

- (II) the date on which the funding agreement expires; or
- (ii) such date as may be mutually agreed upon by the Secretary and the Indian Tribe.

(f) Nonduplication

A funding agreement shall provide that, for the period for which, and to the extent to which, funding is provided to an Indian Tribe under this subchapter, the Indian Tribe—

- (1) shall not be entitled to contract with the Secretary for funds under section 5321 of this title, except that the Indian Tribe shall be eligible for new programs on the same basis as other Indian Tribes; and
- (2) shall be responsible for the administration of programs in accordance with the compact or funding agreement.

(g) Records

(1) In general

Unless an Indian Tribe specifies otherwise in the compact or funding agreement, records of an Indian Tribe shall not be considered to be Federal records for purposes of chapter 5 of title 5.

(2) Recordkeeping system

An Indian Tribe shall—

- (A) maintain a recordkeeping system; and
- (B) on a notice period of not less than 30 days, provide the Secretary with reasonable access to the records to enable the Department to meet the requirements of sections 3101 through 3106 of title 44.

(Pub. L. 93-638, title IV, §405, as added Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 865.)

Editorial Notes

PRIOR PROVISIONS

A prior section 5365, Pub. L. 93-638, title IV, §405, as added Pub. L. 103-413, title II, §204, Oct. 25, 1994, 108 Stat. 4276, related to reports, prior to repeal by Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 864. See section 5372 of this title. Such section was formerly classified to section 458ee of this title prior to editorial reclassification and renumbering as section 5365.

§ 5366. Provisions relating to the Secretary

(a) Trust evaluations

A funding agreement shall include a provision to monitor the performance of trust functions by the Indian Tribe through the annual trust evaluation.

(b) Reassumption

(1) In general

A compact or funding agreement shall include provisions for the Secretary to reassume a program and associated funding if there is a specific finding relating to that program of—

- (A) imminent jeopardy to a trust asset, a natural resource, or public health and safety that—
 - (i) is caused by an act or omission of the Indian Tribe; and
 - (ii) arises out of a failure to carry out the compact or funding agreement; or

(B) gross mismanagement with respect to funds transferred to an Indian Tribe under a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.

(2) Prohibition

The Secretary shall not reassume operation of a program, in whole or part, unless—

- (A) the Secretary first provides written notice and a hearing on the record to the Indian Tribe; and
- (B) the Indian Tribe does not take corrective action to remedy the mismanagement of the funds or programs, or the imminent jeopardy to a trust asset, natural resource, or public health and safety.

(3) Exception

(A) In general

Notwithstanding paragraph (2), the Secretary may, on written notice to the Indian Tribe, immediately reassume operation of a program if—

- (i) the Secretary makes a finding of imminent and substantial jeopardy and irreparable harm to a trust asset, a natural resource, or the public health and safety caused by an act or omission of the Indian Tribe; and
- (ii) the imminent and substantial jeopardy and irreparable harm to the trust asset, natural resource, or public health and safety arises out of a failure by the Indian Tribe to carry out the terms of an applicable compact or funding agreement.

(B) Reassumption

If the Secretary reassumes operation of a program under subparagraph (A), the Secretary shall provide the Indian Tribe with a hearing on the record not later than 10 days after the date of reassumption.

(c) Inability to agree on compact or funding agreement

(1) Final offer

If the Secretary and a participating Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian Tribe may submit a final offer to the Secretary.

(2) Determination

Not more than 60 days after the date of receipt of a final offer by one or more of the officials designated pursuant to paragraph (4), the Secretary shall review and make a determination with respect to the final offer, except that the 60-day period may be extended for up to 30 days for circumstances beyond the control of the Secretary, upon written request by the Secretary to the Indian tribe.

(3) Extensions

The deadline described in paragraph (2) may be extended for any length of time, as agreed upon by both the Indian Tribe and the Secretary.

(4) Designated officials

(A) In general

The Secretary shall designate one or more appropriate officials in the Department to

receive a copy of the final offer described in paragraph (1).

(B) No designation

If no official is designated, the Director of the Office of the Executive Secretariat and Regulatory Affairs shall be the designated official.

(5) No timely determination

If the Secretary fails to make a determination with respect to a final offer within the period specified in paragraph (2), including any extension agreed to under paragraph (3), the Secretary shall be deemed to have agreed to the offer, except that with respect to any compact or funding agreement provision concerning a program described under section 5363(c) of this title, the Secretary shall be deemed to have rejected the offer with respect to such provision and the terms of clauses (ii) through (iv) of paragraphs¹ (6)(A) shall apply.

(6) Rejection of final offer

(A) In general

If the Secretary rejects a final offer (or one or more provisions or funding levels in a final offer), the Secretary shall—

(i) provide timely written notification to the Indian Tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that—

(I) the amount of funds proposed in the final offer exceeds the applicable funding level as determined under section 5325(a)(1) of this title;

(II) the program that is the subject of the final offer is an inherent Federal function or is subject to the discretion of the Secretary under section 5363(c) of this title;

(III) the Indian Tribe cannot carry out the program in a manner that would not result in significant danger or risk to the public health or safety, to natural resources, or to trust resources;

(IV) the Indian Tribe is not eligible to participate in self-governance under section 5362(c) of this title;

(V) the funding agreement would violate a Federal statute or regulation; or

(VI) with respect to a program or portion of a program included in a final offer pursuant to section 5363(b)(2) of this title, the program or the portion of the program is not otherwise available to Indian Tribes or Indians under section 5321(a)(1)(E) of this title;

(ii) provide technical assistance to overcome the objections stated in the notification required by clause (i);

(iii) provide the Indian Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter, and the opportunity for appeal on the objections raised, except that the Indian Tribe may, in lieu of filing such appeal, directly proceed to initiate an

action in a United States district court under section 5331(a) of this title; and

(iv) provide the Indian Tribe the option of entering into the severable portions of a final proposed compact or funding agreement (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

(B) Effect of exercising certain option

If an Indian Tribe exercises the option specified in subparagraph (A)(iv)—

(i) the Indian Tribe shall retain the right to appeal the rejection by the Secretary under this section; and

(ii) clauses (i), (ii), and (iii) of subparagraph (A) shall apply only to the portion of the proposed final compact or funding agreement that was rejected by the Secretary.

(d) Burden of proof

In any administrative action, hearing, appeal, or civil action brought under this section, the Secretary shall have the burden of proof—

(1) of demonstrating, by a preponderance of the evidence, the validity of the grounds for a reassumption under subsection (b); and

(2) of clearly demonstrating the validity of the grounds for rejecting a final offer made under subsection (c).

(e) Good faith

(1) In general

In the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy.

(2) Policy

The Secretary shall carry out this subchapter in a manner that maximizes the policy of Tribal self-governance.

(f) Savings

(1) In general

To the extent that programs carried out for the benefit of Indian Tribes and Tribal organizations under this subchapter reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 5368(c) of this title, except for funding agreements entered into for programs under section 5363(c) of this title, the Secretary shall make such savings available to the Indian Tribes or Tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(2) Discretionary programs of special significance

For any savings generated as a result of the assumption of a program by an Indian Tribe under section 5363(c) of this title, such savings shall be made available to that Indian Tribe.

(g) Trust responsibility

The Secretary may not waive, modify, or diminish in any way the trust responsibility of the

¹ So in original. Probably should be "paragraph".

United States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(h) Decision maker

A decision that constitutes final agency action and relates to an appeal within the Department conducted under subsection (c)(6)(A)(iii) may be made by—

- (1) an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or
- (2) an administrative law judge.

(i) Rules of construction

Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this subchapter and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian Tribe.

(Pub. L. 93-638, title IV, §406, as added Pub. L. 116-180, title I, §101(e), Oct. 21, 2020, 134 Stat. 866.)

REFERENCES IN TEXT

Section 101(a) of the PROGRESS for Indian Tribes Act, referred to in subsec. (i), is section 101(a) of Pub. L. 116-180, which is set out as a note under section 5361 of this title.

Editorial Notes

PRIOR PROVISIONS

A prior section 5366, Pub. L. 93-638, title IV, §406, as added Pub. L. 103-413, title II, §204, Oct. 25, 1994, 108 Stat. 4277; amended Pub. L. 105-277, div. A, §101(e) [title I, §133], Oct. 21, 1998, 112 Stat. 2681-231, 2681-264, set out disclaimers regarding construction of provisions of this chapter and subchapter. Such section was formerly classified to section 458ff of this title prior to editorial reclassification and renumbering as section 5366.

§ 5367. Construction programs and projects

(a) In general

Indian Tribes participating in Tribal self-governance may carry out any construction project included in a compact or funding agreement under this subchapter.

(b) Tribal option to carry out certain Federal environmental activities

In carrying out a construction project under this subchapter, an Indian Tribe may, subject to the agreement of the Secretary, elect to assume some Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle III of title 54, and related provisions of other law and regulations that would apply if the Secretary were to undertake a construction project, by adopting a resolution—

- (1) designating a certifying Tribal officer to represent the Indian Tribe and to assume the status of a responsible Federal official under those Acts, laws, or regulations; and
- (2) accepting the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer

assuming the status of a responsible Federal official under those Acts, laws, or regulations.

(c) Savings clause

Notwithstanding subsection (b), nothing in this section authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), division A of subtitle III of title 54, and other related provisions of law that are inherent Federal functions.

(d) Codes and standards

In carrying out a construction project under this subchapter, an Indian Tribe shall—

- (1) adhere to applicable Federal, State, local, and Tribal building codes, architectural and engineering standards, and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and
- (2) use only architects and engineers who—
 - (A) are licensed to practice in the State in which the facility will be built; and
 - (B) certify that—
 - (i) they are qualified to perform the work required by the specific construction involved; and
 - (ii) upon completion of design, the plans and specifications meet or exceed the applicable construction and safety codes.

(e) Tribal accountability

(1) In general

In carrying out a construction project under this subchapter, an Indian Tribe shall assume responsibility for the successful completion of the construction project and of a facility that is usable for the purpose for which the Indian Tribe received funding.

(2) Requirements

For each construction project carried out by an Indian Tribe under this subchapter, the Indian Tribe and the Secretary shall negotiate a provision to be included in the funding agreement that identifies—

- (A) the approximate start and completion dates for the project, which may extend over a period of one or more years;
- (B) a general description of the project, including the scope of work, references to design criteria, and other terms and conditions;
- (C) the responsibilities of the Indian Tribe and the Secretary for the project;
- (D) how project-related environmental considerations will be addressed;
- (E) the amount of funds provided for the project;
- (F) the obligations of the Indian Tribe to comply with the codes referenced in subsection (d)(1) and applicable Federal laws and regulations;
- (G) the agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction; and
- (H) the agreement of the Secretary to issue a certificate of occupancy, if requested by the Indian Tribe, based upon the review