



FEMA

OVERVIEW OF THE FIRST DRAFT OF THE TRIBAL DECLARATIONS PILOT GUIDANCE

During this tribal consultation, FEMA seeks to discuss the first draft of the Tribal Declarations Pilot Guidance with tribal governments. This draft includes an overview of Stafford Act declarations, disaster assistance, required plans, and declaration request requirements (i.e., what to put in the declaration request). The draft also includes proposed procedures for direct tribal declarations. We created this overview to aid your review of these proposed procedures. The overview highlights new concepts introduced in the first draft and proposed changes from state declaration procedures. It also includes sections intended to better address the unique circumstances that affect tribal communities.

The following is a brief summary of key provisions of the draft guidance as well as FEMA's considerations in the development of tribal-specific declarations procedures. We encourage and welcome questions and comments on any or all aspects of the draft guidance. Please submit your questions/comments to tribalconsultation@fema.dhs.gov or to

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Recovery Directorate c/o Jessica Stewart
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Definitions (p. 7)

The definitions included in the first draft are statutory or currently in FEMA's regulations, which are applicable to direct tribal declarations. The first draft introduces the new terms 'enrolled tribal member' and 'tribal lands'; FEMA proposes the following definitions for these terms:

- **Enrolled tribal member:** a person that the Indian tribal government recognizes as an enrolled member of that Indian tribe at the time of the incident.

- **Tribal lands:** means reservations, lands held in trust by the United States government for the tribal government (trust land) and for individual Indians (allotted land), as well as land owned by the tribal government (fee simple land).¹ Tribal lands do not include, for example: lands not owned by the tribal government, such as tribal homelands not owned by or held in trust for the tribal government; ceded lands or fee lands owned by enrolled tribal members off the reservation; or lands owned by the tribal government that are outside the United States.

FEMA is soliciting comments on the new definitions proposed in the first draft.

Appropriate Regional Administrator for Coordination of Tribal Declaration Requests (p. 12)

FEMA Regions are drawn by state boundaries, so states clearly know which Region they should submit preliminary damage assessment and declaration requests to. Several tribal governments, however, have lands that cross FEMA Regions. The draft pilot guidance proposes that tribes coordinate with the Region where the tribal government seat is located.

FEMA is soliciting comments on whether the concept of appropriate Regional Administrator is clear as described in the guidance, or whether additional information is needed. FEMA is particularly interested in input from those tribes whose lands cross FEMA Regions.

Officials and Entities that Can Request Declarations (p. 28)

The Stafford Act authorizes the Chief Executive of an Indian tribal government to request emergency and major disaster declarations. The Stafford Act defines ‘Indian Tribal Government’ as ‘the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian tribe under the Federally Recognized Indian Tribe List Act of 1994.’ Further, the Stafford Act defines the ‘Chief Executive’ as ‘the person who is the Chief, Chairman, Governor, President, or similar executive official of an Indian tribal government.’

The first draft proposes the following clarifications:

- The Chief Executive of a tribal government cannot request assistance for another tribe and cannot combine damage with other tribes to request one declaration.
- Organizations, such as Alaska Native Regional Corporations or Alaska Native Village Corporations, are not able to request declarations or request declarations on behalf of the tribal government.

¹ Fee simple land does not need to be in the process of transitioning to trust in order to be considered tribal land.

FEMA wonders whether instructions for the officials and entities authorized to request declarations are clear as described in the guidance or whether additional information is needed.

Public Assistance Eligibility for Direct Tribal Declarations (p. 37)

Under state declarations, the Public Assistance Program provides reimbursement for repair, restoration, reconstruction, or replacement of public facilities and certain private nonprofit facilities damaged as a result of the disaster. In addition, Public Assistance will provide reimbursement for eligible emergency protective measures and debris removal carried out by state, tribal and local governments as well as certain nonprofit organizations in the designated area of a state declaration. Public facilities are defined as owned or operated by state, tribal or local governments. Eligible PNP facilities are limited to those that carry out certain activities defined in FEMA's regulations (44 C.F.R. 206.221(e)). During Public Assistance Preliminary Damage Assessments, FEMA only assesses damage that is eligible for Public Assistance.

For direct tribal declarations, tribal governments can request reimbursement for repair, restoration, reconstruction, or replacement of public facilities. Tribal governments can also request reimbursement for eligible emergency protective measures and debris removal. FEMA proposes

- To define eligible 'public facilities' in direct tribal declarations as those facilities owned by the tribal government or for which the tribal government has legal responsibility.
 - This does not include state and local government-owned infrastructure, unless the tribal government has legal responsibility for repairs of that infrastructure.
 - To define eligible work for emergency protective measures and debris removal in tribal declarations as work the tribal government has legal responsibility to perform.
 - State and local governments will not be reimbursed by FEMA for emergency protective measures and debris removal in a tribal declaration.
- Damage to private non-profits is not included.

FEMA wonders if tribal governments want private non-profit entities (PNPs) located on tribal lands to be able to be eligible in a direct tribal declaration? FEMA considers whether the provision of federal assistance to private non-profit entities located on tribal lands will assist the tribal community in responding to and recovering from a disaster? FEMA wonders whether the tribal government has chartered any PNPs and whether the tribal government has agreements with PNPs that are on tribal lands or provide services to individuals that live on tribal lands.

Individual Assistance Eligibility for Direct Tribal Declarations (p. 39)

Under state declarations, an individual (homeowner or renter) whose primary residence is in the designated area of the declaration may be eligible for the Individuals and Households Program. During Individual Assistance Preliminary Damage Assessments, FEMA only assesses damage

that is eligible for the Individuals and Households Program.

For direct tribal declarations, FEMA proposes that

- Tribal governments may request the Individuals and Households Program for *enrolled tribal members* whose primary residences were impacted by the incident. Tribal governments may request assistance for enrolled tribal members who do not live on tribal lands and have been impacted by the incident.
- Tribal governments cannot request assistance for individuals who are not enrolled members of the requesting tribe.

FEMA contemplates whether tribal governments want to request assistance only for enrolled members of the tribe who live on tribal lands? Would tribal governments want to request assistance for enrolled members who do not live on tribal lands; or would tribal governments like the option to request assistance for non-members who live on tribal lands impacted by an incident?

Notification Procedures (p. 41)

FEMA currently notifies the requesting government (either state or tribe) once the President makes a declaration determination. The first draft proposes that FEMA will ensure that states and tribal governments are made aware of the other's PDA and declaration requests, as well as any declaration determinations that are made.

FEMA believes such coordination between states and tribes is vital as disasters typically affect both entities simultaneously. FEMA is soliciting comments regarding ways in which this coordination and these notifications can occur as seamlessly as possible.

The Relationship Between Tribal Government and State Declaration Requests for the Same Incident (p. 34)

The amendment to the Stafford Act provides: "Nothing in this subsection shall prohibit an Indian tribal government from receiving assistance under this title through a declaration made by the President at the request of a state if the President does not make a declaration under this subsection for the same incident." The draft pilot guidance explains this provision by describing the three avenues available to a tribal government in seeking disaster assistance:

- to request its own declaration,
- to seek assistance through a state declaration,
- or to choose to seek one or more types of assistance through its own declaration and seek other types of assistance as part of a state's declaration request.

The guidance discusses each option and includes implications and considerations for each choice, including the option to choose to be a Grantee or sub grantee under a state's declaration.

Additionally, the guidance explains that work and damages can only be considered in one declaration request and cannot be considered in multiple declaration requests.

FEMA wants to ensure that this concept is clear as described in the guidance or whether additional information or explanation is needed.

Public Assistance Criteria (p. 37)

The President declares emergencies and major disasters after he determines that the capabilities of the government are overwhelmed and supplemental assistance is needed. FEMA developed factors to evaluate whether an event has overwhelmed the capabilities of state governments (see 44 CFR 206.48).

The draft guidance proposes modified factors to evaluate whether an event has overwhelmed the capabilities of tribal governments, including:

- Changes to the ‘Estimated Cost of Assistance’ factor
 - The first draft proposes to eliminate the use of the per capita indicator listed in 44 CFR 206.48(a)(1) to evaluate tribal declaration requests for Public Assistance. Currently, the state per capita indicator is \$1.39.
 - The draft maintains the \$1 million minimum for tribes with service populations² 10,000 and higher and utilizes a \$500,000 minimum damage amount for tribes with service populations less than 10,000.

FEMA is soliciting comments on whether and/or how the proposed minimum damage amounts reflect level of damage that may overwhelm the capabilities of the tribal government and other available assistance.

- Replace ‘Localized impacts’ with ‘Impact of the Disaster’
 - For state declaration requests, FEMA evaluates the impact of the disaster at the county and local government level, as well as impacts at the American Indian and Alaskan Native Tribal government levels; this is because at times, there are extraordinary concentrations of damage that might warrant Federal assistance even if the statewide per capita is not met.
 - The draft proposes to replace “Localized impacts” with ‘Impacts of the Disaster.’
 - As most tribal governments do not have sub-jurisdictions within the tribal government, tribal declaration requests have no comparable measure to the state ‘localized impacts’ factor. Therefore, FEMA proposes to evaluate the impacts of the event on the tribal government which will provide context to the damage (i.e., impacts to critical infrastructure; percentage of infrastructure impacted; the cost of resources that have been or will be used to address response and recovery needs; how responding to the

² As defined in the American Indian Population and Labor Force Report published by the Bureau of Indian Affairs Office of Indian Services.

disaster impacts the tribal government's budget and/or tribes economy; what government programs would not be funded in order to pay for response and/or recovery costs, or the consequences of not repairing or replacing damaged infrastructure).

FEMA's goal is to clearly and accurately describe the impact of the disaster factor through the listed examples and whether a tribal government's capabilities have been overwhelmed by these factors. FEMA wonders whether these achieve that goal or whether FEMA should consider other impacts.

- Unique circumstances that affect tribal governments
 - FEMA proposes to include a new factor to allow the tribal governments to discuss circumstances that were not considered in the other factors.

FEMA wonders whether there are other factors to consider when evaluating whether an event has overwhelmed the tribal government's capabilities.

Individual Assistance Criteria (p. 39)

FEMA uses the criteria listed in 44 CFR 206.48(b) to review a state's major disaster declaration request for Individual Assistance and to make a recommendation to the President whether or not to declare a major disaster. For tribal declarations, FEMA proposes the following modifications to these factors:

- Concentration of Damage
 - The draft proposes to retain this factor, as adapted to reflect the tribal context. It replaces 'individuals' with 'enrolled members,' since the first draft proposes that tribal governments can request assistance for enrolled members. It also eliminates the phrase "throughout a state."
 - The draft also proposes to consider the percentage of households impacted by the event to provide additional context of the disaster damage.
- Special Populations
 - In current regulations, American Indian and Alaskan Native Tribal populations are considered a 'special population.' The draft pilot guidance proposes to delete the reference to American Indian and Alaskan Native Tribal populations, since the context of the guidance is generally with respect to tribal populations.
- Unique Circumstances that Affect Tribal Governments
 - Just as with Public Assistance, FEMA proposes to include a new factor to allow the tribal governments to discuss circumstances that were not considered in the other factors.
- Elimination of the "Average Amount of Individual Assistance by State" table at 44 CFR 206.48(b)(6)

- FEMA proposes that this table not be included in the Tribal Declarations Pilot Guidance. The table is based on historic data for state declarations. FEMA does not have any data for Individual Assistance obligations for direct tribal declarations so would not be able to accurately populate such a table.

FEMA wonders whether the proposed criteria reflect an impact that may overwhelm a tribal government's capabilities and other available assistance. FEMA wonders whether there are other factors to consider when evaluating whether an event has overwhelmed the tribal government's capabilities.

Requirement to have a mitigation plan at the time of the declaration request (p. 27)

Currently, states are required to have an approvable FEMA mitigation plan within 30 days of the date of the declaration. Without an approvable mitigation plan, the declaration will only authorize PA emergency work and/or Individual Assistance. If the state does not submit an approvable plan with 30 days of the date of the declaration, PA Categories C-G and/or HMGP will be denied. Tribes that elect to serve as a grantee under a state declaration for Public Assistance or Hazard Mitigation must have a FEMA-approved plan within 30 days of the signing of the FEMA-Tribe Agreement in order to receive PA Categories C-G and/or HMGP. Tribal governments that elect to serve as subgrantees must have a mitigation plan before they can receive mitigation funding.

For tribal declarations, FEMA proposes:

- That tribes have the same initial 30-day time frame as applies to states, but provides the tribal government the option to request an extension within that timeframe giving them a total of up to 120 days after the date of the declaration to get an approved plan.
- PA Categories C-G and/or HMGP may be authorized at the time of a declaration contingent upon the submittal of an approved plan.
- If the President authorizes PA Categories C-G and/or HMGP, FEMA proposes that it will not wait for the mitigation plan to be approved to begin to develop Public Assistance Project Worksheets and applications for Hazard Mitigation assistance. However, FEMA will not obligate funding to those projects until the mitigation plan is approved. If the tribe does not have the plan approved within 120 days of the date of the declaration, FEMA will stop work on the project worksheets and will not obligate any funding for PA Category C-G and HMGP projects under that declaration.

FEMA wonders whether tribal governments, with technical assistance from FEMA, meet these timeframes for adopting the legally required hazard mitigation plans. If not, FEMA is trying to determine barriers to meeting them and/or whether it should consider other appropriate timeframe.

Designated Area (p. 42)

For state declarations, FEMA makes recommendations to the President to designate specific areas that were impacted by an event – typically counties/parishes and independent cities. FEMA then makes Public Assistance and/or Individual Assistance eligibility determinations in the areas designated by the President in the declaration.

For tribal declarations, FEMA proposes

- If the declaration authorizes Public Assistance, the declaration should designate the tribal government and tribal lands impacted by the disaster. If it authorizes Individual Assistance, the declaration should designate the tribal government and affected enrolled tribal members (i.e., those whose primary residences were impacted by the disaster are eligible to apply for assistance.) If Hazard Mitigation is authorized, the declaration should designate the tribal government and tribal lands.
- Although the declaration will not designate a particular area, FEMA will focus damage assessments, inspection and project worksheet development efforts in the areas impacted by the declared event, based on information from the National Weather Service, or other federal authority.
- If the damage is not associated with the declaration-causing incident, it will not be eligible.

The intent of this provision is to capture all disaster affected tribal government infrastructure and enrolled tribal members that could be eligible for assistance under the declaration, while also providing tribal governments with the flexibility to utilize Hazard Mitigation funding to best protect tribal lands and facilities.

The move away from clearly “designated” areas represents a significant shift in FEMA practice. Is the Pilot Guidance explanation of how this will work sufficiently clear? If not, please identify areas of potential confusion.

Population (p. 26)

FEMA proposes to use the tribe’s service population listed in American Indian Population and Labor Force Report published by the Department of Interior-Bureau of Indian Affairs Office of Indian Services³ to determine tribal populations.

FEMA is concerned whether the report accurately determines tribal population and if not, are there other official measures of tribal population that could be used as a supplement to, or in place of, this Report?

³The Indian Employment, Training, and Related Services Demonstrations Act of 1992, mandates the Bureau of Indian Affairs publish, not less than biennially, a report on the American Indian and Alaska Native population who are eligible for services provided by the Secretary of Interior to American Indian and Alaska Native people.

Tribal Leadership Disputes (p. 29)

By law, only the Chief Executive or Acting Chief Executive of a tribal government may request a declaration. When FEMA is informed by the tribal government that there is an internal tribal dispute over who is the tribal Chief Executive, then FEMA will consult with the regional or headquarters office of the Bureau of Indian Affairs for their guidance. If FEMA receives no guidance from the BIA, then FEMA will make a determination based on the following: (1) The currently applicable governing documents of the tribal government including, but not limited to, any constitution, ordinances, statutes, regulations, resolutions, or other documents regarding the election, appointment, and removal of the tribal Chief Executive; and (2) any court of competent jurisdiction for an order determining the lawful Chief Executive of the tribal government. FEMA will use the documents to make the determination. FEMA's determination is solely for purposes of the agency processing requests for federal disaster or emergency assistance and is not an official federal government determination.

Determination of the Chief Executive is an intramural matter of tribes and may vary from tribe to tribe. FEMA would appreciate information on how internal disputes over tribal leadership are resolved for tribes. FEMA is also interested in other sources which may be used to determine such disputes.

Cost share adjustment criteria (p. 40)

Cost shares under the Stafford Act vary by program:

- PA programs for emergency work, debris removal, and permanent work are at least 75 percent federal cost share.
- Housing Assistance, Disaster Case Management, Disaster Legal Services, Disaster Unemployment Assistance, and Crisis Counseling Program under the Stafford Act are 100 percent federally funded.
- Other Needs Assistance is set at a 75 percent federal cost share.
- For HMGP, FEMA can provide up to 75 percent of the total eligible costs.

The Stafford Act authorizes the President to adjust or waive the non-federal cost share for Public Assistance only. FEMA makes recommendations to the President whether or not to adjust the cost share for Public Assistance.

For state declarations, FEMA recommends the President increase the federal Public Assistance cost share from 75 percent to not more than 90 percent whenever the costs are so extraordinary that actual federal disaster obligations, excluding FEMA administrative cost, meet or exceed \$135 per capita⁴ (calendar year 2014).

⁴ The cost share adjustment indicator is adjusted annually based on the Consumer Price Index for All Urban Consumers published annually by the U.S. Department of Labor.

For tribal declarations, FEMA proposes to maintain these criteria to make a recommendation to the President for cost share adjustments.

FEMA wonders whether the \$135 per capita is an amount that measures obligations so extraordinary that warrants a cost share adjustment for tribal declarations. If not, why? FEMA wonders whether there other measures or factors which should be considered.

Timelines to Submit Declaration Requests (p. 29)

FEMA requires states to submit emergency and major disaster declaration requests within 30 days of the date of the incident. States have the option to request additional time to submit the declaration request. States must also submit requests for additional areas and/or assistance within 30 days of the date of the declaration. Additionally, states must submit appeals within 30 days of the date of the request denial.

FEMA proposes to maintain these 30 day time limits for tribal governments to submit declaration requests, requests for additional areas and/or assistance, and appeals with the ability to submit requests for extension during that time period.

FEMA wonders whether tribal governments can meet this timeframe and if there are specific barriers which could prevent the submission of a request during that period.