



USET

SOVEREIGNTY PROTECTION FUND

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The Honorable Elaine Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Dear Secretary Chao,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the U.S. Department of Transportation (DOT) regarding the Notice of Proposed Rulemaking (NPRM) for the Tribal Transportation Self-Governance Program (TTSGP) published on October 2, 2019. The NPRM has been published to gather input regarding the establishment and implementation of an Indian Self-Determination and Education Assistance Act (ISDEAA) self-governance program within the DOT. The publication of the NPRM followed an extensive, and sometimes conflicted, negotiated rulemaking process with a committee of Tribal leaders, Tribal transportation experts, as well as DOT and Bureau of Indian Affairs (BIA) officials. Frustratingly, previous actions by DOT were not in line with federal trust obligation to consult with Tribal Nations on matters that directly affect us and thus lead to discord early in the process. However, USET SPF is glad to see that this rulemaking has moved forward in an inclusive manner, as this is a significant step forward in fully implementing the TTSGP. Below, we provide comments to DOT on how the agency may implement the TTSGP as Congress intended and in a manner that is reflective of the unique relationship between Tribal Nations and the federal government.

USET SPF is a non-profit, inter-tribal organization representing 30 federally recognized Tribal Nations from the Canadian Border to the Everglades and across the Gulf of Mexico¹. USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

By authorizing TTSGP under the Fixing America's Surface Transportation (FAST) Act, Congress again reaffirmed and upheld Tribal sovereignty and self-determination as recognized under ISDEAA. Through the assumption of federal programs and services under ISDEAA, Tribal Nations are able to exercise our inherent sovereignty by delivering essential government services to our citizens directly. The success of self-governance under the ISDEAA is reflected in the significant growth of Tribal self-governance programs

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is strength in Unity

over the years. A majority of USET SPF Tribal Nations engage in self-governance compacting or contracting to provide essential government services including providing vital services such as education, housing, health care, and public safety. The expansion of ISDEAA self-governance authority to DOT will enable our Tribal Nations to more fully exercise our sovereignty and self-determination, as well as better serve our communities. It further serves as the next evolutionary step in expanding ISDEAA self-governance authority to all agencies of the federal government.

While we are encouraged that the DOT draft rule is the product of consensus between federal and Tribal negotiators, we underscore that there continue to be items of disagreement between Tribal Nations and DOT regarding certain provisions of the NPRM. USET SPF strongly urges DOT to continue working closely with Tribal Nations to ensure these items of disagreement are settled in manner that is reflective of the federal trust obligation and the sovereign status of Tribal Nations. As identified by the NPRM's Preamble, there are key areas where Tribal committee members and the DOT were not able to reach consensus. These areas of disagreement include:

1. Establishing an Office of Self-Governance and a Self-Governance Advisory Committee

In order to successfully administer TTSGP, Tribal committee members stated they believe that the implementation of the proposed rule should be an opportunity for the DOT to establish an Office of Self-Governance as well as a self-governance advisory committee. Conversely, the DOT has stated that while it recognizes that both entities have value, the agency believes that this rule is not the appropriate mechanism to create them. USET SPF wholly disagrees with the DOT, as the establishment of both an Office of Self-Governance and a self-governance advisory committee would be critical to the successful operation of the TTSGP. Creating a central office of transportation officials with expertise in Tribal self-governance is important not only for communicating with Tribal Nations in the TTSGP but also for DOT's successful integration of Tribal self-governance across its operating agencies. Further, institutionalizing both the Office of Self-Governance and the advisory committee in this regulation is consistent with Tribal self-governance precedent which has already been established in both the Department of the Interior and the Department of Health and Human Services. USET SPF strongly recommends DOT take the recommendations of Tribal committee members into account and work to establish an Office of Self-Governance as well as a self-governance advisory committee.

2. Applicability of Contract Support Costs and Facility Leases/Support Costs

DOT has taken the position that the payment of contract support costs (CSC) and Tribal leases under the "105(l)" leasing provisions of ISDEAA are in conflict with the TTSGP and therefore should not apply. However, Congress has incorporated the provisions of ISDEAA providing for CSC and Tribal leases – therefore there is no conflict as DOT suggests. Instead, these are critical pieces of successful self-governance programs that have been solidified by both Congress and the courts. Federal courts have time and again ruled that the federal government should address CSC and 105(l) payments as an integral component of fulfilling the federal trust obligation. Adopting regulatory terms that force Tribal Nations to use our limited program funding for administrative and facilities costs would be a violation of that obligation and may subject the federal government to litigation. Congress recognized this when they provided authorization to make Tribal Nations eligible for additional federal funding to cover the costs necessary to administratively support program operations. If implemented as the DOT proposes, it will only undermine the trust and fiduciary legal obligations of the federal government, and would likely subject the agency to litigation. We urge the DOT to remove the provisions 29.419 and 29.420.

3. Exhaustion of Administrative Remedies

While USET SPF supports an administrative option for Tribal Nations, we disagree with the language within the rule that would require Tribal Nations to exhaust all administrative remedies regarding pre-award decisions before filing a suit in federal court. There is no requirement in statute or other self-governance regulations that these claims be subject to Departmental exhaustion. Instead, Tribal Nations have the option to go directly to federal court in the event of disputes. We urge DOT to remove this language from the rule.

Conclusion

Since time immemorial, Tribal Nations have engaged in sophisticated and established forms of self-government as sovereign entities. The passage of ISDEAA and subsequent expansion of self-governance to other federal agencies and programs is an important recognition and promotion of our inherent sovereignty, in accordance with the trust obligation to support our governmental status. USET SPF has consistently urged the Administration and Congress to confirm that all federal programs and dollars be made eligible for inclusion in self-governance contracts and compacts. The TTSGP is a critical step toward the modernized relationship with the United States government our member Tribal Nations envision. USET SPF strongly supports the Tribal views within the proposed rule and we urge the DOT to adopt changes in line with those views. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at L.Malerba@usetinc.org or 202-624-3550.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director