribal consortium~~.

(b) If a Tribe ~~or Intertribal consortium~~ asks the Secretary to donate excess real property that includes land and requests that fee title to the land be held by the United States in trust for a Tribe, the requestor shall submit a resolution of support from the governing body of the Tribe in which the beneficial ownership is to be registered.

(1) If the donation request is submitted to the Secretary of Transportation, that Secretary shall take all steps necessary to transfer the land to the Secretary of the Interior with the Tribe's ~~or Intertribal consortium's~~ request and the Tribe's resolution.

(2) The Secretary shall not require the Tribe ~~or Intertribal consortium~~ to furnish any information in support of a request other than that required by law ~~or regulation~~.

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§ 663.530 May the Secretary elect to reacquire excess USDOT property whose title has been transferred to a Tribe ~~or Intertribal consortium~~?

Yes, but the only circumstances where the Secretary may elect to acquire title to USDOT property purchased is when the TTSGP compact or portion thereof is retroceded, reassumed, terminated, or expires, and the Secretary is required to transfer control of the compacted program to the Secretary of the Interior for continued service to the affected Tribe. Under such circumstances, the Secretary shall have the option to take title to any item of USDOT excess property:

- (1) Whose title has been transferred to a Tribe ~~or Intertribal consortium~~;
- (2) That is still in use in the program; and
- (3) That has a current fair market value, less the cost of improvements borne by the Tribe ~~or Intertribal consortium~~, in excess of \$5,000.

§ 663.531 Is excess USDOT real property to which a Tribe ~~or Intertribal consortium~~ has taken title, eligible for facilities operation and maintenance funding from the Secretary?

Yes, in accordance with 25 U.S.C. 5325(f)(1)-(2).

Excess or Surplus Government Property

§ 663.535 What is excess or surplus government property?

- (a) “Excess government property” is real or personal property under the control of a Federal agency, which is not required for the agency’s needs and the discharge of its responsibilities.
- (b) “Surplus government property” means excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration (GSA).

§ 663.536 How may a Tribe ~~or Intertribal consortium~~ receive excess or surplus government property of other agencies?

- (a) Upon the request of a Tribe that has executed a TTSGP compact, the Secretary shall notify GSA to request that the ~~Indian or Intertribal consortium~~ Tribe be provided the required authority to use to GSAXcess to identify and select excess or surplus property.
- (b) The Tribe ~~or Intertribal consortium~~ shall file a request for specific property with the GSA and with the Secretary on the same day, and shall state how the property is appropriate for use for any purpose(s) for which a TTSGP compact and funding agreement is authorized.
- (c) The Secretary shall expeditiously process such request and shall exercise discretion to acquire the property in the manner described in § [cite to earlier regulation] of this subpart.

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Commented [DOT101]: The Department seeks an opportunity to discuss this issue further with the Committee and workgroups. The sections covering excess and surplus equipment and property need to be jointly reviewed and dated to more accurately reflect the DOT process

Commented [APB102]: Cross-reference Item 4

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Commented [DOT103]: What is the authority to transfer property or equipment to a consortium?

(d) Upon approval of the Tribe ~~or Intertribal consortium's~~ request, the Secretary shall immediately request acquisition of the property from the GSA or the holding agency, as appropriate, by submitting the necessary documentation in order to acquire the requested property prior to the expiration of any "freeze" placed on the property by the Tribe ~~or Intertribal consortium~~.

(e) The Secretary shall specify that the property is requested for donation to a Tribe ~~or Intertribal consortium~~ pursuant to authority provided in 23 U.S.C. §207(l)(8).

(f) The Secretary shall request a waiver of any fees for transfer of the property in accordance with applicable Federal regulations.

§663.537 Who takes title to excess or surplus Federal property donated to a Tribe or Intertribal consortium?

(a) Title to any donated excess or surplus Federal personal property shall vest in the Tribe or Intertribal consortium upon taking possession.

(b) Legal title to donated excess or surplus Federal real property shall vest in the Tribe or Intertribal consortium upon acceptance by the Tribe or Intertribal consortium of a proper deed of conveyance.

(c) If the donation of excess or surplus Federal real property includes land owned by the United States but not held in trust for a Tribe, the Tribe or Intertribal consortium shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of a Tribe.

(1) If the Tribe or Intertribal consortium requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title to the Tribe or Intertribal consortium.

(2) If the Tribe or Intertribal consortium requests beneficial ownership with fee title to be held by the United States in trust for a Tribe:

(i) The Tribe or Intertribal consortium shall submit with its request a resolution of support from the governing body of the Tribe in which the beneficial ownership is to be registered.

(ii) If the donation request of the Tribe or Intertribal consortium is submitted to the Secretary of Transportation, that Secretary shall take all necessary steps to acquire the land and transfer it to the Secretary of the Interior and shall also forward the Tribe or Intertribal consortium's request and the Tribe's resolution.

(iii) The Secretary shall not require submission of any information other than that required by Federal law and regulation unless the Tribe has agreed to their inclusion in its Compact or funding agreement.

Commented [DOT104]: The Department seeks additional clarity from the Committee and workgroups: what is the basis for including sections on Federal property in this TTSGP regulation?

§ 663.538 If a TTSGP compact or portion thereof is retroceded, reassumed, terminated, or expires, may the Secretary reacquire title to excess or surplus Federal property of other agencies that was donated to a Tribe or Intertribal consortium?

No. The applicable Federal statutes do not grant the Secretary the authority to reacquire title to excess or surplus government property acquired from other agencies for donation to a Tribe or Intertribal consortium.

663#.539 When may a Tribe or Intertribal consortium dispose of or sell property acquired under this section?

The property acquired under this section must be used in a manner consistent with the justification submitted at acquisition. The Tribe should notify the Secretary whenever use of the property changes significantly and upon disposal or sale. The intent of this arrangement is to further the work of the transportation program not to generate a profit for the Tribe or intertribal consortium. As such, at the discretion of the Secretary access to surplus and excess property may be terminated for a Tribe or intertribal consortium.

SUBPART G – REGULATION WAIVERS

§ 663.550 What effect does this regulation have on Federal program guidelines, manual, or policy directives.

Subject to 23 U.S.C. 207(n), unless negotiated and agreed to by the Self-Governance Tribe and the Department in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any DOT or OMB circular, policy, manual, guidance, or rule adopted by the Department, except for regulations promulgated under section 207. ~~However, any guidance, policy, or circular required by law cannot be waived. In addition, the Department reserves the right to impose additional safety requirements to the TTSGP that are not part of this rulemaking.~~

§ 663.551 May a Tribe submit a written request to waive the application of a regulation promulgated under 23 U.S.C. 207?

Yes. In accordance with 23 U.S.C. 207(j)(2), a Tribe may submit to the Secretary a written request to waive application of a regulation promulgated under this section with respect to a compact or funding agreement. The request shall identify the regulation sought to be waived and the basis for the request.

§ 663.552 What is the process to approve or deny a request to waive the application of a regulation promulgated under 23 U.S.C. 207?

(a) Not later than 90 days after the date of receipt of a written request, the Secretary shall approve or deny the request in writing.

(b) The Secretary shall review any application by a Tribe for a waiver bearing in mind increasing opportunities for using flexible policy approaches at the Indian Tribal level.

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Commented [APB105]: Issue 4

Tribe proposes these sentences should be stricken.

Federal members state this was added as an alert, but they point to statute. Federal folks will look again. Understand that statute applies here.

(c) If the Secretary does not approve or deny a request submitted under subparagraph (a) on or before the last day of the 90-day period referred to in clause (a), the request shall be deemed approved.

(d) If the application for a waiver is not granted, the agency shall provide the applicant with the reasons for the denial as part of the written response required in clause (a).

(e) A decision by the Secretary under this subparagraph shall be final for the Department.

SUBPART H– RETROCESSION AND WITHDRAWAL

Commented [APB106]: Cross reference Item 5

Retrocession

§ 663.600 What is retrocession?

Retrocession means the return by a Tribe to the Secretary of any or all PSFAs, that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

§ 663.601 How does a Tribe retrocede a PSFA?

The Tribe submits a written notice by certified mail to the Secretary of its intent to retrocede. The notice must specifically identify those PSFAs being retroceded. The notice may also include a proposed effective date of the retrocession.

§ 663.602 What is the effective date of a retrocession?

In accordance with 23 U.S.C. 207(e)(2)(B), unless the request for retrocession is rescinded, the retrocession becomes effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of a specification, the retrocession becomes effective on the earlier of:

- (1) one (1) year after the date of submission of the request, or
- (2) the date on which the funding agreement expires; or
- (3) such date as may be mutually agreed upon by the Secretary and the retroceding Tribe, with respect to the Secretary of the Interior.

§ 663.603 What effect will a retrocession have on a retroceding a Tribe's rights to contract or compact under the ISDEAA Act?

As long as all eligibility criteria for the program is met, a retrocession request shall not negatively affect:

- (a) Any other Agreement or compact to which the retroceding Tribe is a party;

- (b) Any other Agreement or compact the retroceding Tribe may request; and
- (c) Any future request by such Tribe to enter into an Agreement or compact for the same program.

§ 663.604 Will retrocession adversely affect funding available for the retroceded program?

No. The Secretary shall ensure that future funding made available to the Tribe at the same level of funding that would have been available if there had been no retrocession.

Commented [APB107]: Federal members will draft language to ensure this provision works with grant funding.

Tribes will review.

§ 663.605 How are funds distributed when a Tribe fully or partially retrocedes from its compact or funding agreement?

(a) Any funds not obligated by the Tribe and associated with the Tribe's returned PSFAs, less close out costs, must be returned by the Tribe to the Secretary.

Commented [APB108]: Feds to propose changes if necessary. Tribes will review.

(b) The Secretary may:

- (1) reassume the remaining funding associated with the retroceded PSFAs (or portions thereof) included in the applicable compact or funding agreement;
- (2) out of such remaining funds, transfer the funds associated with Department of the Interior PSFAs (or portions thereof) to the Secretary of the Interior to carry out transportation services provided by the Secretary of the Interior; and
- (3) distribute funds not transmitted under (b) above in accordance with applicable law.

§ 663.606 What obligation does the retroceding Tribe have with respect to returning property that was provided by the Secretary under the compact or funding agreement and that was used in the operation of the retroceded program?

In accordance with 25 U.S.C. 5392(c), on the effective date of any retrocession, the retroceding Tribe, shall, at the option of the Secretary, deliver to the Secretary all requested property and equipment provided by the Secretary under the compact or funding agreement, to the extent used to carry out the retroceded PSFAs, which at the time of retrocession has a per item current fair market value in excess of \$5,000 at the time of the retrocession.

Commented [APB109]: Parking lot. Property matters.

Withdrawal

§ 663.610 May a Tribe withdraw from a participating Intertribal consortium?

Yes. A Tribe may fully or partially withdraw from a participating Intertribal consortium its share of any PSFAs, formula funds, grants, and State transferred funds included in a compact or funding agreement but only to the extent allowed by the terms and conditions of the Agreement in place between the Tribe and the Tribal consortium.

§ 663.611 When does a withdrawal become effective?

- (a) In accordance with 25 U.S.C. 5386(g)(1)(B), a withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating inter-Tribal consortium.
- (b) In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on:
- (1) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or
 - (2) Such date as may be mutually agreed upon by the Secretary, the withdrawing Tribe, and the participating Intertribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Tribe or Intertribal consortium.

§ 663.612 How are funds redistributed when a Tribe fully or partially withdraws from a compact or funding agreement and elects to enter into a compact with the Department?

If a Tribe that meets the eligibility criteria identified in 23 U.S.C. 207(b) fully or partially withdraws from a participating inter-Tribal consortium, the withdrawing Tribe is entitled to its Tribal share of all future funds supporting those PSFAs grants, formula funds, and state-transferred funds that the Tribe will be carrying out under its own compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-Tribal consortium).

§ 663.613 How are funds distributed when a Tribe fully or partially withdraws from a compact or funding agreement administered by an intertribal consortium serving more than one Tribe and the withdrawing Tribe elects not to or is not eligible to enter a compact?

All funds not obligated and expended by the intertribal consortium associated with the withdrawing Tribe's returned PSFAs shall be returned by the inter-Tribal consortium to the Department for further transfer based on the type of agreement the Tribe enters into with either the Department of Transportation or Interior.

Commented [APB110]: Include language handling a situation where a tribe withdraws and goes direct service.

**SUBPART I – ~~TERMINATION~~ COMPACT AND/OR FUNDING AGREEMENT
TERMINATION AND PROGRAM REASSUMPTION**

Commented [APB111]: Question of what "obligated and expended" means should be interpreted to accord with the consortium agreement.

Commented [APB112]: Reassumption throughout

§ 663.650 When can the Secretary ~~terminate-reassume~~ a compact or funding agreement?

In accordance with 23 U.S.C. 207(f)(2)(B), the Secretary may ~~terminate-reassume~~ a compact or funding agreement, or portion thereof, subject to the steps in this subpart, when the Secretary makes a specific finding, in writing, to the Tribe that the Secretary has found that there is:

- (a) imminent jeopardy to a trust asset, natural resources, or public health and safety that is caused by an act or omission of the Tribe and that arises out of a failure to carry out the compact or funding agreement, as determined by the Secretary; or

(b) gross mismanagement with respect to funds or programs transferred to the Tribe under the compact or funding agreement, as determined by the Secretary in consultation with the Inspector General of the Department, as appropriate.

§ 663.651 Can the Secretary ~~terminate~~ reassume a portion of a compact or funding agreement?

Yes. Subject to the provisions of this subpart, the Secretary may terminate a portion of the compact or funding agreement, including a particular PSFA if the Secretary has sufficient grounds to do so. Unless the Secretary makes specific findings that a compact or funding agreement as a whole meets the thresholds for termination in 663.650, the Secretary shall identify the narrowest portion of the compact or funding agreement the termination of which will alleviate the termination criteria identified in 663.650.

§ 663.652 What process must the Secretary follow before termination of a compact or funding agreement, or portion thereof?

Except as provided in §663.654 (immediate termination) prior to a termination becoming effective, the Secretary must:

- (a) provide written notice and a hearing on the record to the Tribe that is subject to the compact or funding agreement; and
- (b) Ensure the Tribe has not taken corrective action to remedy the mismanagement of funds or programs or the imminent jeopardy to a trust asset, natural resource, or public health and safety.

§ ###.604 Does the Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?

Yes, at the Tribe's request, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § ###.257(b).

§ ###.605 What happens if the Secretary determines that the Tribe has not corrected the conditions that the Secretary identified in the notice?

(a) The Secretary shall provide a second written notice by certified mail to the Tribe served by the compact or funding agreement that the compact or funding agreement will be terminated, in whole or in part.

(b) The second notice shall include:

- (1) The intended effective date of the termination;
- (2) The details and facts supporting the intended termination; and
- (3) Instructions that explain the Tribe's right to a formal hearing within 30 days of receipt of the notice.

§ 663.653 What is the earliest date on which a ~~termination~~ reassumption can be effective?

Commented [APB113]: Concerns from the federal reps that the hearing on the record is a process with no funding, there are no court reporters, and that this needed to be a matter for GC's office.

Tribes request reinsertion. Hearing on the record is statutory under (f)(C).

Except as provided in § 663.654, no PSFA may be ~~terminated-reassumed~~ by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Tribe with an opportunity to take corrective action in response to any adverse final ruling.

§ 663.654 Does the Secretary have the authority to immediately ~~terminate-reassumes~~ a PSFA?

In accordance with 23 U.S.C. 207(f)(2)(D), the Secretary, upon written notification to a Tribe that is subject to a compact or funding agreement, may immediately terminate the compact or funding agreement (or a portion thereof) if:

- a. The Secretary makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and
- b. The jeopardy arises out of a failure to carry out the compact or funding agreement.

663.655 If the Secretary ~~terminates-reassumes~~ a PSFA immediately, when must the Secretary provide the Tribe with a hearing?

In accordance with 23 U.S.C. 207(f)(2)(D)(ii), if the Secretary immediately ~~terminates-reassumes~~ a compact or funding agreement (or portion thereof), the Secretary shall provide the Tribe subject to the compact or agreement with a hearing on the record not later than 10 days after the date of such termination, unless the Tribe and the Secretary agree to an extension or agree that a hearing is not necessary.

Commented [DOT114]: The Department wishes to discuss with the Committee sections dealing with appeals and hearings and whether to provide more specifics. For example, does this section mean commencing a hearing no later than 10 days after a termination or the completion of a hearing within 10 days of a termination?

§ 663.656 What is the Secretary's burden of proof for a hearing or appeal of a decision to ~~terminate-reassumes~~ a compact or funding agreement (or portion thereof) under the subpart?

The Secretary shall have the burden of proof in demonstrating by clear and convincing evidence the validity of the grounds for the termination.

Commented [APB115]: Federal preference is to have language here that says the hearing must commence within 10 days, not be completed.

§ 663.657 To what extent may the Secretary require a Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the ~~terminated-reassumed~~ program?

On the effective date of any ~~termination-reassumption~~, the Tribe, shall, at the option of the Secretary deliver to the Secretary property and equipment provided by the Secretary under the compact or funding agreement, to the extent the property was used to directly carry out the reassumed program, service, function, or activity (or portion thereof), provided that at the time of termination the property has a per item current fair market value, in excess of \$5,000 at the time of the termination.

Commented [DOT116]: This provision appears to be duplicative of 663.606.

Commented [APB117]: Parking lot item about property applicability to the department.

§ 663.658 Upon termination, what happens to the funding associated with the terminated portions of a compact or funding agreement?

After a finding resulting in termination, the Secretary may reassume the unobligated and unexpended funds, ~~less close-out costs~~, associated with the reassumed PSFAs and transfer the funding in accordance with xxx.320.

Commented [APB118]: Removes close-out funds.

Commented [APB119]: Cross-reference should be updated.

Subpart J - DISCLAIMERS

§663.700 Are the provisions of an existing Tribal Transportation Program Agreement and Referenced Funding Agreement entered into between a Tribe and the FHWA under 23 U.S.C. 202(b)(7) effective after implementation of these regulations?

Yes. In accordance with 23 U.S.C. 207(k)(1)(A) and upon the election of a Tribe, the Secretary shall maintain in effect a Tribal Transportation Program Agreement and Referenced Funding Agreement entered into by the Tribe and the FHWA under the authority of 23 U.S.C. 202(b)(7).

§663.701 Can a Tribe enter into a Tribal Transportation Program Agreement and Referenced Funding Agreement, or renew an existing Agreement with the Secretary, through the FHWA, after the effective date of these regulations?

Yes. As authorized under 23 U.S.C. § 207(k)(1)(B), provided that the Tribe is eligible, a Tribe may enter into a Tribal Transportation Program Agreement and Referenced Funding Agreement under 23 U.S.C. 202(b)(7), or renew an existing Agreement after the effective date of these regulations and such agreements shall be lawful and binding on the parties.

§663.702 May a Tribe with a current Tribal Transportation Program Agreement and Referenced Funding Agreement under 23 U.S.C. 202(b)(7) also negotiate a Compact and Funding Agreement for some or all eligible PSFAs under this Part?

Yes. Provided that the Tribe is eligible to participate in the TTSGP as identified under Subpart B herein, the Tribe may elect to negotiate a Compact and Funding Agreement for Department PSFA's under this part, as long as it is accordance with all applicable Non-Duplication clauses.

SUBPART K - APPLICABILITY of ISDEAA

§ 663.750 What provisions of the ISDEAA apply to compacts and funding agreements developed under this Part?

Except to the extent in conflict with 23 U.S.C. 207, (as determined by the Secretary), the following provisions of the Indian Self-Determination and Education Assistance Act shall apply to compact and funding agreements developed under this Part (except that any reference to the Secretary of the Interior or the Secretary of Health and Human Services in such provisions shall be treated as a reference to the Secretary of Transportation):

- (1) Subsections (a), (b), (d), (g), and (h) of 25 U.S.C. 5386, relating to general provisions;
- (2) Subsections (b) through (e) and (g) of 25 U.S.C. 5387, relating to provisions relating to the Secretary.
- (3) Subsections (a), (b), (d), (e), (g), (h), (i), and (k) of 25 U.S.C. 5388, relating to transfer of funds.

Commented [APB120]: Looks like repeat of statute.

(4) Section 510 of 25 U.S.C. 5390 relating to Federal procurement laws and regulations.

(5) Section 511 of 25 U.S.C. 5391, relating to civil actions.

(6) Subsections (a)(1), (a)(2), and (c) through (f) of 25 U.S.C. 5392, relating to facilitation, except that subsection (c)(1) of that section shall be applied by substituting transportation facilities and other facilities' for 'school buildings, hospitals, and other facilities'.

(7) Subsections (a) and (b) of section 515 of 25 U.S.C. 5395, relating to disclaimers.

(8) Subsections (a) and (b) of section 516 of 25 U.S.C. 5396, relating to application of title I provisions.

(9) Section 518 of 25 U.S.C. 5398, relating to appeals.

SUBPART L – CONSTRUCTION

Commented [APB121]: Part 170 reference

Environmental

§ 663.800 Are eligible activities (PSFAs) carried out under the TTSGP required to comply with Federal environmental laws?

Yes. Eligible activities carried out with funds through the TTSGP must meet the requirements of applicable Federal environmental and cultural resource statutes, such as the National Environmental Policy Act and the National Historic Preservation Act.

§ 663.801 Is the Secretary responsible for compliance with Federal cultural resource and environmental statutes for eligible activities (PSFAs) under 23 U.S.C. 207?

Unless delegated to a Tribe, the Secretary remains responsible for final review and approval of environmental documents for all PSFAs included in a compact or funding agreement. The Tribes may conduct environmental review activities in accordance with these regulations.

Commented [APB122]: Place this item in a parking lot for further review to determine Secretarial authority to delegate.

§ 663.802 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe conducts Federal environmental reviews for eligible activities (PSFAs) under 23 U.S.C. 207?

Commented [APB123]: Place this item in a parking lot for further review to determine Secretarial authority

- (a) Tribes may manage the environmental review process and prepare the appropriate environment review documents in accordance with Federal requirements, however, unless delegated to the Tribe, the Secretary remains responsible for final review and approval of environmental documents, and any associated environmental determinations and findings for all activities included in a compact or funding agreement.
- (b) The Secretary makes determinations and approvals in accordance with Section 4(f) of the DOT Act, 23 U.S.C. 138 and 49 U.S.C. 303, as applicable.
- (c) As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide advice and technical assistance to the Self-Governance Tribe to assist the Self-Governance

Tribe in managing the Federal environmental review process and preparing environmental documents.

§ 663.803 What procedures does a Self-Governance Tribe follow to conduct environmental reviews for eligible activities (PSFAs) under the TTSGP?

Self-Governance Tribes comply with environmental laws by following, at the Tribe's election:

- (a) their own environmental review procedures; **or**
- (b) the environmental review procedures applicable to the particular source of funding.

Commented [DOT124]: DOT seeks the Committee's input on a revision to language in subsection (b). The intent was to make this language more general.

Commented [APB125]: Concerns that the Secretary cannot approve tribal procedures to comply with NEPA, since Secretary has its own requirements.

§ 663.804 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under 23 U.S.C. 207?

No. Unless specifically identified and included in the compact or funding agreement, a Tribe may at their option, choose to voluntarily comply with Executive Orders.

§ 663.805 Can DOT funds be used for Tribal environmental review of eligible activities (PSFAs)?

Yes. Tribal environmental review is an eligible expense unless specifically prohibited by law.

§ 663.806 Must further environmental review be conducted for eligible activities after DOT has approved the environmental documentation and made a determination?

If a substantial amount of time has passed since the determination, typically three years, and the activity taking place or the scope of the project has changed in a way that was not previously analyzed and could result in significant impacts, the Secretary will work with the Tribe to determine whether a re-evaluation or supplementation of the environmental documentation is warranted.

Commented [DOT126]: DOT wishes to discuss this provision with the Committee to obtain additional clarity. As drafted, it is not clear whether the DOT or the Tribe would make the ultimate determination.

Commented [APB127]: Missing Cat ex; 170.453

May be different categorical exclusion depending on funding streams; would want all that apply to apply, per fed drafters.

Commented [APB128]: Place 800 to 806 in a parking lot. Tribes make the point they should have authority for review on their own lands.

Federal reps: would it be amenable to state that tribes may comply with their own environmental provisions that meet or exceed.

Design and Construction Standards

§ 663.810 What design and construction standards may Tribes use under Tribal Self-Governance (PSFAs) under the TTSGP?

Self-Governance Tribes must utilize design and construction standards by following, at the Tribe's election:

- (a) Applicable Federal, State, Regional, or Municipal design and construction standards; or
- (b) Tribal design and construction standards which are consistent with or exceed applicable Federal, State, Regional, or Municipal design and construction standards.

Commented [APB129]: Tribal reps: Maintenance provisions were moved to property section above; ensure that maintenance provisions are maintained.

Force Account

§ 663.815 May Tribes ~~and Intertribal consortia~~ use Tribal force account procedures when carrying out construction projects under TTSGP compacts and funding agreements?

Yes. At the discretion of a Tribe ~~or Intertribal consortia~~, Tribal force account procedures may always be used on any Tribal transportation project pursuant to 23 U.S.C. 202(a)(3).

Procurement

§ 663.816 Do Federal procurement laws and regulations apply to construction project agreements performed under section 23 U.S.C. 207(i)?

No. Unless otherwise agreed to by the Tribe, no provision of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive Orders) shall apply to any construction project conducted under 23 U.S.C. 207(i). The Secretary and the Tribe may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction project agreement or funding agreement. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

§ 663.817 What should a Tribe do if it wishes to use a procurement procedure not provided in its established procurement management standards when carrying out construction projects under TTSGP compacts and funding agreements?

For a particular Tribal transportation project, if the Tribe wishes to use a procurement method that is not provided for in its established procurement management standards, the Tribe shall notify the Secretary for review and approval. The Secretary shall not require the Tribe ~~or intertribal consortia~~ to furnish any information in support of a request for an exemption other than that required by ~~law statute or regulation~~.

Commented [APB130]: Ensure this definition is wide enough to encompass all modes/types.

Commented [APB131]: Issue 4 Tribes request edits. Federal officials note request.

Formatted: Font color: Red, Strikethrough

Davis Bacon

§ 663.820 Do Davis Bacon wage rates apply to construction projects?

Davis Bacon wage rates do not apply to employees of Tribes ~~or Tribal Consortia~~ when the Tribes ~~or Tribal Consortia~~ is carrying out the work. Davis Bacon rates do apply to all other laborers and mechanics employed by contractors and subcontractors in the construction, alteration, and repair in connection with a compact or funding agreement.

Commented [APB132]: Subparts are missing from tribal draft (right of way, construction, etc.)

Federal response is that those provisions are not appropriate for DOT regulation.

ONGOING DISCUSSION ABOUT THIS MATTER.

Commented [DOT133]: The Department wishes to review with the Committee this section dealing with appeals and hearings.

Commented [APB134]: Work through pre-award appeals issues
Cross reference Items 8 & 10 for Post-award appeals.

SUBPART M – APPEALS

§ 663.900 What is the Secretary's burden of proof for appeals under this part?

As required by 25 U.S.C. 5398, the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

§663.901 For the purposes of 25 U.S.C. 5331, does the term contract include compacts and funding agreements entered into under this part?

Yes. For the purposes of 25 U.S.C. 5331, the term contract includes compacts and funding agreements entered into under this part.

§663.910 What decisions may a Tribe appeal under this part?

A Tribe may appeal a decision:

- (a) To reject a final offer, or a portion thereof, of a compact or funding agreement.
- (b) To reject a proposed amendment to a compact or funding agreement;
- (c) To terminate a compact or funding agreement, in whole or in part; or
- (d) Regarding a Tribe's eligibility to participate in the TTSGP, including a decision regarding a Tribe's financial stability, financial management capacity/capability, or transportation program management capability.

Commented [APB135]: Pre-award dispute in this section. Others may come under jurisdiction of CBCA if post-award.

§663.912 What procedures apply to _____ proceedings?

The _____ may use the procedures set forth in [regulatory section with entity's rules] as a guide.

Commented [APB136]: Looking to the Department to identify office or entity that will handle disputes (pre-award)716

§663.913 How does a Tribe know where and when to file its appeal from decisions made by the Department?

Commented [APB137]: same

Every decision in any of the areas listed in §663.716-910 must contain information which shall tell the Tribe where and when to file the Tribe's appeal. Each decision shall include the following statement:

Commented [APB138]: Unclear reference

Within 30 days of the receipt of this decision, you may request an informal conference under ## CFR 663.722, or appeal this decision under ## CFR 663.726 to the _____. Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the _____ under ## CFR 663.2013 shall be filed with the _____ by certified mail or by hand delivery at the following address: [address of appeal body]. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the _____ that you have served these copies

Commented [DOT139]: The Department wishes to discuss this provision with the Committee.

Commented [APB140]: Federal question about being specific on date of receipt, and wonder if this can be changed to say the date of mailing or date shown in a certified mail receipt.

Tribal concerns about similarity of process across departments, and note that the question may arise but is often clarified by a stamp or evidence of delivery.

§663.914 What authority does the _____ have under this part?

The _____ has the authority:

- (a) to conduct a hearing on the record;
- (b) to permit the parties to engage in full discovery relevant to any issue raised in the matter;
- (c) to issue a recommended decision; *and*
- (d) to take such action as necessary to ~~insure~~ensure rights specified in [§663.732].

Commented [APB141]: Title V regs cross reference 137.430 here.

Informal Conferences

§663.920 Does a Tribe have any options besides an appeal?

Yes. The Tribe may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. Or, the Tribe may, in lieu of filing an administrative appeal under this subpart or upon completion of an informal conference, file an action in Federal court pursuant to 25 U.S.C. 5331.

Commented [DOT142]: DOT wishes to discuss this concept with the Committee to obtain additional clarity. How is an informal conference different from a formal hearing? How are these conferences conducted?

§663.921 How does a Tribe request an informal conference?

The Tribe must file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Tribe may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Tribe mails the request, it will be considered filed on the date the Tribe mailed it by certified mail.

Commented [DOT143]: The Department wishes to discuss this provision with the Committee to obtain additional clarity.

Commented [APB144]: Same concerns about specificity of when clock starts to run.

§663.922 How is an informal conference held?

- (a) The informal conference must be held within 30 days of the date the request was received, unless the Tribe and the authorized representative of the Secretary agree on another date.
- (b) If possible, the informal conference will be held at the Tribe's office. If the meeting cannot be held at the Tribe's office and is held more than fifty miles from its office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Tribe.
- (c) The informal conference must be conducted by a designated representative of the Secretary.
- (d) Only people who are the designated representatives of the Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference.

Commented [DOT145]: DOT wishes to discuss this concept with the Committee to obtain additional clarity

Commented [DOT146]: The Department would like to understand what procedural rules govern how informal conferences must be conducted.

§663.923 What happens after the informal conference?

- (a) Within 10 days of the informal conference, the person who conducted the informal conference must prepare and mail to the Tribe a written report which summarizes what happened at the informal conference and a recommended decision.

Commented [APB147]: Questions here about the process for multi-day conference and what the procedure for extending or otherwise defining procedure would be.

- (b) Every report of an informal conference must contain the following language:

“Within 30 days of the receipt of the recommended decision from the informal conference, you may file an appeal of the initial decision of the DOT agency with the _____ (____) under ## CFR 663.726. You may request a hearing on the record. An appeal to the _____ under ## CFR 663.726 shall be filed with the _____ by certified mail or hand delivery at the following address: [appeal agency address]. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the _____ that you have served these copies. Alternatively you may file an action in Federal court pursuant to 25 U.S.C. 5331.”

Commented [DOT148]: DOT would like to discuss this verbiage with the Committee to obtain additional clarity regarding the timing of the recommended decision.

Commented [APB149]: Noted concerns from above re specificity of dates and timing.

§663.924 Is the recommended decision from the informal conference final for the Secretary?

No. If the Tribe is dissatisfied with the recommended decision from the informal conference, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under §663.727, the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to 25 U.S.C. 5331.

Commented [DOT150]: DOT would like to discuss this verbiage with the Committee to obtain additional clarity regarding the timing of the recommended decision.

Commented [DOT151]: DOT wishes to discuss this concept with the Committee to obtain additional clarity regarding whether the recommended decision becomes the Secretary's final decision without further action/review by the Secretary.

§663.925 How does a Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Tribe decides to appeal the initial decision, it must file a notice of appeal with the _____ within 30 days of receiving either the initial decision or the recommended decision from the informal conference.

Commented [DOT152]: DOT would like to discuss this verbiage with the Committee to obtain additional clarity regarding the timing of the initial or recommended decision.

(b) The Tribe may either hand-deliver the notice of appeal to the _____, or mail it by certified mail, return receipt requested. If the Tribe mails the Notice of Appeal, it will be considered filed on the date the Tribe mailed it by certified mail. The Tribe should mail the notice of appeal to: [appeal board address].

(c) The Notice of Appeal must:

- (1) Briefly state why the Tribe thinks the initial decision is wrong;
- (2) Briefly identify the issues involved in the appeal; and
- (3) State whether the Tribe wants a hearing on the record, or whether the Tribe wants to waive its right to a hearing.

(d) The Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Tribe must certify to the _____ that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the _____ under the Act.

(f) In lieu of filing an administrative appeal a Tribe may proceed directly to Federal court pursuant to 25 U.S.C. 5331.

§663.926 May a Tribe get an extension of time to file a notice of appeal?

Yes. If the Tribe needs additional time, the Tribe may request an extension of time to file its Notice of Appeal with the ____ within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Tribe must be in writing, and must give a reason for not filing its notice of appeal within the 30-day time period. If the Tribe has a valid reason for not filing its notice of appeal on time, it shall receive an extension.

Commented [DOT153]: DOT would like to discuss this verbiage with the Committee to obtain additional clarity regarding the timing of the recommended decision.

Commented [DOT154]: DOT would like to discuss this verbiage with the Committee to obtain additional clarity regarding what constitutes a valid decision and who has authority to make that determination.

Commented [APB155]: Questions about what this entails, and whose decision it is. Intent is hearing officer, reason is not defined elsewhere.

§663.927 What happens after a Tribe files an appeal?

(a) Within 5 days of receiving the Tribe's notice of appeal, the ____ will decide whether the appeal falls under §663.746910. If so, the Tribe is entitled to a hearing.

(b) If the ____ cannot make that decision based on the information included in the notice of appeal, the ____ may ask for additional statements from the Tribe, or from the appropriate Federal agency. If the ____ asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the ____ decides that the Tribe is not entitled to a hearing or if the Tribe has waived its right to a hearing on the record, the ____ will dismiss the appeal and inform the Tribe that it is not entitled to a hearing or has waived its right to a hearing.

Commented [DOT156]: The Department would like to discuss this provision with the Committee to obtain additional clarity.

Commented [APB157]: Question from federal reps about appealability of this decision. Intent is that this decision would be final and then become appealable.

Hearings

§663.930 How is a hearing arranged?

(a) If a hearing is to be held, the ____ will refer the Tribe's case to the [Hearings Division] of the [chosen office for hearings]. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

- (1) A briefing and discovery schedule;
- (2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;
- (3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§663.931 What happens when a hearing is necessary?

(a) The ALJ must hold a hearing within 90 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the Secretary must file and serve the Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§663.932 What is the Secretary's burden of proof for appeals covered by §663.716?

As required by 25 U.S.C. 5398 and 663.xxx above, the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

§663.933 What rights do Tribes and the Secretary have during the appeal process?

Both the Tribe and the Secretary have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

(d) Introduce oral or documentary evidence, or both;

Commented [DOT158]: DOT wishes to discuss this provision with the Committee to obtain additional clarity. Does this mean a hearing must be initiated or that a hearing must be completed with an ALJ decision made within 90 days?

Commented [APB159]: Believe this means initiated.

Commented [APB160]: Federal reps: Would have a hard time making this argument to DOT leadership given this is not required in statute.

Tribal reps: note this issue.

Commented [DOT161]: The Department wishes to discuss this provision with the Committee to obtain additional clarity.

- (e) Require that oral testimony be under oath;
- (f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;
- (g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;
- (h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and
- (i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§663.934 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision must contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Tribe has the right to object to the recommended decision.

(b) The recommended decision shall contain the following statement:

"Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 663.734. An appeal to the Secretary under ## CFR 663.734 shall be filed at the following address: [Secretarial Address]. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final."

§663.935 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections must be served on all other parties. The recommended decision shall become final for the Secretary 30 days after the Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final for the Secretary.

§663.936 If a Tribe objects to the recommended decision, what will the Secretary do?

(a) The Secretary has 45 days from the date it receives the final authorized submission in the appeal to modify, adopt, or reverse the recommended decision. The Secretary also may remand the case to the ____ for further proceedings. If the Secretary does not modify or reverse the recommended decision or remand the case to the ____ during that time, the recommended

Commented [APB162]: Question about the right of the secretary to appeal the decision of an ALJ. This depends on where the hearing is held and if the appeal goes to the Secretary herself or is elsewhere.

Commented [DOT163]: DOT wishes to obtain additional clarity with respect to this provision. Is it only the Tribe that has the right to file an objection to the recommended decision? Or is it both parties to the appeal? Subsection (b) of this section and section 663.935 seem to indicate that both parties have the ability to file an objection.

Commented [DOT164]: DOT wishes to obtain additional clarity regarding the timing element in this provision. (Timing)

Commented [APB165]: Federal questions are addressed under 935.

Commented [DOT166]: DOT wishes to obtain additional clarity regarding this provision: does the Secretary have the ability to review/revise the recommended decision (even if neither party files an objection)?

Commented [DOT167]: DOT wishes to obtain additional clarity regarding the timing element of this provision.

Commented [DOT168]: DOT wishes to obtain additional clarity from the Committee regarding what constitutes a final authorized submission and how much time is allowed to submit them. For example, can someone file a response to an objection and how much time is allowed to file?

Commented [APB169]: Flag this item for rewording or a more precise definition

Commented [DOT170]: DOT wishes to obtain additional clarity from the Committee regarding this sentence. Does this mean that if the Secretary takes no action during the 45-day period, the recommended decision will automatically become final?

decision automatically becomes final.

Commented [APB171]: Clean up language about what is final and when.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

- (1) Be in writing;
- (2) Specify the findings of fact or conclusions of law that are modified or reversed;
- (3) Give reasons for the decision, based on the record; and
- (4) State that the decision is final for the Department.

§ 663.937 Will an appeal adversely affect the Tribe's rights in other compact, funding negotiations, or construction project agreement?

No. A pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

§ 663.938 Will the decisions on appeal be available for the public to review?

Yes. All final decisions must be published for the Department under this subpart. Decisions can be found on the Department's website.

APPEALS OF IMMEDIATE TERMINATION OF A SELF-GOVERNANCE PROGRAM

§ 663.940 Will there be a hearing?

Yes. Unless the Self-Governance Tribe waives its right to a hearing in writing, the Secretary shall provide the Tribe with a hearing on the record not later than 10 days after the date of such termination. If possible, the hearing will be held at the office of the Tribe. If the hearing is held more than 50 miles from the office of the Tribe, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Tribe.

Commented [DOT172]: DOT wishes to obtain additional clarity regarding the timing element in this provision. Does this mean a completed hearing and a decision within 10 days of a termination?

Commented [APB173]: Means commencing within 10 days.

§ 663.941 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Tribe has the right to object to the recommended decision.

Commented [DOT174]: DOT wishes to obtain additional clarity regarding this provision: Can any party object to a recommended decision if it is adverse to that party's position?

Commented [APB175]: Objections may be made by any party, if within the Sec's office, process may look different.

(b) The recommended decision must contain the following statement:

Commented [DOT176]: DOT wishes to obtain additional clarity regarding the timing element in this provision. (noted)

“Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under § 663. An appeal to the Secretary as defined in § 663.??? shall be filed at the following address: **INSERT ADDRESS**. If an appeal is not received within 15 days, the recommended decision will become final.”

§ 663.942 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

Commented [DOT177]: DOT wishes to obtain additional clarity regarding the timing element in this provision.

§ 663.943 If a Tribe objects to the recommended decision, what action will the Secretary take?

(a) The Secretary has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

- (1) Be in writing;
- (2) Specify the findings of fact or conclusions of law that are modified or reversed;
- (3) Give reasons for the decision, based on the record; and
- (4) State that the decision is final for the Secretary.

§ 663.944 Will an immediate termination appeal adversely affect the Tribe's rights in other self-governance negotiations?

No. A pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project or program agreement.

Commented [APB178]: Missing EAJA fees; tribal committee members request that this be put back in. Federal representatives note the request.