**Subpart A – General Provisions**

**§ 663.1 Authority, purpose and scope.**

(a) Authority. These regulations are prepared, issued and maintained with the active participation and representation of Tribes and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by 23 U.S.C. 207(n).

(b) Purpose. These regulations codify rules for the Department of Transportation’s (Department) Self-Governance Program including self-governance compacts and funding agreements between the Department and Self–Governance Tribes in accordance with 23 U.S.C. 207.

(c) Scope. These regulations apply to the Department and to Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs), as applicable, under the Tribal Transportation Self-Governance Program ~~except as otherwise specifically authorized by a waiver~~ ~~under 23 U.S.C. 207(j)(2)(A~~). This program shall apply to the following:

* 1. the full tribal share funding provided to the tribe under the Tribal Transportation Program identified in 23 U.S.C. 202;;
	2. any tribal transit formula funding provided to the tribe under the Tribal Transit Program identified in 49 U.S.C. 5311;
	3. any discretionary or competitive grant administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and
	4. any discretionary or competitive grant administered by the Department for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.

*Tribal requeset to delete strikethrough; update funding stream language*

**§ 663.2 Congressional policy.**

(a) As stated in [section 1121 of Pub. L. 114-94](http://www.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I174402B71A-4A46E595FF0-C74382ECB47)&originatingDoc=N344F20408B4711D98CF4E0B65F42E6DA&refType=SL&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)), Congress directed the Secretary to establish and carry out a program to be known as the Tribal Self–Governance within the Department.

(b) According to 25 U.S.C. 5392(a), except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:

     (1) The inclusion of applicable PSFAs and funds associated therewith, in the agreements entered into under this section;

 (2) The implementation of compacts and funding agreements entered into under this part; and

 (3) The achievement of Tribal transportation, infrastructure, and highway safety goals and objectives.

(c) According to 25 U.S.C. 5392(d), funds provided under compacts, funding agreements, or grants made pursuant to this section, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program, unless otherwise prohibited by statute.

(d) According to 25 U.S.C. 5392(f), each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Tribe participating in self-governance and any ambiguity shall be resolved in favor of the Tribe.

(e) According to 25 U.S.C. 5395(b), nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(f) According to 25 U.S.C. 5387(e), in the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this part in a manner that maximizes the policy of Tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000.

*Tribe proposes deletion as above*

**§ 663.3 Effect on existing Tribal rights**.

Nothing in this part shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Tribes;

(b) Terminating, waiving, modifying or reducing the trust responsibility of the United States to the Tribe(s) or individual Indians. The Secretary will act in good faith in upholding this trust responsibility;

(c) Mandating a Tribe to apply for a compact or funding agreement; or

(d) Impeding awards by other Departments and agencies of the United States to Tribes to administer Indian programs under any other applicable law.

**§ 663.4 May the TTSGP be construed to limit or reduce in any way the funding for any program, project, or activity serving a Tribe under this or other applicable Federal law?**

Funds made available to a Tribe through a compact or funding agreement for a statutory formula or the award of a discretionary grant shall not limit or reduce any other funding from a formula or awarded amount. If a Tribe alleges that a compact or funding agreement reduces the amount available, the Tribe may apply the provisions of 25 U.S.C. 5331.

**§ 663.5 Effect of these regulations on Federal program guidelines, manual, or policy directives**.

Subject to 23 U.S.C. 207(e)(1) and as identified in Subpart H, unless negotiated and agreed to by the Self-Governance Tribe and the Department in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except for regulations promulgated under 23 U.S.C. 207.  ~~However, any guidance, policy, or circular required by law cannot be waived. In addition, the Department reserves the right to impose additional safety requirements to the TTSGP that are not part of this rulemaking.~~

*Item to be discussd with DOT GC – conceptual agreement with deletion*

**§ 663.6 Secretarial policy.**

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

**§ 663.7 What definitions apply to this part?**

Unless otherwise provided in this part:

*Act* means sections 1 through 9 and Titles I and V of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, as amended, but only to the extent as incorporated by and not in conflict with 23 U.S.C. 207.

*Administrator* means the ~~FHWA or FTA Administrator~~ from which the funds are being received. To revise

*Appeal* means a request by a Tribe for an administrative review of an adverse decision by the Secretary.

*Compact* means a legally binding and mutually enforceable written agreement, including such terms as the parties intend shall control year after year, that affirms the government-to-government relationship between a Tribe and the United States.

*Construction* means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of any project ~~eligible for assistance under 23 U.S.C. 202 or 49 U.S.C. 5311~~. Such term includes but is not limited to-

 (1) Preliminary engineering, engineering, and design-related services directly relating to the construction of the eligible project including engineering, design, project development and management, construction project management and inspection, surveying, mapping (including establishing temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration), and architectural-related services;

(2) Reconstruction, resurfacing, restoration, rehabilitation and preservation;

(3) Acquisition of rights-of-way;

(4) Relocation assistance, acquisition of replacement housing sites, and acquisition and rehabilitation, relocation, and construction of replacement housing;

(5) Elimination of hazards of railway-highway grade crossings;

(6) Elimination of roadside hazards;

(7) Improvements that directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas; and

(8) Capital improvements that directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses.

*Consultation* means the process by which the Department shall provide Tribes the opportunity to engage in timely and meaningful government-to-government communication, collaboration and participation with the Department, in accordance with the Federal trust responsibility and the principles of self-governance, before any action is taken which will have Tribal implications as defined by Executive Order 13175, in accordance with the Department’s Tribal Consultation Plan, Executive Order 13175, and 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 perform services.

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

*Design* means services related to preparing drawings, specifications, estimates, and other design submissions specified in the contract or agreement, as well as services provided by or for licensed design professionals during the bidding/negotiating, construction and operational phases of the project.

*Department* means the Department of Transportation.

*Discretionary or competitive grant* means a grant in which the Federal awarding agency may select the recipient from among all eligible recipients in light of the legislative and regulatory requirements and published selection criteria established for a program, and can decide the amount of funding to be awarded.

*Eligible Tribe* means a Tribe that is eligible to participate in the Tribal transportation self-governance program.

*FAST Act* means the “Fixing America’s Surface Transportation Act,” Pub. L. 114-94.

*Funding Agreement* means a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Tribe will carry out, ~~the funds being transferred from all modal administrations~~ in support of those applicable PSFAs and such other terms as are required, or may be agreed upon, pursuant to the Tribal transportation self-governance program.

*Gross Mismanagement* means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds transferred to a Tribe by a compact or funding agreement that results in a significant reduction of funds available for the PSFAs assumed by a Tribe.

*Imminent Jeopardy* means an immediate threat and likelihood of significant devaluation, degradation, damage, or loss of a trust asset, or the intended benefit from the asset caused by the actions or inactions of a Tribe in performing trust functions. This includes disregarding Federal trust standards and/or Federal law while performing trust functions if the disregard creates such an immediate threat.

*Indian* means a person who is a member or citizen of a Tribe [consistent to stat def].

*Indirect Cost Rate* means the rates arrived at through negotiation between a Tribe and the appropriate Federal agency for a Tribe’s allowable indirect costs.

*Indirect Costs* means costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved.

*Inherent Federal functions* means those Federal functions which cannot legally be delegated to a non-Federal entity, including Tribes.

*Intertribal consortium or consortium* means a coalition of two or more separate Tribes that join together for the purpose of participating in self-governance.

*Project* means any undertaking determined as being eligible under the Title and Program for which funds are being provided.

*PSFA* means programs, services, functions, and activities (or portions thereof), as applicable.

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

*Reassumption* means rescission, in whole or part, of a funding agreement and assuming or resuming control or operation of the PSFAs and funding pursuant to 23 U.S.C. 207(f)(2)(A)

*Retrocession* means the voluntary return of a self-governance program, service, function or activity (or portion thereof) for any reason, before or on the expiration of the term of the funding agreement.

*Secretary* means the Secretary of Transportation.

*Secretaries* means the Secretary of Transportation and the Secretary of the Interior.

*Self-Determination Contract* means a contract (or grant or cooperative agreement) entered into pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321) between a Tribe and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Tribes.

*Self-governance* means the program of self-governance established under the Tribal Transportation Self-Governance Program.

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

*State Transportation Department* means that department, commission, board, or official of any State charged by its laws with the responsibility for highway [construction](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=6aa6c97262ac63f5365ab166b97a8368&term_occur=8&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) and/or maintenance as defined in 23 U.S.C. 101(a)(28).

*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

*Transportation planning* means developing land use, economic development, traffic demand, public safety, health and social strategies to meet transportation current and future needs.

*Transportation Programs* means all programs administered or financed under ~~23 U.S.C. 202 and 49 U.S.C. 5311~~, United States Code.

*Tribal Program* means the Tribal transportation self-governance program established under the FAST Act (Pub. L.114-94, 23 U.S.C. § 207)*.*

*Tribal share* means a Tribe’s portion of all eligible funds and resources that support applicable PSFAs (or portions thereof) provided through a compact or funding agreement between the Tribe and the Department that are not required by the Secretary for the performance of inherent federal functions.

*Tribal Transportation Planning funds* means funds referenced in [23 U.S.C. 202(c)](https://www.law.cornell.edu/uscode/text/23/204#j).

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

 *Tribal Transit Program* means a program authorized in 49 U.S.C. 5311(j) as a set aside from the Formula Grants for Rural Areas Program.

*Tribe* means any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community 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 a Tribe has authorized another Tribe or an Intertribal consortium to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this section, the authorized Tribe or Intertribal consortium shall have the rights and responsibilities of the authorizing Tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term ‘Tribe’ as used in this section shall include such other authorized Tribe or Intertribal consortium.

**§ 663.8 Acronyms**

AASHTO—American Association of State Highway and Transportation Officials.

ADR—Alternate dispute resolution

ANCSA—Alaska Native Claims Settlement Act

BIA—Bureau of Indian Affairs, Department of the Interior.

BIADOT—Bureau of Indian Affairs, Indian Services—Division of Transportation—Central Office.

CFR—Code of Federal Regulations.

DOI—Department of the Interior.

DOT—Department of Transportation.

FHWA—Federal Highway Administration, Department of Transportation.

FTA—Federal Transit Administration, Department of Transportation.

ISDEAA—Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.

MUTCD—Manual on Uniform Traffic Control Devices

NEPA—National Environmental Policy Act

NTTFI—National Tribal Transportation Facility Inventory.

OMB – Office of Management and Budget

PM&O—Program management and oversight.

PS&E—Plans, specifications and estimates

PSFA - Programs, Services, Functions, and Activities (or portions thereof).

STIP—Statewide Transportation Improvement Program.

TTP—Tribal Transportation Program.

TTSGP - Tribal Transportation Self–Governance Program

U.S.C.—United States Code

TO BE FURTHER COMPLETED. ALSO, CAN SOME OF THE ABOVE DEFINITIONS BE PULLED INTO THIS SECTION?

**Subpart B - ELIGIBILITY**

**§ 663.50 Who may participate in Tribal Transportation Self–Governance Program (TTSGP)?**

In accordance with 23 U.S.C. 207(b), a Tribe shall be eligible to participate in the TTSGP if the Tribe:

1. requests participation in the TTSGP by resolution or other official action by the governing body of the Tribe; and
2. demonstrates ~~to the satisfaction of FHWA and FTA~~, for the preceding three (3) fiscal years, financial stability and financial management capability, and transportation program management capability.

***OK***

**§ 663.51 How does a Tribe demonstrate financial stability and financial management capability?**

1. A Tribe demonstrates financial stability and financial management capability by providing evidence that, during the preceding three (3) fiscal years, it had no uncorrected significant and material audit exceptions in the required annual audit of the Tribe’s self-determination contracts, self-governance funding agreements, or Tribal Transportation Program Agreement.

1. If a Tribe is not required to submit an annual audit for any or all of the three (3) previous years, the Tribe may demonstrate financial stability and financial management capacity by demonstrating that it has, during the prior three (3) fiscal years, assumed the responsibility to deliver, without sanctions or actions taken against the Tribe for findings of financial management issues, transportation services, projects or programs ~~under a:~~

~~(1) Self-determination, self-governance, or government-to-government funding agreement with the Bureau of Indian Affairs;~~

~~(2) Tribal Transportation Program Funding Agreement with the Federal Highway Administration; or~~

1. ~~a grant award with the Federal Transit Administration.~~

*Federal members note tribal objection*.

1. Tribes not meeting the above financial stability and financial management capability requirements but who can demonstrate that steps have been taken to address the identified audit exceptions or findings may request consideration by the ~~FHWA and FTA Administrators~~ that the Tribe has demonstrated their ability to meet the eligibility requirements of this section.

**§ 663.52  How does a Tribe demonstrate transportation program management capability?**

1. A Tribe demonstrates transportation program management capability if:
	1. it has previously assumed responsibility and successfully delivered transportation services, projects or programs under a:
		1. self-determination, self-governance, or government-to-government funding agreement with the Bureau of Indian Affairs;
		2. Tribal Transportation Program Agreement with the Federal Highway Administration; or
		3. funding grant award with the Federal Transit Administration.
2. Evidence of the successful delivery of transportation services, programs and projects may include:
3. a staffed and operational transportation program or department (identifying personnel, job descriptions and years of experience); or
4. documentation showing the successful completion of transportation projects or operation of a program that is related or similar to the program for which funding is being requested for inclusion into the self-governance agreement.
5. The Department may consider any other criteria that a Tribe may propose that demonstrates transportation program management capability.

**SUBPART C – COMPACTS and FUNDING AGREEMENTS**

*Compacts*

**§ 663.100 What is included in a compact?**

A compact shall set forth the general terms of the government-to-government relationship between the Tribe and the United States under the program and other terms that will continue to apply in future fiscal years consistent with the Federal Government’s trust responsibility and statutory and treaty obligations.

**§ 663.101 Is a compact required to participate in self-governance?**

Yes. Tribes must have a compact in place to participate in self-governance.

**§ 663.102 What is the term of a self-governance compact?**

Upon approval and execution of a self-governance compact, the compact remains in effect for so long as permitted by Federal law or until terminated by mutual written agreement, or retrocession, or reassumption of all PSFAs.

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

Yes. In accordance with 23 U.S.C. 207(m)(1)(E), if each Tribe requests, two or more otherwise eligible Tribes may be treated as a single Tribe for the purpose of participating in self-governance as a consortium.

**§ 663.104 How may a compact be amended?**

Compacts may only be amended by mutual written agreement of the Tribe and the Secretary.

*Funding Agreements*

**§ 663.150 What is a funding agreement?**

A funding agreement is a legally binding and mutually enforceable written agreement between the Secretary and a Tribe that identifies the funds being transferred for the applicable PSFAs or projects that the Tribe will carry out under the Compact with such funds, and such other terms as are required or may be agreed upon by the Secretary and the Tribe pursuant to 23 U.S.C. 207.

**§ 663.151 What funds may be included in a funding agreement?**

1. In accordance with 23 U.S.C. 207(d)(2)(A)(i), the funds eligible for inclusion in a funding agreement, at the option of the Tribe, are:
2. the full tribal share funding provided to the tribe under the Tribal Transportation Program identified in 23 U.S.C. 202;
3. any tribal transit formula funding provided to the tribe under the Tribal Transit Program identified in 49 U.S.C. 5311;
4. any discretionary or competitive grant administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and
5. any discretionary or competitive grant administered by the Department for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.
6. ~~No additional funding, including funds for any costs associated with administrative or contract support costs will be made available to Tribes unless specifically authorized and explicitly provided for through Congressional appropriations.~~
7. The Secretary shall provide funding proportionately for periods covered by joint resolution adopted by Congress making continuing appropriations and authorization extensions, to the extent permitted by such resolutions.
8. ~~The funds provided in a funding agreement may only be consolidated to the extent allowed by and in accordance with the statutes and regulations of the programs from which the funds originated. f~~

**§ 663.152 May a Tribe negotiate a funding agreement at the same time it is negotiating a compact?**

Yes, provided that a tribe has or will have a compact in place before the terms of the funding agreement go into effect. ~~No. In accordance with 23 U.S.C. 207(d)(1), Tribes must have a compact in place before negotiating and entering into a written annual funding agreement.~~

*Ok, understood*

**§ 663.153 May a funding agreement be executed without negotiating a compact?**

No. A compact is a separate document from a funding agreement, and the compact must be executed before or at the same time as a funding agreement.

**§663.154 Which entity is responsible for the transferred funds?**

The Tribe shall be responsible for implementing all projects and PSFAs identified on and using the funds received under a funding agreement and for administering and supervising the project and funds in accordance with this section. In addition, the Tribe must carry out the project or PSFAs in accordance with the funding agreement, the statutes, and the regulations in this part or identified in the funding agreement.

**§ 663.155 May a funding agreement include provisions for the Secretary to perform certain activities associated with the PSFAs performed by the Tribe?**

Yes. In accordance with 23 U.S.C. 207(d)(3)(B)(iv) and (v), a funding agreement must set forth the responsibilities of the Secretary and the Tribe and may include any other provision agreed to by the parties. If the Tribe elects and the Secretary agrees, the funding agreement may include provisions for the Secretary to perform certain activities associated with the PSFAs included in the funding agreement. The Tribe may use eligible funds to pay for (i.e., buyback) such activities.

*Terms in a Funding Agreement*

**§ 663.160 What terms must be included in a funding agreement?**

1. In accordance with 23 U.S.C. 207(d)(3), a funding agreement shall set forth terms that generally identify the PSFAs (or portions thereof) to be performed or administered by the Tribe; and for those PSFAs identified:
	1. the general budget category assigned;
	2. the funds to be provided, including those funds to be provided on a recurring basis;
	3. the time and method of transfer of the funds;
	4. the responsibilities of the Secretary and the Indian Tribe; and
	5. any other provision agreed to by the Indian Tribe and the Secretary.
2. In addition, a provision authorizing the Secretary to terminate the compact or funding agreement (or a portion thereof) and reassume the remaining funding associated with the reassumed PSFAs as provided in 23 U.S.C. 207(f)(2)(A) will also be included unless such provision is included in the compact required under this part.

**§ 663.161 May additional terms be included in a funding agreement?**

Yes. In accordance with 23 U.S.C. 207(d)(3)(B), any other provision agreed to by the Tribe and the Secretary may be included in the funding agreement.

**§ 663.162 What provisions of Pub. L. 93-638 apply to compacts and funding agreements negotiated under 23 U.S.C. 207?**

Except to the extent in conflict with other provisions of 23 U.S.C. 207 (as determined by the Secretary), only the provisions of the Indian Self-Determination and Education Assistance Act (ISDEAA) identified in Subpart L of this part shall apply to compacts and funding agreements (except that any reference to the Secretary shall be treated as a reference to the Secretary of Transportation.)

**§ 663.163 What if a Tribe requests incorporation of an additional provision of Pub. L. 93-638 at the negotiation stage of a compact or funding agreement?**

Only the provisions identified in 663.162 above can be requested for incorporation into a compact or funding agreement. If both parties agree to the incorporation of an additional provision during the negotiation stage of a compact or funding agreement, such provision shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

*Term of a Funding Agreement*

**§ 663.165 What is the term of a funding agreement?**

A funding agreement shall have the term mutually agreed to by the parties. As provided in 23 U.S.C. 207(d)(4)(A), absent notification from a Tribe that it is withdrawing or retroceding the operation of one or more PSFAs (or portions thereof) identified in the funding agreement, termination of the funding agreement by the Secretary under 23 U.S.C. 207(f)(2), or unless agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

**§ 663.166 Does a funding a**g**reement remain in effect after the end of its term?**

Yes. The provisions of a funding agreement, including all recurring increases received for Tribal shares and continuing eligibility for other increases, remain in full force and effect until a subsequent funding agreement is executed unless the funding agreement is terminated by the Secretary as provided in 23 U.S.C. 207(f)(2). As provided in 23 U.S.C. 207(d)(4)(B), upon execution of a subsequent funding agreement by the Secretary and a Tribe, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

**§ 663.167 How is a funding agreement amended?**

A funding agreement may be amended by the parties as provided for in the funding agreement, or as identified in 23 U.S.C. 207(d)(5).

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**SUBPART D - FUNDING**

*General*

**§ 663.250 What funds must the Secretary transfer to a Tribe in a funding agreement?**

1. Subject to the terms of any compact or funding agreement, ~~and the availability of funds~~, the Secretary must transfer to a Tribe all funds provided for in the funding agreement.
2. A funding agreement shall authorize the Tribe to receive funds made available to Tribes through:
3. the full tribal share funding provided to the tribe under the Tribal Transportation Program identified in 23 U.S.C. 202;
4. any tribal transit formula funding provided to the tribe under the Tribal Transit Program identified in 49 U.S.C. 5311;
5. any discretionary or competitive grant administered by the Department that is awarded to the tribe for a tribal transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and
6. any discretionary or competitive grant administered by the Department for a transportation-related purpose administered by the Secretary that is otherwise awarded to the Indian tribe.
7. As prescribed in 23 U.S.C. 207(d)(2)(B), with respect to Tribal shares included in a funding agreement, such funds shall be provided without regard to the agency or office of the Department within which the PSFA (or portion thereof) is performed.
8. The Secretary shall provide funding to the Tribes for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.
9. ~~No additional funding, including funds for any costs associated with administrative or contract support costs will be made available to Tribes unless specifically authorized and explicitly provided for through Congressional appropriations.~~
10. Pursuant to 23 U.S.C. 207(h), the Secretary must include funds in a funding agreement in an amount equal to:
11. the sum of the funding that the Tribe would otherwise receive for the PSFA in accordance with a funding formula or other allocation method established under title 23 or chapter 53 of title 49, United States Code; and
12. 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.
13. ~~any other funds required by section 516(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 5396), as made applicable to the Program by 23 U.S.C. § 207(l)(8).~~

**§ 663.251 When must the Secretary transfer to a Tribe the funds identified in a funding agreement?**

When a funding agreement requires an annual transfer of funding to be made by the Secretary at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made to the Tribe, the first such transfer shall be made by the Secretary not later than 30 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise ~~but only to the level of funds made available~~.

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

The Secretary 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 OMB to the Department and the distribution methodologies and other decisions regarding payment of those funds have been made by the Department.

**§ 663.253 May a Tribe negotiate a funding agreement for a term longer or shorter than one year?**

Yes. Upon the Tribe’s request, the Secretary and the Tribe may negotiate a funding agreement for a term longer or shorter than a year. All references in these regulations to funding agreements shall also include funding agreements for a term longer or shorter than one year.

**§ 663.254 May the Secretary increase the funds made available under the funding agreement?**

Yes. In accordance with 25 U.S.C. 5388(d)(2), the Secretary may increase the funds provided in the funding agreement. However, the Tribe and the Secretary must agree to any transfer of funds to the Tribe unless otherwise provided for in the funding agreement.

*Flexible Financing*

**§663.255 May a funding agreement include provisions pertaining to flexible or innovative financing?**

1. In accordance with 23 U.S.C. 207(d)(2)(C), if agreed upon by both parties, a funding agreement shall include provisions pertaining to flexible financing and innovative financing.
2. The Secretary shall establish the terms and conditions relating to the flexible and innovative financing provisions which shall be consistent with:
3. agreements entered into by the Department under 23 U.S.C. 202(b)(7) and 23 U.S.C. 202(d)(5); or
4. regulations of the Department of the Interior relating to flexible financing contained in 25 CFR 170.

**§663.256 Can a Tribe use funds made available under a Funding Agreement to leverage other funds or to pay back loans?**

Yes. A Tribe can use funds made available under a Funding Agreement to leverage other funds or to pay back transportation related loans unless the use of such funds for such purposes is prohibited by law.

**§663.257 Can a Tribe apply for loans or credit from a State infrastructure bank?**

Yes. A Tribe can apply for loans or credit from a State infrastructure bank. Upon the request of a Tribe, the Department will provide necessary documentation to a State infrastructure bank to facilitate obtaining loans and other forms of credit for a Tribal Transportation Program or other eligible project.

*Interest*

**§ 663.260 May a Tribe keep interest earned on funding identified in a Funding Agreement?**

Yes. A Tribe may keep interest earned on funding identified in a Funding Agreement.

**§ 663.261 How may a Tribe use interest earned on funding identified in a Funding Agreement?**

Interest earned on such funds may be used by the Tribe to carry out eligible transportation related projects and activities.

*Prohibitions*

**§ 663.265 What prohibitions apply to the Secretary’s transfer of funds identified on a funding agreement?**

In accordance with 25 U.S.C. 5388(d)(1)(A) and (B), the Secretary is expressly prohibited from:

1. Failing or refusing to transfer to a Tribe its full share of funds due under the Tribal Transportation Self-Governance Program, except as required by Federal law, and
2. From withholding portions of such funds for transfer over a period of years.

**§ 663.266 May the Secretary reduce the amount of funds made available to a Tribe in a funding agreement to make funding available for monitoring or administration by the Department?**

No. In accordance with 25 U.S.C. 5388(d)(1)(C)(i), the Secretary is prohibited from reducing the amount of funds identified for transfer on a Funding Agreement to make funding available for self-governance monitoring or administration.

**§ 663.267 May the Secretary reduce the amount of formula funds due under the Tribal Transportation Self-Governance Program in subsequent years?**

No. In accordance with 25 U.S.C. 5388(d)(1)(C)(ii), the Secretary is prohibited from reducing 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 PSFAs or award included in a compact or 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 subject to the terms of the funding agreement; or
5. completion of a project, activity, or program for which such funds were provided.

**§ 663.268 May the Secretary 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 Act?**

No. In accordance with 25 U.S.C. 5388(d)(1)(c)(iii), the Secretary may not 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 Tribal Transportation Self-Governance Program.

**§ 663.269 May the Secretary reduce the amount of funds required under 23 U.S.C. 207 to pay for costs of Federal personnel displaced by self-governance compacts and funding agreements under the Tribal Transportation Self-Governance Program?**

No. In accordance with 25 U.S.C. 5388(d)(1)(C)(iv), the Secretary may not reduce the amount of funds required under the Tribal Transportation Self-Governance Program to pay for costs of Federal personnel displaced by Self-Governance compacts and funding agreements.

*Prompt Payment Act*

**§ 663.272 Does the Prompt Payment Act apply to funds transferred to a Tribe in a compact or funding agreement?**

Yes. In accordance with 25 U.S.C. 5388(g), the Prompt Payment Act, 39 U.S.C. 3901 *et seq.,* applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to the Self-Governance Program.

*Financial Standards*

**§ 663.276   What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?**

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

**§ 663.277 May a Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?**

Yes. Pursuant to section 25 U.S.C. 5388(i), all funds paid to a Tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that a Tribe elects to carry over funding from one year to the next, such carryover shall not diminish the amount of funds the Tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

**§ 663.278 Is a Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?**

In accordance with 25 U.S.C. 5388(k), made applicable to the Tribal Transportation Self-Governance Program by 23 U.S.C. 207(l)(3), a Tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement ~~except for any required local match~~. If at any time the Tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Tribe may suspend performance of the activity until such time as additional funds are transferred.

**§ 663.279 Will the Compacts and Funding Agreements be affected by subsequent transportation authorization Acts?**

Unless Congress explicitly revokes the Secretary’s authority to carry out compacts and funding agreements or the funding program under this section is no longer authorized, existing compacts and funding agreements will be unaffected by subsequent transportation authorization Acts. Compacts and funding agreements will continue in force in accordance with 23 U.S.C. 207(d)(4) and will not end due to operation of law or any other default mechanisms.

**Subpart E – FINAL OFFER**

**§ 663.300 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 compacts, funding agreements, or amendments thereof.

**§ 663.301 When should a final offer be submitted?**

A final offer should be submitted when the Secretary and a Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels).

**§ 663.302 How does the Tribe submit a final offer?**

(a) A written final offer should be submitted:

(1) During negotiations to the agency lead negotiator *or*

(2) Thereafter to the Secretary or his/her delegated official.

(b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a “Final Offer.”

**§ 663.303 What does a final offer contain?**

A final offer contains a description of the disagreement between the Secretary and the Tribe, the Tribe's final proposal to resolve the disagreement, and the person authorized to act on behalf of the Tribe.

**§ 663.304 How long does the Secretary have to respond to a final offer?**

In accordance with 25 U.S.C. 5387(b), the Secretary will have 45 days to respond to the final offer. The 45-day review period begins from the date the DOT receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

**§ 663.305 May the Secretary request and obtain an extension of time of the 45-day review period?**

Yes. The Secretary may request an extension of time before the expiration of the 45-day review period. The Tribe may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person authorized by the Tribe to grant the extension before the expiration of the 45-day review period as identified in xxx.304

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

The final offer is accepted automatically by operation of law.

**§ 663.307 If the 45-day review period or extension thereto, has expired, and the Tribe’s offer is deemed accepted by operation of law, are there any exceptions to this rule?**

No. There are no exceptions to this rule if the 45-day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law.

**§ 663.308 Once the Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?**

After the Tribe's final offer is accepted or deemed accepted, the terms of the Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

*Rejection of Final Offers*

**§ 663.310 On what basis may the Secretary reject a Tribe's final offer?**

In accordance with 25 U.S.C. 5387(c), the Secretary may reject a Tribe's final offer for one of the following reasons:

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

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

(c) the Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health and safety; or

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

**§ 663.311 How does the Secretary reject a final offer?**

The Secretary must reject a final offer by providing written notice to the Tribe based on the criteria in § 663.310 not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Tribe consistent with this subpart.

**§ 663.312 Is technical assistance available to a Tribe to avoid rejection of a final offer?**

Yes. Upon receiving a final offer, the Secretary must provide technical assistance and share all relevant information with the Tribe so as to attempt avoid rejection of a final offer.

**§ 663.313 Who has authority to make a decision that relates to an appeal of the rejection of a final offer by the Department?**

* 1. The procedures for appeals are found in subpart N of this part.
	2. In accordance with 23 U.S.C. 207(f)(1), a decision that relates to an appeal of the rejection of a final offer by the Department shall be made by either:
		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 judge.

**§ 663.314 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?**

Yes, subject to 25 U.S.C. 5387(c)(1)(D).

**§ 663.315 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement, or amendment?**

No. Appealing the decision of the Secretary does not prevent entering into the compact, funding agreement, or amendment.

**§ 663.316 What is the burden of proof in an appeal from rejection of a final offer?**

The burden of proof for an appeal shall be as identified in Subpart N.

**Subpart F – General Provisions**

*Redesign*

**§ 663.400 May a Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?**

~~Only the formula or Tribal share funding identified in xxx.250(b)(1) and (2) and made available to a Tribe through a funding agreement may be redesigned or consolidated by the Tribe, but only to the extent allowed by and in accordance with the statutes and regulations of those programs.~~

*Conflict of Interest*

**§ 663.405 How does the Secretary address a perceived or actual conflict between provisions of the Indian Self-Determination and Education Assistance Act and 23 U.S.C. 207?**

If the Secretary determines there is a conflict between 23 U.S.C. 207 and the provisions of ISDEAA that are identified in 23 U.S.C. 207(l), the Secretary shall resolve the conflict in a manner most favorable to the tribe ~~shall apply~~.

**§ 663.406 Are Tribes required to address potential conflicts of interest?**

Yes. Tribes participating in self-governance under TTPSG must ensure that internal measures and controls, are in place to address conflicts of interest in the administration of self-governance PSFAs.

*Records*

**§ 663.410 Is a Tribe required to maintain a recordkeeping system?**

Yes. Tribes are required to maintain records and provide Federal agency access to those records as provided in 25 U.S.C. 5386(d) and the statutory ~~or regulatory~~ requirements of the funding being received.

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

No. As identified in 25 U.S.C. 5386(d) except to the extent that a Tribe specifies otherwise in its compact or funding agreement, the records of the Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

**§ 663.412 Is the Tribe required to make its records available to the Secretary?**

Yes. After 30 days advance written notice from the Secretary, the Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system and audit requirements~~, as well as to other records as identified in the regulations for the program for which the funds were received~~.

**§ 663.413 How long must a Tribe keep management system records?**

The Tribe must retain records for three years ~~as required in 2 C.F.R. 200.333~~.

*Cost Principles*

**§ 663.415 Are Self-Governance Tribes required to undertake annual audits?**

Self-Governance Tribes that meet the applicable thresholds under the OMB Circular, 2 C.F.R. 200.501, as updated by the Director of the Office of Management and Budget must undertake annual audits pursuant to those regulations*.*

**§ 663.416 Are there exemptions to the audit requirements?**

Yes. The exemptions to the audit requirements are contained and described in 2 C.F.R. 200.

**§ 663.417 What cost principles must a Self-Governance Tribe follow?**

A Self-Governance Tribe must apply the cost principles of the applicable OMB circular, except as modified by:

(a) Section 106(k) of the Indian Self Determination and Education Assistance Act 25 U.S.C. 5325(a)-(k), except that the eligibility of contract support costs does not authorize or appropriate additional funds for these expenditures.

(b) Other provisions of law, or

(c) Any subsequent exemptions granted by OMB to applicable OMB circulars.

**§ 663.418 May the Secretary require audit or accounting standards other than those specified in § 663.xxx?**

No. No other audit or accounting standards shall be required by the Secretary.

**§ 663.419 How much time does the Federal Government have to make a claim against a Tribe relating to any disallowance of costs, based on an audit conducted under § 663.800?**

In accordance with 25 U.S.C. 5325(f), any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

**§ 663.420 When does the 365 day period commence?**

In accordance with 25 U.S.C. 5325(f), for the purpose of determining the 365-day period, an audit report is deemed received on the date of electronic submission to the Federal Audit Clearinghouse, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the audit report as insufficient due to non-compliance with the applicable OMB Circular, United States Code or noncompliance with any other applicable law.

**§ 663.421 Where do Tribes send their audit reports?**

Any required audits must be submitted to the Federal Audit Clearinghouse pursuant to OMB procedures ~~with a copy provided to the agency from which funds have been provided~~.

*Non-Duplication*

**§ 663.425 If a Tribe receives 23 U.S.C. 202 funding under a compact and funding agreement, is it entitled to enter into a separate program agreement with the Secretary for such funds?**

No. For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Tribe is not entitled to contract with the Secretary for the same funds or PSFAs under 23 U.S.C. 202(b)(6) or 23 U.S.C. 202(b)(7) or under agreements with the Secretary of Interior.

*Federal Tort Claims Act (FTCA)*

**§ 663.430 Are Tribes and their employees carrying out a project or PFSA funded through a Funding Agreement covered by the Federal Tort Claims Act (FTCA)?**

Yes. In accordance with 25 U.S.C. 5396 and section 314 of Public Law 101-512 [25 U.S.C. 5321 note] and 25 U.S.C. 5321(d), Tribes and their employees carrying out projects or PSFAs are covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

Include the name of the DOT contact for FTCA notice here, but cross-reference of Part 900 Subpart M is sufficient and simplifies these provisions.

**§ 663.431 Do Tribes need to be aware of areas which FTCA does not cover?**

Yes. There are claims against Tribes which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. The regulations under this sub-heading are not intended as a definitive description of coverage, which is subject to review by the Department of Justice and the courts on a case-by-case basis.

**§ 663.432 What claims are expressly barred by FTCA and therefore may not be made against the United States, a Tribe, or Consortium?**

Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

**§ 663.433 What claims may not be pursued under FTCA?**

The following claims may not be pursued under FTCA:

1. Claims against subcontractors arising out of the performance of subcontracts with a Tribe;
2. Claims for on-the-job injuries which are covered by workmen's compensation;
3. Claims for breach of contract rather than tort claims; or
4. Claims resulting from activities performed by an employee which are outside the scope of employment.

**§ 663.434 What remedies are expressly excluded by FTCA and therefore are barred?**

The following remedies are expressly excluded by FTCA and barred:

1. Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and
2. Other remedies not permitted under applicable State law.

**§ 663.435 Is there a deadline for filing FTCA claims?**

Yes. Pursuant to 28 U.S.C. 2401, claims shall be filed within 2 years of the date of accrual.

**§ 663.436 How long does the Federal government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?**

The Federal government has 6 months to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed.

**§ § 663.437 Does FTCA apply to a self-governance compact and funding agreement if FTCA is not referenced in the compact or funding agreement?**

Yes, FTCA applies even though clauses regarding FTCA are optional in a compact or funding agreement.

**§ § 663.438 To what extent shall the Tribe cooperate with the Federal government in connection with tort claims arising out of the Tribe's performance?**

(a) The Tribe shall designate an individual to serve as tort claims liaison with the Federal government.

(b) As part of the notification required by 28 U.S.C. 2679(c), the Tribe shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the Tribe or any of its employees that relates to performance of a self-governance compact and funding agreement or subcontract.

(c) The Tribe, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased factual report of the incident so that the claim may be properly evaluated. This report shall be completed within 60 days of notification of the filing of the tort claim and include the following, as appropriate:

(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 and/or Federal employees involved as participants or witnesses;

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

(5) An accurate description of all government and other 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 contract 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, such as may be necessary or useful for purposes of claim determination by the Federal agency; and

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

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

(e) If requested by the Secretary, the Tribe shall 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 Secretary, the Tribe shall authorize representatives of the Secretary to settle or defend any claim and to represent the Tribe in or take charge of any action.

1. If the Federal government undertakes the settlement or defense of any claim or action, the Tribe shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.
2. ~~Failure by a Tribe to assist the Federal government in this work may affect its future eligibility to participate in this program.~~

**§ § 663.439 Does FTCA extend to a Tribe’s subcontractors under a compact?**

No. Subcontractors or sub-grantees providing services to a Tribe are generally not covered. Accordingly, a Tribe shall include in any construction contracts entered into with funds provided under a compact and funding agreement a requirement that Tribal contractors maintain workers compensation, auto, and general liability insurance coverage consistent with statutory minimums and local construction industry standards.

**§ § 663.440 Does FTCA cover employees of the Tribe who are paid by the Tribe from funds other than those provided through the self-governance 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 the self-governance compact and funding agreement.

**§ § 663.441 May persons who are not Indians or Alaska Natives assert claims under FTCA?**

Yes. Non-Indian individuals served under the self-governance compact and funding agreement, may assert claims under this Subpart.

**§ § 663.442 If the Tribe’s employee receives a notification, including but not limited to a summons and/or a complaint alleging a tort covered by FTCA, what should the Tribe do?**

As part of the notification required by 28 U.S.C. 2679(c), if the Tribe’s employee receives a summons and/or complaint alleging a tort covered by FTCA, the Tribe should immediately:

(a) Inform the POC identified in the compact or funding agreement;

(b) Inform the Tribe's tort claims liaison;

(c) XXX at US DOT; and

(d) Forward all of the materials identified in § 663.1916(c) to the contacts given above.

**§ 663.443 Does the year PSFA’s are funded affect FTCA coverage?**

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

*Retention of Federal employee coverage, rights and benefits by employees of Tribes*

**§ 663.445 Do provisions allowing for Federal employees who change jobs to work for Tribes to provide services under compacts and funding agreements under this section retain Federal employee rights and benefits?**

The provisions available to Federal employees who leave Federal employment to work for Tribes as described in 25 U.S.C. 5323 apply equally to eligible Federal employees who leave for employment by Tribes in connection with governmental activities under the TTSGP. For the purposes of this provision, “employee” means an employee as defined in 5 U.S.C. 2105.

*Civil Actions*

 **§ 663.450 Must the Secretary review attorney or other professional contracts entered into by Tribes?**

No. Further, neither 25 U.S.C. 81 nor 25 U.S.C. 476 shall apply to attorney or professional service contracts entered into by Tribes.

*Federal Examinations and Audits*

**§ 663.455 How long must Tribes make records available for Federal examination or audit?**

Tribes shall keep books, documents, papers, and records of funding, grants, and State-provided funds for three years such that the Secretary or the Comptroller General may have access to the records for audit and examination related to grants, contracts, compacts subcontracts, sub-grants, or other arrangements.

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

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

**§ 663.457 What penalties apply for embezzlements, willful misapplication of funding, thefts, or fraud connected to recipients of Federal funding?**

In accordance with 25 U.S.C. 5306, 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 shall 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 shall be not more than $1,000 and imprisonment not more than 1 year, or both.

*Prevailing Wages*

**§ 663.460 Do the wage and labor standards in the Davis-Bacon Act apply to employees of the Tribes?**

No. Wage and labor standards of the Davis-Bacon Act do not apply to employees of Tribes. However, Davis Bacon wage rates apply to all Tribal contractor and subcontractors.

**§ 663.461 Does Indian preference apply to services, activities, programs, and functions performed under a self-governance compact and funding agreement?**

Tribal law must govern Indian preference in employment, where permissible, in contracting and subcontracting, and employment and training, in performance of a compact and funding agreement. To the extent feasible, preference in the award of subcontracts and sub-grants in connection with the administration of compacts and funding agreements shall be given to Indian organizations and to Indian-owned economic enterprises, as defined in 25 U.S.C. 1542.

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

When a compact or funding agreement is intended to benefit one Tribe, the Tribal employment or contract preference laws adopted by such Tribe shall govern with respect to the administration of the compact, funding agreement (or portion thereof).

*Supply and Leases*

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

Yes. A Tribe and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) that must be available to the Tribe and to its employees to the same extent as if the Tribe were a Federal agency. While implementation of this provision is the responsibility of the General Services Administration, the Department shall assist the Tribes to resolve any barriers to full implementation that may arise to the fullest extent possible.

**§ 663.466 Can a Tribe lease Tribal property back to the Secretary?**

Yes. Leasing processes will follow the provisions of 25 U.S.C 2507(a)(7) and 25 C.F.R. 900.69 through 900.74.

*Consultation*

**§ 663.470** **Must the Secretary consult with Tribes regarding budget of programs, grants, services, and initiatives that affect Tribes and Tribal transportation interests?**

Yes. The Secretary shall consult on an annual basis with, and solicit the participation of Tribes in the development of the budgets for program, grants, services, initiatives, or other departmental functions that affect Tribes and Tribal transportation interests.

**§ 663.471 Must the Secretary consult with Tribes regarding proposed changes to funding formulas, fees, taxes, or other means of revenue creation the Department may suggest to Congress, or similar proposals to which the Department plans to respond?**

Yes. When statutorily allowed, the Secretary will consult with Tribes when the Department is formulating revenue creation strategies for Tribal programs, including proposed changes to program formulas. Consultation should be carried out as early as possible in the process of formulating strategies or formulating responses to proposed strategies.

*Reporting*

**§ 663.475 Are there reporting requirements for Tribes participating in the TTSGP?**

Tribes shall provide reports mandated by statute for the PSFAs performed under the compact and funding agreement, together with the reporting requirements set out in this regulation. No additional reporting is required under this part.

**~~§ 663.476 What are the purposes of the Tribal reporting requirements?~~**

~~Tribal reports enable the Secretary to confirm that the Tribe is complying with the statutory reporting requirements of each of the programs assumed by the Tribe. This information will be used to assist the Secretary in advocating for Tribal transportation systems, budget formulation, other reporting required by statute, and sharing of best practices.~~

**~~§ 663.477 Must a Tribe submit confidential, proprietary, or commercial information in its reporting?~~**

~~No. Unless required by statute, a tribe need not submit confidential, proprietary or commercial information.~~

**~~§ 663.478 Where do Tribes submit the required reports?~~**

~~Tribes shall submit the required reports to the DOT XXX or on a nationwide data-base system as set forth in the funding agreement.~~

**~~§ 663.479 Are there any other reports a Tribe must submit to other DOT administrations, bureaus or programs?~~**

~~No. Unless authorized by statute, or an applicable regulation referenced and included in a Compact or Funding Agreement, no additional reporting is required.~~

**~~§ 663.480 May a Self-Governance Tribe participate in a voluntary transportation data collection effort with the DOT?~~**

~~Yes. In order to share information with the Secretary about Tribal unmet needs, potential program improvements, best practices and budget formulation, Tribes may participate, at their option, in transportation data collection efforts.~~

*Financial, Procurement, and Property Management Systems and Standards*

*General*

**§ 663.481— What Financial, Procurement, and Property Management Systems and Standards apply to the TTSGP?**

Applicable financial, procurement, and property management systems and standards are listed in 25 C.F.R. 900.42 to 900.60.

**§ 663.482 What provisions of the Uniform Grant Guidance (2 CFR 200) apply to TTSGP compacts and funding agreements?**

Tribes and Intertribal consortiums are required to comply with the provisions of 2 C.F.R 200, including the provisions that make special accommodation for the operation of programs under the ISDEAA. Tribes are not required to comply with any provisions of 2 CFR 200 that are not made expressly applicable to Tribes administering PSFAs under the ISDEAA, including but not limited to 2 CFR 1201.

**§ 663.483 What program management requirements apply to Tribes or Intertribal consortiums participating in the TTSGP?**

When carrying out TTSGP compact or funding agreement, Tribes and Intertribal consortiums shall develop, implement, and maintain systems that meet the minimum standards set forth in this subpart, unless one or more of the standards have been waived, in whole or in part.

**§ 663.484 Do these standards apply to the contractors of a Tribe or Intertribal consortium?**

A Tribe or Intertribal consortium is authorized to require that its contractors comply with some or all of the standards in this subpart when contractors are retained to assist the Tribe or Intertribal consortium in carrying out a TTSGP compact or funding agreement.

**§ 663.485 What is the difference between a standard and a system?**

(a) Standards are the minimum baseline requirements for the performance of an activity. Standards establish the “what” that an activity should accomplish.

(b) Systems are the procedural mechanisms and processes for the day-to-day conduct of an activity. Systems are “how” the activity will be accomplished.

**§ 663.486 How are a Tribe's or Intertribal consortium’s management standards and management systems evaluated?**

Management systems are evaluated by an independent auditor through the annual single agency audit report that is required by the Single Agency Audit Act and 2 CFR Part 200.

**§ 663.487 When does the Secretary review the management systems of a Tribe or Intertribal consortium participating in the TTSGP?**

When the Tribe or Intertribal consortium submits an initial request to enter into a TTSGP compact, the Tribe or Intertribal consortium shall demonstrate, to the Secretary’s satisfaction that it has the management systems in place to meet the standards set forth in this subpart. The Secretary shall confirm in writing within 60 days that the Tribe or Intertribal consortium’s management systems are or are not sufficient to meet the standards in this subpart.

*Financial Management Systems and Standards*

**§ 663.490 What are the general financial management system standards that apply to a Tribe carrying out a TTSGP compact or funding agreement?**

A Tribe shall expend and account for TTSGP funds in accordance with the statutory requirements of the funds being provided as well as applicable Tribal laws and procedures.

**§ 663.491 What are the general financial management system standards that apply to a Intertribal consortium carrying out a TTSGP compact or funding agreement?**

An Intertribal consortium shall expend and account for TTSGP funds in accordance with the procedures of the Intertribal consortium.

**§ 663.492 What minimum general standards apply to Tribes or Intertribal consortium financial management systems when carrying out a TTSGP compact or funding agreement?**

The fiscal control and accounting procedures of a Tribe or Intertribal consortium shall be sufficient to:

(a) Permit preparation of reports required by a TTSGP compact or funding agreement and the Act; and

(b) Permit the tracing of TTSGP funds to a level of expenditure adequate to establish that they have not been used in violation of any restrictions or prohibitions contained in any statute that applies to the TTSGP compact or funding agreement.

**§ 663.493 What specific minimum requirements shall a Tribe or Intertribal consortium’s financial management system contain to meet these standards?**

A Tribe or Intertribal consortium’s financial management system shall include provisions for the following elements.

(a) Financial reports. The financial management system shall provide for accurate, current, and complete disclosure of the financial results of TTSGP compact or funding agreement activities.

(b) Accounting records. The financial management system shall maintain records sufficiently detailed to identify the source and application of TTSGP compact or funding agreement funds received by the Tribe or Intertribal consortium. The system shall 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 shall maintain effective control and accountability for all TTSGP funds received and for all Federal real property, personal property, and other assets furnished for use by the Tribe or Intertribal consortium under the TTSGP compact or funding agreement.

(d) Budget controls. The financial management system shall permit the comparison of actual expenditures or outlays with the amounts budgeted by the Tribe or Intertribal consortium for each TTSGP compact or funding agreement.

(e) Allowable costs. The financial management system shall be sufficient to determine the reasonableness, allowability, and allocability of TTSGP compact or funding agreement costs based upon the terms of the TTSGP compact or funding agreement.

**§ 663.494 What requirements are imposed upon the Secretary for the transfer of funds by these standards?**

The Secretary shall establish procedures, consistent with statutory requirements and in compliance with the TTSGP compact and funding agreement, for the transfer of funds to the Tribe or Intertribal consortium.

*Procurement Management Systems and Standards*

**§ 663.495 When procuring property or services with TTSGP funds, can a Tribe or Intertribal consortium follow the same procurement policies and procedures applicable to other Tribe or Intertribal consortium funds?**

Tribes and Intertribal consortiums shall have standards that conform to the standards in this subpart. If the Tribe or Intertribal consortium relies upon standards different than those described below, it shall identify the standards it will use as a proposed waiver in the initial TTSGP compact proposal or as a waiver request to an existing compact.

**§ 663.496 If the Tribe or Intertribal consortium does not propose different standards, what basic standards shall the Tribe or Intertribal consortium follow?**

(a) The Tribe or Intertribal consortium shall ensure that its vendors and contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase agreements or orders.

(b) The Tribe or Intertribal consortium shall maintain written standards of conduct governing the performance of its employees who award and administer contracts funded by a TTSGP compact or funding agreement.

(1) No employee, officer, elected official, or agent of the Tribe or Intertribal consortium shall 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 Tribe or Intertribal consortiums conflict of interest policies, would be involved.

(2) An employee, officer, elected official, or agent of a Tribe or Intertribal consortium, or of a subcontractor of the Tribe or Intertribal consortium, is not allowed to solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, with the following exemptions. The Tribe or Intertribal consortium may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.

(3) These standards shall also provide for penalties, sanctions, or other disciplinary actions for violations of the standards.

(c) The Tribe or Intertribal consortium shall review proposed procurements to avoid buying unnecessary or duplicative items and ensure the reasonableness of the price. The Tribe or Intertribal consortium should consider consolidating or breaking out procurement to obtain more economical purchases. Where appropriate, the Tribe or Intertribal consortium shall compare leasing and purchasing alternatives to determine which is more economical.

(d) The Tribe or Intertribal consortium shall conduct all major procurement transactions 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.

(1) Tribes or Intertribal consortiums shall develop their own definition for “major procurement transactions.”

(2) 25 U.S.C 5307(b) regarding Indian preference and Tribal preference, shall be applied to any procurement award in accordance with that section.

(e) The Tribe or Intertribal consortium shall make procurement awards only to responsible entities who have the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Tribe or Intertribal consortium 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.

(f) The Tribe or Intertribal consortium shall maintain records on the significant history of all major procurement transactions. These records may 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.

(g) The Tribe or Intertribal consortium 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.

(1) The settlement of any protest, dispute, or claim shall not relieve the Tribe or Intertribal consortium of any obligations under a TTSGP compact or funding agreement.

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

**§ 663.497 What procurement standards apply to contracts?**

Each contract funded by a TTSGP compact or funding agreement shall at a minimum:

(a) Be in writing;

(b) Identify the interested parties, their authorities, and the purposes of the contract;

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

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

(e) Be subject to 25 U.S.C 5307(b) to the extent identified in xxx.496.

**§ 663.498 Do Federal laws, regulations, and Executive Orders apply to a Tribe's or Intertribal consortium’s contractors or subcontractors?**

Federal laws and regulations may apply to contracts funded by TTSGP compacts and funding agreements. As a result, contracts should contain a provision informing the recipient that their award is funded with TTSGP funds and that the recipient is responsible for identifying and ensuring compliance with applicable Federal laws and regulations. The Secretary and the Tribe or Intertribal consortium may, through negotiation, identify all or a portion of such requirements in the TTSGP compact or funding agreement and, if so identified, these requirements should be identified in the Tribe's or Intertribal consortium’s contracts funded from TTSGP compacts and funding agreements.

*Property Management Systems and Standards*

**§ 663.500 What is a Tribe or Intertribal consortium’s property management system expected to do?**

1. A Tribe or Intertribal consortium’s property management system shall account for all property furnished or transferred by the Secretary for use under a TTSGP compact or funding agreement or acquired with TTSGP compact funds.
2. The property management system shall contain requirements for the use, care, maintenance, and disposition of Federally-owned and other property as follows:
3. Where title vests in the Tribe, in accordance with Tribal law and procedures; or
4. In the case of an Intertribal consortium, according to the internal property procedures of the Intertribal consortium.

**§ 663.501 What type of property is the property management system required to track?**

The property management system of the Tribe or Intertribal consortium shall track:

(a) Personal property and/or rolling stock with an acquisition value in excess of $5,000 per item

(b) Sensitive personal property, which is all personal property that is subject to theft and pilferage, as defined by the Tribe or Intertribal consortium. All firearms shall be considered sensitive personal property; and

(c) Real property provided by the Secretary for use under the compact and funding agreement.

**§ 663.502 What kind of records shall the property management system maintain?**

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

**§ 663.503 Should the property management system prescribe internal controls?**

Yes. Effective internal controls should include procedures:

(a) For the conduct of periodic inventories;

(b) To prevent loss or damage to property; and

(c) To ensure that property is used for a Tribe or Intertribal consortium’s TTSGP compact or funding agreement(s) until the property is declared excess to the needs of the PSFAs assumed under the TTSGP compact, consistent with the Tribe or Intertribal consortium’s property management system.

**§ 663.504 What are the standards for inventories?**

1. A physical inventory should be conducted at least once every 2 years.
2. The results of the inventory shall be reconciled with the Tribe or Intertribal consortium’s internal property and accounting records.

**§ 663.505 What maintenance is required for property?**

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 or Intertribal consortium and the Secretary in any express warranties or guarantees covering the property.

**§ 663.506 What if the Tribe or Intertribal consortium chooses not to take title to property furnished or acquired under the TTSGP compact or funding agreement?**

If the Tribe or Intertribal consortium chooses not to take title to property furnished by the government or acquired with TTSGP funds, title to the property remains vested in the Secretary and appropriate disposition procedures will apply. A list of Federally-owned property to be used under the TTSGP compact shall be included in the funding agreement.

**§ 663.507 Do the same accountability and control procedures described above apply to Federal property?**

Yes, except that requirements for the inventory and disposal of Federal property are different.

**§ 663.508 How are the inventory requirements for Federal property different than for Tribal property?**

There are three additional requirements for Federal property:

(a) The Tribe or Intertribal consortium shall conduct a physical inventory of the Federally-owned property and reconcile the results with the Tribe or Intertribal consortium’s property records annually;

(b) Within 90 days following the end of an annual funding agreement, the Tribe or Intertribal consortium shall certify and submit to the Secretary an annual inventory of all Federally-owned real and personal property used in the contracted program; and

(c) The inventory shall report any increase or decrease of $5,000 or more in the value of any item of real property.

**§ 663.509 What action must the Tribe undertake prior to disposing any Federal personal property?**

Prior to disposing of any Federally owned personal property, including rolling stock, the Tribe shall report to the Secretary in writing of its status (IE: worn out, lost, stolen, damaged beyond repair, or no longer needed for the performance of the PSFAs assumed under the TTSGP compact).

*Surplus and Excess Equipment*

**§ 663.510 What is the purpose of this section?**

This section provides information and requirements for the transfer of title for Federal property and equipment, the donation of Federal excess and surplus property to Tribes carrying out TTSGP compacts and funding agreements, as well as the procedures used for the acquisition of property with funds provided under such agreements.

**§663.511 How will the Secretary exercise discretion to acquire and donate excess and surplus Federal property to a Tribe?**

The Secretary will exercise discretion in a way that gives maximum effect to the requests of Tribes for donation of excess or surplus Federal property, provided that the requesting Tribe shall state how the requested property is appropriate for use for any purpose for which a TTSGP compact and funding agreement is authorized. The Secretary shall assist the Tribes to resolve any barriers to full implementation that may arise to the fullest extent possible.

*Government-Furnished Equipment*

**§663.515 How does a Tribe or Intertribal consortium obtain title to property furnished by the Federal government, where such property is available, for use in the performance of a TTSGP compact or funding agreement?**

(a) If the Tribe or Intertribal consortium is assuming a USDOT program that has property or equipment:

**(1)** The Secretary, in consultation with each Tribe or Intertribal consortium, shall develop a list of the property used in a TTSGP compact or funding agreement.

**(2)** The Tribe or Intertribal consortium shall indicate any items on the list to which the Tribe or Intertribal consortium wants the Secretary to retain title.

**(3)** The Secretary shall provide the Tribe or Intertribal consortium with any documentation needed to transfer title to the remaining listed property to the Tribe or Intertribal consortium.

 **(b)** For government-furnished real and personal property made available to a Tribe or Intertribal consortium on or after October 25, 1994:

**(1)** The Tribe or Intertribal consortium shall take title to all property unless the Tribe or Intertribal consortium requests that the United States retain the title.

**(2)** The Secretary shall determine the presence of any hazardous substance activity, as defined in 41 CFR 10147.202.2(b)(10).

**§663.516 Is government-furnished property received from the Department of the Interior to which a Tribe or Intertribal consortium holds title eligible for facilities operation and maintenance funding from the Secretary of the Interior?**

Yes, in accordance with 25 U.S.C. 450j-1(f)(1)-(2).

*Property Purchased with TTSGP Funds*

**§ 663.520 Who takes title to property purchased with funds under a TTSGP compact or funding agreement?**

The Tribe takes title to such property, unless the Tribe chooses to have the United States take title. In that event, the Tribe must inform the Secretary of the purchase and identify the property and its location in such manner as the Tribe or and the Secretary deem necessary. A request for the United States to take title to any item of tribally purchased property may be made at any time. A request for the Secretary to take fee title to real property shall be expeditiously processed in accordance with applicable Federal law and regulation.

**§ 663.521 May the Secretary acquire title to property purchased from funds provided under a TTSGP compact or funding agreement?**

(a) Yes. But only when a TTSGP compact, or portion thereof, is retroceded, reassumed, terminated, or expires, and the Secretary is required to transfer control of the compacted program to the Secretary of the Interior for continued service to the affected Tribe. For these cases, the property must be for a PSFA that the Secretary of the Interior would normally perform or undertake. Under such circumstances, the Secretary of Interior shall have the option to take title to any item of property purchased with funds provided under a TTSGP compact or funding agreement:

(1) Whose title has been transferred to a Tribe;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Tribe, in excess of $5,000.

(b) If property referred to in [paragraph (a)](https://www.law.cornell.edu/cfr/text/25/900.93#a) of this section is shared between one or more ongoing portions of the compact and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the Tribe using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

*USDOT Excess Property*

**§ 663.525 What is USDOT excess property?**

USDOT excess property means property under the jurisdiction of the USDOT that is excess to any USDOT modal administrations’ needs and the discharge of their responsibilities.

**§ 663.526 How can Tribes learn about USDOT excess property?**

The Secretary shall not less than annually send to Tribes a listing of all excess USDOT personal property before reporting the property to GSA or to any other Federal agency as excess. The listing shall identify the agency official to whom a request for donation shall be submitted.

**§ 663.527 How can a Tribe acquire excess USDOT property?**

**(a)** The Tribe shall submit to the Secretary a request for specific property that includes a statement of how the property is intended for use in connection with a TTSGP compact or funding agreement. The Secretary shall expeditiously process the request and shall exercise discretion in a way that gives maximum effect to the request of Tribes for the donation of excess USDOT property.

**(b)** If more than one request for the same item of personal property is submitted, the Secretary shall award the item to the requestor whose request is received on the earliest date. If two or more requests are received on the same date, the Secretary shall award the item to the requestor with the lowest transportation costs to deliver the excess USDOT property for use by the Tribe. The Secretary shall make the donation as expeditiously as possible.

**(c)** If more than one request for the same parcel of real property is submitted, the Secretary shall award the property to the Tribe whose reservation, trust land, restricted fee or fee land is closest to the real property requested.

**§ 663.528 Who takes title to excess USDOT property donated to a Tribe?**

The Tribe takes title to donated excess USDOT property. The Secretary shall provide the Tribe with all documentation needed to vest title in the Tribe .

**§ 663.529 Who takes title to any land that is part of excess USDOT real property donated to a Tribe?**

**(a)** If a Tribe requests donation of fee title to excess real property that includes land not held in trust for a Tribe, the Tribe shall so specify in its request for donation. The Secretary shall take the necessary action under Federal law and regulations to transfer the title to the Tribe.

**(b)** If a Tribe or asks the Secretary to donate excess real property that includes land and requests that fee title to the land be held by the United States in trust for a Tribe, the requestor shall submit a resolution of support from the governing body of the Tribe in which the beneficial ownership is to be registered.

**(1)** If the donation request is submitted to the Secretary of Transportation, that Secretary shall take all steps necessary to transfer the land to the Secretary of the Interior with the Tribe’s request and the Tribe's resolution.

**(2)** The Secretary shall not require the Tribe to furnish any information in support of a request other than that required by law ~~or regulation~~.

**§ 663.530 May the Secretary elect to reacquire excess USDOT property whose title has been transferred to a Tribe?**

Yes, but the only circumstances where the Secretary may elect to acquire title to USDOT property purchasedis when the TTSGP compact or portion thereof is retroceded, reassumed, terminated, or expires, and the Secretary is required to transfer control of the compacted program to the Secretary of the Interior for continued service to the affected Tribe. Under such circumstances, the Secretary shall have the option to take title to any item of USDOT excess property:

**(1)** Whose title has been transferred to a Tribe;

**(2)** That is still in use in the program; and

**(3)** That has a current fair market value, less the cost of improvements borne by the Tribe in excess of $5,000.

**§ 663.531 Is excess USDOT real property to which a Tribe has taken title, eligible for facilities operation and maintenance funding from the Secretary?**

Yes, in accordance with 25 U.S.C. 5325(f)(1)-(2).

*Excess or Surplus Government Property*

**§ 663.535 What is excess or surplus government property?**

**(a)** “Excess government 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.

**(b)** “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 (GSA).

**§ 663.536 How may a Tribe receive excess or surplus government property of other agencies?**

**(a)** Upon the request of a Tribe that has executed a TTSGP compact, the Secretary shall notify GSA to request that the Tribe be provided the required authority to use to GSAxcess to identify and select excess or surplus property.

**(b)** The Tribe shall file a request for specific property with the GSA and with the Secretary on the same day, and shall state how the property is appropriate for use for any purpose(s) for which a TTSGP compact and funding agreement is authorized.

**(c)** The Secretary shall expeditiously process such request and shall exercise discretion to acquire the property in the manner described in § [cite to earlier regulation] of this subpart.

**(d)** Upon approval of the Tribe request, the Secretary shall immediately request acquisition of the property from the GSA or the holding agency, as appropriate, by submitting the necessary documentation in order to acquire the requested property prior to the expiration of any “freeze” placed on the property by the Tribe.

**(e)** The Secretary shall specify that the property is requested for donation to a Tribe pursuant to authority provided in 23 U.S.C. §207(*l*)(8).

**(f)** The Secretary shall request a waiver of any fees for transfer of the property in accordance with applicable Federal regulations.

**§663.537 Who takes title to excess or surplus Federal property donated to a Tribe or Intertribal consortium?**

**(a)** Title to any donated excess or surplus Federal personal property shall vest in the Tribe or Intertribal consortium upon taking possession.

**(b)** Legal title to donated excess or surplus Federal real property shall vest in the Tribe or Intertribal consortium upon acceptance by the Tribe or Intertribal consortium of a proper deed of conveyance.

**(c)** If the donation of excess or surplus Federal real property includes land owned by the United States but not held in trust for a Tribe, the Tribe or Intertribal consortium shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of a Tribe.

**(1)** If the Tribe or Intertribal consortium requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title to the Tribe or Intertribal consortium.

**(2)** If the Tribe or Intertribal consortium requests beneficial ownership with fee title to be held by the United States in trust for a Tribe:

**(i)** The Tribe or Intertribal consortium shall submit with its request a resolution of support from the governing body of the Tribe in which the beneficial ownership is to be registered.

**(ii)** If the donation request of the Tribe or Intertribal consortium is submitted to the Secretary of Transportation, that Secretary shall take all necessary steps to acquire the land and transfer it to the Secretary of the Interior and shall also forward the Tribe or Intertribal consortium’s request and the Tribe's resolution.

 **(iii)** The Secretary shall not require submission of any information other than that required by Federal law and regulation unless the Tribe has agreed to their inclusion in its Compact or funding agreement.

**§ 663.538 If a TTSGP compact or portion thereof is retroceded, reassumed, terminated, or expires, may the Secretary reacquire title to excess or surplus Federal property of other agencies that was donated to a Tribe or Intertribal consortium?**

No. The applicable Federal statutes do not grant the Secretary the authority to reacquire title to excess or surplus government property acquired from other agencies for donation to a Tribe or Intertribal consortium.

**663#.539 When may a Tribe or Intertribal consortium dispose of or sell property acquired under this section?**

The property acquired under this section must be used in a manner consistent with the justification submitted at acquisition. The Tribe should notify the Secretary whenever use of the property changes significantly and upon disposal or sale. The intent of this arrangement is to further the work of the transportation program not to generate a profit for the Tribe or intertribal consortium. As such, at the discretion of the Secretary access to surplus and excess property may be terminated for a Tribe or intertribal consortium.**SUBPART G – REGULATION WAIVERS**

**§ 663.550 What effect does this regulation have on Federal program guidelines, manual, or policy directives.**

Subject to 23 U.S.C. 207(n), unless negotiated and agreed to by the Self-Governance Tribe and the Department in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any DOT or OMB circular, policy, manual, guidance, or rule adopted by the Department, except for regulations promulgated under section 207. ~~However, any guidance, policy, or circular required by law cannot be waived. In addition, the Department reserves the right to impose additional safety requirements to the TTSGP that are not part of this rulemaking.~~

**§ 663.551 May a Tribe submit a written request to waive the application of a regulation promulgated under 23 U.S.C. 207?**

Yes. In accordance with 23 U.S.C. 207(j)(2), a Tribe may submit to the Secretary a written request to waive application of a regulation promulgated under this section with respect to a compact or funding agreement. The request shall identify the regulation sought to be waived and the basis for the request.

**§ 663.552 What is the process to approve or deny a request to waive the application of a regulation promulgated under 23 U.S.C. 207?**

(a) Not later than 90 days after the date of receipt of a written request, the Secretary shall approve or deny the request in writing.

(b) The Secretary shall review any application by a Tribe for a waiver bearing in mind increasing opportunities for using flexible policy approaches at the Indian Tribal level.

(c) If the Secretary does not approve or deny a request submitted under subparagraph (a) on or before the last day of the 90-day period referred to in clause (a), the request shall be deemed approved.

(d) If the application for a waiver is not granted, the agency shall provide the applicant with the reasons for the denial as part of the written response required in clause (a).

(e) A decision by the Secretary under this subparagraph shall be final for the Department.

**SUBPART H– RETROCESSION AND WITHDRAWAL**

*Retrocession*

**§ 663.600 What is retrocession?**

Retrocession means the return by a Tribe to the Secretary of any or all PSFAs, that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

**§ 663.601 How does a Tribe retrocede a PSFA?**

The Tribe submits a written notice by certified mail to the Secretary of its intent to retrocede. The notice must specifically identify those PSFAs being retroceded. The notice may also include a proposed effective date of the retrocession.

**§ 663.602 What is the effective date of a retrocession?**

In accordance with 23 U.S.C. 207(e)(2)(B), unless the request for retrocession is rescinded, the retrocession becomes effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of a specification, the retrocession becomes effective on the earlier of:

(1) one (1) year after the date of submission of the request, or

(2) the date on which the funding agreement expires; or

(3) such date as may be mutually agreed upon by the Secretary and the retroceding Tribe, with respect to the Secretary of the Interior.

**§ 663.603 What effect will a retrocession have on a retroceding a Tribe’s rights to contract or compact under the ISDEAA Act?**

As long as all eligibility criteria for the program is met, a retrocession request shall not negatively affect:

(a) Any other Agreement or compact to which the retroceding Tribe is a party;

(b) Any other Agreement or compact the retroceding Tribe may request; and

(c) Any future request by such Tribe to enter into an Agreement or compact for the same program.

**§ 663.604 Will retrocession adversely affect funding available for the retroceded program****?**

No. The Secretary shall ensure that future funding made available to the Tribe at the same level of funding that would have been available if there had been no retrocession.

**§ 663.605 How are funds distributed when a Tribe fully or partially retrocedes from its compact or funding agreement?**

1. Any funds not obligated by the Tribe and associated with the Tribe’s returned PSFAs, less close out costs, must be returned by the Tribe to the Secretary.
2. The Secretary may:
	1. reassume the remaining funding associated with the retroceded PSFAs (or portions thereof) included in the applicable compact or funding agreement;
	2. out of such remaining funds, transfer the funds associated with Department of the Interior PSFAs (or portions thereof) to the Secretary of the Interior to carry out transportation services provided by the Secretary of the Interior; and
	3. distribute funds not transmitted under (b) above in accordance with applicable law.

**§ 663.606 What obligation does the retroceding Tribe have with respect to returning property that was provided by the Secretary under the compact or funding agreement and that was used in the operation of the retroceded program?**

In accordance with 25 U.S.C. 5392(c), on the effective date of any retrocession, the retroceding Tribe, shall, at the option of the Secretary, deliver to the Secretary all requested property and equipment provided by the Secretary under the compact or funding agreement, to the extent used to carry out the retroceded PSFAs, which at the time of retrocession has a per item current fair market value in excess of $5,000 at the time of the retrocession.

*Withdrawal*

**§ 663.610 May a Tribe withdraw from a participating Intertribal consortium?**

Yes. A Tribe may fully or partially withdraw from a participating Intertribal consortium its share of any PSFAs, formula funds, grants, and State transferred funds included in a compact or funding agreement but only to the extent allowed by the terms and conditions of the Agreement in place between the Tribe and the Tribal consortium.

**§ 663.611 When does a withdrawal become effective?**

1. In accordance with 25 U.S.C. 5386(g)(1)(B), a withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating inter-Tribal consortium.
2. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on:
3. The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or
4. Such date as may be mutually agreed upon by the Secretary, the withdrawing Tribe, and the participating Intertribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Tribe or Intertribal consortium.

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

If a Tribe that meets the eligibility criteria identified in 23 U.S.C. 207(b) fully or partially withdraws from a participating inter-Tribal consortium, the withdrawing Tribe is entitled to its Tribal share of all future funds supporting those PSFAs grants, formula funds, and state-transferred funds that the Tribe will be carrying out under its own compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-Tribal consortium).

**§ 663.613 How are funds distributed when a Tribe fully or partially withdraws from a compact or funding agreement administered by an intertribal consortium serving more than one Tribe and the withdrawing Tribe elects not to or is not eligible to enter a compact?**

All funds not obligated and expended by the intertribal consortium associated with the withdrawing Tribe’s returned PSFAs shall be returned by the inter-Tribal consortium to the Department for further transfer based on the type of agreement the Tribe enters into with either the Department of Transportation or Interior.

**SUBPART I – COMPACT AND/OR FUNDING AGREEMENT TERMINATION AND PROGRAM REASSUMPTION**

**§ 663.650 When can the Secretary reassume a compact or funding agreement?**

In accordance with 23 U.S.C. 207(f)(2)(B), the Secretary may reassume a compact or funding agreement, or portion thereof, subject to the steps in this subpart, when the Secretary makes a specific finding, in writing, to the Tribe that the Secretary 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 to carry out the compact or funding agreement, as determined by the Secretary; or

(b) gross mismanagement with respect to funds or programs transferred to the Tribe under the compact or funding agreement, as determined by the Secretary in consultation with the Inspector General of the Department, as appropriate.

**§ 663.651 Can the Secretary reassume a portion of a compact or funding agreement?**

Yes. Subject to the provisions of this subpart, the Secretary may terminate a portion of the compact or funding agreement, including a particular PSFA if the Secretary has sufficient grounds to do so. Unless the Secretary makes specific findings that a compact or funding agreement as a whole meets the thresholds for termination in 663.650, the Secretary shall identify the narrowest portion of the compact or funding agreement the termination of which will alleviate the termination criteria identified in 663.650.

**§ 663.652 What process must the Secretary follow before termination of a compact or funding agreement, or portion thereof?**

Except as provided in §663.654 (immediate termination) prior to a termination becoming effective, the Secretary must:

1. provide written notice and a hearing on the record to the Tribe that is subject to the compact or funding agreement; and
2. Ensure the Tribe has not taken corrective action to remedy the mismanagement of funds or programs or the imminent jeopardy to a trust asset, natural resource, or public health and safety.

**§ ###.604 Does the Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?**

Yes, at the Tribe's request, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § ###.257(b).

**§ ###.605 What happens if the Secretary determines that the Tribe has not corrected the conditions that the Secretary identified in the notice?**

(a) The Secretary shall provide a second written notice by certified mail to the Tribe served by the compact or funding agreement that the compact or funding agreement will be terminated, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the termination;

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

(3) Instructions that explain the Tribe's right to a formal hearing within 30 days of receipt of the notice.

**§ 663.653 What is the earliest date on which a reassumption can be effective?**

Except as provided in § 663.654, no PSFA may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Tribe with an opportunity to take corrective action in response to any adverse final ruling.

**§ 663.654 Does the Secretary have the authority to immediately reassume a PSFA?**

In accordance with 23 U.S.C. 207(f)(2)(D), the Secretary, upon written notification to a Tribe that is subject to a compact or funding agreement, may immediately terminate the compact or funding agreement (or a portion thereof) if:

* 1. The Secretary 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.

 **663.655 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Tribe with a hearing?**

In accordance with 23 U.S.C. 207(f)(2)(D)(ii), if the Secretary immediately reassumes a compact or funding agreement (or portion thereof), the Secretary shall provide the Tribe subject to the compact or agreement with a hearing on the record not later than 10 days after the date of such termination, unless the Tribe and the Secretary agree to an extension or agree that a hearing is not necessary.

**§ 663.656 What is the Secretary’s burden of proof for a hearing or appeal of a decision to reassume a compact or funding agreement (or portion thereof) under the subpart?**

The Secretary shall have the burden of proof in demonstrating by clear and convincing evidence the validity of the grounds for the termination.

**§ 663.657 To what extent may the Secretary require a Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the reassumed program?**

On the effective date of any reassumption, the Tribe, shall, at the option of the Secretary deliver to the Secretary property and equipment provided by the Secretary under the compact or funding agreement, to the extent the property was used to directly carry out the reassumed program, service, function, or activity (or portion thereof), provided that at the time of termination the property has a per item current fair market value, in excess of $5,000 at the time of the termination.

**§ 663.658 Upon termination, what happens to the funding associated with the terminated portions of a compact or funding agreement?**

After a finding resulting in termination, the Secretary may reassume the unobligated and unexpended funds, less close-out costs, associated with the reassumed PSFAs and transfer the funding in accordance with xxx.320.

**Subpart J - DISCLAIMERS**

**§663.700 Are the provisions of an existing Tribal Transportation Program Agreement and Referenced Funding Agreement entered into between a Tribe and the FHWA under 23 U.S.C. 202(b)(7) effective after implementation of these regulations?**

Yes. In accordance with 23 U.S.C. 207(k)(1)(A) and upon the election of a Tribe, the Secretary shall maintain in effect a Tribal Transportation Program Agreement and Referenced Funding Agreement entered into by the Tribe and the FHWA under the authority of 23 U.S.C. 202(b)(7).

**§663.701 Can a Tribe enter into a Tribal Transportation Program Agreement and Referenced Funding Agreement, or renew an existing Agreement with the Secretary, through the FHWA, after the effective date of these regulations?**Yes. As authorized under 23 U.S.C. § 207(k)(1)(B), provided that the Tribe is eligible, a Tribe may enter into a Tribal Transportation Program Agreement and Referenced Funding Agreement under 23 U.S.C. 202(b)(7), or renew an existing Agreement after the effective date of these regulations and such agreements shall be lawful and binding on the parties.

 **§663.702 May a Tribe with a current Tribal Transportation Program Agreement and Referenced Funding Agreement under 23 U.S.C. 202(b)(7) also negotiate a Compact and Funding Agreement for some or all eligible PSFAs under this Part?**Yes. Provided that the Tribe is eligible to participate in the TTSGP as identified under Subpart B herein, the Tribe may elect to negotiate a Compact and Funding Agreement for Department PSFA’s under this part, as long as it is accordance with all applicable Non-Duplication clauses.

**SUBPART K - APPLICABILITY of ISDEAA**

**§ 663.750 What provisions of the ISDEAA apply to compacts and funding agreements developed under this Part?**

Except to the extent in conflict with 23 U.S.C. 207, (as determined by the Secretary), the following provisions of the Indian Self-Determination and Education Assistance Act shall apply to compact and funding agreements developed under this Part (except that any reference to the Secretary of the Interior or the Secretary of Health and Human Services in such provisions shall be treated as a reference to the Secretary of Transportation):

(1) Subsections (a), (b), (d), (g), and (h) of 25 U.S.C. 5386, relating to general provisions;

(2) Subsections (b) through (e) and (g) of 25 U.S.C. 5387, relating to provisions relating to the Secretary.

(3) Subsections (a), (b), (d), (e), (g), (h), (i), and (k) of 25 U.S.C. 5388, relating to transfer of funds.

(4) Section 510 of 25 U.S.C. 5390 relating to Federal procurement laws and regulations.

(5) Section 511 of 25 U.S.C. 5391, relating to civil actions.

(6) Subsections (a)(1), (a)(2), and (c) through (f) of 25 U.S.C. 5392, relating to facilitation, except that subsection (c)(1) of that section shall be applied by substituting transportation facilities and other facilities’ for ‘school buildings, hospitals, and other facilities’.

(7) Subsections (a) and (b) of section 515 of 25 U.S.C. 5395, relating to disclaimers.

(8) Subsections (a) and (b) of section 516 of 25 U.S.C. 5396, relating to application of title I provisions.

(9) Section 518 of 25 U.S.C. 5398, relating to appeals.

**SUBPART L – CONSTRUCTION**

*Environmental*

**§ 663.800 Are eligible activities (PSFAs) carried out under the TTSGP required to comply with Federal environmental laws?**

Yes. Eligible activities carried out with funds through the TTSGP must meet the requirements of applicable Federal environmental and cultural resource statutes, such as the National Environmental Policy Act and the National Historic Preservation Act.

**§ 663.801 Is the Secretary responsible for compliance with Federal cultural resource and environmental statutes for eligible activities (PSFAs) under 23 U.S.C. 207?**

Unless delegated to a Tribe, the Secretary remains responsible for final review and approval of environmental documents for all PSFAs included in a compact or funding agreement. The Tribes may conduct environmental review activities in accordance with these regulations,

**§ 663.802 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe conducts Federal environmental reviews for eligible activities (PSFAs) under 23 U.S.C. 207?**

1. Tribes may manage the environmental review process and prepare the appropriate environment review documents in accordance with Federal requirements, however, unless delegated to the Tribe, the Secretary remains responsible for final review and approval of environmental documents, and any associated environmental determinations and findings for all activities included in a compact or funding agreement.
2. The Secretary makes determinations and approvals in accordance with Section 4(f) of the DOT Act, 23 U.S.C. 138 and 49 U.S.C. 303, as applicable.
3. As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide advice and technical assistance to the Self-Governance Tribe to assist the Self-Governance Tribe in managing the Federal environmental review process and preparing environmental documents.

**§ 663.803 What procedures does a Self-Governance Tribe follow to conduct environmental reviews for eligible activities (PSFAs) under the TTSGP?**

Self-Governance Tribes comply with environmental laws by following, at the Tribe’s election:

(a) their own environmental review procedures; or

(b) the environmental review procedures applicable to the particular source of funding.

 **§ 663.804 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under 23 U.S.C. 207?**

No. Unless specifically identified and included in the compact or funding agreement, a Tribe may at their option, choose to voluntarily comply with Executive Orders.

**§ 663.805 Can DOT funds be used for Tribal environmental review of eligible activities (PSFAs)?**

Yes. Tribal environmental review is an eligible expense unless specifically prohibited by law.

**663.806 Must further environmental review be conducted for eligible activities after DOT has approved the environmental documentation and made a determination?**

If a substantial amount of time has passed since the determination, typically three years, and the activity taking place or the scope of the project has changed in a way that was not previously analyzed and could result in significant impacts, the Secretary will work with the Tribe to determine whether a re-evaluation or supplementation of the environmental documentation is warranted.

*Design and Construction Standards*

**§ 663.810 What design and construction standards may Tribes use under Tribal Self-Governance (PSFAs) under the TTSGP?**

Self-Governance Tribes must utilize design and construction standards by following, at the Tribe’s election:

(a) Applicable Federal, State, Regional, or Municipal design and construction standards; or

(b) Tribal design and construction standards which are consistent with or exceed applicable Federal, State, Regional, or Municipal design and construction standards.

*Force Account*

**§ 663.815 May Tribes use Tribal force account procedures when carrying out construction projects under TTSGP compacts and funding agreements?**

Yes. At the discretion of a Tribe, Tribal force account procedures may always be used on any Tribal transportation project pursuant to 23 U.S.C. 202(a)(3).

*Procurement*

**§ 663.816 Do Federal procurement laws and regulations apply to construction project agreements performed under section 23 U.S.C. 207(i)?**

No. Unless otherwise agreed to by the Tribe, no provision of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive Orders) shall apply to any construction project conducted under 23 U.S.C. 207(i). The Secretary and the Tribe may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction project agreement or funding agreement. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

**§ 663.817 What should a Tribe do if it wishes to use a procurement procedure not provided in its established procurement management standards when carrying out construction projects under TTSGP compacts and funding agreements?**

For a particular Tribal transportation project, if the Tribe wishes to use a procurement method that is not provided for in its established procurement management standards, the Tribe shall notify the Secretary for review and approval. The Secretary shall not require the Tribe to furnish any information in support of a request for an exemption other than that required by statute ~~or regulation~~.

*Davis Bacon*

**§ 663.820 Do Davis Bacon wage rates apply to construction projects?**

Davis Bacon wage rates do not apply to employees of Tribes when the Tribes is carrying out the work. Davis Bacon rates do apply to all other laborers and mechanics employed by contractors and subcontractors in the construction, alteration, and repair in connection with a compact or funding agreement.

**SUBPART M – APPEALS**

**§ 663.900 What is the Secretary's burden of proof for appeals under this part?**

As required by 25 U.S.C. 5398, the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

**§663.901 For the purposes of 25 U.S.C. 5331, does the term contract include compacts and funding agreements entered into under this part?**

Yes. For the purposes of 25 U.S.C. 5331, the term contract includes compacts and funding agreements entered into under this part.

**§663.910   What decisions may a Tribe appeal under this part?**

A Tribe may appeal a decision:

1. To reject a final offer, or a portion thereof, of a compact or funding agreement.
2. To reject a proposed amendment to a compact or funding agreement;
3. To terminate a compact or funding agreement, in whole or in part; or
4. Regarding a Tribe’s eligibility to participate in the TTSGP, including a decision regarding a Tribe’s financial stability, financial management capacity/capability, or transportation program management capability.

**§663.912  What procedures apply to \_\_\_\_\_\_\_\_\_\_\_\_ proceedings?**

The \_\_\_\_\_\_\_\_\_\_\_ may use the procedures set forth in [regulatory section with entity’s rules] as a guide.

**§663.913   How does a Tribe know where and when to file its appeal from decisions made by the Department?**

Every decision in any of the areas listed in §663.910 must contain information which shall tell the Tribe where and when to file the Tribe's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under ## CFR 663.722, or appeal this decision under ## CFR 663.726 to the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (\_\_\_\_). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the \_\_\_\_ under ## CFR 663.2013 shall be filed with the \_\_\_\_ by certified mail or by hand delivery at the following address: [address of appeal body]. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the \_\_\_\_\_ that you have served these copies

**§663.914   What authority does the \_\_\_\_ have under this part?**

The \_\_\_\_\_ has the authority:

(a) to conduct a hearing on the record;

(b) to permit the parties to engage in full discovery relevant to any issue raised in the matter;

(c) to issue a recommended decision; *and*

(d) to take such action as necessary to ensure rights specified in [§663.732].

*Informal Conferences*

**§663.920  Does a Tribe have any options besides an appeal?**

Yes. The Tribe may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. Or, the Tribe may, in lieu of filing an administrative appeal under this subpart or upon completion of an informal conference, file an action in Federal court pursuant to 25 U.S.C. 5331.

**§663.921   How does a Tribe request an informal conference?**

The Tribe must file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Tribe may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Tribe mails the request, it will be considered filed on the date the Tribe mailed it by certified mail.

**§663.922   How is an informal conference held?**

(a) The informal conference must be held within 30 days of the date the request was received, unless the Tribe and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Tribe's office. If the meeting cannot be held at the Tribe's office and is held more than fifty miles from its office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Tribe.

(c) The informal conference must be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference.

**§663.923   What happens after the informal conference?**

(a) Within 10 days of the informal conference, the person who conducted the informal conference must prepare and mail to the Tribe a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference must contain the following language:

“Within 30 days of the receipt of the recommended decision from the informal conference, you may file an appeal of the initial decision of the DOT agency with the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (\_\_\_) under ## CFR 663.726. You may request a hearing on the record. An appeal to the \_\_\_\_ under ## CFR 663.726 shall be filed with the \_\_\_\_ by certified mail or hand delivery at the following address: [appeal agency address]. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the \_\_\_\_ that you have served these copies. Alternatively you may file an action in Federal court pursuant to 25 U.S.C. 5331.”

**§663.924   Is the recommended decision from the informal conference final for the Secretary?**

No. If the Tribe is dissatisfied with the recommended decision from the informal conference, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under §663.727, the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to 25 U.S.C. 5331.

**§663.925   How does a Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?**

(a) If the Tribe decides to appeal the initial decision, it must file a notice of appeal with the \_\_\_\_\_ within 30 days of receiving either the initial decision or the recommended decision from the informal conference.

(b) The Tribe may either hand-deliver the notice of appeal to the \_\_\_\_\_, or mail it by certified mail, return receipt requested. If the Tribe mails the Notice of Appeal, it will be considered filed on the date the Tribe mailed it by certified mail. The Tribe should mail the notice of appeal to: [appeal board address].

(c) The Notice of Appeal must:

(1) Briefly state why the Tribe thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Tribe wants a hearing on the record, or whether the Tribe wants to waive its right to a hearing.

(d) The Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Tribe must certify to the \_\_\_\_\_ that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the \_\_\_\_ under the Act.

(f) In lieu of filing an administrative appeal a Tribe may proceed directly to Federal court pursuant to 25 U.S.C. 5331.

**§663.926   May a Tribe get an extension of time to file a notice of appeal?**

Yes. If the Tribe needs additional time, the Tribe may request an extension of time to file its Notice of Appeal with the \_\_\_\_ within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Tribe must be in writing, and must give a reason for not filing its notice of appeal within the 30-day time period. If the Tribe has a valid reason for not filing its notice of appeal on time, it shall receive an extension.

**§663.927   What happens after a Tribe files an appeal?**

(a) Within 5 days of receiving the Tribe's notice of appeal, the \_\_\_\_\_ will decide whether the appeal falls under §663.910. If so, the Tribe is entitled to a hearing.

(b) If the \_\_\_\_ cannot make that decision based on the information included in the notice of appeal, the \_\_\_\_ may ask for additional statements from the Tribe, or from the appropriate Federal agency. If the \_\_\_\_ asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the \_\_\_\_ decides that the Tribe is not entitled to a hearing or if the Tribe has waived its right to a hearing on the record, the \_\_\_\_\_ will dismiss the appeal and inform the Tribe that it is not entitled to a hearing or has waived its right to a hearing.

*Hearings*

**§663.930   How is a hearing arranged?**

(a) If a hearing is to be held, the \_\_\_\_ will refer the Tribe's case to the [Hearings Division] of the [chosen office for hearings]. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) A briefing and discovery schedule;

(2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

**§663.931   What happens when a hearing is necessary?**

(a) The ALJ must hold a hearing within 90 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the Secretary must file and serve the Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

**§663.932   What is the Secretary's burden of proof for appeals covered by §663.716?**

As required by 25 U.S.C. 5398 and 663.xxx above, the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

**§663.933   What rights do Tribes and the Secretary have during the appeal process?**

Both the Tribe and the Secretary have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including

specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

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

(e) Require that oral testimony be under oath;

(f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

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

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

**§663.934   What happens after the hearing?**

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision must contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Tribe has the right to object to the recommended decision.

(b) The recommended decision shall contain the following statement:

“Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 663.734. An appeal to the Secretary under ## CFR 663.734 shall be filed at the following address: [Secretarial Address]. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.”

**§663.935   Is the recommended decision always final?**

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections must be served on all other parties. The recommended decision shall become final for the Secretary 30 days after the Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final for the Secretary.

**§663.936   If a Tribe objects to the recommended decision, what will the Secretary do?**

(a) The Secretary has 45 days from the date it receives the final authorized submission in the appeal to modify, adopt, or reverse the recommended decision. The Secretary also may remand the case to the \_\_\_\_ for further proceedings. If the Secretary does not modify or reverse the recommended decision or remand the case to the \_\_\_\_\_ during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

**§663.937   Will an appeal adversely affect the Tribe's rights in other compact, funding negotiations, or construction project agreement?**

No. A pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

**§ 663.938   Will the decisions on appeal be available for the public to review?**

Yes. All final decisions must be published for the Department under this subpart. Decisions can be found on the Department's website.

*APPEALS OF IMMEDIATE TERMINATION OF A SELF-GOVERNANCE PROGRAM*

**§ 663.940   Will there be a hearing?**

Yes. Unless the Self-Governance Tribe waives its right to a hearing in writing, the Secretary shall provide the Tribe with a hearing on the record not later than 10 days after the date of such termination. If possible, the hearing will be held at the office of the Tribe. If the hearing is held more than 50 miles from the office of the Tribe, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Tribe.

**§ 663.941   What happens after the hearing?**

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJs findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Tribe has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement:

“Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under § 663. An appeal to the Secretary as defined in **§ 663.???** shall be filed at the following address: INSERT ADDRESS. If an appeal is not received within 15 days, the recommended decision will become final.”

**§ 663.942  Is the recommended decision always final?**

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

**§ 663.943  If a Tribe objects to the recommended decision, what action will the Secretary take?**

(a) The Secretary has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Secretary.

**§ 663.944   Will an immediate termination appeal adversely affect the Tribe's rights in other self-governance negotiations?**

No. A pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project or program agreement.