



# Federal Register

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**Thursday,  
February 14, 2002**

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**Part III**

## **Department of Health and Human Services**

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**42 CFR Part 36, et al.**

**Tribal Self-Governance Amendments of  
2000; Proposed Rule**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**42 CFR Part 36, et al.**

**RIN 0917-AA05**

**Tribal Self-Governance Amendments of 2000**

**AGENCY:** Indian Health Service, DHHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary of the Department of Health and Human Services (DHHS) proposes this rule to implement Title V of the Tribal Self-Governance Amendments of 2000 (the Act). The proposed rule has been negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the DHHS. The proposed rule includes provisions governing how DHHS/Indian Health Service (IHS) carries out its responsibility to Indian Tribes under the Act and how Indian Tribes carry out their responsibilities under the Act. Any interested party is invited to comment on the proposed rule. As required by section 517 (b) of the Act, the Department has developed this proposed rule with active Tribal participation of Indian Tribes, inter-Tribal consortia, Tribal organizations and individual Tribal members, using the guidance of the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*

**DATES:** Comments must be received on or before April 15, 2002. We will send copies of this notice of proposed rulemaking (NPRM) to each Indian Tribe. We especially invite comments from individual Indian Tribes, Tribal members, and Tribal organizations.

**ADDRESSES:** Send your written comments to: Betty Gould, Regulations Officer, Division of Regulatory and Legal Affairs, IHS, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20857, Telephone 301-443-1116. (This is not a toll-free number.) Comments received will be available for inspection at the address above from 9 a.m. to 3 p.m., Monday through Friday, beginning approximately two weeks after publication.

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed rule contact: Paula Williams, Director, Office of Tribal Self-Governance, IHS, 5600 Fishers Lane, Room 5A-55, Rockville, MD 20857, Telephone 301-443-7821. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** "The Tribal Self-Governance Amendments of 2000", Pub. L. 106-260, repeals Title III of the Indian Self-Determination Act, Pub. L. 93-638, as amended, (ISDA) and

enacts a new Title V that establishes a permanent Self-Governance program within DHHS. Thus, Indian and Alaska Native Tribes are now able to compact for the operation, control, and redesign of various IHS activities on a permanent basis. Section 517 of Title V requires the Secretary, not later than 90 days after the date of the enactment of the Act, to initiate procedures under the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*, to negotiate and promulgate the regulations necessary to carry out Title V. The Act calls for the establishment of a negotiated rulemaking committee pursuant to 5 U.S.C. 565, comprised only of Federal and Tribal representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance (the Committee) conferred with and allowed representatives of Indian Tribes, inter-Tribal consortia, Tribal organizations, and individual Tribal members to actively participate in the rulemaking process.

Copies of the Committee's charter are on file with the appropriate committees of Congress and with the Library of Congress in accordance with section 9(c) of the Federal Advisory Committee Act, 5 U.S.C. Appendix.

**Public Participation in Pre-Rulemaking Activity**

A Notice of Intent to establish the Committee was published in the **Federal Register** at 65 FR 75906 on December 5, 2000. In the Notice of Intent, we proposed a rulemaking committee of representatives from 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials totaling 30 members. The Notice of Intent established a deadline of January 4, 2001, for submission of written comments. Twenty comments were received. The comments provided valuable input from Indian Tribes, organizations, and individuals. In order to change the composition of the Committee, as suggested by some comments, the Committee would have needed to be increased to more than 30 members. Carrying out the negotiated rulemaking process through a committee with more than 30 members would be cumbersome and challenging in reaching consensus under the time period required by section 517. Therefore, the size of the Committee was not changed. The members, representing 12 Self-Governance Tribes, 11 non-Self-Governance Tribes, and 7 Federal officials, meet the requirements of the Act. The Committee is co-chaired

by one Tribal representative and one Federal representative.

The negotiated rulemaking meetings were open to the public. Individuals that were not voting members of the Committee had an opportunity to attend meetings and to give input to the 30 members of the Committee. The public was informed about the establishment of the Committee through a notice in the **Federal Register** at 66 FR 15063 on March 15, 2001.

The first meeting of the Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance was held in San Diego, California on March 15-16, 2001. At that meeting, the Committee established three sub-committees, a meeting schedule, and a protocol for deliberations. The Committee agreed to operate based on consensus decision-making. The DHHS committed to publish all consensus decisions as the proposed rule. The Committee further agreed that any committee member and his/her constituents could comment on this proposed rule.

To complete the regulations within the statutory timeframe, the Committee divided the areas subject to regulation among three subcommittees, each co-chaired by one Federal and one Tribal representative. The sub-committees made recommendations to the Committee on whether regulations in a particular area were desirable. If the Committee agreed that regulations were desirable, the sub-committees developed options for draft regulations. The sub-committees presented their options to the full Committee, which discussed them and eventually approved the proposed regulations.

Between April 2001 and August 2001, the Committee met five times in different locations throughout the country. All meetings were announced in the **Federal Register** at 66 FR 10182, 66 FR 17657, and 66 FR 27620. Generally, the meetings lasted three days. Sub-committees also met and held teleconferences to develop draft material in support of the full Committee meetings.

In developing regulatory language, full Committee consensus was reached on the regulations that follow under subparts "A" through "P." Where the full Committee could not reach consensus as defined in its protocol, this preamble includes a brief description of the issue, along with the Federal and Tribal positions when available. The public is invited to comment on these issues as well as on the proposed regulations.

Where the Tribal position is stated, it reflects dissatisfaction with proposed

resolution of the issues by the Federal representatives and preference for alternative language as put forth by the Indian Tribes. Where the Federal position is stated, it represents the official views of the DHHS, as expressed by the designated Federal officials.

There are only three issues where consensus was not reached. The three issues are: whether the provisions of Title V apply to statutorily mandated grants added to a funding agreement after award; application of Davis-Bacon prevailing wage rates to construction projects funded with both Federal and non-Federal funds; and Department of Justice representation under section 314 of Public Law 101-512, as amended, of Indian Tribes and Tribal certifying officers for environmental claims.

### Key Areas of Disagreement

#### *Whether Provisions of Title V Apply to Statutorily Mandated Grants Added to a Funding Agreement After Award*

**Tribal Position:** The Tribal position is that section 505(b)(2) provides that Self-Governance Tribes have the alternative of including in funding agreements “such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, or activities (or portions thereof) *including grants (which may be added to a Funding Agreement after an award of such grant)*, with respect to which Indian Tribes or Indians are primary or significant beneficiaries, administered by the DHHS through the IHS and all local, field, service unit, area, regional, and central headquarters and National Office functions so administered under the authority of \* \* \*” (emphasis added).

The Tribal position is that the language in section 505(b)(2) makes clear Congress’ intent that Self-Governance Tribes have the option of including grants that have been awarded in their funding agreement. Once these grants are incorporated in a funding agreement, they are subject to all of the terms and conditions set forth in the funding agreement as well as all of the provisions of Title V and applicable regulations. In contrast, the Federal position is that while grants may be included in a funding agreement at Tribal option, none of the provisions of Title V or regulations promulgated under section 517 apply. On the other hand, the Federal position is that the regulations, policies, and guidance generally applicable to grants apply to these grants included in funding agreements.

From the Tribal perspective, the thrust of self-governance is to remove

excessive Federal control and return funding and decisions to local Tribal control. Whatever flexibility may exist within the grant system, placing grants in a funding agreement without providing the flexibility and benefits of Title V defeats the goal of this inclusion. Statutes are to be construed so as to produce a harmonious whole and so as to further the legislative scheme. In this instance, concluding that none of Title V’s provisions or regulations promulgated under section 517 apply to these grants after they are included in a funding agreement is illogical and impedes Congress’ intent when Title V was enacted. To the extent the language in section 505(b)(2) is ambiguous, Title V makes clear that any ambiguities are to be resolved in favor of the interpretation that facilitates the inclusion of programs, services, functions and activities (PSFAs) and related funds in a funding agreement. See section 512(a). In this instance IHS should interpret section 505(b)(2) making all provisions in Title V and regulations promulgated under section 517 applicable to statutorily mandated grants after they have been incorporated. Accordingly, the Tribal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

**Q:** What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

**A:** Once the grant is awarded and added to the funding agreement, unless provided otherwise in these regulations, all provisions of Title V and these regulations shall apply.

**Federal Position:** The Department firmly believes that statutorily mandated grants are, and must remain, subject to the terms and conditions of the statute mandating the grant, the grant award, and the Department’s grant regulations.

The Federal position is that section 505(b)(1) distinguishes between two types of grants: “discretionary IHS competitive grants” and “Congressionally earmarked competitive grants.” Discretionary IHS competitive grants are defined in the proposed regulations as “grants established by IHS pursuant to IHS’ discretionary authority without any statutory directive.” See § 137.10) Section 505(b)(1) specifically authorizes Self-Governance Tribes to negotiate their full Tribal share funding for such grants and receive that funding along with funding for other PSFAs as part of the negotiation and award of these

funding agreements, rather than to compete for a grant award.

Section 505(b)(1) distinguishes the above discretionary grants from “Congressionally earmarked competitive grants” which are defined in the proposed regulations as “statutorily mandated grants” meaning “a grant specifically designated in a statute for a defined purpose.” See § 137.10 Statutorily mandated grants are specifically excluded from the provisions in section 505(b)(1). Rather, section 505(b)(2) authorizes statutorily mandated grants to be “added to a funding agreement after an award of such grants.”

This distinction recognizes that statutorily mandated grants are not considered part of the PSFAs negotiated and awarded in the funding agreement. To the contrary, statutorily mandated grants have their own statutorily designated requirements for award. Statutorily mandated grants, pursuant to their authorizing statutes, are awarded through the Department’s grants process which is governed by the Department’s grant regulations and policies. These establish the terms and conditions of the grant.

While statutorily mandated grants may be added to funding agreements after award of the grant, such grants retain their separate character as grants and continue to be governed by the terms and conditions of the statute mandating the grant and the grant award—not the terms of the funding agreement or compact or the statutory provisions of Title V. Thus, as agreed to in these proposed regulations, statutorily mandated grant programs may not be redesigned, and the grant awards may not be reallocated for other purposes.

The Department, within the governing grants process, has agreed to lump sum funding for statutorily mandated grants and to the use of interest earned on such funding to enhance the grant program in order to accommodate Tribal programmatic concerns. However, the Department firmly believes that statutorily mandated grants are and must remain subject to the terms and conditions of the statute mandating the grant, the grant award, and the Department’s grant regulations. Accordingly, the Federal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

**Q:** What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

**A:** None of the provisions of Title V apply.

*Application of Davis-Bacon Prevailing Wage Rates to Construction Projects Funded With Both Federal and Non-Federal Funds*

**Tribal Position:** The Committee reached consensus on two proposed regulations, which provide that Davis-Bacon wage rates do not apply to construction projects funded solely with non-Federal funds but do apply to covered employees working on construction projects funded solely by the Federal Government. A third funding possibility also occurs with frequency in the construction of IHS health facilities—a mixture of funds from both Federal and non-Federal sources. The Tribal position is that Davis-Bacon wage rates do not apply to those portions of a construction project funded from non-Federal sources. Accordingly, the Tribal representatives propose that the following provision be included in the final Title V regulation and invite comments on the language set forth below:

**Q:** Do Davis-Bacon wage rates apply to construction projects performed by Tribes using both Federal funds and non-Federal funds?

**A:** The Davis-Bacon wage rates only apply to the portion of the project that is funded with Federal funds. The Davis-Bacon Act and wage rates do not apply to portions of the project funded with non-Federal funds or when Tribes perform work with their own employees.

The Tribal representatives believe that this simple clarification gives Self-Governance Tribes performing Title V construction projects greater autonomy and thus advances Title V's goal of effectively "implementing the Federal policy of government-to-government relations with Indian Tribes" and of further "strengthen[ing] the Federal policy of Indian self-determination." See 25 U.S.C.A. § 458aaa (Pub. L. 106-260, Sec. 2(6), Title V Congressional findings reproduced as note following section 458aaa).

In support of its position, the Tribal representatives note that by its own terms, the Davis-Bacon Act of March 3, 1931, ch. 411, §§ 1, 46 Stat. 1494, as amended, 40 U.S.C. §§ 276a(a), confers no rights directly on construction workers paid either with Federal or non-Federal funds. Rather, it imposes certain restrictions on the Federal Government when Federal funds are used to perform construction activities. See generally *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981) ("The Davis-Bacon Act requires that certain stipulations be placed in Federal construction contracts for the benefit of

mechanics and laborers, but it does not confer rights directly on those individuals."). Section 509(g) of the Act merely extends Davis-Bacon prevailing wage requirements to "laborers and mechanics employed by contractors and subcontractors (excluding Tribes and Tribal organizations) in the construction, alteration, or repair \* \* \* of a building or other facilities in connection with the construction projects funded by the United States under [the Indian Self-Determination and Education Assistance] Act." 25 U.S.C. 458aaa-8(g) (emphasis added).

The Tribal representatives disagree with the Federal position that section 509(g) "unambiguously states" that Davis-Bacon wage rates "do apply" to portions of a Title V construction project that are not "funded by the United States under [the Indian Self-Determination and Education Assistance] Act." 25 U.S.C. 458aaa-8(g). The Tribal position is that the Title V language clearly provides for just the opposite result: that Davis-Bacon wage rates only apply to those portions of the project that are actually funded by the United States, precisely as stated in the Tribal proposed regulation.

The Tribal representatives further point out that even if the language of section 509(g) is subject to the broader reading advanced by the Federal representatives, that fact simply makes this provision ambiguous. Section 509(g) certainly does not provide that Davis-Bacon wage rates apply to construction projects "funded in whole or in part" by the United States. If it did, the Federal position would have greater merit. However, given its actual language, section 509(g) is at best unclear. And if the language of Title V is unclear or is open to more than one reasonable interpretation, rules of statutory construction for Indian legislation require that the Title V Negotiated Rulemaking Committee reject interpretations which work against the interests of Self-Governance Tribes. *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit."). Federal courts have relied on this rule to interpret ambiguous provisions of the ISDA to the benefit of Indian Tribes. See *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462-63 (10th Cir. 1997); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala (Shoshone-Bannock I)*, 988 F. Supp. 1306, 1317 (D. Ore. 1997). In *Ramah*, the Tenth Circuit held that "the canon of construction

favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Ramah*, 112 F.3d at 1462. Thus, "if the [ISDA] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Id.* at 1462 (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988)). See also section 512(a) of the Act.

**Federal position:** The Federal position is that no regulation is necessary for projects funded with a mixture of Federal and non-Federal funds because the language of section 509(g) unambiguously states that the Davis-Bacon wage rates do apply. Section 509(g) defines the employees that are covered, namely "[a]ll laborers and mechanics employed by contractors or subcontractors (excluding Indian Tribes and Tribal organizations)." Section 509(g) also sets forth the activities it covers: "construction, alteration, or repair, including painting or decorating of a building or other facilities." Finally, section 509(g) provides that all covered employees who perform covered activities shall receive Davis-Bacon wages if they perform those activities "in connection with construction projects funded by the United States under this Act." The Federal representatives believe the terms of the statute are clear: if a project receives Federal funding, then any covered employees carrying out covered activities "in connection with" the project must be paid Davis-Bacon wages.

*Department of Justice Representation of Tribes and Tribal Certifying Officers for Environmental Claims.*

**Tribal position:** The Committee reached consensus on all but one of the proposed regulations related to enforcement of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). The Tribal representatives and Federal representatives disagree on whether the Federal Government, specifically the Department of Justice, must defend Indian Tribes and Tribal certifying officers if they are sued as a result of carrying out these Federal environmental responsibilities. For the reasons provided below, the Tribal representatives propose that the following regulation be included in the final Title V regulations and invites comments on the language set forth below:

**Q:** Are Indian Tribes and Tribal certifying officers entitled to the benefit of a Federal defense if they are sued as

a result of carrying out their Federal environmental responsibilities?

A: Yes. Indian Tribes and Tribal Certifying Officers are performing Federal functions when carrying out these Federal environmental responsibilities, and they are deemed to be Federal agencies and Federal officials for this limited purpose. Under section 314 of Public Law 101-512, as amended, the Department of Justice is authorized and directed to defend Indian Tribes and Tribal employees who are sued with respect to claims resulting from the performance of these Federal functions.

The Tribal representatives believe that the potential for Self-Governance Tribes to assume Federal responsibilities for NEPA and NHPA compliance under Title V removes a substantial burden from IHS construction program managers and places that burden on Tribal officials. In transferring this burden, it is important to treat Tribal and Federal certifying officials equally. The Tribal representatives believe this can best be achieved by assuring Tribal certifying officials the benefit of a Federal defense under section 314 of Pub. L. 101-512 for NEPA enforcement actions brought against them. This protection is essential, and fundamentally fair, given that little or no Federal funding is likely to be available to Self-Governance Tribes to cover the expense of such litigation, and that private insurance is almost certainly unavailable for such claims.

The Tribal representatives believe their position is fully consistent with the language of the statute and greatly furthers the Title V Congressional policy of providing Self-Governance Tribes with all the resources, benefits and protections that IHS officials would have in carrying out this core governmental function.

Specifically, section 314 of Pub. L. 101-512 requires the United States to defend "any civil action or proceeding" involving "claims" resulting from the performance of a self-governance compact. It provides as follows:

*With respect to claims resulting from the performance of functions \* \* \* under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act \* \* \*, an Indian Tribe, Tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the IHS in the DHHS while carrying out any such contract or agreement and its employees are deemed to be employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That after September 30, 1990, any civil action or proceeding*

*involving such claims* brought hereafter against any Indian Tribe, Tribal organization, or Indian contractor or Tribal employee covered by this provision *shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act \* \* \** Provided further, That beginning with the fiscal year ending September 30, 1991, and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions. \* \* \* (emphasis added.)

Pub. L. 101-512, Title III, § 314, Pub. L. 103-138, Title III, § 308 (reprinted in 25 U.S.C.A. § 450f, Historical and Statutory Notes.

Under ordinary rules of English grammar, the phrase "such claims" includes all claims resulting from the performance of a compact because "such claims" refers back to "claims resulting from the performance of functions under a \* \* \* compact," the antecedent immediately preceding the reference. Nothing in the provision suggests that "such claims" are limited to tort claims. In interpreting this statutory requirement, the Title V Negotiated Rulemaking Committee should first look to the plain language of the Act. *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language for, if the intent of Congress is clear, that is the end of the matter"). Indeed, some courts have interpreted section 314 to cover "statutory claims" and have assumed that it covers contract claims resulting from the performance of a compact or self-determination contract. See *Waters v. United States*, 812 F.Supp. 166 (N.D. Cal. 1993) (intentional torts and statutory claims within § 314's reach); *Carlow v. United States*, 40 Fed. Cl. 773 (1998) (§ 314 demonstrates that upon retrocession, the United States is liable for legitimate contract claims incurred by Tribal contractors administering ISDA programs). See also *Brown v. United States*, 43 Fed. Cl. 538 (1998) (Tribal compactor not indispensable party to action for mismanagement of lease because action against Indian Tribe is deemed to be an action against the United States).

Section 314's legislative history also supports this plain language interpretation. Earlier laws extending the so-called tort claims coverage to Tribal organizations explicitly limited the coverage to specific types of torts by including the language "claims \* \* \* for personal injury, including death." An early draft of Pub. L. 101-512 contained identical limiting language.

The absence of that language in the final draft indicates that Congress intended there to be no limitation; all claims are included. The presence of new language, extending the coverage to "any civil action or proceeding" indicates that Congress intended the coverage to include, at a minimum, some class of actions broader than torts and, presumably, all civil actions and proceedings that result from the performance of compacts. Congress knew how to limit this coverage to tort claims, indeed to only certain specified tort claims, in 1988 and 1989, but declined to do so in 1990 and thereafter.

This plain language interpretation does not create any unforeseen burdens for the United States. Congress initially extended the so-called tort claim coverage to ISDA contractors and compactors on a limited basis, following the failure of the Federal Government to procure liability insurance on behalf of Indian Tribes, and pending the Secretary's investigation of the feasibility of procuring such insurance or providing alternative protection. When the Secretary failed to investigate the cost and availability of liability insurance, Congress made the coverage permanent in the course of extending and refining the scope of that coverage in a variety of settings. The legislative history indicates that Congress understood that Pub. L. 101-512 and its predecessors simply restored the status quo by making the Federal Government responsible for any legal liability associated with the performance of Federal functions. It does not expand the United States' liability. It simply precludes the United States from reducing its own liability and shifting that liability to Self-Governance Tribes via the ISDA without providing an equal level of protection.

A plain language interpretation also does not render the "full protection and coverage" clause null or void. Moreover, reading the provision as a whole, it is clear that section 314 provides several benefits to Self-Governance Tribes and that those benefits are cumulative. Self-Governance Tribes performing Federal functions are entitled to assert Federal defenses under the FTCA and to have the United States assume its position as a defendant and to be represented by the Attorney General and to have any resulting liability covered by the Treasury and to have the IHS request appropriations to reimburse the Treasury. While the FTCA protection does not have any application in the context of a NEPA enforcement lawsuit, that does not relieve the Federal Government of its obligation to provide Tribes with the other benefits conferred

by section 314, namely the benefit of a Federal defense. This also responds to the Federal representatives' argument that the application of section 314 to NEPA enforcement actions "would result in a mismatch of processes, remedies, and defenses." As set forth in the proposed regulations, a NEPA enforcement action under Section 509(a)(2) of the Act will presumably be handled under the same Administrative Procedures Act (APA) process as currently occurs when the Secretary performs these Federal environmental responsibilities. No confusion or complication need result simply because Justice Department attorneys are handling the defense, instead of members of the private bar.

A narrow interpretation of the coverage of section 314 would shift the burden from the Department of Justice to the IHS or worse still to American Indian and Alaskan Native beneficiaries of IHS health programs. A narrow interpretation would require Self-Governance Tribes to incur substantial expense for liability insurance and/or legal representation. The IHS would then, in the Tribal representatives' view, be legally obliged to provide adequate contract support funds to cover these expenses. If it failed to do so, as a result of shortfalls or for some other reason, funds that should be used to provide direct services would be diverted and the beneficiaries would suffer from diminished health care services, again contrary to Congress' intent. An unduly narrow interpretation would thus conflict with Congressional intent in Title V and impair the Federal trust responsibility to deliver health care to Indian people. See S. Rep. 100-274, Dec. 21, 1987 at 2646 ("The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal Government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility.").

Congress clearly intended to confer on Self-Governance Tribes the same benefits that Federal officials enjoy when performing these Federal functions. It is clear that Self-Governance Tribes are carrying out Federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a Tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and Tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such

coverage is provided when the Federal Government performs the function.

S. Rep. 100-274, Dec. 21, 1987 at 2645. Similarly, transferring the obligation to perform NEPA compliance determinations from Federal to Tribal officials, with virtually no additional funding and without providing these officials with a Federal defense, would create a windfall for the Federal Government, at the expense of Indian health care, contrary to Congressional intent. Department of Justice attorneys are well-experienced in APA litigation and would be in a better position to defend Tribal government officials in NEPA enforcement actions than would members of the private bar. The rare cases likely to be brought under this law will create no undue hardship or expense for the Department of Justice.

*Federal position:* The Federal position is that section 314 of Pub. L. 101-512 read as whole applies solely to claims within the ambit of the FTCA. There is no indication in the legislative history of section 314 that it was intended to do anything other than extend FTCA coverage for tort claims. See, e.g., H.R. Rep. No. 101-789, 101st Cong., 2d Sess. 72 (1990). The Tribal position would draw support from a Congressional rejection of an earlier version of this provision that would cover only claims for personal injury and death. However, this legislative history reflects Congressional concern that property damage claims would be excluded under the earlier version, see 135 Cong. Rec. S8767, S8834 (July 26, 1989) (remarks of Senator Inouye), and not an intent to broaden this provision beyond tort claims. Furthermore, section 314 only extends the "protection and coverage of the [FTCA]." Waivers of the sovereign immunity of the United States are construed narrowly, and in favor of the sovereign. Reading section 314 to imply that any other statutory waiver of Federal sovereign immunity extends to Indian Tribes would violate this principle and invade the province of the legislative branch.

If FTCA coverage did apply to private suits brought to enforce Tribal implementation of Federal environmental responsibilities, it would result in a mismatch of processes, remedies, and defenses. Private suits to enforce the NEPA generally involve court review of an administrative record under the APA for injunctive or declaratory relief. The APA does not authorize the award of damages. 5 U.S.C. § 702. The FTCA, by contrast, allows for trial *de novo* in the district courts, and waives the sovereign immunity of the United States for damages. 28 U.S.C. § 1346(b)(1).

Moreover, the FTCA imposes liability only for negligent acts in the same manner and to the same extent that a private person would be liable, 28 U.S.C. § 2674, and provides a defense for the discretionary activities of Federal officials. 28 U.S.C. § 2680(a). Private suits to enforce Federal environmental responsibilities seek to enforce laws applicable to Federal agencies, not private persons, and squarely challenge the exercise of agency discretion under Federal law.

Finally, even if section 314 did apply to actions other than torts, section 509(a)(2) itself makes clear that the Tribal certifying officer is the proper defendant for claims arising from the performance of Federal environmental responsibilities, not the United States. For this reason, the Federal position is that no regulation is required.

During final Departmental review of the NPRM, § 137.401 was deleted because it would have provided Self-Governance Tribes with the opportunity to participate in the final stages of the budget request process. Tribal participation in the initial stages of the request process is already provided by the Department Policy on Indian/Alaska Native Tribes and Indian Organizations dated August 7, 1997. In June of 2001, the Department held its third annual tribal budget consultation meeting as part of the development of the FY 2003 budget. Participation in the final stages of the budget request process cannot be provided without violating the Executive Branch's longstanding policy on the need to preserve the confidentiality of pre-decisional budget information as outlined in Section 36 of OMB Circular A-11, "COMMUNICATIONS WITH CONGRESS AND THE PUBLIC AND CLEARANCE REQUIREMENTS."

Section 513 of Title V addressed the President's responsibilities regarding the budget, which are outside the scope of this rulemaking. Regulatory provisions have not been included to implement this section.

#### *Miscellaneous Issue: Labor*

The Committee considered but decided not to address the effect of the ISDA, and particularly Title V, on the application of other Federal private sector labor laws. Although this matter is not addressed in the proposed regulation, the IHS recognizes that the United States and Self-Governance Tribes have a unique government-to-government relationship, and that activities in furtherance of that relationship that are authorized by Title V are not ordinary government procurement activities. The IHS also

recognizes that when Indian Tribes undertake self-governance activities, they step into the shoes of the IHS in carrying out the Federal Government's unique responsibility to provide health care for Native Americans. This is a trust responsibility that Congress carries out under the Indian Commerce Clause. The provision of health care to Native Americans is a unique Federal responsibility that Congress has delegated to the IHS, and which in turn has been delegated to Indian Tribes as specified in their self-governance compacts and funding agreements. Under these unique circumstances, and given that Tribes, Tribal organizations and Indian patients are not to be penalized by the transfer of Federal health programs to Tribal operation under Title V, the IHS believes that it is contrary to the intent of the ISDA to apply to Self-Governance Tribes carrying out Title V compacts and funding agreements general Federal laws such as the National Labor Relations Act that would not apply to the IHS if the IHS were carrying out the compacted PSFA.

#### **Summary of Regulations**

The narrative below is keyed to specific subparts of the proposed rule.

##### *Subpart A—General Provisions*

This subpart contains provisions describing the authority, purpose and scope of these regulations. This subpart contains Congressional policies set forth in Title V. This subpart also contains provisions regarding the effect of these regulations on existing Tribal rights, whether Title V may be construed to reduce funding for programs serving a Indian Tribe under this Title or other laws, and the effect of these regulations on Federal policy directives.

##### *Subpart B—Definitions*

This subpart sets forth definitions for key terms used in the balance of the regulations. Most of the definitions come from definitions set forth in Title I or Title V. Throughout this proposed rule, the terms "Indian Tribe" and "Self-Governance Tribe" are used. These terms are included in the definition section. When a provision applies to all Federally-recognized Tribes (including Self-Governance Tribes), the term "Indian Tribe" is used; the term "Self-Governance Tribe" is used when referring to an Indian Tribe participating in self-governance under Title V. Each term includes inter-Tribal consortia and Tribal organizations under conditions set forth in the definition of "Indian Tribe." Terms unique to Subpart N—Construction are

defined in that subpart and not in subpart B.

##### *Subpart C—Selection of Indian Tribes for Participation in Self-Governance*

This subpart describes the eligibility criteria an Indian Tribe must satisfy to participate in self-governance. This subpart explains that Self-Governance Tribes currently participating under Title III of the ISDA and up to 50 additional Indian Tribes per year are eligible to participate in self-governance. This subpart also provides that more than one Indian Tribe can participate in the same compact and/or funding agreement under conditions set forth in this subpart. This subpart explains that in order to be eligible to participate in self-governance an Indian Tribe must successfully complete a planning phase, must request participation in the program through a resolution or official action of the governing body of each Indian Tribe to be served, and must demonstrate financial stability and financial management capability. This subpart describes how an Indian Tribe demonstrates financial stability and financial management capacity and what information is considered in making this determination. Finally, this subpart describes that planning and negotiation grants may be available, but not required, for participation.

##### *Subpart D—Self-Governance Compact*

This subpart describes the authority for Self-Governance Tribes to negotiate compacts and identifies what is included in a compact. This subpart explains that a compact is a separate document from a funding agreement and that the compact must be executed before or at the same time as a funding agreement.

##### *Subpart E—Funding Agreement*

This subpart describes the authority for Self-Governance Tribes to negotiate funding agreements and identifies what is included in a funding agreement. This subpart describes what terms are required to be included in a funding agreement and what terms are included at the Self-Governance Tribe's option.

##### *Subpart F—Statutorily Mandated Grants*

This subpart describes to what extent statutorily mandated grants may be added to a funding agreement after award. Although there were extensive discussions between the Tribal and Federal representatives as to whether the provisions of Title V applied to statutorily mandated grants once added to the funding agreement, consensus was not reached. The Tribal position is

that once the grant is awarded and added to the funding agreement, all of the provisions of Title V apply. The Federal position is that none of the provisions of Title V apply to statutorily mandated grants. A more detailed explanation of the basis for this disagreement is contained in the Key Areas of Disagreement section of these proposed rules.

Notwithstanding this disagreement, Tribal and Federal representatives reached consensus on several important issues concerning statutorily mandated grant funds. Tribal and Federal representatives agreed that a statutorily mandated grant may be added to a funding agreement as an annual lump sum advance payment after the grant is awarded. They also agreed that a Self-Governance Tribe may keep the interest earned on these grant funds and may use such interest earned to enhance the grant program, including allowable administrative costs. In addition, consensus was reached as to the extent such grant funds may be reallocated or redesigned and that FTCA coverage applies. Finally, the Tribal and Federal representatives reached agreement on reporting requirements that apply to statutorily mandated grants.

##### *Subpart G—Funding*

This subpart describes what funds must be transferred to a Self-Governance Tribe in a funding agreement and when those funds must be transferred. This subpart describes those circumstances where the Secretary is prohibited from reducing or failing to transfer funds and where the Secretary is permitted to increase funds. This subpart describes miscellaneous provisions pertaining to funding provided under a funding agreement. This subpart describes that a funding agreement may provide for a stable base budget and describes what funds are included in the stable base budget.

##### *Subpart H—Final Offer*

This subpart describes the final offer and rejection process. The final offer begins the process for resolving, within a specific time frame, disputes that may develop in negotiations of compacts or funding agreements. This subpart describes the process for an Indian Tribe to present a final offer and the procedures the Secretary must follow to reject a final offer.

##### *Subpart I—Operational Provisions*

This subpart contains provisions that address most of the operational aspects of self-governance. This subpart explains that Self-Governance Tribes must ensure that internal measures are

in place to address conflicts of interest and also addresses the audit requirements that Self-Governance Tribes must comply with, together with the accounting standards that govern the expenditure of self-governance funds. It also includes provisions regarding records and record-keeping requirements.

This subpart explains that Self-Governance Tribes may redesign or consolidate PSFAs and may reallocate or redirect funds paid under a funding agreement. It includes a provision barring a Self-Governance Tribe from simultaneously compacting a program under Title V and contracting the same program under Title I. It also includes provisions regarding health status reporting requirements. This subpart addresses the disposition of savings generated by self-governance activities and explains that such savings will be identified in the annual report required under the Act. It explains the process by which Tribes may access both government-furnished real property and government-furnished personal property for use in the performance of a self-governance compact or funding agreement. It includes a provision authorizing funds paid under Title V compacts and grants to be treated as non-Federal funds for matching or cost participation requirements.

This subpart also includes a provision explaining that section 102(d) of the Act, 25 U.S.C. 450f(d) and section 314 of Public Law 101-512, which in part relates to the FTCA, apply to self-governance compacts and funding agreements. It also incorporates by reference the FTCA procedures set forth in the Title I regulations at 25 CFR Part 900, subpart M.

During the negotiations, Tribal representatives raised several issues concerning the relationship between coverage under the FTCA and supplemental liability insurance coverage, and they proposed specific regulations to address these concerns. The Committee ultimately decided that additional regulations were unnecessary because these concerns may be addressed under the existing statutes and regulations, as discussed below.

The first issue Tribal representatives raised was whether supplemental liability insurance purchased by Indian Tribes may be viewed as protecting the Federal Government. Since 1988, there has been no provision in the ISDA or other law that requires Indian Tribes to purchase liability insurance to protect or indemnify the Federal Government. At that time, Congress in 1988 amended the ISDA to: (1) delete a requirement that the Indian Tribes purchase liability

insurance to protect the government, and (2) include FTCA coverage for Indian Tribes carrying out self-determination contracts. The Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472, repealed the first sentence of then section 103(c) of the Act requiring Indian Tribes to purchase liability insurance and substituted a provision extending FTCA coverage to medical malpractice now at section 102(d) of the Act. Instead of Indian Tribes insuring the United States, the United States extended its self-insurance to the Tribes. *See* S. Rep. No. 100-274 at 26-27, reprinted in 1988 U.S.C.C.A.N. 2620, 2645-46. FTCA coverage was extended to general tort liability claims by section 314 of Public Law 101-512.

Tribal representatives have requested clarification as to FTCA coverage of Tribal council members and Tribal organization's governing boards. The FTCA generally covers any activities of the Indian Tribe and its Tribal council members and Tribal organizations and their governing boards in carrying out a compact or funding agreement including activities necessary for assumption of IHS programs (including, but not limited to, adoption of financial management and personnel systems) and oversight and other activities by such councils and boards to assure effective implementation in carrying out such agreements.

Whether the FTCA applies in any particular case is decided on an individual case-by-case basis, first by the Department of Justice and subsequently by the Federal courts. Thus, Indian Tribes may wish to purchase liability insurance supplemental to FTCA coverage, and this is an allowable cost under the compact and funding agreement.

#### *Subpart J—Waivers*

This subpart contains procedures authorizing the Secretary to waive regulations promulgated to implement Title V or regulations promulgated under the authority specified in section 505(b) of the Act. This subpart explains how an Indian Tribe applies for a waiver, how the waiver request is processed, the applicable time frames for approval of waiver requests and that a denial of a waiver request is appealable in Federal court.

#### *Subpart K—Withdrawal*

This subpart addresses the procedures that apply when a Self-Governance Tribe withdraws from a Tribal organization or inter-Tribal consortium. Matters addressed include the effective

date of the withdrawal, disposition of funds upon a withdrawal, and the future administration of the withdrawn programs.

#### *Subpart L—Retraction*

This subpart addresses the procedures that apply when a Self-Governance Tribe retrocedes a program to the Secretary, and includes provisions pertaining to the contents of the retrocession notice, the effective date of the retrocession, the effect of retrocession on other or future contracts or compacts, and the disposition of government furnished property associated with the retroceded program.

#### *Subpart M—Reassumption*

This subpart addresses procedures by which the Secretary, without the consent of the Self-Governance Tribe, may reassume the operation of a program and associated funding in a compact or funding agreement, including the circumstances under which reassumption may occur, the steps which must be followed in any reassumption, the procedural and appeal rights, the effective date of any reassumption, and the return of government-furnished property. This subpart also addresses the additional processes that must be followed in the event of an immediate reassumption.

#### *Subpart N—Construction.*

This subpart addresses the process by which participating Self-Governance Tribes may agree to undertake construction projects and programs under section 509 of the Act. In its scope, this subpart distinguishes between construction projects, and ongoing programs that support construction projects. This subpart sets forth the process for Self-Governance Tribes to enter into and administer self-governance construction project agreements for construction projects, which may include Tribal shares of related construction programs. Alternatively, Self-Governance Tribes may assume construction programs (but not projects) using the compact and funding agreement process set forth in Subparts D and E.

Definitions are provided that are unique to this subpart. The definitions of construction project and construction project agreement are found in section 501 of the Act. For other terms which are common to this subpart and the Title I construction regulations set forth at 25 C.F.R. 900, subpart J, the Title I definitions have been adapted with minor changes. *See* 25 CFR 900.113.



## NEPA Process

Self-Governance Tribes performing construction under section 509 are required to assume the Secretary's responsibilities for the completion of the construction project under the NEPA, the NHPA, and related Federal environmental laws. Sections 137.285 through 137.306 describes these Federal environmental responsibilities and provides Tribal options to carry out these responsibilities by adopting Federal agency environmental review policies and procedures or by developing their own. Sections 137.292, 137.293 and 137.310 through 137.312 describes how Self-Governance Tribes assume Federal environmental responsibilities by resolution, as well as the minimum criteria for the limited waiver of Tribal sovereign immunity required by section 509(a)(2) to allow judicial review of a Tribal certifying officer's actions under this subpart.

## Notification and Project Assumption

Sections 137.320 through 137.344 describe the Secretary's responsibility to notify and consult with Indian Tribes concerning the development of construction budgets and new funding allocation methodologies, as well as when funds are available for the planning, design and construction of IHS construction projects. This subpart further describes the process that Self-Governance Tribes and the Secretary use to develop, negotiate and approve (or reject) construction project agreements under Title V. These sections explain the content and budget requirements for construction project agreements, the Secretary's funding and payment obligations to Self-Governance Tribes, the different types of construction project agreements and the process for resolving disputes when Self-Governance Tribes and the Secretary cannot agree on the content of a construction project agreement. These sections also describe the Self-Governance Tribes' authority to reallocate project funds and to use excess funds remaining at the completion of a construction project agreement.

## Role of the Self-Governance Tribe in Carrying Out Construction Project Agreements

Sections 137.350 through 137.353 describe the Self-Governance Tribes' responsibility to complete construction project agreements and provide day-to-day management and administration for construction projects, within available funding. These sections also describe the Self-Governance Tribes' options if

unforeseen circumstances increase project costs. These sections also describe the Self-Governance Tribes' responsibility to submit semiannual construction progress and financial reports to the Secretary.

## Role of the Secretary in Carrying Out Construction Project Agreements

Section 137.341 sets forth how Self-Governance Tribes will receive payments for construction project agreements under section 509(e). Section 137.341 clarifies that when Self-Governance Tribes enter lump sum fixed price contracts, Self-Governance Tribes may opt to receive payment for a performance period measured either as one year, or as one project phase. Sections 137.360 through 137.365 sets forth the process for Secretarial review and approval of project planning and design documents, as well as Secretarial review and approval of any proposed amendments to the construction project agreement under section 509(f). Section 137.362 clarifies when Secretarial approval of proposed amendments is required, and when Self-Governance Tribes may make unilateral changes. Section 137.366 discusses the timing and purpose of site visits by the Secretary. Section 137.367 provides that the Secretary does not have the authority to issue stop orders, nor any other role in the day-to-day management of the construction project. Section 137.368 clarifies that the Secretary has no responsibility for overseeing health and safety code compliance during a Self-Governance Tribe's administration of a construction project agreement.

## Other Provisions

Sections 137.370 describe the relationship between the construction subpart and other Title V subparts. Sections 137.371 through 137.374 describe the Self-Governance Tribes' authority and options for acquiring real property with funds provided under a construction project agreement, as well as the eligibility of Tribally-owned facilities for replacement, maintenance and improvement on the same basis as Federally-owned facilities. Sections 137.376 through 137.377 explain the application of metric standards, Federal procurement laws, and regulations to construction project agreements. Finally, Sections 137.378 through 137.379 explain when and how Davis-Bacon wage rates apply to construction project agreements. The issue of whether Davis-Bacon wage rates apply to construction projects funded from both Federal and non-Federal sources is discussed in the Key Areas of

Disagreement section of the proposed regulation.

## Subpart O—Secretarial Responsibilities

This subpart addresses (1) consultation with Self-Governance Tribes in the budget formulation process, and (2) the Secretary's annual report to Congress on the administration of Title V and on Tribal funding requirements (including guidelines to be used in the formulation of the report).

## Subpart P—Appeals

This subpart addresses post-award appeals, pre-award appeals (including informal conferences), appeals of immediate reassumptions, and attorneys fees and costs under the Equal Access to Justice Act. As a general matter, this subpart states that all of the remedial provisions available to Tribes under section 110 of the Act are available to Self-Governance Tribes under Title V. For post-award disputes, the proposed regulation incorporates the regulations applicable to Title I contracts.

For pre-award appeals, the proposed regulation builds upon the procedures employed under Title I. Of special note are: (1) The provision authorizing the Interior Board of Indian Appeals to employ its existing procedures as a guide when considering appeals under this subpart; (2) the authority of the Interior Board of Indian Appeals (IBIA) in handling appeals; (3) the duty of the Administrative Law Judge (ALJ) to hold a hearing within 90 days of the date of the order referring the appeal to the ALJ; and (4) the duty of the Secretary to modify, adopt or reverse a recommended decision within 45 days.

Immediate reassumption appeals closely follow the similar appeal process available under the Title I regulations for emergency reassumptions.

The proposed regulation on claims for attorneys' fees and costs under the Equal Access to Justice Act employs the same procedures available to Indian Tribes under the Title I regulations.

## Regulatory Impact Statement

We have examined the impacts of this rule as required by Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612) as amended by subtitle D of the Small Business Regulatory Fairness Act of 1996 (Public Law 104–121) and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits

(including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Unless it is certified that the proposed rule is not expected to have a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires analysis of regulatory options that minimize any significant economic impact of a rule on small entities. Section 202 of the Unfunded Mandates Reform Act (Public Law 104-4) requires an assessment of anticipated costs and benefits before proposing any rule that may result in expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of \$100 million in any one year (adjusted annually for inflation). We have determined that this rule is consistent with the principles set forth in the Executive Order and in these statutes and find that this rule will not have an effect on the economy that exceeds \$100 million in any one year (adjusted for inflation). Therefore, no further analysis is required under the Unfunded Mandates Reform Act. Because this rule does not impose any new costs on small entities, it will not result in a significant economic impact on a substantial number of small entities. Thus, a Regulatory Flexibility Analysis is not required. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

#### **Federalism**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that this proposed rule would not have substantial direct effect on the States, on the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. As this rule has no Federalism implications, a Federalism summary impact statement is not required.

#### **Executive Order 13175—Consultation and Coordination With Indian Tribal Governments**

In accordance with the Act, this proposed rule was developed by a negotiated rulemaking committee comprised only of Federal and Tribal

representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. The committee agreed to operate based on consensus decisionmaking. The proposed regulations have been agreed on by consensus. Where consensus was not reached, both the Tribal and Federal positions are discussed in the preamble.

#### **National Environmental Policy Act (NEPA) Statement**

The DHHS has determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to NEPA.

#### **Paperwork Reduction Act (PRA) of 1995**

This proposed regulation contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Management Reduction Act of 1995 (44 U.S.C. 3501–3520). The information collection requirements in this proposed regulation have been negotiated between the Department and Tribal representatives through the negotiated rulemaking process and have been agreed to by the parties in the negotiation. Health status reporting requirements will be negotiated on an individual Tribal basis and included in individual compacts or funding agreements. Self-governance Tribes will also have the option of participating in a voluntary national uniform data collection effort with the IHS. The subparts summarized below more specifically describe the information collection requirements. As required by the PRA of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of these sections to the OMB for its review:

##### *Subpart C—Selection of Tribes for Participation in Self-Governance*

The provisions in this subpart require collection of information that indicates successful completion of the planning phase, a Tribal resolution requesting participation in self-governance, and information that demonstrates financial stability and financial capacity for participation in self-governance. The Department needs and uses this information to determine the qualified applicant pool for the self-governance project. The information is collected at the time the Indian Tribe requests participation in self-governance. The annual reporting and record keeping burden for this collection of information is estimated to average 10 hours for each new request for 50 respondents. The total annual reporting and record

keeping burden for this collection is estimated to be 500 hours.

##### *Subparts D and E—Compact and Funding Agreement*

The compact sets forth the general terms of the government-to-government relationship between the Self-Governance Tribe and the Secretary and any terms the parties intend to control year after year. A funding agreement is required for each Self-Governance Tribe participating in self-governance and it provides the information that authorizes the Self-Governance Tribe to plan, conduct, consolidate, administer, and receive funding. The funding agreement identifies the PSFAs to be performed or administered; the budget category; the funds to be provided; the time and method of transfer of the funds; and, information regarding any other negotiated provisions or Tribal requests for stable base funding.

The provisions in this subpart require collection of information or record-keeping requirements that may be contained in either the compact or the funding agreement, such as the information provided in health status reports or the information needed when requesting multi-year funding. The Department needs and uses this information to determine eligibility of the applicant; to evaluate applicant capabilities; and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties. The information is collected at the time the Self-Governance Tribe makes an initial request to compact or when the Self-Governance Tribe decides to take specific action to retrocede. The annual reporting and record keeping burden for this collection of information is estimated to average 34 hours for each response for 50 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 1700 hours.

##### *Subpart N—Construction Projects*

The provisions in this subpart require collection of information regarding the Self-Governance Tribes' assumption of Federal responsibilities with respect to construction, including building codes and architectural and engineering standards (including health and safety), the successful completion of the construction project, and carrying out the negotiated construction project agreement. The information needed includes the semi-annual construction project progress and financial reports.

The Department needs and uses this information to determine eligibility of the applicant and to protect the service population and safeguard Federal funds and other resources. The information serves as the official record of the compact or funding agreement terms agreed to by the negotiating parties.

The information is collected at the time the Self-Governance Tribe negotiates the construction project agreement and through semi-annual reports. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 30 respondents. The total annual burden for the collection is estimated to be 1200 hours.

*Subpart P—Appeals*

This subpart provides the appeals procedures available to Indian Tribes. It explains how to file a notice of appeal and what the notice should contain as well as instructions for submitting a written statement of objections. The Department uses this information to evaluate and grant or deny an appeal. The information is collected and reported once an Indian Tribe files an appeal. The annual reporting and record keeping burden for this collection of information is estimated to average 40 hours for each response for 8 respondents. The total annual reporting and record keeping burden for this collection is estimated to be 320 hours.

In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comments by the effected public on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of the IHS;
- The accuracy of our estimate of the information collection burden (the time

it takes respondents to read complete and submit the requested information);

- The quality, utility, and clarity of the information we are collecting; and
- Recommendations to minimize the information collection burden on the affected public, including use of automated collection techniques.

Under the PRA, DHHS must obtain OMB approval of all information and record keeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number. This number will appear in 42 CFR part 137 upon approval. To obtain a copy of the information collection clearance requests, explanatory information, and related form, contact Lance Hodahkwen, Reports Clearance Officer, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20852 at (301) 443-5938.

By law, the OMB must submit comments to the DHHS within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by the OMB, please send comments regarding these reporting burden estimates or any other aspect of these information collection requirements to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: IHS Desk Officer, Allison Eyd.

This rule imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

**List of Subjects**

*42 CFR Parts 36 and 136*

Employment, Government procurement, Health care, Health

facilities, Indians, Penalties, Reporting and recordkeeping requirements.

*42 CFR Parts 36a and 136a*

Grant programs-education, Grant programs-health, Grant programs-Indians, Health care, Health professions, Indians, Penalties, Reporting and recordkeeping requirements, Scholarships and fellowships, Student aid.

*42 CFR Part 137*

Grant programs-Indians, Health care.

Dated: August 13, 2001.

**Michael H. Trujillo,**

*Assistant Surgeon General, Director.*

Dated: January 25, 2002.

**Tommy G. Thompson,**

*Secretary.*

For the reasons set out in the preamble, we are amending chapter I of title 42 of the Code of Federal Regulations as follows:

**PART 36—[REDESIGNATED AS PART 136]**

1. The authority for part 36 continues to read as follows:

**Authority:** 25 U.S.C. 13; sec. 3, 68 Stat. 674 (42 U.S.C. 2001, 2003); Sec. 1, 42 Stat. 208 (25 U.S.C. 13); 42 U.S.C. 2001, unless otherwise noted.

2. Part 36—Indian Health is redesignated as part 136 and transferred to a new Subchapter M—Indian Health Service, Department of Health and Human Services.

3. In redesignated part 136, in the section listed in the first column, the references listed in the second column are revised to read as shown in the third column:

In redesignated part 136	References to §	Are revised to read §
136.14 .....	36.12	136.12
136.21 .....	36.61(c)	136.61
136.23 .....	36.12	136.12
136.23 .....	36.61	136.61
136.42 .....	36.41	136.41
136.43 .....	36.41	136.41
136.53 .....	36.51	136.51
136.53 .....	36.54	136.54
136.56 .....	36.54	136.54
136.106 .....	36.105	136.105
136.116 .....	36.114	136.114
136.303 .....	36.302	136.302
136.321 .....	36.320	136.320
136.322 .....	36.332	136.332
136.351(b)(4) .....	36.350(a)	136.350(a)
136.351(b)(5) .....	36.350(a)	136.350(a)
136.351(b)(7) .....	36.350(a)	136.350(a)
136.351(b)(10) .....	36.350(a)	136.350(a)
136.353 .....	36.350(a)(7) and (8)	136.350(a)(7) and (8)

In redesignated part 136	References to §	Are revised to read §
136.371 .....	36.370	136.370
136.372 .....	36.332	136.332

**PART 36a—[REDESIGNATED AS PART 136a]**

4. The authority for part 36a continues to read as follows:

**Authority:** Sec. 3, 68 Stat. 674; 42 U.S.C 2003; 42 Stat. 208, sec. 1, 68 Stat. 674; 25 U.S.C. 13, 42 U.S.C. 2001, unless otherwise noted.

5. Part 36a—Indian Health is redesignated as Part 136a and transferred to new Subchapter—Indian Health Service, Department of Health and Human Services.

6. Add a new part 137 to new subchapter M to read as follows:

**SUBCHAPTER M—INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**PART 137—TRIBAL SELF-GOVERNANCE**

**Subpart A—General Provisions**

- Sec.
- 137.1 Authority, purpose and scope.
- 137.2 Congressional policy.
- 137.3 Effect on existing Tribal rights.
- 137.4 May Title V be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal Law?
- 137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

**Subpart B—Definitions**

- 137.10 Definitions.

**Subpart C—Selection of Indian Tribes for Participation in Self-Governance**

- 137.15 Who may participate in Tribal Self-Governance?
- 137.16 What if more than 50 Indian Tribes apply to participate in self-governance?
- 137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?
- 137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

**Planning Phase**

- 137.20 What is required during the planning phase?
- 137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?
- 137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?
- 137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider

any other information regarding the Indian Tribe's financial stability and financial management capacity?

- 137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?
- 137.25 Are planning and negotiation grants available?
- 137.26 Must an Indian tribe receive a planning or negotiation grant to be eligible to participate in self-governance?

**Subpart D—Self-Governance Compact**

- 137.30 What is a self-governance compact?
- 137.31 What is included in a compact?
- 137.32 Is a compact required to participate in self-governance?
- 137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?
- 137.34 May a funding agreement be executed without negotiating a compact?
- 137.35 What is the term of a self-governance compact?

**Subpart E—Funding Agreements**

- 137.40 What is a funding agreement?
- 137.41 What PSFAs must be included in a funding agreement?
- 137.42 What Tribal shares may be included in a funding agreement?
- 137.43 Are all funds identified as Tribal shares always paid to the Self-Governance Tribe under a funding agreement?

**Terms in a Funding Agreement**

- 137.45 What terms must be included in a funding agreement?
- 137.46 May additional terms be included in a funding agreement?
- 137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?
- 137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?
- 137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?

**Term of a Funding Agreement**

- 137.55 What is the term of a funding agreement?
- 137.56 Does a funding agreement remain in effect after the end of its term?
- 137.57 How is a funding agreement amended during the effective period of the funding agreement?

**Subpart F—Statutorily Mandated Grants**

- 137.60 May a statutorily mandated grant be added to a funding agreement?
- 137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?

137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?

- 137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?
- 137.68 May funds from a statutorily mandated grant be added to a funding agreement be reallocated?
- 137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?
- 137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?
- 137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?
- 137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?

**Subpart G—Funding**

**General**

- 137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?
- 137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?
- 137.77 When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?
- 137.78 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?
- 137.79 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?
- 137.80 What funds must the Secretary include in a funding agreement?

**Prohibitions**

- 137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?
- 137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?
- 137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?
- 137.88 May the Secretary reduce the amount of funds required under Title V 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?
- 137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel

- displaced by contracts under Title I or self-governance under Title V?  
 137.90 May the Secretary increase the funds required under the funding agreement?

#### Acquisition of Goods and Services from the IHS

- 137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?

#### Prompt Payment Act

- 137.98 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?

#### Interest or Other Income on Transfers

- 137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?  
 137.101 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?

#### Carryover of Funds

- 137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

#### Program Income

- 137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?

#### Limitation of Costs

- 137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

#### Stable Base Budget

- 137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?  
 137.121 What funds may be included in a stable base budget amount?  
 137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?  
 137.123 Once stable base funding is negotiated, do funding amounts change from year to year?  
 137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?

#### Subpart H—Final Offer

- 137.130 What is covered by this subpart?  
 137.131 When should a final offer be submitted?  
 137.132 How does the Indian Tribe submit a final offer?  
 137.133 What does a final offer contain?  
 137.134 When does the 45 day review period begin?  
 137.135 May the Secretary request and obtain an extension of time of the 45 day review period?  
 137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?

- 137.137 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?  
 137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

#### Rejection of Final Offers

- 137.140 On what basis may the Secretary reject an Indian Tribe's final offer?  
 137.141 How does the Secretary reject a final offer?  
 137.142 What is a "significant danger" or "risk" to the public health?  
 137.143 How is the funding level to which the Indian Tribe is entitled determined?  
 137.144 Is technical assistance available to an Indian Tribe to avoid rejection of a final offer?  
 137.145 If the Secretary rejects a final offer, is the Secretary required to provide the Indian Tribe with technical assistance?  
 137.146 If the Secretary rejects all or part of a final offer, is the Indian Tribe entitled to an appeal?  
 137.147 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?  
 137.148 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement or amendment?

#### Burden of Proof

- 137.150 What is the burden of proof in an appeal from rejection of a final offer?

#### Decision Maker

- 137.155 What constitutes a final agency action?

#### Subpart I—Operational Provisions

##### Conflicts of Interest

- 137.160 Are Self-Governance Tribes required to address potential conflicts of interest?

##### Audits and Cost Principles

- 137.165 Are Self-Governance Tribes required to undertake annual audits?  
 137.166 Are there exceptions to the annual audit requirements?  
 137.167 What cost principles must a Self-Governance Tribe follow when participating in self-governance under Title V?  
 137.168 May the Secretary require audit or accounting standards other than those specified in § 137.167?  
 137.169 How much time does the Federal Government have to make a claim against a Self-Governance Tribe relating to any disallowance of costs, based on an audit conducted under § 137.165?  
 137.170 When does the 365 day period commence?  
 137.171 Where do Self-Governance Tribes send their audit reports?  
 137.172 Should the audit report be sent anywhere else to ensure receipt by the Secretary?  
 137.173 Does a Self-Governance Tribe have a right of appeal from a disallowance?

#### Records

- 137.175 Is a Self-Governance Tribe required to maintain a recordkeeping system?  
 137.176 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?  
 137.177 Is the Self-Governance Tribe required to make its records available to the Secretary?  
 137.178 May Self-Governance Tribes store patient records at the Federal Records Centers?  
 137.179 May a Self-Governance Tribe make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178?  
 137.180 Are there other laws that govern access to patient records?

#### Redesign

- 137.185 May a Self-Governance Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?

#### Non-Duplication

- 137.190 Is a Self-Governance Tribe that receives funds under Title V also entitled to contract under section 102 of the Act [25 U.S.C. 450(f)] for such funds?

#### Health Status Reports

- 137.200 Are there reporting requirements for Self-Governance Tribes under Title V?  
 137.201 What are the purposes of the Tribal reporting requirements?  
 137.202 What types of information will Self-Governance Tribes be expected to include in the reports?  
 137.203 May a Self-Governance Tribe participate in a voluntary national uniform data collection effort with the IHS?  
 137.204 How will this voluntary national uniform data set be developed?  
 137.205 Will this voluntary uniform data set reporting activity be required of all Self-Governance Tribes entering into a compact with the IHS under Title V?  
 137.206 Why does the IHS need this information?  
 137.207 Will funding be provided to the Self-Governance Tribe to compensate for the costs of reporting?

#### Savings

- 137.210 What happens if self-governance activities under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings?  
 137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in § 137.210.

#### Access to Government Furnished Property

- 137.215 How does a Self-Governance Tribe obtain title to real and personal property furnished by the Federal Government for use in the performance of a compact, funding agreement, construction project

agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa-11(c)]?

#### Matching and Cost Participation Requirements

137.217 May funds provided under compacts, funding agreements, or grants made pursuant to Title V be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

#### FTCA

137.220 Do section 314 of Public Law 101-512 [25 U.S.C. 450f note] and section 102(d) of the Act [25 U.S.C. 450f(d)] (regarding, in part, FTCA coverage) apply to compacts, funding agreements and construction project agreements?

#### Subpart J—Regulation Waiver

- 137.225 What regulations may be waived under Title V?
- 137.226 How does a Self-Governance Tribe request a waiver?
- 137.227 How much time does the Secretary have to act on a waiver request?
- 137.228 Upon what basis may the waiver request be denied?
- 137.229 What happens if the Secretary neither approves or denies a waiver request within the time specified in § 137.227.
- 137.230 Is the Secretary's decision on a waiver request final for the Department?
- 137.231 May a Self-Governance Tribe appeal the Secretary's decision to deny its request for a waiver of a regulation promulgated under section 517 of the Act [25 U.S.C. 458aaa-16]?

#### Subpart K—Withdrawal

- 137.235 May an Indian Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?
- 137.236 When does a withdrawal become effective?
- 137.237 How are funds redistributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement and elects to enter a contract or compact?
- 137.238 How are funds distributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Indian Tribe and the withdrawing Indian Tribe elects not to enter a contract or compact?
- 137.239 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, is the resulting contract considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)]?

#### Subpart L—Retrocession

- 137.245 What is retrocession?
- 137.246 How does a Self-Governance Tribe retrocede a PSFA?
- 137.247 What is the effective date of a retrocession?

137.248 What effect will a retrocession have on a retroceding Self-Governance Tribe's rights to contract or compact under the Act?

137.249 Will retrocession adversely affect funding available for the retroceded program?

137.250 How are funds distributed when a Self-Governance Tribe fully or partially retrocedes from its compact or funding agreement?

137.251 What obligation does the retroceding Self-Governance 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?

#### Subpart M—Reassumption

- 137.255 What does reassumption mean?
- 137.256 Under what circumstances may the Secretary reassume a program, service, function, or activity (or portion thereof)?
- 137.257 What steps must the Secretary take prior to reassumption becoming effective?
- 137.258 Does the Self-Governance Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?
- 137.259 What happens if the Secretary determines that the Self-Governance Tribe has not corrected the conditions that the Secretary identified in the notice?
- 137.260 What is the earliest date on which a reassumption can be effective?
- 137.261 Does the Secretary have the authority to immediately reassume a PSFA?
- 137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?
- 137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under § 137.257.
- 137.264 To what extent may the Secretary require the Self-Governance Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the reassume program?
- 137.265 May a Tribe be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption?

#### Subpart N—Construction

##### Purpose and Scope

- 137.270 What is covered by this subpart?
- 137.271 Why is there a separate subpart in these regulations for construction project agreements?
- 137.272 What other alternatives are available for Self-Governance Tribes to perform construction projects?
- 137.273 What are IHS construction PSFAs?
- 137.274 Does this subpart cover construction programs?
- 137.275 May Self-Governance Tribes include IHS construction programs in a construction project agreement or in a funding agreement?

#### Construction Definitions

137.280 Construction definitions.

#### NEPA Process

- 137.285 Are Self-Governance Tribes required to accept Federal environmental responsibilities to enter into a construction project agreement?
- 137.286 Do Self-Governance Tribes become Federal agencies when they assume these Federal environmental responsibilities?
- 137.287 What is the National Environmental Policy Act (NEPA)?
- 137.288 What is the National Historic Preservation Act (NHPA)?
- 137.289 What is a Federal undertaking under NHPA?
- 137.290 What additional provisions of law are related to NEPA and NHPA?
- 137.291 May Self-Governance Tribes carry out construction projects without assuming these Federal environmental responsibilities?
- 137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?
- 137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?
- 137.294 What is the typical IHS environmental review process for construction projects?
- 137.295 May Self-Governance Tribes elect to develop their own environmental review process?
- 137.296 How does a Self-Governance Tribe comply with NEPA and NHPA?
- 137.297 If the environmental review procedures of a Federal agency are adopted by a Self-Governance Tribe, is the Self-Governance Tribe responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?
- 137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa-8]?
- 137.299 Are Federal funds available to cover the cost of Self-Governance Tribes carrying out environmental responsibilities?
- 137.300 Since Federal environmental responsibilities are new responsibilities which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?
- 137.301 How are project and program environmental review costs identified?
- 137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?
- 137.303 Are Federal or other funds available for training associated with Tribal assumption of environmental responsibilities?

- 137.304 May Self-Governance Tribes buy back environmental services from the IHS?
- 137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?
- 137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?
- 137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?
- 137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under Section 509 of the Act?
- 137.309 How are NEPA and NHPA obligations typically enforced?
- 137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under Section 509 of the Act [25 U.S.C. 458aaa-8]?
- 137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act?
- 137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa-8(a)(2)]?
- Notification (Prioritization Process, Planning, Development and Construction)**
- 137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?
- 137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?
- 137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?
- Project Assumption Process**
- 137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa-8]?
- 137.326 What must a Tribal proposal for a construction project agreement contain?
- 137.327 May multiple projects be included in a single construction project agreement?
- 137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?
- 137.329 What environmental considerations must be included in the construction project agreement?
- 137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?
- 137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?
- 137.332 On what bases may the Secretary reject a final construction project proposal?
- 137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?
- 137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?
- 137.335 What costs may be included in the budget for a construction agreement?
- 137.336 What is the difference between fixed-price and cost-reimbursement agreements?
- 137.337 What funding must the Secretary provide in a construction project agreement?
- 137.338 May funds from other sources be incorporated into a construction project agreement?
- 137.339 May the Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?
- 137.340 May a Self-Governance Tribe contribute funding to a project?
- 137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?
- 137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?
- 137.343 What happens to funds remaining at the conclusion of a fixed price construction project?
- 137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?
- Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements**
- 137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?
- 137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?
- 137.352 What is contained in a construction project progress report?
- 137.353 What is contained in a construction project financial report?
- Roles of the Secretary in Establishing and Implementing Construction Project Agreements**
- 137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?
- 137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?
- 137.362 May construction project agreements be amended?
- 137.363 What is the procedure for the Secretary's review and approval of amendments?
- 137.364 What constitutes a significant change in the original scope of work?
- 137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?
- 137.366 May the Secretary conduct onsite project oversight visits?
- 137.367 May the Secretary issue a stop work order under a construction project agreement?
- 137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa-8]?
- Other**
- 137.370 Do all provisions of this part apply to construction project agreements under this subpart?
- 137.371 Who takes title to real property purchased with funds provided under a construction project agreement?
- 137.372 What should the Self-Governance Tribe do if it wants real property purchased with construction project agreement funds to be taken into trust?
- 137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?
- 137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring real property with funds provided under a construction project agreement?
- 137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa-8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?
- 137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa-8] subject to Federal metric requirements?
- 137.377 Do Federal procurement law and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa-8]?
- 137.378 Does the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?
- 137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?
- Subpart O—Secretarial Responsibilities Budget Request**
- 137.400—137.404 [Reserved].
- Reports**
- 137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?
- 137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?

137.407 What guidelines will be used by the Secretary to compile information required for the report?

#### Subpart P—Appeals

137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m-1] does the term Acontract include compacts, funding agreements, and construction project agreements entered into under Title V?

#### Post-Award Disputes

137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

#### Pre-Award Disputes

137.415 What decisions may an Indian Tribe appeal under §§ 137.415 through 137.436?

137.416 Do §§ 137.415 through 137.436 apply to any other disputes?

137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?

137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?

137.419 What authority does the IBIA have under §§ 137.415 through 137.436?

137.420 Does an Indian Tribe have any options besides an appeal?

137.421 How does an Indian Tribe request an informal conference?

137.422 How is an informal conference held?

137.423 What happens after the informal conference?

137.424 Is the recommended decision from the informal conference final for the Secretary?

137.425 How does an Indian 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?

137.426 May an Indian Tribe get an extension of time to file a notice of appeal?

137.427 What happens after an Indian Tribe files an appeal?

137.428 How is a hearing arranged?

137.429 What happens when a hearing is necessary?

137.430 What is the Secretary's burden of proof for appeals covered by § 137.145?

137.431 What rights do Indian Tribes and the Secretary have during the appeal process?

137.432 What happens after the hearing?

137.433 Is the recommended decision always final?

137.434 If an Indian Tribe objects to the recommended decision, what will the Secretary do?

137.435 Will an appeal adversely affect the Indian Tribe's rights in other compact, funding negotiations, or construction project agreements?

137.436 Will the decisions on appeal be available for the public to review?

#### Appeals of an Immediate Reassumption of a Self-Governance Program

137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa-6(a)(2)(C)]?

137.441 Will there be a hearing?

137.442 What happens after the hearing?

137.443 Is the recommended decision always final?

137.444 If a Self-Governance Tribe objects to the recommended decision, what action will the Secretary take?

137.445 Will an immediate reassumption appeal adversely affect the Self-Governance Tribe's rights in other self-governance negotiations?

#### Equal Access to Justice Act Fees

137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Authority: 25 U.S.C. 458 *et seq.*

#### Subpart A B General Provisions

##### § 137.1 Authority, purpose and scope.

(a) *Authority.* These regulations are prepared, issued and maintained with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by section 517 of the Act [25 U.S.C. 458aaa-16].

(b) *Purpose.* These regulations codify rules for self-governance compacts, funding agreements, and construction project agreements between the Department of Health and Human Services (DHHS) and Self-Governance Tribes to implement sections 2, 3, and 4 of Pub. L. 106–260.

(c) *Scope.* These regulations are binding on the Secretary and on Indian Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs) under Title V except as otherwise specifically authorized by a waiver under section 512(b) of the Act [25 U.S.C. 458aaa-11(b)].

(d) *Information Collection.* The information collection requirements contained in these rules have been approved by the Office of Management and Budget (OMB) and assigned the following approval numbers: [Approval numbers will appear in this location in the final rule.]

##### § 137.2 Congressional policy.

(a) According to section 2 of Public Law 106–260, Congress has declared that:

(1) The Tribal right of self-government flows from the inherent sovereignty of Indian Tribes and nations;

(2) The United States recognizes a special government-to-government relationship with Indian Tribes,

including the right of the Indian Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;

(3) Although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded Tribal Self-Governance and dominates Tribal affairs.

(4) The Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination Act (ISDA) [25 U.S.C. 450f note] was designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen Tribal control over Federal funding and program management;

(5) Although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian Tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to Tribal governments, upon Tribal request, over decision making for Federal PSFAs

(i) Is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian Tribes; and

(ii) Strengthens the Federal policy of Indian self-determination.

(b) According to section 3 of Pub. L. 106–260, Congress has declared its policy to:

(1) Permanently establish and implement Tribal Self-Governance within the DHHS;

(2) Call for full cooperation from the DHHS and its constituent agencies in the implementation of Tribal Self-Governance—

(i) Enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian Tribes;

(ii) Permit each Indian Tribe to choose the extent of its participation in self-governance in accordance with the provisions of the ISDA relating to the provision of Federal services to Indian Tribes;

(iii) Ensure the continuation of the trust responsibility of the United States to Indian Tribes and Indians;

(iv) Affirm and enable the United States to fulfill its obligations to the Indian Tribes under treaties and other laws;



(v) Strengthen the government-to-government relationship between the United States and Indian Tribes through direct and meaningful consultation with all Tribes;

(vi) Permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities;

(vii) Provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian Tribes; (viii) Encourage the Secretary to identify all PSFAs of the DHHS that may be managed by an Indian Tribe under this Act and to assist Indian Tribes in assuming responsibility for such PSFAs; and

(ix) Provide Indian Tribes with the earliest opportunity to administer PSFAs from throughout the Department.

(c) According to section 512(a) of the Act [25 U.S.C. 458aaa-11(a)], Congress has declared, 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 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 title; and

(3) The achievement of Tribal health goals and objectives.

(d) According to section 512(f) of the Act [25 U.S.C. 458aaa-11(f)], Congress has declared that each provision of Title V and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in and any ambiguity shall be resolved in favor of the Indian Tribe.

(e) According to section 515(b) of the Act [25 U.S.C. 458aaa-14(b)], Congress has declared that nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Indian Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(f) According to section 507(g) of the Act [25 U.S.C. 458aaa-6(g)], Congress has declared that the Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian Tribes and individual Indians that exists under treaties,

Executive orders, other laws, or court decisions.

(g) According to section 515(c) of the Act [25 U.S.C. 458aaa-14(c)], Congress has declared that the Indian Health Service (IHS) under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Tribe to do so. Nothing in this section shall impair the right of the IHS or an Indian Tribe to seek recovery from third parties section 206 of the Indian Health Care Improvement Act [25 U.S.C. 1621e], under section 1 of the Federal Medical Care Recovery Act [42 U.S.C. 2651], and any other applicable Federal, State or Tribal law.

(h) According to section 507(e) of the Act [25 U.S.C. 458aaa-6(e)], Congress has declared that 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 Title V in a manner that maximizes the policy of Tribal Self-Governance, and in a manner consistent with the purposes specified in section 3 of the Act.

#### § 137.3 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 Indian Tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians. The Secretary must act in good faith in upholding this trust responsibility;

(c) Mandating an Indian Tribe to apply for a compact(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.

#### § 137.4 May Title V be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal Law?

No, if an Indian Tribe alleges that a compact or funding agreement violates section 515(a) of the Act [25 U.S.C. 458aaa-14(a)], the Indian Tribe may apply the provisions of section 110 of the Act [25 U.S.C. 450m-1].

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

Unless expressly agreed to by the Self-Governance Tribe 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 IHS, except for the eligibility provisions of section 105(g) of the Act [25 U.S.C. 450j(g)] and regulations promulgated under section 517 of the Act [25 U.S.C. 458aaa-16(e)].

### Subpart B—Definitions.

#### § 137.10 Definitions.

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, Public Law 93-638, as amended.

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

*Compact* means a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

*Congressionally earmarked competitive grants* as used in section 505(b)(1) of the Act [25 U.S.C. 458aaa-4(b)(1)] means statutorily mandated grants as defined in this section and used in subpart H of this part.

*Contract* means a self-determination contract as defined in section 4(j) of the Act [25 U.S.C. 450b].

*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.

*Department* means the Department of Health and Human Services.

*Director* means the Director of the Indian Health Service.

*Funding agreement* means a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from the Service Unit, Area, and Headquarter's levels in support of those PSFAs and such other terms as are required, or may be agreed upon, pursuant to Title V.

*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 an Indian Tribe by a compact or funding agreement that results in a significant reduction of funds available for the PSFAs assumed by a Self-Governance Tribe.

*IHS* means Indian Health Service.

*IHS discretionary grant* means a grant established by IHS pursuant to the IHS'

discretionary authority without any specific statutory directive.

*Indian* means a person who is a member of an Indian Tribe.

*Indian Tribe* means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies, and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; provided that in any case in which an Indian Tribe has authorized another Indian Tribe, an inter-Tribal consortium, or a Tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under Title V, the authorized Indian Tribe, inter-Tribal 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 part). In such event, the term 'Indian Tribe' as used in this part includes such other authorized Indian Tribe, inter-Tribal consortium, or Tribal organization.

*Indirect costs* shall have the same meaning as it has in 25 CFR 900.6 as applied to compacts, funding agreements and construction project agreements entered into under this part.

*Inherent Federal functions* means those Federal functions which cannot legally be delegated to Indian Tribes.

*Inter-Tribal consortium* means a coalition of two or more separate Indian Tribes that join together for the purpose of participating in self-governance, including Tribal organizations.

*OMB* means the Office of Management and Budget.

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

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

*Reassumption* means rescission, in whole or part, of a funding agreement and assuming or resuming control or operation of the PSFAs by the Secretary without consent of the Self-Governance Tribe.

*Retained Tribal share* means those funds that are available as a Tribal share but which the Self-Governance Tribe elects to leave with the IHS to administer.

*Retraction* means the voluntary return to the Secretary 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 Health and Human Services (and his or her respective delegates.)

*Self-Governance* means the program of self-governance established under section 502 of the Act [25 U.S.C. 458aaa-1].

*Self-Governance Tribe* means an Indian Tribe participating in the program of self-governance pursuant to section 503(a) of the Act [25 U.S.C. 458aaa-2(a)] or selected and participating in self-governance pursuant to section 503(b) of the Act [25 U.S.C. 458aaa-2(b)].

*Statutorily mandated grant* as used in this section and subpart F of this part means a grant specifically designated in a statute for a defined purpose.

*Title I* means sections 1 through 9 and Title I of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, as amended.

*Title V* means Title V of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, as amended.

*Tribal organization* means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; provided, that in any case where a contract or compact is entered into, or a grant is made, to an organization to perform services benefitting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the entering into or making of such contract, compact, or grant.

*Tribal share* means an Indian Tribe's portion of all funds and resources that support secretarial PSFAs that are not required by the Secretary for the performance of inherent Federal functions.

### Subpart C—Selection of Indian Tribes for Participation in Self-Governance

#### § 137.15 Who may participate in Tribal Self-Governance?

Those Self-Governance Tribes described in 503(a) of the Act [25 U.S.C. 458aaa-2(a)] participating in the Title III Tribal Self-Governance Demonstration Project and up to 50 additional Indian Tribes per year that meet the criteria in § 137.18 may participate in self-governance.

#### § 137.16 What if more than 50 Indian Tribes apply to participate in self-governance?

The first 50 Indian Tribes who apply and are determined to be eligible shall have the option to participate in self-governance. Any Indian Tribe denied participation due to the limitation in number of Indian Tribes that may take part is entitled to participate in the next fiscal year, provided the Indian Tribe continues to meet the financial stability and financial management capacity requirements.

#### § 137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?

Yes, Indian Tribes may either:

(a) Each sign the same compact and/or funding agreement, provided that each one meets the criteria to participate in self-governance and accepts legal responsibility for all financial and administrative decisions made under the compact or funding agreement, or

(b) Authorize another Indian Tribe to participate in self-governance on their behalf.

#### § 137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

To be eligible to participate in self-governance, an Indian Tribe must have:

- (a) Successfully completed the planning phase described in § 137.20;
- (b) Requested participation in self-governance by resolution or other official action by the governing body of each Indian Tribe to be served; and
- (c) Demonstrated, for three fiscal years, financial stability and financial management capability.

#### Planning Phase

#### § 137.20 What is required during the planning phase?

The planning phase must be conducted to the satisfaction of the Indian Tribe and must include:

- (a) Legal and budgetary research; and
- (b) Internal Tribal government planning and organizational preparation relating to the administration of health programs.

#### § 137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?

The Indian Tribe provides evidence that, for the three years prior to participation in self-governance, the Indian Tribe has 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.

**§ 137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?**

Yes, if the Indian Tribe chooses to centralize its self-determination or self-governance financial and administrative functions with non-self-determination or non-self-governance financial and administrative functions, such as personnel, payroll, property management, etc., the Secretary may consider uncorrected significant and material audit exceptions related to the integrity of a cross-cutting centralized function in determining the Indian Tribe's eligibility for participation in the self-governance program.

**§ 137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider any other information regarding the Indian Tribe's financial stability and financial management capacity?**

No, meeting the criteria set forth in §§ 137.21 and 137.22, shall be conclusive evidence of the required stability and capability to participate in self-governance.

**§ 137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?**

Yes, any Indian Tribe may apply, as provided in § 137.25, for a grant to assist it to:

- (a) Plan to participate in self-governance; and
- (b) Negotiate the terms of the compact and funding agreement between the Indian Tribe and Secretary.

**§ 137.25 Are planning and negotiation grants available?**

Subject to the availability of funds, IHS will annually publish a notice of the number of planning and negotiation grants available, an explanation of the application process for such grants, and the criteria for award. Questions may be directed to the Office of Tribal Self-Governance.

**§ 137.26 Must an Indian tribe receive a planning or negotiation grant to be eligible to participate in self-governance?**

No, an Indian Tribe may use other resources to meet the planning requirement.

**Subpart D—Self-Governance Compact**

**§ 137.30 What is a self-governance compact?**

A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

**§ 137.31 What is included in a compact?**

A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility and statutory and treaty obligations to Indian Tribes and such other terms as the parties intend to control from year to year.

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

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

**§ 137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?**

Yes, at an Indian Tribe's option, a funding agreement may be negotiated prior to or at the same time as the negotiation of a compact.

**§ 137.34 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.

**§ 137.35 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.

**Subpart E—Funding Agreements**

**§ 137.40 What is a funding agreement?**

A funding agreement is a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from service unit, area and headquarters levels in support of those PSFAs and such other terms as are required or may be agreed upon pursuant to Title V.

**§ 137.41 What PSFAs must be included in a funding agreement?**

At the Self-Governance Tribe's option, all PSFAs identified in and in accordance with section 505(b) of the Act must be included in a funding agreement, subject to section 507(c) of the Act [25 U.S.C. 458aaa-6(c)].

**§ 137.42 What Tribal shares may be included in a funding agreement?**

All Tribal shares identified in sections 505(b)(1) [25 U.S.C. 458aaa-4(b)(1)] and 508(c) of the Act [25 U.S.C. 458aaa-7(c)] may be included in a funding agreement, including Tribal shares of IHS discretionary grants.

**§ 137.43 Are all funds identified as Tribal shares always paid to the Self-Governance Tribe under a funding agreement?**

No, at the discretion of the Self-Governance Tribe, Tribal shares may be left, in whole or in part, with IHS for certain PSFAs. These shares are referred to as a "retained Tribal shares."

**Terms in a Funding Agreement**

**§ 137.45 What terms must be included in a funding agreement?**

A funding agreement must include terms required under section 505(d) of the Act [25 U.S.C. 458aaa-4(d)] and provisions regarding mandatory reporting and reassumption pursuant to section 507(a) of the Act [25 U.S.C. 458aaa-6(a)], unless those provisions have been included in a compact.

**§ 137.46 May additional terms be included in a funding agreement?**

Yes, at the Self-Governance Tribe's option, additional terms may be included as set forth in sections 506 [25 U.S.C. 458aaa-5] and 516(b) of the Act [25 U.S.C. 458aaa-15(b)]. In addition, any other terms to which the Self-Governance Tribe and the Secretary agree may be included.

**§ 137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?**

(a) Yes, the provisions of Title I listed in section 516(a) of the Act [25 U.S.C. 458aaa-15(a)] and section 314 of Pub. L. 101-512, as amended, [25 U.S.C. 450f note] mandatorily apply to a compact, funding agreement and construction project agreement to the extent they are not in conflict with Title V. In addition, at the option of a Self-Governance Tribe, under section 516(b) of the Act [25 U.S.C. 458aaa-15(b)] any provisions of Title I may be included in the compact or funding agreement.

(b) The provisions of Title I referenced in section 516(a) of the Act [25 U.S.C. 458aaa-15(a)] are sections 5 [25 U.S.C. 450c], 6 [25 U.S.C. 450d], 7 [25 U.S.C. 450e], 102(c) and (d) [25 U.S.C. 450f(c) and (d)], 104 [25 U.S.C. 450i], 105(k) and (l) [25 U.S.C. 450j(k) and (l)], 106(a) through (k) [25 U.S.C. 450j-1(a) through (k)], and 111 [25 U.S.C. 450n] of the Act.

**§ 137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?**

The incorporated Title I provision shall have the same force and effect as if it were set out in full in Title V.

**§ 137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?**

In that event, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

**Term of a Funding Agreement**

**§ 137.55 What is the term of a funding agreement?**

A funding agreement shall have the term mutually agreed to by the parties. Absent notification from an Indian Tribe that it is withdrawing or retroceding the operation of one or more PSFAs identified in the funding agreement, the funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

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

Yes, the provisions of a funding agreement remain in full force and effect until a subsequent funding agreement is executed. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

**§ 137.57 How is a funding agreement amended during the effective period of the funding agreement?**

A funding agreement may be amended by the parties as provided for in the funding agreement, Title V, or this part.

**Subpart F—Statutorily Mandated Grants**

**§ 137.60 May a statutorily mandated grant be added to a funding agreement?**

Yes, in accordance with section 505(b)(2) of the Act [25 U.S.C. 458aaa-4(b)(2)], a statutorily mandated grant may be added to the funding agreement after award.

**§ 137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?**

Yes, grant funds shall be added to the funding agreement as an annual lump sum advance payment after the grant is awarded.

**§ 137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?**

Yes, a Self-Governance Tribe may keep interest earned on statutorily mandated grant funds.

**§ 137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?**

Interest earned on such funds must be used to enhance the grant program including allowable administrative costs.

**§ 137.68 May funds from a statutorily mandated grant added to a funding agreement be reallocated?**

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, funds from a statutorily mandated grant may not be reallocated.

**§ 137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?**

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, a program added to a funding agreement under a statutorily mandated grant may not be redesigned.

**§ 137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?**

Yes, the reporting requirements for a statutorily mandated grant program added to a funding agreement are subject to the terms and conditions of the grant award.

**§ 137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?**

Yes, the Secretary and the Self-Governance Tribe may develop separate programmatic reporting requirements for statutorily mandated grants.

**§ 137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?**

Yes, Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement are covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

**Subpart G—Funding**

**General**

**§ 137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?**

Subject to the terms of any compact or funding agreement, the Secretary must transfer to a Tribe all funds provided for in the funding agreement, pursuant to section 508(c) of the Act [25 U.S.C. 458aaa-7(c)] and § 137.80. The Secretary shall provide funding for

periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

**§ 137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?**

When a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise.

**§ 137.77 When must the Secretary transfer funds identified in a funding agreement which does not correspond to the Federal fiscal year, e.g., calendar year?**

When the period covered by a funding agreement crosses Federal fiscal years and unless 100 percent of the funding is available and agreed to in the funding agreement, funding for the funding agreement will be apportioned between the two fiscal years and payments due under the funding agreement associated with each respective fiscal year will be made on the later of:

- (a) The effective date of the funding agreement, or
- (b) Ten days after apportionment from OMB.

**§ 137.78 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?**

The Secretary must transfer any funds that were not paid in the initial lump sum payment within 10 days after distribution methodologies and other decisions regarding payment of those funds have been made by the IHS.

**§ 137.79 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?**

Yes, upon Tribal request, the Secretary must 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.

**§ 137.80 What funds must the Secretary include in a funding agreement?**

The Secretary must include funds in a funding agreement in an amount equal to the amount that the Self-Governance Tribe would have been entitled to receive in a contract under Title I, including amounts for direct program costs specified under section 106(a)(1) of the Act and amounts for contract support costs specified under section

106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j-1(a)(2), (3), (5) and (6)]. In addition, the Secretary shall include any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Self-Governance Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

#### Prohibitions

##### **§ 137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?**

Yes, sections 508(d)(1)(A) and (B) of the Act [25 U.S.C. 458aaa-7(d)(1)(A) and (B)] expressly prohibit the Secretary from:

(a) Failing or refusing to transfer to a Self-Governance Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under Title V, except as required by Federal law, and

(b) From withholding portions of such funds for transfer over a period of years.

##### **§ 137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?**

Yes, the Secretary is prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration.

##### **§ 137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?**

No, in accordance with section 508(d)(1)(C)(ii) of the Act [25 U.S.C. 458aaa-7(d)(1)(C)(ii)], the Secretary is prohibited from reducing the amount of funds required under Title V in subsequent years, except pursuant to:

(a) A reduction in appropriations from the previous fiscal year for the program or function to be 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.

##### **§ 137.88 May the Secretary reduce the amount of funds required under Title V 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, the Secretary may not reduce the amount of funds required under Title V 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.

##### **§ 137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V?**

No, the Secretary may not reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V.

##### **§ 137.90 May the Secretary increase the funds required under the funding agreement?**

Yes, the Secretary may increase the funds required under the funding agreement. However, the Self-Governance Tribe and the Secretary must agree to any transfer of funds to the Self-Governance Tribe unless otherwise provided for in the funding agreement.

#### Acquisition of Goods and Services from the IHS

##### **§ 137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?**

Yes, a Self-Governance Tribe may choose to purchase from the IHS any goods and services transferred by the IHS to a Self-Governance Tribe in a compact or funding agreement. The IHS shall provide any such goods and services to the Self-Governance Tribe, on a reimbursable basis, including payment in advance with subsequent adjustment.

#### Prompt Payment Act

##### **§ 137.96 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?**

Yes, the Prompt Payment Act, 39 U.S.C. section 3901 *et seq.*, applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to Title V. See also "137.76 through 137.78 and 137.341(f).

#### Interest or Other Income on Transfers

##### **§ 137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?**

Yes, pursuant to section 508(h) of the Act [25 U.S.C. 458aaa-7(h)], a Self-Governance Tribe may retain and spend interest earned on any funds paid under a compact or funding agreement.

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

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 and Title V. 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. In addition, the Self-Governance Tribe must:

(a) Conform to fundamental fiduciary duties of loyalty and impartiality;

(b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Self-Governance Tribe.

#### Carryover of Funds

##### **§ 137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?**

Yes, pursuant to section 508(i) of the Act, a Self-Governance Tribe may carryover from one year to the next any funds that remain at the end of the funding agreement.

#### Program Income

##### **§ 137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?**

All Medicare, Medicaid, or other program income earned by a Self-Governance Tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Self-Governance Tribe may retain all such

income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Self-Governance Tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

#### Limitation of Costs

##### **§ 137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?**

No, if a Self-Governance Tribe believes that the total amount of funds provided for a specific PSFA in a compact or funding agreement is insufficient, the Self-Governance Tribe must provide reasonable written notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement in a quantity sufficient for the Self-Governance Tribe to complete the PSFA, as jointly determined by the Self-Governance Tribe and the Secretary, the Self-Governance Tribe may suspend performance of the PSFA until such time as additional funds are transferred.

#### Stable Base Budget

##### **§ 137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?**

Yes, at the option of a Self-Governance Tribe, a funding agreement may provide for a stable base budget, specifying the recurring funds to be transferred to a Self-Governance Tribe for a period specified in the funding agreement.

##### **§ 137.121 What funds may be included in a stable base budget amount?**

The stable base budget amount may include, at the option of the Self-Governance Tribe,

(a) Recurring funds available under section 106(a) of the Act [25 U.S.C. 450j-1];

(b) Recurring Tribal shares; and

(c) Any recurring funds for new or expanded PSFAs not previously assumed by the Self-Governance Tribe.

##### **§ 137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?**

Yes, the funding agreement may include non-recurring funds, other recurring funds, and other funds the Self-Governance Tribe is entitled to

include in a funding agreement that are not included in the stable base budget amount.

##### **§ 137.123 Once stable base funding is negotiated, do funding amounts change from year to year?**

Stable base funding amounts are subject to adjustment:

(a) Annually only to reflect changes in Congressional appropriations by sub-sub activity excluding earmarks;

(b) By mutual agreement of the Self-Governance Tribe and the Secretary; or

(c) As a result of full or partial retrocession or reassumption.

##### **§ 137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?**

No, the Self-Governance Tribe may provide in its funding agreement that the effective period of the stable base budget will be either longer or shorter than the term of the funding agreement.

#### Subpart H—Final Offer

##### **§ 137.130 What is covered by this subpart?**

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

##### **§ 137.131 When should a final offer be submitted?**

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

##### **§ 137.132 How does the Indian Tribe submit a final offer?**

(a) A written final offer should be submitted:

(1) During negotiations to the agency lead negotiator;

(2) Thereafter to the Director.

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

##### **§ 137.133 What does a final offer contain?**

A final offer contains a description of the disagreement between the Secretary and the Indian Tribe and the Indian Tribe's final proposal to resolve the disagreement.

##### **§ 137.134 When does the 45 day review period begin?**

The 45 day review period begins from the date the IHS receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

##### **§ 137.135 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 Indian 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 Indian Tribe to grant the extension before the expiration of the 45 day review period.

##### **§ 137.136 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.

##### **§ 137.137 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.

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

After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian 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

##### **§ 137.140 On what basis may the Secretary reject an Indian Tribe's final offer?**

The Secretary may reject an Indian Tribe's final offer for one of the following reasons:

(a) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under the Act;

(b) The PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian Tribe;

(c) The Indian Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health; or

(d) The Indian Tribe is not eligible to participate in self-governance under section 503 of the Act [25 U.S.C. 458aaa-2].

##### **§ 137.141 How does the Secretary reject a final offer?**

The Secretary must reject a final offer by providing written notice to the

Indian Tribe based on the criteria in § 137.140 not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Self-Governance Tribe consistent with this subpart.

**§ 137.142 What is a “significant danger” or “risk” to the public health?**

A significant danger or risk is determined on a case-by-case basis in accordance with section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

**§ 137.143 How is the funding level to which the Indian Tribe is entitled determined?**

The Secretary must provide funds under a funding agreement in an amount equal to the amount that the Indian Tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) of the Act [25 U.S.C. 450j–1(a)(1)] and amounts for contract support costs specified under section 106(a)(2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)], including any tribal shares.

**§ 137.144 Is technical assistance available to an Indian Tribe to avoid rejection of a final offer?**

Yes, upon receiving a final offer, the Secretary must offer any necessary technical assistance, and must share all relevant information with the Indian Tribe in order to avoid rejection of a final offer.

**§ 137.145 If the Secretary rejects a final offer, is the Secretary required to provide the Indian Tribe with technical assistance?**

Yes, the Secretary must offer and, if requested by the Indian Tribe, provide additional technical assistance to overcome the stated grounds for rejection.

**§ 137.146 If the Secretary rejects all or part of a final offer, is the Indian Tribe entitled to an appeal?**

Yes, the Indian Tribe is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart P of this part. Alternatively, at its option, the Indian Tribe has the right to sue pursuant to section 110 of the Act [25 U.S.C. 450m–1] in Federal district court to challenge the Secretary’s decision.

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

Yes, subject to section 507(c)(1)(D) of the Act [25 U.S.C. 458aaa–6(c)(1)(D)].

**§ 137.148 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.

**Burden of Proof**

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

With respect to any appeal, hearing or civil action, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final offer.

**Decision Maker**

**§ 137.155 What constitutes a final agency action?**

A final agency action shall consist of a written decision from the Department to the Indian Tribe 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.

**Subpart I—Operational Provisions**

**Conflicts of Interest**

**§ 137.160 Are Self-Governance Tribes required to address potential conflicts of interest?**

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

**Audits and Cost Principles**

**§ 137.165 Are Self-Governance Tribes required to undertake annual audits?**

Yes, under the provisions of section 506(c) of the Act [25 U.S.C. 458aaa–5(c)], Self-Governance Tribes must undertake annual audits pursuant to the Single Audit Act, 31 U.S.C. 7501 *et seq.*

**§ 137.166 Are there exceptions to the annual audit requirements?**

Yes, the exceptions are described in 31 U.S.C. 7502 of the Single Audit Act.

**§ 137.167 What cost principles must a Self-Governance Tribe follow when participating in self-governance under Title V?**

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

(a) Section 106 (k) of the Act [25 U.S.C. 450j–1],

(b) Other provisions of law, or

(c) Any exemptions to applicable OMB circulars subsequently granted by the OMB.

**§ 137.168 May the Secretary require audit or accounting standards other than those specified in § 137.167?**

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

**§ 137.169 How much time does the Federal Government have to make a claim against a Self-Governance Tribe relating to any disallowance of costs, based on an audit conducted under § 137.165?**

Any right of action or other remedy (other than those relating to a criminal offence) 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.

**§ 137.170 When does the 365 day period commence?**

For the purpose of determining the 365 day period, an audit report is deemed received on the date of actual receipt by the Secretary, at the address specified in § 137.172, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency audit report as insufficient due to non-compliance with chapter 75 of title 31, United States Code or noncompliance with any other applicable law.

**§ 137.171 Where do Self-Governance Tribes send their audit reports?**

(a) For fiscal years ending on or before June 30, 1996, the audit report must be sent to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

(b) For fiscal years, beginning after June 30, 1996, the audit report must be sent to: Single Audit Clearinghouse, 1201 E. 10th St., Jeffersonville, IN 47132.

**§ 137.172 Should the audit report be sent anywhere else to ensure receipt by the Secretary?**

Yes, the Self-Governance Tribe should also send the audit report to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

**§ 137.173 Does a Self-Governance Tribe have a right of appeal from a disallowance?**

Yes, the notice must set forth the right of appeal and hearing to the Interior Board of Contract Appeals, pursuant to section 110 of the Act [25 U.S.C. 450m-1].

**Records**

**§ 137.175 Is a Self-Governance 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 § 137.177.

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

No, except to the extent that a Self-Governance Tribe specifies otherwise in its compact or funding agreement, the records of the Self-Governance Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

**§ 137.177 Is the Self-Governance Tribe required to make its records available to the Secretary?**

Yes, after 30 days advance written notice from the Secretary, the Self-Governance Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of title 44 United States Code.

**§ 137.178 May Self-Governance Tribes store patient records at the Federal Records Centers?**

Yes, at the option of a Self-Governance Tribe, patient records may be stored at Federal Records Centers to the same extent and in the same manner as other Department patient records in accordance with section 105(o) of the Act [25 U.S.C. 450j(o)].

**§ 137.179 May a Self-Governance Tribe make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178?**

Yes, a Self-Governance Tribe may make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to § 137.178.

**§ 137.180 Are there other laws that govern access to patient records?**

Yes, a Tribe must consider the potential application of Tribal, Federal and state law and regulations that may apply to requests for access to Tribal patient records, such as the provisions 42 CFR 2.1-2.67 pertaining to records regarding drug and/or alcohol treatment.

**Redesign**

**§ 137.185 May a Self-Governance Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?**

Yes, a Self-Governance Tribe may redesign or consolidate PSFAs included in a funding agreement and reallocate or redirect funds for such PSFAs in any manner which the Self-Governance Tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

**Non-Duplication**

**§ 137.190 Is a Self-Governance Tribe that receives funds under Title V also entitled to contract under section 102 of the Act [25 U.S.C. 450(f)] for such funds?**

For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Self-Governance Tribe is not entitled to contract with the Secretary for such funds under section 102 of the Act [25 U.S.C. 450f], except that such Self-Governance Tribe is eligible for new programs on the same basis as other Indian Tribes.

**Health Status Reports**

**§ 137.200 Are there reporting requirements for Self-Governance Tribes under Title V?**

Yes, compacts or funding agreements negotiated between the Secretary and a Self-Governance Tribe must include a provision that requires the Self-Governance Tribe to report on health status and services delivery. These reports may only impose minimal burdens on the Self-Governance Tribes.

**§ 137.201 What are the purposes of the Tribal reporting requirements?**

Tribal reports enable the Secretary to prepare reports required under Title V and to develop the budget request. The reporting requirements are not intended as a quality assessment or monitoring tool, although such provision may be included at the option of the Self-Governance Tribe. Under no circumstances will the reporting

requirement include any confidential, proprietary or commercial information. For example, while staffing levels may be a part of a report, pay levels for the staff are considered confidential between the Self-Governance Tribe and the employee.

**§ 137.202 What types of information will Self-Governance Tribes be expected to include in the reports?**

Reports will be derived from existing minimal data elements currently collected by Self-Governance Tribes, and may include patient demographic and workload data. Not less than 60 days prior to the start of negotiations or a mutually agreed upon timeframe, the IHS will propose a list of recommended minimal data elements, along with justification for their inclusion, to be used as a basis for negotiating these requirements into the Self-Governance Tribe's compact or funding agreement.

**§ 137.203 May a Self-Governance Tribe participate in a voluntary national uniform data collection effort with the IHS?**

Yes, in order to advance Indian health advocacy efforts, each Self-Governance Tribe will be encouraged to participate, at its option, in national IHS data reporting activities such as Government Performance Results Act, epidemiologic and surveillance reporting.

**§ 137.204 How will this voluntary national uniform data set be developed?**

IHS will work with representatives of Self-Governance Tribes, in coordination with the Tribal Self Governance Advisory Committee (TSGAC), to develop a mutually-defined annual voluntary uniform subset of data that is consistent with Congressional intent, minimizes reporting burdens, and responds to the needs of the Self-Governance Tribe.

**§ 137.205 Will this voluntary uniform data set reporting activity be required of all Self-Governance Tribes entering into a compact with the IHS under Title V?**

No, to the extent that specific resources are available or have not otherwise been provided to the Self-Governance Tribe for this purpose, and if the Self-Governance Tribes choose to participate, the IHS will provide resources, hardware, software, and technical assistance to the Self-Governance Tribes to facilitate data gathering to ensure data consistency and integrity under this voluntary effort.

**§ 137.206 Why does the IHS need this information?**

This information will be used to comply with sections 513 [25 U.S.C. 458aaa-12] and 514 [25 U.S.C. 458aaa-13] of the Act as well as to assist IHS



in advocating for the Indian health system, budget formulation, and other reporting required by statute, development of partnerships with other organizations that benefit the health status of Indian Tribes, and sharing of best practices.

**§ 137.207 Will funding be provided to the Self-Governance Tribe to compensate for the costs of reporting?**

Yes, reporting requirements are subject to the Secretary providing specific funds for this purpose in the funding agreement.

**Savings**

**§ 137.210 What happens if self-governance activities under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings?**

To the extent that PSFAs carried out by Self-Governance Tribes under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 508(c) of the Act [25 U.S.C. 458aaa–7(c)], the Secretary must make such savings available to the Self-Governance Tribes, for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

**§ 137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in § 137.210.**

The annual report prepared pursuant to section 514(b)(2) [25 U.S.C. 458aaa–13(b)(2)] of the Act must specifically identify any such savings.

**Access to Government Furnished Property**

**§ 137.215 How does a Self-Governance Tribe obtain title to real and personal property furnished by the Federal Government for use in the performance of a compact, funding agreement, construction project agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa–11(c)]?**

(a) For government-furnished real and personal property made available to a Self-Governance Tribe, the Self-Governance Tribe must take title to all real or personal property unless the Self-Governance Tribe requests that the United States retain the title.

(b) For government-furnished personal property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with each Self-Governance Tribe, must

develop a list of the property used in a compact, funding agreement, or construction project agreement.

(2) The Self-Governance Tribe must indicate any items on the list to which the Self-Governance Tribe wants the Secretary to retain title.

(3) The Secretary must provide the Self-Governance Tribe with any documentation needed to transfer title to the remaining listed property to the Self-Governance Tribe.

(c) For government-furnished real property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with the Self-Governance Tribe, must develop a list of the property furnished for use in a compact, funding agreement, or construction project agreement.

(2) The Secretary must inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202.2(b)(10).

(3) The Self-Governance Tribe must indicate on the list to the Secretary any items of real property to which the Self-Governance Tribe wants the Secretary to retain title and those items of property to which the Self-Governance Tribe wishes to obtain title. The Secretary must take such steps as necessary to transfer title to the Self-Governance Tribe those items of real property which the Self-Governance Tribe wishes to acquire.

**Matching and Cost Participation Requirements**

**§ 137.217 May funds provided under compacts, funding agreements, or grants made pursuant to Title V be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?**

Yes, funds provided under compacts, funding agreements, or grants made pursuant to Title V may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

**FTCA**

**§ 137.220 Do section 314 of Public Law 101–512 [25 U.S.C. 450f note] and section 102(d) of the Act [25 U.S.C. 450f(d)] (regarding, in part, FTCA coverage) apply to compacts, funding agreements and construction project agreements?**

Yes, regulations governing FTCA coverage are set out at 25 CFR Part 900, Subpart M.

**Subpart J—Regulation Waiver**

**§ 137.225 What regulations may be waived under Title V?**

A Self-Governance Tribe may request a waiver of regulation(s) promulgated under section 517 of the Act [25 U.S.C. 458aaa–16] or under the authorities specified in section 505(b) of the Act [25 U.S.C. 458aaa–4(b)] for a compact or funding agreement entered into with the IHS under Title V.

**§ 137.226 How does a Self-Governance Tribe request a waiver?**

A Self-Governance Tribe may request a waiver by submitting a written request to the Secretary identifying the applicable Federal regulation(s) sought to be waived and the basis for the request.

**§ 137.227 How much time does the Secretary have to act on a waiver request?**

The Secretary must either approve or deny the requested waiver in writing within 90 days after receipt by the Secretary.

**§ 137.228 Upon what basis may the waiver request be denied?**

A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law.

**§ 137.229 What happens if the Secretary neither approves or denies a waiver request within the time specified in § 137.227?**

The waiver request is deemed approved.

**§ 137.230 Is the Secretary's decision on a waiver request final for the Department?**

Yes, the Secretary's decision on a waiver request is final for the Department.

**§ 137.231 May a Self-Governance Tribe appeal the Secretary's decision to deny its request for a waiver of a regulation promulgated under section 517 of the Act [25 U.S.C. 458aaa–16]?**

The decision may not be appealed under these regulations but may be appealed by the Self-Governance Tribe in Federal Court under applicable law.

**Subpart K—Withdrawal**

**§ 137.235 May an Indian Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?**

Yes, an Indian Tribe may fully or partially withdraw from a participating inter-Tribal consortium or Tribal organization its share of any PSFAs included in a compact or funding agreement.

**§ 137.236 When does a withdrawal become effective?**

A withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating Tribal organization or inter-Tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on

(a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or

(b) Such date as may be mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the participating Tribal organization or inter-Tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian Tribe, inter-Tribal consortium, or Tribal organization.

**§ 137.237 How are funds redistributed when a Indian Tribe fully or partially withdraws from a compact or funding agreement and elects to enter a contract or compact?**

When an Indian Tribe eligible to enter into a contract under Title I or a compact or funding agreement under Title V fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization, and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:

(a) the withdrawing Indian Tribe is entitled to its Tribal share of funds supporting those PSFAs that the Indian Tribe will be carrying out under its own contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-Tribal consortium or Tribal organization); and

(b) the funds referred to in paragraph (a) of this section must be transferred from the funding agreement of the inter-Tribal consortium or Tribal organization, on the condition that the provisions of sections 102 [25 U.S.C. 450f] and 105(i) of the Act [25 U.S.C. 450j], as appropriate, apply to the withdrawing Indian Tribe.

**§ 137.238 How are funds distributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Indian Tribe and the withdrawing Indian Tribe elects not to enter a contract or compact?**

All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Indian Tribe's returned PSFAs, less close out

costs, shall be returned by the inter-Tribal consortium or Tribal organization to the IHS for operation of the PSFAs included in the withdrawal.

**§ 137.239 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, is the resulting contract considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)]?**

Yes, if the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, the resulting contract is considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)] at the option of the Indian Tribe.

**Subpart L—Retrocession****§ 137.245 What is retrocession?**

Retrocession means the return by a Self-Governance Tribe to the Secretary of 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.

**§ 137.246 How does a Self-Governance Tribe retrocede a PSFA?**

The Self-Governance Tribe submits a written notice to the Director 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.

**§ 137.247 What is the effective date of a retrocession?**

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:

- (a) The earlier of 1 year after:
  - (1) The date of submission of the request, or
  - (2) The date on which the funding agreement expires; or
- (b) Whatever date is mutually agreed upon by the Secretary and the retroceding Self-Governance Tribe.

**§ 137.248 What effect will a retrocession have on a retroceding Self-Governance Tribe's rights to contract or compact under the Act?**

A retrocession request shall not negatively affect:

- (a) Any other contract or compact to which the retroceding Self-Governance Tribe is a party;

(b) Any other contracts or compacts the retroceding Self-Governance Tribe may request; and

(c) Any future request by such Self-Governance Tribe or an Indian Tribe to compact or contract for the same program.

**§ 137.249 Will retrocession adversely affect funding available for the retroceded program?**

No, the Secretary shall provide no less than the same level of funding that would have been available if there had been no retrocession.

**§ 137.250 How are funds distributed when a Self-Governance Tribe fully or partially retrocedes from its compact or funding agreement?**

Any funds not obligated by the Self-Governance Tribe and associated with the Self-Governance Tribe's returned PSFAs, less close out costs, must be returned by the Self-Governance Tribe to IHS for operation of the PSFA's associated with the compact or funding agreement from which the Self-Governance Tribe retroceded in whole or in part.

**§ 137.251 What obligation does the retroceding Self-Governance 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?**

On the effective date of any retrocession, the retroceding Self-Governance 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, less the cost of improvements borne by the Self-Governance Tribe in excess of \$5,000 at the time of the retrocession.

**Subpart M—Reassumption****§ 137.255 What does reassumption mean?**

Reassumption means rescission by the Secretary without consent of the Self-Governance Tribe of PSFAs and associated funding in a compact or funding agreement and resuming responsibility to provide such PSFAs.

**§ 137.256 Under what circumstances may the Secretary reassume a program, service, function, or activity (or portion thereof)?**

(a) Subject to the steps in § 137.257, the Secretary may reassume a program, service, function, or activity (or portion thereof) and associated funding if the Secretary makes a specific finding relative to that PSFA of:

(1) Imminent endangerment of the public health caused by an act or omission of the Self-Governance Tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement; or

(2) Gross mismanagement with respect to funds transferred to the Self-Governance Tribe by a compact or funding agreement, as determined by the Secretary, in consultation with the Inspector General, as appropriate.

(b) Immediate reassumption may occur under additional requirements set forth in § 137.261.

**§ 137.257 What steps must the Secretary take prior to reassumption becoming effective?**

Except as provided in §§ 137.261 for immediate reassumption, prior to a reassumption becoming effective, the Secretary must:

(a) Notify the Self-Governance Tribe in writing by certified mail of the details of findings required under §§ 137.256(a)(1) and (2);

(b) Request specified corrective action within a reasonable period of time, which in no case may be less than 45 days;

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Self-Governance Tribe to overcome the conditions that led to the findings described under (a); and

(d) Provide the Self-Governance Tribe with a hearing on the record as provided under Subpart of this part.

**§ 137.258 Does the Self-Governance Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?**

Yes, at the Self-Governance Tribe's request, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § 137.257(b).

**§ 137.259 What happens if the Secretary determines that the Self-Governance 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 Self-Governance Tribe served by the compact or funding agreement that the compact or funding agreement will be rescinded, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the reassumption;

(2) The details and facts supporting the intended reassumption; and

(3) Instructions that explain the Indian Tribe's right to a formal hearing within 30 days of receipt of the notice.

**§ 137.260 What is the earliest date on which a reassumption can be effective?**

Except as provided in § 137.261, no PSFA may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Self-Governance Tribe with an opportunity to take corrective action in response to any adverse final ruling.

**§ 137.261 Does the Secretary have the authority to immediately reassume a PSFA?**

Yes, the Secretary may immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding upon providing to the Self-Governance Tribe written notice in which the Secretary makes a finding:

(a) Of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian Tribe; and

(b) The endangerment arises out of a failure to carry out the compact or funding agreement.

**§ 137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?**

If the Secretary immediately reassumes a PSFA, the Secretary must provide the Self-Governance Tribe with a hearing under Subpart P of this part not later than 10 days after such reassumption, unless the Self-Governance Tribe and the Secretary agree to an extension.

**§ 137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under § 137.257?**

Yes, the Secretary may make a grant for the purpose of obtaining technical assistance as provided in section 103 of the Act [25 U.S.C. 458aaa-h].

**§ 137.264 To what extent may the Secretary require the Self-Governance Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the reassume program?**

On the effective date of any reassumption, the Self-Governance Tribe, shall, at the option of the Secretary and only to the extent requested by 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 reassume program, service, function, or activity (or portion thereof), provided that at the time of reassumption the property has a per item current fair market value, less the cost of improvements borne by the Self-

Governance Tribe, in excess of \$5,000 at the time of the reassumption.

**§ 137.265 May a Tribe be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption?**

Yes, a Tribe may be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption.

**Subpart N—Construction**

**Purpose and Scope**

**§ 137.270 What is covered by this subpart?**

This subpart covers IHS construction projects carried out under section 509 of the Act [25 U.S.C. 458aaa-8].

**§ 137.271 Why is there a separate subpart in these regulations for construction project agreements?**

Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Provisions of a construction project agreement and this subpart shall be liberally construed in favor of the Self-Governance Tribe.

**§ 137.272 What other alternatives are available for Self-Governance Tribes to perform construction projects?**

Self-Governance Tribes also have the option of performing IHS construction projects under a variety of other legal authorities, including but not limited to Title I of the Act, the Indian Health Care Improvement Act, Public Law 94-437, and Public Law 86-121. This subpart does not cover projects constructed pursuant to agreements entered into under these authorities.

**§ 137.273 What are IHS construction PSFAs?**

IHS construction PSFAs are a combination of construction projects as defined in § 137.280 and construction programs.

**§ 137.274 Does this subpart cover construction programs?**

No, except as provided in § 137.275, this subpart does not cover construction programs such as the:

(a) Maintenance and Improvement Program;

(b) Construction program functions; and,

(c) Planning services and construction management services.

**§ 137.275 May Self-Governance Tribes include IHS construction programs in a construction project agreement or in a funding agreement?**

Yes, Self-Governance Tribes may choose to assume construction programs

in a construction project agreement, in a funding agreement, or in a combination of the two. These programs may include the following:

- (a) Maintenance and improvement program;
- (b) Construction program functions, and
- (c) Planning services and construction management services.

### Construction Definitions

#### § 137.280 Construction definitions.

*ALJ* means administrative law judge.  
*APA* means Administrative Procedures Act, 5 U.S.C. 701–706.

*Budget* means a statement of the funds required to complete the scope of work in a construction project agreement. For cost reimbursement agreements, budgets may be stated using broad categories such as planning, design, construction, project administration, and contingency. For fixed price agreements, budgets may be stated as lump sums, unit cost pricing, or a combination thereof.

*Categorical exclusion* means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

*CEQ* means Council on Environmental Quality in the Office of the President.

*Construction management services (CMS)* means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. CMS activities typically include:

- (1) Coordination and information exchange between the Self-Governance Tribe and the Federal Government;
- (2) Preparation of a Self-Governance Tribe's project agreement; and
- (3) A Self-Governance Tribe's subcontract scope of work identification and subcontract preparation, and competitive selection of construction contract subcontractors.

*Construction phase* is the phase of a construction project agreement during which the project is constructed, and includes labor, materials, equipment and services necessary to complete the work, in accordance with the construction project agreement.

*Construction project* means:

(1) An organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities described in a project agreement, and

(2) Does not include construction program administration and activities described in sections 4(m)(1) through (3) of the Act [25 U.S.C. 4b(m)(1) through (3)], that may otherwise be included in a funding agreement under section 505 of the Act [25 U.S.C. 458aaa–4].

*Construction project agreement* means a negotiated agreement between the Secretary and a Self-Governance Tribe, that at a minimum:

(1) Establishes project phase start and completion dates;

(2) Defines a specific scope of work and standards by which it will be accomplished;

(3) Identifies the responsibilities of the Self-Governance Tribe and the Secretary;

(4) Addresses environmental considerations;

(5) Identifies the owner and operations and maintenance entity of the proposed work;

(6) Provides a budget;

(7) Provides a payment process; and

(8) Establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

*Design phase* is the phase of a construction project agreement during which project plans, specifications, and other documents are prepared that are used to build the project. Site investigation, final site selection activities and environmental review and determination activities are completed in this phase if not conducted as a part of the planning phase.

*Maintenance and improvement program*:

(1) As used in this subpart means the program that provides funds for eligible facilities for the purpose of:

(i) Performing routine maintenance;

(ii) Achieving compliance with accreditation standards;

(iii) Improving and renovating facilities;

(iv) Ensuring that Indian health care facilities meet existing building codes and standards; and

(v) Ensuring compliance with public law building requirements.

(2) The maintenance and improvement program is comprised of routine maintenance and repair funding and project funding. Typical maintenance and improvement projects

have historically been funded out of regional or national project pools and may include, but are not limited to, total replacement of a heating or cooling system, remodel of a medical laboratory, removal of lead based paint, abatement of asbestos and abatement of underground fuel storage tanks. Maintenance and repair program funding provided under a funding agreement is not covered under this subpart.

*NEPA* means the National Environmental Policy Act of 1969 [42 U.S.C. 4321 *et seq.*].

*NHPA* means the National Historic Preservation Act [16 U.S.C. 470 *et seq.*].

*Planning phase* is the phase of a construction project agreement during which planning services are provided.

*Planning services* may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed, conducting environmental review activities and justifying the need for the project.

*SHPO* means State Historic Preservation Officer.

*Scope of work* means a brief description of the work to be accomplished under the construction project agreement, sufficient to confirm that the project is consistent with the purpose for which the Secretary has allocated funds.

*THPO* means Tribal Historic Preservation Officer.

### NEPA Process

#### § 137.285 Are Self-Governance Tribes required to accept Federal environmental responsibilities to enter into a construction project agreement?

Yes, under section 509 of the Act [25 U.S.C. 458aaa–8], Self-Governance Tribes must assume all Federal responsibilities under the NEPA of 1969 [42 U.S.C. 4321 *et seq.*] and the National Historic Preservation Act [16 U.S.C. 470 *et seq.*] and related provisions of law that would apply if the Secretary were to undertake a construction project, but only those responsibilities directly related to the completion of the construction project being assumed.

#### § 137.286 Do Self-Governance Tribes become Federal agencies when they assume these Federal environmental responsibilities?

No, while Self-Governance Tribes are required to assume Federal environmental responsibilities for projects in place of the Secretary, Self-Governance Tribes do not thereby

become Federal agencies. However, because Self-Governance Tribes are assuming the responsibilities of the Secretary for the purposes of performing these Federal environmental responsibilities, Self-Governance Tribes will be considered the equivalent of Federal agencies for certain purposes as set forth in this subpart.

**§ 137.287 What is the National Environmental Policy Act (NEPA)?**

The NEPA is a procedural law that requires Federal agencies to follow established environmental review procedures, which include reviewing and documenting the environmental impact of their actions. NEPA establishes a comprehensive policy for protection and enhancement of the environment by the Federal Government; creates the Council on Environmental Quality in the Office of the President; and directs Federal agencies to carry out the policies and procedures of the Act. CEQ regulations (40 CFR 1500–1508) establish three levels of environmental review: categorical exclusions, environmental assessments, and environmental impact statements.

**§ 137.288 What is the National Historic Preservation Act (NHPA)?**

The National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings, such as construction projects, on properties covered by the NHPA, such as historic properties, properties eligible for listing on the National Register of Historic Places, or properties that an Indian Tribe regards as having religious and/or cultural importance. Section 106 of the NHPA [16 U.S.C. 70f] requires Federal agencies to afford the Advisory Council on Historic Preservation, acting through the State Historic Preservation Officer or the Tribal Historic Preservation Officer, a reasonable opportunity to comment on such undertakings.

**§ 137.289 What is a Federal undertaking under NHPA?**

The Advisory Council on Historic Preservation has defined a Federal undertaking in 36 CFR 800.16(y) as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

**§ 137.290 What additional provisions of law are related to NEPA and NHPA?**

(a) Depending upon the nature and the location of the construction project, environmental laws related to NEPA and NHPA may include:

- (1) Archaeological and Historical Preservation Act [16 U.S.C. 461];
  - (2) Archeological Resources Protection Act [16 U.S.C. 470];
  - (3) Clean Air Act [42 U.S.C. 7401];
  - (4) Clean Water Act [32 U.S.C. 1251];
  - (5) Coastal Barrier Improvement Act [42 U.S.C. 4028];
  - (6) Coastal Barrier Resources Act [16 U.S.C. 3501];
  - (7) Coastal Zone Management Act [16 U.S.C. 1451];
  - (8) Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601];
  - (9) Endangered Species Act [16 U.S.C. 1531 et seq.];
  - (10) Farmland Protection Policy Act [7 U.S.C. 4201 et seq.];
  - (11) Marine Protection, Research, and Sanctuaries Act [33 U.S.C. 1401];
  - (12) National Historic Preservation Act [16 U.S.C. 470 et seq.];
  - (13) National Trails System Act [16 U.S.C. 1241];
  - (14) Native American Graves Protection and Repatriation Act [25 U.S.C. 3001];
  - (15) Noise Control Act [42 U.S.C. 7901];
  - (16) Resource Conservation and Recovery Act [42 U.S.C. 3251];
  - (17) Safe Drinking Water Act [42 U.S.C. 300];
  - (18) Toxic Substance Control Act [15 U.S.C. 2601];
  - (19) Wild and Scenic Rivers Act [16 U.S.C. 1271]; and
  - (20) Wilderness Act [16 U.S.C. 1131].
- (b) This section provides a list of environmental laws for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

**§ 137.291 May Self-Governance Tribes carry out construction projects without assuming these Federal environmental responsibilities?**

Yes, but not under section 509 of the Act [25 U.S.C. 458aaa–8]. Self-Governance Tribes may otherwise elect to perform construction projects, or phases of construction projects, under other legal authorities (see § 137.272).

**§ 137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?**

Self-Governance Tribes assume environmental responsibilities by:

- (a) Adopting a resolution or taking an equivalent Tribal action which:

- (1) Designates a certifying officer to represent the Self-Governance Tribe and to assume the status of a responsible Federal official under NEPA, NHPA, and related provisions of law; and

- (2) Accepts the jurisdiction of the Federal court, as provided in § 137.310 and § 137.311 for purposes of enforcement of the Federal environmental responsibilities assumed by the Self-Governance Tribe; and
- (b) Entering into a construction project agreement under section 509 of the Act [25 U.S.C. 458aaa–8].

**§ 137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?**

No, the Self-Governance Tribe may adopt a single resolution or take equivalent Tribal action to assume environmental responsibilities for a single project, multiple projects, a class of projects, or all projects performed under section 509 of the Act [25 U.S.C. 458aaa–8].

**§ 137.294 What is the typical IHS environmental review process for construction projects?**

(a) Most IHS construction projects normally do not have a significant impact on the environment, and therefore do not require environmental impact statements (EIS). Under current IHS procedures, an environmental review is performed on all construction projects. During the IHS environmental review process, the following activities may occur:

- (1) Consult with Tribal, Federal, state, and local officials and interested parties on potential environmental effects;
- (2) Document assessment of potential environmental effects; (IHS has developed a form to facilitate this process.)

- (3) Perform necessary environmental surveys and inventories;

- (4) Consult with the Advisory Council on Historic Preservation, acting through the SHPO or THPO, to ensure compliance with the NHPA;

- (5) Determine if extraordinary or exceptional circumstances exist that would prevent the project from meeting the criteria for categorical exclusion from further environmental review under NEPA, or if an environmental assessment is required;

- (6) Obtain environmental permits and approvals; and

- (7) Identify methods to avoid or mitigate potential adverse effects;

(b) This section is for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

**§ 137.295 May Self-Governance Tribes elect to develop their own environmental review process?**

Yes, Self-Governance Tribes may develop their own environmental review process or adopt the procedures of the IHS or the procedures of another Federal agency.

**§ 137.296 How does a Self-Governance Tribe comply with NEPA and NHPA?**

Self-Governance Tribes comply with NEPA and the NHPA by adopting and following:

- (a) Their own environmental review procedures;
- (b) The procedures of the IHS; and/or
- (c) The procedures of another Federal agency.

**§ 137.297 If the environmental review procedures of a Federal agency are adopted by a Self-Governance Tribe, is the Self-Governance Tribe responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?**

No, the Federal agency is responsible for ensuring its own policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws, not the Self-Governance Tribe.

**§ 137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa-8]?**

No, but Self-Governance Tribes may at their option, choose to voluntarily comply with Executive Orders. For facilities where ownership will vest with the Federal Government upon completion of the construction, Tribes and the Secretary may agree to include the goals and objectives of Executive Orders in the codes and standards of the construction project agreement.

**§ 137.299 Are Federal funds available to cover the cost of Self-Governance Tribes carrying out environmental responsibilities?**

Yes, funds are available:

- (a) For project-specific environmental costs through the construction project agreement; and
- (b) For environmental review program costs through a funding agreement and/or a construction project agreement.

**§ 137.300 Since Federal environmental responsibilities are new responsibilities, which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?**

Yes, the Secretary must transfer not less than the amount of funds that the

Secretary would have otherwise used to carry out the Federal environmental responsibilities assumed by the Self-Governance Tribe.

**§ 137.301 How are project and program environmental review costs identified?**

(a) The Self-Governance Tribe and the Secretary should work together during the initial stages of project development to identify program and project related costs associated with carrying out environmental responsibilities for proposed projects. The goal in this process is to identify the costs associated with all foreseeable environmental review activities.

(b) If unforeseen environmental review and compliance costs are identified during the course of design and construction, the Self-Governance Tribe or the Self-Governance Tribe and the Secretary (with or without amendment as required by § 137.363) may do one or more of the following:

- (1) Mitigate adverse environmental effects;
- (2) Alter the project scope of work; and/or
- (3) Add additional program and/or project funding, including seeking supplemental appropriations.

**§ 137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?**

(a) Yes, start-up costs are available as provided in section 508(c) of the Act [25 U.S.C. 458aaa-7(c)]. During the initial year that these responsibilities are assumed, the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j-1(a)(2)] must include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the agreement necessary:

- (1) To plan, prepare for, and assume operation of the environmental responsibilities; and
- (2) To ensure compliance with the terms of the agreement and prudent management.

(b) Costs incurred before the initial year that the agreement is in effect may not be included in the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j-1(a)(2)] if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

**§ 137.303 Are Federal or other funds available for training associated with Tribal assumption of environmental responsibilities?**

Yes, Self-Governance Tribes may use construction program and project funds

for training and program development. Training and program development funds may also be available from other Federal agencies, such as the Environmental Protection Agency and the National Park Service, state and local governments, and private organizations.

**§ 137.304 May Self-Governance Tribes buy back environmental services from the IHS?**

Yes, Self-Governance Tribes may "buy back" project related services in their construction project agreement, including design and construction engineering, and environmental compliance services from the IHS in accordance with Section 508(f) of the Act [25 U.S.C. 458aaa-7(f)] and § 137.95, subject to the availability of the IHS's capacity to conduct the work.

**§ 137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?**

Yes, Self-Governance Tribes assuming Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8] are entitled to receive equal consideration, on the same basis as any Federal agency, for lead, cooperating, and joint lead agency status. For informational purposes, the terms "lead," "cooperating," and "joint lead agency" are defined in the CEQ regulations at 40 CFR 1508.16, 1508.5 and 1506.2 respectively.

**§ 137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?**

Self-Governance Tribes may be recognized as having lead, cooperating, or joint lead agency status through funding or other agreements with other agencies. To the extent that resources are available, the Secretary will encourage and facilitate Federal, state, and local agencies to enter into agreements designating Tribes as lead, cooperating, or joint lead agencies for environmental review purposes.

**§ 137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?**

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8] remain with the Secretary. Federal agencies, including the IHS, retain responsibility for ensuring their environmental review procedures meet the requirements of

NEPA, NHPA and related provisions of law, as called for in § 137.297.

(b) The Secretary will provide information updating and changing IHS agency environmental review policy and procedures to all Self-Governance Tribes implementing a construction project agreement, and to other Indian Tribes upon request. If a Self-Governance Tribe participating under section 509 of the Act [25 U.S.C. 458aaa–8] does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide technical assistance with carrying out Federal environmental responsibilities.

**§ 137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8]?**

No, the Secretary does not have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8].

**§ 137.309 How are NEPA and NHPA obligations typically enforced?**

NEPA and NHPA obligations are typically enforced by interested parties who may file lawsuits against Federal agencies alleging that the agencies have not complied with their legal obligations under NEPA and NHPA. These lawsuits may only be filed in Federal court under the provisions of the APA, 5 U.S.C. 701–706. Under the APA, a Federal judge reviews the Federal agency's actions based upon an administrative record prepared by the Federal agency. The judge gives appropriate deference to the agency's decisions and does not substitute the court's views for those of the agency. Jury trials and civil discovery are not permitted in APA proceedings. If a Federal agency has failed to comply with NEPA or NHPA, the judge may grant declaratory or injunctive relief to the interested party. No money damages or fines are permitted in APA proceedings.

**§ 137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?**

Yes, but only as provided in this section. Unless Self-Governance Tribes consent to the jurisdiction of a court, Self-Governance Tribes are immune from civil lawsuits. Self-Governance Tribes electing to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C.

458aaa–8] must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Self-Governance Tribes are not required to waive any other immunity.

**§ 137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?**

(a) Yes, Section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)] only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Self-Governance Tribes are not required to subject themselves to suit in their own name, to submit to trial by jury or civil discovery, or to waive immunity for money damages, attorneys fees, or fines.

(b) Self-Governance Tribes may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying official's actions are based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities; and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.

**§ 137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?**

Only the designated Tribal certifying officer acting in his or her official capacity may be sued. Self-Governance Tribes and other Tribal officials are not proper defendants in lawsuits brought under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)].

**Notification (Prioritization Process, Planning, Development and Construction)**

**§ 137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?**

Yes, before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes. In addition, before spending any funds for planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary must

consult with any Indian Tribe that would be significantly affected by the expenditure to determine Tribal preferences concerning the size, location, type, and other characteristics of the project.

**§ 137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?**

In addition to the requirements contained in section 513 of the Act [25 U.S.C. 458aaa–12], Indian Tribes and the Secretary are encouraged to jointly identify health facility and sanitation needs at the earliest possible date for IHS budget formulation. In developing budget justifications for specific projects to be proposed to Congress, the Secretary shall follow the preferences of the affected Indian Tribe(s) to the greatest extent feasible concerning the size, location, type, and other characteristics of the project.

**§ 137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?**

(a) Yes, within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the Secretary shall notify, by registered mail with return receipt in order to document mailing, the Indian Tribe(s) to be benefitted by the availability of the funds for each phase of a project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a construction project proposal.

(b) The Secretary shall, within 30 days after receiving a request from an Indian Tribe, furnish the Indian Tribe with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(c) An Indian Tribe is not required to request this information prior to either submitting a notification of intent or a construction project proposal.

(d) The Secretary shall have a continuing responsibility to furnish information to the Indian Tribes.

**Project Assumption Process**

**§ 137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa–8]?**

(a) A Self-Governance Tribe may start the process of developing a construction project agreement by:

(1) Notifying the Secretary in writing that the Self-Governance Tribe wishes to enter into a pre-agreement negotiation phase as set forth in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)]; or

(2) Submitting a proposed construction project agreement. This proposed agreement may be the final proposal, or it may be a draft for consideration and negotiation, or

(3) A combination of the actions described in paragraphs (a)(1) and (2) of this section.

(b) Upon receiving a Self-Governance Tribe's request to enter into a pre-negotiation phase the Secretary shall take the steps outlined in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)].

**§ 137.326 What must a Tribal proposal for a construction project agreement contain?**

A construction project proposal must contain all of the required elements of a construction project agreement as defined in § 137.280. In addition to these minimum requirements, Self-Governance Tribes may propose additional items.

**§ 137.327 May multiple projects be included in a single construction project agreement?**

Yes, a Self-Governance Tribe may include multiple projects in a single construction project agreement proposal or may add additional approved projects by amendment(s) to an existing construction project agreement.

**§ 137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?**

(a) No, the Self-Governance Tribe and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects.

(b) The Secretary may provide, or the Self-Governance Tribe may request, Federal construction guidelines and manuals for consideration by the Self-Governance Tribe in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards) are consistent with or exceed otherwise applicable nationally recognized standards, the Secretary must accept the Tribally proposed standards.

**§ 137.329 What environmental considerations must be included in the construction project agreement?**

The construction project agreement must include:

(a) Identification of the Tribal certifying officer for environmental review purposes,

(b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in § 137.310 and 137.311.

(c) Identification of the environmental review procedures adopted by the Self-Governance Tribe, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Self-Governance Tribe's adopted procedures.

**§ 137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?**

The Self-Governance Tribe may submit a final construction project proposal to the Secretary. No later than 30 days after the Secretary receives the final construction project proposal, or within a longer time agreed to by the Self-Governance Tribe in writing, the Secretary shall review and make a determination to approve or reject the construction project proposal in whole or in part.

**§ 137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?**

No, the Secretary may not reject a final construction project proposal based on a determination of Tribal capacity or capability.

**§ 137.332 On what basis may the Secretary reject a final construction project proposal?**

(a) The only basis for rejection of project activities in a final construction project proposal are:

(1) The amount of funds proposed in the final construction project proposal exceeds the applicable funding level for the construction project as determined under sections 508(c) [25 U.S.C. 458aaa-7(c)] and 106 of the Act [25 U.S.C. 450j-1].

(2) The final construction project proposal does not meet the minimum content requirements for construction project agreements set forth in section 501(a)(2) of the Act [25 U.S.C. 458aaa(a)(2)]; and

(3) The final construction project proposal on its face clearly

demonstrates that the construction project cannot be completed as proposed.

(b) For construction programs proposed to be included in a construction project agreement, the Secretary may also reject that portion of the proposal that proposes to assume an inherently Federal function that cannot legally be delegated to the Self-Governance Tribe.

**§ 137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?**

Whenever the Secretary rejects a final construction project proposal in whole or in part, the Secretary must:

(a) Send the Self-Governance Tribe a timely written notice of rejection that shall set forth specific finding(s) that clearly demonstrates, or that is supported by controlling legal authority supporting the rejection;

(b) Within 20 days, provide all documents relied on in making the rejection decision to the Self-Governance Tribe;

(c) Provide assistance to the Self-Governance Tribe to overcome any objections stated in the written notice of rejection;

(d) Provide the Self-Governance Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal of the decision to reject the final construction contract proposal, under the regulations set forth in subpart P of this part, except that the Self-Governance Tribe may, in lieu of filing an appeal, initiate an action in Federal district court and proceed directly under sections 511 [25 U.S.C. 458aaa-10] and 110(a) of the Act [25 U.S.C. 450m-1(a)]. With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final construction project proposal (or portion thereof); and

(e) Provide the Self-Governance Tribe with the option of entering into the severable portions of a final proposed construction project agreement (including a lesser funding amount) that the Secretary did not reject, subject to any additional alterations necessary to conform the construction project agreement to the severed provisions. Exercising this option does not affect the Self-Governance Tribe's right to appeal the portion of the final construction project proposal that was rejected by the Secretary.



**§ 137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?**

If the Secretary fails to notify the Self-Governance Tribe of the decision to approve or reject within 30 days (or a longer period if agreed to by the Self-Governance Tribe in writing), then the proposal will be deemed approved by the Secretary.

**§ 137.335 What costs may be included in the budget for a construction agreement?**

(a) A Self-Governance Tribe may include costs allowed by applicable OMB Circulars, and costs allowed under sections 508(c) [25 U.S.C. 458aaa-7(c)], 106 [25 U.S.C. 450j-1] and 105 (m) of the Act [25 U.S.C. 450j(m)]. The costs incurred will vary depending on which phase of the construction process the Self-Governance Tribe is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement is fixed price or cost-reimbursement, budgets may include costs or fees associated with the following:

- (1) Construction project proposal preparation;
- (2) Conducting community meetings to develop project documents;
- (3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans and specifications, and to assist in oversight of the design during construction;
- (4) Real property lease or acquisition;
- (5) Development of project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance;
- (6) Project management, superintendence, safety and inspection;
- (7) Travel, including local travel incurred as a direct result of conducting the construction project agreement and remote travel in conjunction with the project;
- (8) Consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who provide services, to include construction management services;
- (9) Project site development;
- (10) Project construction cost;
- (11) General, administrative overhead, and indirect costs;
- (12) Securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(13) Other costs directly related to performing the construction project agreement;

(14) Project contingency:

(i) A cost-reimbursement project agreement budgets contingency as a broad category. Project contingency remaining at the end of the project is considered savings.

(ii) Fixed-price agreements budget project contingency in the lump sum price or unit price.

(c) In the case of a fixed-price project agreement, a reasonable profit determined by taking into consideration the relevant risks and local market conditions.

**§ 137.336 What is the difference between fixed-price and cost-reimbursement agreements?**

(a) Cost-reimbursement agreements generally have one or more of the following characteristics:

- (1) Risk is shared between IHS and the Self-Governance Tribe;
- (2) Self-Governance Tribes are not required to perform beyond the amount of funds provided under the agreement;
- (3) Self-Governance Tribes establish budgets based upon the actual costs of the project and are not allowed to include profit;
- (4) Budgets are stated using broad categories, such as planning, design, construction project administration, and contingency;
- (5) The agreement funding amount is stated as a "not to exceed" amount;
- (6) Self-Governance Tribes provide notice to the IHS if they expect to exceed the amount of the agreement and require more funds;
- (7) Excess funds remaining at the end of the project are considered savings; and,
- (8) Actual costs are subject to applicable OMB circulars and cost principles.

(b) Fixed Price agreements generally have one or more of the following characteristics:

- (1) Self-Governance Tribes assume the risk for performance;
- (2) Self-Governance Tribes are entitled to make a reasonable profit;
- (3) Budgets may be stated as lump sums, unit cost pricing, or a combination thereof;
- (4) For unit cost pricing, savings may occur if actual quantity is less than estimated; and,
- (5) Excess funds remaining at the end of a lump sum fixed price project are considered profit.

**§ 137.337 What funding must the Secretary provide in a construction project agreement?**

The Secretary must provide funding for a construction project agreement in

accordance with sections 106 [25 U.S.C. 450j-1] and 508(c) of the Act [25 U.S.C. 458aaa-7(c)].

**§ 137.338 May funds from other sources be incorporated into a construction project agreement?**

Yes, at the request of the Self-Governance Tribe, the Secretary may include funds from other agencies as permitted by law, whether on an ongoing or a one-time basis.

**§ 137.339 May a Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?**

Yes, notwithstanding any other provision of law, all funds provided under a construction project agreement may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

**§ 137.340 May a Self-Governance Tribe contribute funding to a project?**

Yes, the Self-Governance Tribe and the Secretary may jointly fund projects. The construction project agreement should identify the Secretarial amount and any Tribal contribution amount that is being incorporated into the construction project agreement. The Self-Governance Tribe does not have to deposit its contribution with the Secretary.

**§ 137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?**

(a) For all construction project agreements, advance payments shall be made annually or semiannually, at the Self-Governance Tribe's option. The initial payment shall include all contingency funding for the project or phase of the project to the extent that there are funds appropriated for that purpose.

(b) The amount of subsequent payments is based on the mutually agreeable project schedule reflecting:

- (1) Work to be accomplished within the advance payment period,
- (2) Work already accomplished, and
- (3) Total prior payments for each annual or semiannual advance payment period.

(c) For lump sum, fixed price agreements, at the request of the Self-Governance Tribe, payments shall be based on an advance payment period measured as follows:

- (1) One year; or
- (2) Project Phase (e.g., planning, design, construction). If project phase is chosen as the payment period, the full amount of funds necessary to perform the work for that phase of the

construction project agreement is payable in the initial advance payment. For multi-phase projects, the planning and design phases must be completed prior to the transfer of funds for the associated construction phase. The completion of the planning and design phases will include at least one opportunity for Secretarial approval in accordance with § 137.360.

(d) For the purposes of payment, Sanitation Facilities Construction Projects authorized pursuant to Pub. L. 86-121, are considered to be a single construction phase and are payable in a single lump sum advance payment in accordance with paragraph (c)(2) of this section.

(e) For all other construction project agreements, the amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year.

(f) Any agreement to advance funds under paragraphs (b), (c) or (d) of this section is subject to the availability of appropriations.

(g) (1) Initial advance payments are due within 10 days of the effective date of the construction project agreement; and

(2) Subsequent payments are due:

(i) Within 10 days of apportionment for annual payments or

(ii) Within 10 days of the start date of the project phase for phase payments.

**§ 137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?**

All funds, including contingency funds, remaining at the conclusion of the project are considered savings and may be used by the Self-Governance Tribe to provide additional services for the purpose for which the funds were originally appropriated. No further approval or justifying documentation is required before the expenditure of the remaining funds.

**§ 137.343 What happens to funds remaining at the conclusion of a fixed price construction project?**

(a) For lump sum fixed price construction project agreements, all funds remaining at the conclusion of the project are considered profits and belong to the Self-Governance Tribe.

(b) For fixed price construction project agreements with unit price components, all funds remaining that are associated with overestimated unit price quantities are savings and may be used by the Self-Governance Tribe in accordance with § 137.342. All other funds remaining at the conclusion of the project are considered profit and belong to the Self-Governance Tribe.

**§ 137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?**

Yes, a Self-Governance Tribe may reallocate funds among construction project agreements to the extent not prohibited by applicable appropriation law(s).

**Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements**

**§ 137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?**

Yes, a Self-Governance Tribe assumes responsibility for completing a construction project, including day-to-day on-site management and administration of the project, in accordance with the negotiated construction project agreement. However, Self-Governance Tribes are not required to perform beyond the amount of funds provided. For example, a Self-Governance Tribe may encounter unforeseen circumstances during the term of a construction project agreement. If this occurs, options available to the Self-Governance Tribe include, but are not limited to:

(a) Reallocating existing funding;

(b) Reducing/revising the scope of work that does not require an amendment because it does not result in a significant change;

(c) Utilizing savings from other projects;

(d) Requesting additional funds or appropriations;

(e) Utilizing interest earnings;

(f) Seeking funds from other sources; and/or

(g) Redesigning or re-scoping that does result in a significant change by amendment as provided in §§ 137.363 and 137.364.

**§ 137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?**

Yes, a Self-Governance Tribe must provide the Secretary with construction project progress and financial reports semiannually or, at the option of the Self-Governance Tribe, on a more frequent basis. Self-Governance Tribes are only required to submit the reports, as negotiated in the Construction Project Agreement, after funds have been transferred to the Self-Governance Tribe for a construction project. Construction project progress reports and financial reports are only required for active construction projects.

**§ 137.352 What is contained in a construction project progress report?**

Construction project progress reports contain information about accomplishments during the reporting period and issues and concerns of the Self-Governance Tribe, if any.

**§ 137.353 What is contained in a construction project financial report?**

Construction project financial reports contain information regarding the amount of funds expended during the reporting period, and financial concerns of the Self-Governance Tribe, if any.

**Roles of the Secretary in Establishing and Implementing Construction Project Agreements**

**§ 137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?**

The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Self-Governance Tribe in advance of construction if the Self-Governance Tribe is required to submit planning or design documents as a part of the scope of work under a construction project agreement.

**§ 137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?**

Yes, but only if there is an amendment to the construction project agreement that results in a significant change in the original scope of work.

**§ 137.362 May construction project agreements be amended?**

Yes, the Self-Governance Tribe, at its discretion, may request the Secretary to amend a construction project agreement to include additional projects. In addition, amendments are required if there is a significant change from the original scope of work or if funds are added by the Secretary. The Self-Governance Tribe may make immaterial changes to the performance period and make budget adjustments within available funding without an amendment to the construction project agreement.

**§ 137.363 What is the procedure for the Secretary's review and approval of amendments?**

(a) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance

Tribe, the Secretary intends to disapprove the proposed amendment, then the Secretary shall follow the procedures set forth in §§ 137.330 through 137.334.

(b) The time allowed for Secretarial review, comment, and approval of amendments is 30 days, or within a longer time if agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 30 days shall be deemed approved.

(c) The timeframe set forth in paragraph (b) of this section is intended to be the maximum time and may be reduced based on urgency and need, by agreement of the parties. If the Self-Governance Tribe requests reduced timeframes for action due to unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested timeframes.

**§ 137.364 What constitutes a significant change in the original scope of work?**

A significant change in the original scope of work is:

(a) A change that would result in a cost that exceeds the total of the project funds available and the Self-Governance Tribe's contingency funds; or

(b) A material departure from the original scope of work, including substantial departure from timelines negotiated in the construction project agreement.

**§ 137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?**

(a) The Secretary shall review and approve planning documents to ensure compliance with planning standards identified in the construction project agreement. The Secretary shall review and approve design documents for general compliance with requirements of the construction project agreement.

(b) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance Tribe, the Secretary intends to disapprove the documents, then the Secretary shall follow the procedures set forth in § 137.333.

(c) The time allowed for Secretarial review, comment, and approval of planning and design documents is 21 days, unless otherwise agreed to by the Self-Governance Tribe in writing.

Absence of a written response by the Secretary within 21 days shall be deemed approved.

**§ 137.366 May the Secretary conduct onsite project oversight visits?**

Yes, the Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule negotiated in the construction project agreement. The Secretary must provide the Self-Governance Tribe with reasonable advance written notice to assist the Self-Governance Tribe in coordinating the visit. The purpose of the visit is review the progress under the construction project agreement. At the request of the Self-Governance Tribe, the Secretary must provide the Self-Governance Tribe a written site visit report.

**§ 137.367 May the Secretary issue a stop work order under a construction project agreement?**

No, the Secretary has no role in the day-to-day management of a construction project.

**§ 137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8]?**

No, the Secretary is not responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8].

**Other**

**§ 137.370 Do all provisions of this part apply to construction project agreements under this subpart?**

Yes, to the extent the provisions are not inconsistent with the provisions in this subpart. Provisions that do not apply include: programmatic reports and data requirements; reassumption; compact and funding agreement review, approval, and final offer process; and compact and funding agreement contents.

**§ 137.371 Who takes title to real property purchased with funds provided under a construction project agreement?**

The Self-Governance Tribe takes title to the real property unless the Self-Governance Tribe requests that the Secretary take title to the property.

**§ 137.372 What should the Self-Governance Tribe do if it wants real property purchased with construction project agreement funds to be taken into trust?**

The Self-Governance Tribe must submit a resolution of support from the governing body of Self-Governance

Tribes in which the beneficial ownership is to be registered. Upon receipt of the Self-Governance Tribes' resolution, the Secretary shall transfer the request to the Secretary of the Interior so that it may be expeditiously processed in accordance with applicable Federal laws and regulations. The Secretary may not require the Self-Governance Tribe to furnish any information in support of such a request other than that expressly required by applicable law or regulation.

**§ 137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?**

No, unless the Self-Governance Tribe has requested the Secretary take title to the property.

**§ 137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring real property with funds provided under a construction project agreement?**

No, unless the Self-Governance Tribe has requested the Secretary take title to the property. The Self-Governance Tribe is responsible for acquiring all real property needed to perform a construction project under a construction project agreement, not the Secretary. The Secretary shall not withhold funds or refuse to enter into a construction project agreement because of a disagreement between the Self-Governance Tribe and the Secretary over the Self-Governance Tribe's decisions to purchase or lease real property.

**§ 137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?**

Yes, Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] are eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States.

**§ 137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] subject to Federal metric requirements?**

No, however, the Self-Governance Tribe and the Secretary may negotiate the use of Federal metric requirements in the construction project agreement when the Self-Governance Tribe will

design and/or construct an IHS facility that the Secretary will own and operate.

**§ 137.377 Do Federal procurement laws and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa–8]?**

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 section 509 of the Act [25 U.S.C. 458aaa–8]. The Secretary and the Self-Governance 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.

**§ 137.378 Does the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?**

No, the Federal Davis-Bacon Act and wage rates do not apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds.

**§ 137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?**

Davis-Bacon Act wage rates only apply to laborers and mechanics employed by the contractors and subcontractors (excluding Indian Tribes, inter-Tribal consortia, and Tribal organizations) retained by Self-Governance Tribes to perform construction. The Davis-Bacon Act and wage rates do not apply when Self-Governance Tribes perform work with their own employees.

**Subpart O—Secretarial Responsibilities**

**Budget Request**

**§§ 137.400–137.404 [Reserved]**

**Reports**

**§ 137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?**

Yes, no later than January 1 of each year after the date of enactment of the Tribal Self-Governance Amendments of 2000, the Secretary shall submit to the Committee on Indian Affairs of the

Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of Title V. The report shall include a detailed analysis of the funding requirements presently funded or unfunded for each Indian Tribe or Tribal organization, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under Title V.

**§ 137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?**

No, in compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V.

**§ 137.407 What guidelines will be used by the Secretary to compile information required for the report?**

The report shall be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds. The report must identify:

- (a) The relative costs and benefits of self-governance, including savings;
- (b) With particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to Self-Governance Tribes and their members;
- (c) The funds transferred to each Self-Governance Tribe and the corresponding reduction in the Federal bureaucracy;
- (d) The funding formula for individual Tribal shares of all headquarter's funds, together with the comments of affected Self-Governance Tribes, developed under §§ 137.405 of this subpart; and
- (e) Amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location.

**Subpart P—Appeals**

**§ 137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m–1] does the term “contract” include compacts, funding agreements, and construction project agreements entered into under Title V?**

Yes, for the purposes of section 110 of the Act [25 U.S.C. 450m–1] the term “contract” includes compacts, funding agreements, and construction project agreements entered into under Title V.

**Post-Award Disputes**

**§ 137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?**

Yes, the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V.

**Pre-Award Disputes**

**§ 137.415 What decisions may an Indian Tribe appeal under §§ 137.415 through 137.436?**

An Indian Tribe may appeal:

- (a) A decision to reject a final offer, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];
- (b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];
- (c) A decision to rescind and reassume a compact or funding agreement, in whole or in part, under section 507(a)(2) of the Act [25 U.S.C. 458aaa–6(a)(2)], except for immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)];
- (d) A decision to reject a final construction project proposal, or a portion thereof, under section 509(b) of the Act [25 U.S.C. 458aaa–8(b)] and subpart N of this part; and
- (e) For construction project agreements carried out under section 509 of the Act [25 U.S.C. 458aaa–8], a decision to reject project planning documents, design documents, or proposed amendments submitted by a Self-Governance Tribe under section 509(f) of the Act [25 U.S.C. 458aaa–8(f)] and subpart N of this part.

**§ 137.416 Do §§ 137.415 through 137.436 apply to any other disputes?**

No, §§ 137.415 through 137.436 only apply to decisions listed in § 137.415. Specifically, §§ 137.415 through 137.436 do not apply to any other dispute, including, but not limited to:

- (a) Disputes arising under the terms of a compact, funding agreement, or construction project agreement that has been awarded;
- (b) Disputes arising from immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)] and §§ 137.261 and 137.262, which are covered under §§ 137.440 through 137.445.

(c) Other post-award contract disputes, which are covered under §§ 137.412.

(d) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 45 CFR 5.

(e) Decisions relating to the award of grants under section 503(e) of the Act [25 U.S.C. 458aaa-2(e)], which may be appealed under 45 CFR 5.

**§ 137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?**

The IBIA may use the procedures set forth in 43 CFR 4.22-4.27 as a guide.

**§ 137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?**

Every decision in any of the areas listed in § 137.415 must contain information which shall tell the Indian Tribe where and when to file the Indian Tribe's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 42 CFR 137.421, or appeal this decision under 42 CFR 137.425 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. 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 IBIA that you have served these copies.

**§ 137.419 What authority does the IBIA have under §§ 137.415 through 137.436?**

The IBIA 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; and
- (c) To issue a recommended decision;
- (d) To take such action as necessary to insure rights specified in § 137.430.

**§ 137.420 Does an Indian Tribe have any options besides an appeal?**

Yes, the Indian 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 Indian 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 section 110 of the Act [25 U.S.C. 450m-1].

**§ 137.421 How does an Indian Tribe request an informal conference?**

The Indian 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 Indian 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 Indian Tribe mails the request, it will be considered filed on the date the Indian Tribe mailed it by certified mail.

**§ 137.422 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 Indian Tribe and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian Tribe's office. If the meeting cannot be held at the Indian 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 Indian 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 Indian Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference.

**§ 137.423 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 Indian Tribe a written report which summarizes what happened at the informal conference and a recommended decision.

(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 DHHS agency with the Interior Board of Indian Appeals (IBIA) under 42 CFR 137.425. You may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. 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 IBIA that you have served these copies. Alternatively you may file an action in

Federal court pursuant to section 110 of the Act. [25 U.S.C. 450m-1].

**§ 137.424 Is the recommended decision from the informal conference final for the Secretary?**

No, if the Indian 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 Indian Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under § 137.426, the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m-1].

**§ 137.425 How does an Indian 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 Indian Tribe decides to appeal, it must file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision from the informal conference.

(b) The Indian Tribe may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the Notice of Appeal, it will be considered filed on the date the Indian Tribe mailed it by certified mail. The Indian Tribe should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

(c) The Notice of Appeal must:

- (1) Briefly state why the Indian Tribe thinks the initial decision is wrong;
- (2) Briefly identify the issues involved in the appeal; and
- (3) State whether the Indian Tribe wants a hearing on the record, or whether the Indian Tribe wants to waive its right to a hearing.

(d) The Indian Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian Tribe must certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the IBIA under the Act.

(f) In lieu of filing an administrative appeal an Indian Tribe may proceed directly to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m-1].

**§ 137.426 May an Indian Tribe get an extension of time to file a notice of appeal?**

Yes, if the Indian Tribe needs additional time, the Indian Tribe may request an extension of time to file its Notice of Appeal with the IBIA within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian 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 Indian Tribe has a valid reason for not filing its notice of appeal on time, it may receive an extension.

**§ 137.427 What happens after an Indian Tribe files an appeal?**

(a) Within 5 days of receiving the Indian Tribe's notice of appeal, the IBIA will decide whether the appeal falls under § 137.415. If so, the Indian Tribe is entitled to a hearing.

(b) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian Tribe, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the IBIA decides that the Indian Tribe is not entitled to a hearing or if the Indian Tribe has waived its right to a hearing on the record, the IBIA will dismiss the appeal and inform the Indian Tribe that it is not entitled to a hearing or has waived its right to a hearing.

**§ 137.428 How is a hearing arranged?**

(a) If a hearing is to be held, the IBIA will refer the Indian Tribe's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. 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.

**§ 137.429 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 Indian Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

**§ 137.430 What is the Secretary's burden of proof for appeals covered by § 137.415?**

As required by section 518 of the Act [25 U.S.C. 458aaa-17], 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.

**§ 137.431 What rights do Indian Tribes and the Secretary have during the appeal process?**

Both the Indian 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;
- (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.

**§ 137.432 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 Indian 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 42 CFR 137.43. An appeal to the Secretary under 42 CFR 137.43 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. 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.

**§ 137.433 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 Indian Tribe receives the ALJ's 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.

**§ 137.434 If an Indian 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 IBIA for further proceedings. If the Secretary does not modify or reverse the recommended decision or remand the case to the IBIA 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 Department.

**§ 137.435 Will an appeal adversely affect the Indian 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.

**§ 137.436 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 an Immediate Reassumption of a Self-Governance Program**

**§ 137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa-6(a)(2)(C)]?**

(a) The Secretary may, upon written notification to the Self-Governance Tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if:

- (1) The Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Self-Governance Tribe; and
- (2) The endangerment arises out of a failure to carry out the compact or funding agreement.

(b) When the Secretary advises a Self-Governance Tribe that the Secretary intends to take an action referred to in paragraph (a) of this section, the Secretary must also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

**§ 137.441 Will there be a hearing?**

Yes, unless the Self-Governance Tribe waives its right to a hearing in writing. The Deputy Director of the Office of Hearings and Appeals must appoint an Administrative Law Judge to hold a hearing,

(a) The hearing must be held within 10 days of the date of the notice referred to in § 137.440 unless the Self-Governance Tribe agrees to a later date.

(b) If possible, the hearing will be held at the office of the Self-Governance Tribe. If the hearing is held more than 50 miles from the office of the Self-Governance Tribe, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Self-Governance Tribe.

**§ 137.442 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 Self-Governance Tribe has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement: Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under § 137.443. An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. 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 15 days, the recommended decision will become final.

**§ 137.443 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 Self-Governance Tribe receives the ALJ's 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.

**§ 137.444 If a Self-Governance 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.

**§ 137.445 Will an immediate reassumption appeal adversely affect the Self-Governance 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 agreement.

**Equal Access to Justice Act Fees**

**§ 137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?**

Yes, EAJA claims against the Department will be heard pursuant to 25 CFR 900.177.

[FR Doc. 02-3248 Filed 2-11-02; 1:29 pm]

BILLING CODE 4160-16-P