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TRANSFORMING AN AGENCY AND INDIAN COUNTRY: The Tribal Transportation Self-Governance Program at the Department of Transportation *How Tribes can shape and participate in the FAST Act's new Self-Governance Program*

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Tribal Transportation Funding Increased in the FAST ACT

Congress passed the “Fixing America’s Surface Transportation” (FAST) Act, in December 2015 by over-whelming majorities.

President Obama signed the FAST Act into law on December 4, 2015 as Pub. L. 114-94. The FAST Act is the first 5-year highway bill in a decade and will expire in FY 2020.



Tribal Transportation Program (TTP) Funding

MAP-21 TTP Funding in FY 2015 - **\$450 million**

Fast Act TTP Funding in FY 2016 - \$465 million

Fast Act TTP Funding in FY 2017 - \$475 million

Fast Act TTP Funding in FY 2018 - \$485 million

Fast Act TTP Funding in FY 2019 - \$495 million

Fast Act TTP Funding in FY 2020 - **\$505 million**

This represents a **\$175 million increase** in funding for Tribes over the 5-year authorization from the FY 2015 MAP-21 level.

Tribal Transit Program Funding

The FAST Act increases Tribal Transit program from \$30 million to **\$35 million** per year.

\$30 million is authorized for the formula component of the Tribal Transit Program, a **\$5 million increase** over the MAP-21 level.

\$5 million is set aside annually for the discretionary competitive transit grant program.

This small increase in funding for Tribal transit ensures the program was not “flat-lined” so further increases do not become a political impossibility in the future.

Tribal Transportation Self-Governance Program in FAST Act

Responding to Tribal advocates seeking to extend the Self-Governance Program to the Department of Transportation, House Transportation and Infrastructure Committee Ranking Member, Pete DeFazio (D-OR), and member Don Young (R-AK) introduced H.R. 1068, the Tribal Transportation Self-Governance Act of 2015, in February 2015.



Tribal Transportation Self-Governance Program

The FAST Act adds new section 207 to title 23 of the United States Code which requires that the Secretary of Transportation “*shall establish and carry out a program to be known as the tribal transportation self-governance program.*”



Tribal Transportation Self-Governance Program

The Tribal Transportation Self-Governance Program is modeled on Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-68, which permanently extended the tribal self-governance program to the Department of Health and Human Services (DHHS).

Like Title V, the new law directs the Secretary of Transportation to draft regulations to implement the self-governance program through use of a Negotiated Rulemaking Committee. The Committee is to be comprised of representatives of Indian tribes and the Federal government.

Negotiated Rulemaking Procedures

- ✓ The Secretary must “initiate procedures” to negotiate and promulgate regulations within 90 days of enactment (Mar. 3, 2016) (**Already Late**);
- ✓ The FAST Act mandates that proposed regulations must be issued not later than 21 months after enactment (by Sept. 2017);
- ✓ 180-day extension is permissible upon request to Congress (Mar. ’18);
- ✓ The Negotiated Rulemaking Committee is to be comprised of only Federal and Tribal government representatives, a “majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this title [title 23]”;
- ✓ The lack of promulgated regulations “shall not limit the effect of this section.”

Tribal Transportation Self-Governance Program

The extension of the Self-Governance Program to the Department of Transportation has the potential to *transform the Department and Indian country* by speeding the transfer of federal programs, funds and authority to Indian tribes for infrastructure development. The new law should open up new funding opportunities in USDOT agencies that Tribes seldom access.



Tribal Transportation Self-Governance Program

Tribes will soon be able to plan, conduct, consolidate, administer and receive full tribal share funding, tribal transit formula funds and funding from every discretionary and competitive grant program available to tribes and carry out such programs and services under a single *Tribal Transportation Self-Governance Program Funding Agreement*.



Major Provisions

- Eligibility
- Compacts
- Funding Agreements
- General Provisions
- Secretarial Provisions
- Cost Principles
- Transfers of Funds
- Construction Programs
- Secretarial Interpretation & Disclaimers
- Applicability of ISDEAA provisions

Location of Current Self-Governance Tribes



USDOT Administrations (those working with Tribes most often are in bold - USDOT Self-Governance Program should expand the list)

- Office of the Secretary (OST)
- **National Highway Traffic Safety Administration (NHTSA)**
- **Federal Aviation Administration (FAA)**
- **Federal Highway Administration (FHWA)**
- **Federal Transit Administration (FTA)**
- Pipeline and Hazardous Materials Safety Administration (PHMSA)
- Motor Carrier Safety Administration (FMCSA)
- Federal Railroad Administration (FRA)
- Saint Lawrence Seaway Development Corporation (SLSDC)
- Surface Transportation Board (STB)
- Maritime Administration (MARAD)
- Office of the Assistant Secretary of Research and Technology (OST-R)

Establishing Self-Governance Program Eligibility

- Request participation by resolution or other official action by the governing body of the tribe;
- Demonstrate “**financial stability and financial management capacity**” for the past three years; and
- Demonstrate “**transportation program management capability.**” **Congressional addition not sought by Tribes. It will be important for tribal negotiators to include pro-tribal definition in final regulations.**

Self-Governance Program Eligibility Cont'd

- ❑ financial stability and financial management capacity:
 - ✓ No uncorrected significant and material audit exceptions in the annual audit of self-determination contracts or funding agreements. (3 fiscal years)
- ❑ transportation program management capability:
 - ✓ Demonstrate transportation program management capability, including the capability to manage and complete projects eligible under this title and projects eligible under chapter 53 of title 49.
- **Implementation: Topic for Negotiated Rulemaking**

Developing Self-Governance Compact

- Compact required.- Upon the tribe's request, the Secretary shall negotiate and enter into a written compact;
- Contents.- The compact shall set forth the general terms of the government-to-government relationship between the tribe and federal government and other terms that will continue to apply in future fiscal years; and
- Amendments.- A compact may only be amended by mutual agreement of the tribe and the Secretary.

Negotiating Annual Funding Agreements

Funding Agreement required.- Annual funding agreements are required after the compact is entered into.

Contents.- A full range of USDOT funding sources and programs (PSFAs) are available for inclusion in the funding agreement.

Specific provisions for:

- Formula funding shares
- Discretionary and competitive grants
- Transfers of State Fed-aid funds (in addition to 202(a)(9) transfers)
- Flexible and Innovative Financing provisions permitted

Annual Funding Agreements Cont'd

- Terms:
 - General budget category;
 - Funds to be provided, including on a recurring basis;
 - Time and method of funds transfer;
 - Responsibilities of the Secretary and the Tribe; and
 - Any other provisions agreed upon by the parties.

Annual Funding Agreements Cont'd

- Subsequent Funding Agreements:
 - Each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.
 - Terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.
- No additional terms or amendments
 - The Secretary shall not require additional terms in a new or subsequent funding agreement, or revise or amend the funding agreement, without the tribe's consent, except where required by federal law.

General Self-Governance Program Provisions

- Redesign and Consolidation
 - In general, tribes may redesign and consolidate PSFAs included in a funding agreement in any manner that the tribe considers to be in the ‘best interest of the Indian community being served.’
 - If a tribe receives discretionary or competitive grant funds - including State apportioned funds - the tribe must use the funds “for the purpose of which the funds were originally authorized.”
- Tribes may retrocede PSFAs included within a funding agreement.

USDOT Secretarial Power to Approve or Terminate Agreements

- Final USDOT Decision maker.- Decisions relating to an appeal of the rejection of a final offer by the Department are to be made by either an official who holds a higher position than the original decisionmaker in the Department, or by an administrative law judge (ALJ).
 - Only applies to the appeal of a **final offer**.
- Termination.- Compacts or funding agreements must include authorization for the Secretary to terminate an agreement in the case that the Secretary makes a finding of:
 - imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety and that arises out of a failure to carry out the compact or funding agreement; or
 - Gross mismanagement with respect to funds or programs transferred under the compact or funding agreement.
- Written notice, hearing on the record, and chance for corrective action needed before termination, except in the case of “imminent substantial and irreparable jeopardy.”

Self-Governance Audit and Allowable Cost Principles

- In administering funds received under a compact and funding agreement, an Indian tribe shall apply cost principles under the applicable OMB circular, except as modified by section 106 of the ISDEAA, 25 U.S.C. 450j-1, other provisions of law, or by any exemptions to such circulars subsequently issued.
- Tribes must comply with the Single Agency Audit Act but “[n]o other audit or accounting standards shall be required by the Secretary.”

Transfer of Self-Governance Funds

- The Secretary shall provide funds to the tribe in an amount equal to:
 - (a) The sum of the funding that the tribe would otherwise receive for the PFSA in accordance with the funding formula or other allocation method established under title 23 or ch. 59 of title 49; and
 - (b) Such additional amounts as the Secretary determines equal the amounts that would have been withheld for the costs of the BIA for administration of the program or project.

Construction Program Standards

- Standards.- Construction projects must be built in accordance with construction program standards set out on the new regulations (or as specifically approved by the Secretary). **It will be important for tribal negotiators to include pro-tribal construction and monitoring standards in final regulations.**
- Monitoring.- Construction programs shall be monitored by the Secretary in accordance with applicable regulations.



Should Native American Tribes Have More Power To Govern Themselves?

Secretarial Interpretation and Disclaimers

Interpretations.- The Secretary must interpret all federal laws, Executive orders, and regulations in a manner that will facilitate: (a) the inclusion of PFSAs and associated funds in compacts and funding agreements; and (b) the implementation of the compacts and funding agreements.

Disclaimers.- If a Tribe elects, the Secretary must maintain current Tribal Transportation Program (TTP) Agreements or enter into new FHWA TTP agreements. This means that Tribes have a choice whether to enter into a self-governance agreement or keep their current FHWA or BIA TTP Agreements.

Other ISDEAA Provisions

Most ISDEAA Titles I and V provisions also apply to USDOT compacts and funding agreements.

It will be important for tribal negotiators to ensure that a maximum number of pro-tribal provisions are included in the final USDOT regulations.

Modern Federal Indian Policy

- Characterized by notions of Tribal Self-Determination/Self-Governance
- In most subject matter areas, tribal governance compacts and 638 contracts produce tribal control.
- Theory: Defining policy and administering governmental services are important to sovereignty and self-determination.

Tribal Transportation Self-Governance Program

The Self-Governance Program amendment to the FAST Act was the result of sustained tribal advocacy. The same effort will be required during the Negotiated Rulemaking process to develop meaningful regulations. The rulemaking will likely span the Obama administration and initial years of the next president. The participation of tribal advocates in the rulemaking will be critical to achieve the broadest implementation of the Tribal Transportation Self-Governance Program within the Department.

To elevate tribal transportation needs at USDOT, it is also important for the President to appoint the Nation's *first* Deputy Assistant Secretary for Tribal Government Affairs within USDOT to coordinate tribal transportation programs and activities in all offices and administrations of the Department and to “be a participant in any negotiated rulemaking.” Filling this position will be an important precedent for the next administration.

Questions?

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