Thursday, August 18, 2016

Self-Governance Administration Workgroup

Committee Chair Rhoads

Self-Governance Administration Workgroup Chair:\_\_\_Jody Clark\_\_\_\_\_\_\_\_\_\_\_\_

This effort should be Tribally driven…we would like to know an opposing views early on.

Roles of Chair:

* To keep all the attorneys in line….
* Keep thing moving
* Making sure all are respectful
* Reporting back to the full committee
* Organize any interim teleconferences between full committee meetings
* To check the notes from the meeting and approve the notes before the notes go out

Self-Governance Recorder: \_\_\_Howard Mermelstein\_\_\_\_ backup Lesa Shaw\_\_\_\_\_\_\_\_\_\_

* Take accurate notes
* Disseminate notes and products to the workgroup
* Compile the information
* Send the information to the other workgroup and the full committee after Chair approval
* Coordinate between the recorder and backup recorder to confirm the notes

ACTIONS: (will designate the people by names of for drafting)

Drafting column 2 in the side by side. There are things that are easy and there will be some things that are more complicated related to transportation.

207(a) Establishment

207(b) Eligibility

207(c) Compacts

207(d) Annual Funding Agreements

207(e) General Provision

207(f) Provisions relating to Secretary

207(g) Cost Principles

207(h) Transfer of Funds

207(i) Construction Program

207(j) Facilitation

207(k) Disclaimers

207(l) Applicability of Indian Self-Determination and Education Assistance Act

207(m) Definitions

207(n) Regulations

Side by Side technical group: Chair Clark, Howard, Karen, Jonah, Jeff, John, Matt, and Adam

Draft the sections as needed similar to Title 5 and other regulations as applicable (except for planning, design, construction that will be handled by the Operations workgroup). Make the section in 23 USC 207 make sure that the 23 USC 207 section is covered under the Title 5 column

Pete - List of committee members (sign in passed around at the meeting)

Vivian – email the group the ROW regulations 25 CFR 169

Vivian/Bob – will put the committee notebook on the website. And provide to hardcopies to the Lesa and Howard as the recorders for the Self-Governance Administration workgroup.

Kenneth Martin – share with the TTPSG the current thinking on how DOT will handle the implementation of SG. Deputy Assistant can discuss how DOT could handle. There is going to be SG in DOT.

Tribal Caucus Topics:

* Model/agreement or compact that actually makes a deal with DOT for the Tribe to operate the program.

Federal Caucus Topics:

**Brainstorm of Topics:**

Agenda for the workgroup

Define needs: key elements to comply with the program and how the program works administratively.

* Brain storm the list of needs
* Prioritize that list of needs
* Initial discussions on assignments on drafting the regulations (drafting group)

Brainstorm: (the side by side will help to see of the Title 5 regulation is applicable)

* Compiling materials under SG how it would fit under the transportation topic (eligibility are virtually identical).
* Aligning the SG with the regulations
* Each Tribe here has had experience with 638 or other contracting, we do not want to back the same route as we have learned. Navajo had moved in the last 3 years to FHWA. Each table has experience that we could change. One would could change is financial disclosure.
* Technical support (where is the Tribal money going) both
* All of us of Tribes with different needs, whatever we come up we need each Tribe for work with the solutions.
* Echo the learning from experiences and reporting where the Tribal money is spent.
* Clearly delineating Federal and Tribal responsibilities for the program. both
* Each Tribe is unique not like a one stop shop and all Tribes are different. both
* Focused to allow maximum flexibility and sovereign authority both
* Flexibility on the contract, do not forget about Tribes that are 638 contracting
* Tribes pooling their funding to do a project
* Tribes working with State DOT’s (Counties) to do project.
* Identifying how DOT will re-organize to respond to self governance? This effort needs to know how DOT is organized for the SG effort (contracting, next person for an impass, etc.). Also with DOI and DOT. There will likely be recommendations made from this workgroup and Bob/Vivian will carry forward the recommendations. If anyone in DOT has started to draft a design…that specific issue has not been addressed. Can we assign that someone from DOT will come back to this group with the status of DOT on Self-governance? Is there going to be an official office of SG, possibly? If the workgroup comes up with the agreements DOT will respond based on these recommendations.
* Flexibility if you are big Tribe or small Tribe, when BIA is funneling funds to the Tribe the BIA should be aware of this self governance process (sometimes office of SG is left out of the discussion). both
* Maintain the Tribes right to truly have a self-governance (not have DOT micro managing the SG effort). both
* Some Tribes do not have our transportation departments covering all of transportation, for example mass transit might be in one department, another department for planning, another for roads. Need to figure out how to do 638 contracts and how that will mesh?
* How to address crossing DOI and DOT lines with the SG effort. both
* Ensuring that there is a uniform understanding as it relates to Tribes from either FHWA, or others, and there are certain provisions of law…spirit is to have SG override the provisions of the law. This is a DOT regulation that will be developed and will inform those DOT departments of what they to do. both
* Sovereignty…understanding sovereignty and the SG program and how those concepts relate to DOT programs and how the two mesh. both
* DOT programs where funding opportunities exist and we can have one contract so that the efforts are not cumbersome for the Tribes (not multiple sets of rules).
* Creating a brand new self governance programs and we have the benefit from other SG (mainly Title 5) get the best parts and keep simple and user friendly.
* We should not re-invent the wheel, we have some pretty good regulations under Title 5 (we should use that) both
* Acknowledge the Nation to Nation relationship both
* Consistency in how this applies (common issue in most programs) make this effort as clear as possible (relates to how DOT responds). both
* Get the buy-in from agencies we typically do not work with (SG maybe forced on those agencies or they do not understand it). both
* Look at contracts we have with other agencies and look at contract support costs.
* NEPA, how is NEPA going to be involved? Under 638 BIA is the lead for NEPA. This would include NEPA, SHPO and THPO (and USFW, USACE). In Operations under Construction and both
* ROW for the administration piece (getting the ROW recorded). The title recording part is with administration. both
* *Tribal concern that the final product may affect the way they are doing 638 contracting or other forms of contracting, need to make sure Tribes understand they still have options. Statement…for the preamble*
* *Other contract services GtoG, 638, direct FHWA, direct BIA, DOI self governance (this SG effort with DOT is the sixth way to contract). Under Title 4 Compacts with Tribal Governments, it is another alternative. Tribes can use a combination of the mechanisms above. Statement for the preamble*
* Some Tribes contract with State DOTs and now FHWA can handle that funding. States have not got the word that FHWA can handle the State DOT funds for the Tribe for a specific project. Every State should have information from the top down so that the Tribe does not have to inform the State of the funding option. There are two methods for Tribes to get funds from the State…202(a)(9) and a direct agreement with the State. If a project is 100% State funded can that project be moved to the SG effort. For example with the Hoopa Tribe, rather than go through the 202(a)(9) and used the SG rules to delineate the scope of that agreement. Hoopa Tribe did not give a waiver on sovereign immunity. both

From the draft:

**SELF-GOVERNANCE ADMINISTRATION**

definition sections, tribal consultation and collaboration process, Secretarial interpretations to facilitate self-governance, outlines the new Tribal Self-Governance Program within USDOT and explains how the Self-Governance Program works with the other USDOT modal administrations under the Office of the Secretary, tribal eligibility, the process for developing compacts and AFAs, transfer of recurring funds and grants from all USDOT administrations, final offer process, dispute resolution process, Prompt Payment Act, Federal Tort Claims protection, flexible and innovative funding, contribution of funds from States and local governments under Section 202(a)(9) agreements funds, retrocession, withdrawal, reassumption, the regulation waiver process and such other issues as the Committee deems relevant.

**Title V (Part 137) suggested references include:**

* Subpart A – General Provisions
* Subpart B – Definitions
* Subpart C – Selection of Tribes for Participation in Self-Governance
* Subpart D – Self-Governance Compact
* Subpart E – Funding Agreements
* Subpart F – Statutorily Mandated Grants
* Subpart G – Funding
* Subpart H – Final Offer
* Subpart J – Regulation Waiver
* Subpart K – Withdrawal
* Subpart L – Retrocession
* Subpart M - Reassumption

**Other topics:**

* Discretionary/competitive grants
* Other topics

OPERATIONS WORKGROUP ITEMS (this group has issues that run deeper, several items would need to be drafted from scratch)

* Two regulations identify 25 CFR 170 23 CFR 661 (Bridge). The bulk of the funding that goes into the program is TTP. Somewhere in this regulation there should a way to interpret the same procedures with the other administrations. There has be some way to address these different regulations. For example FHWA has used the FAA Federal Register notice in our process. Add 25 CFR 170 and 23 CFR 661 should be added to the hands
* Management of the ROW by construction and transportation planning

Issues that need to be clarified:

* Access to surplus and excess equipment
* Dispute resolution