



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 20 2024

The Honorable Harriet M. Hageman
Chair
Subcommittee on Indian and Insular Affairs
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Chair Hageman:

Enclosed are responses to questions for the record submitted to the Department of the Interior's witness, Bryan Newland, Assistant Secretary for Indian Affairs, following his appearance before your Subcommittee on March 6, 2024, at an oversight hearing titled "*Advancing Tribal Self-Determination: Examining Bureau of Indian Affairs' 638 Contracting*". These responses were prepared by the Bureau of Indian Affairs.

Thank you for the opportunity to respond to you on these matters.

Sincerely,

Pamela Barkin
Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosure

cc: The Honorable Teresa Leger Fernández
Ranking Member

Questions for the Record

U.S. House Committee on Natural Resources, Subcommittee on Indian and Insular Affairs
Oversight Hearing on “Advancing Tribal Self-Determination: Examining Bureau of Indian Affairs’ 638 Contracting”
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Questions from Chairman Westerman

Question 1: Several witness statements raised concerns about how the Bureau of Indian Affairs (BIA) and the Office of Self Governance (OSG) has communicated with the entities and how this resulted in delays and challenges for tribes to implement 638 contracts and/or compacts.

- a. What changes need to be made by BIA and OSG to improve communication between these entities?**

Response: To ensure better coordination between the Office of Self Governance (OSG) and the Bureau of Indian Affairs (BIA), the Self-Governance Tribes have asked that the Director of OSG be included in all BIA Regional Director and BIA central office Senior Executive Service (SES) staff meetings, retreats, and notices sent to the Regional Directors. Likewise, budget staff meetings and awarding officials’ meetings will include OSG. This relationship will be instituted as a permanent communication process to be followed to address the concerns raised at the hearing.

- b. Are there statutory barriers to information sharing that Congress should address?**

Response: No, there are no statutory barriers.

Question 2: President Harvier’s written statement mentioned BIA inefficiencies during the COVID-19 pandemic that have impacted their ability to provide services covered by their self-governance compact.

- a. How is BIA improving these types of inefficiencies and what is the process for making sure tribal staff have the training and access needed to run programs**

Response: BIA has made several improvements to incorporate the lessons learned from the COVID-19 pandemic. For example, President Harvier identified specific findings from their 2022 Tribal Trust Evaluation that highlighted deficiencies in the BIA process that impacted the Tribe’s delivery of services, such as—

- new staff certification to access ProTrac, TAAMS, and other DOI trust systems/databases;
- lack of available BIA probate training for new staff;
- limited contact with BIA staff due to remote work schedules;
- barriers to timely access BIA-approved laptops and equipment;
- internet connectivity to DOI trust systems/databases; and
- delays in receiving BIA-certified land inventories.

The BIA is pleased to share that many of these challenges are resolved.

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The BIA network and hardware imaging now allows remote secure VPN access throughout the BIA network, and BIA laptops are also able to receive remote updates using the VPN network, thus no longer requiring the equipment to physically connect at a BIA-operated site. The BIA has also moved nearly all TAAMS training to an online, self-paced course format that can be remotely accessed. The BIA continues to evaluate which training and certifications can be moved to a virtual format to better support both federal and Tribal workforces. The BIA also continues to work to improve network performance throughout Indian Country to ensure network reliability in the event of another situation like the COVID-19 pandemic.

Question 3: The Committee has heard that there is a clear differentiation between what one BIA region classifies as an inherently federal function to another BIA region.

- a. **What is the process for communication between BIA regions on the issue of inherently federal functions?**
- b. **Where can improvements be made to eliminate confusion?**

Response: An inherent Federal function means a Federal function that may not be legally delegated to an Indian Tribe. P.L. 93-638, § 401(6) (25 U.S.C. § 5361(6)). The long-standing policy and practice of BIA has been to assess whether a function is an “inherent Federal function” on a case-by-case basis. This requires each Region to assess their own service delivery methods and requirements against any existing legal authorities. While Regions attempt to maintain consistency, it is difficult to ensure uniformity across all 12 Regions and the many different programs they provide. Currently, the BIA is evaluating new means to ensure greater consistency in determining whether particular functions are inherent Federal functions as they relate to Tribes’ rights to self-determination and self-governance and hopes to establish a more uniform process in the upcoming fiscal year. In all cases in which a Tribe proposes to contract or compact a BIA-provided service, there is a negotiation that allows the Tribe and BIA to engage in constructive conversation and negotiations for the specific functions each organization will take on and the allowable funds that BIA can provide the Tribe to do so. We will continue to negotiate in good faith and always with the intention to advance each Tribe’s right to self-determination and self-governance.

Question 4: Tribal governments and people have sought to proactively use fire to protect their communities from wildfire risks and for other purposes, but the BIA position on tribal fire use and tribal management of their own fire and fuels programs, including on trust lands, is unclear, particularly when tribal governments seek to engage in fire use, such as prescribed fire, on their lands without explicit approval from BIA. The Committee has heard that BIA is claiming that burn plan approval for prescribed fire is an inherent federal function, and thus cannot be part of a compact agreement with Tribes, and therefore Tribes are not able to include burn plans in their self-governance compacts or

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access recurring program funding for carrying out federal programs to implement prescribed burning.

- a. Does BIA have a written policy regarding what constitutes inherent federal function with respect to approving prescribed fire burn plans on trust lands?**

Response: As discussed earlier, an inherent Federal function means a Federal function that may not be legally delegated to an Indian Tribe. P.L. 93-638, § 401(6) (25 U.S.C. § 5361(6)). The long-standing policy and practice of BIA has been to determine whether a function is an inherent Federal function on a case-by-case basis.

In this case, the BIA Division of Wildland Fire Management (DWF) Authorities for the use of Prescribed Fire, Fire Use and Fuels treatments are instructed by Part 90 of the Indian Affairs Manual (IAM). “It is the policy of BIA to manage wildland fuels in an efficient and fiscally responsible manner to mitigate risks, both direct and indirect, to Tribes and communities, and to comply with all applicable federal, state, local, and Tribal environmental laws and regulations.” 90 IAM Chapter 4 states that “this policy may also apply to entities carrying out activities on behalf of BIA under contracts or other agreements if expressly agreed to in the contracts or agreements, or if the requirement to abide by such policy is otherwise required by law. These entities may include contractors or Tribes operating through contracts issued pursuant to Public Law (P.L.) 93-638. Compact Tribes may not be required to abide by the policies contained in this chapter (depending on individual compact language) but are encouraged to use BIA policy as guidance.” It is critical that proper planning is accomplished within the scope of using the prescribed fire and that staff are trained to safely manage prescribed fire implementation and manage Fire Use based on the appropriate planning conditions that the Tribe and BIA developed and agreed to.

The BIA is evaluating new means to ensure greater consistency in defining inherent federal functions as they relate to Tribes’ rights to self-determination and self-governance and hopes to establish a more uniform process in the upcoming fiscal year. In all cases in which a Tribe proposes to contract or compact a BIA-provided service, there is a negotiation that allows the Tribe and BIA to engage in constructive conversation and negotiations for the specific functions each organization will take on and the allowable funds that BIA can provide the Tribe to do so. We will continue to negotiate in good faith and always with the intention to advance each Tribe’s right to self-determination and self-governance.

- b. Is there any other reason beyond claims of inherent federal function that a tribe would not be able to compact related fire and fuels programs?**

Response: Yes. A Tribe submits a request to contract fire and fuels programs under a compact pursuant to Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 5301 *et seq.* The ISDEAA provides the framework for BIA’s consideration of whether a Tribe may contract Wildland Fire Management program functions as proposed.

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c. In developing any policy, did BIA engage in tribal consultation or otherwise seek tribal input?

Response: The BIA develops wildland fire operational policy based on the appropriation language related to funding and DOI’s program directives and policies related to funding and Secretarial direction. Operational policy is used to direct the work of Federal government employees. At the program level, Tribal consultation does not occur during operational policy development. Tribal consultation does occur at the departmental level when funding levels significantly increase or decrease.

d. To the extent that the BIA asserts that it must approve such tribal fire use, is BIA’s position based on statute, regulation, or some other authority?

Response: Depending on the status of the Fire Management program, 90 IAM provides that BIA and Tribal 638 contract Wildland Fire Management (WFM) programs are required to follow BIA policies, whereas Tribal compact WFM programs are *encouraged* to include BIA WFM policies in agreements. 25 CFR 163.28(d) also applies to fire management measures, where the Secretary may use fire as a management tool on Indian land, after consultation with the beneficial Indian owners, to achieve land and/or resource management objectives. These regulations do not preclude the requirements found in 40 CFR 49.11021, which provides permits for general open burning, agricultural burning, and forestry and silvicultural burning.

The BIA’s DWFM Authorities for utilization of Prescribed Fire, Fire Use and Fuels treatments are instructed by the following statutes, regulations, and guidance:

- 16 U.S.C. § 594, Protection of timber owned by United States from fire, disease, or insect ravages;
- 25 U.S.C. § 33, National Indian Forest Resources Management;
- P.L. 108-148, Healthy Forests Restoration Act of 2003;
- P.L. 108-278, Tribal Forest Protection Act;
- 25 CFR 163.28, Fire management measures;
- 620 Departmental Manual (DM) 6: Fuels Management;
- 53 IAM 1-11: Forestry;
- 90 Indian Affairs Manuel Chapter 1: Wildland Fire Management Overview and Responsibilities; and
- The National Strategy: The Final Phase in the Development of the National Cohesive Wildland Fire Management Strategy, U.S. Department of Agriculture (USDA) and the Department of the Interior (DOI), April 2014.

For cultural burns, the BIA supports cultural burns either by undertaking the action itself or through ISDEAA funding agreements where the Tribes perform the action under a self-determination contract or a self-governance compact.

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Decisions on ISDEAA funding agreements have no bearing on cultural RX fires, but the challenge is how cultural burns are defined. Tribes have several definitions for cultural burns, such as RX fires for medicinal purposes, food sovereignty, habitat restoration, watershed management, fire risk reduction, or many other Tribal objectives.

Currently, the BIA is the only federal wildland fire agency who has a dedicated funding source for Reserved Treaty and ancestral territories lands, the Reserved Treaty Rights Lands (RTRL) program. The RTRL provides funding for Tribal and BIA personnel to develop cross-boundary projects on non-Tribal lands. Through RTRL, Tribes are allocated positions and projects to work alongside states and federal land management agencies when a Tribe has reserved rights to conduct such activities.