**WORKING COMMENTS OF RWS AND VP ON WORKING DRAFT**

**Subpart A**

**§ ###.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 the Department of Transportation’s (Department) Self-Governance Program including self-governance compacts and funding agreements between the Department and Self–Governance Tribes in accordance with sections 1121 of Pub. L. 114-94. (23 U.S.C. §207).

(c) Scope. These regulations apply to the Department and to Indian 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 23 USC 207(j)(2)(A).

**§ ###.2 Congressional policy.**

(a)

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

 Eligible programs from the Department. (b) According to section 512(a) of the ISDEAA [25 U.S.C. 458aaa-11(a)], except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:

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

 (2) The implementation of compacts and funding agreements entered into under this part;   (3) The achievement of Tribal transportation goals and objectives.

(c) According to section 512(c) of the ISDEAA Act [25 U.S.C. 458aaa-11(c)], in connection with any compact or funding agreement executed pursuant to this part, upon the request of an Indian tribe, the Secretary:

(1) shall permit an Indian tribe to use existing transportation facilities and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary’s jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the Indian tribe for their use and maintenance;

(2) may donate to an Indian tribe title to any personal property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—

(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;

(B) if property described in subparagraph (A) has a value in excess of $5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Secretary for further disposition; and

(C) all property referred to in subparagraph (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; and

(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appropriate for use by the Indian tribe for any purpose for which a compact or funding agreement is authorized under this part.

(d) According to section 512(d) of the ISDEAA Act [25 U.S.C. 458aaa-11(d)], funds provided under compacts, funding agreements, or grants made pursuant to this section, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program, unless otherwise prohibited by law.

(e) According to section 512(e) of the ISDEAA Act [25 U.S.C. 458aaa-11(e)], States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this part and other Federal laws benefiting Indians and Indian tribes.

(f) According to section 512(f) of the ISDEAA Act [25 U.S.C. 458aaa-11(f)] each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

(g) According to section 515(b) of the Act [25 U.S.C. 458aaa-14(b)], 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.

(i) According to section 507(e) of the Act [25 U.S.C. 458aaa-6(e)], in the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this part in a manner that maximizes the policy of tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000.

**§ ###.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?**

Funds made available to a tribe through a compact or funding agreement for a statutory formula or the award of a discretionary grant shall not be reduced from the formula or awarded amount. If an Indian Tribe alleges that a compact or funding agreement reduces the amount available, 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 Indian Tribe may apply the provisions of 25 USC 450m-1.

**Sec. ###.5 Effect of these regulations on Federal program guidelines, manual, or policy directives**.

Subject to 23 USC 207(e)(1), unless expressly agreed to by the Self-Governance Tribe in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except for regulations promulgated under 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, Federal statutes, Executive Orders, and court decisions. The Secretary supports the self-determination choices of each Tribe and will continue to work with all Tribes on a government-to-government basis to address issues concerning Tribal self-determination.

**Subpart B**

**Eligibility**

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

In accordance with 23 USC 207(b), an Indian tribe shall be eligible to participate in the TTSGP if the Indian tribe:

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

**§ ###.2 How does a tribe demonstrate financial stability and financial management capability?**

1. A Tribe demonstrates financial stability and financial management capability by providing evidence that, during the preceding three (3) fiscal years, it had no uncorrected significant and material audit exceptions in the required annual audit of the Tribe’s self-determination contracts, self-governance funding agreements, or Tribal Transportation Program Agreement with any Federal agency.
2. If an Indian Tribe is not required to submit an annual audit for any or all of the three (3) previous years, the Tribe may demonstrate financial stability and financial management capacity by demonstrating to the Secretary that it has, within the prior three (3) fiscal years, assumed the responsibility to deliver transportation services, projects or programs under a:

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

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

(3) a grant award with the Federal Transit Administration.

All without sanctions or actions taken against the Tribe for financial management issues.

1. Tribes not meeting the above financial stability and financial management capability requirements but who can demonstrate that steps have been taken to address the identified audit exceptions or findings may request consideration by the Secretary..

**§ ###.##  How does an Indian Tribe demonstrate transportation program management capability?**

1. A Tribe demonstrates transportation program management capability if:
2. it has previously assumed responsibility and successfully delivered transportation services, projects or programs under a:

(A) self-determination, self-governance, or government-to-government funding agreement with the Bureau of Indian Affairs;(B) Tribal Transportation Program Agreement with the Federal Highway Administration; or

(C)funding grant award with the Federal Transit Administration.

2. Evidence of the successful delivery of transportation services, programs and projects may include:

 (A) a staffed and operational transportation program or department (identifying personnel, job descriptions and years of experience);

 (B) documentation showing the successful completion of a transportation project or program related or similar to the program funding being requested for inclusion into the self-governance agreement.

(c) The Secretary may consider any other criteria that a Tribe may propose that demonstrates transportation program management capability.

**SUBPART C**

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

A compact 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 consistent with the Federal Government’s trust responsibility and statutory and treaty obligations.

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

Yes. Tribes must have a compact in place 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. Upon the Tribe’s election, 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, retrocession or reassumption of all PSFAs.

###.### **May more than one Indian tribe enter into a single compact and funding agreement?**

Yes. If each tribe requests, two or more otherwise eligible Indian tribes may be treated as a single Indian 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 written agreement of the Indian Tribe and the Secretary.

**SUBPART D**

**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 funds being transferred, the projects or PSFAs that the Tribe will carry out with those funds, and such other terms as are required or may be agreed upon pursuant to 23 U.S.C. § 207.
2. The funds identified in a funding agreement shall include funds made available to Tribes through:

(1) the Tribal Transportation Program identified in 23 USC 202;

(2) the Tribal Transit Program identified in 49 USC 5311;

(3) the award of any entitlement, discretionary and competitive grant at USDOT for which Tribes are an eligible direct recipient; and

(4) Federal-aid funds apportioned to a State and any other funds if the Indian 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 USC § 202(a).

1. 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.
2. A funding agreement shall authorize the Tribe, as it determines, to plan, conduct, and administer the funds identified in (b) above.
3. The funds is this provision may be consolidated but only to the extent allowed by and in accordance with the statutes and regulations of those programs.
4. The terms of the Funding Agreement must be in accordance with 23 USC 207(d)(3).

**§ 137.41 What PSFAs will be included in a funding agreement?**

At the Tribe’s option, PSFAs (or portions thereof) that are made available to Tribes to carry out the tribal transportation programs and discretionary grants or awards identified in 137.40(b) above may be included in a funding Agreement in accordance with 23 USC 207(d)(2)(A).

**§ 137.43 May a Tribe negotiate to leave a portion of Tribal shares with the Department?**

No. A Tribe cannot leave a portion of any funds included in a Funding Agreement with the Department.

**§137.xx Which entity is responsible for the transferred funds?**

The Indian Tribe shall be responsible for constructing and maintaining a project carried out using the funds received under a Self-Governance Agreement 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. In addition, the Indian Tribe must carry out the project or PSFAs in accordance with the funding agreement, the statutes, and regulations of those program from which the funds were provided.

**Flexible Financing**

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

1. In accordance with 23 USC 207(d)(2)C), if agreed upon by both parties, a funding agreement shall include provisions pertaining to flexible and innovative financing. The Secretary may issue regulations to establish the terms and conditions relating to the flexible and innovative financing provisions. If the Secretary does not issue such regulations, the terms and conditions relating to the flexible and innovative financing provisions referred to above shall be consistent with
2. agreements entered into by the Department under 23 USC 202(b)(7) and 23 USC 202(d)(5), as in effect before the date of enactment of MAP–21 (Public Law 112–141); or
3. regulations of the Department of the Interior relating to flexible financing contained in 25 CFR 170.

**§170.228 Can an Indian tribe use funds made available under a Self-Governance Agreement to leverage other funds or to pay back loans?**

Yes. An Indian tribe can use funds made available under a self-governance agreement to leverage other funds or to pay back transportation related loans but only to the extent allowed by and in accordance with the statutes and regulations of those funds being used. **§170.229 Can an Indian 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.

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**TERMS IN A FUNDING AGREEMENT**

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

In accordance with 23 USC 207(d)(3), a funding agreement shall set forth terms that generally identify the PSFAs (or portions thereof) to be performed or administered by the Indian tribe; and for those PSFAs identified:

1. the general budget category assigned;
2. the funds to be provided, including those funds to be provided on a recurring basis;
3. the time and method of transfer of the funds;
4. the responsibilities of the Secretary and the Indian tribe; and
5. any other provision agreed to by the Indian tribe and the Secretary.

In addition, a provision authorizing the Secretary to terminate the compact or funding agreement (or a portion thereof) and reassume the remaining funding associated with the reassumed PFSAs as provided in 23 U.S.C. 207(f)(2)(A) will also be included.

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

Yes, at the Tribe’s request, additional terms may be included as set forth in subsections (a), (b), (d), (g), and (h) of section 506 of [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 subsection (b) of [25 U.S.C. 458aaa–15](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)" \l "co_pp_a83b000018c76)] as made applicable to the Tribal Transportation Self-Governance Program by 23 USC 207(l). In addition, any other terms to which the Tribe and the Secretary agree may be included.

**§ 137.47 What provisions of Title I and Title V of the Indian Self-Determination and Education Assistance Act apply to compacts and funding agreements negotiated under 23 U.S.C. § 207?**

*Yes. The provisions identified in 23 USC 207(l) apply to compacts and funding agreements and shall have the same force as if they were set out in full in 23 USC 207.*

**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 an Indian Tribe that it is withdrawing from or retroceding the operation of one or more PFSA identified in a funding agreement, or the Funding Agreement is terminated by the Secretary under 23 USC 207(f), 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, , remain in full force and effect until a subsequent funding agreement is executed or the funding agreement is terminated as identified in 137.55. 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, or as identified in 23 U.S.C. § 207(d)(5).

**SUBPART XX \_ DISCRETIONARY AND DISCRETIONARY AND COMPETITIVE GRANTS OR FUNDS RECEIVED THROUGH AN AGREEMENT DEVELOPED UNDER 23 USC 202(A)(9)**

**§ 137.60 May the award of a discretionary and competitive grant at USDOT be added to a funding agreement?**

Yes, in accordance with 23 U.S.C. §207(d)(2)(A)(i), adiscretionary or competitive grant may be added to the funding agreement after award.

**§ 137.xx May funds made available to the Tribe through the execution of an Agreement developed under 23 USC 202(A)(9) be added to a funding agreement?**

Yes, in accordance with 23 U.S.C. §207(d)(2)(A)(ii), funds made available through the execution of an Agreement developed under 23 USC 202(a)(9) may be added to a funding agreement.

**§ 137.65 May a Tribe receive the funding identified in 137, xx and 137.xx above in an annual lump sum advance payment?**

Yes. Discretionary or competitive grant program funds may be added to the funding agreement as an annual lump sum advance payment after award unless specifically prohibited by the statute that covers those programs. Funds made available through the execution of an agreement under 23 USC 202(a)(9) shall be made available in accordance with terms of the 23 USC 202(a)(9) Agreement.

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

Yes, a Tribe may keep interest earned on funds identified in a Funding Agreement

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

Interest earned on such funds may be used by the Tribe at its discretion.

**§ 137.68 May the funding identified in this section be reallocated, redesigned, or consolidated?**

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, these funds may not be reallocated, redesigned, or consolidated

**§ 137.xx What happens to excess funding that remains after completion and final acceptance of a project funded through a discretionary or competitive grant or funding made available through a 23 USC 202(a)(9) Agreement?**

After completion and final acceptance of a project or PFSA funded through the funds made available to the Tribe through a discretionary or competitive grant or funding made available through a 23 USC 202(a)(9) Agreement shall be returned to the Secretary as defined in the terms of the agreement..

**§ 137.70 Are the reporting requirements different for a discretionary or competitive grant or funding made available through a 23 USC 202(a)(9) Agreement**

Except as provided otherwise under this Part, the reporting requirements for these funds are subject to the reporting requirements and terms and conditions of the award.

**137.XX – May the Secretary require reporting in addition to what is statutorilty required for a discreationy grant or award.**

NO

**§ 137.71 May the Tribe develop separate programmatic reporting requirements for the funding made available in a a discretionary or competitive grant or funding made available through a 23 USC 202(a)(9) Agreement**

Yes. However, the Tribe must submit the data/reports required by the respective program statutes and regulations for the funding made available through the Funding Agreement

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

Yes, Tribes and their employees carrying out these projects or PSFAs are covered by the FTCA in accordance with section 314 of Public Law 101-512 [25 U.S.C. 450f note] and section 102(d) of the Act [25 U.S.C. 450f(d)]. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

**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)?

**Subpart 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?**

Only the formula or tribal share funding identified in 170.40(a) and (b) and made available to a Tribe through a funding agreement may be redesigned or consolidated by the Tribe, but only to the extent allowed by and in accordance with the statutes and regulations of those programs.

**Conflict of Interest**

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

Except to the extent in conflict with 23 USC 207 (as determined by the Secretary), the provisions of ISDEAA that are identified in 23 USC 207(l) shall apply to a compact or Funding Agreement.

**§ ###.### 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 25 USC 458aaa-5(d) and the statutory or regulatory requirements of the funding being received..

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

No. As identified in 25 USC 458aaa-5(d)except to the extent that a Tribe specifies otherwise in its compact or funding agreement, the records of the Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

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

Yes, after 30 days advance written notice from the Secretary, the Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system and audit requirements

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

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

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

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

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

(b) Such date as may be mutually agreed upon by the Secretary and the retroceding Tribe and, with respect to the Department of the Interior, PSFA’s, the Secretary of the Interior

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

A retrocession request shall not negatively affect:

(a) Any other Agreements contracts or compacts to which the retroceding Tribe is a party;

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

(c) Any future request by such Tribe to enter into an Agreement, contract or compact 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 Tribe to the Department for further transfer to the Department of the Interior for the delivery of the PSFA’s associated with the compact or funding agreement from which the Tribe retroceded in whole or in part.

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

In accordance with 25 USC 458aaa-11(c), on the effective date of any retrocession, the retroceding Tribe, shall, at the option of the Secretary, deliver to the Secretary all requested property and equipment provided by the Secretary under the compact or funding agreement, to the extent used to carry out the retroceded PSFAs, which at the time of retrocession has a per item current fair market value in excess of $5,000 at the time of the retrocession.

**Withdrawal**

**§ ###.### 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 but only to the extent allowed by the terms and conditions of the Agreement in place between the Tribe and the tribal consortium or organization.

**§ ###.### When does a withdrawal become effective?**

In accordance with 25 USC 458aaa(g)(1)(B), 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 into a compact with the Department?**

If the Tribe meets the eligibility criteria identified in 23 USC 207(b), if a Tribe fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization,:

(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, shall 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 or is not eligible to enter a compact?**

All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Tribe’s returned PSFAs shall be returned by the inter-Tribal consortium or Tribal organization to the Department for further transfer to the Department of the Interior for determination on delivery of funding and program responsibilities.

**§ 137.239 If the withdrawing Tribe elects to carry out PSFAs under a compact or funding agreement under this Title through another contracting mechanism at the Department, is the resulting contracting mechanism considered a mature contract under 25 U.S.C. 450b(h)?**

Yes, if the withdrawing 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)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=25USCAS450B&originatingDoc=N3B05E0408B4711D98CF4E0B65F42E6DA&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_f383000077b35) ~~]~~ at the option of the Tribe.

**Non-Duplication**

**§ ###.### 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?**

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.

**SUBPART F**

**§ ###.600 What constitutes a final agency action?**

In accordance with 23 USC 207(f)(1), 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?**

In accordance with 23 USC 207(f)(2)(B), 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:

(a) imminent jeopardy to a trust asset, natural resources, or public health and safety that is caused by an act or omission of the Tribe and that arises out of a failure to carry out the compact or funding agreement, as determined by the Secretary; or

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

**§ ###.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 (immediate termination) prior to a termination becoming effective, the Secretary must:

1. have first provided written notice and a hearing on the record to the Indian Tribe that is subject to the compact or funding agreement; and

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 resopurce, or public health and safety.

**§ ###.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?**

In accordance with 23 USC 207(f)(2)(D), 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 a portion thereof) if:

* 1. The Secretary makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and
	2. The jeopardy arises out of a failure to carry out the compact or funding agreement.

 **##.608 If the Secretary terminates a PSFA immediately, when must the Secretary provide the Tribe with a hearing?**

In accordance with 23 USC 207(f)(2)(D)(ii), if the Secretary immediately terminates a compact or funding agreement (or portion thereof), 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, unless the Tribe and the Secretary agree to an extension.

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

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

**§ ###.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?**

In accordance with 23 USC 207(f)(2)(A)(ii), after a finding resulting in termination, the Secretary may reassume the remaining funding associated with the reassumed programs, services, functions, and activities included in the compact or funding agreement.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

**SUBPART G – Cost Principles**

**§ ###.701 Are Self-Governance Tribes required to undertake annual audits?**

Self-Governance 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(d).

**§ ###.703 What cost principles must a Self-Governance Tribe follow?**

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

(a) Section 106(k) of the Indian Self Determination and Education Assistance Act 25 U.S.C. 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.

**§ ###.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?**

In accordance with 25 USC 450j-1(f), any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

**§ ###.706 When does the 365 day period commence?**

In accordance with 25 USC 450j-1(f), For the purpose of determining the 365 day period, an audit report is deemed received on the date of electronic submission to the Federal Audit Clearinghouse, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the audit report as insufficient due to non-compliance with the applicable OMB Circular, United States Code or noncompliance with any other applicable law.

**§ ###.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.

**SUBPART H —Funding**

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

1. 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 associated with the PFSAs assumed by the Tribe and [§ 137.79] herein.

(b) The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

*See 23 U.S.C. §207(l )(3) applying 25 U.S.C. § 458aaa-7(a) and (b) to the TTSGP.*

**§ 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.

*See 23 U.S.C. §207(l )(3) applying 25 U.S.C. § 458aaa-7(a) to the TTSGP regarding 10 days after apportionment of funds.*

**§ 137.77 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 30 days after distribution methodologies and other decisions regarding payment of those funds have been made by the Department.

*See 23 U.S.C. §207(l )(3) applying 25 U.S.C. § 458aaa-7(a) to the TTSGP*

**§ 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.

*See 23 U.S.C. §207(l )(3) applying 25 U.S.C. § 458aaa-7(a) to the TTSGP*

**§ 137.79 What funds must the Secretary include in a funding agreement?**

1. 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, service, function, 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.

Nothing in this part shall be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian tribe under title 23 or chapter 53 of title 49 or other applicable Federal law. Any Indian tribe that alleges that a compact or funding agreement is in violation of this ~~section~~ part may apply the provisions of section 450m-1 of ~~this~~ title 25.

*See* *23 U.S.C. § 207(h) regarding above paragraphs (a)(1) and (2), 23 U.S.C. § 207(d)(2)(B) regarding above paragraph (b) and 23 U.S.C. § 207(l)(7) regarding above paragraph (c) concerning disclaimer.*

**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.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(d) regarding prohibitions.*

**§ 137.86 Is the Secretary prohibited from reducing the amount of funds made available to a tribe in a funding agreement under 137.40(b) to make funding available for self-governance monitoring or administration by the Department?**

Yes, the Secretary is prohibited from reducing the amount of funds to make funding available for self-governance monitoring or administration.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(d)(1)(C)(i) regarding reduction of funding.*

**§ 137.87 May the Secretary reduce the amount of 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 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.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(d)(1)(C)(ii) regarding further restrictions on reductions in funding.*

**§ 137.88 May the Secretary reduce the amount of funds identified in a funding agreement to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?**

In accordance with 25 USC 458aaa-7(d)(1)(c)(iii), the Secretary may not reduce the amount of funds identified in a Funding Agreement to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(d)(1)(C)(iii) regarding further prohibitions against reductions for various Federal pay costs.*

**§ 137.89 May the Secretary reduce the amount of funds required under ~~Title V~~ 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?**

In accordance with 25 U.S.C. § 458aaa-7(d)(1)(C)(iv) , the Secretary may not reduce the amount of funds required under the Tribal Transportation Self-Governance Program to pay for costs of Federal personnel displaced by Self–Governance compacts and funding agreements.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(d)(1)(C)(iv) regarding prohibitions against reductions to pay for displaced Federal personnel.*

**§ 137.90 May the Secretary increase the funds required under the funding agreement?**

Yes, the Secretary may increase the funds provided in a funding agreement. However, the Self–Governance Tribe and the Secretary must agree to any transfer of funds to the Self–Governance Tribe unless otherwise provided for in the funding agreement.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(d)(2) regarding increases to funding agreements.*

**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.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(g) regarding the application of the Prompt Payment Act to fund transfers.*

**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 [[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)], an Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or transportation purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this part shall be managed using the prudent investment standard.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(h)regarding use of interest.*

**§ 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 invest and manage the funds as a prudent investor would, in light of the purpose, terms, distribution requirements, and provisions in the compact or funding agreement 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 and allowable in amount and appropriate to the investment responsibilities of the Self–Governance 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?**

In accordance with 25 USC 458aaa-7(i), all funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from 1 year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

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?**

In accordance with 25 USC 458aaa-7(k), an Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

*See 23 U.S.C. § 207(l)(3) applying 25 U.S.C. § 458aaa-7(k) regarding the inclusion of the limitation of costs clause in a compact and funding agreement.*

SUBPART J

**§ 137.2 FACILITATION**

**SECRETARIAL INTERPRETATION**

**xxx.xxx How shall Federal laws, executive orders and regulations be interpreted?**

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 therewith, in compacts and funding agreements;

(B) the implementation of the compacts and funding agreements; and

(C) the achievement of Tribal Transportation infrastructure and highway safety goals and objectives.

*See 23 U.S.C. § 207(l)(6) referencing 25 U.S.C. §§ 458aaa-11(a)(1), (2) and 458aaa-11(c) – (f) regarding interpretation of federal laws, etc., state facilitation and regulatory rules of construction.*

**XXX.XXX May a Tribe submit a written request to waive the application of a regulation promulgated under 23 USC 207?**

Yes, in accordance with 23 USC 207(j)(2), an Indian tribe may submit to the Secretary a written request to waive application of a regulation promulgated under this section with respect to a compact or funding agreement. The request shall identify the regulation sought to be waived and the basis for the request. Right from statute ?

**XXX.XXX What is the process to approve or deny a request to waive the application of a regulation promulgated under 23 USC 207?**

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

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

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

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

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

**Subpart K**

**207 (k) DISCLAIMERS**

**§###.1 Are the provisions of an existing Tribal Transportation Program Agreement and Referenced Funding Agreement entered into between an Indian Tribe and the Federal Highway Administration under section 202(b)(7effective 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), provided that the Tribe is eligible, 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.

**SUBPART L**

**207(l) APPLICABILITY of ISDEAA**

APPLICABILITY OF INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.—Except to the extent in conflict with Section 1121 of the FAST Act, (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):

(1) Subsections (a), (b), (d), (g), and (h) of section 506 of such Act (25 U.S.C. 458aaa–5), relating to general provisions;

(2) Subsections (b) through (e) and (g) of section 507 of such Act (25 U.S.C.458aaa–6), relating to provisions relating to the Secretary of Health and Human Services.

(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.

(4) Section 510 of such Act (25 U.S.C. 458aaa-9), relating to Federal procurement laws and regulations.

(5) Section 511 of such Act (25 U.S.C. 458aaa–10), relating to civil actions.

(6) 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’.

(7) Subsections (a) and (b) of section 515 of such Act (25 U.S.C. 458aaa–14), relating to disclaimers.

(8) Subsections (a) and (b) of section 516 of such Act (25 U.S.C. 458aaa–15), relating to application of title I provisions.

(9) Section 518 of such Act (25 U.S.C. 458aaa–17), relating to appeals.

**§ ###.1202** **Are Tribes required to address potential conflicts of interest?**

Yes, Tribes participating in self-governance under Section 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 as well as other recor3ed as identitifed in the regulations for the program for which the funds were received.,

**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 Secretary or his/her delegated official..

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

**§ ###.1303 What does a final offer contain?**

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

**§ ###.1304 How long does the Secretary have to respond to a final offer?**

In accordance with xxxxxxxxxxx, the Secretary will have 45 days to respond to the final offer. The 45 day review period begins from the date the DOT receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

**§ ###.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 as identified in xxx.1303.

**§ ###.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?**

In accordance with xxxx.xxx, the Secretary may reject a Tribe's final offer for one of the following reasons:

(a) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Tribe is entitled to; 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 23 USC 207(b).

**§ ###.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 provide technical assistance and share all relevant information with the Tribe so as to attempt avoid rejection of a final offer.

**§ ###.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.

**§** **###.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.

**§ ###.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 or the funding program under this section is no longer authorized, existing compacts and funding agreements will be unaffected by subsequent transportation authorization Acts. Compacts and funding agreements will continue in force 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 owned 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.

**§ ###.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.

**§ ###.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*.**)**] and as identified in 23 USC 207, 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.

**§###.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.

**§###.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**

**§ ###.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.

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*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.

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*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.

*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 self-governance program.

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

*Imminent 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.

*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.

*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.

*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)

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

*Secretary* means the Secretary of Transportation

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

*Self-Determination Contract* means a contract (or grant or cooperative agreement) entered into pursuant to the Indian Self-Determination and Education Assistance Act 25 U.S.C. 5321 between 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.

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

*Tribal 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.