

# Rules and Regulations

Federal Register

Vol. 88, No. 69

Tuesday, April 11, 2023

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

## DEPARTMENT OF JUSTICE

### 28 CFR Part 90

[OVW Docket No. 2023–01]

RIN 1105–AB69

### Special Tribal Criminal Jurisdiction Reimbursement

**AGENCY:** Office on Violence Against Women, Department of Justice.

**ACTION:** Interim final rule.

**SUMMARY:** The Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) authorized a new program to reimburse Tribal governments (or authorized designees of Tribal governments) for expenses incurred in exercising “special Tribal criminal jurisdiction” (STCJ) over non-Indians who commit certain covered crimes in Indian country. This rule will implement this new Tribal Reimbursement Program within the Department of Justice’s Office on Violence Against Women (OVW) by providing details on how it will be administered, including eligibility, frequency of reimbursement, costs that can be reimbursed, the annual maximum allowable reimbursement per Tribe, and conditions for waiver of the annual maximum.

**DATES:**

*Effective date:* This rule is effective April 11, 2023.

*Comment date:* Written comments must be postmarked and electronic comments must be submitted on or before June 12, 2023. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until 11:59 p.m. Eastern Time at the end of that day.

**ADDRESSES:** To ensure proper handling of comments, please reference “RIN 1105–AB69” or “Docket No. OVW 2023–01” on all electronic and written correspondence. The Department

encourages the electronic submission of all comments through <http://www.regulations.gov> using the electronic comment form provided on that site. For easy reference, an electronic copy of this document is also available at the <http://www.regulations.gov> website. It is not necessary to submit paper comments that duplicate the electronic submission, as all comments submitted to <http://www.regulations.gov> will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Marnie Shiels, Office on Violence Against Women, United States Department of Justice, 145 N Street NE, 10W.100, Washington, DC 20530.

**FOR FURTHER INFORMATION CONTACT:**

Marnie Shiels, Office on Violence Against Women, telephone (202) 307–6026 or email at [marnie.shiels@usdoj.gov](mailto:marnie.shiels@usdoj.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Posting of Public Comments**

Please note that all comments received are considered part of the public record and made available for public inspection online at <https://www.regulations.gov>. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency’s public docket file, but not posted online.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase

“CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on <https://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you want to inspect the agency’s public docket file in person by appointment, please see the information under the **FOR FURTHER INFORMATION CONTACT** heading.

**II. General Purpose of This Rule**

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) recognized the authority of participating Tribes to exercise “special domestic violence criminal jurisdiction” (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit crimes of domestic violence or dating violence or who violate certain protection orders in Indian country.<sup>1</sup> The Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) expanded this recognition, effective October 1, 2022, to cover additional crimes, among other changes to the jurisdiction, and renamed it “special Tribal criminal jurisdiction.”<sup>2</sup>

VAWA 2022 also authorized a new program to reimburse Tribal governments (or authorized designees of Tribal governments) for expenses incurred in exercising special Tribal criminal jurisdiction (hereinafter referred to as the “Tribal

<sup>1</sup> Sec. 904, Public Law 113–4, 127 Stat. 54, 120–123 (codified at 25 U.S.C. 1304).

<sup>2</sup> Public Law 117–103, div. W, title VIII, section 804, 136 Stat. 49, 898–904 (amending 25 U.S.C. 1304). The VAWA 2013 definition of “participating tribe,” codified at 25 U.S.C. 1304(a)(4) (2021), was revised by VAWA 2022 to take into account the changes to the jurisdiction and moved to section 1304(a)(10). VAWA 2022 also established a different definition of “participating Tribe” for most Alaska Tribes. See Public Law 117–103, div. W, title VIII, section 812(3), 136 Stat. 49, 905. More information on these definitions is provided in the Background section of this document.

Reimbursement Program”).<sup>3</sup> This rule will implement the Tribal Reimbursement Program by setting forth eligibility requirements, frequency of reimbursement, costs that may be reimbursed, an annual maximum allowable reimbursement per Tribe, and conditions for waiver of the annual maximum allowable reimbursement.

### III. Background

#### A. VAWA 2013

Following the Supreme Court’s 1978 decision in *Oliphant v. Suquamish Tribe*,<sup>4</sup> Tribes lacked criminal jurisdiction to prosecute non-Indians for crimes committed in Indian country. If the victim was Indian and the perpetrator was non-Indian, the crime could be prosecuted only by the United States or, in some circumstances, by the state in which the Tribe’s Indian country is located.<sup>5</sup>

Native American women have suffered some of the highest rates of violence at the hands of intimate partners in the United States. A National Institute of Justice (NIJ) analysis of 2010 survey data funded by the Centers for Disease Control and Prevention and NIJ found that more than half (55.5 percent) of American Indian and Alaska Native women have experienced physical violence by an intimate partner in their lifetimes. Over their lifetimes, American Indian and Alaska Native women are about five times as likely as non-Hispanic White-only females to have experienced physical violence at the hands of an intimate partner who is of a different race at least once in their life.<sup>6</sup>

<sup>3</sup> This program is codified as section 204(h)(1) of the Indian Civil Rights Act (ICRA). See 25 U.S.C. 1304(h)(1). A Tribal government is the government of an “Indian tribe,” which is defined in ICRA as “any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.” *Id.* at 1301(1). The most recent list of 574 federally recognized Tribes published by the Department of the Interior’s Bureau of Indian Affairs is available at <https://www.govinfo.gov/content/pkg/FR-2022-01-28/pdf/2022-01789.pdf>.

<sup>4</sup> 435 U.S. 191 (1978).

<sup>5</sup> Prior to the Supreme Court’s decision in *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022), the presumption was that states possessed no criminal jurisdiction over crimes committed by or against Indians in Indian country unless Congress conferred such authority upon a state. In *Castro-Huerta*, the Supreme Court changed that analysis with respect to crimes committed by non-Indians against Indians.

<sup>6</sup> Andre B. Rosay, U.S. Dept. of Justice, Nat’l Inst. of Justice, *Violence Against American Indian and Alaska Native Women and Men: 2010 Findings from the National Intimate Partner and Sexual Violence Survey* (May 2016) 21, 26, <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf>. The same analysis likewise found high rates of sexual violence against Native American women, concluding that more than one in two American

Realizing the challenges created by Tribes’ lack of jurisdiction to prosecute non-Indian domestic violence offenders, Congress included in VAWA 2013 a historic provision recognizing the inherent authority of participating Tribes to exercise “special domestic violence criminal jurisdiction” (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit crimes of domestic violence or dating violence against Indian victims or violate certain protection orders in Indian country.<sup>7</sup> Since VAWA 2013’s passage, 31 Tribes have reported that they have implemented SDVCJ.

In VAWA 2013, Congress ensured that the protections for a defendant’s federal rights and civil liberties would be the same in Tribal court as they would be if the defendant were prosecuted in a state court. Specifically, if the case includes the possibility that a term of imprisonment of any length may be imposed, the defendant must be afforded all applicable rights under the Indian Civil Rights Act of 1968 (ICRA),<sup>8</sup> all rights applicable to defendants charged with felony offenses under the Tribal Law and Order Act of 2010 (TLOA),<sup>9</sup> and also the right to trial by an impartial jury chosen from a jury pool that is drawn from sources that reflect a fair cross-section of the community and do not systemically exclude any distinctive group in the community, including non-Indians.<sup>10</sup> The TLOA rights include providing each indigent defendant, at no cost to the defendant, the right to the assistance of a licensed defense attorney.<sup>11</sup>

To assist Tribes in implementing the provisions of VAWA 2013, in June 2013, DOJ established the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal

Indian and Alaska Native women (56.1 percent) have experienced sexual violence in their lifetime. American Indian and Alaska Native women are three times as likely as white women to have experienced sexual violence by a perpetrator who is of a different race. *Id.* at 13, 18.

<sup>7</sup> See 25 U.S.C. 1304 (2021). VAWA 2013 defined “participating Tribe” as “an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.” *Id.* at 1304(a)(4) (2021).

<sup>8</sup> The Indian Civil Rights Act of 1968 (ICRA) (codified as amended at 25 U.S.C. 1301–1304) limited the amount of jail time a Tribe can impose and the maximum fine to one-year imprisonment and \$5,000.

<sup>9</sup> The Tribal Law and Order Act (TLOA, title II of Pub. L. 111–211) allowed Tribes to impose increased sentences (up to 3 years or \$15,000), predicated on the provision of additional rights for defendants. 25 U.S.C. 1302(a)(7), (b), and (c).

<sup>10</sup> 25 U.S.C. 1304(d).

<sup>11</sup> The additional rights that a tribe must provide under TLOA when it imposes a total term of imprisonment of more than one year are listed at 25 U.S.C. 1302(c).

Jurisdiction (ITWG) so that Tribes could exchange views, information, and advice about how they could best implement and exercise SDVCJ, combat domestic violence, recognize victim’s rights and safety needs, and fully protect defendants’ rights. Since then, over 50 Tribes have participated in the ITWG where Tribes regularly share their experiences preparing to implement or implementing SDVCJ, attend in-person or online meetings, and participate in numerous webinars on subjects such as jury pools and juror selection, defendants’ rights, victims’ rights, and prosecution skills. Through the ITWG, Tribes have not only discussed challenges and successes with other Tribes but also shared best practices, including their revised Tribal codes, court rules, court forms, jury instructions, and other tools they have developed to implement SDVCJ. DOJ continues to support the ITWG including by providing training and technical assistance.

VAWA 2013 also authorized a grant program to assist Tribes in preparing to exercise and exercising SDVCJ.<sup>12</sup> This program, known as the Tribal Jurisdiction Program, first received an appropriation of \$2.5 million in fiscal year (FY) 2016. Funds may be used to support a broad range of activities including efforts to strengthen Tribal criminal justice systems, provide indigent criminal defense, conduct jury trials, and provide services and rights to crime victims. Under the grant program, Tribes submit an estimated budget with their application and, if selected for funding, draw down funds as they incur the expenses based on actual costs. The grant program has flexibility to allow Tribes to use grant funds both for planning to exercise jurisdiction and the expenses of exercising the jurisdiction. Tribes that receive grants may continue to apply for additional grant funding at the end of each grant cycle. The annual appropriation for the program increased to \$4 million in FY 2017 and again to \$5.5 million in FY 2022.<sup>13</sup>

Over the course of several annual consultations with Tribes under VAWA, Tribal leaders recommended that OVV simplify the grant application process and that Congress authorize reimbursement of exercising Tribes for their expenses in holding non-Indians accountable; some also identified insufficient funding as an obstacle to

<sup>12</sup> 25 U.S.C. 1304.

<sup>13</sup> The total FY 2023 appropriation for the grant program and the reimbursement program that is the subject of this rule is \$11 million (pursuant to 25 U.S.C. 1304(j)(2), up to 40 percent of this amount may be used for reimbursements).

implementing the VAWA 2013 jurisdiction.

OVW implemented several changes to the grant program in response to Tribal leader recommendations, including simplifying the application process, informing Tribes about the broad purposes and flexible uses of the grants, and making non-competitive awards available to exercising Tribes to defray costs resulting from a Tribe's exercise of the jurisdiction. In particular, on October 19, 2021, OVW issued a non-competitive Support for Tribes Exercising Special Domestic Violence Criminal Jurisdiction Initiative Invitation to Apply. Unlike the annual competitive solicitations under the Tribal Jurisdiction Program, this solicitation invited tribes that already had implemented SDVCJ to apply for 12-month funding to cover discrete costs associated with prosecuting SDVCJ cases rather than 36-month awards to cover a broad range of project expenses, including code development, victim services, and development of a coordinated community response. OVW made eleven awards totaling \$2,142,651 under this Invitation to Apply. Although these measures increased Tribal interest in the grant funding, Tribal leaders continued to recommend that Tribes be reimbursed for the expenses incurred in exercising the jurisdiction, and Congress responded to this recommendation in VAWA 2022 by authorizing the new Tribal Reimbursement Program.

#### B. VAWA 2022

A March 2018 report published by the National Congress of American Indians (NCAI), *VAWA 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) Five-Year Report*, documented the successes and gaps in SDVCJ implementation.<sup>14</sup> Successes included convictions of defendants with documented histories of violent behavior, along with acquittals and only one *habeas* petition—testaments to Tribes' ability to safeguard the rights of defendants. Gaps—discussed in the NCAI report and in Tribal leader testimony at annual Tribal consultations pursuant to VAWA—included the omission of other common forms of violence against women and children (e.g., stalking, sexual assault, sex trafficking, and child abuse) and assaults on responding officers, courtroom personnel, and prison staff,

as well as the exclusion of Tribes in Maine and Alaska.<sup>15</sup>

To address these gaps, VAWA 2022 expanded VAWA 2013's recognition of participating Tribes' inherent authority by including prosecution of any "covered crime" that occurs in the Indian country of the participating Tribe, specifically referring to participating Tribes as including those in the state of Maine, renaming the jurisdiction "special Tribal criminal jurisdiction" (STCJ), and establishing a pilot program under which the Attorney General is to designate up to five Alaska Tribes per calendar year as participating Tribes to exercise STCJ over all persons present in the Tribe's Village.<sup>16</sup> As of October 1, 2022, participating Tribes may exercise jurisdiction over the following "covered crimes":<sup>17</sup>

- Assault of Tribal justice personnel
- Child violence
- Dating violence
- Domestic violence
- Obstruction of justice
- Sexual violence
- Sex trafficking
- Stalking
- Violation of a protection order.

#### C. Tribal Reimbursement Program

VAWA 2022 also created the Tribal Reimbursement Program, which will reimburse Tribes for expenses incurred in exercising STCJ.<sup>18</sup> Under the Tribal Reimbursement Program, eligible expenses for reimbursement include

<sup>15</sup> For more information on these successes and gaps, see Statement of Allison L. Randall, Principal Deputy Director, Office on Violence Against Women, U.S. Department of Justice, before the Senate Committee on Indian Affairs (Dec. 8, 2021), available at <https://www.indian.senate.gov/sites/default/files/DOJ%20Statement%20for%20SCIA%20VAWA%20Hearing%2012.8.21.pdf>.

<sup>16</sup> Public Law 117–103, div. W, title VIII, sections 804, 812 & 813, 136 Stat. 49, 898–910. VAWA 2022 revised VAWA 2013's definition of "participating Tribe" to read "an Indian tribe that elects to exercise special Tribal criminal jurisdiction over the Indian country of that Indian tribe." 25 U.S.C. 1304(a)(10) (2022). VAWA 2022 also created a separate definition of "participating Tribe" for Alaska Tribes that do not have any "Indian country," as that term is defined in 18 U.S.C. 2511, in their jurisdiction and are interested in participating in the Alaska STCJ pilot program established by section 813(d)(1) of VAWA 2022 (codified at 25 U.S.C. 1305). This definition defines the term as an Indian tribe that is designated by the Attorney General to exercise STCJ under the Alaska pilot statute, *i.e.*, the exercise of STCJ with respect to covered crimes (as defined in the main STCJ statute) over all persons present in the village of the Tribe. See VAWA 2022, Public Law 117–103, div. W, title VIII, § 812(1) and (3), 136 Stat. 840, 905; 25 U.S.C. 1305(d)(1) & (6).

<sup>17</sup> 25 U.S.C. 1304(a)(5).

<sup>18</sup> Note that while costs associated with planning to exercise STCJ can be covered by the existing grant program, the reimbursement program can only cover costs incurred in, relating to, or associated with exercise of STCJ.

expenses and costs incurred in, relating to, or associated with the following:

- (i) investigating, making arrests relating to, making apprehensions for, or prosecuting covered crimes (including costs involving the purchasing, collecting, and processing of sexual assault forensic materials);
- (ii) detaining, providing supervision of, or providing services for persons charged with covered crimes (including costs associated with providing health care);
- (iii) providing indigent defense services for one or more persons charged with one or more covered crimes; and
- (iv) incarcerating, supervising, or providing treatment, rehabilitation, or reentry services for one or more persons charged with one or more covered crimes.

Along with the new Tribal Reimbursement Program, OVW will continue to administer grants under the Tribal Jurisdiction Program. As of October 1, 2022, Tribes are able to use funds under the Tribal Jurisdiction Program to address the full range of STCJ. OVW will also continue to provide technical assistance (TA) for planning and implementing changes in Tribal criminal justice systems necessary to exercise STCJ. VAWA 2022 increased the authorizations of appropriations for FY 2023 through FY 2027; the statute, however, provided a combined authorization for both grants and reimbursement and specified that no more than 40 percent may be used for reimbursements under the Tribal Reimbursement Program.<sup>19</sup> The FY 2023 combined appropriation for both programs is \$11 million, making the maximum amount available for reimbursements \$4.4 million. Tribes will be eligible for both grants and reimbursement but will not be allowed to use grant and reimbursement funds to cover the same costs.

VAWA 2022 requires that the Attorney General issue regulations governing the Tribal Reimbursement Program by March 15, 2023, thus establishing rules for reimbursements of Tribal governments (or authorized designees) for expenses incurred in exercising STCJ. The statute also directs that these rules set a maximum annual reimbursement amount per Tribe and establish a process and conditions for waivers of the maximum amount; in addition, to the maximum extent practicable, reimbursement or notification of the reason for not reimbursing is to be made within 90 days after the Attorney General receives

<sup>14</sup> The report is available at [https://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](https://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf).

<sup>19</sup> See 25 U.S.C. 1304(j).

a qualifying request. Not later than 30 days after a Tribe (or designee) reaches the annual maximum amount, the Attorney General is directed to provide notice of this fact to the Tribe (or designee).

#### IV. Input From Tribes

On July 27 and 28, 2022, OVW held online consultations with Tribal leaders regarding implementation of the new Tribal Reimbursement Program. There were 72 non-Federal attendees, and eleven Tribal leaders and designated representatives of Tribal leaders provided testimony. In addition, OVW held a roundtable with a selected group of implementing Tribes to discuss their experiences with implementation, including information on costs, on August 24, 2022, and a listening session on August 31, 2022, at an ITWG meeting that was open to all attendees at the ITWG. Participants in each of the sessions noted similar concerns. OVW also received comments with the same themes during its Annual Violence Against Women Tribal Consultation, which was held September 21–23, 2022 in Anchorage, AK. Some common themes from across these sessions were:

- Tribes want a simple process to apply for funds. This includes making sure that any technology used is accessible and that there are alternative approaches for Tribes without internet access. This also includes keeping any required documentation as simple as possible.
- Tribes are concerned about the limited amount of available funds and want a way to allocate the funds that is fair and does not require Tribes to compete against each other for money.
- Tribes across the country emphasized that Alaska tribes have particular needs, including a lack of resources to develop the criminal justice system and court infrastructure to be able to exercise STCJ.
- Tribes express significant concern about how and where to detain and incarcerate STCJ offenders, noting that this is one of the significant costs that reimbursement should cover, especially unanticipated associated costs such as unforeseen medical or dental expenses.
- Tribes would like the maximum possible flexibility to determine which costs they can seek reimbursement for through the program.
- Tribes highlighted that many Tribes are under-resourced and lack the ability to pay the costs of exercising STCJ up front while awaiting federal reimbursement.

VAWA 2022 also established a pilot program for the Attorney General to designate Alaska Tribes to exercise

STCJ. On July 19 and 20, and August 3, 2022, the Office of Tribal Justice held consultations about this pilot. Commenters expressed concerns about the lack of Tribal criminal justice system infrastructure in Alaska and the need for consistent, noncompetitive funding to address these needs, as well as the need for Alaska-specific technical assistance regarding STCJ implementation.

#### V. Potential Tribal Reimbursement Program Issues

In developing this rule, OVW identified several issues that would need to be addressed. First, OVW's financial ability to reimburse Tribes for expenses associated with exercising STCJ will necessarily be limited each year by the overall appropriation by which both the Tribal Reimbursement Program and the Tribal Grants Program are funded. This makes the maximum allowable reimbursement per Tribe and waiver process by which Tribes may seek to exceed that maximum critically important, to ensure fairness in the amount of reimbursement for each Tribe that applies. For example, in FY 2023, OVW has available, at most, \$4.4 million to meet all reimbursement requests. If the rule set the maximum allowable reimbursement at \$400,000, then the first eleven Tribes to apply for reimbursement might receive all money before any remaining exercising Tribe has the opportunity to request reimbursement.

Second, Tribes will need to maintain adequate records to verify for both monitoring and auditing purposes that the expenses for which they request reimbursement are eligible for reimbursement under the statute. At a minimum, such records must demonstrate that the case for which expenses are sought is an exercise of STCJ (*i.e.*, that the offense is one of the listed crimes and the defendant is a non-Indian) and must substantiate the costs for which a Tribe is seeking reimbursement.

Third, Tribes will need to ensure that the costs for which they are seeking reimbursement are not charged to other funding either within DOJ or any other federal, state, or local agency.<sup>20</sup> This includes programs such as OVW's Tribal Jurisdiction Program, other DOJ programs included in the Coordinated Tribal Assistance Solicitation (CTAS), or Department of Interior funding.

Fourth, because this is a reimbursement program, the amounts provided to Tribes must be based on

actual expenses incurred in the exercise of STCJ.

#### VI. Explanation of Rationale for Provisions of This Regulation

In selecting a structure for this program, OVW considered how to address Tribal leaders' testimony regarding the Tribes' need for a reimbursement process that ensures (1) a predictable, stable source of funding, (2) each Tribe receives a fair share of available funds, particularly when available funding is likely to be insufficient to cover all reimbursement requests, and (3) Tribes that lack adequate resources to front the expenses of exercising STCJ can access some reimbursement funds in a timely fashion. OVW also considered Tribal testimony that Tribes should not be required to compete against each other for funding.

In response to these concerns, as well as the requirements outlined at 25 U.S.C. 1304(h)(1), the interim final rule provides that each Tribe that requests reimbursement will receive the same dollar amount for the maximum allowable reimbursement (except that the amount may not exceed the amount the Tribe expended the previous year in exercising STCJ). The maximum allowable reimbursement will thus function as a form of "base funding," where each Tribe will have access to this maximum allowable reimbursement early in the calendar year and can draw it down as needed. At the end of the calendar year, Tribes may submit a waiver request seeking the actual amounts spent on exercise of STCJ, if their actual eligible STCJ expenses exceeded the maximum allowable reimbursement. Each Tribe will receive the same percentage of their total actual expenses in excess of the maximum allowable reimbursement. The chart and explanation below provide an example of how this might work for five sample Tribes. Please note that, for ease of understanding, this example uses a smaller amount of funding than is likely to be available and fewer total tribes than are likely to seek reimbursement.

##### *Example:*

Assume \$1,000,000 is available for the Tribal Reimbursement Program in a given calendar year. OVW, as provided in the interim final rule, sets aside \$250,000 (25 percent) for maximum allowable reimbursements. Five Tribes request to participate in the program. Each Tribe, except Tribe C, submits a list of prior year STCJ expenses exceeding \$50,000; Tribe C submits a list showing \$25,000 in prior year expenses. As a result, each Tribe receives access to a maximum allowable

<sup>20</sup> 25 U.S.C. 1304(i).

reimbursement of \$50,000 (1/5th of \$250,000) except Tribe C, whose maximum allowable reimbursement is capped at \$25,000 (the amount or prior year expenses for STCJ). This leaves \$775,000 available for waivers of the maximum allowable reimbursement. At the end of the calendar year, four of the

five Tribes submit requests for waiver funds in excess of the maximum allowable reimbursement totaling \$1,145,000, which reflects their total actual expenditures for exercising STCJ less the maximum allowable reimbursements already received. The percentage each of the four Tribes

receives for waiver amounts is calculated by dividing the \$775,000 by \$1,145,000 (the amount requested for waivers), which is .6768559, or 67.68559%. Each tribe would therefore receive 67.68559% of the amount they requested for a waiver.

	Prior year expenses actual or estimate	Maximum allowable reimbursement	Current year actual expenses	Request for waiver funds in excess of maximum allowable reimbursement	Waiver amount	Total reimbursement
Tribe A .....	\$100,000	\$50,000	\$120,000	\$70,000	\$47,380	\$97,380
Tribe B .....	700,000	50,000	750,000	700,000	473,799	523,799
Tribe C .....	25,000	25,000	100,000	75,000	50,764	75,764
Tribe D .....	60,000	50,000	50,000	0	0	50,000
Tribe E .....	300,000	50,000	350,000	300,000	203,057	253,057
Total .....	1,185,000	225,000	1,370,000	1,145,000	775,000	1,000,000

Although Tribes will need to wait until the end of the calendar year to request and then receive their full reimbursement, the process set forth in the interim final rule ensures that Tribes with expenses later in the year are still able to receive the same percentage of their expenses met overall (as opposed to a “first come, first served” model where Tribes seeking reimbursement early in the year receive full reimbursement whereas Tribes that incur expenses later in the year may receive little or no reimbursement). The process also permits Tribes that have unexpected costs, over and above their maximum allowable reimbursement, such as a large medical bill, to be able to request reimbursement at the end of the year.

In developing the rule for this program, OVW made every effort to honor the concerns expressed by Tribes, while also addressing statutory requirements and ensuring the appropriate use of Federal funds. For example, the interim final rule includes documentation requirements that are as simple as possible while mandating that Tribes maintain auditable records. The rule lists reimbursable expenses, as outlined by the statute, but adds a broad category for “other costs incurred in, relating to, or associated with exercising STCJ” to permit Tribes to seek reimbursement for costs not anticipated by the rule. However, because the statute directs the Attorney General to reimburse Tribal governments “for expenses incurred in exercising” of STCJ (see 25 U.S.C. 1304(h)(1)(A)) (emphasis added), OVW lacks the discretion to include *planning* costs such as Tribal code development. To ensure reimbursement funds are used to

supplement, not supplant, local, state, and federal funding, the rule directs Tribes to expend funds from other sources before seeking funds from this program.

OVW notes that many Tribal leaders and experts (both from Alaska and other states) expressed concern about the particularly significant needs of Alaska Tribes, such as the need for development of criminal justice systems and severe lack of resources. The Tribal Reimbursement Program, however, is not well suited to address these needs of Alaska Tribes that have not yet been designated by the Attorney General to exercise STCJ through the pilot program because, as discussed above, it is designed to reimburse the costs incurred by Tribes that already are exercising STCJ. OVW recognizes the need to provide additional support and funding to Alaska Tribes that wish to pursue Attorney General designation through the pilot program. To this end, on December 20, 2022, OVW issued the Emerging Issues and Training and Technical Assistance Call for Concept Papers, which requests proposals to provide technical assistance to Alaska Tribes on STCJ implementation, including through the creation of an Alaska-specific ITWG. In addition, on February 9, 2023, OVW released the FY 2023 Special Tribal Criminal Jurisdiction: Targeted Support for Alaska Natives Special Initiative Solicitation. This solicitation requests proposals only from Alaska Tribal governments and consortia of such governments whose Native Villages are within an Alaska Native Village Statistical Area (and therefore are potentially eligible to seek Attorney General designation to exercise STCJ).

**VII. Section-by-Section Summary of the Proposed Regulatory Text**

*§ 90.30 Definitions*

Section 90.30 provides that the definitions in 25 U.S.C. 1304(a) apply to the Tribal Reimbursement Program.

*§ 90.31 Eligibility*

Section 90.31 describes the eligibility for the Tribal Reimbursement Program. Tribes are eligible if they are Federally recognized and are exercising STCJ over any covered crime.

*§ 90.32 Reimbursement Request*

Section 90.32 describes the reimbursement request process for the Tribal Reimbursement Program. The request process for each participating Tribe will include a certification that the participating Tribe meets the eligibility requirements of section 90.31 and a list of the participating Tribe’s expenses from the prior year incurred in exercising STCJ. OVW will issue an annual Notice of Reimbursement Opportunity, which will include sample forms for use in the certification and list of expenses. OVW will also provide training for Tribes on the reimbursement request process.

*§ 90.33 Division of Funds: Maximum Allowable Reimbursement and Waivers*

Section 90.33 provides that the funds available for the Tribal Reimbursement Program each year will be divided into two parts: one part that will guarantee the availability of funds for each participating Tribe that requests reimbursement up to the maximum allowable reimbursement, and one part that will fund waivers of the maximum.

### § 90.34 Annual Maximum Allowable Reimbursement per Participating Tribe

Section 90.34 provides that each participating Tribe that requests the annual maximum allowable reimbursement may receive access to an equal amount of the funds set aside for maximum allowable reimbursements under section 90.33. Tribes will receive the funds through the Automated Standard Application for Payments (ASAP) system, an electronic system that federal agencies use to quickly and securely transfer money to recipient organizations. Tribes will be able to see in ASAP the amount of funds remaining of the annual maximum allowable reimbursement and when the Tribe has spent all the funds.

### § 90.35 Waivers of Annual Maximum Allowable Reimbursement

Section 90.35 provides the process for participating Tribes to request a waiver of the annual maximum allowable reimbursement if they incur costs in excess of that amount. If there are not sufficient funds available to reimburse the total eligible expenses requested by all participating Tribes, each Tribe will get the same percentage of their remaining costs met. Requests for waiver must include a summary of eligible expenses that shows how the Tribe's maximum allowable reimbursement was spent and identifies the specific expenses that are requested for reimbursement in excess of the maximum allowable reimbursement, including how such expenses were calculated. Participating Tribes are not required to provide documentation at the end of the year when they submit their waiver request but must keep documentation on file to support each claimed expense. OVW will provide a sample form for the summary of eligible expenses.

### § 90.36 Categories of Expenses Eligible for Reimbursement

Section 90.36 provides examples of expenses associated with the exercise of STCJ for which participating Tribes may request reimbursement and information on how to calculate the costs for such expenses.

### § 90.37 Ineligible Expenses

Section 90.37 lists expenses that cannot be reimbursed through the Tribal Reimbursement Program.

### § 90.38 Collection of Expenses From Offenders

Section 90.38 addresses the situation where a participating Tribe recoups expenses related to exercise of STCJ from convicted offenders.

### § 90.39 Expenses Documentation

Section 90.39 describes documentation of expenses that must be retained on file by participating Tribes. Such records must be retained for a period of three years from the end of the calendar year and are subject to review by DOJ.

### § 90.40 Other Sources of Funding

Section 90.40 provides that, if there are other sources of Federal funding available to pay for a particular cost associated with the exercise of STCJ, participating Tribes must expend funds from those sources before seeking reimbursement from this program.

### § 90.41 Denial of Specific Expenses for Reimbursement

Section 90.41 provides the process for participating Tribes to request a review of the denial of any specific expenses for which the participating Tribe has requested reimbursement.

### § 90.42 Monitoring and Audit

Section 90.42 provides that Tribes receiving reimbursement of expenses from the Tribal Reimbursement Program will be subject to regular monitoring and audits to ensure that expenses are properly documented and are allocable to the exercise of STCJ.

### § 90.43 Corrective Action

Section 90.43 provides for a corrective action plan and/or recovery/recoupment for expenses that are later found to be ineligible for reimbursement. In addition, participating Tribes that fail to submit the required summary of eligible expenses, respond to requests for information during monitoring or auditing, or follow a corrective action plan or return funds expended on ineligible expenses will be deemed ineligible for additional Tribal Reimbursement Program funds, in the same or another calendar year, until such deficiencies are remedied.

## VIII. Effective Date

This interim final rule takes effect April 11, 2023.

## IX. Statutory and Regulatory Certifications

### Administrative Procedure Act

The Administrative Procedure Act (APA), codified at 5 U.S.C. 553, generally requires that agencies publish substantive rules in the **Federal Register** for notice and comment. However, pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an

“agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” Furthermore, the APA requires publication or service of a substantive rule not less than 30 days before its effective date except “as otherwise provided by the agency for good cause found and published in the rule.” 5 U.S.C. 553(d)(3).

In accordance with 5 U.S.C. 553(b)(B) and (d)(3), the Acting Director of the Office on Violence Against Women finds that there is good cause to publish this rule without prior notice and an opportunity for public comment and good cause to publish this rule with an immediate effective date. Publishing this rule with prior notice and comment is impracticable, unnecessary, and contrary to the public interest, as explained in more detail below. These same reasons constitute good cause for an immediate effective date. Moreover, there is no need to afford affected parties a 30-day period to adjust their behavior prior to the rule's effective date; therefore, an immediate effective date does not contravene any principles of fairness.

First, providing prior notice and an opportunity to comment is impracticable due to the timeline established by the authorizing statute and the need to have in place a viable process for reimbursing Tribes that exercise STCJ. The Indian Civil Rights Act (ICRA) of 1968, as amended by VAWA 2022, recognizes that, effective October 1, 2022, participating tribes may exercise tribal criminal jurisdiction over non-Indian offenders who commit an expanded set of covered crimes in Indian country. *See* 25 U.S.C. 1304(b) (recognizing STCJ) and VAWA 2022, Sec. 3, Public Law 117–103 (effective date). In turn, ICRA, as amended by VAWA 2022, authorizes the Department of Justice to reimburse Tribal governments for expenses incurred in exercising STCJ and requires the Attorney General to promulgate rules governing these reimbursements by March 15, 2023 (one year after enactment of VAWA 2022). 25 U.S.C. 1304(h)(1). Moreover, administration of the new reimbursement program hinges on the availability of an appropriation to support the program, authorized by 25 U.S.C. 1304(j). Assuming that such funding is available, the statute directs that, to the maximum extent practicable, not later than 90 days after the date on which the Attorney General receives a qualifying reimbursement request from a Tribal government (or authorized

designee), the Attorney General must provide reimbursement or notification why no reimbursement can be issued. *Id.* at 1304(h)(1)(C)(iii).

Given that the Consolidated Appropriations Act, 2023, Public Law 117–328, provides an appropriation of up to \$4.4 million for the Tribal Reimbursement Program in FY 2023, OVW must be ready to issue reimbursements if it receives a qualifying request from a Tribal government. However, OVW also must have a rule in place governing the Tribal Reimbursement Program prior to issuing any reimbursements. This is particularly important because OVW anticipates that the amount of funds requested in reimbursements will exceed the amount of funds appropriated by Congress. Based on an analysis of grant award budgets approved under OVW's Tribal Jurisdiction Program during the past eight years, as well as input received from Tribes during consultation and listening sessions, Tribal requests for reimbursement likely will far exceed available funds. The analysis of Tribal Jurisdiction Program grant budgets showed that corrections costs alone add up to nearly \$1,000,000 total across 17 Tribes. This rule provides direction on prioritizing among requests and establishing an annual maximum allowable reimbursement per Tribe. In the absence of a rule to address how to prioritize requests and to set the maximum allowable reimbursement amount, OVW might expend all available funds on reimbursements well before all reimbursement requests are received. As a result, Tribes submitting requests early in this calendar year might receive all the funding, while Tribes submitting later might receive none.

Second, providing prior notice and an opportunity to comment is unnecessary because a robust course of consultation and discussion with Tribal leaders, criminal justice personnel, and advocates has preceded issuance of this rule. As described above, pursuant to EO 13175 and the Department's policy governing Tribal consultation, as part of developing this rule OVW held two consultation sessions with Tribal leaders inviting oral and written testimony, a listening session with members of the Intertribal Technical-Assistance Working Group on STCJ (an intertribal working group that counts more than 80% of SDVCJ implementing tribes among its membership), and a roundtable discussion with a group of implementing tribes regarding SDVCJ expenses and their recommendations regarding administration of the Tribal Reimbursement Program. As a result of

these sessions, OVW has considered comments from the Tribes most interested in and affected by the rule and has incorporated those views, to the degree practicable, into this interim final rule.

Third, it would be contrary to the public interest to delay issuance of this rule. As noted in the Background section above, Congress has recognized expanded tribal criminal jurisdiction over non-Indians who commit certain covered crimes in Indian country to address epidemic rates of violence against American Indian and Alaska Native women and the jurisdictional gaps in Indian country that may impede holding offenders accountable. Moreover, in the consultations and discussions that OVW held with Tribal leaders and advocates, participants reiterated the challenges that Tribes face in shouldering the immediate costs of exercising STCJ. If OVW does not have in place an interim final rule to facilitate reimbursement payments to Tribal governments, these governments may delay implementing STCJ and certain non-Indian offenders may continue to commit crimes with impunity.

Finally, there is no need to delay the rule's effective date for 30 days because no affected entity will need to adjust its behavior prior to the rule's effective date. Tribal governments do not need to take any steps to come into compliance with the new rule. Rather, each Tribe will decide whether it wishes to request reimbursement funds, regardless of the effective date. In addition, if a Tribe needs more time to put in place systems that will enable it to seek reimbursement, an immediate effective date will not prevent it from doing so. Therefore, an immediate effective date does not contravene any principles of fairness as the affected parties may choose to take no actions or defer those actions regardless of when the rule takes effect.

As part of this interim final rule, OVW will accept comments and consider revising the rule. Issuance of the rule on an interim final basis, however, will enable OVW to implement the Tribal Reimbursement Program during its first year of funding in an equitable and orderly fashion. The interim final rule is necessary for OVW to begin implementing the program, including making reimbursement payments to Tribes, during FY 2023.

#### *Executive Orders 12866 and 13563—Regulatory Review*

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of

Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b). General Principles of Regulation.

The Department of Justice has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f) because it is not likely to: (1) have an annual effect on the economy of \$100 million or more; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues.

(1) The rule's impact is limited to funds appropriated for the OVW Tribal Reimbursement Program, which are unlikely to ever exceed \$10 million per year. As explained above, the FY 2023 appropriation for this program is a maximum of \$4.4 million. The authorization of appropriations for the program, at 25 U.S.C. 1304(j), is a maximum of \$10 million. Therefore, this rule cannot have an annual effect of \$100 million or more.

(2) The rule does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency because OVW is the only agency that administers funds appropriated by Congress expressly to support Tribes in administering STCJ. OVW administers a grant program for Tribes implementing and exercising STCJ and can ensure that the grant program and the reimbursement program operate in tandem. Furthermore, by mandating that recipients cannot seek reimbursement for expenses that are already paid for by another federal agency, the rule obviates the likelihood of creating inconsistency or otherwise interfering with another agency's actions.

(3) The rule does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients. The rule does not change the economic impact of funds appropriated for the Tribal Reimbursement Program; instead, the rule provides, as directed by statute, that appropriated funds are used to reimburse costs incurred by Tribes in exercising STCJ. Further, as discussed above, the annual appropriation is not at a level that would have a significant budgetary impact on the Federal government or federally recognized tribes. Finally, the rule will impose very few economic costs on participating Tribes, as discussed below.

(4) This rule does not raise any novel legal or policy issues. Although STCJ may present novel legal questions in individual prosecutions, the issuance of reimbursements to assist Tribes with specified types of expenses is not novel as other Federal government agencies operate programs that provide reimbursement to Tribes.

Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and to select regulatory approaches that maximize net benefits. The Department has assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits.

OVW provides the following analysis of the most noteworthy costs, benefits, and alternative choices. Overall, the Tribal Reimbursement Program, as implemented by this interim final rule, has very few costs, outside of the appropriated funds for the program. The only additional costs are those that Tribes may face in documenting that the expenses for which they request reimbursement were incurred in relation to covered crimes and in documenting and justifying the dollar amounts for such requests. In drafting this rule, OVW balanced the need to make this process as simple and flexible as possible for Tribes, with the need to have auditable records and ensure that funds are expended appropriately. We considered requiring Tribes to submit more detailed documentation at the time of requesting reimbursement, in order to ensure that all requested expenses are eligible for reimbursement. We rejected this as imposing too great a burden on participating Tribes and instead identified an approach that reduces the reimbursement request requirements but will ensure that participating Tribes maintain adequate records for monitoring and audit purposes and puts them on notice that they may need to return reimbursement funds that are later found to be ineligible.

#### *Executive Order 13132—Federalism*

This regulation will not have substantial direct effects on the states, on the relationship between the national government and the states, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### *Regulatory Flexibility Act*

OVW, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this regulation will not have a significant economic impact upon a substantial number of small entities for the following reason: The direct economic impact is limited to OVW's appropriated funds. For more information on economic impact, please see above.

#### *Executive Order 12988—Civil Justice Reform*

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

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

This rule will not result in substantial direct increased costs to Indian Tribal governments; rather, the Tribal Reimbursement Program (as carried out through the rule) will confer a benefit on participating Tribes. The rule creates a process for Tribes to access certain funds appropriated for their benefit. As discussed above, any financial costs imposed by the rule are minimal. OVW held Tribal consultations on July 27 and 28, 2022, a roundtable on August 24, 2022, and an additional listening session on August 30, 2022, all focused solely on this program. In addition, during OVW's statutorily required annual consultation held most recently on September 21–23, 2022, the Tribes also commented on this program.

#### *Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year (as adjusted for inflation), and it will not uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based

companies to compete in domestic and export markets.

#### **List of Subjects in 28 CFR Part 90**

Grant programs; judicial administration.

For the reasons set forth in the preamble, the Office on Violence Against Women amends 28 CFR part 90 as follows:

#### **PART 90—VIOLENCE AGAINST WOMEN**

■ 1. The authority for part 90 is revised to read as follows:

**Authority:** 42 U.S.C. 3711 *et seq.*; 42 U.S.C. 13925; 25 U.S.C. 1304(h).

■ 2. Add subpart C to read as follows:

#### **Subpart C—Reimbursement to Tribal Governments for Expenses Incurred Exercising Special Tribal Criminal Jurisdiction**

Sec.	
90.30	Definitions.
90.31	Eligibility.
90.32	Reimbursement request.
90.33	Division of funds: maximum allowable reimbursement and waivers.
90.34	Annual maximum allowable reimbursement per participating Tribe.
90.35	Conditions for waiver of annual maximum.
90.36	Categories of expenses eligible for reimbursement.
90.37	Ineligible expenses.
90.38	Collection of expenses from offenders.
90.39	Expenses documentation.
90.40	Other sources of funding.
90.41	Denial of specific expenses for reimbursement.
90.42	Monitoring and audit.
90.43	Corrective action.

#### **Subpart C—Reimbursement to Tribal Governments for Expenses Incurred Exercising Special Tribal Criminal Jurisdiction**

##### **§ 90.30 Definitions.**

The definitions in 25 U.S.C. 1304(a) apply to the Reimbursement to Tribal Governments for Expenses Incurred in Exercising Special Tribal Criminal Jurisdiction (hereinafter referred to as “the Tribal Reimbursement Program” or “this program”).

##### **§ 90.31 Eligibility.**

(a) Tribal governments eligible to seek reimbursement under this program are the governments of Tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian Tribes, that exercise Special Tribal Criminal Jurisdiction (STCJ), as defined by 25 U.S.C. 1304(a)(14) or section 812(5) of Public Law 117–103 (“participating Tribes”).

(b) Tribes that are in the planning phases prior to implementing STCJ are not eligible for reimbursement of planning costs from this program.

(c) Participating Tribes that are currently exercising jurisdiction over non-Indian offenders who commit any covered crime, as defined by 25 U.S.C. 1304(a)(5), and are in the planning phase to exercise jurisdiction over additional covered crimes are eligible for reimbursement with regard to the cases for which they already are exercising jurisdiction but not for planning costs.

#### **§ 90.32 Reimbursement request.**

Each year for which funds are available for the Tribal Reimbursement Program, the Office on Violence Against Women (OVW) will issue a Notice of Reimbursement Opportunity with instructions on how to apply for the maximum allowable reimbursement. The reimbursement request for each participating Tribe will include a certification that the participating Tribe meets the eligibility requirements of § 90.31. It will also include a list of expenses that the participating Tribe incurred in exercising STCJ in the previous year, in categories such as law enforcement, prosecution, indigent defense, pre-trial services, corrections, and probation. If a participating Tribe has newly implemented tribal criminal jurisdiction over non-Indians and therefore cannot submit 12 months' worth of expenses for the prior year, the participating Tribe may use estimated amounts for each category of expenses.

#### **§ 90.33 Division of funds: maximum allowable reimbursement and waivers.**

OVW will set aside for this program up to 40 percent of funds appropriated pursuant to 25 U.S.C. 1304(j), unless otherwise provided by law. The funds set aside for the Tribal Reimbursement Program will be divided into two parts: one part that will guarantee the availability of funds for each participating Tribe that requests reimbursement up to the maximum allowable reimbursement, and one part that will fund waivers of the maximum. In the first year that OVW administers appropriated funds for this program, OVW will allot 25 percent of Tribal Reimbursement Program funds for maximum allowable reimbursements. In subsequent years, OVW may adjust this percentage, based on the appropriations available, the number of participating Tribes, the extent to which participating Tribes expend the maximum allowable reimbursement in the prior year, and the total dollar amount of waivers requested during the prior year. OVW also may

consider whether demand for grant funds under the Tribal Jurisdiction Program warrants adjusting this percentage.

#### **§ 90.34 Annual maximum allowable reimbursement per participating Tribe.**

Each participating Tribe will receive access to an equal portion of the funds set aside for maximum allowable reimbursements under § 90.33 (e.g., 25 percent of the total funds available for the Tribal Reimbursement Program), unless their prior year expenses were less than the maximum amount, in which case they will be limited to the actual amount of their prior year expenses. Over the course of a calendar year, participating Tribes may draw down funds from the maximum allowable reimbursement as needed for eligible expenses as described in § 90.36. Participating Tribes are not required to provide documentation at the time they draw down from the maximum allowable reimbursement. Participating Tribes must provide a summary of eligible expenses at the end of the calendar year, which must identify actual expenditures eligible for reimbursement, including dollar amounts for each expenditure and how they were calculated, and must keep documentation on file to support each claimed expense. Such documentation must be sufficient to meet the standards that 2 CFR part 200 provides for grants.

#### **§ 90.35 Conditions for waiver of annual maximum.**

(a) If participating Tribes incur eligible expenses in excess of their annual maximum allowable reimbursement, they may request a waiver of the annual maximum at the end of the calendar year. Requests for a waiver must include the summary of eligible expenses required by section 90.34 that shows how the maximum allowable reimbursement funds were spent and an additional summary of eligible expenses that identifies actual expenditures eligible for reimbursement in excess of the maximum, including dollar amounts for each expenditure and how they were calculated. Participating Tribes are not required to provide documentation at the end of the calendar year when they submit their waiver request but must keep documentation on file to support each claimed expense. Such documentation must be sufficient to meet the standards that 2 CFR part 200 provides for grants.

(b) Waivers will be calculated at the end of the calendar year based on available funds. If there are not sufficient funds available to reimburse the total eligible expenses requested by

all participating Tribes, each Tribe will get the same percentage of their additional costs met. This percentage will be calculated by comparing the funds available and the total amount requested for waivers.

#### **§ 90.36 Categories of expenses eligible for reimbursement.**

Participating Tribes may apply for the maximum allowable reimbursement and waiver funds for the following expenses associated with the exercise of STCJ for each calendar year. For an expense to be eligible, the cost must be incurred in response to a report of a covered crime committed by a non-Indian, but there does not need to be an arrest or a prosecution for the offense. The summary of eligible expenses submitted each year must demonstrate how costs were calculated. Following are examples of types of eligible costs that participating Tribes may include and basis for calculations.

(a) Law enforcement expenses such as officer time (including response, interviews, follow-up, report writing, and court time); sexual assault kits or other evidentiary supplies; and testing, analysis, and storage of evidence. Requests for reimbursement must be based on actual costs attributed to SCTJ cases.

(b) Incarceration expenses such as prison and jail costs and prisoner transportation costs, whether through contract or Tribally owned facilities. Requests for reimbursement must be based on actual costs attributed to STCJ cases and may be based on per diem costs for housing non-Indian offenders.

(c) Offender medical and dental expenses not otherwise covered by insurance policies or federal sources such as Medicaid, including costs for insurance for offenders. Requests for reimbursement must be based on actual costs attributed to STCJ cases.

(d) Prosecution expenses such as staff time (including meetings, interviews, filings, research, preparation, court, and other time that can be demonstrated as allocable to prosecuting a covered crime); expert witness fees; exhibits; witness costs; and copying costs. Requests for reimbursement must be based on actual costs attributed to STCJ cases.

(e) Defense counsel expenses such as staff time (including meetings, interviews, filings, research, preparation, court, and other time that can be demonstrated as allocable to defending one or more non-Indian offenders charged with one or more covered crimes); competency evaluations; expert witness fees; exhibits; witness costs; and copying

costs. Requests for reimbursement must be based on actual cost. If the defense counsel is provided by contract, then the reimbursement amount can be based on the invoiced cost to the participating Tribe.

(f) Court expenses such as judge and court staff time; postage for summoning jurors; jury fees; witness costs; and competency evaluation or other mental health evaluations ordered by the court. Requests for reimbursement must be based on actual costs attributed to STCJ cases.

(g) Community supervision/re-entry expenses such as probation, parole, or other staff time; electronic or other monitoring fees; chemical dependency testing; batterer or sex offender evaluation and treatment; and pre-sentence investigation costs. Requests for reimbursement must be based on actual costs attributed to STCJ cases.

(h) Indirect costs based on a current federally approved indirect cost rate agreement.

(i) Other costs incurred in, relating to, or associated with exercising STCJ. Participating Tribes requesting reimbursement for costs in this category must demonstrate that the cost is incurred in, relating to, or associated with exercise of STCJ.

#### **§ 90.37 Ineligible expenses.**

Participating Tribes are not permitted to request reimbursement for the following:

(a) Planning; Expenses associated with planning to exercise STCJ, such as code drafting.

(b) Training, including costs for training criminal justice personnel, court personnel, or others.

(c) Any expenses not incurred in, relating to, or associated with exercising STCJ.

#### **§ 90.38 Collection of expenses from offenders.**

If a participating Tribe recoups expenses related to exercise of STCJ from the convicted offenders prior to receiving reimbursement for such expenses, then the recouped funds shall be used prior to seeking reimbursement through the Tribal Reimbursement Program. If a participating Tribe recoups expenses related to exercise of STCJ from the convicted offenders subsequent to receiving reimbursement for such expenses, such funds must be used toward exercise of STCJ.

#### **§ 90.39 Expenses documentation.**

Documentation of expenses retained on file by participating Tribes pursuant to sections 90.34 and 90.35 must be adequate for an audit. At a minimum,

participating Tribes must retain the general accounting ledger and all supporting documents, including invoices, sales receipts, or other proof of expenses incurred for those expenses reimbursed by the Tribal Reimbursement Program. Such records must be retained for a period of three years from the end of the calendar year during which the participating Tribe sought reimbursement. All financial records pertinent to the Tribal Reimbursement Program, including the general accounting ledger and all supporting documents, are subject to agency review during the calendar year in which reimbursement is sought, during any audit, and for the three-year retention period.

#### **§ 90.40 Other sources of funding.**

If there are other sources of federal funding available to pay for a particular cost associated with the exercise of STCJ, participating Tribes must expend funds from those sources before seeking reimbursement from this program. Examples include existing Department of Justice grant funds, Medicare/Medicaid, and Bureau of Indian Affairs funding.

#### **§ 90.41 Denial of specific expenses for reimbursement.**

If reimbursement of specific expenses is denied, the participating Tribe may request review of the denial via a letter to the OVW Director stating the reason why the denied expense was eligible for reimbursement. OVW must receive the letter within 30 calendar days of the denial. The OVW Director will review the letter and notify the participating Tribe of a final decision within 30 days of receipt of the letter.

#### **§ 90.42 Monitoring and audit.**

Tribes receiving reimbursement of expenses under the Tribal Reimbursement Program will be subject to regular monitoring and audits to ensure that expenses are properly documented and are allocable to the exercise of STCJ.

#### **§ 90.43 Corrective action.**

Reimbursement requests later found not to meet statutory, regulatory, or other program requirements may result in a corrective action plan and/or recovery/recoupment. Participating Tribes that fail to submit the required summary of eligible expenses under §§ 90.34 and 90.35, respond to requests for information during monitoring or auditing, or follow a corrective action plan or return funds expended on ineligible expenses will be deemed ineligible for additional Tribal Reimbursement Program funds, in the

same or another calendar year, until such deficiencies are remedied.

Dated: March 31, 2023.

**Allison Randall,**

*Acting Director.*

[FR Doc. 2023–07519 Filed 4–10–23; 8:45 am]

**BILLING CODE 4410-FX-P**

## **DEPARTMENT OF HOMELAND SECURITY**

### **Coast Guard**

#### **33 CFR Part 147**

[Docket Number USCG–2021–0474]

**RIN 1625-AA87**

#### **Safety Zone; Lucius Spar Outer Continental Shelf Facility, Keathley Canyon Block 875, Gulf of Mexico**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is establishing a safety zone around the Lucius Spar, located in Keathley Canyon Block 875 on the Outer Continental Shelf (OCS) in the Gulf of Mexico. The purpose of this rule is to protect the facility from all vessel traffic operating outside the normal shipping channels and fairways that are not providing service to or working with the facility. Establishing a safety zone around the facility will significantly reduce the threat of allisions, collisions, security breaches, oil spills, releases of natural gas, and thereby protect the safety of life, property, and the environment.

**DATES:** This rule is effective April 11, 2023.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2021–0474 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email LCDR David Newcomb, District Eight OCS, U.S. Coast Guard; telephone 504–671–2106, [David.T.Newcomb@uscg.mil](mailto:David.T.Newcomb@uscg.mil).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Table of Abbreviations**

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
OCS Outer Continental Shelf