

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Parts 36, 36a, 136, 136a, and 137

RIN 0917-AA05

Tribal Self-Governance Amendments of 2000

AGENCY: Indian Health Service, DHHS.

ACTION: Final rule.

SUMMARY: The Secretary of the Department of Health and Human Services (DHHS) hereby issues this final rule to implement Title V of the Tribal Self-Governance Amendments of 2000 (the Act). The final rule has been negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the DHHS. The final 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. As required by section 517 (b) of the Act, the Department has developed this final 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.

DATES: This rule will become effective on June 17, 2002.

FOR FURTHER INFORMATION CONTACT: Paula Williams, Director, Office of Tribal Self-Governance, The Reyes Building, 801 Thompson Ave., Suite 240, Rockville, MD 20852, 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, met the requirements of the Act. The Committee was 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 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 Committee meetings.

The Department published proposed regulations in a Notice of Proposed Rulemaking in the **Federal Register** on February 14, 2002, at 67 FR 6998 (NPRM). In the NPRM the Department invited the public to comment on the proposed provisions. In addition, the Department outlined three issues where consensus was not yet reached and invited the public to comment on those issues as well.

Ultimately, the Department received comments from 36 Indian Tribes and Tribal organizations, one individual, and one State. The full committee reconvened in Bethesda, Maryland, between April 15 and April 18, 2002, to review the comments, to evaluate changes suggested by the comments, and to recommend final regulatory language.

As a result of the meeting, the full committee was able to reach consensus on regulatory language on all but three issues. Discussion of these three issues are contained under the appropriate subpart in the following Summary of Regulation and Comments Received.

The Department commends the ability of the committee to cooperate and develop a rule that addresses the interests of the Tribes and the Agency. We believe this negotiated rulemaking process has been a model for developing

successful Federal and Tribal partnership in other endeavors.

Summary of Regulations and Comments Received

The narrative and discussion of comments below is keyed to specific subparts of the rule.

Subpart A—General Provisions

Summary of Subpart

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.

Discussion of Comments

Several comments noted the lack of any Secretarial policy in the NPRM for Title V. In negotiating the NPRM for Title V, Federal and Tribal members reached an impasse based on this issue. However, to respond to the comments, Federal and Tribal committee members further negotiated language on Secretarial policy. Based upon this Administration's statements before Congress and other policy directives, the Federal representatives drafted language which recognizes the sovereign status of Indian Tribes and the Administration's support of the government-to-government relationship between Tribes and the United States. The following language was agreed upon by the Federal and Tribal members and is included as a new section 137.6:

Section 137.6 Secretarial Policy.

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

Subpart B—Definitions

Summary of Subpart

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.

Discussion of Comments

There were two comments regarding the definitions in section 137.10. One comment recommended that the definition of "Compact" be clarified. With a slight change to the proposal, the Committee agreed with the recommendation and amended the definition to include the phrase "including such terms as the parties intend shall control year after year."

One comment suggested that the term "Tribal Self-Governance Advisory Committee," a term used in section 137.204, be defined. The Committee agreed and added the following definition:

Tribal Self-Governance Advisory Committee means the Committee established by the Director of IHS that consists of Tribal representatives from each of the IHS Areas participating in Self-Governance, and that provides advocacy and policy guidance for implementation of Tribal Self-Governance within IHS.

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

Summary of Subpart

This subpart describes the eligibility criteria an Indian Tribe must satisfy to participate in self-governance. This subpart also describes that planning and negotiation grants may be available, but not required, for participation.

Discussion of Comments

A comment was received regarding section 137.25, recommending that the timing of planning and negotiation grants be spelled out in more detail. The Committee did not accept this comment because this matter can be dealt with more effectively in annual announcements regarding these grants. Therefore no change was made.

One comment recommended that the answer to section 137.26 should be amended to make it parallel to the question by adding "and to negotiate" at the end of the sentence. The Committee agreed and made the change. Another comment suggested adding additional questions and answers that provide instructions to Tribes seeking to participate in self-governance. The Committee determined that these issues are better addressed in annual agency announcements.

Subpart D—Compact

Summary of Subpart

This subpart describes the authority for Self-Governance Tribes to negotiate compacts and identifies what is included in a compact.

Discussion of Comments

No comments were received on Subpart D.

Subpart E—Funding Agreements

Summary of Subpart

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

Discussion of Comments

One comment to section 137.42 recommended explaining more about the effect of including "Tribal shares of IHS discretionary grants" in a funding agreement. The Committee concluded that Subpart E adequately addresses this matter and did not accept the recommendation.

One comment to section 137.43 suggested amending the question to make it clearer. The Committee agreed and amended the question to read: "May a Tribe negotiate and leave funds with IHS for retained services?" The Committee also changed the first word of the answer to "Yes" to be consistent with the revised question.

One comment suggested adding "or portions thereof" after "PSFAS" in the answer to section 137.43. The answer already states that "Tribal shares may be left, in whole or in part with IHS". The proposed language would be redundant and the Committee did not make the requested change.

One comment recommended substituting statutory language for the term "Tribal share" in section 137.43. The Committee made no change because the term "Tribal share" is already defined in section 137.10 and is used appropriately in section 137.43.

One comment suggested adding in the answer to section 137.56 the words ", including all recurring increases received and continuing eligibility for other increases." The Committee agreed and made the change.

Subpart F—Statutorily Mandated Grants

Summary of Subpart

This subpart describes to what extent statutorily mandated grants may be

added to a funding agreement after award. It also addresses annual lump sum advance payment after the grant is awarded, interest on grant awards, reallocation and redesign, and FTCA coverage of statutorily mandated grants added to a funding agreement.

Discussion of Comments

Several comments were submitted supporting the Tribal position in the Preamble that Title V provisions apply to statutorily mandated grants. The Committee did not reach agreement on this issue. Tribal committee members urged that the rule state clearly that Title V applies to statutorily mandated grants. Federal committee members rejected the Tribal view. The Secretary has included the following question and answer to the final rule as new question and answer 137.73:

Section 137.73 What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

None of the provisions of Title V apply.

While the final rule includes the question and answer, Tribal committee members wish to make clear that they strongly disagree with the Department's interpretation of the statute on this issue. The full discussion of the conflict in statutory construction is found in the NPRM at 67 Fed. Reg. 6999 (February 14, 2002).

Subpart G—Funding

Summary of Subpart

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 also 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.

Discussion of Comments

In negotiating proposed rules, the Committee agreed to the following language which was published in the NPRM as section 137.77:

Section 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 and will be made on the later of:

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

One comment was received which recommended replacing section 137.77 with language reflecting the holding *St. Regis Mohawk Tribe v. Area Director, Nashville Area, Indian Health Service*, (D.A.B. Jan. 17, 2002). The comment proposed a new question and answer:

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 a period covered by a funding agreement crosses Federal fiscal years a Tribe is entitled to be paid one hundred percent of the funding for both fiscal years at the beginning of the funding agreement.

Tribal Committee members agreed with the comment. Federal Committee members clarified that under Title V IHS provides a process for transfer of funds for this purpose. Because the Tribal and Federal Committee members disagreed on the interpretation of the holding to application of this case, the Secretary decided to delete section 137.77.

A comment on section 137.78 recommended that specific conditions be set forth in the rule regarding the timing of payments. The Committee believes that the rule adequately addresses this matter and did not make a change.

One comment recommended addressing carryover of grants in section 137.105. The Committee believes that the provisions applicable to various grants are adequately addressed in other sections and that no changes to the regulations are needed.

One comment recommended clarifying a citation to the Indian Health Care Improvement Act (IHCIA) found in Section 137.110. The Committee believes it is best not to try to interpret the IHCIA in these regulations and did not make a change.

Several comments were made regarding funds that may be included in a stable base budget. In response to the comment that the words "including direct contract support" be included in section 137.121(a), the Department is committed to recognizing all allowable program and contract support costs under section 106(a) of the Act, whether those costs are classified as direct or indirect. The proposed regulations reflect this commitment without singling out any particular classification of costs. The suggestion that Section 137.121 identify other funds that IHS agrees to is dealt with in Section 137.122. Thus, the Committee has made no change to section 137.121.

Subpart H—Final Offer

Summary of Subpart

This subpart describes the final offer and rejection process.

Discussion of Comments

One comment suggested adding more detail about the process by which Tribes and IHS achieve resolution after a final offer. The Committee determined that Subpart H provides sufficient detail and the Committee did not add additional questions and answers.

The Committee noted that "or" was inadvertently omitted at the end of subsection 137.132(a)(1) and has inserted it in the final rule.

In section 137.143 of the NPRM the term "Tribal shares" was substituted for the statutory language approved by the Committee. Several comments were received recommending reinsertion of the statutory language which is more accurate in the context of this rule. The Committee agreed and replaced the term "Tribal shares" with "any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out."

One comment recommended that section 137.190 be improved to make clear that the duplication prohibition applies to both funds and PSFAs. The comment was agreed to and the reference to "such funds" was changed to "the same funds or PSFA". In addition, for additional clarification the concluding clause regarding eligibility for other, non-duplicative PSFAs was set forth as a free-standing sentence, and the words "except that" were deleted.

One comment recommended that section 137.210 be expanded to explain how savings are identified and distributed. In light of the provision in

section 137.407(a) requiring that savings be included in the Secretary's annual report, the Committee did not accept the recommendation.

Subpart I—Operational Provisions

Summary of Subpart

This subpart contains provisions that address most of the operational aspects of self-governance.

Discussion of Comments

One comment recommended that section 137.215 address what happens to Federally furnished property upon retrocession or reassumption. This is addressed expressly in the subparts regarding retrocession and reassumption at sections 137.251 and 137.264, respectively and thus, no action was required.

Subpart J—Regulation Waiver

Summary of Subpart

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.

Discussion of Comments

No comments were received on Subpart J.

Subpart K—Withdrawal

Summary of Subpart

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

Discussion of Comments

Several comments objected to the NPRM's deletion of an additional sentence in section 137.238 and section 137.250 regarding the handling of contract support cost funds. Since the Act is clear and does not distinguish funds by type or treat them differently in this regard, there is no need to reference an agency policy to deal with one type of funding in a compact or funding agreement. Contract support costs are generally handled pursuant to the IHS contract support cost circular in effect.

Subpart L—Retrocession

Summary of Subpart

This subpart addresses the procedures that apply when a Self-Governance Tribe retrocedes a program to the Secretary.

Discussion of Comments

No comments were received on Subpart L.

Subpart M—Reassumption

Summary of Subpart

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.

Discussion of Comments

The citation in section 137.257(d) regarding appeals was corrected in response to a comment.

One comment noted that in section 137.264, the word "reassume" should be "reassumed." The Committee agreed and has made the change in both the question and answer.

Subpart N—Construction

Summary of Subpart

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. 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 National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act (NHPA), and related Federal environmental laws. This subpart describes 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. This subpart describes the Self-Governance Tribes' responsibility to complete construction project

agreements and provide day-to-day management and administration for construction projects, within available funding. This subpart sets forth how Self-Governance Tribes will receive payments for construction project agreements, 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.

Discussion of Comments

One comment recommended changing the term "scope of work" in the definitions in section 137.280 to read "specific scope of work" to resolve an inconsistency between the proposed definition and section 501(a)(2)(B) of the Act. The comment further recommended that the definition of "specific scope of work" be revised to clarify the level of detail required for the construction project agreement. The Committee agreed to modify the term in the final rule to resolve the inconsistency, and further agreed to specify that a scope of work is a brief, written description of the work.

One comment asked if the Department may delegate its responsibilities under the NHPA without the participation or approval of the Advisory Council on Historic Preservation. Section 509(a) of the Act provides:

Indian Tribes participating under Tribal self-governance may carry out construction projects under this part if they elect to assume all Federal responsibilities under the National Environmental Policy Act * * * the National Historic Preservation Act * * * and related provisions of law that would apply if the Secretary were to undertake the construction project.

This provision requires the Department to delegate Federal environmental responsibilities for construction project agreements to Self-Governance Tribes, including the Department's responsibilities under NHPA. Subpart N sets forth procedures for a Self-Governance Tribe to assume these Federal environmental responsibilities, but is not intended to modify the statutory role of either the Council on Environmental Quality or the Advisory Council on Historic Preservation. Section 137.285 clarifies that Self-Governance Tribes must assume these Federal environmental responsibilities to carry out a construction project under Title V of the Act. Section 137.288 summarizes the Federal responsibility under section 106 of the NHPA 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 applicable undertakings. For these reasons, the Committee believed that Subpart N is consistent with the statutory requirements of the NHPA.

One comment suggested that because the abbreviations NEPA and NHPA are provided in the definitions, they should be used consistently throughout Subpart N. The Committee agreed with the comment and the abbreviations are used throughout Subpart N. The Committee also corrected the statutory reference to the NHPA in 137.288 to read 16 U.S.C. 470f.

One comment suggested that section 137.294 (a)(1) be revised to read “consult with *applicable* Tribal, Federal, State, and local officials and interested parties * * *” The Committee agreed that the regulation should be revised but concluded that “appropriate” should be inserted instead of “applicable.” The Committee did not intend to use “appropriate” as a term of art but only to indicate that IHS consultation requirements vary based on the project under review.

One comment referenced section 137.297, which provides that if a Tribe adopts a Federal agency’s environmental review policy, then the Federal agency is responsible for ensuring that the policy meets the requirements of NEPA, NHPA, and any related environmental laws. This comment also recommended that an additional question and answer be added to clarify that if a Tribe adopts its own environmental review procedures, then the Tribe is responsible for deciding that it has met the requirements of these related environmental laws. The Committee agreed that Tribes are to be permitted to adopt their own environmental review policies and procedures that comply with these Federal environmental statutes without oversight by the Department, but believed that sections 137.295, 137.296, 137.308 adequately discuss the Tribes’ authority to develop such policies and procedures.

One comment asked if Subpart N will apply to construction projects carried out on non-Tribal lands. The comment stated that under the Advisory Council on Historic Preservation’s regulations, 36 CFR Part 800, Tribes may only apply Tribal policies and procedures to Tribal lands. Subpart N applies to all construction project agreements carried out under Title V of the Act. The Department is required to carry out its Federal environmental responsibilities wherever it undertakes construction projects, whether on Tribal or non-Tribal lands. Section 509(a) of the Act

requires that the Self-Governance Tribe assume the same responsibilities that would apply if the Department were to undertake the construction project. Section 509(a) of the Act does not exempt non-Tribal lands from its coverage. As discussed above, Subpart N only sets forth procedures for the delegation of Federal environmental procedures and does not modify any Federal environmental statutory requirements.

One comment expressed concern that the regulations do not assure that Tribal policies and procedures are the same or equivalent to the Advisory Council of Historic Preservation regulations at 36 CFR part 800. The Comment further stated that Section 137.296 does not appear to be consistent with the 36 CFR part 800 provisions regarding the approval of alternate procedures.

As discussed above, Section 509(a) independently requires the Department to delegate its Federal environmental responsibilities to Self-Governance Tribes carrying out construction projects under Title V. Notwithstanding section 106 of the NHPA, section 517(a)(1) of the ISDEAA provides “the Secretary shall initiate procedures under subchapter III of chapter 5 of Title 5 [the Negotiated Rulemaking Act] to negotiate and promulgate such regulations as are necessary to carry out [Title V of the Act].” Pursuant to this authority, Subpart N sets forth the procedures for Self-Governance Tribes to assume Federal environmental responsibilities when carrying out construction projects under Title V of the Act. Section 137.296 authorizes Self-Governance Tribes to adopt Tribal or Federal environmental review procedures that comply with the statutory requirements.

One comment recommended that section 137.301(b) be revised to clarify when the Secretary is involved in addressing unforeseen environmental review costs. The Committee agreed with the comment and revised section 137.301(b) to provide that it is at the request of the Self-Governance Tribe that the Secretary will become involved. The Committee further revised section 137.301(b) to clarify that this regulation applies to unforeseen environmental review costs identified during any phase of the construction project.

One comment stated that the last sentence of section 137.307 is not grammatically correct. The committee agreed and revised the sentence in the final rule.

One comment recommended that language be restored in Section 137.320 to reflect the answer that was originally proposed by the Committee but was deleted in the NPRM. The Committee

agreed with the concerns raised by the comment that the final rule reflect the consensus of the Committee and revised section 137.320 to read in part as follows:

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

This language is consistent with the Secretary’s duty under 25 U.S.C. § 1631 to honor Tribal preferences as determined through consultation.

The Committee received four comments on behalf of twenty eight Tribes and Tribal organizations supporting the Tribal position on Department of Justice representation of Tribes and Tribal certifying officers for environmental claims brought under Section 509 of the Act. The comments proposed adding the additional question and answer suggested in the Tribal position on this area of disagreement in the NPRM:

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 Federal and Tribal committee members did not reach consensus on whether the Department of Justice would represent Tribes and Tribal certifying officers in environmental actions. 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.

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.

The Tribal representatives believe that 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 Alaska 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.").

The Tribal Representatives believe that 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.

Tribal representatives are committed to working with the Secretary to address the concerns identified by the Committee through Secretarial interpretation, further rulemaking, and clarifying legislation that further fosters self-governance. Further clarification of the Tribal position may be found at 67 FR 7000-01 (February 14, 2002).

While the Department has carefully considered the views of the Tribal representatives on this issue, it cannot accept the Tribal proposal to add a question and answer providing Department of Justice representation for environmental actions brought under section 509(a). Section 314 of Public Law 101-512 applies only to actions brought under the Federal Tort Claims Act, not suits seeking to enforce NEPA, NHPA, or related environmental statutes. Moreover, as a matter of law, the Act treats the enforcement of environmental responsibilities differently from any other claims brought against a Self-Governance Tribe arising from self-governance compacts or construction project agreements. Section 509 of the Act specifically requires that the Self-Governance Tribe designate a certifying officer and accept the jurisdiction of the Federal court for purposes of enforcement of environmental statutes. The Tribal position, that suits to enforce environmental responsibilities are to be deemed suits against the United States, conflicts with these statutory requirements.

One comment recommended revising section 137.336(b)(5) and adding a new section 137.343(c) to allow Self-Governance Tribes to designate excess funds remaining at the end of a lump sum fixed price project as either savings or profit. The Committee agreed and adopted the recommendation in the final rule.

One comment recommended that section 137.338 be revised to replace the word "may" with "shall" to be consistent with similar provisions in Title I of the Act. The Committee agreed with the recommendation and revised section 137.338 to replace the word "may" with the word "must."

One comment expressed appreciation to the Committee for the payment provisions set forth in section 137.341 "as a prime example of a regulatory provision that seeks to liberally construe the Act to favor Self-Governance Tribes." No action was required.

One comment read section 137.372 as requiring that Self-Governance Tribes submit fee to trust applications to the Secretary of Health and Human Services for real property purchased with construction project agreement funds. The comment questioned why the Secretary of DHHS needs to be involved at all in the process of transferring fee land into trust when the Department of Interior's regulations at 25 CFR Part 151 already set forth a detailed process for transferring land into trust. The Committee agreed with the comment and revised section 137.372 in the final rule.

Consistent with this comment, the Committee also revised sections 137.373 and 137.374 to clarify that all references to the Secretary taking title to property purchased with construction project agreement funds refer to fee title, not trust title. The question in section 137.374 was also revised to include leasing to be consistent with the answer. One Committee member recommended that section 137.374 be further revised to discuss Tribal acquisitions of government surplus property. The Committee did not accept this recommendation because the revised regulation covers all acquisitions of property, including government surplus property.

The Committee received four comments on behalf of twenty-eight Tribes and Tribal organizations supporting the Tribal position on whether the Davis-Bacon Act applies to construction project agreements that include funds from both Federal and non-Federal sources, including Tribal contributions and State funds. The comments proposed adding the additional question and answer suggested in the Tribal position on this area of disagreement in the NPRM:

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 Federal and Tribal committee members did not reach consensus on whether the Davis-Bacon Act applies to

projects funded with both Federal and non-Federal funds. Tribal and Federal officials included this issue in their non-consensus reports. The Tribal representatives believe this proposed regulation would give Self-Governance Tribes performing Title V construction projects greater autonomy and would advance 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).

The Tribal representatives believe the proposed regulation is supported by 509(g) of the Act, and at best, this section of the Act is ambiguous. Section 512 requires that the "Secretary shall interpret all Federal laws * * * in a manner that will facilitate * * * the achievement of Tribal health goals and objectives." Furthermore, even if the language of Title V is open to more than one reasonable interpretation, rules of statutory construction for Indian legislation require that the statute be construed liberally in favor of the 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."). In *Ramah Navajo Chapter v. Lujan*, the Tenth Circuit held that, "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)).

Tribal representatives are committed to working with the Secretary to address the concerns identified by the Committee through Secretarial interpretation, further rulemaking, and clarifying legislation that further fosters self-governance. Further clarification of the Tribal position may be found at 67 FR 7000 (February 14, 2002).

While the Department has given careful consideration to the views of the Tribal representatives on this issue, it cannot accept the Tribal proposal. The Department recognizes that requiring the use of Federal Davis-Bacon wage rates on jointly funded projects is cumbersome, especially for Self-Governance Tribes located in multiple prevailing wage jurisdictions. Moreover, the Department is concerned that this requirement may discourage Self-Governance Tribes from using non-

Federal funds to build or improve health care facilities. However, the Department is persuaded that the wording of section 509(e) of the Act precludes adopting the proposed Q&A.

Subpart O—Secretarial Responsibility and Budget Request

Summary of Subpart

This subpart addresses consultation with Self-Governance Tribes in the budget formulation process.

Discussion of Comments

Several comments raised concerns about the deletion of sections 137.400, 401 and 402 and asked that they be reinstated in the final rule. Sections 137.400 and 137.402 were included in the proposed rule recommended by the rulemaking committee but deleted from the proposed rule published in the **Federal Register** because they purported to require the President, in consultation with Indian Tribes, to identify in his annual budget request to the Congress all funds necessary to fully fund all funding agreements authorized under Title V. To include the provisions in Departmental regulations raised concerns under Article II, Section 3 of the United States Constitution, because they would place requirements on the President and Administration officials regarding what to include in the President's budget request to the Congress. With respect to section 137.401, which concerned Tribal consultation on budget issues, the Committee decided to include in the final rule a revised section 137.401 on Tribal consultation, as follows:

Section 137.401 What Role Does Tribal Consultation Play in the IHS Annual Budget Request Process?

The IHS will consult with Tribes on budget issues consistent with Administration policy on Tribal consultation.

One comment noted that the term "Title I" in section 137.405 should be capitalized. The correction was made.

In response to a comment regarding a grammatical correction to section 137.407(d), the word "headquarter's" was changed to "headquarters".

The committee found that the word "and" had been misplaced in section 137.419(b). The word has been moved to section 137.419(c).

Subpart P—Appeals

Summary of Subpart

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.

Discussion of Comments

One comment recommended that section 137.421 be clarified to have the deadline to request an informal conference run from the date of receipt, and to provide Tribes with 45 days rather than 30 days to request an informal conference. Since section 137.421 already provides that the deadline runs from the date of receipt, rather than mailing, the Committee made no change.

One comment suggested additional language in subsection 137.422(c) to address the participation by an OTSG representative in the informal conference. In response, the Committee agreed to add the following sentence to the end of section 137.422(d):

Such designated representatives may include OTSG.

Administrative Matters

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 final 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 \$110 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 \$110 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.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a 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 final rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that this final 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.

In accordance with the Act, this final 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 regulations have been agreed on by consensus except as noted in the preamble.

The DHHS has determined that this final 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 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 were negotiated between the Department and Tribal representatives through the negotiated rulemaking process and were 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. Response to the data collection is voluntary; however, submission of the data is essential to participation in the Tribal Self-governance process. Self-governance Tribes have the option of participating

in a voluntary national uniform data collection effort with the IHS. Final submission of these requirements have been sent to OMB for approval pursuant to PRA. In the course of its review, OMB will consider any public comments received on these requirements as expressed in the proposed rule. The information to be collected is as follows:

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 programs, services, functions, and activities (or portions thereof) (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 accordance with the PRA, 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.

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: April 23, 2002.

Michael H. Trujillo,
Assistant Surgeon General, Director.

Dated: May 10, 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—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)
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.203, 83 Stat. 763; 30 U.S.C.843, 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.

137.6 Secretarial policy.

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 May a Tribe negotiate and leave funds with IHS for retained services?

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)?
- 137.73 What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

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 that were not paid as part of the initial lump sum payment?
- 137.78 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?
- 137.79 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?

Federal Tort Claims Act (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 Must 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 Does the Secretary have a role in the fee-to-trust process when real

- property is purchased with construction project agreement funds?
- 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 or leasing 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

- 137.401 What role does Tribal consultation play in the IHS annual budget request process?

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 "contract" 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—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 have been submitted to the Office of Management and Budget (OMB) and are pending OMB approval.

§ 137.2 Congressional policy.

(a) According to section 2 of Pub. L. 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 to—

(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)].

§ 137.6 Secretarial policy.

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

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, including such terms as the parties intend shall control year after year, 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.

Retrocession 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 designees.)

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 Self-Governance Advisory Committee means the Committee established by the Director of IHS that consists of Tribal representatives from each of the IHS Areas participating in Self-Governance, and that provides advocacy and policy guidance for implementation of Tribal Self-Governance within IHS.

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 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 and to negotiate.

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 May a Tribe negotiate and leave funds with IHS for retained services?

Yes, 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, including all recurring increases received and continuing eligibility for other increases, 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 are added to a funding agreement covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

§ 137.73 What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

None of the provisions of Title V apply.

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 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.

§ 137.78 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.

§ 137.79 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 *or*

(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 Tribes 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 funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

§ 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 offense) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

§ 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 the same funds or PSFA under section 102 of the Act [25 U.S.C. 450f]. 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 Self-Governance Tribes 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.

Federal Tort Claims Act (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 an 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 P 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 reassumed 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 reassumed 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 or specific scope of work means a brief written 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 NHPA 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. 470f] requires Federal agencies to afford the Advisory Council on Historic Preservation, acting through the SHPO or the THPO, 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 Data Preservation Act [16 U.S.C. 469];
- (2) Archeological Resources Protection Act [16 U.S.C. 470aa];
- (3) Clean Air Act [42 U.S.C. 7401];
- (4) Clean Water Act [33 U.S.C. 1251];
- (5) Coastal Barrier Improvement Act [42 U.S.C. 4028 and 16 U.S.C. Sec. 3501];
- (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. 1401–1445; 16 U.S.C. 1431–1447F; 33 U.S.C. 2801–2805];
- (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. 4901];
- (16) Resource Conservation and Recovery Act [42 U.S.C. 6901];
- (17) Safe Drinking Water Act [42 U.S.C. 300F];
- (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 appropriate 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 performance of the construction project, the Self-Governance Tribe or, at the request of the Self-Governance Tribe, 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 1501.5 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 to the Self-governance tribe to assist the Self-governance Tribe in 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 projects, 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 and honor Tribal preferences whenever practicable 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, unless, at the option of the Self-Governance Tribe, such amounts are reclassified in whole or in part as savings.

§ 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 Must funds from other sources be incorporated into a construction project agreement?

Yes, at the request of the Self-Governance Tribe, the Secretary must 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 section 137.342. All other funds remaining at the conclusion of the project are considered profit and belong to the Self-Governance Tribe.

(c) At the option of the Self-Governance Tribe, funds otherwise identified in paragraphs (a) and (b) as "profit" may be reclassified, in whole or in part, as savings and to that extent may be used by the Self-Governance Tribe in accordance with section 137.142.

§ 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 Does the Secretary have a role in the fee-to-trust process when real property is purchased with construction project agreement funds?

No, the Secretary does not have a role in the fee-to-trust process except to provide technical assistance if requested by the Self-Governance Tribe.

§ 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 to take fee title to the property.

§ 137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring or leasing real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary take fee 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 Do 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****§ 137.401 What role does Tribal consultation play in the IHS annual budget request process?**

The IHS will consult with Tribes on budget issues consistent with Administration policy on Tribal consultation.

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 headquarters' 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 part 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 part 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;
- (c) to issue a recommended decision;

and

(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. Such designated representatives may include Office of Tribal Self-Governance.

§ 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. S.W., 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 ALJs 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 ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 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.

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