

RD AN No. 4670 (4284-J)  
August 16, 2012

TO: State Directors, Rural Development  
ATTN: Business Programs Directors  
SUBJECT: Value-Added Producer Grant Program  
Clarification of Tribal Entity Eligibility

**PURPOSE/INTENDED OUTCOME:**

The purpose of this Administrative Notice (AN) is to clarify the eligibility of tribal entities under the Value-Added Producer Grant (VAPG) program. This is intended to provide guidance to 7 CFR Part § 4284.920 “Applicant Eligibility” to further clarify this issue.

**COMPARISON WITH PREVIOUS AN:**

There are no previous AN issued on this subject.

**IMPLEMENTATION RESPONSIBILITIES:**

Section 231 of the Agriculture Risk Protection Act of 2000 (Pub. L. 106–224) as amended by section 6202 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) (*see* 7 U.S.C. 1632a(b)) authorizes the establishment of the Value-Added Agricultural Product Market Development grants, also known as the VAPG program. The program is designed to help eligible producers of agricultural commodities enter into or expand value-added activities including the development of feasibility studies, business plans, and marketing strategies. The program will also provide working capital for expenses such as implementing an existing viable marketing strategy.

EXPIRATION DATE:  
August 31, 2013

FILING INSTRUCTIONS:  
Preceding RD Instruction 4284-J

## Value –Added Producer Grant Program

Through consultation with tribes and tribal leaders, communicating with staff and analyzing past VAPG awards, it is apparent that significant challenges exist when tribal entities attempt to access the VAPG program. Tribal governments are distinct political entities that have the power of self-government and exercise sovereignty over their members and territory. This is a political relationship not only between the Federal government and the Tribe, but also a relationship between the Tribe and its tribal members. The Federal government has certain trust duties because of the political relationship established through the United States Constitution, treaties, court decisions and laws.

The unique cultural and governmental structures of tribes are diverse and tribal governments, and businesses employ various structures for business transactions. These structures are not always identical to state-law based business entities but may still meet the basic applicant eligibility and definition criteria set within 7 C.F.R. § 4284.920 and 7 C.F.R. § 4284.902.

7 C.F.R. § 4284.920 states that applicants must demonstrate that they meet all definition requirements for one of four applicant types: independent producer, agricultural producer group, farmer or rancher cooperative; or majority-controlled producer-based business venture. Each of these applicant types are defined at 7 C.F.R. § 4284.902. Each applicant type is comprised, through ownership, membership or both of at least a majority of Independent Producers, as defined at 7 CFR 4284.902. An Independent Producer is an individual or an entity that is solely owned and controlled by Agricultural Producers defined at 7 C.F.R. § 4284.902. This definition states that an Agricultural Producer is “...An individual or entity directly engaged in the production of an agricultural commodity, or that has the legal right to harvest an agricultural commodity, that is the subject of the value-added project. Agricultural producers may ‘directly engage’ either through substantially participating in the labor, management and field operations themselves or by maintaining ownership and financial control of the agricultural operation.” The definitions for “agricultural producer” and “independent producer” are the basis for each applicant eligibility type.

Historically, tribes and tribal entities have been deemed ineligible for the VAPG program. The Agency interpretation was that tribes or tribal entities operating on behalf of the entire tribe (inclusive of members not participating in agricultural production) were not eligible for the program because they could not conform to the definition of Independent Producer requiring ownership or membership of at least a majority of Agricultural Producers.

However, due to the unique relationship between Federally Recognized Tribes, their tribal members and the Federal Government and in recognition of cultural and governmental differences inherent in tribal structures, Federally Recognized Indian Tribes (including instrumentalities of Tribes, sub-divisions/agencies of Tribal governments and Tribal corporations) may be able to apply on behalf of all tribal members who are under the Tribe’s direct regulatory control. Tribes retain police power and inherent sovereignty over the activities of their tribal members on agricultural activities that take place on land held in trust by the Department of Interior. It is the position of the Agency that, where agricultural activities are

carried out by the tribe or tribal entities for the benefit of the entire tribe (inclusive of tribal members not performing agricultural functions), each tribal member is, in effect, an agricultural producer by virtue of their direct engagement in agricultural production through ownership and financial control of the operation (per the definition of agricultural producer at 7 CFR 4284.902). Tribal entities wishing to use this distinction must document that the collection or production of the commodity is under the regulatory jurisdiction of the Tribe, including individual tribal members also within the Tribe's regulatory jurisdiction.

State and Field staff should analyze each applicant for eligibility according to all of the requirements at § 4284.920 (as well as all other eligibility requirements found at 7 CFR 4284.920-925) along with the examples provided below that illustrate possible scenarios of how the product could be owned by a tribal entity throughout the value-added process. Staff should gather information from the applicant to determine structure and ownership of the applicant entity as well as ownership of the product through the value-added process. When applicant eligibility cannot be discerned at the State Office level, National Office program staff should be consulted in order to make a timely eligibility determination.

### **EXPLANATIONS AND EXAMPLES:**

The examples below are meant to provide staff with case studies aimed at clarifying how certain types of tribal applicants may be eligible to apply for VAPG assistance. The examples are not meant to be an exhaustive list and other tribal applicants with differing organizational structures may be eligible applicants. Not all tribal applicants are automatically eligible for VAPG assistance. Rural Development employees are encouraged to exercise their discretion in making such determinations and, as noted above, seek National Office consultation if such an applicant's eligibility cannot be discerned. Examples of tribal entities that may be eligible include but are not limited to:

#### ***1. Tribal Government as a Business Entity***

Many tribes conduct business through the tribal political structure with direct oversight of the business activity controlled by the tribal legislature or council. The review of the applicant must determine if the production is occurring through this political structure and if the tribal political structure produces the raw commodity and retains ownership throughout the value-added process. Rural Development employees must determine if the tribe is applying for an eligible product and if they qualify as an eligible entity. Determinations of eligible entities will substantiate that the applicant produces and owns the commodity through the valued added process.

**Eligible Example:** Tribe A applies for a VAPG to process and market shellfish. The Tribe maintains the sea dike and related aquaculture facilities through direct oversight of Tribe A's Natural Resources Department. Tribe A's Aquaculture Facility is operated as an independent shellfish producer managed by Tribe A on behalf of its ultimate owners, the members of Tribe A, of which a smaller percentage of independent "clammers" make a full-time living. These independent "clammers" are treated as employees of Tribe A's Facility and ownership of the product remains with Tribe A in its operation of the facility through general revenues

of the Tribe. The VAPG will expand the product depth of the Tribe A Aquaculture Facility by developing a business plan, studying the feasibility of the project. Up to the point of application, Tribe A had not supplied “finished-product” and this grant will allow for Tribe A to capture a larger portion of the revenue. Tribe A also retains control and access to the waterways with adjacent ground being held in trust for the benefit of both the Tribe and individual tribal members through retained treaty-based fishing rights. Tribe A is an eligible Independent Producer because:

- The Tribe owns and controls the land where the shellfish are gathered and operates its own shellfish production corporation for the benefit of the Tribe as a whole, therefore, all tribal members are considered agricultural producers by virtue of their direct engagement in agricultural production through ownership and financial control of the operation and the Tribe.
- The Tribe currently produces and owns at least 50 percent of the raw commodity needed for the project.
- The Tribe produces and owns the commodity throughout the valued added process, for the benefit of all tribal members.

## ***2. Tribal Unincorporated Instrumentality***

Unincorporated instrumentalities are formed by a tribe under tribal law and share the same legal character because they are not necessarily a separate entity from the Tribe itself. These entities are generally wholly or at least majority controlled by the tribal political structure with a manager to oversee day-to-day operations. These entities can operate various business activities which could include VAPG eligible activities as an extension of general tribal business. Rural Development employees should analyze the relationship between the Tribe and the unincorporated tribal instrumentality to determine if the appropriate applicant is the tribe itself, the unincorporated tribal instrumentality or either, and whether it is at least majority controlled by the tribal political structure, as well as substantiation that the applicant produces and owns the commodity through the valued added process.

**Eligible Example:** Tribe C maintains existing wild rice beds and develops new wild rice beds on a lake under its tribal jurisdiction through the Tribe’s Natural Resources Department (TNRD). TNRD and the members of Tribe C are subject to the regulatory control of Tribe C. Under this regulatory control Tribe C and its tribal members have exclusive rights to harvest rice as a result of retained treaty rights and tribal jurisdiction over the use of its rice beds. After the harvest, Tribe C purchases raw rice from the “harvesters” through the Tribal C Wild Rice Venture (tribal unincorporated instrumentality) which is wholly and directly controlled by the tribal political structure. This Venture processes the product, labels it as Tribe C Wild Rice and sells the product to retail/wholesale distributors. Tribe C directs the venture and retains all risk of loss on the activities of the venture. The tribe applies for a VAPG for the eligible purpose of further marketing Tribe C Wild Rice. In this instance, Tribe C is eligible as an Independent Producer because

- The Tribe wholly controls Tribal C Wild Rice Venture, the tribal unincorporated instrumentality;

- Benefits from the production and sale of the rice accrue to the tribe as a whole, and as in the first example, all tribal members are considered agricultural producers by virtue of their direct engagement in agricultural production through ownership and financial control of the operation and the Tribe;
- The Tribe currently owns and produces more than 50 percent of the agricultural commodity that will be used for the value-added product and they retain the risk of loss for the raw commodity throughout the value chain from production of the raw commodity to the sale of processed rice. The tribal instrumentality's purchase of rice from its member producers is an internal transaction, similar to the way an LLC or Cooperative purchases its product from Cooperative member producers, and therefore does not constitute a break in the chain of ownership.

### ***3. Tribal Agencies or Divisions***

Tribes can grant authority to their tribal agencies or divisions to simultaneously act as a political subdivisions and quasi-businesses. This allows a semi-separation from government functions and fulfills an essential government function. The power to tax and regulate could be combined within a business function of the tribe all formed underneath an economic development subdivision of the tribe. In examples 1 and 2, the tribe could also choose to separate the assets and liabilities from the tribal council/legislature (customarily through a resolution of the tribal council or legislature) and operate the value-added eligible project through their Natural Resources Department (NRD). Upon examination of the structure, this would make the NRD the eligible applicant because the commodity was produced and owned through the valued added process by the NRD.

**Eligible Example:** Tribe E grants authority to the Tribe E Department of Agriculture (TEDA) to operate agricultural related businesses and allocates 10,000 acres of tribal trust land to the TEDA. In an attempt to redevelop historical seeds and crops of Tribe E, TEDA grants the right to use the land, at no cost, to tribal members and sells low-cost seeds to these tribal members to grow on these parcels. Tribal members grow the products on these lands and after harvest sell a majority of the produce back to TEDA to process and market as Tribe E Historical Crops. In this instance TEDA has granted access to tribal lands, exclusively to tribal members and those individual tribal members grow the commodity. TEDA is eligible to apply for VAPG assistance as an Independent Producer entity on behalf of the tribal member agricultural producers, because:

- TEDA has regulatory jurisdiction over the tribal members and the land
- TEDA documents that the individual tribal producers are eligible agriculture producers.
- TEDA retains regulatory authority over the operation; and
- TEDA and the tribal members produce and produce and own more than 50 percent of the commodity from its raw state through the valued added process. TEDA's purchase of rice from the tribal member producers is an internal transaction, similar to the way an LLC or Cooperative purchases its product from Cooperative member producers, and therefore does not constitute a break in the chain of ownership.

### ***4. Section 17 Corporations According to 25 USC § 477***

The Indian Reorganization Act allows tribes to conduct business-related activities through federally-chartered corporations whose corporate charter is issued by the Department of Interior according to 25 USC § 477. These entities allow tribes to separate assets and liabilities from other tribal activities, but retain certain benefits of tribal sovereignty. These are corporations formed under federal law and should receive the same eligibility analysis as a state law-formed legal entity. The Section 17 Corporation must still fall within an eligible applicant category and retain ownership of the eligible product.

**Eligible Example:** Tribes H, I and J jointly apply for a Section 17 Corporation to develop salmon production across the Northwest. This is a membership organization that jointly develops salmon markets with combined product and is operated by tribes H, I, J, K, L, M and N. The corporation is operated by a board of directors with each tribe having one director who is ~~or~~ a salmon harvester. The Section 17 Corporation applies for a VAPG to study the feasibility of marketing a smoked salmon product on behalf of all tribes represented.

The Corporation is eligible in this instance as an Agricultural Producer Group because:

- It works on behalf of the member tribes who are eligible independent producers by aggregating and marketing the product on behalf of the independent producers from member Tribes of the Section 17 Corporation.; and
- they regulate legal access to the harvest; and
- the majority of the board is made up of independent producers.
- The independent producers and member Tribes produce and own more than 50 percent of the commodity from its raw state through the valued added process.

Depending on its exact structure, this entity could also be an Independent Producer or a Cooperative. If non-tribal members or entities were involved, it could qualify as a Majority Controlled Producer-Based Business Venture.

## ***5. Corporations Formed Under Tribal Law***

Tribally chartered corporations are formed under tribal law through a tribal incorporation statute or code. The corporations can be formed as for- or not-for-profit organizations. They share similar characteristics to state-law based corporations or other business entities, but the tribal code or statute will spell out the exact legal characteristics available to tribal chartered corporations. Tribal law should be followed in assessing the eligibility and good standing of the tribally formed corporation. Rural Development employees should accept the appropriate documentation provided by the tribal government as outlined in the tribal incorporation law. Staff should analyze the appropriate documentation for applicant eligibility similar to state-law based business entities with the caveat that in this instance the tribal corporation is generally the applicant for VAPG assistance and not the Tribe. The Tribe would need to prove eligibility in a venture operated by a tribally chartered corporation by showing that the Tribe produced and owned the commodity throughout the valued added process.

**Example:** Tribe O puts in place a tribal incorporation code that allows for the formation of corporations underneath the laws of Tribe O. Tribe O creates the Tribe O Farm Corporation (TOFC) which is an independent for-profit corporation organized under Tribe O. TOFC has a board of directors that operate the agricultural operations. The TOFC owns or leases all lands for production. Lands not owned by the TOFC are leased from private landowners, and in some instances from the Tribe. The TOFC operates crop and livestock production in addition to its wheat-to-flour production. The TOFC is eligible as an Independent Producer because:

- TOFC receives all of the benefits from the value added process and those benefits ultimately accrue to the tribe.
- TOFC produces and owns 100 percent of the crops harvested by the farm through the point in which it is processed, manufactured and sold into wholesale or retail markets

## ***6. Conflicts of Interest***

Tribal entities should not apply for a VAPG for a product that they will ultimately sell exclusively to another tribal entity under the control of the same tribe, as this would be a conflict of interest. In addition, Tribal applicants of any type cannot use grant or matching funds to purchase commodities produced by tribal agriculture producers, including individual tribal members.

## ***7. Other Considerations***

Although tribal entity applicants may be structured such that they have non-tribal entities as partners/owners, Rural Development employees should note that the applicant may not contract with non-tribal members for the production of the majority of raw commodity needed for the value-added project.

## **REVIEW QUESTIONS:**

The questions below should be utilized by Rural Development employees to analyze projects in determining tribal entity eligibility. The examples provided above may be sufficient for staff but the review questions should be used to determine if further analysis on eligibility is necessary under the “Review Assistance” section below.

### **1. Is the application from a federally recognized tribe, a tribal enterprise, a subdivision of a federally recognized tribe, a tribally chartered corporation or a Section 17 corporation?**

- If the applicant is not the tribe, how is it related to the tribe and the tribe’s producers?
- How exactly is the applicant chartered, incorporated, authorized, or organized to conduct business?

- Do the benefits from the production of the agricultural commodity accrue to the tribe as a whole or does the tribal entity represent an exclusive subset of agricultural producers who receive the benefit?
- Does the tribal entity partner with non-tribal entities? In what way?

**2. If the applicant is applying as an Independent Producer:**

- Is the entity wholly owned and controlled by the Tribe, with the benefits from the agricultural activity accruing to the tribe as a whole? (such that all tribal members are, by extension, agricultural producers)?
- Does the entity currently produce and own more than 50 percent of the raw commodity to be used for the value-added product.
- Does the entity retain ownership of the product from its raw state through the value-added process during the project? (Internal title transfer between members and the applicant entity does not constitute a break in ownership).

**3. If the applicant is applying as a Agricultural Producer Group:**

- Is the entity a membership organization?
- Are a majority of the members Independent Producers
- Are a majority of the members of the board of directors Independent Producers?
- Does the entity's mission include working on behalf of its member Independent Producers?
- Are the Independent Producers on whose behalf the work will be done identified by name or class?
- Do the Independent Producers currently produce and own more than 50 percent of the raw commodity to be used for the value-added product.
- Do the Independent Producers retain ownership of the product from its raw state through the value-added process? (Internal title transfer between members and the applicant entity does not constitute a break in ownership).

**4. If the applicant is applying as a Farmer or Rancher Cooperative:**

- Is the entity 100 percent owned and controlled by Independent Producers with benefits derived and distributed equitably on the basis of use by each owner?
- Is the entity incorporated as a cooperative or otherwise identified as a business operating on a cooperative-basis?
- Are the Independent Producers on whose behalf the work will be done identified by name or class?
- Do the Independent Producers currently produce and own more than 50 percent of the raw commodity to be used for the value-added product.
- Do the Independent Producers retain ownership of the product from its raw state through the value-added process? (Internal title transfer between members and the applicant entity does not constitute a break in ownership).



- Note that it is the Agency's position that if a cooperative is 100 percent owned and controlled by agricultural harvesters (loggers, fishermen for example), it is eligible only as an Independent Producer and not as a farmer or rancher cooperative.

**5. If the applicant is applying as a Majority-Controlled Producer-Based Business Venture:**

- Is the majority of the number of owners Independent Producers?
- Does the majority of financial interest belong to independent Producers?
- Does the majority of voting interest belong to Independent Producers on the governing board?
- Do the Independent Producers currently produce and own more than 50 percent of the raw commodity to be used for the value-added product.
- Do the Independent Producers retain ownership of the product from its raw state through the value-added process? (Internal title transfer between members and the applicant entity does not constitute a break in ownership).

**6. Does the proposed project meet all other program eligibility requirements found at 7 CFR 4284.920-925?**

**REVIEW ASSISTANCE:**

If a tribal entity is considering application to the VAPG and the proposed activity meets the project eligibility as defined in 4284.922 you are instructed to encourage application under the VAPG program. If possible, tribal applicant eligibility determinations are to be made at the Field and State Office Level. For those applicant types requiring further review, forward the application to the National Office VAPG program staff for eligibility determination. When forwarding these applications please include all organizational documents (such as articles of incorporation, corporate charters, tribal resolutions, certificates of good standing and other applicable documentation) so that program eligibility can be determined and justified in a timely fashion.

If you have any questions concerning the content of this AN, please contact the Cooperatives Programs Staff at (202) 720-7558.

*(Signed by John C. Padalino)*

JOHN C. PADALINO  
Acting Administrator  
Business and Cooperative Programs