| **COLUMN 1** | **COLUMN 2** | **COLUMN 3** |
| --- | --- | --- |
| **“Fixing America's Surface**  **Transportation Act” (“FAST Act”)**  **(Public Law 114-94)**  **Sec. 1121. Tribal Transportation**  **Self-Governance Program**  **(23 U.S.C. §207)** | **PROPOSED REGULATION** | **COMMENTS** |
| **SEC. 1121. TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM.**  (a) IN GENERAL.—Chapter 2 of title 23, United States Code,  is amended by inserting after section 206 the following [new section]  **§ 207(a) Tribal transportation self-governance program**:  ESTABLISHMENT.—Subject to the requirements of this section, the Secretary shall establish and carry out a program to be known as the tribal transportation self-governance program. The Secretary may delegate responsibilities for administration of the program as the Secretary determines appropriate.  **207(b)** ELIGIBILITY.—  (1) IN GENERAL.—Subject to paragraphs (2) and (3), an Indian tribe shall be eligible to participate in the program if the Indian tribe requests participation in the program by resolution or other official action by the governing body of the Indian tribe, and demonstrates, for the preceding 3 fiscal years, financial stability and financial management capability, and transportation program management capability.  (2) CRITERIA FOR DETERMINING FINANCIAL STABILITY AND FINANCIAL MANAGEMENT CAPACITY.—For the purposes of paragraph (1), evidence that, during the preceding 3 fiscal years, an Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe’s self-determination contracts or self-governance funding agreements with any Federal agency shall be conclusive evidence of the required financial stability and financial management capability.  (3) CRITERIA FOR DETERMINING TRANSPORTATION PROGRAM MANAGEMENT CAPABILITY.—The Secretary shall require an Indian tribe to demonstrate transportation program management capability, including the capability to manage and complete projects eligible under this title and projects eligible under chapter 53 of title 49, to gain eligibility for the program.  **207(c)**  COMPACTS.—  (1) COMPACT REQUIRED.—Upon the request of an eligible Indian tribe, and subject to the requirements of this section, the Secretary shall negotiate and enter into a written compact with the Indian tribe for the purpose of providing for the participation of the Indian tribe in the program.  (2) CONTENTS.—A compact entered into under paragraph (1) shall set forth the general terms of the government-to-government relationship between the Indian tribe and the United States under the program and other terms that will continue to apply in future fiscal years.  (3) AMENDMENTS.—A compact entered into with an Indian tribe under paragraph (1) may be amended only by mutual agreement of the Indian tribe and the Secretary.  **207(d) Annual Funding Agreements**.—  (1) FUNDING AGREEMENT REQUIRED.—After entering into a compact with an Indian tribe under subsection (c), the Secretary shall negotiate and enter into a written annual funding agreement with the Indian tribe.  (2) CONTENTS.—  (A) IN GENERAL.—   1. FORMULA FUNDING AND DISCRETIONARY GRANTS.—A funding agreement entered into with an Indian tribe shall authorize the Indian tribe, as determined by the Indian tribe, to plan, conduct, consolidate, administer, and receive full tribal share funding, tribal transit formula funding, and funding to tribes from discretionary and competitive grants administered by the Department for all programs, services, functions, and activities (or portions thereof) that are made available to Indian tribes to carry out tribal transportation programs and programs, services, functions, and activities (or portions thereof) administered by the Secretary that are otherwise available to Indian tribes.   (ii) TRANSFERS OF STATE FUNDS.—   * 1. INCLUSION OF TRANSFERRED FUNDS IN FUNDING AGREEMENT.—A funding agreement entered into with an Indian tribe shall include Federal-aid funds apportioned to a State under chapter 1 if the State elects to provide a portion of such funds to the Indian tribe for a project eligible under section 202(a). The provisions of this section shall be in addition to the methods for making funding contributions described in section 202(a)(9). Nothing in this section shall diminish the authority of the Secretary to provide funds to an Indian tribe under section 202(a)(9).   **(II) METHOD FOR TRANSFERS.—If a State elects to provide funds described in subclause (I) to an Indian tribe**—  (aa) the transfer may occur in accordance with section 202(a)(9); or  (bb) the State shall transfer the funds back to the Secretary and the Secretary shall transfer the funds to the Indian tribe in accordance with this section.  (III) RESPONSIBILITY FOR TRANSFERRED FUNDS.—Notwithstanding any other provision of law, if a State provides funds described in sub- clause (I) to an Indian tribe—  (aa) the State shall not be responsible for constructing or maintaining a project carried out using the funds or for administering or supervising the project or funds during the applicable statute of limitations period related to the construction of the project; and  (bb) the Indian tribe shall be responsible for constructing and maintaining a project carried out using the funds and for administering and supervising the project and funds in accordance with this section during the applicable statute of limitations period related to the construction of the project.  (B) ADMINISTRATION OF TRIBAL SHARES.—The tribal shares referred to in subparagraph (A) shall be provided without regard to the agency or office of the Department within which the program, service, function, or activity (or portion thereof) is performed.  (C) FLEXIBLE AND INNOVATIVE FINANCING.—  (i) IN GENERAL.—A funding agreement entered into with an Indian tribe under paragraph (1) shall include provisions pertaining to flexible and innovative financing if agreed upon by the parties.  (ii) TERMS AND CONDITIONS.—  (I) AUTHORITY TO ISSUE REGULATIONS.—The Secretary may issue regulations to establish the terms and conditions relating to the flexible and innovative financing provisions referred to in clause (i).  (II) TERMS AND CONDITIONS IN ABSENCE OF REGULATIONS.—If the Secretary does not issue regulations under subclause (I), the terms and conditions relating to the flexible and innovative financing provisions referred to in clause (i) shall be consistent with—  (aa) agreements entered into by the Department under—  (AA) section 202(b)(7); and (BB) section 202(d)(5), as in effect before the date of enactment of MAP–21 (Public Law 112–141); or  (bb) regulations of the Department of the Interior relating to flexible financing contained in part 170 of title 25, Code of Federal Regulations, as in effect on the date of enactment of the FAST Act.  (3) TERMS.—A funding agreement shall set forth—  (A) terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered by the Indian tribe; and  (B) for items identified in subparagraph (A)—  (i) the general budget category assigned;  (ii) the funds to be provided, including those funds to be provided on a recurring basis;  (iii) the time and method of transfer of the funds;  (iv) the responsibilities of the Secretary and the Indian tribe; and  (v) any other provision agreed to by the Indian tribe and the Secretary.  (4) SUBSEQUENT FUNDING AGREEMENTS.—  (A)APPLICABILITY OF EXISTING AGREEMENT.—Absent notification from an Indian tribe that the Indian tribe is withdrawing from or retroceding the operation of 1 or more programs, services, functions, or activities (or portions thereof) identified in a funding agreement, or unless otherwise agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.  (B) EFFECTIVE DATE OF SUBSEQUENT AGREEMENT.— The terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.  (5) CONSENT OF INDIAN TRIBE REQUIRED.—The Secretary shall not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Indian tribe that is subject to the agreement unless such terms are required by Federal law.  (2) CONTENTS.—  (A) IN GENERAL.—  (i) FORMULA FUNDING AND DISCRETIONARY GRANTS.—A funding agreement entered into with an Indian tribe shall authorize the Indian tribe, as determined by the Indian tribe, to plan, conduct, consolidate, administer, and receive full tribal share funding, tribal transit formula funding, and funding to tribes from discretionary and competitive grants administered by the Department for all programs, services, functions, and activities (or portions thereof) that are made available to Indian tribes to carry out tribal transportation programs and programs, services, functions, and activities (or portions thereof) administered by the Secretary that are otherwise available to Indian tribes.  **207(e) General Provisions**  (1)REDESIGN AND CONSOLIDATION.—  (A) IN GENERAL.—An Indian tribe, in any manner that the Indian tribe considers to be in the best interest of the Indian community being served, may—  (i) redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement; and  (ii) reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof), if the funds are—  (I) expended on projects identified in a transportation improvement program approved by the Secretary; and  (II) used in accordance with the requirements in—  (aa) appropriations Acts;  (bb) this title and chapter 53 of title 49; and  (cc) any other applicable law.  (B) EXCEPTION.—Notwithstanding subparagraph (A), if, pursuant to subsection (d), an Indian tribe receives a discretionary or competitive grant from the Secretary or receives State apportioned funds, the Indian tribe shall use the funds for the purpose for which the funds were originally authorized.  (2) RETROCESSION.—  (A) IN GENERAL.—  (i) AUTHORITY OF INDIAN TRIBES.—An Indian tribe may retrocede (fully or partially) to the Secretary pro- grams, services, functions, or activities (or portions thereof) included in a compact or funding agreement.  (ii) REASSUMPTION OF REMAINING FUNDS.—Following a retrocession described in clause (i), the Secretary may—  (I) reassume the remaining funding associated with the retroceded programs, functions, services, and activities (or portions thereof) included in the applicable compact or funding agreement;  (II) out of such remaining funds, transfer funds associated with Department of Interior pro- grams, services, functions, or activities (or portions thereof) to the Secretary of the Interior to carry out transportation services provided by the Secretary of the Interior; and  (III) distribute funds not transferred under subclause (II) in accordance with applicable law.  (iii) CORRECTION OF PROGRAMS.—If the Secretary makes a finding under subsection (f)(2)(B) and no funds are available under subsection (f)(2)(A)(ii), the Secretary shall not be required to provide additional funds to complete or correct any programs, functions, services, or activities (or portions thereof).  (B) EFFECTIVE DATE.—Unless the Indian tribe rescinds a request for retrocession, the retrocession shall become effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of such a specification, the retrocession shall become effective on—  (i) the earlier of—  (I) 1 year after the date of submission of the request; or  (II) the date on which the funding agreement expires; or  (ii) such date as may be mutually agreed upon by the parties and, with respect to Department of the Interior programs, functions, services, and activities (or portions thereof), the Secretary of the Interior.  **207**(f) PROVISIONS RELATING TO SECRETARY--  (1) DECISIONMAKER.—A decision that relates to an appeal of the rejection of a final offer by the Department shall be made either—  (A) by 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  (B) by an administrative judge.  (2) TERMINATION OF COMPACT OR FUNDING AGREEMENT.—  (A) AUTHORITY TO TERMINATE.—  (i) PROVISION TO BE INCLUDED IN COMPACT OR FUNDING AGREEMENT.—A compact or funding agreement shall include a provision authorizing the Secretary, if the Secretary makes a finding described in subparagraph (B), to—  (I) terminate the compact or funding agreement (or a portion thereof); and  (II) reassume the remaining funding associated with the reassumed programs, functions, services, and activities included in the compact or funding agreement.  (ii) TRANSFERS OF FUNDS.—Out of any funds reassumed under clause (i)(II), the Secretary may transfer the funds associated with Department of the Interior programs, functions, services, and activities (or portions thereof) to the Secretary of the Interior to provide continued transportation services in accordance with applicable law.  (B) FINDINGS RESULTING IN TERMINATION.—The finding referred to in subparagraph (A) is a specific finding of—  (i) imminent jeopardy to a trust asset, natural resources, or public health and safety that is caused by an act or omission of the Indian tribe and that arises out of a failure to carry out the compact or funding agreement, as determined by the Secretary; or  (ii) gross mismanagement with respect to funds or programs transferred to the Indian tribe under the compact or funding agreement, as determined by the Secretary in consultation with the Inspector General of the Department, as appropriate.  (C) PROHIBITION.—The Secretary shall not terminate a compact or funding agreement (or portion thereof) unless—  (i) the Secretary has first provided written notice and a hearing on the record to the Indian tribe that is subject to the compact or funding agreement; and  (ii) the Indian 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.  (D) EXCEPTION.—  (i) IN GENERAL.—Notwithstanding subparagraph (C), the Secretary, upon written notification to an Indian tribe that is subject to a compact or funding agreement, may immediately terminate the compact or funding agreement (or portion thereof) if—  (I) the Secretary makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and  (II) the jeopardy arises out of a failure to carry out the compact or funding agreement.  (ii) HEARINGS.—If the Secretary terminates a com- pact or funding agreement (or portion thereof) under clause (i), the Secretary shall provide the Indian tribe subject to the compact or agreement with a hearing on the record not later than 10 days after the date of such termination.  (E) BURDEN OF PROOF.—In any hearing or appeal involving a decision to terminate a compact or funding agreement (or portion thereof) under this paragraph, the Secretary shall have the burden of proof in demonstrating by clear and convincing evidence the validity of the grounds for the termination.  **207(g) COST PRINCIPLES**  COST PRINCIPLES.—  In administering funds received under this section, an Indian tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by section 106 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j–1), other provisions of law, or by any exemptions to applicable Office of Management and Budget circulars subsequently granted by the Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit conducted pursuant to this subsection shall be subject to the provisions of section 106(f) of that Act (25 U.S.C. 450j–1(f)).  **207(h) TRANSFER of FUNDS**  TRANSFER OF FUNDS.—The Secretary shall provide funds to an Indian tribe under a funding agreement in an amount equal to—  (1) the sum of the funding that the Indian tribe would otherwise receive for the program, function, service, or activity in accordance with a funding formula or other allocation method established under this title or chapter 53 of title 49; and  (2) such additional amounts as the Secretary determines equal the amounts that would have been withheld for the costs of the Bureau of Indian Affairs for administration of the program or project.  **207(i) CONSTRUCTION PROGRAMS**  **PLACEHOLDER PLACEHOLDER**  **PLACEHOLDER PLACEHOLDER**  **PLACEHOLDER PLACEHOLDER**  **207(j) FACILITATION**  (1) SECRETARIAL INTERPRETATION.—Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate—  (A) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated there- with, in compacts and funding agreements; and  (B) the implementation of the compacts and funding agreements.  **207 (k) DISCLAIMERS**.—  (1) EXISTING AUTHORITY.—Notwithstanding any other provision of law, upon the election of an Indian tribe, the Secretary shall—  (A) maintain current tribal transportation program funding agreements and program agreements; or  (B) enter into new agreements under the authority of section 202(b)(7).  (2) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section may be construed to impair or diminish the authority of the Secretary under section 202(b)(7).  **207(l) APPLICABILITY of ISDEAA**  (l) APPLICABILITY OF INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.—Except to the extent in conflict with this section (as determined by the Secretary), the following provisions of the Indian Self-Determination and Education Assistance Act shall apply to compact and funding agreements (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):  **207(l)(1)** Subsections (a), (b), (d), (g), and (h) of section 506 of such Act (25 U.S.C. 458aaa–5), relating to general provisions.  **207(l)(2)**  Subsections (b) through (e) and (g) of section 507of such Act (25 U.S.C. 458aaa–6), relating to provisions relating to the Secretary of Health and Human Services.  **207(l)(3)**  Subsections (a), (b), (d), (e), (g), (h), (i), and (k) of section 508 of such Act (25 U.S.C. 458aaa–7), relating to transfer of funds.  **1**  **207(l)(4)**  Section 510 of such Act (25 U.S.C. 458aaa–9), relating to Federal procurement laws and regulations.  **207(l)(5) Civil Actions**  Section 511 of such Act (25 U.S.C. 458aaa–10), relating to civil actions.  **207(l)(6) Facilitation**  Subsections (a)(1), (a)(2), and (c) through (f) of section 512 of such Act (25 U.S.C. 458aaa–11), 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’.  **207(l)(7) Disclaimers**  Subsections (a) and (b) of section 515 of such Act (25 U.S.C. 458aaa–14), relating to disclaimers.  **207(l)(8) Application of other Sections**  Subsections (a) and (b) of section 516 of such Act (25 U.S.C. 458aaa–15), relating to application of title I provisions  ,  **,**  **,**  **207(l)(9) Appeals**  Section 518 of such Act (25 U.S.C. 458aaa–17), relating to appeals.  ,  **,**  **,**  **,**  **,,**  **,**  **,**  **,**  **207(m) Definitions**   1. IN GENERAL.—In this section, the following definitions apply (except as otherwise expressly provided):   (A) COMPACT.—The term ‘compact’ means a compact between the Secretary and an Indian tribe entered into under subsection (c).  (B) DEPARTMENT.—The term ‘Department’ means the Department of Transportation.  (C) ELIGIBLE INDIAN TRIBE.—The term ‘eligible Indian tribe’ means an Indian tribe that is eligible to participate in the program, as determined under subsection (b).  D) FUNDING AGREEMENT.—The term ‘funding agreement’ means a funding agreement between the Secretary and an Indian tribe entered into under subsection  (d).  (E) INDIAN TRIBE.—The term ‘Indian 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 an Indian tribe has authorized another Indian tribe, an intertribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this section, the authorized Indian tribe, intertribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term ‘Indian tribe’ as used in this section shall include such other authorized Indian tribe, intertribal consortium, or tribal organization.  (F) PROGRAM.—The term ‘program’ means the tribal transportation self-governance program established under this section.  (G) SECRETARY.—The term ‘Secretary’ means the Secretary of Transportation    (H) TRANSPORTATION PROGRAMS­ .—The term ‘transportation programs’ means all programs administered or financed by the Department under this title and chapter 53 of title 49.  (2) APPLICABILITY OF OTHER DEFINITIONS.—In this section, the definitions set forth in sections 4 and 505 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b; 458aaa) apply, except as otherwise expressly provided in this section.  **25 U.S.C. 450b**  §450b(a) "**construction programs**" means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;  (b) "**contract funding base**" means the base level from which contract funding needs are determined, including all contract costs;  (c) "**direct program costs**" means costs that can be identified specifically with a particular contract objective;  (d) "**Indian**" means a person who is a member of an Indian tribe;  (e) "**Indian tribe**" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;  (f) "**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 benefited without effort disproportionate to the results achieved;  (g) "**indirect cost rate**" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;  (h) "**mature contract**" means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: *Provided*, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 450f(a) of this title, a contract of the tribal organization which meets this definition shall be considered to be a mature contract;  (i) "**Secretary**", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;  (j) "**self-determination contract**" means a contract (or grant or cooperative agreement utilized under section 450e–1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided [1](https://www.gpo.gov/fdsys/pkg/USCODE-2014-title25/html/USCODE-2014-title25-chap14-subchapII-sec450b.htm" \l "450b_1_target) the last proviso in section 450j(a) [2](https://www.gpo.gov/fdsys/pkg/USCODE-2014-title25/html/USCODE-2014-title25-chap14-subchapII-sec450b.htm" \l "450b_2_target) of this title, no contract (or grant or cooperative agreement utilized under section 450e–1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;  (k) "**State education agency**" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;  (l) "**tribal organization**" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and  (m) "**construction contract**" means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract—  (1) that is limited to providing planning services and construction management services (or a combination of such services);  (2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or  (3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.  **25 U.S.C. 458aaa(a)**  (1) **Construction project**.--The term ‘construction project’—  (A) means an organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities, as described in a construction project agreement; and  (B) does not include construction program administration and activities described in paragraphs (1) through (3) of section 4(m), that may otherwise be included in a funding agreement under this title.  (2) **Construction project agreement**.--The term ‘construction project agreement’ means a negotiated agreement between the Secretary and an Indian tribe, that at a minimum—  (A) establishes project phase start and completion dates;  (B) defines a specific scope of work and standards by which it will be accomplished;  (C) identifies the responsibilities of the Indian tribe and the Secretary;  (D) addresses environmental considerations;  (E) identifies the owner and operations and maintenance entity of the proposed work;  (F) provides a budget;  (G) provides a payment process; and  (H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.  (3) **Gross mismanagement**.--The term ‘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 an Indian tribe by a compact or funding agreement that results in a significant reduction of funds available for the programs, services, functions, or activities (or portions thereof ) assumed by an Indian tribe.  (4) **Inherent federal functions**.--The term ‘inherent Federal functions’ means those Federal functions which cannot legally be delegated to Indian tribes.  (5) **Inter-tribal consortium**.--The term ‘inter- tribal consortium’ means a coalition of two more separate Indian tribes that join together for the purpose of participating in self- governance, including tribal organizations.  (6) **Secretary**.--The term ‘Secretary’ means the Secretary of Health and Human Services.  (7) **Self-governance**.--The term ‘self-governance’ means the program of self-governance established under section 502.  (8) **Tribal share**.--The term ‘tribal share’ means an Indian tribe’s portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions.  §458aaa(b) **Indian Tribe**.--In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof ) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term ‘Indian tribe’ as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.  **207(n) REGULATIONS**  (3) EFFECT.—The lack of promulgated regulations shall not limit the effect of this section.  (4) EFFECT OF CIRCULARS, POLICIES, MANUALS, GUIDANCE, AND RULES.—Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except regulations promulgated under this section. | § ###.1 Authority, purpose and scope.  (a) Authority. These regulations are prepared, issued and maintained with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by section 207(n) of title 23    (b) Purpose. These regulations codify rules for self-governance compacts, funding agreements, and construction project agreements between the Department of Transportation and Self–Governance Tribes to implement sections 1121 of Pub.L. 114-94. (23 U.S.C. §207)    (c) Scope. These regulations are binding on the Secretary and on Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs) under the Tribal Transportation Self-Governance Program except as otherwise specifically authorized by a waiver under section 207(i)(2)(A) of title 23.    (d) Information collection. The information collection requirements have been submitted to the Office of Management and Budget (OMB) and are pending OMB approval.  § ###.2 Congressional policy.  (a) According to [section 2 of Pub. L. 106-260](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 has declared that:    (1) The Tribal right of self-government flows from the inherent sovereignty of Indian Tribes and nations;  (2) The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of the Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;  (3) Although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded Tribal Self–Governance and dominates Tribal affairs.  (4) Congress has reviewed the results of Tribal Self–Governance and finds that transferring full control and funding to Tribal governments, upon Tribal request, over decision making for Federal PSFAs:  (i) Is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian Tribes; and  (ii) Strengthens the Federal policy of Indian self- determination.  (b) According to [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)) and section 2 of Pub. L. 106-260 Congress has declared its policy to:  (1) direct the Secretary to establish and carry out a program to be known as the Tribal Self–Governance within the Department.  (2) Call for full cooperation from the Department and all its modal administrations to implement the Tribal Transportation Self–Governance Program to—  (i) Enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to,Tribes;  (ii) Permit each Tribe to choose the extent of its participation in self-governance in accordance with the provisions of the ISDA relating to the provision of Federal services to Indian Tribes;  (iii) Ensure the continuation of the trust responsibility of the United States to Tribes and Indians;  (iv) Affirm and enable the United States to fulfill its obligations to the Indian Tribes under treaties and other laws;  (v) Strengthen the government-to-government relationship between the United States and Indian Tribes through direct and meaningful consultation with all Tribes;  (vi) Permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities;  (vii) Provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian Tribes;  (viii) Encourage the Secretary to identify all PSFAs of the Department that may be managed by an Indian Tribe under this Act and to assist Indian Tribes in assuming responsibility for such PSFAs; and  (ix) Provide Indian Tribes with the earliest opportunity to administer PSFAs from throughout the Department.     (c) According to section 512(a) of the Act [25 U.S.C. 458aaa- 11(a)], Congress has declared, 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 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 title; and    (3) The achievement of Tribal transportation goals and objectives.  (d) According to section 512(f) of the Act [25 U.S.C. 458aaa-11(f)], Congress has declared that each provision of the Self-Governance Program and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in and any ambiguity shall be resolved in favor of the Indian Tribe.  (e) According to section 515(b) of the Act [25 U.S.C. 458aaa-14(b)], Congress has declared that nothing in the Act shall be  construed to diminish in any way the trust responsibility of the United States to Indian Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.  (f) According to section 507(g) of the Act [25 U.S.C. 458aaa-6(g)], Congress has declared that the Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.  (g) According to section 507(e) of the Act [25 U.S.C. 458aaa-6(e)], Congress has declared that 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 in a manner that maximizes the policy of Tribal Self-Governance, and in a manner consistent with the purposes specified in the Self-Governance Program.  (h) According to 23 U.S.C. § 101(b)(3), Congress declares that-  (A) it is in the national interest to preserve and enhance the surface transportation system to meet the needs of the United States for the 21st Century;  (B) continued planning for and investment in surface transportation is critical to ensure the surface transportation system adequately meets the changing travel demands of the future;  (C) among the foremost needs that the surface transportation system must meet to provide for a strong and vigorous national economy are safe, efficient, and reliable-  (i) national and interregional personal mobility (including personal mobility in rural and urban areas) and reduced congestion;  (ii) flow of interstate and international commerce and freight transportation;  (iii) travel movements essential for national security;  (D) the connection between land use and infrastructure is significant; and  (E) transportation should play a significant role in promoting economic growth, improvement the environment, and sustaining the quality of life.  (i) For more than a quarter century, Congress has known that the conditions for successful economic development on Indian lands are essentially the same as for any other predominantly rural community. There must be community stability, including adequate law enforcement and judicial systems and basic human services. There must be adequate infrastructure including roads, safe water and waste disposal systems, and power and communications utilities. When these systems are in place, tribes are in the best position to implement economic development plans, taking into account the available natural resources, labor force, financial resources and markets.  (j) The development of local government services, the provision of supportive human services, and local planning are essential to successful economic development. The Indian Self-Determination Act has made these conditions possible on many Indian reservations and Alaska Native villages.  § ###.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 Indian tribes;  (b) Terminating, waiving, modifying or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians.  The Secretary must act in good faith in upholding this trust responsibility;  (c) Mandating an Indian Tribe to apply for a compact or funding agreement; or  (d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.  § ###.4 May the Tribal Transportation Self-Governance Program be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal law?    No, if a Tribe alleges that a compact or funding agreement violates section 515(a) of the Act [[25 U.S.C. 458aaa–14(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS458AAA-14&originatingDoc=N3474D0B08B4711D98CF4E0B65F42E6DA&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_8b3b0000958a4) ], the Tribe may apply the provisions of section 110 of the Act [[25 U.S.C. 450m–1](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS450M-1&originatingDoc=N3474D0B08B4711D98CF4E0B65F42E6DA&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink))].  Sec. ###.5  Effect of these regulations on Federal program guidelines, manual, or policy directives.      Unless expressly agreed to by the Tribe in the compact or funding agreement, the Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except for regulations promulgated under section 207.  § ###.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, 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.  § ###.7 Paperwork Reduction.   1. Under 23 U.S.C. § 101(e), it is the national policy that to the maximum extent possible the procedures to be utilized by the Secretary and all other affected heads of Federal departments, agencies, and instrumentalities for carrying out title 23 and any other provision of law relating to the Federal highway programs shall encourage the substantial minimization of paperwork and interagency decision procedures and the best use of available manpower and funds so as to prevent needless duplication and unnecessary delays at all levels of government.   (b) The inappropriate application of federal procurement laws and federal acquisition regulations to self-determination contracts and agreements has resulted in excessive paperwork and unduly burdensome reporting requirements imposed on tribes. An essential factor in the success of the policy of Indian self-determination and self-governance is that it allows tribes to plan and deliver services appropriate to their diverse demographic, geographic, economic and institutional needs.  Eligibility  § ####.#1 Who may participate in Tribal Self–Governance?  An Indian tribe shall be eligible to participate in the program if the Indian tribe requests participation in the program by resolution or other official action by the governing body of the Indian tribe, and demonstrates, for the preceding 3 fiscal years, financial stability and financial management capability, and transportation program management capability.  § ###.#2 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?  An Indian tribe shall be eligible to participate in the Program if it demonstrates financial stability, financial management capability, and transportation program management capability.  § ###.#3 How does a tribe demonstrate financial stability and financial management capability?   1. The Indian Tribe provides evidence that, during the preceding 3 fiscal years, an Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe’s self-determination contracts or self-governance funding agreements with any Federal agency or in its Tribal Transportation Program Agreement with Federal Highway Administration shall be conclusive evidence of the required financial stability and financial management capability.   (b) the Secretary may determine that an Indian tribe is eligible to participate in the Tribal Transportation Self-Governance Program notwithstanding uncorrected significant and material audit exceptions if the Indian tribe has taken reasonable steps to address the audit exception.  Among the factors the Secretary shall consider are:  (i) The nature, duration and extent of the significant and material audit exceptions;  (ii) The degree to which the audit exception was directly related to tribal transportation program activities;  (iii) The measures the Tribe has taken, or will take, to correct the audit exceptions;  (iv) The Tribe’s use of protective financial measures to safeguard federal transportation funds, such as the establishment a separate bank account to manage federal transportation funds.  (#) The Secretary shall provide technical assistance to Indian tribes with uncorrected significant and material audit exceptions with the goal of assisting the Indian tribe to establish eligibility for  the Tribal Transportation Self-Governance Program.   1. If an Indian Tribe is not required to submit an annual audit for any or all of the 3 previous years, the Tribe may demonstrate financial stability and financial management capacity by showing that it has previously assumed federal functions to deliver transportation services, including but not limited to road maintenance services, transit or traffic safety services, under: (1) a self-determination, self-governance, or government-to-government funding agreement with the Bureau of Indian Affairs; (2) a Tribal Transportation Program Agreement with the Federal Highway Administration; or (3) a funding agreement with the Federal Transit Administration, at any time during the prior three fiscal years, and that there were no sanctions or actions taken against the Tribe for financial management issues. 2. The Secretary may consider any other criteria that a Tribe may propose that demonstrates financial stability and financial management capability.      § ###.##  How does an Indian Tribe demonstrate transportation program management capability?   1. The Indian tribe provides conclusive evidence of transportation program management capability if it has previously assumed federal functions to deliver transportation services, including but not limited to road maintenance services, transit or traffic safety services, under: (1) a self-determination, self-governance, or government-to-government funding agreement with the Bureau of Indian Affairs; (2) a Tribal Transportation Program Agreement with the Federal Highway Administration; or (3) a funding agreement with the Federal Transit Administration, at any time during the prior three fiscal years.   (b) An Indian tribe may demonstrate program management capability by means other than having previously assumed federal transportation funding and management and  responsibilities by demonstrating that the tribe has:  (i) a staffed and operational transportation program or department (identifying personnel, job descriptions and years of experience);  (ii) completed a highway safety plan;  (iii) completed a Plans, Specifications and Estimates (PS&E) design package for one or more transportation project to be carried out with available funding;  (iv) completed  transportation construction projects  using federal and/or non-federal funds;  (v) overseen a public transit system;  (vi) Overseen a transportation maintenance system; or  (vii) Submits additional information satisfactory to the Secretary that evidences its transportation program management capabilities  (c) The Secretary may consider any other criteria that a Tribe may propose that demonstrates transportation program management capability.  207(c) Compacts  § 137.30 What is a self-governance compact?  A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self–Governance Tribe and the United States  § 137.31 What is included in a compact?  A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government’s trust responsibility and statutory and treaty obligations to Indian Tribes and such other terms as the parties intend to control from year to year.  § 137.32 Is a compact required to participate in self-governance?  Yes. Tribes must have a compact in order to participate in self-governance.  § 137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?  Yes. At a Tribe’s option, the Tribe and the Secretary~~,~~ may negotiate a funding agreement prior to or at the same time as the negotiation of a compact.  § 137.34 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.  § 137.35 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.  ###.### May more than one Tribe enter into a single compact and funding agreement?  Yes. 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.  ###.### How may the compact be amended?  Compacts may only be amended by mutual agreement of the parties.  **207(d) Annual Funding Agreements**  **§ 137.40 What is a funding agreement?**   1. A funding agreement is a legally binding and mutually enforceable written agreement that identifies the programs, services, functions and activities (PSFAs) that the Tribe will carry out, the funds being transferred from all Department levels in support of those PSFAs, without regard to the agency or office of the Department within which the PFSA (or portion thereof) is performed, and such other terms as are required or may be agreed upon pursuant to 23 U.S.C. § 207 2. A funding agreement shall authorize the Tribe, as it determines, to plan, conduct, consolidate, administer and receive full tribal share funding and tribal transit formula funding. 3. A funding agreement shall also include funding to tribes from mandatory discretionary and competitive grants administered by the Department that are made available to Tribes to carry out tribal transportation programs and PFSAs administered by the Secretary that are otherwise available to Tribes. 4. A funding agreement shall include Federal-aid funds apportioned to a State and any other funds if the Tribe negotiates an agreement authorized under 23 USC § 202(a)(9) or § 207 (d)(2)(A)(ii)(II)(bb) for a project eligible under 23 U.S.C. § 202(a).   **§ 137.41 What PSFAs must be included in a funding agreement?**    At the Tribe’s option, all PSFAs identified in and in accordance with sections 207(d)(2)(A) and 207(d)(3)(A) of title 23 must be included in a funding agreement, subject to section\_\_ [of this Part] regarding the rejection of final offers.  **§ 137.42 What Tribal shares may be included in a funding agreement?**  All Tribal shares identified in the Tribal Transportation Program and Tribal Transit Program may be included in a funding agreement, including Tribal shares of Department discretionary and competitive grants.  **§ 137.43 May a Tribe negotiate and leave a portion of Tribal shares with the Department?**  Upon the agreement of the Secretary and the Tribe reflected in a funding agreement, a portion of Tribal shares may be left with Department agencies for certain PSFAs. [PARKED ITEM] [Discussion of change to “buyback” rather than retained services. Further discussion of how “retained” services will work at DOT. Proposal that Secretarial agreement not needed but would be mandatory]  **§ 137.\_\_ May a funding agreement include Federal-aid funds apportioned to a State under chapter 1 of title 23 United States Code?**  Yes. As authorized under section 207(d)(2)(A)(ii) of title 23, if the Tribe enters into an agreement as authorized, and the State elects to provide a portion of Federal-aid funds apportioned to the State under chapter 1 for a project eligible under section 202(a) of title 23, or elects to provide any other funds, the funding agreement shall include such funds.  **§137.\_\_ Are other transfer arrangements available for the transfer to a Tribe of Federal-aid funds apportioned to a State under chapter 1 of title 23 United States Code?**  Yes. The transfer of Federal-aid funds may also occur in accordance with section 202(a)(9) of title 23 United States Code or the State and Tribe may agree that the State shall transfer the funds back to the Secretary and the Secretary shall transfer the funds to the Tribe in accordance with section 207(d)(2)(A)(ii) of title 23.  **§137.\_\_ Which entity is responsible for the transferred funds?**  Upon receipt of the Federal-aid funds into a funding agreement, the Tribe shall be responsible for constructing and maintaining a project carried out using the Federal-aid funds and for administering and supervising the project and funds in accordance with section 207(d)(A)(ii) during the applicable statute of limitations period related to the construction of the project. The State shall not be responsible for constructing or maintaining the project carried out by the Tribe or for administering or supervising the project or funds during the applicable statute of limitations period related to the construction of the project.  **Flexible Financing**  **§170.227 May a funding agreement include provisions pertaining to flexible or innovative financing?**   1. Yes, a funding agreement shall include the provisions of paragraph (b) pertaining to flexible and innovative financing. 2. At the request of a Tribe, a funding agreement shall include the following clauses regarding flexible or innovative financing:   “Tribes may use flexible financing in the same manner as States to finance eligible projects, unless otherwise prohibited by law.  “Tribes may issue bonds or enter into other debt-financing instruments under 23 U.S.C. 122 with the expectation of payment of Tribal Transportation Program (TTP) funds, or other federal funds not prohibited by law, to satisfy the instruments.  “Under 23 U.S.C. 603, the Secretary may enter into an agreement for secured loans or lines of credit for Tribal Transportation and other eligible projects meeting the requirements contained in 23 U.S.C. 602. Tribes, or with the consent of the Department modal administration, the Department may service federal credit instruments. The secured loans or lines of credit must be paid from tolls, user fees, payments owing to the obligor under a public-private partnership or other dedicated revenue sources.  “Tribes may use Tribal Transportation Program funds, or other eligible funds, as collateral for loans or bonds to finance eligible projects. Upon the request of an Indian tribe, the Secretary shall provide necessary documentation to banks and other financial institutions.”  **§170.228 Can a Tribe use Tribal Transportation Program funds under section 202(a) of title 23 to leverage other funds or to pay back loans?**   1. A Tribe can use Tribal Transportation Program funds under section 202(a) of title 23 to leverage other funds. 2. A Tribe can use such funds to pay back loans or other finance instruments that were used for a project that: 3. The Tribe paid for in advance of the current year using non-Tribal Transportation Program or other eligible funds; 4. Was included in an FHWA-approved Tribal Transportation Program Transportation Improvement Program (TTPTIP); and 5. Was included in the National Tribal Transportation Facility Inventory (NTTFI) at the time of construction.   **§170.229 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.  **§170.230 How long must a project financed through flexible financing remain on a TTIP?**  Tribesmust identify each Tribal Transportation Program project financed through flexible financing along with the repayment amount on their annual TTIP until the flexible financing instrument has been satisfied.  **§170.\_\_ Can an Indian tribe use other federal funds awarded under the funding agreement to leverage other funds or to pay back loans?**  Yes, except when prohibited by federal law.  TERMS IN A FUNDING AGREEMENT  **§ 137.45 What terms must be included in a funding agreement?**  A funding agreement must include terms required under section 207(d)(3) of title 23 and provisions regarding reassumption pursuant to section 207(e)(2)(A)(ii) of title 23, unless those provisions have been included in a compact. A funding agreement shall set forth –   1. terms that generally identify the PFSAs (or portions thereof) to be performed or administered by the Indian tribe; and 2. for items identified in subparagraph (i) – 3. the general budget category assigned; 4. the funds to be provided, including those funds to be provided on a recurring basis; 5. the time and method of transfer of the funds; 6. the responsibilities of the Secretary and the Tribe; and 7. any other provision agreed to by the Tribe and the Secretary. 8. 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 PFSAs as provided in 23 U.S.C. § 207(f)(2)(A)(i).   **§ 137.46 May additional terms be included in a funding agreement?**  Yes, at the Tribe’s option, additional terms may be included as set forth in section 506 [[25 U.S.C. 458aaa–5](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS458AAA-5&originatingDoc=N35C3BEE08B4711D98CF4E0B65F42E6DA&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink))] and 516(b) of the Act [[25 U.S.C. 458aaa–15(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS458AAA-15&originatingDoc=N35C3BEE08B4711D98CF4E0B65F42E6DA&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_a83b000018c76) ] as made applicable to the Tribal Transportation Self-Governance Program by section 207(l ) of title 23. In addition, any other terms to which the Tribe and the Secretary agree may be included.  **§ 137.47 Do ~~any~~ provisions of Title I and Title V of the Indian Self-Determination and Education Assistance Act apply to compacts, funding agreements, and construction project agreements negotiated under 23 U.S.C. § 207?**    **§ 137.48 What is the effect of incorporating a Title I or Title V provision into a compact or funding agreement?**    The incorporated Title I or Title V provision shall have the same force and effect as if it were set out in full in 23 U.S.C. §207, as amended.  **§ 137.49 What if a Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?**  In that event, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.  **TERM OF A FUNDING AGREEMENT**  **§ 137.55 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), absent notification from a Tribe that it is withdrawing from or retroceding the operation of one or more PFSA identified in a funding agreement, or unless otherwise agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.  **§ 137.56 Does a funding agreement remain in effect after the end of its term?**  Yes, the provisions of a funding agreement, including all recurring increases received and continuing eligibility for other increases, remain in full force and effect until a subsequent funding agreement is executed. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.  **§ 137.57 How is a funding agreement amended during the effective period of the funding agreement?**  A funding agreement may be amended by the parties as provided for in the funding agreement, 23 U.S.C. § 207, as amended, or this part.  **Statutorily Mandated Discretionary and Competitive Grants**  **§ 137.60 May a statutorily mandated discretionary or competitive grant be added to a funding agreement?**    Yes, in accordance with 23 U.S.C. §207(d)(2)(A)(i), as amended, a statutorily mandated discretionary or competitive grant may be added to the funding agreement after award.  **§ 137.65 May a Tribe receive statutorily mandated discretionary or competitive grant funding in an annual lump sum advance payment?**  Yes, grant funds shall be added to the funding agreement as an annual lump sum advance payment after the grant is awarded.  **§ 137.66 May a Tribe keep interest earned on statutorily mandated discretionary or competitive grant funds?**  Yes, a Tribe may keep interest earned on statutorily mandated discretionary or competitive grant funds.  **§ 137.67 How may a Tribe use interest earned on statutorily mandated discretionary or competitive grant funds?**    Interest earned on such funds may be used by the Tribe at their discretion.  **§ 137.68 May funds from a statutorily mandated discretionary or competitive grant added to a funding agreement be reallocated?**    No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, funds from a statutorily mandated discretionary or competitive grant may not be reallocated.  **§ 137.69 May a statutorily mandated discretionary or competitive grant program or State apportioned funds added to a funding agreement be redesigned or consolidated?**    No, if an Indian tribe receives a statutorily mandated discretionary orcompetitive grant from the Secretary or receives State apportioned funds, the Indian tribe shall use the funds for the purpose for which the funds were originally authorized.  **§ 137.70 Are the reporting requirements different for a statutorily mandated discretionary or competitive grant program added to a funding agreement?**    Except as provided otherwise under this Part, the reporting requirements for a statutorily mandated discretionary or competitive grant program added to a funding agreement are subject to the terms and conditions of the grant award.  **§ 137.71 May the Secretary and the Tribe, develop separate programmatic reporting requirements for statutorily mandated discretionary and competitive grants?**    Yes, the Secretary and the Tribe may develop separate programmatic reporting requirements for statutorily mandated discretionary and competitive grants.  **§ 137.72 Are Tribes and their employees carrying out statutorily mandated discretionary and competitive grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?**    Yes, Tribes and their employees carrying out statutorily mandateddiscretionaryand competitive grant programs added to a funding agreement are covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M, 42 C.F.R. § 137.220 and this Part [ ].  **NOTE**: Are additional regulatory provisions required to identify other PFSAs (or portions thereof) administered by the Secretary of Transportation that are “otherwise available to Indian tribes” to include in a funding agreement under the Tribal Transportation Self-Governance Program as authorized in 23 U.S.C. §207(d)(2)(A)(i)?  **§137.220 Do section 314 of Public Law 101-512 (25 U.S.C. 450f note) and section 102(d) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f(d)) (regarding, in part, FTCA coverage) apply to compacts, funding agreements and construction project agreements?**  Yes, regulations governing FTCA coverage are set out at 25 CFR Part 900, Subpart M.  **207(e) General Provisions**  **Redesign**  **§ What is Redesign ?**  **§ ###.### May a Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?**    Yes, a Tribe may redesign or consolidate PSFAs included in a funding agreement and reallocate or redirect funds for such PSFAs in any manner which the Tribe deems to be in the best interest of the Indian community being served. In accordance with 23 U.S.C. 207(e)(1)(A)(ii)  **Conflict of Interest**  **§ ###.### How does the Secretary address a perceived conflict between provisions of the Indian Self-Determination and Education Assistance Act and 23 U.S.C. § 207?**  Provisions of ISDEAA incorporated into 23 U.S.C. §207 by §207(*l*) shall be presumed not to conflict with §207. In the event that the Secretary interprets a conflict between incorporated ISDEAA provisions and 23 U.S.C. § 207, the Secretary shall resolve the conflict in the manner most favorable to the Tribe.  **§ ###.### May the Secretary consider conflicts between provisions of ISDEAA incorporated by 23 U.S.C. § 207(*l*) and portions of the law outside of 23 U.S.C. § 207?**  No. The Secretary is limited by statute and may only consider conflicts that the Secretary determines to arise between 23 U.S.C. §207 and the provisions of the ISDEAA incorporated by § 207(*l*). The Secretary may not consider conflicts between provisions applied in § 207(*l*) and other provisions of law.  **§ ###.### 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 PSFA’s  **Records**  **§ ###.### 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 [§ ###.1205](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000547&cite=42CFRS137.177&originatingDoc=N396D17D08B4711D98CF4E0B65F42E6DA&refType=VP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)).  **§ ###.### Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?**  No, 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.  **§ ###.### 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 requirements.  **Retrocession**  **§ ###.### What is retrocession?**  Retrocession means the return by a Tribe to the Secretary of 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.  **§ ###.### How does a Tribe retrocede a PSFA?**  The Tribe submits a written notice 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.  **§ 137.247 What is the effective date of a retrocession?**    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:  (a) The earlier of 1 year after:  (1) The date of submission of the request, or  (2) The date on which the funding agreement expires; or  (b) Whatever date is mutually agreed upon by the Secretary and the retroceding Tribe.  **§ ###.### What effect will a retrocession have on a retroceding Tribe’s rights to contract or compact under the Act?**  A retrocession request shall not negatively affect:    (a) Any other contract or compact to which the retroceding Tribe is a party;  (b) Any other contracts or compacts the retroceding Tribe may request; and  (c) Any future request by such Tribe to compact or contract for the same program.  **§ ###.### Will retrocession adversely affect funding available for the retroceded program****?**  No, the Secretary shall provide no less than the same level of funding that would have been available if there had been no retrocession.  **§ ###.### How are funds distributed when a Tribe fully or partially retrocedes from its compact or funding agreement?**  Any funds not obligated by the Tribe and associated with the Tribe’s returned PSFAs, less close out costs, must be returned by the Self–Governance Tribe to the Department for operation of the PSFA’s associated with the compact or funding agreement from which the Tribe retroceded in whole or in part.  **§ ###.### What happens to the PSFA’s in a compact and funding agreement upon retrocession by a Tribe?**  The Secretary and The Tribe shall negotiate a mutually acceptable arrangement concerning the retro-ceded PSFA’s.  **Withdrawal**  **§ ###.### May a Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?**  Yes, a Tribe may fully or partially withdraw from a participating inter-Tribal consortium or Tribal organization its share of any PSFAs, formula funds, grants, and state transferred funds included in a compact or funding agreement.  **§ ###.### When does a withdrawal become effective?**  A withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating Tribal organization or inter-Tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on:  (a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or  (b) Such date as may be mutually agreed upon by the Secretary, the withdrawing Tribe, and the participating Tribal organization or inter-Tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Tribe, inter-Tribal consortium, or Tribal organization.  **§ ###.### How are funds redistributed when a Tribe fully or partially withdraws from a compact or funding agreement and elects to enter a contract or compact?**  When a Tribe is eligible to enter into a contract under Title I or a compact or funding agreement under Title V fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization, and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:  (a) The withdrawing Tribe is entitled to its Tribal share of 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 or Tribal organization); and  (b) the funds referred to in paragraph (a) of this section must be transferred from the funding agreement of the inter-Tribal consortium or Tribal organization, on the condition that the provisions of ~~[~~[25 U.S.C. 450f](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS450F&originatingDoc=N3AF1E3108B4711D98CF4E0B65F42E6DA&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink))~~]~~ and 25 U.S.C. 450j of the Act [[25 U.S.C. 450j](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS450J&originatingDoc=N3AF1E3108B4711D98CF4E0B65F42E6DA&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink))], as appropriate, apply to the withdrawing Tribe.    **§ ###.### How are funds distributed when a Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Tribe and the withdrawing Tribe elects not to enter a contract or compact?**  All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Tribe’s returned PSFAs, less close out costs, shall be returned by the inter-Tribal consortium or Tribal organization to the Department for determination on funding and program responsibilities.  **Non-Duplication**  **§ ###.### If a Tribe that receives funds under 23 U.S.C. 202(b)(6) or 23 U.S.C. 202(b)(7) contracts, or under agreements with the Secretary of Interior also entitled to compact under this section 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. If it wishes, the Tribe can elect to leave those agreements and begin a compact and funding agreement under this section. Such Tribe is eligible to enter into agreements under this section for new programs on the same basis as other Tribes.  **NON DUPLICATION – Proposed Replacement for Above**  **How does a Tribe carrying out PSFA’s under Title 23 and Chapter 53 of Title 49 perform such PSFA’s under the compact and funding agreement under this part?**  After qualifying to participate in the program under this part, A Tribe may enter into a compact and funding agreement with the Department for all or some of the PSFA’s currently performed by the Tribe, provided there is no duplication of funding awarded under the respective agreements. Nothing shall prevent the Tribe from entering into agreements for new programs on the same basis as other Tribes.  **207(f) PROVISIONS RELATING TO SECRETARY--**  **§ ###.600 What constitutes a final agency action?**  A final agency action shall consist of a written decision from the Department to the Tribe either:    (a) By 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    (b) By an administrative judge.  **§ ###.601 When can the Secretary Terminate a Compact or Funding Agreement?**  (a) The Secretary may terminate 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:  (1) 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  (2) 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.  **§ ###.602 Can the Secretary terminate 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 program, function, service, or activity 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 ###.601(a)(1) and (2), the Secretary shall identify the narrowest portion of the compact or funding agreement the termination of which will alleviate the termination criteria in ###.601(a)(1) and (2).  **§ ###.603 What process must the Secretary follow before termination a compact or funding agreement, or portion thereof?**  Except as provided in §###.607, for immediate termination, prior to a termination becoming effective, the Secretary must:  (a) Notify the Tribe in writing by certified mail of the details of findings required under § ###.601& ###.602;  (b) Request specified corrective action within a reasonable period of time, which in no case may be less than 45 days;  (c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Tribe to overcome the conditions that led to the findings described under (a); and  (d) Provide the Tribe with a hearing on the record as provided under Subpart ###.\_\_ of this part.  **§ ###.604 Does the Tribe have a right to a hearing prior to a non-immediate termination 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.  **§ ###.606 What is the earliest date on which a termination can be effective?**  Except as provided in § ###.607, no PSFA may be terminated 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.  **§ ###.607 Does the Secretary have the authority to immediately terminate a PSFA?**  Yes, the Secretary may immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding upon providing to the Tribe written notice in which the Secretary makes a finding:  (a) of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Tribe; and  (b) the endangerment arises out of a failure to carry out the compact or funding agreement.  **###.608 If the Secretary terminates a PSFA immediately, when must the Secretary provide the Tribe with a hearing?**  If the Secretary immediately terminate a PSFA, the Secretary must provide the Tribe with a hearing under Subpart \_\_ of this part not later than 10 days after such termination, unless the Tribe and the Secretary agree to an extension.  **§ ###.609 May the Secretary provide a grant to a Tribe for technical assistance to overcome conditions identified under § ###.603?**  Yes, the Secretary may make a grant for the purpose of obtaining technical assistance as provided 25 U.S.C. 458aaa-h.  **§ ###.610 What is the Secretary’s burden of proof for a hearing or appeal of a decision to terminate 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.  .611 melded to 207(e)  **§ ###.612 May a Tribe be reimbursed for actual and reasonable close out costs incurred after the effective date of termination?**  Yes, a Tribe may be reimbursed for actual and reasonable close out costs incurred after the effective date of termination.  **§ ###.613** **On termination, what happens to the funding associated with the terminated portions of a compact or funding agreement?**  Upon termination pursuant to this subpart, the Secretary may reassume the remaining funding associated with the terminated programs, functions, services, and activities included in the compact or funding agreement.  (a) Out of any funds reassumed , the Secretary may transfer the funds associated with Department of the Interior PSFA’s (or portions thereof) to the Secretary of the Interior to provide continued transportation services in accordance with applicable law.  (b) Funds associated with programs not within DOI may be sent to the Administrator of the appropriate agency within DOT for further action.  **207(g) COST PRINCIPLES**  **§ ###.701 Are Tribes required to undertake annual audits?**  Tribes that meet the applicable thresholds under the Office of Management and Budget 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*.*  **§ ###.702 Are there exemptions to the audit requirements?** Yes, the exemptions are described in 2 C.F.R. § 200.501.  **§ ###.703 What cost principles must a Tribe follow?**  A 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. 450j-1],  (b) Other provisions of law, or  (c) Any exemptions to applicable OMB circulars subsequently granted by the OMB.  **§ ###.704 May the Secretary require audit or accounting standards other than those specified in § ###.703?**  No, no other audit or accounting standards shall be required by the Secretary, including any otherwise allowed by 2 C.F.R. § 200.503.  **§ ###.705 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 § ###.701?**  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.  **§ ###.706 When does the 365 day period commence?**  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.  **§ ###.707 Where do Tribes send their audit reports?**  Any required audits must be submitted to the Federal Audit Clearinghouse pursuant to OMB procedures.  **§ ###.708 Does a Tribe have a right of appeal from a disallowance?**  Yes, the notice must set forth the right of appeal and hearing to the Civilian Board of Contract Appeals, pursuant to 25 U.S.C. 450m-1.  **207(h) TRANSFER of FUNDS**  **—Funding**  **§ 137.75 What funds must the Secretary transfer to a Tribe in a funding agreement?**    Subject to the terms of any compact or funding agreement, the Secretary must transfer to a Tribe all funds provided for in the funding agreement as required by 23 U.S.C. 207(h) and 207(d)(2)(A)(i)and(ii)   1. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.   **§ 137.76 When must the Secretary transfer to a Tribe funds identified in a funding agreement?**    When a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 30 days after the apportionment of such funds by the OMB and made available to the Department, unless the funding agreement provides otherwise. Funds received during the course of the fiscal year shall also be transferred to the Tribe, within 30 days of being made available to the Department.    **§ 137.78 May a Tribe negotiate a funding agreement for a term longer or shorter than one year?**  Yes, upon Tribal request, the Secretary must 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.  **§ 137.79 What funds must the Secretary include in a funding agreement?**    (a) The Secretary must include funds in a funding agreement in an amount equal to—  (1) the sum of the funding that the Indian tribe would otherwise receive for the program, function, service, or activity in accordance with a funding formula or other allocation method established under title 23 or chapter 53 of title 49; and  (2) such additional amounts as the Secretary determines equal the amounts that would have been withheld for the costs of the Bureau of Indian Affairs for administration of the program or project.  ~~the amount that the Self–Governance Tribe would have been entitled to receive in a contract under Title I , including amounts for direct program costs specified under section 106(a)(1) of the Act and amounts for contract support costs specified under section 106(a)(2), (3), (5), and (6) of the Act [~~[~~25 U.S.C. 450j–1(a)(2), (3), (5) and (6)~~](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS450J-1&originatingDoc=N36B91B608B4711D98CF4E0B65F42E6DA&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_d86d0000be040) ~~].~~  (b)In addition, the Secretary shall include any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Tribe or its members, all without regard to the organizational level within the Department where such programs, functions, services or activities (or portions thereof) are carried out.   1. Nothing in this part shall be construed to limit or reduce in any way the funding for any program, project, or activity serving an Tribe under title 23 or chapter 53 of title 49 or other applicable Federal law. Any Tribe that alleges that a compact or funding agreement is in violation of this part may apply the provisions of section 450m-1 of title 25.   PROHIBITIONS  **§ 137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Tribe under 23 U.S.C. § 207**    Yes, sections 508(d)(1)(A) and (B) of the Act [[25 U.S.C. 458aaa–7(d)(1)(A) and (B)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS458AAA-7&originatingDoc=N36CD8DC08B4711D98CF4E0B65F42E6DA&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_a7830000870a0) ], as made applicable to the Tribal Transportation Self-Governance Program by 23 U.S.C. §207(l )(3), expressly prohibit the Secretary from:    (a) Failing or refusing to transfer to a Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under the Tribal Transportation Self-Governance Program, except as required by Federal law, and    (b) From withholding portions of such funds for transfer over a period of years.  **§ 137.86 Is the Secretary prohibited from reducing the amount of funds required under the Tribal Transportation Self-Governance Program to make funding available for self-governance monitoring or administration by the Secretary?**    Yes, the Secretary is prohibited from reducing the amount of funds required under the Tribal Transportation Self-Governance Program to make funding available for self-governance monitoring or administration.  **§ 137.87 May the Secretary reduce the amount of formula funds due under the Tribal Transportation Self-Governance Program in subsequent years?**    No, in accordance with section 508(d)(1)(C)(ii) of the Act [[25 U.S.C. 458aaa–7(d)(1)(C)(ii)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS458AAA-7&originatingDoc=N36E29C608B4711D98CF4E0B65F42E6DA&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_f33900009a713) ], as made applicable to the Tribal Transportation Self-Governance Program by 23 U.S.C. § 207(l )(3) of title 23 the Secretary is prohibited from reducing the amount of funds required in subsequent years, except pursuant to:    (a) A reduction in appropriations or a change in allocation formula or applicable obligation limitation from the previous fiscal year for the program or function to be included in a compact or funding agreement;    (b) A Congressional directive in legislation or accompanying report;    (c) A Tribal authorization;    (d) A change in the amount of pass-through funds subject to the terms of the funding agreement; or  (e) Completion of a project, activity, or program for which such funds were provided.  **§ 137.88 May the Secretary reduce the amount of funds required under the Tribal Transportation Self-Governance Program 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, the **Secretary** may not reduce the amount of funds required under the Tribal Transportation Self-Governance Programto pay for Federal functions, including  Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities.  **§ 137.89 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, the Secretary may not reduce the amount of funds required under the Tribal Transportation Self-Governance Programto pay for costs of Federal personnel displaced by Self–Governance compacts and funding agreements**.**.  **§ 137.90 May the Secretary increase the funds required under the funding agreement?**    Yes, the Secretary may increase the funds required under 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.  PROMPT PAYMENT ACT  **§ 137.96 Does the Prompt Payment Act apply to funds transferred to a Tribe in a compact or funding agreement?**    Yes, the Prompt Payment Act, 39 U.S.C. section 3901 et seq., applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to the Tribal Transportation Self-Governance Program.  INTEREST OR OTHER INCOME ON TRANSFERS  **§ 137.100 May a Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?**    Yes, pursuant to section 508(h) of the Act [[25 U.S.C. 458aaa–7(h)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS458AAA-7&originatingDoc=N374778B08B4711D98CF4E0B65F42E6DA&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_f383000077b35) ], a Tribe may retain and spend interest earned on any funds paid under a compact or funding agreement.  **§ 137.101 What standard applies to a Tribe’s management of funds paid under a compact or funding agreement?**  A Tribe is under a duty to manage the funds as a prudent investor would, in light of the purpose, terms, distribution requirements, and provisions in the compact or funding agreement and the Tribal Transportation Self-Governance Program. 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 Tribe. In making and implementing investment decisions, the Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so. In addition, the Tribe must:    (a) Conform to fundamental fiduciary duties of loyalty and impartiality;    (b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and  (c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Tribe.  CARRYOVER OF FUNDS  **§ 137.105 May a Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?**  Yes, a Tribe may carryover from one year to the next any funds that remain at the end of the funding agreement.  LIMITATION OF COSTS    **§ 137.115 Is a Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?**    No, if a Tribe believes that the total amount of funds provided for a specific PSFA in a compact or funding agreement is insufficient, the Tribe must provide reasonable written notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement in a quantity sufficient for the Tribe to complete the PSFA, as jointly determined by the Tribe and the Secretary, the Tribe may suspend performance of the PSFA until such time as additional funds are transferred.  **207(i) CONSTRUCTION PROGRAMS**  **PLACEHOLDER PLACEHOLDER**  **PLACEHOLDER PLACEHOLDER**  **PLACEHOLDER PLACEHOLDER**  **207 (j) FACILITATION**  **§ 137.2 SECRETARIAL POLICY**  Congress has declared, except as otherwise provided by law, the Secretaryshall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:  (1) The inclusion of PSFAs and funds associated therewith, in the agreements entered into under this part;    (2) The implementation of compacts and funding agreements entered into under the Tribal Transportation Self-Governance Program; and    (3) The achievement of Tribal transportation infrastructure and highway safety goals and objectives.  (4) 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.  (5) The Sec under the DOT Consultation Policy encourages States to enter into agreements with Tribes to facilitate and supplement the initiatives, programs, and policies authorized by this part and other Federal laws benefiting Indians and Tribes.  **207 (k) DISCLAIMERS**  **§###.1 Are the provisions of an existing Tribal Transportation Program Agreement and Referenced Funding Agreement entered into between an Tribe and the Federal Highway Administration under section 202(b)(7) prior to the enactment of the Tribal Transportation Self-Governance Program 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 Federal Highway Administration under the authority of section 202(b)(7).  **§###.2 Can a Tribe enter into a Tribal Transportation Program Agreement and Referenced Funding Agreement, or renew an existing Agreement with the Secretary, through the Federal Highway Administration, after the effective date of these regulations?** Yes. As authorized under 23 U.S.C. § 207(k)(1)(B), a Tribe may enter into a Tribal Transportation Program Agreement and Referenced Funding Agreement under section 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.    **§###.3 May a Tribe with a current Tribal Transportation Program Agreement and Referenced Funding Agreement under section 202(b)(7) also negotiate a Compact and Funding Agreement for some or all Department PSFAs under this Part?** Yes. Provided that the Tribe is eligible to participate in the Tribal Transportation Self-Governance Program as provided under Subpart (b) herein, the Tribe may also elect to negotiate a Compact and Funding Agreement for Department PSFA’s under this part, as long as it is accordance with 207(e) Non-Duplication clause.  **207(l) APPLICABILITY of ISDEAA**  APPLICABILITY OF INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.—Except to the extent in conflict with this section (as determined by the Secretary), the following provisions of the Indian Self-Determination and Education Assistance Act shall apply to compact and funding agreements (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):  **207(l)(1)**  **1. General Provisions**  **§ ###.1200** **How does the Secretary address a percieved conflict between provisions of the Indian Self-Determination and Education Assistance Act and 23 U.S.C. § 207?**  Provisions of ISDEAA incorporated into 23 U.S.C. §207 by §207(*l*) shall be presumed not to conflict with §207. In the event that the Secretary interprets a conflict between incorporated ISDEAA provisions and 23 U.S.C. § 207, the Secretary shall resolve the conflict in the manner most favorable to the Tribe.  **§ ###.1201 May the Secretary consider conflicts between provisions of ISDEAA incorporated by 23 U.S.C. § 207(*l*) and portions of the law outside of 23 U.S.C. § 207?**  No. The Secretary is limited by statute and may only consider conflicts that the Secretary determines to arise between 23 U.S.C. §207 and the provisions of the ISDEAA incorporated by § 207(*l*). The Secretary may not consider conflicts between provisions applied in § 207(*l*) and other provisions of law.  **§ ###.1202** **Are Tribes required to address potential conflicts of interest?**  Yes, Tribes participating in self-governance under this Act must ensure that internal measures and controls are in place to address conflicts of interest in the administration of PSFAs.  **§ ###.1203 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 § **###.1205**.  **§ ###.1204 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?**  No, 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.  **§ ###.1205 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 requirements.  **§ ###.1206** **May a Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?**  Yes, a Tribe may fully or partially withdraw from a participating inter-Tribal consortium or Tribal organization its share of any PSFAs, formula funds, grants, and state-transferred funds included in a compact or funding agreement.  **§ ###.1207 When does a withdrawal become effective?**  A withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating Tribal organization or inter-Tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on:  (a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or  (b) Such date as may be mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the participating Tribal organization or inter-Tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian Tribe, inter-Tribal consortium, or Tribal organization.  **§ ###.1208 How are funds redistributed when a Tribe fully or partially withdraws from a consortium’s compact or funding agreement and elects to enter a compact and funding agreement?**  When a Tribe eligible to enter into a compact and funding agreement fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization, and has proposed to enter into a compact and funding agreement covering the withdrawn funds:  (a) The withdrawing Tribe is entitled to its Tribal share of funds supporting those PSFAs, grants, formula funds, and state-transferred funds that the Indian 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 or Tribal organization); and  (b) the funds referred to in paragraph (a) of this section must be transferred from the funding agreement of the inter-Tribal consortium or Tribal organization, on the condition that the provisions of 25 U.S.C. 450f and 25 U.S.C. 450j, as appropriate, apply to the withdrawing Indian Tribe.  **§ ###.1209 How are funds distributed when a Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Indian Tribe and the withdrawing Indian Tribe elects not to enter a contract or compact?**  All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Indian Tribe's returned PSFAs, less close out costs, shall be returned by the inter-Tribal consortium or Tribal organization to the DOT or other responsible agencies, as appropriate, for determination of funding and program responsibilities.  **§ ###.1210 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement is the resulting contract considered a mature contract under 25 U.S.C. 450b(h)?**  Yes, if the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement, the resulting contract is considered a mature contract under 25 U.S.C. 450b(h) at the option of the Indian Tribe.  **§ ###.1211 Is a Tribe that receives funds under 23 U.S.C. 202(b)(6) or 23 U.S.C. 202(b)(7) contracts, or under agreements with the Secretary of Interior also entitled to compact under this section for such funds?**  For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Self-Governance 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. If it wishes, the Self-Governance Tribe can elect to leave those agreements and begin a compact and funding agreement under this section. Such Self-Governance Tribe is eligible to enter into agreements under this section for new programs on the same basis as other Indian Tribes.  **207(l)(2) Provisions Relating To The Secretary**    **Final Offer**  **§ ###.1300 What is covered by this subpart?**  This subpart explains the final offer process provided by the statute for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.  **§ ###.1301 When should a final offer be submitted?**  A final offer should be submitted when the Secretary and an Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels).  **§ ###.1302 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 Deputy Assistant Secretary for Tribal Government Affairs.  (b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a “Final Offer.”  **§ ###.1303 What does a final offer contain?**  A final offer contains a description of the disagreement between the Secretary and the Tribe and the Tribe's final proposal to resolve the disagreement.  **§ ###.1304 When does the 45 day review period begin?**  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.  **§ ###.1305 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.  **§ ###.1306 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.  **§ ###.1307 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.  **§ ###.1308 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**  **§ ###.1309 On what basis may the Secretary reject a Tribe's final offer?**  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 under the Act;  (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 207(b) of the Act.  **§ ###.1310 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 § ###.1309 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.  **§ ###.1311 What is a “significant danger” or “risk” to the public health and safety standards?**  A significant danger or risk is determined on a case-by-case basis in accordance with 25 U.S.C. 458aaa-6(c).  **~~§ ###.143 How is the funding level to which the Indian Tribe is entitled determined?~~**  ~~The Secretary must provide funds under a funding agreement in an amount equal to the amount that the Indian Tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) of the Act [25 U.S.C. 450j-1(a)(1)] and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j-1(a)(2), (3), (5) and (6)], including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.~~  **§ ###.1312 Is technical assistance available to a Tribe to avoid rejection of a final offer?**  Yes, upon receiving a final offer, the Secretary must offer any necessary technical assistance, and must share all relevant information with the Tribe in order to avoid rejection of a final offer.  **§ ###.1313 If the Secretary rejects a final offer, is the Secretary required to provide the Tribe with technical assistance?**  Yes, if requested by the Tribe, the Secretary must offer to provide additional technical assistance to overcome the stated grounds for rejection.  **§ ###.1314 If the Secretary rejects all or part of a final offer, is the Tribe entitled to an appeal?**  Yes, the Tribe is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart \_\_ of this part. Alternatively, at its option, the Tribe has the right to sue pursuant to 25 U.S.C. 450m-1 in Federal district court to challenge the Secretary's decision.  **§ ###.1315 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?**  Yes, subject to 25 U.S.C. 458aaa-6(c)(1)(D).  **§ ###.1316 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.  **§ ###.1317 What is the burden of proof in an appeal from rejection of a final offer?**  With respect to any appeal, hearing or civil action, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final offer.  **Secretarial Provision**  **§ ###.1318 Do the provisions of this section allow the Secretary to waive or modify the trust responsibility?**  No. Congress has declared that the Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.  **207(l)(3) Transfer of Funds**  **§ ###.1400 What funds must the Secretary transfer to a Tribe in a funding agreement?**  Subject to the terms of any compact or funding agreement, the Secretary must transfer to a Tribe all funds provided for in the funding agreement, pursuant to 23 U.S.C. § 207(d)(2)(A) and other funds agreed to be provided. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations and authorization extensions, to the extent permitted by such resolutions.  **§ ###.1401 When must the Secretary transfer to a Tribe funds identified in a funding agreement?**  When a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 30 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise.  **§ ###.1402 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?**  The Secretary must transfer any funds that were not paid in the initial lump sum payment within 10 days after distribution methodologies and other decisions regarding payment of those funds have been made by the Department of Transportation.  **§ ###.1403 May a Tribe negotiate a funding agreement for a term longer or shorter than one year?**  Yes, upon Tribal request, the Secretary must 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.  **§ ###.1404 What funds must the Secretary include in a funding agreement?**  The Secretary must include the following funds in the annual funding agreement:   1. Funds in an amount equal to the amount that the Tribe would have been entitled to receive under full tribal share funding, tribal transit formula funding, and funding to tribes from discretionary and competitive grants administered by the Department for all PSFAs (or portions thereof) that are made available to tribes to carry out tribal transportation services; 2. Funds associated with PSFA’s administered by the Secretary that are otherwise available to Tribes; 3. Funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out; 4. Funds made available through the execution of a 23 U.S.C. **§** 202(a)(9) agreement between a Tribe and a State or States; and 5. Any other funds as agreed to by the Tribe and the Secretary.   **§ ###.1405 Must the Secretary provide State-provided funds to Tribes through a Self-Governance funding agreement?**  No. The Tribe, State, and Secretary may negotiate an agreement under 23 USC § 202(a)(9) for the transfer of state funds, and the provisions of the Self-Governance program do not affect that authority.  **§ ###.1406 Who is responsible for funds transferred from a State to a Tribe through a funding agreement?**  The responsibility for the funds transferred through an agreement with a state will be in accordance with the terms of such agreement.  **Prohibitions**  **§ ###.1407 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Tribe under the Self-Governance Program ?**  Yes, 25 U.S.C. 458aaa-7(d)(1)(A) and (B) expressly prohibit the Secretary from:  (a) Failing or refusing to transfer to a Tribe its full share of any central, headquarters, regional, area, or service unit office, grant, formula, or other funds due under the Self-Governance program, except as required by Federal law, and  (b) From withholding portions of such funds for transfer over a period of years.  **§ ###.1408 Is the Secretary prohibited from reducing the amount of funds required under the Self-Governance Program to make funding available for self-governance monitoring or administration by the Secretary?**  Yes, the Secretary is prohibited from reducing the amount of funds required under the Self-Governance Program to make funding available for self-governance monitoring or administration.  **§ ###.1409 May the Secretary reduce the amount of funds due under the Self-Governance Program in subsequent years?**  No, in accordance with 25 U.S.C. 458aaa-7(d)(1)(C)(ii), the Secretary is prohibited from reducing the amount of funds required under this section in subsequent years, except pursuant to:  (a) A reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;  (b) A Congressional directive in legislation or accompanying report;  (c) A Tribal authorization  (d) A change in the amount of pass-through funds subject to the terms of the funding agreement; or  (e) Completion of a project, activity, or program for which such funds were provided.  **§ ###.1410 May the Secretary reduce the amount of funds required under the Self-Governance Program 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, the Secretary may not reduce the amount of funds required under this section 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.  **§ ###.1411 May the Secretary reduce the amount of funds required under the Self-Governance Program to pay for costs of Federal personnel displaced by self-governance compacts and funding agreements?**  No, the Secretary may not reduce the amount of funds required under this section to pay for costs of Federal personnel displaced by the self-governance program.  **§ ###.1412 May the Secretary increase the funds required under the funding agreement?**  Yes, the Secretary may increase the funds required under 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.  **§** **###.1413 Must the Secretary acquire and transfer to a Tribe, federal supplies and resources to carry out a compact and funding agreement?**  If statutorily available, and at the Tribe’s request, the Secretary shall acquire personnel, supplies (including those from federal warehouses and supply sources such as lodging, airlines, and other transportation), and federal resources available to the Secretary, and transfer the same to the Tribe in order to carry out a compact or funding agreement.  **§ ###.1414 Does the Prompt Payment Act apply to funds transferred to a Tribe in a compact or funding agreement?**  Yes, the Prompt Payment Act, 39 U.S.C. section 3901 *et seq.,* applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to the Self-Governance Program. See also § ###.1225 through ###.1228 and [137.341(f)].  **§ ###.1415 May a Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?**  Yes, pursuant to section 25 U.S.C. 458aaa-7(h), a Tribe may retain and spend interest earned on any funds paid under a compact or funding agreement.  **§ ###.1416 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. 458aaa-7(i), a Tribe may carryover from one year to the next any funds that remain at the end of the funding agreement.  **§ ###.1417 Is a Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?**  No, if a Tribe believes that the total amount of funds provided for a specific PSFA in a compact or funding agreement is insufficient, the Tribe must provide reasonable written notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement in a quantity sufficient for the Tribe to complete the PSFA, as jointly determined by the Tribe and the Secretary, the Tribe may suspend performance of the PSFA until such time as additional funds are transferred.  **§ ###.1418 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 under this section, existing compacts and funding agreements will be unaffected by subsequent transportation authorization Acts. Compacts and funding agreements will continue in force according to 23 U.S.C. 207(d)(4) and will not end due to operation of law or any other default mechanisms.  **207(l)(4) Federal Procurement Laws and Regulations**  Procurement  **§ ###.1500 Do Federal procurement laws and regulations apply to construction project agreements performed under section 23 USC 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 section 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  **207(l)(5) Civil Actions**  **§ ###.1600 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.  **207(l)(6) Facilitation**  **§ ###.1701 Does the Self-Governance Tribe have access to existing federal property to carry out the compact and funding agreement?**  Yes. According to section 25 U.S.C. 458aaa-11(c), the Secretary shall permit the Indian tribe to use existing transportation facilities and other facilities, and all equipment therein or appertaining thereto, and other personal property owened by the Government within the Secretary’s jurisdiction under such terms the Secretary and the Self-Governance Tribe may agree with regard to their use and maintenance.  **§ ###.1702 May the Secretary donate excess real or personal property to the Self-Governance Tribe?**  Yes. If the real or personal property is in excess to the needs of the Department or of the General Services Administration, provided that:  (a) Subject to subparagraph (b), title to the property and equipment furnished by the federal government for use in carrying out the compact and funding agreement (or purchased with compact and funding agreement funds) shall vest in the appropriate Indian Tribe, unless otherwise requested by the tribe.  (b) If the property in (a) has a value exceeding $5,000 at the time of retrocession, withdrawal, or termination, at the option of the Secretary at that time, title to the property and equipment shall revert to the Department.  (c) All property in (a) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States.  **§ ###.1703 May the Secretary acquire real or personal property to donate to the Self-Governance Tribe?**  Yes. If the Secretary determines the property is appropriate for use by the tribe for any purpose for which a compact or funding agreement is authorized under this section, the Secretary may acquire real or personal property for the purpose of donating it to the Tribe.  **Matching Funds**  **§ ###.1704 Shall funds provided under compacts, funding agreements, grants, or State transfers made pursuant to this section be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal Transportation program?**  Yes, As provided in 25 U.S.C.5392(d) funds provided under compacts, funding agreements, State transfers or grants made pursuant 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 Transportation program.    **§ ###.1705 May States work with Tribes to further transportation and transportation-related goals?**  Yes. As provided in 25 U.S.C. 5392(e) States are authorized and encouraged to enact legislation and to enter into agreements with Tribes to facilitate and supplement the initiatives, program, and policies authorized by the part and other federal laws benefitting Indians and Tribes.  **207(l)(7) Disclaimers**  **§ ###.1800** **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 must act in good faith in upholding this trust responsibility;  (c) Mandating a Tribe to apply for a compact(s) or grant(s) as described in the Act; or  (d) Impeding awards by other Departments and agencies of the United States to Tribes to administer Indian programs under any other applicable law.  **§ ###.1801 May this section 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?**  No, if a Tribe alleges that a compact or funding agreement violates 25 U.S.C. 458aaa-14(a), the Tribe may apply the provisions of 25 U.S.C. 450m-1.  **207(l)(8) Application of other Sections of this Subchapter**  Mandatory Title I Provisions  **Records**  **§ ###.1900 How long must Tribes make records available for federal examination or audit?**  Tribes should 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.  **§ ###.1901 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.  **§ ###.1902 What penalties apply for embezzlements, willful misapplication of funding, thefts, or fraud connected to recipients of federal funding?**  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**  **§ ###.1903 Do the wage and labor standards in the Davis-Bacon Act apply to Tribes and Tribal Consortia?**  No, wage and labor standards of the Davis-Bacon Act do not apply to employees of Tribes. They 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.  **§ ###.1904 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. 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.  **§ ###.1905 When does tribal 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).  **FTCA**  **§ ###.1906** **What does this subpart cover?**  This subpart explains the applicability of the Federal Tort Claims Act (FTCA). This section covers:  (a) Coverage of claims arising out of the performance of functions under Self-Governance compacts and funding agreements; and  (b) Procedures for filing claims under FTCA.  **§ ###.1907 What other statutes and regulations apply to FTCA coverage?**  A number of other statutes and regulations apply to FTCA coverage, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671-2680) and related Department of Justice regulations in 28 CFR part 14.  **§ ###.1908 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 following general guidance is 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.  (a) 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).  (b) What 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.  (c) What remedies are expressly excluded by FTCA and therefore are barred?  (1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and  (2) Other remedies not permitted under applicable state law.  **§ ###.1909 Is there a deadline for filing FTCA claims?**  Yes, claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).  **§ ###.1910 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.  **§ ###.1911 Is it necessary for a self-governance compact or funding agreement to include any clauses about FTCA coverage?**  No, clauses about FTCA coverage are optional.  **§ § ###.1912 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 if the compact and/or funding agreement does not mention it.  **§ § ###.1913 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 report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include 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.  (g) 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.  **§ § ###.1914 Does this coverage extend to subcontractors of self-governance compact and funding agreements?**  No, subcontractors or sub-grantees providing services to a Tribe are generally not covered.  **§ ###.1915 Is FTCA the exclusive remedy for a tort claim, including a claim concerning personal injury or death, resulting from the performance of a self-governance compact and funding agreement?**  Yes, except as explained in § ###.1908(b). No claim may be filed against a Tribe or employee based upon performance of functions under a self-governance compact and funding agreement. All claims shall be filed against the United States and are subject to the limitations and restrictions of FTCA.  **§ § ###.1916 What employees are covered by FTCA for medical-related claims?**  The following employees are covered by FTCA for medical-related claims:  (a) Permanent employees;  (b) Temporary employees;  (c) Persons providing services without compensation in carrying out a contract;  (d) Federal employees assigned to the compact and funding agreement.  **§ § ###.1917 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?**  Yes, 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.  **§ § ###.1918 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.  **§ § ###.1919 If the Tribe’s employee receives a notification, including but not limited to: 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) The Office of Self-Governance at US DOT, and  (d) Forward all of the materials identified in § ###.1913(c) to the contacts given in § ###.1919 (a), (b), & (c).  **§ #####.1920 Does the year PSFA’s are funded affect FTCA coverage?**  No, the year funding was provided has no affect on the application of FTCA  **§ ###.1921 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. 450i apply equally to eligible federal employees who leave for employment by tribes in connection with governmental activities under the TTGSP. For the purposes of this provision, “employee” means an employee as defined in 5 U.S.C. 2105.  **Supply and Leases**  **§ ###.1922 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.  **§ ##.1923 Can a Tribe lease tribal property back to the Secretary?**  Yes. Leasing processes will follow the provisions of section 105(l) of ISDEAA and 25 C.F.R. Part 900.69 through 900.74.  ***§ ###.1924 What funds must the Secretary include in a funding agreement?***  The Secretary must include funds in a funding agreement in an amount equal to the amount that the Self-Governance Tribe would have been entitled to receive in a contract under Title I, including amounts for direct program costs specified under section 106(a)(1) of the Act and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j-1(a)(2), (3), (5) and (6)]. In addition, the Secretary shall include any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Self-Governance Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.  **§ ###.1925** **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 (whether Self Governance Tribes or not) and tribal organizations in the development of the budgets for program, grants, services, initiatives, or other departmental functions that affect tribes and tribal transportation interests (including participation of Tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to 31 USC 1105).  **§ ###.1926 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. The Secretary must consult with tribes and tribal organizations when the Department is formulating revenue creation strategies for programs—including proposed changes to transportation trust funds, taxes or fees, or formula changes—as those changes affect tribal interests. Consultation should be carried out as early as possible in the process of formulating strategies or formulating responses to proposed strategies.  **§ ###.1927 Does the application of provisions and participation by tribes in the TTGSP affect tribal sovereign immunity or the trust relationship?**  No. Nothing in this section shall be construed as:  (a) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or  (b)authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.  **§ ###.1928 May a Tribe incorporate provisions of the Indian Self-Determination and Education Assistance Act into compacts and funding agreements?**  Yes. At the Option of the Tribe, any provisions of the Indian Self-Determination and Education Assistance Act [25 U.S.C. 450, *et seq*.**)**] may be incorporated into a compact or funding agreement. Any incorporated provisions shall have the same force and effect as if it were set out in the full in the ISDEAA.  **§ ###.1929 What if a Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?**  In that event, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.  **207(l)(9) Appeals**  **§ ###.2000 What is the Secretary's burden of proof for appeals under this part?**  As required by 25 U.S.C. 458aaa-17, 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.  **§###.2001 For the purposes of section 110 of the Act (25 U.S.C. 450m-1) does the term contract include compacts, funding agreements, and construction project agreements entered into under this part?**  Yes, for the purposes of section 110 of the Act [25 U.S.C. 450m-1] the term “contract” includes compacts, funding agreements, and construction project agreements entered into under section 207 of title 23 United States Code.  POST-AWARD DISPUTES  **§###.2002 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under this part?**  Yes, the regulations at [25 CFR Part 900, Subpart N](http://www.ecfr.gov/cgi-bin/text-idx?SID=44411be41895e68484ed97a9badfe512&mc=true&node=pt25.2.900&rgn=div5#sp25.2.900.n) apply to compacts, funding agreements, and construction project agreements entered into under this part. For purposes of 25 CFR Part 900, Subpart N, the phrase “HHS and DOI self-determination contracts” and the term “contract” includes compacts, funding agreements, and construction project agreements entered into under this part. The term “awarding official” includes the Department official(s) with authority to enter into a compact and funding agreement under this part.  PRE-AWARD DISPUTES  **§###.2003   What decisions may an Indian Tribe appeal under §###.2003 through ###.2024?**  (a) A decision to reject a final offer, or a portion thereof, under section 507(b) of ISDEAA [25 U.S.C. 458aaa-6(b)], as incorporated herein by section 207(*l*)(2);  (b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa-6(b)] as incorporated herein by section 207(*l*)(2);  (c) A decision to terminate a compact or funding agreement, in whole or in part, under section 207(f)(2), except for immediate termination under section 207(f)(2)(D) of the Act;  (d) *A decision to reject a final construction project or program proposal, or a portion thereof, under section 509(b) of the Act [25 U.S.C. 458aaa-8(b)] and subpart N of this part; and*  (e) *For construction project or program agreements carried out under section 509 of the Act [25 U.S.C. 458aaa-8], a decision to reject project planning documents, design documents, or proposed amendments submitted by a Self-Governance Tribe under section 509(f) of the Act [25 U.S.C. 458aaa-8(f)] and subpart N of this part.*  (f) A decision regarding a Tribe’s eligibility to participate in the Program under this part, as described in section 207(b), including a decision regarding a Tribe’s financial stability and financial management capacity/capability or a Tribe’s transportation program management capability.  **§###.2004   Do §§###.2003 through ###.2024 apply to any other disputes?**  No, §###.2003 through ###.2024 only apply to decisions listed in §###.2003. Specifically, §§###.2003 through ###.2024 do not apply to any other dispute, including, but not limited to:  (a) Disputes arising under the terms of a compact, funding agreement, or *construction project or program agreement* that has been awarded;  (b) Disputes arising from immediate terminations under section 207(f)(2)(D) of the Act [25 U.S.C. 458aaa-6(a)(2)(C)] and §137.261 and 137.262, which are covered under §137.440 through 137.445.  (c) Other post-award contract disputes, which are covered under §###.2002.  (d) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 45 CFR part 5.  .  **§###.2005  What procedures apply to \_\_\_\_\_\_\_\_\_\_\_\_ proceedings?**  The \_\_\_\_\_\_\_\_\_\_\_ may use the procedures set forth in [regulatory section with entity’s rules] as a guide.  **§###.2006   How does an Indian Tribe know where and when to file its appeal from decisions made by the Department?**  Every decision in any of the areas listed in §###.2003 must contain information which shall tell the Indian Tribe where and when to file the Indian 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 ###.2009, or appeal this decision under ## CFR ###.2013 to the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (\_\_\_\_). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the \_\_\_\_ under ## CFR ###.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  **§###.2007   What authority does the \_\_\_\_ have under §§###.2003 through ###.2024?**  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 insure rights specified in [§###.2019].  **§###.2008  Does an Indian Tribe have any options besides an appeal?**  Yes, the Indian 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 Indian 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 section 110 of the ISDEAA [25 U.S.C. 450m-1].  **§###.2009   How does an Indian Tribe request an informal conference?**  The Indian 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 Indian 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 Indian Tribe mails the request, it will be considered filed on the date the Indian Tribe mailed it by certified mail.  **§###.2010   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 Indian Tribe and the authorized representative of the Secretary agree on another date.  (b) If possible, the informal conference will be held at the Indian Tribe's office. If the meeting cannot be held at the Indian 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 Indian 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 Indian Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference. Such designated representatives may include the ~~Office of Tribal Self-Governance~~ [Perhaps the Deputy Ass’t Secretary for Tribal Governmental Affairs or any DOT SG agency].  **§###.2011   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 Indian 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 ###.2013. You may request a hearing on the record. An appeal to the \_\_\_\_ under ## CFR ###.2013 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 section 110 of the ISDEAA. [25 U.S.C. 450m-1].  **§###.2012   Is the recommended decision from the informal conference final for the Secretary?**  No. If the Indian 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 Indian Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under §###.2014 , the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to section 110 of the ISDEAA [25 U.S.C. 450m-1].  **§###.2013   How does an Indian 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 Indian Tribe decides to appeal, 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 Indian Tribe may either hand-deliver the notice of appeal to the \_\_\_\_\_, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the Notice of Appeal, it will be considered filed on the date the Indian Tribe mailed it by certified mail. The Indian Tribe should mail the notice of appeal to: [appeal board address].  (c) The Notice of Appeal must:  (1) Briefly state why the Indian Tribe thinks the initial decision is wrong;  (2) Briefly identify the issues involved in the appeal; and  (3) State whether the Indian Tribe wants a hearing on the record, or whether the Indian Tribe wants to waive its right to a hearing.  (d) The Indian Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian 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 an Indian Tribe may proceed directly to Federal court pursuant to section 110 of the ISDEAA [25 U.S.C. 450m-1].  **§###.2014   May an Indian Tribe get an extension of time to file a notice of appeal?**  Yes, if the Indian Tribe needs additional time, the Indian 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 Indian 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 Indian Tribe has a valid reason for not filing its notice of appeal on time, it shall receive an extension.  **§###.2015   What happens after an Indian Tribe files an appeal?**  (a) Within 5 days of receiving the Indian Tribe's notice of appeal, the \_\_\_\_\_ will decide whether the appeal falls under §###.2003. If so, the Indian 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 Indian 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 Indian Tribe is not entitled to a hearing or if the Indian Tribe has waived its right to a hearing on the record, the \_\_\_\_\_ will dismiss the appeal and inform the Indian Tribe that it is not entitled to a hearing or has waived its right to a hearing.  **§###.2016   How is a hearing arranged?**  (a) If a hearing is to be held, the \_\_\_\_ will refer the Indian 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.  **§###.2017   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 Indian Tribe with a response to the notice of appeal.  (c) If the hearing is held more than 50 miles from the Indian Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.  (d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.  **§###.2018   What is the Secretary's burden of proof for appeals covered by §###.2003?**  As required by section 518 of the ISDEAA [25 U.S.C. 458aaa-17] and ###.2000 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.  **§###.2019   What rights do Indian Tribes and the Secretary have during the appeal process?**  Both the Indian 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.  **§###.2020   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 Indian 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 ### CFR ###.2021. An appeal to the Secretary under ## CFR ###.2021 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.  **§###.2021   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 Indian 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.  **§###.2022   If an Indian 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.  **§###.2023   Will an appeal adversely affect the Indian 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.  **§ ###.2024   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**  **§ ###.2030   What happens in the case of an immediate termination under section 207(f)(2)(D) of title 23?**  (a) The Secretary may, upon written notification to the Tribe, immediately terminate operation of a program, service, function, or activity (or portion thereof) under a compact and funding agreement if:  (1) The Secretary makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety caused by an act or omission of the Tribe; and  (2) The jeopardy arises out of a failure to carry out the compact or funding agreement.  (b) When the Secretary advises a Tribe that the Secretary intends to take an action referred to in paragraph (a) of this section, the Secretary must also notify the\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.  **§ ###.2031   Will there be a hearing?**  Yes, unless the Self-Governance Tribe waives its right to a hearing in writing. The\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_must appoint an Administrative Law Judge to hold a hearing,  (a) The hearing must be held within 10 days of the date of the notice referred to in § ###.2030unless the Tribe agrees to a later date.  (b) 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.  **§ ###.2032   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 § ###.2033. An appeal to the Secretary under \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_shall be filed at the following 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 15 days, the recommended decision will become final.  **§ ###.2033  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.  **§ ###.2034  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.  **§ ###.2035   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.  EQUAL ACCESS TO JUSTICE ACT FEES  **§ ###.2040   Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?**  Yes, EAJA claims against the Department will be heard pursuant to § ###.####  **207(m) Definitions**  **§ [ ] Definitions.**  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.  *Administrator* means the Federal Highway Administrator.  *Appeal* means a request by an Indian 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* as defined in 23 U.S.C. 101(4), means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of transportation facility, as defined in 23 U.S.C. 101(a)(31), or any project eligible for assistance under [the Tribal Transportation Self-Governance Program] or [title 23 or chapter 53 of title 49]. The term includes bond costs and other costs relating to the issuance in accordance with section 122 of title 23 of bonds or other debt financing instruments and costs incurred by the in performing project related audits that directly benefit a project eligible under this part Such term includes -  (1) Preliminary engineering, engineering, and design-related services directly relating to the construction of a highway or other project eligible under title 23 or chapter 53 of title 49, 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.  [Self-Determination] *Construction Contract* means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract—  (1) that is limited to providing planning services and construction management services (or a combination of such services);  (2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or  (3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.  *Construction Programs* means programs for the planning, design, construction, repair, improvement, and expansion of tribal transportation facilities and other facilities. ~~including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities~~  *Construction Project* means an organized non-continuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or tribal transportation and other facilities, as described in a construction project agreement.  *Construction Project Agreement* means a negotiated agreement between the Secretary and a Tribe, that at a minimum—  (A) establishes project phase start and completion dates;  (B) defines a specific scope of work and standards by which it will be accomplished;  (C) identifies the responsibilities of the Indian tribe and the Secretary;  (D) addresses environmental considerations;  (E) identifies the owner and operations and maintenance entity of the proposed work;  (F) provides a budget;  (G) provides a payment process; and  (H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.  *Consultation* means the process by which the Department shall provide tribes and tribal organizations 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.  *Contract Funding Base* means the base level from which contract funding needs are determined, including all contract costs.  *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.  *Direct Program Costs* means costs that can be identified specifically with a particular contract objective.  *Eligible Indian Tribe* means an Indian tribe that is eligible to participate in the tribal transportation self-governance program.  *FAST Act* means the “Fixing America’s Surface Transportation Act”, title 23 of the United States Code and chapter 53 of title 49 of the United States Code, as amended by Public Law 114-94.  *FHWA* means the Federal Highway Administration of the Department of Transportation.  *FTA* means the Federal [Transit](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=dac345dd7c448e20a13bec13c3bbb2a8&term_occur=1&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) Administration of the Department of Transportation.  *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 Department levels and modal administrations of the Department in support of those PSFAs and such other terms as are required, or may be agreed upon, pursuant to the tribal transportation selfgovernance 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 Endangerment  *Imminent Jeopardy*  *Indian* means a person who is a member or citizen of an Indian Tribe.  The term ‘Indian 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 an Indian tribe has authorized another Indian tribe, an intertribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this section, the authorized Indian tribe, intertribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term ‘Indian tribe’ as used in this section shall include such other authorized Indian tribe, intertribal consortium, or tribal organization..  *Indirect Cost Rate* means the rate arrived at through negotiation between a Tribe and the appropriate Federal agency.  *Indirect Costs* shall have the same meaning as it has in 25 CFR 900.6 as applied to compacts, funding agreements and construction project agreements entered into under this part  *Inherent Federal functions* means those Federal functions which cannot legally be delegated to Indian 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, including Tribal organizations.  *Maintenance* means the preservation of the tribal transportation facility and other eligible facilities, including but not limited to: surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for safe and efficient utilization of the facility.  *Mature Contract* means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: *Provided*, That upon the request of a Tribe or tribal organization which meets this definition shall be considered to be a mature contract.  *Program* means the tribal transportation self-governance program established under the FAST Act (Public Law 114-94, 23 U.S.C. §207),  Project means any undertaking eligible for assistance under title 23 and chapter 53 of title 49.  *Project Planning* means project-related activities that precede the [design](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=a27220840cc0e0defffcba4308cc67bf&term_occur=4&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) phase of a transportation or other eligible project. Examples of these activities are: Collecting data on traffic, accidents, or functional, safety or structural deficiencies; corridor studies; conceptual studies, environmental studies; geotechnical studies; archaeological studies; project scoping; public hearings; location analysis; preparing applications for permits and clearances; and meetings with facility owners and transportation officials.  *Proposed road* or facility means any road or facility, including a primary access route, that will serve public transportation needs, meets the eligibility requirements of the Tribal Transportation Program, and does not currently exist.  *PSFA* means programs, services, functions, and activities (or portions thereof).  *Public Authority* as defined in 23 U.S.C. 101(a)(20) means a Federal, State, county, town, or township, [Indian](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=56063416a0b02bb0ba978338b4c3fbbf&term_occur=15&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) [tribe](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=7bc93ba2c5f10e5a84ed7d279dd8f5f2&term_occur=9&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5), municipal, or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.  *Public road* means any road or street under the jurisdiction of and maintained by a [public authority](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=263d8f060c7f3e397b3d17a490bf7f3a&term_occur=1&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) and open to public travel.  *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 the 207(f)(2)(A)  *Rehabilitation* means the work required to restore the structural integrity of transportation and other facilities as well as work necessary to correct safety defects.  *Relocation* means the adjustment of transportation facilities, other facilities and utilities required by a project. It includes removing and reinstalling the facility, including necessary temporary facilities; acquiring necessary right-of-way on the new location; moving, rearranging or changing the type of existing facilities; and taking any necessary safety and protective measures. It also means constructing a replacement facility that is both functionally equivalent to the existing facility and necessary for continuous operation of the utility service, the project economy, or sequence of [construction](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=6aa6c97262ac63f5365ab166b97a8368&term_occur=7&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5).      *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  Secretarie*s* 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 Tribe or tribal organization 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: State means any of the 50 states, the District of Columbia, or Puerto Rico or political sub-divisions thereof.  State Transportation Department-as defined in 23 U.S.C. 101(a)(28) 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.  STIP means Statewide Transportation Improvement [Program](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=75884058a8d0d71529bfc592e0446e2b&term_occur=11&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5). It is a financially constrained, multi-year list of transportation projects. The [STIP](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=f15283288ab29486b4feba640c6d834e&term_occur=1&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) is developed under [23](https://www.law.cornell.edu/uscode/text/23/) U.S.C. [134](https://www.law.cornell.edu/uscode/text/23/134) and [135](https://www.law.cornell.edu/uscode/text/23/135), and [49](https://www.law.cornell.edu/uscode/text/23/49) U.S.C. 5303-5305. The [Secretary of Transportation](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=f5c710b1637511beccc269476ab57bc6&term_occur=3&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) reviews and approves the [STIP](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=f15283288ab29486b4feba640c6d834e&term_occur=2&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) for each State.  Transit means services, equipment, and functions associated with the public movement of people served within a community or network of communities provided and/or made available by a Tribe or other public authority using Federal funds.  Transportation planning means developing land use, economic development, traffic demand, public safety, health and social strategies to meet transportation current and future needs.  Transportation Programsmeans all programs administered or financed under title 23 of the United States Code and chapter 53 of title 49.  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 Organization* means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: provided, that in any case where a contract or compact is entered into or grant made, to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the entering into or making of such contract, compact, or grant.  Tribal share means a Tribe’s portion of all funds and resources that support secretarial PSFAs (or portions thereof) that are not required by the Secretary for the performance of inherent Federal functions.  Tribal Transportation Facility means a public highway, road, bridge, trail, or transit system that is located on or provides access to tribal land and appears on the national tribal transportation facility inventory described in 23 USC 202(b)(1).  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)  TTIPmeans Tribal Transportation Improvement [Program](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=75884058a8d0d71529bfc592e0446e2b&term_occur=13&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5). It is a multi-year list of proposed transportation projects developed by a [Tribe](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=7bc93ba2c5f10e5a84ed7d279dd8f5f2&term_occur=11&term_src=Title:25:Chapter:I:Subchapter:H:Part:170:Subpart:A:170.5) from the tribal priority list or the long-range transportation plan.  *Tribal Transportation Office of Self-Governance (TTOSG)* means the office within the Department of Transportation that is responsible for implementing and developing tribal self-governance.  *U.S.C.* means the United States Code.  **207(n) REGULATIONS**  **§ 137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.**    Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except regulations promulgated under this section. | 137.1(a)  137.1(b)  137.1(c)  137.1(d)  137.2(a)  137.2(b)  137.2(c)  137.2(d)  137.2(e)  137.2(f)  137.2(h)  23 USC 101(b)  S. Rep. 100-274, 100th Cong., 1st Sess., 1987 (Indian Self-Determination and Education Assistance Act Amendments of 1987), reprinted in 1988 U.S.C.C.A.N. 2620, 2623  Id., at 2624.  137.3  137.4  137.5  137.6  23 USC 101(e)  S. Rep. 100-274, 100th Cong., 1st Sess., 1987 (Indian Self-Determination and Education Assistance Act Amendments of 1987), reprinted in 1988 U.S.C.C.A.N. 2620, 2624 and 2626.  137.15  137.18  Planning phase omitted  137.18(c)  207(c) Compacts  Title V. Subpart D—Self-Governance compact  Title IV Sec. 402; Selection of Participating Tribes  Title IV Sec. 402(b)(2)  Title I, Sec. 108, (e)Other Provisions (2) Contract Modifications or Amendments  Section 504(b), 25 U.S.C. § 458aaa-3(b)  207(d)  *See 23 U.S.C. §§ 207(d)(1), (2)(A)(i) and 207(d)(2)(B)*  *Refer to operations group for discussion on implementing this 202(a)(9)-related provision*  *137.41*  *See 23 U.S.C. §§ 207(d)(2)(A)(i) and (d)(3)(A).*  137.42  *See 23 U.S.C. §§ 207(d)(2)(A)(i), (d)(3)(B)(ii) and 207(h).*  *137.43*  *Refer to Operations Workgroup re: concept of buyback.*  *new*  *Send provision to Operations Workgroup for details of implementing provision.*  *See 23 U.S.C. § 207(d)(2)(A)(ii) regarding Federal-aid funds and 202(a)(9)(B) regarding “any funds received from a State, county, or local subdivision.*  *new*  *See 23 U.S.C. § 207(d)(2)(A)(ii)(III) regarding responsibility for transferred funds*  *See 23 U.S.C. § 207(d)(2)(C) regarding flexible and innovative financing*  *25 CFR 170*  *See rule 25 C.F.R. §170.228*  *See proposed rule 25 C.F.R. §170.229*  *See proposed rule 25 C.F.R. §170.230*  *new*  *137.45*  *See 23 U.S.C. §§ 207(d)(3)(A) and (B) regarding terms of a funding agreement and 207(f)(2)(A)(i) regarding termination of a compact or funding agreement*  *137.46*  *137.47*  [*Geoff Strommer to develop regulatory text*] [*Include a reference here to 207(l) sections]*  *See 23 U.S.C. § 207(l) regarding application of title I and title V provisions.*  *137.48*  *137.49*  *137.55*  *See 23 U.S.C. § 207(d)(4).*  *137.56*  *See 23 U.S.C. § 207(d)(4).*  *137.57*  *See 23 U.S.C. § 207(d)(5).*  *137.60*  *Recommend that the phrase “****statutorilymandated discretionary or competitive grant****” be a defined term under the proposed rule and reflect the statutory language of 23 U.S.C. § 207(d)(2)(A)(i) –*  *137.65*  *“’****Statutorily mandated discretionary or competitive grant****’ as used in this part means a grant specifically designated in a statute for a defined purpose administered by the Department for all programs, services, functions and activities (or portions thereof) that are made available to a* ***public authority,*** *including an* ***Indian tribe,*** *to carry out*  ***transportation or*** *other programs and programs, services, functions and activities (or portions thereof) administered by the Secretary that are otherwise available to an Indian tribe.”*  *137.66*  *137.67*  *137.68*  *137.69*  *137.70*  *137.71*  *137.72*  *137.220*  *See 23 U.S.C. § 207(l)(8) regarding section 314 of Pub. L. 101-512 (FTCA).*  207(e)  137.185  Question whether this should be elsewhere in operational regs.  Already in 207(*l*)(1)  Already in 207(*l*)(1)  Already in 207(*l*)(1)  137.160  137.175  Already in 207(*l*)(1)  Left in reference to 1205 from 207(*l*)(1).  137.177. Already in 207(*l)*(i) removed references to HHS code requirements.  137.177. Already in 207(*l)*(i) Patient records provisions removed.  137.245  137.246 amended  137.247  137.248  137.249  137.250  Admin WG  137.235 already in 207(*l*)(1)  137.236 already in 207(*l*)(1).  137.237 already in 207(*l*)(1).  Possibly re  137.239 already in 207(l)(1).  Assigned to Bob plus add additional Question/Answer  137.190. Already in 207(l)(1).  XXXXXXXXXX  Proposed replacement for above question  207(f)  From 137.155  The DOT has an office of hearings with ALJs, but they do not have experience with SG. There must be discussion about whether to use CBCA or Interior ALJs, whether to have an ALJ in DOT to hear Indian appeals, or to have a new process.  .601 is a restatement of the statute  Provision is new, as is “narrowest scope” language.  137.257  137.258  137.259  137.260  137.261  137.262  137.263  137.430, restatement of the statute  Same as in 207(e)  Parking lot  137.265  Restated statute. Act does not use term “reassumption,” but instead uses “termination.”  Provisions related to final offer that are under the “provisions related to the Secretary” heading in Title V regs will be stated in full under 207(*l*).  207(g)  The law does not integrate the single audit act requirements in 458aaa-5c. The super circular brings in many of the audit requirements, but only for annual expenditures of more than $750,000 a year. I have updated the provisions from 137.165-173 accordingly.  200.503 allows separate audits called for by departments (at department cost).  Changed to remove reference to SAA and to put in OMB circular  Updated to remove physical address.  This may be out of date, recommend striking.  207(l)(8) Sec 516  CBCA review is incorporated in 106(f) by reference to Section 110 of ISDEAA; Committee should decide if it wants to replicate this process, use the CBCA, or have a new process.  207(h)  1  *207(d)(2)(A)(i)and(ii)*  *Look at duplication with 207(d) and 207(h) 137.75 / 137.79 also look at 207(l)(8)*  *Combine with 137.75*  *Look at duplication with 207(d) and 207(h) 137.75 / 137.79 also look at 207(l)(8)*  *137.79*  *137.85*  *See 207(l)(3)*  *Formula = placeholder*  *See 207(l)(3) parked in Shawnee meeting*  *duplicative*  *137.87*  *Same as*  *207(l)(3) 1410*  *Same as 1411*  *Combine with 137.88*  137.88  Same as (l)(3) 1412  137.89  Same as 207(l)(3)1  *137.100*  *137.101*  *137.105*  *Same as 1416*  *Same as 1417*  *137.115*  207(i) construction  **PLACEHOLDER**  **PLACEHOLDER**  **PLACEHOLDER PLACEHOLDER**  207 (j)  137.2(c)  **.** *[supplements the Administration Workgroup 207(a) Congressional policy statement to include:]*  Keep intent but reword for sec policy.  Language in AFA not here ( Bob Sparrow comment)  Back to Matt  207(k) Disclaimers  New  New  New  207 (l)  Addressed in (e)  These two provisions are new and are aimed at preserving self-governance precepts if the Secretary finds a conflict.  Addressed in (e)  Addressed in (e)  137.160  Addressed in (e)  137.175  Addressed in (e)  137.176  Addressed in (e)  Addressed in (e)  137.177, removed references to HHS code requirements.  Patient records provisions removed  137.235  Addressed in (e)  137.236  Addressed in (e)  137.237  Addressed in (e)  137.238  Likely to remove  Assigned to Bob  Addressed in (e)  Plus new Q/A  From Bob ( carryover?  137.239  137.190 on non-duplication. Revised to refer to FHWA program agreements, BIA g2g, and other BIA agreements.  207(l)(2)  This could be integrated into 207(f), which the analogue to where it is found in Part ###.  137.130  137.131  .  137.132; replaced Director of the IHS with the DAS-TGA in DOT  Possibly DOT OSG  137.133  137.134  137.135  137.136  137.137  137.138  On Bob S. plate  137.140    Changed reference to 207(b) (eligibility)  137.141  Existing regs do not give any specifics apart from process requirements.  Leroy will look at this section Title 23 language ?  This should be moved to 207(d). or (h)  137.144  137.145  137.146  Fill in part #  137.147  137.148  137.150  137.2(f).  **207(l)(3)**  Modeled on 137.75. Revised to reflect provisions 207(d) (these may already appear in that section’s regs).  137.76  Discussion from subpart (207)(h)  137.77  137.77  This could also read FHWA.  137.78  137.79, revised to include statutory language from 207(d).  New  New  Needs rewording to fit US DOT  Added grant and formula funds  137.86  137.87  Parked for now  Parked 10/20/16  137.88  137.89  137.90  New, restatement of 458aaa-7(e).  137.96  Cross ref not apply see also 207(h)  137.100  137.110  137.115  New  **207(l)(4)**  Based on 137.377, but referencing construction provisions of this rule.  Integrate with the 207(i) drafters  Share w operations workgroup.  **207(l)(5)**  Statute is clear here.  **207(l)(6)**  New language.  New  New  1701 – 1703 send to/compare with operations wg  137.217. Added state transfers. Language in 207 is “shall” not “may” as in Title V regs.  New  207(l)(7)  137.3  Update provision #  207(l)(8)  450c(b) in Q&A form  New language  Refer to super circular provisions  450(d) in Q&A form  § 1000.407  § 1000.406  Statute 450e(c) recast in Q&As  Included by reference in 207  1000.270  1000.271  1000.272  1000.273  1000.274  1000.275. Recommend striking the drafted language to allow tribes to draft to meet their needs  1000.276  1000.277  1000.277  1000.277  1000-278  FHWA requires tribal contractors to have insurance at local level  28 CFR part 16 ?  Matt will work on 11/16/16  1000.278  1000.279  1000.280  1000.281  1000.282  1000.283  New provision to link 25 USC 450i on retained employee benefits.  1000.408. There are other supply provisions in 207(l)  This is a modified version of 450j(*l*) that removes references to a “facility” and instead says “property.”  450j(*l*)(2) revised and modified in Q&A form, though removed the provision that the Secretary would determine allowable expenses, and added in expenses agreed to by parties.  137.79  **We include this as a placeholder to discuss contract support costs in the TTSGP agreements.**  New language regarding budget consultations. Committee may wish to revise this to better reflect the function of DOT. Based on 450j1(i).  450n  137.47 & 137.48  137.49  207(l)(9)  137.430  137.410  137.412  New Provision defining contract added for clarity  137.415  Will require revision once operations completes provisions.  “ “  This provision is new.  137.416  To be amended following ops. Workgroup.  137.417  Committee members to decide the location of appeals body.  137.418  Committee members to decide the location of the appeals body.  137.419  137.420  137.421  137.421  137.422  Committee members to decide appropriate office here, if any.  137.423  137.424  137.425  137.425  137.426  137.427  137.427  137.428  137.429  137.430  137.431  137.432  The CFR states this section is 42 CFR 137.43, but it appears this is a typo and should be 137.433.  137.433  137.434  137.435  137.436  137.440  137.441  137.442  137.443  137.444  137.445  137.450  207(m)  137.10  23 CFR 1.2  137.10  137.10  Operations look at  170.5\* and 101(a)(4) amended  *170\* citations are to the proposed rule (25 CFR Part 170) of Dec. 19, 2014 which represents the most current defin.*  Operations to look at  Operations look at and decide if needed  450b(m) amended 207(m)(  450b(a) amended and 207(m)(2)  Question-Can we take out portions of the 207 definition?  Operations to Look at  458aaa(a)(1) amended and 207(m)(2)  Question: Can we take out parts of the 207 definition?  Operations to Look at  458aaa(a)(2) and 207(m)(2)  US DOT transportation tribal consultation plan, HHS tribal consultation policy, and USDA tribal consultation policy.  450b(b) and 207m)(2)  137.10  170.5\*  207(m)(1)(B)  450b(c)and207(m)(2)  207(m)(1)(C)  In FAST Act  170.5\*  170.5\*  137.10 and  see 207(m)(1)(D). 207(d)  137.10 and 207(m)(2)  This is the wording in 207.  See 207(f) & 137.256  See 207(f)  137.10and 207(m)(2)  207(m)(1)(e)  ,  450b(g)and207(m)(2)  137.10and 207(m)(2)  170.5\* amended  Operations to look at  See 170.5 and appendix to subpart G to Part 170 regs  450b(h) and 207(m)(2)  *Term may be fine as revised or as originally written. Depends on treatment in TTSGP regulations.*  207(m)(1)(F) amende  Operations Look at this  23 USC 101(18) as amended  170.5\* amended  Operation Look at This  Operations to Look at  170.5\*  170.5\*  170.5\*  170.5\*  Operations to look at  23 USC 101(a)(21)  170.5\*  Operations to look at  137.10  207(f)  Operations to look at  170.5\*  Operations to look at  170.5\* amended  Operations to look at  137.10  207(m)(1)(G)  170.5 amended  450b(j) amended and 207(m)(2)  *450(b)(j)*  207(m)(2) amended  23 U.S.C. 101(a)(25)  170.5\*  170.5\*  170.5\*  207(m)(1)(H)  202(c)  137.10and 207(m)(2)  450b(l)  5381(a)(8)  137.10and 207(m)(2)  170.5\* and 23 USC 101(a)(31)  170.5\* amended  170.5\*  To be determined by DOT/OST  170.5\*  207(n)  207(n)(4) |