

23 USC 207: Tribal transportation self-governance program

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§207. Tribal transportation self-governance program

(a) **ESTABLISHMENT.**-Subject to the requirements of this section, the Secretary shall establish and carry out a program to be known as the tribal transportation self-governance program. The Secretary may delegate responsibilities for administration of the program as the Secretary determines appropriate.

(b) ELIGIBILITY.-

(1) **IN GENERAL.**-Subject to paragraphs (2) and (3), an Indian tribe shall be eligible to participate in the program if the Indian tribe requests participation in the program by resolution or other official action by the governing body of the Indian tribe, and demonstrates, for the preceding 3 fiscal years, financial stability and financial management capability, and transportation program management capability.

(2) **CRITERIA FOR DETERMINING FINANCIAL STABILITY AND FINANCIAL MANAGEMENT CAPACITY.**-For the purposes of paragraph (1), evidence that, during the preceding 3 fiscal years, an Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe's self-determination contracts or self-governance funding agreements with any Federal agency shall be conclusive evidence of the required financial stability and financial management capability.

(3) **CRITERIA FOR DETERMINING TRANSPORTATION PROGRAM MANAGEMENT CAPABILITY.**-The Secretary shall require an Indian tribe to demonstrate transportation program management capability, including the capability to manage and complete projects eligible under this title and projects eligible under chapter 53 of title 49, to gain eligibility for the program.

(c) COMPACTS.-

(1) **COMPACT REQUIRED.**-Upon the request of an eligible Indian tribe, and subject to the requirements of this section, the Secretary shall negotiate and enter into a written compact with the Indian tribe for the purpose of providing for the participation of the Indian tribe in the program.

(2) **CONTENTS.**-A compact entered into under paragraph (1) shall set forth the general terms of the government-to-government relationship between the Indian tribe and the United States under the program and other terms that will continue to apply in future fiscal years.

(3) **AMENDMENTS.**-A compact entered into with an Indian tribe under paragraph (1) may be amended only by mutual agreement of the Indian tribe and the Secretary.

(d) ANNUAL FUNDING AGREEMENTS.-

(1) **FUNDING AGREEMENT REQUIRED.**-After entering into a compact with an Indian tribe under subsection (c), the Secretary shall negotiate and enter into a written annual funding agreement with the Indian tribe.

(2) CONTENTS.-**(A) IN GENERAL.-**

(i) **FORMULA FUNDING AND DISCRETIONARY GRANTS.**-A funding agreement entered into with an Indian tribe shall authorize the Indian tribe, as determined by the Indian tribe, to plan, conduct, consolidate, administer, and receive full tribal share funding, tribal transit formula funding, and funding to tribes from discretionary and competitive grants administered by the Department for all programs, services, functions, and activities (or portions thereof) that are made available to Indian tribes to carry out tribal transportation programs and programs, services, functions, and activities (or portions thereof) administered by the Secretary that are otherwise available to Indian tribes.

(ii) TRANSFERS OF STATE FUNDS.-

(I) **INCLUSION OF TRANSFERRED FUNDS IN FUNDING AGREEMENT.**-A funding agreement entered into with an Indian tribe shall include Federal-aid funds apportioned to a State under chapter 1 if the State elects to provide a portion of such funds to the Indian tribe for a project eligible under section 202(a). The provisions of this section shall be in addition to the methods for making funding contributions described in section 202(a) (9). Nothing in this section shall diminish the authority of the Secretary to provide funds to an Indian tribe under section 202(a)(9).

(II) METHOD FOR TRANSFERS.-If a State elects to provide funds described in subclause (I) to an Indian tribe-
(aa) the transfer may occur in accordance with section 202(a)(9); or
(bb) the State shall transfer the funds back to the Secretary and the Secretary shall transfer the funds to the Indian tribe in accordance with this section.

(III) RESPONSIBILITY FOR TRANSFERRED FUNDS.-Notwithstanding any other provision of law, if a State provides funds described in subclause (I) to an Indian tribe-
(aa) the State shall not be responsible for constructing or maintaining a project carried out using the funds or for administering or supervising the project or funds during the applicable statute of limitations period related to the construction of the project; and
(bb) the Indian tribe shall be responsible for constructing and maintaining a project carried out using the funds and for administering and supervising the project and funds in accordance with this section during the applicable statute of limitations period related to the construction of the project.

(B) ADMINISTRATION OF TRIBAL SHARES.-The tribal shares referred to in subparagraph (A) shall be provided without regard to the agency or office of the Department within which the program, service, function, or activity (or portion thereof) is performed.

(C) FLEXIBLE AND INNOVATIVE FINANCING.-

(i) IN GENERAL.-A funding agreement entered into with an Indian tribe under paragraph (1) shall include provisions pertaining to flexible and innovative financing if agreed upon by the parties.

(ii) TERMS AND CONDITIONS.-

(I) AUTHORITY TO ISSUE REGULATIONS.-The Secretary may issue regulations to establish the terms and conditions relating to the flexible and innovative financing provisions referred to in clause (i).

(II) TERMS AND CONDITIONS IN ABSENCE OF REGULATIONS.-If the Secretary does not issue regulations under subclause (I), the terms and conditions relating to the flexible and innovative financing provisions referred to in clause (i) shall be consistent with-

(aa) agreements entered into by the Department under-

(AA) section 202(b)(7); and

(BB) section 202(d)(5), as in effect before the date of enactment of MAP-21 (Public Law 112-141); or

(bb) regulations of the Department of the Interior relating to flexible financing contained in part 170 of title 25, Code of Federal Regulations, as in effect on the date of enactment of the FAST Act.

(3) TERMS.-A funding agreement shall set forth-

(A) terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered by the Indian tribe; and

(B) for items identified in subparagraph (A)-

(i) the general budget category assigned;

(ii) the funds to be provided, including those funds to be provided on a recurring basis;

(iii) the time and method of transfer of the funds;

(iv) the responsibilities of the Secretary and the Indian tribe; and

(v) any other provision agreed to by the Indian tribe and the Secretary.

(4) SUBSEQUENT FUNDING AGREEMENTS.-

(A) APPLICABILITY OF EXISTING AGREEMENT.-Absent notification from an Indian tribe that the Indian tribe is withdrawing from or retroceding the operation of 1 or more programs, services, functions, or activities (or portions thereof) identified in a funding agreement, or unless otherwise agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

(B) EFFECTIVE DATE OF SUBSEQUENT AGREEMENT.-The terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.

(5) CONSENT OF INDIAN TRIBE REQUIRED.-The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe that is subject to the agreement unless such terms are required by Federal law.

(e) GENERAL PROVISIONS.-

(1) REDESIGN AND CONSOLIDATION.-

(A) IN GENERAL.-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.

(2) RETROCESSION.-

(A) IN GENERAL.-

(i) AUTHORITY OF INDIAN TRIBES.-An Indian tribe may retrocede (fully or partially) to the Secretary programs, services, functions, or activities (or portions thereof) included in a compact or funding agreement.

(ii) REASSUMPTION OF REMAINING FUNDS.-Following a retrocession described in clause (i), the Secretary may-

(I) reassume the remaining funding associated with the retroceded programs, functions, services, and activities (or portions thereof) included in the applicable compact or funding agreement;

(II) out of such remaining funds, transfer funds associated with Department of Interior programs, services, functions, or activities (or portions thereof) to the Secretary of the Interior to carry out transportation services provided by the Secretary of the Interior; and

(III) distribute funds not transferred under subclause (II) in accordance with applicable law.

(iii) CORRECTION OF PROGRAMS.-If the Secretary makes a finding under subsection (f)(2)(B) and no funds are available under subsection (f)(2)(A)(ii), the Secretary shall not be required to provide additional funds to complete or correct any programs, functions, services, or activities (or portions thereof).

(B) EFFECTIVE DATE.-Unless the Indian tribe rescinds a request for retrocession, the retrocession shall become effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of such a specification, the retrocession shall become effective on-

(i) the earlier of-

(I) 1 year after the date of submission of the request; or

(II) the date on which the funding agreement expires; or

(ii) such date as may be mutually agreed upon by the parties and, with respect to Department of the Interior programs, functions, services, and activities (or portions thereof), the Secretary of the Interior.

(f) PROVISIONS RELATING TO SECRETARY.-

(1) DECISIONMAKER.-A decision that relates to an appeal of the rejection of a final offer by the Department shall be made either-

(A) by 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

(B) by an administrative judge.

(2) TERMINATION OF COMPACT OR FUNDING AGREEMENT.-

(A) AUTHORITY TO TERMINATE.-

(i) PROVISION TO BE INCLUDED IN COMPACT OR FUNDING AGREEMENT.-A compact or funding agreement shall include a provision authorizing the Secretary, if the Secretary makes a finding described in subparagraph (B), to-

(I) terminate the compact or funding agreement (or a portion thereof); and

(II) reassume the remaining funding associated with the reassumed programs, functions, services, and activities included in the compact or funding agreement.

(ii) TRANSFERS OF FUNDS.-Out of any funds reassumed under clause (i)(II), the Secretary may transfer the funds associated with Department of the Interior programs, functions, services, and activities (or portions thereof) to the Secretary of the Interior to provide continued transportation services in accordance with applicable law.

(B) FINDINGS RESULTING IN TERMINATION.-The finding referred to in subparagraph (A) is a specific finding of-

(i) imminent jeopardy to a trust asset, natural resources, or public health and safety that is caused by an act or omission of the Indian tribe and that arises out of a failure to carry out the compact or funding agreement, as determined by the Secretary; or

(ii) gross mismanagement with respect to funds or programs transferred to the Indian tribe under the compact or funding agreement, as determined by the Secretary in consultation with the Inspector General of the Department, as appropriate.

(C) PROHIBITION.-The Secretary shall not terminate a compact or funding agreement (or portion thereof) unless-

(i) the Secretary has first provided written notice and a hearing on the record to the Indian tribe that is subject to the compact or funding agreement; and

(ii) the Indian 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.

(D) EXCEPTION.-

(i) IN GENERAL.-Notwithstanding subparagraph (C), the Secretary, upon written notification to an Indian tribe that is subject to a compact or funding agreement, may immediately terminate the compact or funding agreement (or portion thereof) if-

(I) the Secretary makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and

(II) the jeopardy arises out of a failure to carry out the compact or funding agreement.

(ii) HEARINGS.-If the Secretary terminates a compact or funding agreement (or portion thereof) under clause (i), the Secretary shall provide the Indian tribe subject to the compact or agreement with a hearing on the record not later than 10 days after the date of such termination.

(E) BURDEN OF PROOF.-In any hearing or appeal involving a decision to terminate a compact or funding agreement (or portion thereof) under this paragraph, the Secretary shall have the burden of proof in demonstrating by clear and convincing evidence the validity of the grounds for the termination.

(g) COST PRINCIPLES.-In administering funds received under this section, an Indian tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by section 106 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1),¹ other provisions of law, or by any exemptions to applicable Office of Management and Budget circulars subsequently granted by the Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit conducted pursuant to this subsection shall be subject to the provisions of section 106(f) of that Act (25 U.S.C. 450j-1(f)).¹

(h) TRANSFER OF FUNDS.-The Secretary shall provide funds to an Indian tribe under a funding agreement in an amount equal to-

(1) the sum of the funding that the Indian tribe would otherwise receive for the program, function, service, or activity in accordance with a funding formula or other allocation method established under this title or chapter 53 of title 49; 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.

(i) CONSTRUCTION PROGRAMS.-

(1) STANDARDS.-Construction projects carried out under programs administered by an Indian tribe with funds transferred to the Indian tribe pursuant to a funding agreement entered into under this section shall be constructed pursuant to the construction program standards set forth in applicable regulations or as specifically approved by the Secretary (or the Secretary's designee).

(2) MONITORING.-Construction programs shall be monitored by the Secretary in accordance with applicable regulations.

(j) FACILITATION.-

(1) SECRETARIAL INTERPRETATION.-Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate-

(A) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in compacts and funding agreements; and

(B) the implementation of the compacts and funding agreements.

(2) REGULATION WAIVER.-

(A) IN GENERAL.-An Indian 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.

(B) APPROVALS AND DENIALS.-

(i) IN GENERAL.-Not later than 90 days after the date of receipt of a written request under subparagraph (A), the Secretary shall approve or deny the request in writing.

(ii) REVIEW.-The Secretary shall review any application by an Indian tribe for a waiver bearing in mind increasing opportunities for using flexible policy approaches at the Indian tribal level.

(iii) DEEMED APPROVAL.-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 (i), the request shall be deemed approved.

(iv) DENIALS.-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 (i).

(v) FINALITY OF DECISIONS.-A decision by the Secretary under this subparagraph shall be final for the Department.

(k) DISCLAIMERS.-

(1) EXISTING AUTHORITY.-Notwithstanding any other provision of law, upon the election of an Indian tribe, the Secretary shall-

- (A) maintain current tribal transportation program funding agreements and program agreements; or
- (B) enter into new agreements under the authority of section 202(b)(7).

(2) LIMITATION ON STATUTORY CONSTRUCTION.-Nothing in this section may be construed to impair or diminish the authority of the Secretary under section 202(b)(7).

(l) APPLICABILITY OF INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.-Except to the extent in conflict with this section (as determined by the Secretary), the following provisions of the Indian Self-Determination and Education Assistance Act shall apply to compact and funding agreements (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 section 506 of such Act (25 U.S.C. 458aaa-5),¹ relating to general provisions.

(2) Subsections (b) through (e) and (g) of section 507 of such Act (25 U.S.C. 458aaa-6),¹ relating to provisions relating to the Secretary of Health and Human Services.

(3) Subsections (a), (b), (d), (e), (g), (h), (i), and (k) of section 508 of such Act (25 U.S.C. 458aaa-7),¹ relating to transfer of funds.

(4) Section 510 of such Act (25 U.S.C. 458aaa-9),¹ relating to Federal procurement laws and regulations.

(5) Section 511 of such Act (25 U.S.C. 458aaa-10),¹ relating to civil actions.

(6) Subsections (a)(1), (a)(2), and (c) through (f) of section 512 of such Act (25 U.S.C. 458aaa-11),¹ 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 such Act (25 U.S.C. 458aaa-14),¹ relating to disclaimers.

(8) Subsections (a) and (b) of section 516 of such Act (25 U.S.C. 458aaa-15),¹ relating to application of title I provisions.

(9) Section 518 of such Act (25 U.S.C. 458aaa-17),¹ relating to appeals.

(m) DEFINITIONS.-

(1) IN GENERAL.-In this section, the following definitions apply (except as otherwise expressly provided):

(A) COMPACT.-The term "compact" means a compact between the Secretary and an Indian tribe entered into under subsection (c).

(B) DEPARTMENT.-The term "Department" means the Department of Transportation.

(C) ELIGIBLE INDIAN TRIBE.-The term "eligible Indian tribe" means an Indian tribe that is eligible to participate in the program, as determined under subsection (b).

(D) FUNDING AGREEMENT.-The term "funding agreement" means a funding agreement between the Secretary and an Indian tribe entered into under subsection (d).

(E) INDIAN TRIBE.-The term "Indian 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 an Indian tribe has authorized another Indian tribe, an intertribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this section, the authorized Indian tribe, intertribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term "Indian tribe" as used in this section shall include such other authorized Indian tribe, intertribal consortium, or tribal organization.

(F) PROGRAM.-The term "program" means the tribal transportation self-governance program established under this section.

(G) SECRETARY.-The term "Secretary" means the Secretary of Transportation.

(H) TRANSPORTATION PROGRAMS.-The term "transportation programs" means all programs administered or financed by the Department under this title and chapter 53 of title 49.

(2) APPLICABILITY OF OTHER DEFINITIONS.-In this section, the definitions set forth in sections 4 and 505¹ of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b; 458aaa)¹ apply, except as otherwise expressly provided in this section.

(n) REGULATIONS.-

(1) IN GENERAL.-

(A) PROMULGATION.-Not later than 90 days after the date of enactment of the FAST Act, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5 to negotiate and promulgate such regulations as are necessary to carry out this section.

(B) PUBLICATION OF PROPOSED REGULATIONS.-Proposed regulations to implement this section shall be published in the Federal Register by the Secretary not later than 42 months after such date of enactment.

(C) EXPIRATION OF AUTHORITY.-The authority to promulgate regulations under subparagraph (A) shall expire 48 months after such date of enactment.

(D) EXTENSION OF DEADLINES.-A deadline set forth in subparagraph (B) or (C) may be extended up to 180 days if the negotiated rulemaking committee referred to in paragraph (2) concludes that the committee cannot meet the deadline and the Secretary so notifies the appropriate committees of Congress.

(2) COMMITTEE.-

(A) IN GENERAL.-A negotiated rulemaking committee established pursuant to section 565 of title 5 to carry out this subsection shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this title.

(B) REQUIREMENTS.-The committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

(C) ADAPTATION OF PROCEDURES.-The Secretary shall 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.

(3) Effect.-The lack of promulgated regulations shall not limit the effect of this section.

(4) EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCE, AND RULES.-Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except regulations promulgated under this section.

(Added Pub. L. 114–94, div. A, title I, §1121(a), Dec. 4, 2015, 129 Stat. 1359 ; amended Pub. L. 115–235, §1, Aug. 14, 2018, 132 Stat. 2443 .)

EDITORIAL NOTES

REFERENCES IN TEXT

The date of enactment of MAP–21, referred to in subsec. (d)(2)(C)(ii)(II)(aa)(BB), is deemed to be Oct. 1, 2012, see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of this title.

The date of enactment of the FAST Act, referred to in subsecs. (d)(2)(C)(ii)(II)(bb) and (n)(1)(A), is the date of enactment of Pub. L. 114–94, which was approved Dec. 4, 2015.

The Indian Self-Determination and Education Assistance Act, referred to in subsecs. (g), (l), and (m) (2), is Pub. L. 93–638, Jan. 4, 1975, 88 Stat. 2203 , which was classified principally to subchapter II (§450 et seq.) of chapter 14 of Title 25, Indians, prior to editorial reclassification as chapter 46 (§5301 et seq.) of Title 25. Sections 4, 106, 506 to 508, 510 to 512, 515, 516, and 518 of the Act were classified to sections 450b, 450j–1, 458aaa–5 to 458aaa–7, 458aaa–9 to 458aaa–11, 458aaa–14, 458aaa–15, and 458aaa–17, respectively, of Title 25, prior to editorial reclassification as sections 5304, 5325, 5386 to 5388, 5390 to 5392, 5395, 5396, and 5398, respectively, of Title 25. Section 505 of the Act probably should be a reference to section 501 of the Act, which defines terms and was classified to section 458aaa of Title 25 prior to editorial reclassification as section 5381 of Title 25. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of Title 25 and Tables.

PRIOR PROVISIONS

A prior section 207, Pub. L. 85–767, Aug. 27, 1958, 72 Stat. 908 ; Pub. L. 93–87, title I, §150, Aug. 13, 1973, 87 Stat. 275 , provided for use of funds for construction and improvement of parkways, including

acquisition of rights-of-way and related scenic easements, administration of such funds according to regulations jointly approved by the Secretary and the Secretary of the Interior, and that parkway projects on a Federal-aid system be subject to all requirements of this title and of any other law applicable to highways on such system, prior to repeal by Pub. L. 97-424, title I, §126(d), Jan. 6, 1983, 96 Stat. 2115 .

AMENDMENTS

2018-Subsec. (n)(1)(B). Pub. L. 115-235, §1(1), substituted "42 months" for "21 months".

Subsec. (n)(1)(C). Pub. L. 115-235, §1(2), substituted "48 months" for "30 months".

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section effective Oct. 1, 2015, see section 1003 of Pub. L. 114-94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

¹ See References in Text note below.