



**BILL**

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## **DEPARTMENT OF AGRICULTURE**

### **Rural Business-Cooperative Service**

### **Rural Utilities Service**

### **7 CFR Chapter XLII**

**[DOCKET: RBS-23-BUSINESS-0006]**

**RIN: 0570-AB10**

### **Rural Business Development Grant (RBDG) Regulation: Tribes and Tribal Business References to Provide Equitable Access**

**AGENCY:** Rural Business-Cooperative Service and Rural Utilities Service, USDA

**ACTION:** Final rule and response to comment.

**SUMMARY:** The Rural Business Development Grant (RBDG) program is intended for governmental entities and non-profits that foster economic development, job creation and business creation in rural and Tribal communities. Eligible applicants for RBDG assistance include rural towns, communities, State agencies, authorities, nonprofit corporations, institutions of higher education, Federally recognized Tribes (<https://www.bia.gov/service/tribal-leaders-directory>) and cooperatives (if organized as a private nonprofit corporation). United States Department of Agriculture (USDA) intends to improve Tribal Government participation in the program. This final rule seeks to increase Tribal Government participation with programmatic amendments. This final rule responds to all comments received on the proposed rule.

**DATES:** The final rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** Additional information about RBDG is available at <https://www.rd.usda.gov/programs-services/business-programs/rural-business-development-grants>.

**FOR FURTHER INFORMATION CONTACT:** For questions on this document contact Will Dodson, Branch Chief, Intermediary Programs, Program Management Division, Rural Business-Cooperative Service, 1400 Independence Ave., SW, Stop 3201, Washington, DC 20250; telephone, 202-690-4730; email, will.dodson@usda.gov.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On March 25, 2015, Rural Business-Cooperative Service (RBCS or the Agency), a Rural Development (RD) agency of the USDA, published an interim final rule with comment, 80 FR 15665, for the RBDG program. The interim final rule with comment ensured the Agency had a regulation in place to meet the Congressional mandate established in the Agricultural Act of 2014 (2014 Farm Bill). The RBDG program is targeted at public governmental entities, including Tribal Governments, and non-profit entities, which in turn empower business and market development. However, following implementation of the interim final rule, the Agency received regular feedback through Tribal consultation that the interim final rule did not adequately define and address how Tribes legally structure their businesses and related enterprises as arms or instrumentalities of Tribes. The RBDG program did not previously identify Tribally-owned businesses separate from Tribal Governments. This nuance effectively prevented full access to participation for Tribes and Tribally-owned businesses.

Tribal Governments do not maintain a tax base; therefore, Tribes often establish corporate or other business entities as government arms or instrumentalities to provide for a public (Tribal) good or to generate revenue for the provision of public (Tribal) goods by the Tribal Government. These Tribal Government entities often significantly contribute to their local economy through employment of Tribal and non-Tribal members (non-Tribal United States citizens), job training and advancement opportunities, and by filling gaps in commerce across Tribal lands that are often food, economic, and credit deserts.

The Federal Government maintains a treaty and trust responsibility to provide for economic self-sufficiency among Indian Tribes.

Consistent input from Tribal Governments and Tribal stakeholders indicated that the RBDG program has experienced reduced participation of Tribal Governments and Tribal entities, since inception of the program. This reduction in participation is due to policies that have not fully considered or included the range of strategies that Tribal nations employ to build Tribal markets and economies through government arms and instrumentalities. Historically, Tribes have not fully utilized the RBDG program due to Agency policy, which does not adequately consider the range of entities that Tribal nations incorporate, that are Tribal Government owned and operated to foster economic development and promote meaningful employment, while also generating revenue for the Tribal Government. The complex legal and political structure and nature of Tribal nations and these Tribal entities necessitates a close relationship between both entities with ownership and control remaining with the Tribal Governments. The amendments update and codify the Agency's policy regarding Tribal nations and their Tribal-owned entities.

## **II. Discussion of Public Comments**

The Agency published a proposed rule on May 24, 2023 (88 FR 33552) to solicit comments on plans to reduce barriers to access for Tribes in the RBDG program by amending Tribal applicant definitions, Tribal applicant references, conflict of interest language, and appearance of conflict of interest and affiliation language as it relates to Tribes in the RBDG regulation 7 CFR part 4280, subpart E. A 60-day comment period was provided for the proposed rule, which closed on July 24, 2023, and no comments were received through the regulatory public comment period.

The Agency conducted a virtual Tribal Consultation and listening session on July 12, 2023, for Tribal leaders and tribal organizations. An additional 30-day comment period was provided to Tribal leaders so they could submit Tribal consultation written

comments via email. The Tribal consultation written comment period closed on August 14, 2023. RBCS received comments from three respondents (two were from elected Tribal leaders and the third was from a regional Tribal non-profit). Most comments were supportive of the rule. However, a few concerns were raised regarding how the Agency would process these changes in a consistent manner.

(a) *Virtual Tribal Consultation and Listening Session Comments.* The Agency's virtual Tribal consultation and listening session included a Tribal Caucus portion.

(1) *Tribal Caucus Session.* This session provided Tribal leaders the opportunity to discuss relevant consultation issues and was facilitated by a representative from a recognized Tribal organization, without Federal policymakers online.

(2) *Tribal Consultation and Listening Session and associated briefing materials (framing paper and Dear Tribal Leader Letter).* This session provided Tribal leaders an opportunity to review the Agency's summary of proposed changes to the RBDG regulation. Specifically, this included the clarification and expansion of eligibility for federally recognized Tribes to support wholly owned Tribal-government entities as program beneficiaries. Additional topics included the proposed expansion of the "Small and Emerging Business" definition to include Tribal governments and Tribally owned entities, as well as clarification of the definition of "Conflict of Interest" to explain how the Agency defines the relationship between Tribal Nations and their Tribal-owned entities. These topics were covered by the Agency.

For the listening session the Agency provided four (4) standard questions to the attendees to obtain feedback. The four standard questions are listed below with a summary of the feedback received for each question.

(i) *Do Tribal leaders agree these changes will help increase tribal eligibility within the RBDG program?* The feedback received during the consultation indicated unanimous support for the proposed changes.

(ii) *Is there anything we should strike or edit in the updated regulatory language?* There was no indication of striking or editing any proposed language by participants.

(iii) *Is there anything we overlooked that we should include in the updated regulatory language?* There was no indication of any omissions in the proposed language by participants.

(iv) *Does your Tribe have any unique organizational structures for your enterprises that we should consider as we finalize these changes?* There were no suggestions made for this question in the listening session.

(b) *Tribal Comment #1.* Tribal leader for Central Council of Tlingit and Haida Indian Tribes of Alaska (Tlingit & Haida) provided recommendations as follows:

(i) The definition for Tribal governments cited to the Tribal List Act of 1994 (Pub. L. 103-454, 108 Stat. 4791) should include as an eligible entity Tribal organization as defined by 25 U.S.C. 5304(1).

(ii) The RBDG program should not require tribal resolutions from each tribal member of the tribal organization to participate in the RBDG program.

*Agency Response.* The Agency agrees with the first comment and asserts that the rulemaking recognizes both Tribal government arms and instrumentalities and democratically elected Tribal organizations when registered as non-profits as eligible direct RBDG applicants and program beneficiaries. As such, Tribal organizations as defined by 25 U.S.C. 5304(1) are already included as eligible entities and the Agency will work with staff administering the program to ensure that this clarification is made through future training and staff instruction.

The Agency also agrees with the second part of the comment. The Agency requires a resolution of the board or governing body of any RBDG program applicant to ensure that the organization has approved the application. However, due to the unique

nature of the Tribal organizations under 25 U.S.C. 5304(l) the member Tribes have already empowered these organizations to apply on their behalf, and therefore requiring separate resolutions of support from the member Tribes is not needed. Tribal organizations under 25 U.S.C. 5304(l) may need to provide documentation that they are empowered to apply on behalf of their member Tribes through existing organizational documents, etc.

(c) *Tribal Comment #2.* Tribal leader for the Oglala Sioux Tribe submitted responses to the four standard questions that were provided during the listening sessions. The responses were in support of the proposed regulatory language revisions, and the Tribal leader did not have any suggested edits.

*Agency Response.* The Agency appreciates the time and participation of the Oglala Sioux Tribe in the listening session and the communication sent on August 14, 2023.

(d) *Tribal Comment #3.* Tribal leader for United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) provided the following comments:

(i) Expressed concern regarding expansion of the Small and Emerging Business definition. USET SPF would like the language associated with this definition to ensure that Tribal governments are not referred to, or categorized as business entities, but rather they are distinct sovereigns with a legally established, recognized, and upheld nation-to-nation, government-to-government relationship with the U.S. Federal government.

(ii) Recommended that the Agency provide additional training and develop clear guidance to USDA State Office Staff to better understand Tribal sovereignty, U.S. Tribal Nation relations, and the unique distinctions between Tribal governments and Tribally owned and operated entities and businesses.

*Agency Response.* The Agency appreciates the comments. In reference to the first comment, the Agency feels the RBDG regulation provides an adequate distinction

between Tribal governments and Tribal business entities. One of the goals of the RBDG program is to assist small and emerging businesses and the nature of the proposed revisions are limited to that context. The Agency recognizes that Tribal governments are distinct sovereigns with a legally established, recognized, and upheld nation –to-nation, government-to-government relationship with the U.S. Federal Government. The effort of the proposed language is to simply reflect and codify the Agency’s understanding, within the context of RBDG eligibility, of the relationship between Tribal governments and their Tribally owned entities. In reference to the second comment, the Agency agrees and intends to provide training to USDA State Office staff to better understand the regulatory changes, Tribal sovereignty, and the unique relationship that the federal government has with federally recognized Tribes. Training that is developed will include input and participation from RBDG program staff, RD’s Tribal Relations Team and USDA’s Office of Tribal Relations.

### **III. Summary of Changes to the Rule**

The summary of changes provided below are the same as what was provided in the proposed rule published in the *Federal Register* (88 FR 33552) on May 24, 2023. The final rule provides no new changes.

(a) *Administrative Change.*

The RBDG Program (7 CFR part 4280) is currently listed under chapter XLII, Rural Business-Cooperative Service and Rural Utilities Service, Department of Agriculture, along with Direct and Insured Loanmaking (7 CFR part 4274), Guaranteed Loanmaking (7 CFR part 4279), Grants (7 CFR part 4284), Cooperative Agreements (7 CFR part 4285), Servicing (7 CFR part 4287), Payment Programs (7 CFR part 4288), and Rural Business Investment Company (“RBIC”) Program (7 CFR part 4290). This final rule will update the ownership of chapter XLII to remove Rural Utilities Service as these programs are all under RBCS exclusively.

(b) *Section 4280.403 Definitions.*

The definitions section is being revised to add and revise definitions.

*Conflict of Interest.* The *Conflict of interest* definition is added to codify the Agency's interpretation of the relationship of Tribal nations and their Tribal owned entities to expand eligibility opportunities for Tribal applicants.

*Indian Tribe (Tribal).* The current operating definition for *Indian Tribe (Tribal)* is being revised to *Indian Tribe (Tribal), Tribal Government, and/or Federally Recognized Tribes.* Historically, the Program has utilized the list of Federally Recognized Tribes published by the Bureau of Indian Affairs to determine if a Tribe was eligible to directly apply for RBDG assistance. No change to the current policy is being implemented and the statutory cite for this policy will now be included within the regulation. Eligible applicants for RBDG assistance continue to be rural Towns, Communities, State agencies, Authorities, Nonprofit corporations, Institutions of higher education, Federally Recognized Tribes (<https://www.bia.gov/service/tribal-leaders-directory>), and cooperatives (if organized as a private nonprofit corporation).

*Small and Emerging Business.* The *Small and Emerging Business* definition is being revised to add language to clarify the relationship of Tribal Governments and Tribal owned entities. Specifically, the management and Board of Directors of the Tribal government owned entity or business do not have to be independent of the Tribal Council. Language has also been added to clarify that the asset and employee size limitations to qualify as a small and emerging business are limited to the Tribal entity that is applying for assistance and is not intended to be inclusive of all Tribal assets or all Tribal employees. Consequently, it is anticipated that financial documentation required for Program participation will be limited to the immediate Tribal entity that is applying for the assistance and not required for the Tribe or its other Tribal entities, unless the Tribe itself is the applicant. These amendments were made in accordance with direct

Tribal leader input conducted through Tribal consultation and will improve Tribal Government accessibility to both the regular RBDG Program and RBDG funds appropriated specifically to support projects that benefit federally recognized Tribes and their members.

(c) *Section 4280.500 OMB control number.*

On March 25, 2015, RBCS published an interim final rule with comment for the RBDG Program, 80 FR 15665, that assigned Office of Management and Budget (OMB) control numbers 0570-0022 and 0570-0024 in accordance with the Paperwork Reduction Act of 1995 (PRA). OMB control numbers 0570-0022 and 0570-0024 have been discontinued as of 2016. A new collection package in accordance with PRA was issued in 2016 and the new OMB control number is 0570-0070.

#### **IV. Executive Orders/Acts**

##### *Executive Order 12866 – Classification*

This final rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

##### *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this final rule as not a major rule, as defined by 5 U.S.C. 804(2).

##### *Assistance Listing Number (Formally Known as the Catalog of Federal Domestic Assistance)*

The Assistance Listing Number assigned to the RBDG Program is 10.351. The Assistance Listings are available on the internet at <https://sam.gov/>.

##### *Executive Order 12372 – Intergovernmental Consultation*

This program is subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. RBCS conducts intergovernmental consultations for each loan in accordance with 2 CFR part 415, subpart C. However, Tribes and Tribal entities as defined in this final rule are exempt of this requirement.

#### *Paperwork Reduction Act*

This final rule contains no new reporting or recordkeeping burdens under OMB control number 0570-0070 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

#### *National Environmental Policy Act*

In accordance with the National Environmental Policy Act of 1969, Pub. L. 91-190, this final rule has been reviewed in accordance with 7 CFR part 1970 (“Environmental Policies and Procedures”). The Agency has determined that (i) this action meets the criteria established in 7 CFR 1970.53(f); (ii) no extraordinary circumstances exist; and (iii) the action is not “connected” to other actions with potentially significant impacts, is not considered a “cumulative action,” and is not precluded by 40 CFR 1506.1. Therefore, the Agency has determined that the action does not have a significant effect on the human environment, and therefore neither an Environmental Assessment nor an Environmental Impact Statement is required.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act (“APA”) or any other statute. The APA exempts from notice and comment requirements rules “relating to agency management or personnel or to public property, loans, grants,

benefits, or contracts” (5 U.S.C. 553(a)(2)), so therefore an analysis has not been prepared for this final rule.

*Executive Order 12988 – Civil Justice Reform*

This final rule has been reviewed under Executive Order 12988. In accordance with this final rule: (1) unless otherwise specifically provided, all State and local laws that conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division of the Department of Agriculture (7 CFR part 11) must be exhausted before bringing suit in court that challenges action taken under this rule.

*Unfunded Mandates Reform Act (UMRA)*

Title II of the UMRA, Pub. L. 104-4, establishes requirements for Federal Agencies to assess the effects of their regulatory actions on State, local, and Tribal Governments and on the private sector. Under section 202 of the UMRA, Federal Agencies generally must prepare a written statement, including cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or Tribal Governments, in the aggregate, or to the private sector, of \$100 million or more in any one-year. When such a statement is needed for a rule, section 205 of the UMRA generally requires a Federal agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This final rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and Tribal Governments or for the private sector. Therefore, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

*Executive Order 13132 – Federalism*

It has been determined, under EO 13132, Federalism, that the policies contained in this final rule do not have any substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this final rule impose substantial direct compliance costs on State and local Governments. Therefore, consultation with the States is not required.

*Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments*

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a Government-to-Government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

RBCS has determined that the rule does have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian Tribes but reflects a remedy to RBDG Tribal barriers identified in Tribal consultation, including recent Tribal consultations on equity hosted in March 2021 and April 2022. USDA also held an additional follow-up Tribal consultation for input during the 60-day comment period. Additionally, if a Tribe requests Government-to-Government consultation regarding this rule, the Agency will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided. Interested Tribal leaders are encouraged to contact

the Office of Tribal Relations or RD's Tribal Coordinator at [AIAN@usda.gov](mailto:AIAN@usda.gov) to request such a consultation.

#### *E-Government Act Compliance*

RD is committed to the E-Government Act of 2002, Pub. L. 107-347, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible and to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### *Civil Rights Impact Analysis*

RD has reviewed this final rule in accordance with USDA Regulation 4300-4, "Civil Rights Impact Analysis," to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex, disability, marital or familial status. Based on the review and analysis of the final rule and all available data, issuance of this proposal is not likely to negatively impact low and moderate-income populations, minority populations, women, Indian tribes or persons with disability, by virtue of their age, race, color, national origin, sex, disability, or marital or familial status. No major civil rights impact is likely to result from this final rule.

#### *USDA Non-Discrimination Statement*

In accordance with Federal civil rights laws and USDA civil rights regulations and policies, the USDA, its mission areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs,

or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (e.g., Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD-3027, *USDA Program Discrimination Complaint Form*, which can be obtained online at <https://www.usda.gov/sites/default/files/documents/ad-3027.pdf> from any USDA office, by calling (866) 632-9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD-3027 form or letter must be submitted to USDA by:

(1) Mail: U.S. Department of Agriculture

Office of the Assistant Secretary for Civil Rights

1400 Independence Avenue, SW

Washington, D.C. 20250-9410; or

(2) Fax: (833) 256-1665 or (202) 690-7442; or

(3) Email: [program.intake@usda.gov](mailto:program.intake@usda.gov)

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#### **List of Subjects in 7 CFR Part 4280**

Business and industry, Energy, Grant programs-business, Loan programs-business, and Rural areas.

For the reasons discussed in the preamble, 7 CFR chapter XLII is amended as follows:

1. Under the authority of 5 U.S.C. 301 and 7 U.S.C. 1989, the heading for chapter XLII is revised to read as follows:

**Chapter XLII Rural Business-Cooperative Service, Department of Agriculture**

**PART 4280 – LOANS AND GRANTS**

2. The authority citation for part 4280 is revised to read as follows:

**Authority:** 7 U.S.C. 1989(a), 7 U.S.C. 2008s

**Subpart E – Rural Business Development Grants**

3. Amend § 4280.403 by:

a. Adding the definition of “Conflict of Interest” in alphabetical order and revising the definitions of “Indian Tribe (Tribal)” and “Small and Emerging Business” to read as follows:

**§ 4280.403 Definitions.**

\* \* \* \* \*

*Conflict of Interest.* When the grantee’s employees, Board of Directors, or their immediate families have a legal or personal financial interest in the recipient(s) receiving the benefits or services of the grant. Tribal Governments, subdivisions of Tribal Governments (chapters, districts, authorities, townships, etc.), and Tribal arms and instrumentalities, entities wholly-owned and chartered by Tribal Governments including but not limited to: Tribal owned corporations (including Section 17 Corporations, Community Development Corporations and Economic Development Corporations), Tribal owned businesses, Tribal owned authorities, Tribal owned utilities, other Tribally owned enterprises and their subsidiaries will not be considered as having a conflict of interest due to their, or their Board’s, ties to their associated Tribe or each other.

\* \* \* \* \*

*Indian Tribe (Tribal), Tribal Government and/or Federally Recognized Tribes.*

Any Indian or Alaska Native tribe, band, nation, pueblo, village or community as defined by the Federally Recognized Indian Tribe List Act (List Act) of 1994 (Pub. L. 103-454).

\* \* \* \* \*

*Small and Emerging Business.* Any private and/or nonprofit business which will employ 50 or fewer new employees and has less than \$1 million in gross revenue; for retail operations, gross revenue may be reduced by cost of goods sold and returns or for a service organization, gross revenue may be reduced by the cost of providing service or for a manufacturing operation, gross revenue may be reduced by the cost of raw materials and the cost of production. The \$1 million gross revenue and 50 or fewer new employee thresholds apply only to each individual Tribal owned enterprise applicant or recipient. Due to the unique structuring of Tribal economic development, the revenue or employees of the Tribe and/or parent Tribal enterprise will not apply towards the individual Tribal enterprise applicant or recipient, regardless of shared ownership or Directors. The revenue of Tribes, subdivisions of Tribes and Tribal entity applicants, will not be considered revenue in determining program and project eligibility.

\* \* \* \* \*

4. Revise § 4280.500 to read as follows:

**§ 4280.500 OMB control number.**

The reporting and recordkeeping requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. chapter 35 and have been assigned OMB control number 0570-0070 in accordance with the Paperwork Reduction Act of 1995. You are not required to respond to this collection of information unless it displays a valid OMB control number.

Karama Neal,  
Administrator,  
Rural Business-Cooperative Service,  
USDA Rural Development.

Andrew Berke,  
Administrator,  
Rural Utilities Service,  
USDA Rural Development.

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