

U.S. Department of Transportation Information Session

Tribal Transportation Self-Governance Program

Proposed Rule: 49 CFR part 29

Anchorage, AK December 2019

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Why are we here?

- **The Fixing America's Surface Transportation (FAST) Act required the U.S. Department of Transportation (DOT) to establish a Tribal Transportation Self-Governance Program (TTSGP)**
 - Incorporates select provisions of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638 (ISDEAA)
 - Requires negotiated rulemaking process to develop proposed regulations
- **Program Purpose**
 - Transfer Federal funding for transportation-related programs to eligible Tribes through a single funding agreement
 - Facilitate Tribal control over the delivery of Tribal transportation programs, services, functions, and activities (PSFAs)
- **Program Benefits**
 - Greater Tribal control and decision-making authority
 - Reduced administrative burdens for Tribes
 - Chief Self-Governance Official

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Preamble

- Explains the purpose of the rulemaking ○ Summarizes the negotiated rulemaking process
- Summarizes each subpart of the proposed regulations, 49 CFR part 29
 - Largely a product of consensus ○ Explains Tribal and Departmental views on key areas of disagreement ○ Summarizes the regulatory analyses and notices

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- Subpart D: Contents of a Compact and Funding Agreement
 - Subpart E: Rules and Procedures for Transfer of Funds
- Subpart F: Program Operations ○ Subpart G: Withdrawal ○ Subpart H: Retrocession ○ Subpart I: Termination and Reassumption ○ Subpart J: Dispute Resolution and Appeals

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- Contract support costs
 - Facility support costs (Section 105(l) costs)
 - Exhaustion of administrative remedies for pre-award decisions except final offers ○ **Proposed rule text reflects Departmental view**

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guidance, or rules

- Responsibilities under the Program
- Consultation
- Existing Tribal Transportation Program (TTP) Agreements ○ Circumstances where more than one party purports to be the authorized representative of a Tribe ○ Definitions

Subpart B: Eligibility and Negotiation Process

- **Three Statutory Requirements for Eligibility**
 - A Tribal resolution or other official action requesting participation
 - Financial Stability and Financial Management Capability
 - Transportation Program Management Capability

Subpart B: Eligibility and Negotiation Process

Three Way to Demonstrate Financial Stability and Financial Management Capability

- **Conclusive Evidence**
 - Tribe subject to Single Audit Act
 - For the prior three years, no uncorrected significant and material audit exceptions in the required annual audit of the Tribe's 93-638 contract or self-governance agreement with any Federal agency

- **Sufficient Evidence**
 - Tribe subject to Single Audit Act and has a TTP Agreement or DOT grant agreement
 - For the prior three years, no uncorrected significant and material audit exceptions in the required annual audit

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Subpart B: Eligibility and Negotiation Process

- **Discretionary Determination**
 - Tribe not subject to the Single Audit Act
 - Independent audit that for the prior three years, no uncorrected significant and material audit exceptions on a 93-638 contract, selfgovernance agreement with any Federal agency, TTP Agreement, or DOT grant agreement; AND
 - Evidence of financial management systems and standards that meet or exceed those set forth in the rule (§§ 29.506–29.508)
- DOT will provide technical assistance, if feasible, to Tribes that do not meet the Financial Stability and Financial Management Capability eligibility criterion

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Subpart B: Eligibility and Negotiation Process

Transportation Program Management Capability

- **Discretionary Standard**
 - Documentation showing:
 - The Tribe previously or is presently carrying out transportation services, programs, or projects under 93-638, self-governance, TTP Agreements or DOT grant agreements

- The extent the Tribe has previously received Federal funding and carried out management responsibilities relating to planning, design, delivery, construction maintenance, or operation of transportation-related projects and whether completed
- The Tribe has established and maintains a staffed and operational transportation or transit program
- The completion of one or more transportation projects or operation of a program related to the PSFA that the Tribe requests to include in a funding agreement.
- Other Documentation: DOT may consider evidence of non-transportation management capability of similar complexity, size, staffing and budget.

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Subpart B: Eligibility and Negotiation Process

Eligibility Determinations

- Rule sets forth timeframes for an eligibility determination ○ Provides a process for supplementing applications with additional evidence
- Determination of eligibility is a final agency action subject to appeal to U.S. District Courts

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- Technical assistance ○ **Rejection of a final offer**
- Four grounds on which the Department may reject
- May be administratively appealed to a hearing official or directly appealed to U.S. District Courts

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Subpart D: Contents of a Compact & Funding Agreement

- **Compacts**
 - General terms that govern from year-to-year
 - Must be in place before or signed at the same time as funding agreement
- **Funding Agreements**
 - Typically annual agreements
 - Certain terms are required, for example:
 - Funds to be transferred
 - Responsibilities of the Department and the Tribe
 - Health and safety requirements that apply to the funds
 - Other terms may be negotiated ○ **Tribe may redesign, consolidate, reallocate, or redirect funds except where a statute specifies a specific purpose**
 - Special rules apply to competitive and discretionary funds

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Subpart E: Rules and Procedures for Transfer of Funds

- **Funds Eligible for Inclusion in a Funding Agreement**
 - Tribal Transportation Program (TTP) funds
 - Tribal Transit Program funds
 - DOT discretionary and competitive grant awards
 - Funds transferred pursuant to 23 U.S.C. 202(a)(9) and credited to the TTP
- **Tribes are responsible for administering their Tribal PSFAs using these funds**

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Subpart E: Rules and Procedures for Transfer of Funds

- **Provides numerous similar benefits to Title V of ISDEAA** ○

Timing

- DOT must transfer funds in a lump sum within 30 days of apportionment, including partial transfers when there is a continuing resolution (CR)
- DOT must transfer discretionary and competitive grant awards within 30 days of signing the grant agreement

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Subpart E: Rules and Procedures for Transfer of Funds

- **Sets forth rules that apply to funds received in a funding agreement**

- Tribes may retain and expend interest on such funds
- Remaining funds may be carried over except different rules apply to discretionary and competitive grants
- Funds included in a funding agreement are considered non-Federal funds for cost-matching purposes
- Prompt Payment Act applies
- Prudent investor standard applies

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Subpart E: Rules and Procedures for Transfer of Funds

- **Contract Support Costs (CSCs)**
 - Tribes are not entitled to CSCs for:
 - Apportioned funds
 - Discretionary and competitive grants
 - 202(a)(9) State funds
 - Overhead and administrative expenses may be an eligible and allowable use of funds received in a funding agreement
- **Facility Support Costs**
 - Tribes are not entitled to enter into leases with DOT and receive facility support costs
 - Such costs may be an eligible and allowable use of funds received in a funding agreement

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- Technical Assistance ○ Prevailing Wages ○ Tribal Preference ○ Environmental and Cultural Resource Compliance ○ Federal Tort Claims Act
- Waiver of Program Regulations

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- Tribe retains records for three years for Department review
- Any cost disallowance subject to procedures under the Contract Disputes Act
- **Cost Principles**
 - Cost principles of 2 CFR part 200 (Super Circular) apply except as modified by ISDEAA (25 U.S.C. 5325(k))

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- **Procurement standards**
 - Minimum requirements for contracts carried out using funds included in a funding agreement
- **Property management systems and standards**

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- **Reporting**
 - Clarifies reporting requirements: only statutorily required reports as set forth in the funding agreement and reports required in the regulation
 - For discretionary and competitive grants, additional reporting is subject to negotiation

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extent feasible

- **Prevailing Wages**
 - Davis-Bacon Act wage and labor standards do not apply to the Tribe, but do apply to contractors
- **Tribal Preference**
 - Indian preference applies, to the greatest extent feasible, to any contract, subcontract, grant, or subgrant under a compact and funding agreement

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Subpart F: Program Operations

- **Environmental and Cultural Resource Compliance**
 - Tribes must assist DOT with compliance with all applicable environmental and cultural resource laws
- **Federal Tort Claims Act (FTCA)**
 - FTCA applies to Tribes under a compact and funding agreement
 - Regulation sets forth process for addressing FTCA claims ○ **Waiver of Program Regulations**
 - Sets forth process for requesting a waiver of a regulation in 49 CFR part 29
 - Includes criteria for the Department to reject a waiver request
 - Waiver decisions are a final agency action subject to judicial review

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Subpart H: Retrocession

- Tribe may elect to retrocede all or part of a PSFA ○ Retroceded PSFAs may be carried out by the Department of the Interior (DOI) if DOI determines that that it provides the transportation services
- If DOI does not carry out the transportation service, the Tribe must return all associated funds ○ A decision to retrocede will not affect future funding

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- **Provides a process before termination and reassumption may occur**
 - Notice to the Tribe and opportunity for corrective action
 - Hearing on the record
 - Exception for immediate termination in limited circumstances

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amendment

- Final offers ▪ Eligibility
- **Appealed to a hearing official**
 - Regulation sets out process and timing

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Subpart J: Dispute Resolution and Appeals

- **Post-award disputes**
 - Disputes that arise after the compact and funding agreement are executed
 - Governed by the Contract Disputes Act
 - Examples include cost disallowance, disputed terms in the funding agreement
- **Regulation sets out process and timing**
 - Initial decision by chief self-governance official ▪ Three options for appeal:
 - Civilian Board of Contract Appeals
 - U.S. Court of Federal Claims
 - U.S. District Courts

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Formal Consultations

- **Tuesday, November 5, 2019, 8:30 a.m.-12 p.m. (CST), Choctaw, Mississippi**
United Southern and Eastern Tribes (USET)/IJSET Sovereignty Protection Fund (SPF) Annual Meeting, Pearl River Resort, 13541 Hwy 16W, Choctaw, MS 39350
- **Tuesday, November 19, 2019. 9:00 a.m.-1:00 p.m. (PST), Seattle, Washington**
Federal Aviation Administration, Northwest Mountain Region, 2200 South 2 16th Street, Des Moines, Washington 98198
- **Thursday, November 21, 2019. 1 p.m.-5 p.m. (EST), Virtual listening session**
Webinar: <https://connectdot.connectsolutions.com/lsr500ausdot/>
Conference Call: 800-683-4564; Access Code: 027757

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How to Submit Comments

- **Electronically** through the Federal eRulemaking Portal: www.regulations.gov. Follow the online instructions for submitting comments.
- **Mail:** U.S. Department of Transportation, Docket Operations, M– 30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- **Fax:** 1–202–493–2251.

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- **Amy Coyle**, Senior Attorney, Office of the General Counsel
amy.coyle@dot.gov
202.366.0691
- **Vivian Philbin**, Assistant Chief Counsel, Federal Lands, Federal Highway Administration vivian.philbin@dot.gov
720.963.3445

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