

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 29**

[Docket No. DOT-OST-2018-0104]

2105-AE71

Tribal Transportation Self-Governance Program**AGENCY:** Office of the Secretary (OST), DOT.**ACTION:** Notice of proposed rulemaking (NPRM).

SUMMARY: The U.S. Department of Transportation (DOT or Department) requests comments on a proposed rule to establish and implement the Tribal Transportation Self-Governance Program (TTSGP or Program), as authorized by Section 1121 of the Fixing America's Surface Transportation (FAST) Act. The proposed rule was negotiated among representatives of Tribes and the Federal Government. The Program would provide to participating Tribes greater control and decision-making authority over their use of certain DOT funding for which they are eligible recipients while reducing associated administrative burdens. These proposed regulations include eligibility criteria, describe the contents of and process for negotiating self-governance compacts and funding agreements with the Department, and set forth the roles, responsibilities, and limitations on the Department and Tribes that participate in the TTSGP.

DATES: Written comments on this notice must be received on or before December 2, 2019. The Department will consider late comments to the extent practicable.

ADDRESSES: You may submit comments by any of the following methods:

- *Electronically through the Federal eRulemaking Portal:* www.regulations.gov. Follow the online instructions for submitting comments.

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

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- *Fax:* 1-202-493-2251.

All comment submissions must include the agency name, docket name, and docket number (DOT-OST-2018-0104) or Regulation Identifier Number

(RIN) for this rulemaking (2105-AE71). Note that all comments received will be posted without change to www.regulations.gov, including any personal information provided. Physical access to the Docket is available at the Hand Delivery address noted above.

This document may be viewed online under the docket number noted above through the Federal eRulemaking portal, www.regulations.gov. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website, www.archives.gov/federal-register, and the Government Publishing Office's website, www.gpo.gov/fdsys. In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. The DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be viewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Jackson, Designated Federal Officer, Office of the Secretary, (202) 366-9151 or via email at ronald.jackson@dot.gov, or Ms. Krystyna Bednarczyk, Office of the General Counsel, (202) 366-5283, or via email at krystyna.bednarczyk@dot.gov. Office hours are from 8 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:**I. Background***A. Tribal Consultation*

Consistent with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, the Department will hold four public information, education, and consultation meetings during the public comment period to explain the rule, answer questions, and take oral testimony. While a court reporter will document these meetings, attendees are encouraged to submit written public comments. Three meetings will be held in or near Indian country at the locations listed below and a fourth meeting will be held virtually. Additional information on the meetings may be found at www.transportation.gov/self-governance. The Department will hold meetings on the following dates and locations:

1. October 21, 2019, 8:30 a.m.–1 p.m. MDT, National Congress of American Indians Annual Convention, Albuquerque, NM.

2. November 5, 2019, 8:30 a.m.–12 p.m. CST, United Southern and Eastern Tribes Annual Meeting, Choctaw, MS.

3. November 19, 2019, Seattle, WA.

4. November 21, 2019, 1 p.m.–5 p.m. EST, Virtual Listening Session by Webinar, <https://connectdot.connectsolutions.com/sr500ausdot/>. Telephone: 800-683-4564; Access Code: 027757.

B. Authority for This Rulemaking

These proposed regulations would implement Section 1121 of the Fixing America's Surface Transportation (FAST) Act, Public Law (Pub. L.) 114-94, which was enacted on December 4, 2015, and is codified at 23 U.S.C. 207 (Section 207). This section directs the Secretary of Transportation (Secretary) to establish and carry out the Tribal Transportation Self-Governance Program (TTSGP). It also directed the Department to develop regulations to implement the program pursuant to the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.* The purpose of Section 207 is to transfer Federal funding for transportation-related programs to participating Tribes and to facilitate Tribal control over the delivery of transportation programs, services, functions and activities (PSFAs). Section 207 incorporates by reference select provisions of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638, as amended (ISDEAA).¹ Congress enacted the ISDEAA to promote effective and meaningful participation by Tribes in the planning, conduct, and administration of Federal programs and services for Tribes. The ISDEAA authorizes Tribes to enter into self-determination contracts and self-governance compacts with the Departments of the Interior and Health and Human Services to assume operation of direct services for Tribes and administrative functions that support the delivery of these services by these Departments.

Implementation of the TTSGP through this rule would maintain and improve the Federal Government's unique and continuing relationship with and responsibility to Tribes, without a diminishment in any way of 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, and permit each eligible Tribe to choose the extent of its participation in the TTSGP. It would

¹ Following enactment of the FAST Act, Congress transferred the ISDEAA provisions within Title 25 of the U.S. Code. The docket contains a table that provides the relevant provisions and their current citations.

provide Tribes with control over the implementation of covered programs, implement a process for negotiating and seeking approval of an alternative funding mechanism by executing a compact and funding agreement with the Department, and authorize Tribes to plan, conduct, redesign, and administer, as appropriate and consistent with other statutory authorities, PSFAs that meet the needs of the individual Tribal communities. Finally, the TTSGP would provide a reduction in administrative burdens.

Section 207 is self-effectuating. It sets forth the following:

- To participate in the TTSGP, a Tribe's governmental body must authorize its participation in self-governance, and the Tribe must demonstrate, for the previous three fiscal years, financial stability and financial management capacity, and transportation program management capability.
- The Department and an eligible Tribe negotiate and enter into a written funding agreement that allows the Tribe to plan, conduct, consolidate, and administer programs that the Department would otherwise administer.
- A Tribe may redesign or consolidate certain programs and reallocate funds to best meet a Tribe's transportation needs.
- A Tribe may suspend performance under a compact and funding agreement in the absence of funding or, at the Tribe's election, retrocede all or a portion of the programs that are included in a funding agreement for any reason.
- Funding agreements must provide for advance payments to the participating Tribes for amounts equal to what the Tribe would be eligible to receive under contracts and grants under Section 207.
- Except as otherwise provided by law, the Secretary must interpret laws and regulations in a manner that will facilitate the inclusion of programs and funds in, and the implementation of, compacts and funding agreements.
- Each provision of Section 207, a compact, or a funding agreement must be liberally construed for the benefit of Tribes participating in self-governance and any ambiguity must be resolved in favor of Tribes.
- The Department has 90 days from the receipt of a request to waive the TTSGP regulations in which to approve or deny the request or the waiver request is deemed automatically approved.

C. Negotiated Rulemaking Process

Section 207(n) directs the Secretary to develop the regulations consistent with the Negotiated Rulemaking Act and to adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian Tribes. Section 207(n) restricts membership of the negotiated rulemaking committee (committee) to Federal and Tribal government representatives. The Federal Highway Administration, on behalf of the Department, published a **Federal Register** notice (81 FR 24158) on April 25, 2016, announcing the intent to establish a committee and soliciting nominations for membership on the committee. The Department published a **Federal Register** notice (81 FR 49193) on July 27, 2016, announcing the formation of the committee and identifying 23 Tribal representatives, and 7 Federal representatives.

The first committee meeting was held in Sterling, VA on August 16–18, 2016, during which the committee negotiated Protocols, a set of written procedures under which the committee would operate.² A total of 11 meetings of the full committee were then held in different locations throughout the country.³ The committee members and technical advisors organized themselves into two work groups and used the scheduled committee meetings to develop draft materials and exchange information. The committee's meeting minutes and any materials approved by the full committee were made a part of the official record.

There were no committee meetings between December 2016 and January 2018, during which time, the Office of the Secretary assumed responsibility for the rulemaking. The Department published a **Federal Register** notice (82 FR 60571) on December 21, 2017, announcing a committee meeting in January 2018. The full committee reconvened in Sterling, VA on January 8–12, 2018. The committee discussed a draft document that consolidated the products of the committee work groups. The January 2018 meeting was followed by a one-day committee meeting in February 2018. These meetings were

² Documents adopted by the committee, including the Protocols and meeting minutes, are available at fhwa.dot.gov/programs/ttp/ttsgp/.

³ The December 2016 meeting did not achieve a quorum of committee members due to inclement weather and subsequent air travel flight cancellations. Those present participated in the established work groups to continue to develop and review proposed regulatory language, and the committee adopted that work product at the January 2018 meeting.

intended to gather information from the full committee to clarify areas of disagreement, identify the issues for which the committee had yet to discuss or propose text, and ensure the Federal members clearly understood how the negotiated provisions on which the committee previously reached consensus reflected statutory mandates.

Next, the committee met in Washington, DC at Department headquarters on June 18–19, 2018. In advance of the meeting, the Department distributed a revised discussion draft, and a crosswalk comparison of the January and June 2018 drafts, for consideration by the full committee. The Tribal representatives attended the June 2018 committee meeting but raised several objections. They believed that the draft being submitted to the committee had not been prepared mutually through a negotiated process involving both the Department and Tribal representatives. On June 19, 2018, the Tribal representatives suspended negotiations based on their objections. As such, the committee did not approve any meeting minutes or documents.

Concurrent with its decision to suspend negotiations, the Tribal representatives submitted a letter⁴ to the Department proposing new timelines to conclude negotiations, setting forth a number of requests and conditions that must be met before the Tribal representatives would agree to resume negotiations. In order to meet the statutory time frame for publication of a draft and final rule, the Department declined the request of Tribal committee representatives to delay publication of the draft rule. However, negotiations resumed after enactment, on the August 14, 2018 of Public Law 115–235, which extended the statutory deadline to issue the proposed and final rule.

At the request of the Tribal representatives, the Department retained the services of the Federal Mediation and Conciliation Service (FMCS), a neutral third-party, to facilitate subsequent negotiations. The Department and the Tribal representatives subsequently worked through their differences with the assistance of FMCS.

In October 2018, the Tribal representatives submitted to the Department a revised discussion draft for the committee's consideration. With assistance from FMCS, the committee resumed negotiations in Washington, DC, between October 29–November 3, 2018. At the recommendation of FMCS, the committee appointed a drafting

⁴ The letter is available in the docket.

subcommittee, composed of nominated committee members and technical advisors, to develop recommendations and draft regulatory text for consideration by the committee. The committee directed the work of the drafting subcommittee.

Between November 2018 and February 2019, the FMCS convened the drafting subcommittee virtually and in Washington, DC to develop recommendations and proposed regulatory text for the committee's negotiation. After consulting with the Designated Federal Officer (DFO) and the Tribal Co-Chairs, the FMCS convened the committee in Shawnee, Oklahoma on March 18–19, 2019, followed by a two-day drafting subcommittee meeting on March 20–21, 2019. During the committee meeting, the committee reached tentative agreement on several proposed regulatory sections and provided additional direction to the drafting subcommittee. Finally, the committee authorized FMCS and the drafting subcommittee to continue to negotiate additional recommendations and to propose regulatory language addressing the remaining topics.

FMCS convened the drafting subcommittee in Washington, DC on April 1–4, April 23–26, and May 20–23, 2019, to develop the remaining provisions of the draft rule for the committee's consideration. After consulting with the DFO and the Tribal Co-Chairs, FMCS convened the committee in Scottsdale, Arizona on June 3–6, 2019. At the meeting, the drafting subcommittee presented the proposed regulatory language to the committee, identified a limited number of non-consensus items that remained outstanding, and provided recommendations and preferred language addressing these areas of disagreement. The committee reached tentative agreement on most of the rule and provided additional direction to the drafting subcommittee on the outstanding provisions. The committee authorized the drafting subcommittee to complete the draft rule for the committee's review and agreement.

The drafting subcommittee met in Washington, DC on June 25–26, 2019, to complete its work. On June 26, 2019, FMCS facilitated the subcommittee's briefing of the committee on the draft rule. The committee reached consensus on the draft rule, including the description of the disagreement items discussed below. The Tribal Co-Chairs and the DFO confirmed the committee's consensus determination to submit the draft rule to the Department.

II. Summary of the Proposed Regulations

The following summary describes the Department's proposed regulations to implement the TTSGP. Except for four areas of disagreement discussed below, the proposed regulations are the product of consensus. The Department seeks public comment on the proposed rule and the non-consensus items noted below.

Subpart A—General Provisions

This subpart would set forth the purpose and authority of these regulations, Departmental policy, effect of these regulations on existing Tribal rights, the Department's obligation to consult with self-governance Tribes, and definitions. It would clarify the prospective effect of these regulations and address the status of a participating Tribe's existing Tribal Transportation Program (TTP) Agreement entered into under the authority of 23 U.S.C. 202 to a compact and funding agreement. Finally, it would clarify the effect of 23 U.S.C. 207 on requirements contained in Federal program guidelines, manuals, or policy directives.

The definition provision would define the phrase “programs, services, functions, and activities” or “PSFAs.” The Department does not deliver PSFAs on behalf of Tribes; Tribes instead carry out PSFAs using the five categories of funding eligible to be include in a funding agreement between the Department and the Tribe.

Subpart B—Eligibility and the Negotiation Process

This subpart would identify the eligibility requirements for a Tribe or Tribal consortium (collectively “Tribe”) to participate in the Program. Tribes must demonstrate financial stability and financial management capability, and transportation program management capability to be eligible to participate in the TTSGP. The regulation would provide three means by which Tribes may demonstrate financial stability and financial management capacity. First, the regulation would set forth Section 207's conclusive evidence standard. This regulation would also set forth a new, sufficient evidence standard for Tribes subject to the Single Audit Act that currently conduct business with DOT through the TTP or a DOT grant award and have no uncorrected significant and material audit exceptions in their required single audits. Finally, the regulation would introduce a standard for Tribes without a mandate to comply with the Single Audit Act that currently conduct

business with DOT to request eligibility in DOT's discretion.

Tribes that would meet the sufficient evidence standard are well placed to participate in the DOT self-governance program—they conduct audits under the Single Audit Act, demonstrate that they do not have material and significant audit exceptions, and demonstrate transportation program capability. While TTP Agreements are “in accordance with the ISDEEA,” Tribes are subject to Federal Highway Administration (FHWA) oversight when they administer TTP funds. Tribes plan, budget, prioritize, and otherwise manage their Tribal transportation programs. The sufficient evidence standard recognizes that Tribes that successfully work with the FHWA under TTP Agreements and successfully manage grants for the maintenance, rehabilitation, and construction of transportation facilities should receive the benefits Congress intended in enacting the TTSGP.

The regulation would also provide a discretionary standard under which Tribes that do not meet the audit threshold of the Single Audit Act may participate in the Program if the necessary financial assurances are in place. This option is consistent with FHWA practice in administering the TTP provided the Tribe demonstrates financial capacity. FHWA has long permitted Tribes not subject to the Single Audit Act to participate, provided they undergo an independent audit and provide evidence demonstrating no uncorrected significant and material audit findings. DOT has determined that some smaller-funded Tribes have worked well with DOT under TTP Agreements as well as under the Federal Transit Administration's Tribal Transit Program. The Department does not want to compel those Tribes to join a consortium to be eligible for the DOT self-governance program.

The regulation also would provide for technical assistance, to the extent the Department has the resources and expertise, to Tribes that do not meet the criteria for financial stability and financial management capacity due to uncorrected significant and material audit exceptions. While the Department will not substitute its judgement for that of another agency where the audit reveals findings related to a non-DOT program, the Department may provide technical assistance for audit exceptions related to DOT programs. In these instances, a Tribe can work with the Department to correct those exceptions so that they come into compliance and demonstrate financial stability and

financial management capacity under the conclusive, sufficient, or discretionary evidence standards.

This regulation also would describe the evidence the Department would consider in making the discretionary determination that a Tribe has demonstrated transportation program management capability to be eligible to participate in the Program. The Department will use these criteria to evaluate the totality of the evidence presented in support of the eligibility application. Finally, this subpart would describe the negotiation process a Tribe must follow to enter into a compact and funding agreement with the Department to participate in the TTSGP.

The United States Department of the Interior (DOI) operates the DOI Tribal Self-Governance Program pursuant to Title IV of ISDEAA, as amended (codified at 25 U.S.C. 5301 *et seq.*) and jointly administers with FHWA the TTP. This subpart does not alter, affect, modify or otherwise change the eligibility requirements under 25 U.S.C. 5362, or implementing regulations at 25 CFR part 1000, for a Tribe or Tribal consortium seeking to participate in the DOI Tribal Self-Governance Program. Nothing in this proposed rule shall be construed to diminish or otherwise affect the authority of the Secretary of the Interior to carry out and administer the DOI Tribal Self-Governance Program. Additionally, this subpart does not alter or otherwise effect existing TTP contracting options available to Tribes with DOI.

Subpart C—Final Offer Process

This subpart would set forth the final offer process that a Tribe may invoke during negotiation with the Department of a compact and funding agreement. It is the Department's intent that a Tribe should only use the final offer process when there is a negotiation impasse and not before the parties have fully explored an area of disagreement. This subpart also would set forth the Department's responsibilities in processing a final offer, the grounds for rejecting the Tribe's final offer, and the Tribe's rights to challenge an adverse decision related to the final offer.

Subpart D—Contents of Compacts and Funding Agreements

This subpart would identify what is included in a compact, funding agreements and amendments, the duration of such agreements, and the rights and responsibilities of the Department and a Tribe. It would clarify that, notwithstanding the effect of 23 U.S.C. 207(n)(4), the compacts and funding agreements must include the

requirements related to public health and safety associated with the funding under the relevant programs.

Subpart E—Rules and Procedures for Transfer of Funds

This subpart would set forth the five categories of Department funds that a Tribe may elect to include in its funding agreement and, with agreement of a State, the transfer of Federal-aid funds. This subpart also describes responsibilities of the Department with respect to transfer of such funds, including the time to transfer the funds, and other issues related to the funding provided to Tribes through their TTSGP compact and funding agreements, including the use of such funds via the funding agreement. This subpart also would address how these funds may be used for matching or cost participation purposes and investment standards. Finally, while § 29.401(c)(2) sets forth the requirement from Section 207(h)(2) that the Department include in a funding agreement amounts equal to the project-related administrative expenses (PRAE) incurred by the Bureau of Indian Affairs (BIA) that the Department would have withheld under the Tribal Transportation Program, the Department notes that it does not presently provide to the BIA any funds for PRAE.

Subpart F—Program Operations

This subpart includes information and instructions to Tribes that participate in the TTSGP. Topics covered in this subpart include: (1) Audits and cost principles; (2) management systems and standards; (3) procurement management systems and standards; (4) property management systems and standards; (5) recordkeeping requirements; (6) reporting; (7) technical assistance; (8) prevailing wages; (9) Indian preference; (10) environmental and cultural resource compliance; (11) Federal Tort Claims Act applicability, and (12) waiver of Program regulations. The technical assistance provision would clarify that the Department is committed to carrying out the principles of self-governance while also ensuring proper stewardship and oversight of Federal funds.

With respect to rights-of-way on Tribal lands, these regulations would not affect the Department of the Interior's (DOI's) authority. DOI will continue to exercise its authority relating to the application, review, grant, administration, and oversight of rights-of-way on Tribal lands under 25 U.S.C. 323–328 and 25 CFR part 169.

Subpart G—Withdrawal

This subpart would describe the process for a Tribe to withdraw from a consortium's TTSGP compact or funding agreement with the Department, including distribution of the Tribe's shares of TTSGP funding. It would clarify that the Department is not a party to internal consortium disputes and would provide notice to consortia that seek to participate in the TTSGP that its agreements should adequately address the circumstances under which a member Tribe may withdraw.

Subpart H—Retrocession

This subpart would clarify that a Tribe may voluntarily discontinue performing a portion or all of the PSFAs under its compact and funding agreement, and may return remaining funds to the Department in accordance with the process set forth in this subpart. It also would clarify the effect of a Tribe's retrocession on its eligibility, and sets forth how funds must be distributed when the retrocession takes effect.

Subpart I—Termination and Reassumption

This subpart would describe when and under what circumstances the Department may terminate a Tribe's compact and funding agreement.

Subpart J—Dispute Resolution and Appeals

This subpart would set forth procedures, including various alternative dispute resolution mechanisms, that a Tribe may use to resolve disputes with the Department arising before or after execution of a compact or funding agreement, as well as the appeal rights and procedures Tribes must use to appeal the Department's decisions to terminate a Tribe's compact and funding agreement. It would provide the process for filing and processing appeals from adverse decisions and the applicable burden of proof.

III. Key Areas of Disagreement

The committee did not reach consensus on four issues. These include: (1) Whether to establish an Office of Self-Governance in the Department and create a Self-Governance Advisory committee prior to or simultaneous with issuance of the final rule; (2) whether the title I ISDEAA provision, 25 U.S.C. 5325(a), relating to contract support costs (CSCs), is in conflict with Section 207; (3) whether the title I ISDEAA provision, 25 U.S.C. 5324(l), relating to lease payments to a Tribe for facilities a Tribe makes

available to the Program, is in conflict with Section 207; and (4) whether the Department may require in this rule that a Tribe must exhaust administrative remedies for pre-award decisions, other than final offers, as a pre-condition to the Tribe filing suit in Federal court.

Each area of disagreement is presented below, in order, by subpart and section, as appropriate. To the extent a disagreement could not be resolved, the Department has incorporated its language proposal into the proposed regulatory text, and the Tribal and Department views on these areas of disagreement are set forth below. The Department solicits comments on these areas of disagreement.

During the negotiated rulemaking, the committee addressed over two dozen general subject matter areas: (1) Congressional and Secretarial policy; (2) definitions; (3) technical assistance; (4) eligibility; (5) negotiating funding agreements and compacts, including final offer; (6) contents of compacts and funding agreements; (7) regulatory waivers and streamlining; (8) transfer of funds; (9) requirements, limitations, and uses of funding; (10) financial management, property management and procurement management systems and standards, and disposition of Federal property; (11) retrocession, termination and assumption; (12) withdrawal from a Tribal consortium; (13) appeals and dispute resolution, and Equal Access to Justice Act (EAJA); (14) applicability to the Program of ISDEAA provisions; (15) CSCs; (16) facility lease payments under 25 U.S.C. 5324(l); (17) limitations on Secretarial action related to transfer of funds; (18) environmental review; (19) Federal Tort Claims Act (FTCA) applicability; (20) reporting and auditing; (21) applicability of certain Federal laws and regulations, prevailing wages, and Indian preference; (22) respective roles and functions to implement the Program: Office of Self-Governance, officials, consultations, and advisory councils; (23) effect of the Program on Department authority concerning formula and discretionary or competitive grants and consolidation and redesign authority; (24) effect of Program on Tribal Transportation Program (TTP) agreements, Tribal rights and current agreements; and (25) Federal sources of supply and excess, surplus Federal property. The committee broke each area into questions and answers, and the vast majority of these topics were agreed to by the Federal and Tribal representatives, and are reflected in the NPRM.

A. Establishing an Office of Self-Governance and Establishing an Advisory Committee

1. Tribal View

Tribal representatives believe that the Department should establish an Office of Self-Governance in order to successfully administer the Program. This office would act as the point of contact for Tribes to learn about the Program and their eligibility to participate, and, over time, to provide knowledge and expertise to the Department relating to Indian Tribes and the TTSGP. Tribes believe this Office should be created as soon as practicable. The regulations do contemplate a Chief Self Governance Official who will handle all matters related to the TTSGP. It is the Tribal representatives' view that staffing an Office of Self-Governance and meeting with Indian Tribes, Tribal elected officials, and Tribal transportation, transit and highway safety staff prior to the rule taking effect would be indispensable to the Program and the Department, and would better guarantee the Department's successful implementation of the TTSGP. With respect to the establishment of a TTSGP Self-Governance Advisory Committee, Tribal representatives believe that Tribal advisory committees have proven for years to be indispensable assets to Tribes and the Department of the Interior's (DOI) Bureau of Indian Affairs (BIA), the Department of Health and Human Services' (HHS) Indian Health Service (IHS), and the Department's Federal Highway Administration. These committees provide recommendations to the agencies and information to their respective Tribes and regions to better administer these programs that are critical to the Indian Tribes and their citizens. These bodies were established by and are referenced in agency regulations. *See* 25 CFR 170.135–170.137 (Tribal Transportation Program Coordinating Committee), 1000.102 (DOI Self-Governance Advisory Committee), 42 CFR 137.25, 137.10, and 137.204 (IHS Self-Governance Committee). Tribal representatives feel that the Department will lose a valuable resource of Tribal knowledge and expertise by not establishing an advisory body to assist the Department in implementing the Program.

2. Department View

Section 207 does not require the establishment of an Office of Self-Governance, and it is not Federal agency practice to establish new offices in regulation. Establishing an office within the Department is a matter of internal

organization and management. These regulations are not the appropriate mechanism for resolving the Tribal representatives' recommendation.

The Department does not foreclose the possibility of establishing an Office of Self-Governance. The proposed regulations provide for a Chief Self-Governance Official, a flexible structure that may accommodate an office in the future. In the interim, the Deputy Assistant Secretary for Tribal Affairs liaises with Tribal representatives by providing information, making technical assistance available, and coordinating policy across the Department in support of self-governance activities.

The Department does not disagree that an advisory committee may provide important information to the Department as it begins to carry out the TTSGP. However, this regulation is not the appropriate mechanism for establishing an advisory committee. In addition, the Department may avail itself of other processes, such as the Tribal consultation provision in Subpart A, to solicit feedback and information from Tribes and self-governance experts as it begins the process of implementing the TTSGP.

B. Applicability of Contract Support Costs

1. Tribal View

Tribal representatives assert that section 207(l)(8) makes 25 U.S.C. 5325(a) applicable to the Program, and is not in conflict with Section 207 as a matter of law and policy. Section 207 requires payment of contract support costs (CSCs), which are primarily administrative costs, in support of funds transferred to Tribes under the TTSGP. The ISDEAA requires CSCs to be added to program funds otherwise made available by an agency to a Tribe “for the reasonable costs of activities which must be carried out by a Tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which . . . normally are not carried on by the respective Secretary in his direct operation of the program; or . . . are provided by the Secretary in support of the contracted program from resources other than those under contract.” 25 U.S.C. 5325(a)(2)(A) and (B). The Tribal Representatives contend that the Department should only find an ISDEAA provision “in conflict” with Section 207 if it would take away from the effectiveness of the Program and the statutory scheme established by Section 207. The Tribal position is that these provisions apply to the Department and are not in conflict with Section 207.

CSCs are an eligible expense that should be included in and paid in addition to the funds made available to a Tribe under the Program. The absence of appropriations specifically for CSCs in annual appropriations for the Department's formula-based and discretionary and competitive grant programs is not a legal basis to find 25 U.S.C. 5325(a) in conflict with Section 207. Tribal representatives believe that Section 207 requires the Department to fully fund CSCs.

Based on their experience with ISDEAA programs, Tribes believe that Tribal success in implementing ISDEAA agreements, especially with regard to financial management systems integrity, compliance with annual audits, and the good stewardship of Federal funds, depends on Federal agencies requesting the full level of Tribal need for CSC funds. These same principles apply to the TTSGP just as they do to health care, social services, and other programs Tribes administer under self-governance programs.

The basis for payment of CSCs is not whether the Department provided direct services to Tribes prior to Tribes carrying out ISDEAA agreements. Newly recognized Indian Tribes that seek to enter into ISDEAA contracts and funding agreements with the BIA and the IHS are eligible for full CSCs on the same basis as other Tribes even though the Federal agencies may never have provided direct services to these Tribes or their members. ISDEAA's CSC requirement is based on a Tribe's administrative needs associated with the Tribe performing PSFAs with Federal funds, not the agency funding history or structure for providing such funds.

Tribes carrying out self-governance programs face challenges paying for administrative costs that come along with running programs when CSCs are not fully funded. Administrative overhead costs are "mandatory" costs that Tribes must incur to properly account for and expend Federal funds. Tribes should not have to use their formula program funds or limited Tribal funds to cover such mandatory costs; this reduces the funds available to operate the programs Tribes administer under self-governance.

If the Department does not authorize the addition of CSC funds to assist the Tribe in carrying out the Tribe's PSFAs, Tribal representatives assert that the final rule should remain silent on the issue so that, should CSCs be determined to apply to the Program in the future, such funds can be added without changes to the rule.

2. Department View

The Department acknowledges that, except to the extent there are conflicts, 25 U.S.C. 5325(a) is made applicable to the Program by operation of Section 207(I)(8). However, pursuant to Section 207(I), the Department has preliminarily determined that 25 U.S.C. 5325(a) conflicts with Section 207(h), which mandates that the Secretary provide funds to Tribes in "an amount equal to" (1) the sum of funds the Tribes would receive under a funding formula or other allocation method established under title 23 and chapter 53 of title 49 of the U.S. Code added to "(2) such additional amounts as the Secretary determines equal the amounts that would have been withheld for the costs of the Bureau of Indian Affairs for administration of the program or project."⁵ The plain language of 23 U.S.C. 207(h) is a funding limitation, because the provision uses the phrase "an amount equal to." This limitation conflicts with the mandate in 25 U.S.C. 5325(a)(1) to provide to Tribes funds in an amount "not . . . less than" the agency would have provided to operate the program for the contract period, including supportive administrative functions." The limitation in 23 U.S.C. 207(h) also conflicts with the mandate in 25 U.S.C. 5325(a)(2) that requires the agency to "add[]" contract support costs (CSCs) to the amount provided under 25 U.S.C. 5325(a)(1). Accordingly, the Department is not obligated to pay CSCs to supplement the five categories of funds set forth in § 29.400.

Even absent a conflict, Tribes carrying out compacts and funding agreements under the Program would not incur CSCs. CSCs ensure that a Tribe does not experience diminution in program resources when PSFAs are transferred from the Federal Government to Tribal operation. Tribes carrying out their Tribal PSFAs with Department funding do not risk diminishing their program resources due to their participation in the Program because the Department never administered the activities to begin with. When Tribes enter the Program, they will not assume operation of a transportation program from the Federal Government and will not incur additional expenses associated with activities previously performed by the Federal Government for the benefit of Tribes or on their behalf. In the context of DOT's formula funding for Tribes, the funds appropriated for transfer to Tribes are either Tribal shares or residual

⁵ The Department does not withhold funds for the costs of the Bureau of Indian Affairs for project or program administration, and therefore anticipates that this amount will always be zero.

agency funds to perform inherent Federal functions such as program management and oversight. The competitive and discretionary grant programs are not programs that the Department previously performed and therefore CSC funding is not necessary to prevent a diminution in the competitive and discretionary grant program. Rather, these programs contemplate that Tribes would use a portion of the funds to cover administrative obligations, and the funding limitation in 23 U.S.C. 207(h) requires that the funds allocated to Tribes be used to offset any administrative obligations.

The Department administers two programs that solely benefit Tribes and that allocate funds to Tribes under a funding formula: The Tribal Transportation Program and the Tribal Transit Program. The Department does not plan, conduct, and administer a program or service that the Federal Government would have otherwise provided directly. Rather, the Department transfers funds to Tribes and authorizes them to plan, conduct, and administer the funds to deliver Tribal programs and services in accordance with their needs and priorities. The Department's administration of these programs is limited to program management and oversight, and other inherent Federal functions. The vast majority of other Departmental funding programs are non-formula, competitive and discretionary grant programs that are not solely for the benefit of Tribes and do not provide CSCs for non-Tribal recipients. Therefore, CSCs would not apply even if 25 U.S.C. 5325(a) were not in conflict with Section 207.

Nevertheless, Tribes may be able to recover some funding for the indirect costs they incur while administering a grant from the Department transferred in a funding agreement on the same basis as any other grantee. The payment of indirect costs would be governed by the Federal cost principles that apply to grants programs, as well as any applicable caps on indirect cost funding. To be clear, certain costs that Tribes seek to recover as CSCs under the TTSGP are generally available as an eligible and allocable expense of both DOT formula programs. Under these programs, Tribal recipients may use Federal financial assistance for eligible planning, operating, and capital expenses. Tribes may also use program funds for pre-award, startup, direct, indirect, and program oversight costs. However, this does not mean that additional funds have been authorized or appropriated for these expenses, and

there are no additional funds to provide to Tribes for CSCs. Based on the Department's preliminary determination, the funding limitation in Section 207(h) does not allow any other outcome.

C. Facility Leases and Facility Support Costs (§ 29.420)

1. Tribal View

The Tribal representatives and the Department disagree on whether the Department must enter into a lease with a Tribe when it requests to use a facility for the administration and delivery of services under a TTSGP funding agreement. Section 207(l)(8) incorporates by reference 25 U.S.C. 5324(l), which directs the Department to pay Tribes for the costs of leasing a facility that a Tribe (1) owns, leases, or holds a trust interest in; and (2) uses to carry out an ISDEAA agreement.

Tribal representatives disagree with the preliminary finding that ISDEAA provisions regarding facility leaseback options conflict with Section 207. Tribes assert that the lack of appropriations to the Department to give effect to the leasing provision of 25 U.S.C. 5324(l) of the ISDEAA is not a legal or policy basis for finding the provision to be "in conflict" with the purposes of the TTSGP. The proper question to ask is whether it advances the purposes and goals of the TTSGP for the Department to compensate a Tribe for the Tribe's use of a facility leased or otherwise made available by the Tribe to carry out the PSFAs that are eligible for inclusion in a compact and funding agreement under the Program. By covering necessary facilities costs, lease payments would free up funding for construction, maintenance, and other transportation projects, furthering the goals of the Program. Far from conflicting with the TTSGP, the 25 U.S.C. 5324(l) leasing provisions empower the Program to do more.

2. Department View

The Department acknowledges that Section 207(l)(8) incorporates by reference 25 U.S.C. 5324(l), which directs the Department to compensate Tribes for the use of a facility for the administration and delivery of services under ISDEAA. However, pursuant to Section 207(l), the Department has preliminarily determined that 25 U.S.C. 5324(l) conflicts with the funding limitation in Section 207(h). If the Department provided additional funding under 25 U.S.C. 5324(l), the amount of funds would never equal the amount contemplated by Section 207(h).

Currently, the Tribal Transportation Program and the Tribal Transit Program makes the construction or leasing of transportation facilities, including certain facility support costs, an eligible cost of each program's funds. Finally, the Department notes that additional funds have not been authorized or appropriated for these expenses, and there are no additional funds to provide to Tribes with facility lease-back and facility support costs. This is consistent with the funding mandate of Section 207(h).

D. Exhaustion of Administrative Remedies (§ 29.906)

1. Tribal View

The Tribal representatives object to the Department's inclusion of a requirement to exhaust administrative remedies for pre-award decisions (except appeals of the rejection of a final offer) before initiating a civil action against the Department in the U.S. District Courts. Tribal representatives argue that there is no statutory mandate in Section 207 or the incorporated provisions of the ISDEAA that requires a Tribe to exhaust administrative remedies before a Tribe may bring suit in Federal court. Regulations of the DOI and IHS, which implement titles I, IV and V of the ISDEAA, do not include an exhaustion provision; Tribes assert the Program should operate in the same way. Tribal representatives assert that Tribes may incorporate section 110 of the ISDEAA, 25 U.S.C. 5331, in a compact or funding agreement by operation of section 207(l) and 25 U.S.C. 5396, which allows for a direct appeal to U.S. District Courts of an adverse agency decision without the need to exhaust administrative remedies. Tribal representatives assert that while some Tribes may choose to exhaust administrative remedies before considering further recourse, the decision of whether to pursue additional administrative remedies is an act of self-determination and self-governance that a Tribe should make and that the Department should defer to the principles of self-governance on this issue.

2. Department View

In negotiating the disputes and administrative appeal provisions, the committee requested the drafters to develop a simple, easy to follow dispute resolution process. Accordingly, the Department proposes a two-step process for pre-award disputes by which all initial decisions would be made by a Chief Self-Governance Official and appealed to a hearing official appointed

by the Office of the General Counsel. This requirement does not apply to appeals of the Department's denial of a final offer because Section 207 provides that a Tribe may proceed directly to U.S. District Courts, in lieu of an administrative appeal. The Department devised an efficient, timely, and responsive process that would ensure a proper record for certain pre-award disputes. While Section 207 does not include an express exhaustion requirement, the Department interprets the Administrative Procedure Act and Supreme Court precedent to grant the Department discretion to impose a requirement that Tribes exhaust their administrative remedies before proceeding to the U.S. district courts. Additionally, the Department disagrees that 25 U.S.C. 5331 provides direct review in U.S. District Courts. Instead, 25 U.S.C. 5331 addresses the proper venue and relief that can be granted for civil actions filed pursuant to this section, but does not address timing of when these civil actions may be brought.

E. Tribal Concerns Related To Transfer of Funds

While not a disagreement issue, the Tribal representatives want to solicit public comment on three sections in Subpart E addressing the timing for the transfer of funds. The committee agreed that the rule would require the Department to transfer funds included in a funding agreement within 30 days of the apportionment of funds from the Office of Management and Budget to the Department or, for discretionary and competitive grants, within 30 days of inclusion of the grant in a funding agreement. See § 29.403 (initial transfer), § 29.404 (funds not paid as part of the initial lump sum or initial periodic payment), and § 29.404 (discretionary and competitive grants).

Tribes initially asserted that the transfers should occur within 10 days of the apportionment of funds by the Office of Management and Budget to the Department, or 10 days after execution of the funding agreement covering grants, unless the funding agreement provides otherwise, in accordance with 25 U.S.C. 5388(a). The Tribal representatives agreed to the 30-day requirements because in some instances the Department may be able to make such transfers within 10 days if the Department's financial management systems permit, but could not do so in all instances. Tribes urge the Department to identify any limitations in the Department's financial management systems that would prevent the timely transfer of funds to

Tribes under the Program. The success of a Tribe's transportation project or program may depend on the expeditious transfer of Federal funds because many Tribes operate with very short construction seasons. It is the Tribes' view that the Department should improve its transfer process so that the vast majority of fund transfers occur within 10 days.

IV. Regulatory Analyses and Notices

A. Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improving Regulation and Regulatory Review, Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and USDOT Regulatory Policies and Procedures

The DOT, in consultation with the Office of Management and Budget, has determined that this action does not constitute a significant regulatory action within the meaning of Executive Order (E.O.) 12866 or within the meaning of DOT regulatory policies and procedures. In addition, this action complies with the principles of E.O. 13563. After evaluating the costs and benefits of these proposed amendments, DOT anticipates that the economic impact of this rulemaking would be minimal. Tribes would not be required to participate in the TTSGP, so any costs associated with implementation would be voluntarily assumed by the Tribes. The proposed rule would enable Indian Tribes to exert greater control and decision-making authority over the administration of funds awarded under other statutorily authorized formula fund and competitive or discretionary grant programs eligible for inclusion in the program. The rule describes the process and procedures for negotiating compacts and annual funding agreements with Tribes and intertribal consortia. The rule would not impose a compliance burden on the economy generally, does not introduce any new funds into the stream of commerce, and does not adversely affect in any material way the economy, productivity, competition, jobs, the environment, public health or safety. Finally, this proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866. For additional information about the costs and benefits of this rulemaking, please see the Regulatory Impact Analysis, which is available in the Docket.

B. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354; 5 U.S.C.

601–612), DOT has evaluated the effects of this proposed rule on small entities, such as local governments and businesses. Based on the evaluation, the Department anticipates that this action would not have a significant economic impact on small entities. The Department only foresees this rule having an impact on the Federal Government and Indian Tribes, which are not considered to be small entities for purposes of this Act. The DOT certifies that this document will not have a significant economic effect on a substantial number of small entities.

C. Unfunded Mandates Reform Act

The DOT has determined that this proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). The actions proposed in this NPRM would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$151 million or more in any one year (when adjusted for inflation) in 2012 dollars. In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have the authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The funding programs subject to this rulemaking permit this type of flexibility.

D. Executive Order 12630, Taking of Private Property

The DOT has analyzed this NPRM under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The DOT does not anticipate that this proposed action would affect taking of private property interests or otherwise have taking implications under E.O. 12630.

E. Executive Order 13132, Federalism Assessment

The DOT has analyzed this NPRM in accordance with the principles and criteria contained in E.O. 13132. This NPRM would impact Tribal governments, but there is no federalism impact on the relationship or balance of power between the United States and Indian Tribes affected by this action. The DOT has determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The DOT has also determined that this action would not preempt any State law

or regulation, or affect the States' ability to discharge traditional State governmental functions.

F. Executive Order 12988, Civil Justice Reform

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988 to minimize litigation, eliminate ambiguity, and reduce burden.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The DOT has determined that the proposed rule does not contain collection of information requirements for the purposes of the PRA.

H. National Environmental Policy Act

The Department has analyzed the environmental impacts of this final rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) and has determined preliminarily that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* The purpose of this rulemaking is to establish a departmental Tribal transportation self-governmental program. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking, but the Department invites comment on this determination.

I. Executive Order 13175, Tribal Consultation

The Department has analyzed this NPRM under E.O. 13175, and has determined that because the NPRM would uniquely affect Tribal governments, it would follow departmental and Administration procedures in consulting with Tribal governments on the NPRM. We have

evaluated this action for potential effects on federally recognized Indian Tribes and have determined that the NPRM would not impose substantial direct compliance costs on Indian Tribal governments, would not preempt Tribal law, would not have any potentially adverse effects, economic or otherwise, on the viability of Indian Tribes. Rather, this action will reduce the administrative burden of Indian Tribes participating in this program. Therefore, a Tribal summary impact statement is not required.

The Department initiated a negotiated rulemaking process, with both Tribal and Federal representatives, which the Department asserts fulfills its obligations to consult, as appropriate. The results of these ongoing negotiated rulemaking meetings were periodically reported and discussed in other Federal and Tribal fora. The Tribal and Federal representatives reached consensus on the rule text and Preamble, except for the four areas of disagreement discussed above. The DOT will continue to seek the input of Tribes through the comment period and until publication of the Final Rule.

J. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

The DOT has analyzed this proposed action under E.O. 13045. The DOT certifies that this proposed action would not cause an environmental risk to health or safety that may disproportionately affect children.

K. Regulation Identifier Number

A Regulation Identifier Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 29:

Grant programs—transportation,
Grant programs—Indians, Indians.

Issued on: September 27, 2019.

Elaine L. Chao,

Secretary of Transportation.

■ For the reasons set out in the preamble, the Department of Transportation proposes to add part 29 to title 49 of the Code of Federal Regulations to read as follows:

PART 29—TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM

Subpart A—General Provisions

Sec.

- 29.1 What is the purpose and authority for this part?
29.2 What is the Department's policy for the Program?
29.3 What is the effect of this part on existing Tribal rights?
29.4 How do Departmental circulars, policies, manuals, guidance, or rules apply to a Tribe's performance under the Program?
29.5 Who is responsible for carrying out the functions connected with the Program?
29.6 Must the Department consult with Tribes regarding matters that affect the Program?
29.7 What is the effect of this Program on existing Tribal Transportation Program agreements?
29.8 What happens if more than one party purports to be the authorized representative of a Tribe?
29.9 What definitions apply to this part?

Subpart B—Eligibility and Negotiation Process

Eligibility

- 29.100 What are the criteria for eligibility to participate in the Program?

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- 29.101 How does a Tribe commence negotiations for a compact, funding agreement, or amendment?
29.102 What information should the Tribe provide to the Department when it expresses its interest in negotiating a compact, funding agreement, or amendment?
29.103 How will the Department respond to the Tribe's written request?
29.104 Must the Department and the Tribe follow a specific process when negotiating compacts, funding agreements, and amendments?
29.105 Will negotiations commence or conclude within a specified time period?
29.106 What are best practices to pursue negotiations?
29.107 What recourse does the Department or the Tribe have if the negotiations reach an impasse?
29.108 May the Department and the Tribe continue to negotiate after the Tribe submits a final offer?
29.109 Who is responsible for drafting the compact or funding agreement?

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- 29.200 What is covered by this subpart?
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29.202 How does a Tribe submit a final offer?
29.203 What must a final offer contain?
29.204 How long does the Department have to respond to a final offer?
29.205 How does the Department acknowledge receipt of a final offer?
29.206 May the Department request and obtain an extension of time of the 45-day review period?

- 29.207 What happens if the Department takes no action within the 45-day review period (or any extensions thereof)?
29.208 What happens once the Department accepts the Tribe's final offer or the final offer is accepted by operation of law?

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- 29.209 On what basis may the Department reject a Tribe's final offer?
29.210 How does the Department reject a final offer?
29.211 Is technical assistance available to a Tribe to overcome rejection of a final offer?
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- 29.300 What is included in a compact?
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29.302 What is the duration of a compact?
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29.307 What terms must a funding agreement include?
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29.309 Will a funding agreement include provisions pertaining to flexible or innovative financing?
29.310 May a Tribe redesign, consolidate, reallocate, or redirect the funds included in a funding agreement?
29.311 How is a funding agreement amended?
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- 29.407 Does the award of funds for discretionary or competitive grants entitle the Tribe to receive contract support costs?
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- 29.412 May the Department increase the funds included in the funding agreement if necessary to carry out the Program?
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- 29.414 What limitations apply to Department actions related to transfer of funds associated with PSFAs?
- 29.415 Does the Prompt Payment Act apply to funds transferred to a Tribe in a funding agreement?
- 29.416 What standard applies to a Tribe's management of funds included in a funding agreement?
- 29.417 Must a Tribe continue performance of the Tribal Transportation Program or the Tribal Transit Program under a compact and funding agreement if the Department does not transfer sufficient funds?
- 29.418 May a funding agreement include transfers of State funds?
- 29.419 Does the award of formula funds entitle a Tribe to receipt of contract support costs?
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- 29.506 What are the general financial management system standards that apply to a Tribe when carrying out a compact and funding agreement under this part?
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- 29.511 Must a Tribe maintain a recordkeeping system?
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- 29.515 When procuring property or services with funds included in a funding agreement, can a Tribe follow its own procurement standards?
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- 29.517 Do Federal laws and regulations apply to a Tribe's contractors or subcontractors?
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- 29.519 What reporting must a Tribe provide?

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- 29.520 How may a Tribe use existing Department facilities, equipment, or property?
- 29.521 How may a Tribe acquire surplus or excess Federal property for use under the Program?
- 29.522 How must a Tribe use surplus or excess Federal property acquired under the Program?
- 29.523 If a compact or funding agreement (or portion thereof) is retroceded, reassumed, terminated, or expires, may the Department reacquire title to property purchased with funds under any compact and funding agreement or excess or surplus Federal property that was donated to the Tribe under the Program?

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- 29.524 What technical assistance is available from the Department?

Prevailing Wages

- 29.525 Do the wage and labor standards in the Davis-Bacon Act apply to employees of a Tribe?

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- 29.526 Does Indian preference apply to PSFAs under the Program?
- 29.527 When do Tribal employment law and contract preference laws govern?

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- 29.528 What compliance with environmental and cultural resource statutes is required?

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- 29.529 Is the Federal Tort Claims Act applicable to a Tribe when carrying out a compact and funding agreement under the Program?
- 29.530 What steps should a Tribe take after becoming aware of a Federal Tort Claim?
- 29.531 Is it necessary for a compact or funding agreement to include any terms about FTCA coverage?
- 29.532 Does FTCA cover employees of the Tribe who are paid by the Tribe from funds other than those provided through the compact and funding agreement?
- 29.533 May persons who are not Indians assert claims under FTCA?
- 29.534 Does the year PSFAs are funded affect FTCA coverage?

Waiver of Program Regulations

- 29.535 What is the process for regulation waivers under this part?

Subpart G—Withdrawal

- 29.600 May a Tribe withdraw from a consortium?
- 29.601 When does a withdrawal become effective?
- 29.602 How are funds redistributed when a Tribe fully or partially withdraws from a compact and funding agreement and elects to enter into a compact with the Department?
- 29.603 How are funds distributed when a Tribe fully or partially withdraws from a compact and funding agreement administered by a consortium serving more than one Tribe, and the withdrawing Tribe elects not to or is ineligible to enter into a compact under this part?

Subpart H—Retrocession

- 29.700 May a Tribe retrocede a PSFA and the associated funds?
- 29.701 How does a Tribe notify the Department of its intention to retrocede?
- 29.702 What happens if the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede?
- 29.703 What happens if the Department of the Interior determines that it does not provide the transportation services the Tribe intends to retrocede?
- 29.704 What is the effective date of a retrocession?
- 29.705 What effect will a retrocession have on a Tribe's right to compact under the Program?
- 29.706 Will retrocession adversely affect future funding available for the retroceded program?

Subpart I—Termination and Reassumption

- 29.800 When can the Department reassume a compact or funding agreement?
- 29.801 Can the Department reassume a portion of a compact or funding agreement and the associated funds?

- 29.802 What process must the Department follow before termination of a compact or funding agreement (or portion thereof)?
- 29.803 What happens if the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice?
- 29.804 When may the Department reassume?
- 29.805 When can the Department immediately terminate a compact or funding agreement (or portion thereof)?
- 29.806 Upon termination, what happens to the funds associated with the terminated portions of the compact or funding agreement?

Subpart J—Dispute Resolution and Appeals

- 29.900 What is the purpose of this subpart?
- 29.901 Can a Tribe and the Department resolve disputes using alternative dispute resolution processes?
- 29.902 Does the Equal Access to Justice Act apply to the Program?
- 29.903 What determinations may not be appealed under this subpart?

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- 29.904 What are pre-award decisions that a Tribe may appeal?
- 29.905 To whom does a Tribe appeal a pre-award decision?
- 29.906 Must a Tribe exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts for a pre-award decision?
- 29.907 When and how must a Tribe appeal a pre-award decision?
- 29.908 May a Tribe request an extension of time to file an administrative appeal to the hearing official?
- 29.909 When and how must the hearing official respond to the Tribe's appeal?
- 29.910 What is the Department's burden of proof for appeals of pre-award decisions?
- 29.911 What is the effect of a pending appeal on negotiations?

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- 29.912 What is a post-award dispute?
- 29.913 What is a claim under the Contract Disputes Act?
- 29.914 How does a Tribe file a Contract Disputes Act claim?
- 29.915 Must a Tribe certify a Contract Disputes Act claim?
- 29.916 Who bears the burden of proof in a Contract Disputes Act claim?
- 29.917 What is the Department's role in processing the Contract Disputes Act claim?
- 29.918 What information must the Chief Self-Governance Official's decision contain?
- 29.919 When must the Chief Self-Governance Official issue a written decision on the claim?
- 29.920 Is a decision of the Chief Self-Governance Official final?
- 29.921 Where may a Tribe appeal the Chief Self-Governance Official's decision on a Contract Disputes Act claim?
- 29.922 May a party appeal a Civilian Board of Contract Appeals decision?

- 29.923 What is the effect of a pending appeal?

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- 29.924 May a Tribe appeal the Department's decision to terminate a compact or funding agreement?
- 29.925 Is a Tribe entitled to a hearing on the record?
- 29.926 What rights do the parties have in an appeal of a termination decision?
- 29.927 What notice and service must the parties provide?
- 29.928 What is the Department's burden of proof for a termination decision?
- 29.929 How will the Department communicate its decision following a hearing on a termination decision?
- 29.930 May a party appeal the decision of an administrative law judge?
- 29.931 What is the effect of an appeal on negotiations?

Authority: 23 U.S.C. 207.

Subpart A—General Provisions

§ 29.1 What is the purpose and authority for this part?

(a) The regulations in this part implement the Tribal Transportation Self-Governance Program required by 23 U.S.C. 207 and set forth rules for compacts and funding agreements negotiated between the Department and eligible Tribes under the Program. Funding agreements may contain funds as set forth in 23 U.S.C. 207(d)(2)(A) and § 29.400.

(b) The Department prepared and issued these rules pursuant to 23 U.S.C. 207(n) with the active participation and representation of Tribes, consortia, Tribal organizations, and individual Tribal members, consistent with the negotiated rulemaking procedures.

§ 29.2 What is the Department's policy for the Program?

It is the Department's policy to:

(a) Recognize the unique government-to-government relationship with Tribes, including the right of Tribes to self-government, and to support Tribal sovereignty and self-determination;

(b) Encourage Tribes to participate in the Program;

(c) Affirm and enable the United States to fulfill its obligations to Tribes under treaties and other laws, and to ensure the continuation of the trust responsibility of the United States to Tribes and Indians that exist under treaties, other laws, and Executive orders;

(d) Interpret Federal laws and regulations to facilitate the inclusion of eligible funds in funding agreements under the Program to carry out Tribal PSFAs, except as otherwise provided by law;

(e) Consult with Tribes directly and meaningfully on policies that have

Tribal implications and affect the Program;

(f) Acknowledge that PSFAs performed by Tribes are an exercise of Tribal self-determination and self-governance; and that Tribes are responsible for day-to-day operation of PSFAs carried out under the Program, and accept responsibility and accountability for the use of funds and satisfactory performance consistent with the terms of funding agreements; and

(g) Liberally construe this part to effectuate 23 U.S.C. 207 for the benefit of Tribes participating in the Program.

§ 29.3 What is the effect of this part on existing Tribal rights?

(a) Nothing in this part requires a Tribe to apply to participate in the Program.

(b) A Tribe's decision to participate in the Program does not:

(1) Affect, modify, diminish, or otherwise impair the sovereign immunity from suit enjoyed by the Tribe;

(2) Terminate, waive, modify, or reduce the trust responsibility of the United States to the Tribe or individual Indians; or

(3) Reduce the amount of the Tribe's formula or discretionary funding from the Department or impair the Tribe's ability to obtain funding from another Federal program.

§ 29.4 How do Departmental circulars, policies, manuals, guidance, or rules apply to a Tribe's performance under the Program?

A Tribe's performance under the Program is not subject to any Departmental circular, policy, manual, guidance, or rule, except for this part, unless the Tribe and Department otherwise negotiate and agree in the compact or funding agreement.

§ 29.5 Who is responsible for carrying out the functions connected with the Program?

The Department will carry out the Program, including making eligibility determinations; negotiating compacts and funding agreements with Tribes; overseeing compliance with Department requirements; and otherwise administering and implementing the Program consistent with this Part. As provided in § 29.402, Tribes are responsible for day-to-day management of the Tribe's PSFAs consistent with the compact and funding agreement.

§ 29.6 Must the Department consult with Tribes regarding matters that affect the Program?

Yes. The Department must consult with Tribes on matters relating to the Program. The Department will carry out

consultations in accordance with Executive Order 13175 and applicable Department policies, including the Department's Tribal Consultation Plan.

§ 29.7 What is the effect of this Program on existing Tribal Transportation Program agreements?

This Program does not terminate existing authority for a Tribe to enter into agreements with the Federal Highway Administration, or contracts or agreements with the Department of the Interior, for the Tribal Transportation Program. A Tribe may maintain its current contracts or agreements, or include Tribal Transportation Program funds in a funding agreement under this Program. A Tribe may only have one agreement at a time for the same funds.

§ 29.8 What happens if more than one party purports to be the authorized representative of a Tribe?

If more than one party purports to be the authorized representative of a Tribe during the negotiation of a compact, funding agreement, or amendment, the Department will notify the parties, consult with the Department of the Interior, defer negotiation or execution of any documents until such authority is clarified, and provide written notice to the parties of the Department's decision to defer.

§ 29.9 What definitions apply to this part?

Unless otherwise provided in this part:

Appeal means a request by a Tribe for an administrative or judicial review of a decision by the Department.

Chief Self-Governance Official means a Department official responsible for overseeing the Program and carrying out the responsibilities set forth in this part.

Compact means a legally binding and mutually enforceable written agreement between the Department and a Tribe entered into pursuant to 23 U.S.C. 207(c) that sets forth the general terms that will govern the Tribe's participation in the Program and affirms the government-to-government relationship.

Consortium means an organization or association of Tribes that is authorized by those Tribes to participate in the Program under this part and is responsible for negotiating, executing, and implementing compacts and funding agreements on behalf of its member Tribes.

Consultation means the process by which the Department and a Tribe engage in timely, substantive, and meaningful government-to-government communication, collaboration and participation, and exchange views in furtherance of the Federal trust responsibility and the principles of self-

governance, before any action is taken that will have Tribal implications as defined by Executive Order 13175, in accordance with the Department's Tribal Consultation Plan, Executive Order 13175, all subsequent Presidential Memoranda regarding Tribal consultation, and applicable Federal law.

Contractor means a third party who has entered into a legally binding agreement with a Tribe to provide goods or services.

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

Department means the U.S. Department of Transportation.

Discretionary or competitive grant means a grant in which the Federal awarding agency may select the award amount and recipients from among all eligible applicants in light of the legislative and regulatory requirements and published selection criteria established for a program.

Excess property is real or personal property under the control of a Federal agency, which is not required for the agency's needs and the discharge of its responsibilities.

Funding agreement means a legally binding and mutually enforceable written agreement between the Department and a Tribe entered into pursuant to 23 U.S.C. 207(d) that identifies the funds the Tribe will use to carry out its PSFAs, and sets forth the terms and conditions under which the Tribe will receive the funds.

Gross mismanagement means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds included in a compact and funding agreement that results in a significant reduction of funds available for a PSFA carried out by a Tribe.

Imminent jeopardy means an immediate threat to a trust asset, natural resource, or public health and safety that is caused by the act or omission of a Tribe and that arises out of a failure by the Tribe to carry out the compact or funding agreement.

Indian means a person who is a member or citizen of a Tribe.

Indian Tribe or Tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community (including colonies and rancherias) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. In any case in which

an Indian Tribe has authorized another Indian Tribe, an intertribal consortium, or a Tribal organization to plan for or carry out PSFAs on its behalf under this part, the authorized Indian Tribe, intertribal consortium, or Tribal organization shall have the rights and responsibilities of the authorizing Indian Tribe (except as otherwise provided in the authorizing resolution or in Title 23 U.S. Code). In such event, the term Indian Tribe or Tribe as used in this part shall include such other authorized Indian Tribe, intertribal consortium, or Tribal organization.

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

Operating Administration means a component administration of the U.S. Department of Transportation.

Program means the Tribal Transportation Self-Governance Program established by 23 U.S.C. 207.

Project means any activity determined as being eligible under the U.S. Code title and program for which funds are being provided.

Programs, services, functions, and activities or PSFAs means programs, services, functions, and activities, or portions thereof, that a Tribe carries out using funds included in a funding agreement under the Program.

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

Reassumption means the termination, in whole or part, of a funding agreement and assuming or resuming the remaining funds included in the compact and funding agreement pursuant to 23 U.S.C. 207(f)(2)(A).

Receipt means the actual date on which a submission is received. With respect to the Department, receipt is the date on which the authorized Department official specified in this part receives the submission. Demonstration of receipt includes a date stamp, postal return receipt, express delivery service receipt, or any other method that provides receipt, including electronic mail.

Retrocession means the voluntary return of a Tribe's PSFA and associated remaining funds for any reason, before or on the expiration of the term of the funding agreement.

Secretary means the Secretary of Transportation.

Self-Determination Contract means a contract (or grant or cooperative agreement) entered into pursuant to Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321) between a Tribe and the

appropriate Secretary for the planning, conducting and administration of programs or services that are otherwise provided to Tribes.

Self-governance means the Federal policy of Indian self-determination and self-government rooted in the inherent sovereignty of Tribes, reflected in the government-to-government relationship between the United States and Tribes, and expressed in the Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended, and the program of self-governance established under the Program.

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

Surplus government property means excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration.

Technical assistance means the process by which the Department provides targeted support to a Tribe with a development need or problem.

Transit means regular, continuing shared ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income, excluding the transportation services set forth in 49 U.S.C. 5302(14)(B).

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

TTP Agreement means an agreement between a Tribe and either the Federal Highway Administration or the Bureau of Indian Affairs pursuant to 23 U.S.C. 202 that authorizes a Tribe to carry out all but the inherently Federal functions of the TTP.

Tribal Organization means the recognized governing body of any Tribe; any legally established organization of Indians that is controlled, sanctioned, or chartered by such governing body or is democratically elected by the adult members of the Indian community to be served by such organization and includes the maximum participation of Indians in all phases of its activities.

Subpart B—Eligibility and Negotiation Process

Eligibility

§ 9.100 What are the criteria for eligibility to participate in the Program?

(a) *Eligibility.* A Tribe is eligible to participate in the Program if—

(1) The Tribe requests participation in the Program by resolution or other official action by the governing body of the Tribe; and

(2) The Department determines that, over the 3 most recent fiscal years, the Tribe has demonstrated financial stability and financial management capability, and transportation program management capability in accordance with the criteria specified in 23 U.S.C. 207(b) and this section.

(b) *Financial stability and financial management capability—*(1) *Conclusive evidence.* A Tribe subject to the Single Audit Act demonstrates financial stability and financial management capability by providing evidence establishing that, during the preceding 3 fiscal years, the Tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Tribe's self-determination contracts or self-governance funding agreements with any Federal agency. This will be conclusive evidence of the required financial stability and financial management capability.

(2) *Sufficient evidence.* A Tribe subject to the Single Audit Act that has a TTP Agreement or a grant award provided by the Department may provide evidence establishing that, during the preceding 3 fiscal years, the Tribe had no uncorrected significant and material audit exceptions in its required single audit of the Tribe's Federal award programs. This will be sufficient evidence of the required financial stability and financial management capability.

(3) *Evidence without a mandate to comply with the Single Audit Act.* If a Tribe is not subject to the Single Audit Act, the Department will consider the following evidence to determine if the Tribe demonstrates financial stability and financial management capability:

(i) Evidence demonstrating that the Tribe has financial management systems and standards that meet or exceed the standards set forth in §§ 29.506–29.508 of this part; and

(ii) An independent audit containing no uncorrected significant and material audit exceptions that covers the preceding 3 fiscal years of the Tribe's self-determination contracts or self-governance funding agreements with any Federal agency, TTP agreements, or a grant award from the Department.

(4) *Evidence of management systems.* As part of the Department's eligibility determination under paragraph (b)(3) of this section, the Department may require a Tribe to demonstrate that it has the management systems in place that meet or exceed the standards required in §§ 29.506 through 29.511 and 29.516 of this part. The Department will confirm in writing within 90 days of receipt of any such submission by the Tribe whether the Tribe's management systems are or are not sufficient to meet the required standards.

(5) *Technical assistance.* At a Tribe's request, the Department will provide, to the extent feasible, technical assistance, such as feedback on management systems and standards or review of internal controls, to a Tribe with one or more uncorrected significant and material audit exceptions with the goal of assisting the Tribe to establish eligibility for the Program.

(c) *Transportation program management capability.* (1) In making the eligibility determination under 23 U.S.C. 207(b), the Department also must determine that a Tribe demonstrates transportation program management capability, including the capability to manage and complete projects eligible under title 23 and chapter 53 of title 49.

(2) To assist the Department in determining transportation program management capability, a Tribe may submit evidence including, but not limited to:

(i) Documentation showing that the Tribe has previously or is currently directing or carrying out transportation services, projects, or programs under a self-determination, self-governance, or TTP Agreement, or a grant award with the Department.

(ii) Documentation showing the extent to which the Tribe previously received Federal funding and carried out management responsibilities relating to the planning, design, delivery, construction, maintenance, or operation of transportation-related projects, and whether they were completed;

(iii) Documentation that the Tribe has established and maintains, as appropriate, a staffed and operational transportation or transit program, department, commission, board, or official of any Tribal government charged by its laws with the responsibility for transportation-related responsibilities, including but not limited to, administration, planning, maintenance, and construction activities. This documentation should identify the Tribal personnel, job descriptions, and expertise necessary to administer or implement PSFAs that the Tribe proposes to assume under the

Program. The documentation may also include resolutions, other authorizations, or proposed budgets demonstrating that the Tribe has taken steps to organize a Tribal office or department to address the transportation-related needs of the Tribe and how that entity has or will demonstrate transportation program management capacity; and

(iv) Documentation showing the completion of one or more transportation projects or operation of a program that is related to or similar to the PSFA the Tribe requests to include in a funding agreement negotiated between the Tribe and the Department. The Department will consider the number, complexity, and type of projects or programs that the Tribe describes as part of this determination. This documentation should address the substantive involvement of the Tribe in operating a transportation program, which may be demonstrated by:

(A) Involvement in the development of a completed and approved highway safety plan;

(B) Involvement in the development of a completed and approved plans, specifications and estimates design package for one or more transportation projects to be carried out with available funding;

(C) Involvement in the delivery of a completed and approved transportation construction project using Federal or non-Federal funds;

(D) Oversight or operation of a public transit project or public transit system;

(E) Oversight or operation of a transportation maintenance system; or

(F) Other information that evidences the transportation program management capabilities of the Tribe.

(4) *Other indicia of program management capability.* In determining transportation program management capability, the Department will consider any other criteria and evidence that a Tribe may submit, including the operation by the Tribe of non-transportation programs of similar complexity, size, administrative need, staffing requirement, or budget.

(d) *Program eligibility determination.*

(1) Within 15 calendar days of receipt of a Tribe's submission seeking an eligibility determination under this section to participate in the Program, the Department will notify the Tribe in writing to confirm that it has received the submission and notify the Tribe whether any evidence necessary to make the determination is missing.

(2) Within 90 days of receipt of a Tribe's submission of its financial management systems and standards pursuant to paragraphs (b)(3)(i) and

(b)(4)(i), the Department will notify the Tribe whether the systems and standards are sufficient to meet the standards set forth in §§ 29.506 through 29.508 of this part.

(3) Within 120 days of receipt of an initial submission, the Department will issue its determination of a Tribe's eligibility to participate in the Program. If the Tribe provides additional evidence at the Department's request to complete the application, the Department will have up to an additional 45 days to issue its determination of the Tribe's eligibility to participate in the Program. The determination will constitute final agency action which the Tribe may appeal in accordance with §§ 29.904 through 29.911.

Negotiations

§ 29.101 How does a Tribe commence negotiations for a compact, funding agreement, or amendment?

After the Department notifies a Tribe in writing that it is eligible to participate in the Program pursuant to § 29.100, the Tribe must submit a written request to the Chief Self-Governance Official to begin negotiating a compact, funding agreement, or amendment. The Tribe may send the request to *tsgp@dot.gov* or use any other method that provides receipt.

§ 29.102 What information should the Tribe provide to the Department when it expresses its interest in negotiating a compact, funding agreement, or amendment?

When a Tribe expresses its interest in negotiating a compact, funding agreement, or amendment, the written request need only request that the Department enter into negotiations for a compact, funding agreement, or amendment. To the degree the Tribe has the following information available to it, the request may include, as appropriate:

(a) Whether the Tribe wants to negotiate a compact, funding agreement, or amendment;

(b) The funding programs that the Tribe wants to include in the funding agreement or amendment;

(c) The terms the Tribe wants to include in the compact, funding agreement, or amendment;

(d) Any information or technical assistance the Tribe needs from the Department to assist in pursuing the negotiation process; and

(e) The Tribal official with authority to negotiate on behalf of the Tribe, the designated Tribal contact, relevant contact information, and, if applicable, the name and contact information of an

attorney authorized to represent the interests of the Tribe in the negotiation.

§ 29.103 How will the Department respond to the Tribe's written request?

Within 15 days of receipt of a Tribe's written request, the Department will notify the Tribe in writing of the identity of the designated representative(s) of the Department who will conduct the negotiation and, to the extent feasible, will provide to the Tribe the information requested by the Tribe consistent with § 29.102(d).

§ 29.104 Must the Department and the Tribe follow a specific process when negotiating compacts, funding agreements, and amendments?

The Department and the Tribe do not have to follow a specific process when negotiating compacts, funding agreements, and amendments. The Department and the Tribe should cooperate to develop a plan to address each issue subject to negotiation and provide the representatives an opportunity to address the Tribal proposals, legal or program issues of concern, the time needed to complete the negotiations, and the development of a term sheet.

§ 29.105 Will negotiations commence or conclude within a specified time period?

Unless the Department and the Tribe agree otherwise, negotiations will commence within 60 days of the Department's receipt of the Tribe's written request to negotiate a compact, funding agreement, or amendment. The Department and the Tribe should make every effort to conclude negotiations within 90 days from the date on which negotiations commence, unless the parties agree to extend the time period for negotiations. Negotiations may proceed by electronic mail, teleconferences, or in-person meetings.

§ 29.106 What are best practices to pursue negotiations?

(a) The parties should collaborate and provide a clear explanation of their positions and interests. Each party should provide timely and specific responses to proposals presented during negotiations in order to conclude negotiations as soon as possible within the period provided in § 29.105.

(b) In negotiating the applicable construction, design, monitoring, or health and safety requirements that apply to the PSFAs the Tribe carries out using funds included in a funding agreement, along with the other terms set forth in § 29.307, the parties should cooperate and will prioritize the reduction of administrative requirements on the Tribe when

negotiating the terms of the compact, funding agreement, or amendment to effectuate the purposes of self-governance.

(c) The parties should conduct the negotiations in order to reach agreement on as many items as possible, and to refine unresolved issues in order to avoid disputed terms. The negotiations should conclude with mutually agreed upon terms and conditions. If any unresolved issues remain, a Tribe may submit a final offer to the Department under subpart C of this part.

§ 29.107 What recourse does the Department or the Tribe have if the negotiations reach an impasse?

The Department and the Tribe should resolve disagreements by mutual agreement whenever possible. If the Tribe and the Department are unable to reach agreement by the agreed upon date for completing negotiations, the Tribe may request to participate in an alternative dispute resolution process pursuant to § 29.901, or it may submit a final offer to the designated Department representative in accordance with subpart C of this part.

§ 29.108 May the Department and the Tribe continue to negotiate after the Tribe submits a final offer?

The parties may continue negotiations after the Tribe submits a final offer by mutual agreement, and may execute the remaining parts of the compact, funding agreement, or amendment consistent with § 29.213.

§ 29.109 Who is responsible for drafting the compact or funding agreement?

It is the mutual obligation of the Department and the Tribe to draft the compact, funding agreement, or amendment. Either party may offer to prepare the initial draft for the other party's review.

Subpart C—Final Offer Process

§ 29.200 What is covered by this subpart?

This subpart explains the final offer process for resolving, within a specific timeframe, disputes that may develop in negotiation of a compact, funding agreement, or amendment.

§ 29.201 In what circumstances should a Tribe submit a final offer?

If the Department and the Tribe are unable to agree, in whole or in part, on the terms of a compact, funding agreement, or amendment, the Tribe may submit a final offer to the Department.

§ 29.202 How does a Tribe submit a final offer?

(a) A Tribe must submit a written final offer to the Department's designated representative and the Chief Self-Governance Official to *ttsgp@dot.gov* or send the final offer using any other method that provides receipt to: Chief Self-Governance Official, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

(b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a "Final Offer—Response due within 45 days of receipt."

§ 29.203 What must a final offer contain?

A final offer must contain a description of the disagreement between the Department and the Tribe, the Tribe's final proposal to resolve the disagreement, including any draft proposed terms to be included in a compact, funding agreement or amendment, and the name and contact information for the person authorized to act on behalf of the Tribe. If the final offer is insufficient for the Department to make a decision, the Department will notify the Tribe and request additional information. A request for more information has no effect on deadlines for response.

§ 29.204 How long does the Department have to respond to a final offer?

The Department has 45 days to respond to the final offer. The 45-day review period begins on the date the Chief Self-Governance Official receives the final offer.

§ 29.205 How does the Department acknowledge receipt of a final offer?

Within 10 days of the Chief Self-Governance Official receiving the final offer, the Department will send the Tribe an acknowledgement of the final offer, together with documentation that indicates the date on which the Chief Self-Governance Official received the final offer. The Department's failure to send the acknowledgement does not constitute approval of the final offer.

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

The Department may request an extension of time before the expiration of the 45-day review period. The Tribe may either grant or deny the Department's request for an extension. Any grant of extension of time must be in writing and signed by a person authorized by the Tribe to grant the extension before the expiration of the 45-day review period.

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

The final offer is accepted by operation of law if the Department takes no action within the 45-day review period (or any extensions thereof).

§ 29.208 What happens once the Department accepts the Tribe's final offer or the final offer is accepted by operation of law?

Once the Department accepts the Tribe's final offer or the final offer is accepted by operation of law, the Department must add the terms of the Tribe's final offer to the compact, funding agreement, or amendment and transfer funds, if appropriate, no later than 30 days after the apportionment of such funds by the Office of Management and Budget to the Department.

Rejection of Final Offers

§ 29.209 On what basis may the Department reject a Tribe's final offer?

The Department may reject a Tribe's final offer for any of the following reasons:

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

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

(c) Carrying out the PSFA would result in significant danger or risk to public health or safety; or

(d) The Tribe is not eligible to participate in self-governance under section 23 U.S.C. 207(b).

§ 29.210 How does the Department reject a final offer?

The Department must reject a final offer by providing written notice to the Tribe based on the criteria in § 29.209 no more than 45 days after receipt of a final offer by the Chief Self-Governance Official, or within a longer time period as agreed to by the Tribe consistent with this subpart. The notice must explain the basis for the rejection of the final offer.

§ 29.211 Is technical assistance available to a Tribe to overcome rejection of a final offer?

Upon receiving a final offer, the Department must provide technical assistance to overcome the objections stated in the Department's rejection of a final offer.

§ 29.212 May a Tribe appeal the rejection of a final offer?

A Tribe may appeal the rejection of a final offer in accordance with §§ 29.904 through 29.911.

§ 29.213 If a Tribe appeals a final offer, do the remaining provisions of the compact, funding agreement, or amendment not in dispute go into effect?

If a Tribe appeals the rejection of a final offer, the parties may execute and make effective the remaining provisions of the compact, funding agreement, or amendment that are not subject to appeal.

Subpart D—Contents of Compacts and Funding Agreements

Compacts

§ 29.300 What is included in a compact?

A compact only includes the general terms that govern a Tribe's participation in the Program and such other terms as the parties mutually agree that will continue to apply from year to year, and affirms the government-to-government relationship between the Tribe and the Department. Such terms include the authority, purpose, and obligations of the Tribe and the Department. The written compact memorializes matters on which the Department and the Tribe agree. Language addressing disagreement between the Department and the Tribe will not be included in the compact.

§ 29.301 Is a compact required to participate in the Program?

A Tribe must have a compact in place to participate in the Program. A compact must be in effect between the Department and the Tribe before the Tribe may enter into a funding agreement with the Department. The Tribe may negotiate a compact at the same time it is negotiating a funding agreement, so long as the compact is executed prior to or concurrent with the funding agreement.

§ 29.302 What is the duration of a compact?

A compact remains in effect until it is terminated by mutual written agreement, retrocession, or reassumption under this part.

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

A consortium of two or more Tribes may participate in the Program on the same basis as an individual Tribe. A consortium may comprise a combination of one or more Tribes that may or may not be independently eligible under § 29.100, so long as the consortium is eligible.

§ 29.304 May a compact be amended?

A compact may be amended at any time by the mutual written agreement of the Tribe and the Department.

Funding Agreements

§ 29.305 When can a Tribe initiate negotiation of a funding agreement?

Concurrent with or after a Tribe has entered into a compact with the Department, the Department and Tribe will negotiate a funding agreement, consistent with §§ 29.101 through 29.109. The funding agreement is the legally binding written agreement that identifies the funds a Tribe will use to carry out its PSFAs, and sets forth the terms and conditions under which the Tribe will receive the funds.

§ 29.306 What is the duration of a funding agreement?

(a) The duration of a funding agreement is one year unless the parties negotiate a multiyear funding agreement or, for an initial funding agreement, a partial year agreement.

(b) Each funding agreement will remain in full force and effect until the parties execute a subsequent funding agreement, except when:

(1) A Tribe provides notice to the Department that it is withdrawing or retroceding funds for the operation of one or more PSFAs (or portions thereof) identified in the funding agreement;

(2) The Department terminates the funding agreement under 23 U.S.C. 207(f)(2); or

(3) The parties agree otherwise.

§ 29.307 What terms must a funding agreement include?

A funding agreement must set forth the following:

(a) The funds the Department will provide, including those funds provided on a recurring basis;

(b) The PSFAs the Tribe intends to carry out using the funds;

(c) The general budget category assigned to the funds;

(d) The time and method of transfer of funds;

(e) The responsibilities of the Department and the Tribe;

(f) Any applicable statutory limitations on the use of funds;

(g) Any statutory or negotiated reporting requirements;

(h) Any applicable Federal or federally approved design, construction, and monitoring standards, unless the Tribe's design, construction, and monitoring standards are consistent with or exceed such standards;

(i) Other Federal health and safety requirements that apply to the funds included in the funding agreement, unless the Tribe provides adequate assurance that its relevant health and safety requirements are consistent with or exceed such requirements;

(j) Any other provision agreed to by the Tribe and the Department; and

(k) Provisions authorizing the Department to terminate the funding agreement (in whole or in part) and reassume the remaining funding for transfer as appropriate.

§ 29.308 May the funding agreement include additional terms?

At a Tribe's request, the parties may incorporate into a compact or funding agreement any other provision of Title I of the Indian Self-Determination and Education Assistance Act, unless the Department determines there is a conflict between the provision and 23 U.S.C. 207. The Department will make the determination consistent with 23 U.S.C. 207(j).

§ 29.309 Will a funding agreement include provisions pertaining to flexible or innovative financing?

If the Department and a Tribe agree, a funding agreement will include provisions pertaining to flexible financing and innovative financing. In that event, the Department and Tribe will establish terms and conditions relating to the flexible and innovative financing provisions that are consistent with 23 U.S.C. 207(d)(2)(C).

§ 29.310 May a Tribe redesign, consolidate, reallocate, or redirect the funds included in a funding agreement?

A Tribe may redesign, consolidate, reallocate, or redirect funds included in the Tribe's funding agreement in any manner it considers to be in the best interest of the Indian community being served, subject to any statutory requirements specific to the funding program, provided that the funds are expended on projects identified in a transportation improvement program approved by the Department, where statutorily required, and used in accordance with the requirements in appropriations acts, title 23 of the U.S. Code, chapter 53 of title 49 of the U.S. Code, and any other applicable law. However, a Tribe must use any discretionary or competitive grant funds or 23 U.S.C. 202(a)(9) funds included in the funding agreement, for the purpose for which the funds were originally authorized.

§ 29.311 How is a funding agreement amended?

A funding agreement may be amended by the mutual written agreement of the Department and the Tribe as provided for in the funding agreement. The Department will not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the

Tribe, unless such terms are required by Federal law.

§ 29.312 Is a subsequent funding agreement retroactive to the end of the term of the preceding funding agreement?

When the Department and a Tribe execute a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

Subpart E—Rules and Procedures for Transfer of Funds

§ 29.400 What funds may a Tribe elect to include in a funding agreement?

A Tribe may elect to include in a funding agreement the following funds:

(a) Funds provided to the Tribe under the Tribal Transportation Program identified in 23 U.S.C. 202 in accordance with the statutory formula set forth in 23 U.S.C. 202(b);

(b) Any transit funds provided to the Tribe under 49 U.S.C. 5311;

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

(d) Funds for any other discretionary and competitive grant for a transportation-related purpose administered by the Department otherwise available to the Tribe; and

(e) Federal-aid funds apportioned to a State under chapter 1 of title 23 of the U.S. Code if the State elects to provide a portion of such funds to the Tribe for a project eligible under 23 U.S.C. 202(a)(9) or formula funds awarded to a State under 49 U.S.C. 5311 that are allocated to the Tribe by the State, and at the election of both the Tribe and State are designated for the direct obligation of funds to the Tribe.

§ 29.401 What funds must the Department transfer to a Tribe in a funding agreement?

(a) Subject to the terms of a funding agreement, the Department must transfer to a Tribe all the funds provided for in the funding agreement.

(b) The Department must provide funds for periods covered by a joint resolution adopted by Congress making continuing appropriations and authorization extensions, to the extent permitted by such resolutions. The Department will defer payment of funds to the Tribe if the period of continuing appropriations is less than 35 days.

(c) The Department will include funds in a funding agreement in the amount equal to:

(1) The sum of the funds that the Tribe would otherwise receive in

accordance with a funding formula or other allocation method set forth in title 23 U.S.C. or 49 U.S.C. chapter 53; and

(2) Such additional amounts as the Department determines equal the amounts that would have been withheld, if any, for the costs of the Bureau of Indian Affairs to administer the program or project on behalf of the Tribe.

§ 29.402 Which entity is responsible for the funds included in a funding agreement?

The Tribe is responsible for implementing the Tribe's PSFAs using the funds included in a funding agreement and for administering the funds in accordance with this part. In addition, the Tribe must carry out its PSFAs in accordance with the funding agreement, and all applicable statutes and regulations identified in the funding agreement.

§ 29.403 When must the Department transfer to a Tribe the funds identified in a funding agreement?

When a funding agreement requires an annual transfer of funds to be made by the Department at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funds to be made to the Tribe, the Department will make the first transfer no later than 30 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

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

The Department must transfer any funds that were not paid in the initial lump sum payment (or initial periodic payment) within 30 days after the apportionment of such funds by the Office of Management and Budget to the Department, and the Department has determined any distribution methodologies, as applicable, and made other decisions regarding payment of those funds.

§ 29.405 When must the Department transfer funds for a discretionary or competitive grant?

If the Department selects a Tribe for a discretionary or competitive grant, and the Tribe elects to include the grant funds in its funding agreement, the Department will transfer the funds to a Tribe in accordance with the terms of the Notice of Funding Opportunity or as the Department and the Tribe may agree. The Department will transfer these funds no later than 30 days after the Department and the Tribe execute a

funding agreement or an amendment covering the grant.

§ 29.406 Does the award of funds for a discretionary or competitive grant entitle a Tribe to receive the same amount in subsequent years?

The award of funds for a discretionary or competitive grant does not entitle a Tribe to receive the same amount of funds in subsequent years.

§ 29.407 Does the award of funds for discretionary or competitive grants entitle the Tribe to receive contract support costs?

Funds awarded for discretionary and competitive grants do not entitle the Tribe to receive contract support costs, are not part of the amount required to be transferred by the Department pursuant to 25 U.S.C. 5325, and are not subject to the prohibition on the Department's ability to reduce funds in § 29.413(a)(4). However, a Tribe may use grant funds to cover overhead and administrative expenses associated with operation of the grant, as provided in the grant award.

§ 29.408 How may a Tribe use interest earned on funds included in a funding agreement?

A Tribe may retain interest earned on funds included in a funding agreement to carry out governmental or transportation purposes.

§ 29.409 May a Tribe carry over from one fiscal year to the next any funds that remain at the end of the funding agreement?

The period of availability for funds transferred to a Tribe in a funding agreement does not lapse, except where the Tribe receives funds pursuant to a discretionary or competitive grant award for which Congress authorizes a defined period of availability. After transfer to the Tribe, such funds will remain available until expended. If a Tribe elects to carry over funds from one fiscal year to the next, such carryover funds will not diminish the amount of formula funds the Tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

§ 29.410 May a Tribe use remaining funds from a competitive or discretionary grant included in a funding agreement?

A Tribe may use remaining funds from a competitive or discretionary grant included in a funding agreement, but only with written approval from the Department. The Department must determine that the use of such funds is consistent with the statutory requirements of the grant program, including purpose and time, and is for the project for which the grant was provided.

§ 29.411 Are funds included in a compact and funding agreement non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

Notwithstanding any other provision of law, funds included in a compact and funding agreement are non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

§ 29.412 May the Department increase the funds included in the funding agreement if necessary to carry out the Program?

The Department may increase the funds included in the funding agreement if necessary to carry out the Program. However, the Tribe and the Department must agree to any transfer of funds to the Tribe unless otherwise provided for in the funding agreement.

§ 29.413 How will the Department assist a Tribe with its credit requests?

At the request of a Tribe that has applied for a loan or other credit assistance from a State infrastructure bank or other financial institution to complete an eligible transportation-related project with funds included in a funding agreement, the Department will provide documentation in its possession or control to assist the Tribe.

§ 29.414 What limitations apply to Department actions related to transfer of funds associated with PSFAs?

The Department will not:

(a) Fail or refuse to transfer to a Tribe its full share of funds due under the program, except as required by Federal law;

(b) Withhold portions of such funds for transfer over a period of years;

(c) Reduce the amount of funds identified for transfer in a funding agreement to make funding available for self-governance monitoring or administration by the Department;

(d) Reduce the amount of funds required under the program in subsequent years, except pursuant to:

(1) A reduction in appropriations or change in the funding formula results from the previous fiscal year for the funds included in a funding agreement;

(2) A congressional directive in legislation or accompanying report;

(3) A Tribal authorization;

(4) A change in the amount of pass-through funds included in the funding agreement;

(5) A termination of the funding agreement (or portion thereof) due to a finding of gross mismanagement or imminent jeopardy pursuant to subpart I;

(6) Completion of a project, activity, or program for which competitive or

discretionary grant funds were provided or expenditure of all competitive or discretionary grant funds authorized by the Department under separate statutory authorities for an eligible project, activity, or program; or

(7) A final decision by the Department pursuant to subpart I to terminate a compact and funding agreement (or portions thereof) due to gross mismanagement or imminent jeopardy.

(e) Reduce the amount of funds identified in a funding agreement to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the program, except that such prohibition is inapplicable when Congress authorizes the Department to set aside a portion of the funds for project monitoring and oversight related functions; or

(f) Reduce the amount of funds required under the Program to pay for costs of Federal personnel displaced by compacts and funding agreements.

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

The Prompt Payment Act, 39 U.S.C. 3901 *et seq.*, applies to the transfer of funds under this program.

§ 29.416 What standard applies to a Tribe's management of funds included in a funding agreement?

(a) A Tribe must invest and manage funds included in a funding agreement as a prudent investor would, in light of the purpose, terms, distribution requirements, and applicable provisions in the compact and funding agreement. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation, but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suited to the Tribe. In making and implementing investment decisions, the Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so.

(b) The Tribe must:

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

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

(3) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Tribe.

§ 29.417 Must a Tribe continue performance of the Tribal Transportation Program or the Tribal Transit Program under a compact and funding agreement if the Department does not transfer sufficient funds?

A Tribe does not have to continue performance of the Tribal Transportation Program (23 U.S.C. 202(b)) or the Tribal Transit Program (49 U.S.C. 5311(c)(1)) that requires an expenditure of funds in excess of the amount of funds included in a funding agreement. If at any time the Tribe has reason to believe that the total amount included in a funding agreement is insufficient, the Tribe must provide reasonable notice of such insufficiency to the Chief Self-Governance Official. If the Department does not increase the amount of funds included in the funding agreement for the Tribal Transportation Program or Tribal Transit Program, the Tribe may suspend performance of the program activity until such time as the Department transfers additional funds.

§ 29.418 May a funding agreement include transfers of State funds?

(a) A State may elect to provide a portion of Federal-aid funds apportioned to the State under chapter 1 of title 23 of the U.S. Code to an eligible Tribe for a project eligible under 23 U.S.C. 202(a).

(b) If a State provides such funds, the transfer may occur in accordance with 23 U.S.C. 202(a)(9), or the State may transfer the funds back to the Department, and the Department will transfer the funds to the participating Tribe through the Tribe's funding agreement.

(c) If a State provides such funds, the Tribe (and not the State) will be responsible for constructing and maintaining any projects carried out using the funds and for administering and supervising the projects and funds in accordance with 23 U.S.C. 207 during the applicable statute of limitations period related to the construction of the project.

(d) Contract support costs will not be made available to a Tribe in connection with any State funds transferred at the election of a State to the Tribe pursuant to 23 U.S.C. 202(a)(9) or funds awarded to a State pursuant to 49 U.S.C. 5311 that are transferred at the election of a State to FTA for the benefit of a Tribe. However, overhead and administrative expenses may be an eligible use of such funds.

§ 29.419 Does the award of formula funds entitle a Tribe to receipt of contract support costs?

The award of formula funds does not entitle a Tribe to receipt of contract support costs under 25 U.S.C. 5325(a). A funding agreement under this part will not provide additional funds for contract support costs to carry out PSFAs. While a Tribe is not entitled to additional funds for contract support costs, a Tribe may use a portion of its formula funds (§ 29.400(a) and (b)) for overhead and administrative expenses if such costs are reasonable, allowable, and allocable in accordance with 2 CFR part 200 and the applicable statutory and regulatory program requirements.

§ 29.420 Is a Tribe entitled to enter into facility leases from the Department and to receive facility support costs?

A Tribe is not entitled to enter into facility leases with the Department and receive facility support costs. A funding agreement under this part will not provide additional funds for facility leases and facility support costs to carry out PSFAs. However, facility leases and facility support costs may be an eligible and allowable use of funds a Tribe receives under a funding agreement.

Subpart F—Program Operations**Audits and Cost Principles****§ 29.500 Must a Tribe undertake an annual audit?**

A Tribe that meets the applicable thresholds under 2 CFR 200.501 must undertake an annual audit pursuant to the regulations set forth in 2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, except to the extent that part exempts a Tribe from complying with the audit requirements.

§ 29.501 Must a Tribe submit any required audits to the Federal Audit Clearinghouse and the Department?

A Tribe must submit any required audits to the Federal Audit Clearinghouse pursuant to the Office of Management and Budget procedures and provide prompt notice to the Department it has done so.

§ 29.502 How long must a Tribe keep and make records available for Federal examination or audit?

A Tribe must keep books, documents, papers, and records of funding, grants, and State-provided funds for 3 years from the date of submission of the Single Audit Act audit and provide access to the Department or the Comptroller General for audit and examination related to grants, contracts,

compacts subcontracts, sub-grants, or other arrangements.

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

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

§ 29.504 How may the Federal Government make a claim against a Tribe relating to any disallowance of costs based on an audit conducted under this part?

(a) *Disallowance of costs.* Any claim by the Federal Government against a Tribe relating to funds included in a funding agreement based on any audit conducted pursuant to this part is subject to 25 U.S.C. 5325(f).

(1) 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 Department provides notice of such a disallowance within 365 days from receiving any required annual audit report. The notice must set forth the right of appeal and hearing in accordance with §§ 29.912 through 29.923.

(2) To calculate the 365-day period, an audit report is deemed received by the Department on the date of electronic submission to the Federal Audit Clearinghouse. The Department has 60 days after receiving the audit report to give notice to the Tribe of its determination to reject an audit report as insufficient due to non-compliance with the applicable provisions of 2 CFR part 200 or any applicable statute.

(b) *Criminal penalties.* Any person, officer, director, agent, employee, or person otherwise connected with a recipient of a contract, subcontract, grant, or sub-grant who embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property provided to the recipient will be fined not more than \$10,000 or imprisoned for not more than 2 years, or both. If the amount of funds in question does not exceed \$100, then the fine will be no more than \$1,000 and imprisonment not more than 1 year, or both.

§ 29.505 What cost principles must a Tribe apply in compacts and funding agreements under this part?

(a) A Tribe must apply the applicable cost principles of the Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR part 200, except as modified by:

(1) 25 U.S.C. 5325(k), which sets forth certain categories of allowable uses of funds that a Tribe may include in a funding agreement provided that such use supports implementation of the PSFA.

(2) Other provisions of Federal law; or

(3) Any subsequent exemptions granted by the Office of Management and Budget.

(b) The Department may not require other audit or accounting standards.

Management Systems and Standards**§ 29.506 What are the general financial management system standards that apply to a Tribe when carrying out a compact and funding agreement under this part?**

(a) *Generally.* A Tribe carrying out a compact and funding agreement under this part must develop, implement, and maintain systems that meet the minimum financial standards set forth in this section, unless one or more of the standards have been waived, in whole or in part.

(b) *Applicability to Tribal contractors.* A Tribe may require that its contractors comply with some or all of the standards in this section when the Tribe retains contractors to assist in carrying out the requirements of a funding agreement.

(c) *Evaluation.* When required under 2 CFR part 200, an independent auditor retained by a Tribe must evaluate the financial management systems of the Tribe through an annual audit report in accordance with the Single Agency Audit Act, 31 U.S.C. 7501–7506.

(d) *Financial management systems standards.* The general financial management system standards that apply to a Tribe carrying out a funding agreement under this part must expend and account for funds provided to the Tribe through a funding agreement in accordance with all statutory requirements applicable to the receipt and use of the funds being provided, as well as the requirements set forth in the applicable compact and funding agreement, and applicable provisions of 2 CFR part 200.

§ 29.507 What general minimum standards apply to a Tribe's financial management systems when carrying out a compact and funding agreement?

The following general minimum standards apply to a Tribe's financial management systems when carrying out a compact and funding agreement. The fiscal control and accounting procedures of a Tribe must be sufficient to:

(a) Permit preparation of reports required by the compact, funding agreement, and this part; and

(b) Permit the tracing of program funds to a level of expenditure adequate to establish that the funds have not been used in violation of any restrictions or prohibitions contained in any statute or provision of 2 CFR part 200 that applies to the receipt and use of the funds included in the compact and funding agreement.

§ 29.508 What specific minimum requirements must a Tribe's financial management system include to meet general minimum standards?

To meet the general minimum standards of § 29.507, the financial management system of a Tribe must include the following specific minimum requirements:

(a) *Financial reports.* The financial management system must provide for accurate, current, and complete disclosure of the financial results of activities carried out by the Tribe under a compact and funding agreement;

(b) *Accounting records.* The financial management system must maintain records sufficiently detailed to identify the source and application of funding transferred to the Tribe in a funding agreement. The system must contain sufficient information to identify contract awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income;

(c) *Internal controls.* The financial management system must maintain effective control and accountability for all funds transferred to the Tribe in the funding agreement and for all Federal real property, personal property, and other assets furnished for use by the Tribe under its compact and funding agreement;

(d) *Budget controls.* The financial management system must permit the comparison of actual expenditures or outlays with the amounts budgeted by the Tribe for each funding agreement; and

(e) *Allowable costs.* The financial management system must be sufficient to determine that the expenditure of funds is reasonable, allowable, and allocable based upon the terms of the

funding agreement and applicable provisions of 2 CFR part 200.

§ 29.509 What procurement standards apply to contracts carried out using funds included in a funding agreement?

(a) Each contract carried out using funds included in a funding agreement must, at a minimum:

(1) Be in writing;

(2) Identify the interested parties, their respective roles and responsibilities, and the purposes of the contract;

(3) State the work to be performed under the contract;

(4) State the process for making any claim, the payments to be made, and the terms of the contract; and

(5) State that it is subject to 25 U.S.C. 5307(b) to the extent identified in § 29.525.

(b) A Tribe that chooses to use a procurement method that is not provided for in its established procurement management standards in the delivery of a Tribal transportation project must submit the request to deviate from these standards to the Department for review and approval in accordance with § 29.515. The deviation request must specify the procurement method that the Tribe proposes to use and the project to which such method will be applied.

§ 29.510 What property management systems and standards must a Tribe maintain?

(a) *Property management system.* A Tribe must maintain a property management system to account for all property acquired with funds included in a funding agreement, acquired with Federal funds awarded by the Department or the Department of the Interior, or obtained as excess or surplus Federal property to be used for activities under the Program. The property management system must contain requirements for the use, care, maintenance, and disposition of such property as follows:

(1) Where title vests in the Tribe, in accordance with Tribal law and procedures; or

(2) In the case of a consortium, according to the internal property procedures of the consortium.

(b) *Transit asset management.* In addition to the property management system and standards in this section, property acquired with transit funds (chapter 53 of Title 49 U.S. Code) is subject to the property management requirements set forth in 49 U.S.C. 5326 concerning the transit asset management plan, performance targets, and reports.

(c) *Tracking requirements under a property management system.* The

property management system of the Tribe relating to property used under the Program must track:

(1) Personal property and rolling stock with an acquisition value in excess of \$5,000 per item;

(2) Sensitive personal property, which is all personal property that is subject to theft and pilferage, as defined by the Tribe; and

(3) Real property.

(d) *Records.* The property management system must maintain records that accurately describe the property, including any serial number, vehicle identification number, or other identification number. These records should contain current information such as the source, titleholder, acquisition date, acquisition cost, share of Federal participation in the cost, location, use and current condition of the property, and the date of disposal and sale price, if any.

(e) *Internal controls.* The property management system must maintain effective internal controls that include, at a minimum, procedures for the Tribe to:

(1) Conduct periodic, physical inventories at least once every 2 years and reconcile such inventories with the Tribal internal property and accounting records;

(2) Prevent loss or damage to property; and

(3) Ensure that property is used by the Tribe to carry out activities under a funding agreement until the Tribe declares the property excess to the needs of the PSFAs carried out by the Tribe under the funding agreement, consistent with the property management system of the Tribe.

(f) *Maintenance requirements.* Required maintenance includes the performance of actions necessary to keep the property in good working condition, the procedures recommended by equipment manufacturers, and steps necessary to protect the interests of the Tribe and the Department in any express warranties or guarantees covering the property.

(g) *Disposition of personal property acquired under a funding agreement.* Prior to disposition of any personal property, including rolling stock, the Tribe must report to the Chief Self-Governance Official in writing of the property's status (*e.g.*, worn out, lost, stolen, damaged beyond repair, or no longer needed to carry out activities under a funding agreement). The Department will provide disposition instructions in accordance with 2 CFR 200.313. A Tribe may retain, sell or otherwise dispose of personal property with a current per unit fair market value

of \$5,000 or less with no further obligation to the Department.

(h) *Disposition of real property acquired under a funding agreement.* Prior to disposition of any real property acquired under a funding agreement, the Tribe must report to the Chief Self-Governance Official, who will ensure the Department provides disposition instructions in accordance with 2 CFR 200.311.

Records

§ 29.511 Must a Tribe maintain a recordkeeping system?

A Tribe must maintain records and provide Federal agency access to those records as provided in 25 U.S.C. 5386(d) and the statutory requirements of the funds included in a funding agreement.

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

(a) Except to the extent that a Tribe specifies otherwise in its compact or funding agreement, the records of the Tribe retained by the Tribe will not be considered Federal records for purposes of chapter 5 of title 5, U.S. Code.

(b) Tribal records submitted to the Department are considered Federal records for the purposes of the Freedom of Information Act and Federal Privacy Act. If a Tribe provides information to the Department that the Tribe considers to be trade secret, or confidential commercial or financial information, the Tribe must identify it as such. The Department will not disclose the information to the public, except to the extent required by law. In the event the Department receives a FOIA request for the information, the Department will follow the procedures described in its FOIA regulations at 49 CFR part 7.

§ 29.513 Must a Tribe make its records available to the Department?

After 30 days advance written notice from the Department, a Tribe must provide the Department with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system and audit requirements.

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

A Tribe must keep books, documents, papers, and records of funding, grants, and State-provided funds for 3 years from the date of submission of the Single Audit Act audit such that the Department or the Comptroller General may have access to the records for audit and examination related to grants, contracts, compacts subcontracts, subgrants, or other arrangements.

Procurement

§ 29.515 When procuring property or services with funds included in a funding agreement, can a Tribe follow its own procurement standards?

When procuring property or services with funds included in a funding agreement, a Tribe must have standards that conform to the procurement standards in this subpart. If a Tribe relies upon procurement standards different than those described in § 29.516, it must identify the standards it will use in a proposed waiver in the initial negotiation of a funding agreement or as a waiver request to an existing funding agreement. The Tribe must submit the request to the Department in accordance with § 29.535.

§ 29.516 What are the minimum procurement standards that a Tribe must follow when procuring property or services with funds included in a funding agreement?

A Tribe must follow the minimum procurement standards set forth below when procuring property or services with funds included in a funding agreement.

(a) *Minimum procurement standards.*

(1) A Tribe must ensure that its vendors and contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase agreements or orders.

(2) A Tribe must maintain written standards of conduct governing the performance of its employees who award and administer contracts paid for using funds transferred to the Tribe under a funding agreement.

(i) An employee, officer, elected official, or agent of a Tribe must not participate in the selection, award, or administration of a procurement supported by Federal funds if a conflict of interest, real or apparent, as defined in the conflict of interest policies of the Tribe, would be involved.

(ii) Employees, officers, elected officials, or agents of a Tribe, or of a subcontractor of the Tribe, must not solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, except that the Tribe may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.

(iii) The standards must also provide for penalties, sanctions, or other disciplinary actions for violations of the procurement standards.

(3) A Tribe must review proposed procurements to avoid buying unnecessary or duplicative items and

ensure the reasonableness of the price. The Tribe should consider consolidating or breaking out procurement to obtain more economical purchases. Tribes are encouraged to realize economies of scale in the procurement of goods, services, and supplies under this part, including the negotiation of cooperative agreements with other public authorities. Where appropriate, the Tribe must compare leasing and purchasing alternatives to determine which is more economical.

(4) A Tribe must conduct all major procurement transactions that exceed the simplified acquisition threshold set forth in 2 CFR 200.88 by providing full and open competition, to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.

(i) Consistent with 2 CFR 200.88, a Tribe may develop its own definition for a simplified acquisition threshold.

(ii) A Tribe may apply to any procurement award the Indian preference requirements for wages and grants contained in 25 U.S.C. 5307(b).

(5) A Tribe must make procurement awards only to responsible entities with the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Tribe will consider such matters as the contractor's integrity, its compliance with public policy, its record of past performance, and its financial and technical resources.

(6) A Tribe must maintain records on the significant history of all major procurement transactions. These records must include, but are not limited to, the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the contract price.

(7) A Tribe is solely responsible, using good administrative practice and sound business judgment, for processing and settling all contractual and administrative issues arising out of a procurement. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

(i) The settlement of any protest, dispute, or claim will not relieve the Tribe of any obligations under a funding agreement.

(ii) Violations of law must be referred to the Tribal or Federal authority having proper jurisdiction.

(b) *Conflicts of interest.* A Tribe participating in the program must ensure that internal measures and controls are in place to address conflicts of interest in the administration of compacts and funding agreements under this part.

§ 29.517 Do Federal laws and regulations apply to a Tribe's contractors or subcontractors?

A Tribe's contractors are responsible for complying with Federal laws and regulations. Contracts between a Tribe and its contractors should inform contractors that the contract is carried out using funds transferred to the Tribe in a funding agreement, and that the contractors and its subcontractors are responsible for identifying and ensuring compliance with applicable Federal laws and regulations. The Department and the Tribe may, through negotiation, identify all or a portion of such requirements in the funding agreement and, if so identified, these requirements should be identified in the contracts the Tribe awards using funds included in a funding agreement.

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

A Tribe and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) to the same extent as if the Tribe were a Federal agency. The Department will assist the Tribes, to the extent feasible, to resolve any barriers to full implementation.

Reporting**§ 29.519 What reporting must a Tribe provide?**

(a) A Tribe must provide reports mandated by statute associated with the funds included in the funding agreement. In accordance with § 29.307, the funding agreement will list these reporting requirements. A Tribe will cooperate with the Department to assist it in complying with its statutory reporting requirements. No additional reporting will be required.

(b) Notwithstanding paragraph (a) of this section, if the Tribe includes funds for a discretionary or competitive grant in a funding agreement, the parties will negotiate the appropriate reporting requirements to include in the funding agreement.

Property**§ 29.520 How may a Tribe use existing Department facilities, equipment, or property?**

At the request of a Tribe, the Department will permit a Tribe to use and maintain existing facilities, equipment therein or appertaining thereto, and other personal property, if applicable, owned by the Government within the Department's jurisdiction, subject to terms and conditions agreed to by the Department and the Tribe. The

requested facilities, equipment, or property must be used to carry out the Tribe's PSFAs under the compact and funding agreement. Such facilities, equipment, or other personal property will be eligible for replacement, maintenance, and improvement using funds included in a funding agreement, or the Tribe may expend its own funds. The Department does not have any additional funding sources for replacement, maintenance, or improvement of such facilities, equipment, other personal property. The Department will exercise discretion in a way that gives the maximum effect to the request of a Tribe to use such facilities, equipment, or property.

§ 29.521 How may a Tribe acquire surplus or excess Federal property for use under the Program?

A Tribe may acquire any surplus or excess property for use in the performance of the compact and funding agreement consistent with the procedures established by the General Services Administration. The Tribe must notify the Chief Self-Governance Official of the surplus or excess property it proposes to acquire and the purpose for which it will be used in the performance of the compact or funding agreement. If the Department participates in the acquisition by the Tribe of any excess or surplus Federal property, the Department will expeditiously process the request and assist the Tribe in its acquisition to the extent feasible and exercise discretion in a way that gives maximum effect to the Tribe's request for donation of the excess or surplus Federal property. When the Department's participation is required, the Department should expeditiously request acquisition of the property from General Services Administration or the holding agency, as appropriate, by submitting the necessary documentation prior to the expiration of any "freeze" placed on the property by the Tribe or the Department on the Tribe's behalf. The Tribe must take title to any property acquired pursuant to this section. Such surplus or excess property will be eligible for replacement, maintenance, and improvement using funds included in a funding agreement, or the Tribe may expend its own funds. The Department does not have any additional funding sources for replacement, maintenance, or improvement of such surplus or excess property.

§ 29.522 How must a Tribe use surplus or excess Federal property acquired under the Program?

The Tribe must use any property acquired under this section in a manner consistent with the justification submitted at acquisition. The Tribe should notify the Chief Self-Governance Official whenever use of the property changes significantly and upon disposal or sale.

§ 29.523 If a compact or funding agreement (or portion thereof) is retroceded, reassumed, terminated, or expires, may the Department reacquire title to property purchased with funds under any compact and funding agreement or excess or surplus Federal property that was donated to the Tribe under the Program?

If a compact or funding agreement (or portion thereof) is retroceded, reassumed, terminated, or expires, the Tribe retains title to the property purchased with funds under any compact or funding agreement or excess for surplus Federal property donated under the Program if it is valued at \$5,000 or less. If the value of the property is over \$5,000 at the time of retrocession, withdrawal, or reassumption, title to such property may revert to the Department at the Department's discretion.

Technical Assistance**§ 29.524 What technical assistance is available from the Department?**

Upon the written request of a Tribe, and to the extent feasible, the Department will provide technical assistance, including periodic program reviews, to assist a Tribe improve its performance in carrying out the Program.

Prevailing Wages**§ 29.525 Do the wage and labor standards in the Davis-Bacon Act apply to employees of a Tribe?**

Wage and labor standards of the Davis-Bacon Act do not apply to employees of a Tribe. However, Davis Bacon wage rates apply to all Tribal contractors and subcontractors.

Tribal Preference**§ 29.526 Does Indian preference apply to PSFAs under the Program?**

To the greatest extent feasible, any contract, subcontract, grant, or subgrant under a compact and funding agreement must give preference for employment and training, and the award of subcontracts and sub-grants, to Indians, Indian organizations, and Indian-owned economic enterprises, as defined in 25 U.S.C. 1452.

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

To the extent provided in applicable Federal law, Tribal law governs Indian preference policies in the performance of a compact and funding agreement under the Program. When a compact or funding agreement is intended to benefit one Tribe, the Tribal employment or contract preference laws adopted by such Tribe will govern with respect to the administration of the compact and funding agreement.

Environmental and Cultural Resource Compliance**§ 29.528 What compliance with environmental and cultural resource statutes is required?**

(a) The Department must meet the requirements of applicable Federal environmental and cultural resource laws, such as the National Environmental Policy Act and the National Historic Preservation Act, for a proposed project under the Program.

(b) The Secretary has delegated environmental and cultural resource compliance responsibilities to the Operating Administrations, as appropriate. As such, an Operating Administration will serve as the lead agency responsible for final review and approval of environmental documents, and any associated environmental determinations and findings for a proposed project under the Program. The Secretary, as delegated to the Operating Administrations, is also responsible for making determinations and issuing approvals in accordance with Section 4(f) (23 U.S.C. 138 and 49 U.S.C. 303), as applicable. Tribes may consult with the Chief Self-Governance Official to determine which Operating Administration should serve as the lead agency.

(c) If the Department is conducting the environmental review process for a proposed project under the Program, the Tribe must assist the Department to satisfy the requirements of applicable Federal environmental and cultural resource laws.

(d) A Tribe may manage or conduct the environmental review process for a proposed project under the Program and may prepare drafts of the appropriate environmental review documents for submission to the Department.

(1) A Tribe may follow its own environmental review procedures if the procedures and documentation also satisfy the Federal environmental review requirements applicable to the project. A Tribe should work with the Operating Administration serving as lead agency to ensure the Tribal process

will satisfy all applicable Federal environmental review requirements.

(2) The Operating Administration serving as lead agency must determine that the process and documentation satisfy the applicable Federal environmental review requirements.

(e) As resources permit and at the request of a Tribe, the Department will provide advice and technical assistance to the Tribe to assist in the management of the Federal environmental review process and preparation of environmental documents.

(f) Unless prohibited by law, a Tribe may use funds included in a funding agreement to pay for environmental review activities.

Federal Tort Claims Act**§ 29.529 Is the Federal Tort Claims Act applicable to a Tribe when carrying out a compact and funding agreement under the Program?**

(a) Section 314 of Public Law 101–512 and 25 U.S.C. 5396(a) incorporated by 23 U.S.C. 207(l)(8) make the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401, 2671–2680, applicable to a Tribe carrying out a compact and funding agreement under the Program.

(b) Contractors, subcontractors, or sub-recipients of a Tribe are not subject to the terms and conditions of FTCA. The Tribe may use the regulations set forth in 25 CFR part 900, subpart M, as guidance on the Tribe's rights and responsibilities under the FTCA. Accordingly, the Tribe must include, in any contract entered into with funds provided under a compact and funding agreement, a requirement that contractors, sub-contractors, or sub-recipients maintain applicable insurance coverage, such as workers compensation, auto, and general liability insurance, consistent with statutory minimums and local industry standards.

§ 29.530 What steps should a Tribe take after becoming aware of a Federal Tort Claim?

(a) Immediately after receiving a claim or a summons and complaint filed under the FTCA, the Tribe must notify the Chief Self-Governance Official at tsgp@dot.gov or use any other method that provides receipt.

(b) The Tribe, through a designated tort claims liaison assigned by the Tribe, must assist the Department in preparing a comprehensive and factually based report, which will inform the Department's report to the U.S. Department of Justice.

(c) The Tribe's designated tort claims liaison must immediately provide the following significant details of the event

and include, as appropriate and to the extent within their knowledge, possession, or control:

(1) The date, time, and exact place of the accident or incident;

(2) A concise and complete statement of the circumstances of the accident or incident;

(3) The names and addresses of Tribal or Federal employees involved as participants or witnesses;

(4) The names and addresses of all other eyewitnesses;

(5) An accurate description of all Federal, Tribal, and privately owned property involved, and the nature and amount of damage, if any;

(6) A statement as to whether any person involved was cited for violating a Federal, State, or Tribal law, ordinance, or regulation;

(7) The Tribe's determination as to whether any of its employees (including Federal employees assigned to the Tribe) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the funding agreement at the time the incident occurred;

(8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats, and photographs of the site or damaged property, that may be necessary or useful for the Department to determine the claim; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The Tribe must cooperate with and provide all necessary assistance to the U.S. Department of Justice and the Department's attorneys assigned to defend the tort claim including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Department, the Tribe must make an assignment and subrogation of all the Tribe's rights and claims (except those against the Federal Government) arising out of a tort claim against the Tribe.

(f) If requested by the Department, the Tribe must authorize representatives of the Department to settle or defend any claim and to represent the Tribe in or take charge of any action. If the Federal Government undertakes the settlement or defense of any claim or action, the Tribe must provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 29.531 Is it necessary for a compact or funding agreement to include any terms about FTCA coverage?

Terms about FTCA coverage are optional in a compact or funding

agreement, and the FTCA applies even if terms regarding FTCA are not included in a compact or funding agreement.

§ 29.532 Does FTCA cover employees of the Tribe who are paid by the Tribe from funds other than those provided through the compact and funding agreement?

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

§ 29.533 May persons who are not Indians assert claims under FTCA?

Any aggrieved person may assert claims for alleged torts arising from activities performed in carrying out compacts and funding agreements under the Program.

§ 29.534 Does the year PSFAs are funded affect FTCA coverage?

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

Waiver of Program Regulations

§ 29.535 What is the process for regulation waivers under this part?

(a) A Tribe may request a waiver of a regulation promulgated under this part with respect to a compact or funding agreement. The Tribe must submit the request in writing to the Chief Self-Governance Official to tsgp@dot.gov or use any other method that provides receipt, at the following address: Chief Self-Governance Official, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. The request must be marked with the words "REQUEST TO WAIVE REGULATIONS" on the first page of the request and on the envelope enclosing the request (or in the subject line if by electronic mail). The request must identify the regulation subject to the waiver request, the language the Tribe seeks to waive, and the basis for the request.

(b) Within 10 days of receipt of the waiver request, the Chief Self-Governance Official will send the Tribe an acknowledgement of the waiver request, together with a date-stamped cover sheet that indicates the date on which the Department received the waiver request.

(c) No later than 90 days after the date of receipt of a written request under paragraph (a) of this section, the Department must approve or deny the request in writing. If the application for a waiver is denied, the Department must

provide the Tribe with the reasons for the denial as part of the written response.

(d) The Department will consider the following factors in making its decision on a waiver request:

(1) The extent to which the waiver provides flexibility to facilitate the implementation of the Program at the Tribal level;

(2) The extent to which the Tribe will benefit from the waiver;

(3) Whether the waiver is contrary to Federal law; and

(4) Whether the waiver is consistent with Federal transportation policy.

(e) If the Department does not approve or deny a request submitted under paragraph (a) of this section on or before the last day of the 90-day period, the request will be deemed approved by operation of law.

(f) A decision by the Department on a waiver request is a final agency action subject to judicial review under the Administrative Procedure Act.

Subpart G—Withdrawal

§ 29.600 May a Tribe withdraw from a consortium?

A Tribe may fully or partially withdraw from a consortium in accordance with any applicable terms and conditions of a consortium agreement with the Tribe. The withdrawing Tribe must provide written notification to the consortium and the Department of its decision to withdraw.

§ 29.601 When does a withdrawal become effective?

A withdrawal becomes effective within the time frame specified in the resolution that authorizes the Tribe to withdraw from the 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 Department, the withdrawing Tribe, and the consortium that has signed the compact and funding agreement.

§ 29.602 How are funds redistributed when a Tribe fully or partially withdraws from a compact and funding agreement and elects to enter into a compact with the Department?

A withdrawing Tribe that is eligible for the Program under 23 U.S.C. 207(b) and § 29.100 may enter into a compact and funding agreement for its share of funds supporting those PSFAs that the Tribe will carry out, calculated on the

same basis as the funds were initially allocated in the funding agreement of the consortium, unless otherwise agreed to by the consortium and the Tribe.

§ 29.603 How are funds distributed when a Tribe fully or partially withdraws from a compact and funding agreement administered by a consortium serving more than one Tribe, and the withdrawing Tribe elects not to or is ineligible to enter into a compact under this part?

Unless otherwise agreed to by the consortium and the Tribe, the consortium must return to the Department all funds not obligated and expended by the consortium associated with the withdrawing Tribe when the withdrawing Tribe elects not to or is ineligible to enter into a compact under this part.

Subpart H—Retrocession

§ 29.700 May a Tribe retrocede a PSFA and the associated funds?

A Tribe may voluntarily retrocede (fully or partially) its PSFA under a compact and funding agreement under this Part. A Tribe may retrocede for any reason.

§ 29.701 How does a Tribe notify the Department of its intention to retrocede?

(a) *Notice.* A Tribe must submit a written notice of its intent to retrocede to the Chief Self-Governance Official to tsgp@dot.gov or by any other method that provides receipt. The notice must specifically identify those PSFAs the Tribe intends to retrocede.

(b) *Notice to the Department of the Interior.* The Department will send the Tribe's notice of its intention to retrocede to the Department of the Interior and request that the Department of the Interior determine whether the PSFA is associated with transportation services provided by the Department of the Interior.

§ 29.702 What happens if the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede?

If the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede, the Department will notify the Tribe. The Tribe must return all remaining funds, less closeout costs, associated with those transportation services to the Department for transfer to the Department of the Interior.

§ 29.703 What happens if the Department of the Interior determines that it does not provide the transportation services the Tribe intends to retrocede?

If the Department of the Interior determines that it does not provide the

transportation services the Tribe intends to retrocede, the Tribe may withdraw its notice to retrocede or return all remaining funds, less closeout costs, associated with the retroceded PSFA, and the Department will distribute those funds in accordance with applicable law.

§ 29.704 What is the effective date of a retrocession?

The retrocession becomes effective within the timeframe specified in the funding agreement. In the absence of a specified date, the retrocession becomes effective:

(a) On the earlier of 1 year after the date of the Tribe's submission of the request, or the date on which the funding agreement expires; or

(b) Such date mutually agreed upon by the Departments and the retroceding Tribe when the Department of the Interior has agreed to assume a retroceded PSFA.

§ 29.705 What effect will a retrocession have on a Tribe's right to compact under the Program?

Provided that a Tribe is eligible under § 29.100, retrocession will not adversely affect any future request by the Tribe to include funds from the same program in a compact or funding agreement.

§ 29.706 Will retrocession adversely affect future funding available for the retroceded program?

Retrocession will not adversely affect future funding for the retroceded program. Future funding will be available to the Tribe at the same level of funding as if there had been no retrocession.

Subpart I—Termination and Reassumption

§ 29.800 When can the Department reassume a compact or funding agreement?

The Department may terminate and reassume a compact or funding agreement (or portion thereof) when the Department makes a specific finding, in writing, to a Tribe, that the Department has found that there is:

(a) Imminent jeopardy to a trust asset, natural resources, or public health and safety that is caused by an act or omission of the Tribe and that arises out of a failure by the Tribe to carry out the compact or funding agreement; or

(b) Gross mismanagement with respect to funds transferred to the Tribe under the compact and funding agreement, as determined by the Department in consultation with the Office of the Inspector General, as appropriate. Gross mismanagement

means a significant, clear, and convincing violation of compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds included in a compact and funding agreement that results in a significant reduction of funds available for the PSFA carried out by the Tribe.

§ 29.801 Can the Department reassume a portion of a compact or funding agreement and the associated funds?

The Department may reassume a portion of a compact or funding agreement and the associated funds if the Department has sufficient grounds to do so. The Department must identify the narrowest portion of the compact or funding agreement for reassumption.

§ 29.802 What process must the Department follow before termination of a compact or funding agreement (or portion thereof)?

Except as provided in § 29.805, prior to a termination becoming effective, the Department must:

(a) Notify the Tribe in writing by any method that provides receipt of the findings required under § 29.800;

(b) Request specific corrective action within a reasonable period of time, no less than 45 days, to correct the conditions that may result in the Department's termination of a compact or funding agreement (or portion thereof);

(c) To the extent feasible and if requested, offer and provide technical assistance to assist the Tribe in overcoming the conditions that led to the findings described under paragraph (a) of this section. Technical assistance may take the form of feedback, review, and other assistance requested, as appropriate; and

(d) Provide an opportunity for a hearing on the record in accordance with Subpart J of this part.

§ 29.803 What happens if the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice?

(a) If the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice, the Department must provide a second written notice by any method that provides receipt to the Tribe that the Department will terminate the compact or funding agreement, in whole or in part.

(b) The second notice must include:

(1) The effective date of the termination;

(2) The details and facts supporting the termination; and

(3) Instructions that explain the Tribe's right to a hearing pursuant to § 29.925.

§ 29.804 When may the Department reassume?

Except as provided in § 29.805, the Department may not reassume until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Tribe with an opportunity to take corrective action in response to any adverse final ruling.

§ 29.805 When can the Department immediately terminate a compact or funding agreement (or portion thereof)?

(a) The Department may immediately terminate a compact or funding agreement (or a portion thereof) if:

(1) The Department makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and

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

(b) The Department must provide notice of immediate termination by any method that provides receipt. The notice must set forth the findings that support the Department's determination, advise the Tribe whether it will be reimbursed for any closeout costs incurred after the termination, request the return of any property, and advise the Tribe of its right to a hearing pursuant to § 29.925. Concurrently, the Department must notify the Office of Hearings that the Department intends to immediately terminate a compact or funding agreement. Pursuant to § 29.928, the Department has the burden of proof in any hearing or appeal of an immediate termination.

§ 29.806 Upon termination, what happens to the funds associated with the terminated portions of the compact or funding agreement?

Upon termination, the Department will reassume the remaining funds associated with the terminated portions of the compact or funding agreement. The Department may:

(a) Transfer funds associated with transportation services provided by the Department of the Interior to the Department of the Interior; or

(b) Distribute any funds not transmitted to the Department of the Interior in accordance with applicable law.

Subpart J—Dispute Resolution and Appeals

§ 29.900 What is the purpose of this subpart?

This subpart sets forth procedures that a Tribe may use to resolve disputes with the Department arising before or after the execution of a compact or

funding agreement under the Program. It also sets forth the process for filing and processing administrative appeals.

§ 29.901 Can a Tribe and the Department resolve disputes using alternative dispute resolution processes?

At any time, a Tribe or the Department may request an informal process or an alternate dispute resolution procedure, such as mediation, conciliation, or arbitration, to resolve disputes. The goal of any such process (which may involve a third party) is to provide an inexpensive and expeditious mechanism to resolve disputes by mutual agreement instead of an administrative or judicial proceeding. The parties should resolve disputes at the lowest possible staff level whenever possible.

§ 29.902 Does the Equal Access to Justice Act apply to the Program?

The Equal Access to Justice Act (EAJA), 5 U.S.C. 504 and 28 U.S.C. 2414, and the relevant implementing regulations (48 CFR 6101.30 and 6101.31; 49 CFR part 6) will apply if the Tribe's compact or funding agreement make these provisions applicable.

§ 29.903 What determinations may not be appealed under this subpart?

The following determinations may not be appealed under this subpart:

(a) *Waiver determination.* A waiver determination made pursuant to § 29.535 is a final agency action subject to judicial review under the Administrative Procedure Act.

(b) *Disputes or appeals arising under other Federal laws.* Decisions made under other Federal statutes, such as the Freedom of Information Act and the Privacy Act. Such decisions may be appealable under those statutes and their implementing regulations.

(c) *Selection and award decisions for competitive or discretionary grants.* The Department's selection and level of award decisions for competitive or discretionary grants administered by the Department are not subject to appeal.

Pre-Award Decisions

§ 29.904 What are pre-award decisions that a Tribe may appeal?

A Tribe may appeal pre-award decisions, which include:

- (a) A decision whether to include a Department program in a funding agreement;
- (b) A decision whether an activity is an inherent Federal function;
- (c) A decision on a final offer before the Department and the Tribe enter into a compact or funding agreement;
- (d) A decision on a final offer before the Department and the Tribe execute

an amendment modifying the terms of an existing compact or funding agreement; and

- (e) An eligibility determination.

§ 29.905 To whom does a Tribe appeal a pre-award decision?

A Tribe appeals a pre-award decision to a hearing official, who was not involved in the initial decision, appointed by the General Counsel.

§ 29.906 Must a Tribe exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts for a pre-award decision?

A Tribe must exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts except a Tribe may appeal the rejection of a final offer directly to the U.S. District Courts in lieu of an administrative appeal.

§ 29.907 When and how must a Tribe appeal a pre-award decision?

(a) A pre-award decision becomes final 30 days after receipt by the Tribe. To appeal the pre-award decision, a Tribe must submit the written request to the Office of the General Counsel and the official whose decision the Tribe is appealing within 30 days of receiving the decision. The request must include a statement describing the reasons for appeal and any supporting documentation.

(b) The Tribe may request to resolve the dispute using an alternative dispute resolution process before the hearing official issues a decision.

§ 29.908 May a Tribe request an extension of time to file an administrative appeal to the hearing official?

If a Tribe needs additional time, it may request an extension of time to file an appeal of a pre-award decision. Within 30 days of receiving a decision, a Tribe must request the extension from the Office of the General Counsel, which has the discretion to grant the extension. The request must be in writing and give a reason for not filing its administrative appeal within the 30-day period. The Department may accept an appeal after the 30-day period for good cause.

§ 29.909 When and how must the hearing official respond to the Tribe's appeal?

(a) The hearing official must issue a decision in writing within 60 days of the receipt of the appeal. If the Tribe requests an informal hearing, the hearing official must issue a decision within 60 days of the hearing.

(b) All decisions issued by the hearing official must include a statement describing the rights of a Tribe to appeal

the decision to the U.S. District Courts. The Department must provide the decision by any method that provides a receipt.

§ 29.910 What is the Department's burden of proof for appeals of pre-award decisions?

The Department must demonstrate by clear and convincing evidence the validity of a pre-award decision, and that the decision is consistent with 23 U.S.C. 207.

§ 29.911 What is the effect of a pending appeal on negotiations?

A pending appeal of a pre-award decision will not prevent the Department from negotiating and executing the non-disputed, severable portions of a compact or funding agreement or prevent the Department from awarding funds to the Tribe that may be included in a funding agreement.

Post-Award Disputes

§ 29.912 What is a post-award dispute?

A post-award dispute is a claim that arises under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101–7109. Such disputes arise once a compact or funding agreement is executed. Post-award disputes include:

- (a) Disputed interpretation of a provision of an executed compact or funding agreement;
- (b) Disallowance of costs under a funding agreement;
- (c) Suspension of payments under a funding agreement;
- (d) Allocation, distribution, or reduction of funds when a dispute arises between a consortium and a withdrawing Tribe;
- (e) Failure to comply with the terms of a funding agreement; and
- (f) Any other claim arising out of a compact or funding agreement.

§ 29.913 What is a claim under the Contract Disputes Act?

A Contract Disputes Act claim is a written demand filed by a Tribe that seeks one or more of the following:

- (a) Payment of a specific sum of money under the funding agreement;
- (b) Adjustment or interpretation of terms in a funding agreement;
- (c) Payment that is disputed as to liability or amount;
- (d) Payment that the Department has not acted upon in a reasonable time following a demand for payment; or
- (e) Any other claim relating to the terms of the compact or funding agreement.

§ 29.914 How does a Tribe file a Contract Disputes Act claim?

A Tribe must submit its claim in writing to the Chief Self-Governance Official, who serves as the Department's awarding official for the purposes of Contract Disputes Act claims. The Chief Self-Governance Official will document the receipt of the claim.

§ 29.915 Must a Tribe certify a Contract Disputes Act claim?

A Tribe must certify a claim for more than \$100,000 in accordance with the Contract Disputes Act. The Tribe must certify that:

- (a) The claim is made in good faith;
- (b) Supporting documents or data are accurate and complete to the best of the Tribe's knowledge and belief;
- (c) The amount claimed accurately reflects the amount the Tribe believes is owed; and
- (d) The individual making the certification is authorized to make the claim on behalf of the Tribe and bind the Tribe with respect to the claim.

§ 29.916 Who bears the burden of proof in a Contract Disputes Act claim?

The Tribe bears the burden of proof to demonstrate, by a preponderance of the evidence, the validity of a Contract Disputes Act claim.

§ 29.917 What is the Department's role in processing the Contract Disputes Act claim?

(a) The Department must document the date that the Chief Self-Governance Official received the claim.

(b) The Chief Self-Governance Official must provide the Tribe with an opportunity to resolve the claim informally with assistance from Department officials who have not substantially participated in the disputed matter. Such informal mechanisms may include participating in dispute resolution pursuant to § 29.901.

(c) If the Department and the Tribe do not agree on a settlement, the Chief Self-Governance Official must issue a written decision on the claim by any method that provides a receipt.

§ 29.918 What information must the Chief Self-Governance Official's decision contain?

- (a) The Chief Self-Governance Official's decision must:
 - (1) Describe the claim or dispute;
 - (2) Reference the relevant terms of the compact and funding agreement;
 - (3) Set forth the factual areas of agreement and disagreement; and
 - (4) Set forth the Chief Self-Governance Official's decision, and provide the facts and reasons that support the decision.

(b) The Chief Self-Governance Official must provide the decision to the Tribe and describe the Tribe's appeal rights in language similar to the following:

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA), 1800 F Street NW, Washington, DC 20245. If you decide to appeal, you must provide written notice within 90 days of receipt of this decision to the CBCA and provide a copy to the Chief Self-Governance Official. The notice must indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the CBCA, you may bring an action in the U.S. Court of Federal Claims or U.S. District Courts within 12 months of the date you receive this notice. If you do not appeal a decision within one of these time periods, it is not subject to further review.

§ 29.919 When must the Chief Self-Governance Official issue a written decision on the claim?

(a) If the claim is for less than \$100,000, the Tribe may request that the Chief Self-Governance Official issue a decision within 60 days of the date of receipt of the claim. If the Tribe does not request that the Chief Self-Governance Official issue a decision within 60 days of the date of receipt of the claim, the Chief Self-Governance Official must issue a decision within a reasonable time, which will depend on the size and complexity of the claim and the adequacy of the information provided in support of the claim. The Tribe must request a decision by the Chief Self-Governance Official before seeking an appeal in accordance with paragraph (c) of this section.

(b) If the claim is for more than \$100,000, the Chief Self-Governance Official must issue a decision within 60 days of the date of receipt of the claim or notify the Tribe of the time within which the Chief Self-Governance Official will issue a decision. Such timeframe must be reasonable, which will depend on the size and complexity of the claim and the adequacy of the information provided in support of the claim.

(c) If the Chief Self-Governance Official does not issue a decision within these time frames, a Tribe may treat the delay as a denial and appeal the decision in accordance with § 29.921.

§ 29.920 Is a decision of the Chief Self-Governance Official final?

(a) A decision of the Chief Self-Governance Official is final and conclusive, and not subject to review, unless the Tribe timely commences an

appeal or suit pursuant to the Contract Disputes Act.

(b) Once the Chief Self-Governance Official issues a decision, the decision may not be changed except by agreement of the parties or under the following limited circumstances:

- (1) Evidence is discovered that could not have been discovered through due diligence before the Chief Self-Governance Official issued the decision;
- (2) The Chief Self-Governance Official learns that there has been fraud, misrepresentation, or other misconduct by a party;
- (3) The decision is beyond the scope of the Chief Self-Governance Official's authority;
- (4) The claim has been satisfied, released, or discharged; or
- (5) Any other reason justifying relief from the decision.

(c) If the Chief Self-Governance Official withdraws a decision and issues a new decision that is not acceptable to the Tribe, the Tribe may appeal the new decision in accordance with § 29.921. If the Chief Self-Governance Official does not issue a new decision, the Tribe may proceed under § 29.919(c).

(d) If a Tribe files an appeal or suit, the Chief Self-Governance Official may modify or withdraw the final decision before a decision is issued in the pending appeal.

§ 29.921 Where may a Tribe appeal the Chief Self-Governance Official's decision on a Contract Disputes Act claim?

A Tribe may appeal the Chief Self-Governance Official's decision on a Contract Disputes Act claim in one of the following forums:

- (a) The Civilian Board of Contract Appeals. The appeal must be in accordance with the Board's implementing regulations in 48 CFR part 6101;
- (b) The U.S. Court of Federal Claims; or
- (c) The U.S. District Courts.

§ 29.922 May a party appeal a Civilian Board of Contract Appeals decision?

A party may appeal a decision of the Civilian Board of Contract Appeals within 120 days to the U.S. Court of Appeals for the Federal Circuit.

§ 29.923 What is the effect of a pending appeal?

- (a) A Tribe must continue performance in accordance with the compact and funding agreement during the appeal of any claims to the same extent the Tribe would have performed had there been no dispute.
- (b) A pending dispute will not affect or prevent the negotiation or award of any subsequent compact or funding

agreement between the Department and the Tribe.

Termination Appeals

§ 29.924 May a Tribe appeal the Department's decision to terminate a compact or funding agreement?

A Tribe may appeal the Department's decision to terminate a compact or funding agreement to the Department's Office of Hearings.

§ 29.925 Is a Tribe entitled to a hearing on the record?

(a) The Department must provide a Tribe with a hearing on the record for a non-immediate termination prior to or in lieu of the corrective action period set forth in the termination notice as described in § 29.802.

(b) The Department must provide a Tribe with a hearing on the record for an immediate termination. The Department and the Tribe will work together to determine a mutually acceptable time and place for the hearing. The hearing on the record must commence no later than 10 days after the date of such termination or a later date upon mutual agreement. If feasible, the hearing may occur virtually or telephonically. If requested by the Tribe, the Department may arrange for an in-person hearing.

(c) The Tribe may decline a hearing in writing.

§ 29.926 What rights do the parties have in an appeal of a termination decision?

(a) During the appeal of a termination decision, a Tribe and the Department have the right to:

- (1) A designated representative;

(2) Present the testimony of witnesses, orally or in writing, who have knowledge of the relevant issues;

(3) Cross-examine witnesses;

(4) Introduce oral or documentary evidence, or both;

(5) Receive, upon request and payment of reasonable costs, a copy of the transcript of the hearing, and copies of all documentary evidence that is introduced at the hearing;

(6) Take depositions, request the production of documents, serve interrogatories on other parties, and request admissions; and

(7) Any other procedural rights established under the Administrative Procedure Act.

(b) An administrative law judge assigned by the chief administrative law judge of the Department's Office of Hearings must conduct hearings on the record for a termination decision unless the Tribe waives the hearing.

§ 29.927 What notice and service must the parties provide?

(a) The parties must file each document with U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

(b) The parties must serve copies of each document with:

(1) The Chief Self-Governance Official; and

(2) The authorized Tribal representative.

§ 29.928 What is the Department's burden of proof for a termination decision?

The Department must demonstrate by clear and convincing evidence the

validity of the grounds for the termination.

§ 29.929 How will the Department communicate its decision following a hearing on a termination decision?

After the hearing or any post-hearing briefing schedule established by the Department's Office of Hearings, the administrative law judge must send all parties the decision by any method that provides a receipt. The decision must contain the administrative law judge's findings of fact and conclusions of law on all the issues.

§ 29.930 May a party appeal the decision of an administrative law judge?

The decision of an administrative law judge is a final agency action subject to judicial review under the Administrative Procedure Act, and a party may appeal it to the U.S. District Courts.

§ 29.931 What is the effect of an appeal on negotiations?

A pending appeal of a termination decision will not affect or prevent the award of another funding agreement or TTP agreement. However, if the Department terminates all or a portion of a compact or funding agreement due to a finding of gross mismanagement or imminent jeopardy, which is sustained on appeal, and the Tribe has not corrected the adverse findings, the Department has discretion to reject a proposal to award the Tribe a new funding agreement or provide new funds in an existing funding agreement.

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