



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

To: Federal Aviation Administration, Federal Highway Administration, and Federal Transit Administration Recipients and Sponsors Implementing the Disadvantaged Business Enterprise (DBE) and Airport Concession DBE (ACDBE) Programs

From: Irene B. Marion
Director, Departmental Office of Civil Rights

Re: DBE/ACDBE Certification Eligibility of Native American-owned Firms

Date: April 22, 2022

This guidance rescinds and supersedes in full the Department’s August 26, 2019 memo “Definition of Native American Owned DBEs” regarding the Disadvantaged Business Enterprise and Airport Concessions Disadvantaged Business Enterprise (DBE/ACDBE) certification eligibility of Native American-owned firms.

Section 26.5 of the DBE program regulation at 49 CFR part 26 identifies Native Americans as one of the groups whose members are rebuttably presumed to be socially and economically disadvantaged. In addition, section 26.5 states that “Native Americans” includes persons who are enrolled members of a federally *or* state recognized Indian tribe.¹ The ACDBE regulation contains identical definitions at 49 CFR 23.13. An enrolled member of such a tribe is Native American under every provision of 49 CFR parts 23 and 26, including certification eligibility requirements. Specifically, a Native American-owned firm’s eligibility does not depend—for purposes of the Department’s DBE/ACDBE program, including both in-state and interstate applicants—on whether the reviewing Unified Certification Program’s (UCP) state recognizes the applicable tribe. It suffices that *a* state does.

The Department issued the August 2019 guidance in response to concerns that UCPs were not verifying eligibility of DBE applicants prior to making certification decisions, and that some firms whose owners were neither federally nor state-recognized had been certified as DBEs or ACDBEs. The Department acknowledged that some of these firms may have been certified before the 2014 revision to the 49 CFR parts 23 and 26 definition of “Native Americans,” when enrolled membership in a federally or state-recognized tribe was not expressly required, and that some firms may have been certified since that time without recognition of the revised definition. The Department continues to emphasize that it is important to the integrity of the DBE/ACDBE program that only firms meeting all eligibility standards of the Regulation, including social disadvantage, are allowed to participate in the program.

¹ The definition of Native Americans also includes Alaska Natives and Native Hawaiians.

The Department understands that the August 2019 guidance cited above raised questions about whether certification requirements for state-recognized tribes vary depending on whether a firm applied through the interstate certification process or through in-state certification. Furthermore, the Department is aware that firms that are owned by Native Americans have been denied or decertified because the state in which the UCP is located does not recognize the tribe in which the majority owner(s) is an enrolled member. The Department encourages UCPs to review their certification files for any such certification decisions. For any firms that were denied certification or decertified by a UCP within the last 12-month period (or other reapplication waiting period established by the UCP) – either through the in-state or interstate certification process and on the sole basis that the majority owner(s) is an enrolled member of a state-recognized tribe in a state other than the UCP’s state – the UCP should contact the firm and re-evaluate the eligibility of the firm. The UCP should do so consistent with the definition of Native American in 49 CFR 26.5 (for DBE applicants) and 49 CFR 23.3 (for ACDBE applicants) and other applicable certification requirements in parts 23 and 26.² The Department also encourages UCPs to contact any firms that were decertified or denied certification prior to the last 12-month period (or other reapplication waiting period established by the UCP) and notify them that they are eligible to submit a new application. In the interstate certification context, a UCP’s non-recognition of a tribe recognized by a different state does not constitute a “good cause” reason under section 26.85(d)(2) for denying the application. Under all provisions of parts 23 and 26, it suffices that either the federal government or *a* state recognizes the tribe.³

The Department appreciates the feedback from stakeholders regarding DBE program guidance and appreciates your continued cooperation in furthering the mission of creating and maintaining equity in federally assisted contracting opportunities.

The Deputy General Counsel of the Department of Transportation, performing the functions and duties of the General Counsel, has reviewed this document and approved it as consistent with the language and intent of 49 CFR parts 23 and 26. The contents of the document do not have the force and effect of law and are not meant to bind the public in any way. The document is intended only to provide information to the public regarding existing requirements under the law and agency policies.

² This does not affect a recipient’s right to question group membership under section 26.63.

³ The Department does not maintain an official list of state-recognized tribes. Questions regarding whether a state recognizes a tribe should continue to be referred to the state in which the tribe, band, nation, group, or community resides.