

Response to Tribal Comments on Establishment of the Indian Trust Asset Reform Act Demonstration Project

On January 24, 2018, the U.S. Department of the Interior invited Tribes to Tribal consultation on establishing the Demonstration Project authorized by Title II of the Indian Trust Asset Reform Act (ITARA), P.L. 114-178. *See, also*, 83 Fed. Reg. 5456 (February 7, 2018). The Department hosted three sessions: February 27, 2018, in Prior Lake, Minnesota; March 1, 2018, in Portland, Oregon; and March 8, 2018, by teleconference. The Department also accepted written comments it received by March 15, 2018. The following provides a summary of the comments received, organized by topic, and the Department's responses to those comments.

1. Announcement

Several Tribes asked how the Demonstration Project will be announced.

Response: The Department will send a Tribal leader letter.

2. Scope

One commenter suggested the Department adopt the definition of trust asset found in 25 C.F.R. § 115.002 for purpose of the Demonstration Project. Another commenter stated that Title II is broader than forestry and is intended to allow Tribes to direct how they want any of their trust resources managed.

Response: The Department notes that there is no discussion of any trust asset other than land and timber in ITARA. Further, the only trust management activities discussed in the statute are surface leasing and forest land management activities. It is unclear how Tribal management of other trust assets, absent the authority to promulgate Tribal regulations for the resource, would differ from management under other authorities, e.g., Tribal Energy Resource Agreements, Self-Governance compacts, or 25 U.S.C. § 4022. In the interest of maximizing participation, however, the Department will consider applications on a case-by-case basis. Tribes are encouraged to identify the Tribal trust assets they intend to include in their Indian Trust Asset Management Plan (ITAMP) when applying to participate in the project.

3. Allotments

One commenter stated that the Department should clarify whether an ITAMP can cover allotments.

Response: ITARA applies only to Tribal assets.

4. Deadline

A few Tribes stated that the Department should establish a 30 day deadline for providing Tribes with written notice that they are eligible to participate.

Response: The Department is sending a letter to Tribal leaders announcing the establishment of the Demonstration Project. At that time, Tribes may submit a request to participate. ITARA

does not require, and the Department will not adopt, a 30 day deadline to approve applications for participation. The Department will contact Tribes that have already applied regarding the status of their applications and any need to supplement their applications.

5. National Environmental Policy Act (NEPA)

Some Tribes asked whether NEPA applies to the Secretary's approval of an ITAMP.

Response: No. Congress required in ITARA that the Secretary must approve or disapprove an ITAMP in 120 days. Thus, there is a "clear and unavoidable conflict in statutory authority" and "NEPA must give way." *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 965 (9th Cir. 2016).

One Tribe asked whether Tribes may define "public" in tribal regulations developed under ITARA Section 205.

Response: Yes, Tribes may define "public" in their tribal regulations under ITARA Section 205 because, as with the HEARTH Act, Congress did not define "public" in ITARA.

Two Tribes stated that with regard to an environmental review process, ITARA generally mirrors the HEARTH Act but also explains that Tribes can elect to stay with the Bureau of Indian Affairs' (BIA) environmental review process. These Tribes also stated that the definition of "interested party" in 25 C.F.R. Part 163 limits the universe of persons and entities that can appeal timber sales to those with a direct economic interest. The Tribes further point out that, "25 C.F.R. § 163.21 generally requires an appeal bond." The Tribes stated that "there are no such limitations for appeals by third parties challenging surface leasing under the HEARTH Act." Finally, the Tribes assert that these changes in ITARA were made to ensure that Tribal regulations for forestry "are guided by the BIA forestry regulations, not the Department's general NEPA regulations."

Response: First, the provision on using a Federal agency's process appears in the HEARTH Act, too, and refers to adoption of a Federal environmental review process (e.g., Housing and Urban Development or the Department of Agriculture) for the same project, not to making BIA prepare the review instead of the Tribe. Second, a discussion concerning whether or not ITARA may be read as suggested with regard to "interested parties" is premature. Should the question ever arise in court, the Department will consider the appropriate response, with due consideration given to the particular facts and circumstances presented. Finally, as with the HEARTH Act, neither the Department nor Congress contemplate that the ITARA environmental review process would follow NEPA or the Department's regulations at 43 C.F.R. Part 46 (e.g., there is no alternatives analysis).

One Tribe asked whether NEPA applies to program administration and under what circumstances, if any, a Tribe could assume that authority.

Response: NEPA does apply to certain programmatic decisions taken under an ITAMP, for example, planning activities and actions contemplated under an approved Forest Management Plan, but only if Federal approval or funding is required. Since forestry management activities under approved Tribal forestry regulations would not require Secretarial approval, the Department would not prepare a NEPA review for such activities.

6. Secretary's Order 3206 regarding the Endangered Species Act

One Tribe asked that Secretary's Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, be incorporated into the Program.

Response: Secretary's Order 3206 has not been amended, superseded, or revoked, and therefore, is still in effect. There is no need to specifically incorporate it into the Program.

7. Appraisals

One Tribe requests that ITAMPs be explicitly authorized to include Tribal procedures for appraisal and valuation under ITARA Section 305(b).

Response: The Department may not authorize "Tribal procedures" without a better understanding of what, specifically, the Tribe intends to do. ITARA Section 305(b) required the Secretary to establish a procedure for Tribes and individual Indians to forego Departmental review of a given appraisal at the written request of the Tribe or individual when certain criteria was met. Tribes participating in the ITARA Demonstration Project may use this provision if they follow the procedure and comply with the requirements under 43 C.F.R. Part 100.

8. Criminal Enforcement of Federal Crimes

One Tribe recommended it remain clear that the government will continue its criminal enforcement of federal crimes (such as timber theft and trespass) throughout the term of an ITAMP.

Response: ITARA does not alter the existing legal structure or process for prosecution of federal crimes on Indian lands.

9. Exiting Project

One Tribe asked who, under ITARA 204(d)(2), continues to perform the management activities after a Tribe provides notice of the termination of its ITAMP until October 1.

Response: Regardless of the date on which a Tribe provides notice of termination of its ITAMP, the ITAMP remains in effect until October 1, i.e., until the start of the new fiscal year. Therefore, the Tribe remains responsible for trust asset management under the ITAMP through the end of the current fiscal year.

10. Participation Criteria

One Tribe stated that the Department should clarify what is meant by the ITAMP template requirement that Tribal programs covered under the ITAMP must be in full compliance with Bureau standards.

Response: Tribes that already operate programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), must be in compliance with Bureau standards at the time of their application for the Demonstration Project. For example, Tribes under a corrective action plan by the Office of Trust Review and Audit will not be selected for the Demonstration Project until they bring their program(s) into compliance.

11. ITAMP and FMP

Two Tribes asked whether participating Tribes must have a separate Forest Management Plan (FMP) approved by the Secretary.

Response:

The ITAMP and the FMP are two separate documents and each must be approved by the Secretary. This is consistent with ITARA. ITARA Section 205(c)(2) states, “At the discretion of the Indian Tribe, the Indian Tribe may include in the integrated resource management plan any one or more of the transactions and activities authorized to be included in the plan under subsection (b).” This provision indicates that Congress envisioned the ITAMP and the integrated resource management plan to remain separate documents. There is no indication Congress intended different treatment for FMPs. Furthermore, having separate documents with separate Secretarial approval ensures that one does not terminate the other. For example, if the ITAMP and the FMP are the same document, then termination of the ITAMP would also terminate the FMP.

12. ITAMP Template

A few Tribes stated that the ITAMP template presented by the Department at consultation includes requirements beyond the requirements stated in ITARA and recommended the Department withdraw the template.

Response: The ITAMP template is suggested guidance and was intended to stimulate discussion at consultation. Participating Tribes are free to develop their proposed ITAMP according to their preference. ITAMPs must include, at a minimum, the contents required by ITARA Section 204(a)(2), just as Section 203(c)(2) states the *minimum requirements* for the Secretary to be able to consider a Tribe for participation in the Demonstration Project. The Department strongly encourages interested Tribes to go beyond the minimum and develop as thorough a plan and request to participate as possible. The more information Tribes provide as part of their request to participate, the more informed the Secretary will be when making the decision whether to approve the request. Furthermore, understanding what works well among participating Tribes, will assist Tribes that may consider joining the Demonstration Project in the future. The Department encourages an open and continuous dialogue between participating Tribes, future Tribal applicants, and the BIA.

Tribes asked whether Tribal resolutions are required to include a non-liability provision as suggested in the ITAMP template.

Response: The template provided at consultation was intended as suggested guidance and to provide a basis for discussion at consultation. ITARA provides the minimum requirements that must be included in a Tribal resolution and ITAMP. The Department is revising its sample ITAMP on the basis of consultation feedback and a final ITAMP sample will be available on the website for Tribes' convenience.

Two Tribes asked whether Section IV of the ITAMP template presented at consultation requires Tribes address Tribal environmental laws or have a Tribal environmental policy ordinance (TEPO).

Response: Not every section of the draft template will apply to every Tribe. The environmental laws highlighted in Section IV were included as examples of authorities that may be relevant to a Tribe. It was intended to provide possible authorities that a Tribe may want to use as the basis for approving certain forest land management activities. For instance, the Department is not requiring participating Tribes have a TEPO. However, a participating Tribe that has a TEPO may want to include a copy in its ITAMP. Furthermore, the Department reiterates that ITARA does require Tribes include an environmental review process in their proposed Tribal regulations for surface leasing or forest land management activities.

Two Tribes asked whether Tribes are required to include a Tribal infrastructure section, such as Section V in the ITAMP template, in their proposed ITAMPs.

Response: Not every section of the draft template will apply to every Tribe. ITARA Section 204(a)(2) provides the minimum content that must be included in an ITAMP.

A few Tribes expressed concern that Section VI (Financial Plan), as drafted, appears to require Tribes to fund the management activities with Tribal dollars. These Tribes stated that Section VI is not required by ITARA and pointed to ITARA's requirement that proposed Trust Asset Management Plans "allocate trust asset management funding that is available for the Indian trust assets subject to the Plan to meet the trust asset management objectives and priorities." The Tribes argue that this provision was intended to allow Tribes to reallocate federal funding that is available for the management activities, not require Tribes to tribally fund the activities.

Response: Tribes are not required to fund the activities with Tribal dollars. However, Section VI (Financial Plan) was included in the ITAMP template to highlight the fact that there is no separate appropriation for the Demonstration Project. The Department may not have any funding available for the ITAMP. The Department does not agree that direct service Tribes may participate in the Demonstration Project. Nothing in ITARA authorizes Tribes to direct and allocate the Secretary's funds for programs the Secretary operates. Direction of federal employees and control of federal offices' budgets are inherently federal functions (see next comment). The Department would need an explicit statement from Congress to change this.

ITARA contains no such explicit authority. Therefore, the only potential funding sources for Tribes to operate Tribal forest management or surface leasing programs under an ITAMP are through the use of funding vehicles such as self-determination contracts or self-governance compacts, and/or Tribal funds. Tribes that do not currently operate a forestry or surface leasing program but would like to explore joining the Demonstration Project, should reach out to the BIA to discuss a path forward, e.g., how to begin the ISDEAA compacting/contracting process.

One Tribe commented that criteria for the Demonstration Project should explicitly identify any specific, inherently federal functions that may not be included in an ITAMP.

Response: As articulated by Solicitor Leshy in 1996, the relevant OMB guidance and case law state some general principles for determining what functions are inherently federal, but the restriction under the ISDEAA (and therefore ITARA) may only be applied on a case-by-case basis. Tribes should propose the functions that they wish to assume, and the Department will conduct that analysis accordingly.

One commenter asked why the draft ITAMP template includes a reference to 25 C.F.R. Part 163.

Response: For Tribes that would like to adopt Tribal regulations for forest land management activities under ITARA Section 205, we suggest those Tribes review 25 C.F.R. Part 163. To be consistent with the National Indian Forest Resources Management Act (NIFRMA), which ITARA requires, certain provisions cannot be changed in Tribal regulations, e.g., terms defined by NIFRMA cannot be altered in the Tribe's regulations.

One Tribe stated that Sections V (Infrastructure) and VII (Reporting, Monitoring, and Compliance) in the ITAMP template set standards that reach beyond the specific contents identified for a proposed ITAMP. The Tribe asked whether these requirements are applicable and being implemented for all current Indian forestry programs or if there is a more stringent set of requirements being established for Tribes desiring to conduct forest management activities under an ITAMP.

Response: ITARA Sec. 204(a)(2)(F) requires an ITAMP include a process for the Tribe and the federal government to conduct evaluations to ensure that trust assets are being managed in accordance with the plan. Section VII was meant to address that requirement.

See comment and response above regarding Section V.

It was recommend that the Department use the template developed by the Intertribal Timber Council (ITC).

Response: ITARA Section 204(a)(2) provides the minimum content required for a proposed ITAMP. Two sample ITAMPs are available on the Department's website for Tribes' convenience; the ITC template may be seen as another sample. Not all provisions in the sample ITAMPs will be suitable for every Tribe. Tribes should reach out to the BIA should they have questions regarding ITAMP requirements.

13. Implementation – Cost Savings

One Tribe stated that the Demonstration Project must ensure that any cost savings realized under the plan are to be retained on site to improve forest management activities.

Response: As stated above, the only funding available for programs operated under an ITAMP are ISDEAA funds or Tribal funds. With regard to federal funds, standard ISDEAA rules and procedures apply.

14. Regulations

Two Tribes stated that any federal regulations that relate to trust assets can be waived in ITAMPs, including those promulgated by non-BIA agencies or agencies in other executive branches.

Response: The Department disagrees with this interpretation of ITARA. Nothing in Title II implies that Congress intended such a broad reach. Title II of ITARA defines Secretary as "Secretary of the Interior." Furthermore, the Secretary does not have authority over other executive agencies or the regulations promulgated by those agencies. It is unclear how the Secretary would implement or enforce this assertion.

One Tribe recommended that the Department explicitly identify federal regulations that cannot be superseded.

Response: This will be determined on a case-by-case basis. Tribes should propose the regulations that they wish to supersede and the Department will conduct that analysis accordingly.

One commenter asked whether participating Tribes need to have Tribal surface leasing regulations under the HEARTH Act or whether Tribes can propose those as part of the Demonstration Project process.

Response: Tribes do not need to already have Tribal surface leasing regulations approved by the Secretary in order to participate in the Demonstration Project. Participating Tribes may provide proposed surface leasing regulations as part of their participation in the Demonstration Project. Those proposed regulations will require Secretarial approval, which is separate from the Tribe's approval to participate and approval of the Tribes ITAMP (although, those proposed regulations, like those for forest land management activities, could be submitted to the Secretary once a Tribe has been selected for participation). Furthermore, for Tribes who desire only to adopt Tribal surface leasing regulations, the Department recommends the Tribe use the established HEARTH Act process instead of applying to participate in the Demonstration Project.

15. National Marine Fisheries Service (NFMS)

One commenter discussed moving NFMS and provided ideas regarding fisheries management.

Response: This comment is outside the scope of consultation.

16. Process

One commenter asked what level of the Department will review and approve ITAMP requests.

Response: Review will be conducted by Department and BIA Subject Matter Experts appropriate to management of the particular trust asset proposed for Tribal management and approval.

17. Eligibility

It was recommended that the Department develop baseline criteria for participation and provide an explanation of the process to apply.

Response: Further guidance is being developed. The Department reiterates that the more information Tribes provide as part of their request to participate, the more informed the Secretary will be when making the decision whether to approve the request. Furthermore, understanding what works well among participating Tribes, will assist Tribes that may consider joining the Demonstration Project in the future. The Department encourages an open and continuous dialogue between participating Tribes, future Tribal applicants, and the BIA.