



FAQ - Tribal Self-Determination and Self-Governance at the U.S. Department of Agriculture

May 9, 2024

TABLE OF CONTENTS

Self-Determination and Self-Governance 101

- [What is "638"?](#)
- [What is the difference between 638 self-determination contracting \(Title I\) and self-governance compacting \(Titles IV and V\)?](#)
- [What does it mean, as a practical matter, for a Tribe to assume 638 administration of a federal program?](#)
- [Does a Tribe's use of its 638 authority cost more federal money?](#)
- [What federal programs does 638 apply to?](#)
- [What do USDA's Equity Action Plans \(2022 Plan & 2023 Update\) say about 638?](#)
- [What does the Forest Service's Action Plan on Tribal Consultation and Strengthening Nation-to-Nation Relationships say about 638?](#)
- [What does Executive Order 14112 say about 638?](#)

Self-Determination and Self-Governance in the 2018 Farm Bill

- [Were the 638 FDPIR pilot and the 638 TFPA demonstration programs authorized by the 2018 Farm Bill successful?](#)

Indian Country's Priorities for the Upcoming Farm Bill

- [Why is Indian Country prioritizing 638 in the upcoming Farm Bill?](#)
- [Why must the 638 FDPIR pilot authorized by the 2018 Farm Bill be made permanent?](#)

NativeFarmBill.com



- [What is the NFBC advocating for in making the 638 FDPIR pilot permanent?](#)
- [Why must the 638 TFPA demonstration program authorized by the 2018 Farm Bill be made permanent?](#)
- [As part of the upcoming Farm Bill, what additional programs do Tribes want to enter into 638 agreements for?](#)
- [What Forest Service programs, functions, services, or activities do Tribes want to administer?](#)
- [What NRCS programs, functions, services, or activities do Tribes want to administer?](#)
- [Why do Tribal governments want to administer SNAP?](#)
- [What would expanding 638 to FSIS look like?](#)
- [Why is the Coalition not advocating for a study on 638 at USDA?](#)
- [Why won't applying 638 to USDA programs increase the cost to the federal budget and "score"?](#)

Tribal Capacity

- [Are Tribes actually able to run complicated USDA-funded programs such as forestry management, conservation, meat inspection, and feeding programs?](#)
- [Do Tribes have the capacity to serve non-Indians through a 638 agreement?](#)

U.S. Department of Agriculture Capacity

- [Will USDA be overwhelmed by hundreds of Tribes if 638 authority is expanded throughout the department?](#)
- [What if only a few Tribal Nations utilize a 638 opportunity?](#)
- [Why does USDA need an office of self-governance?](#)
- [Will the expansion of 638 to more USDA programs subject the agency to litigation over contract support costs?](#)
- [Why is the ongoing contract support costs litigation not applicable to USDA?](#)

Lessons Learned From the Expansion of Self-Determination and Self-Governance to the U.S. Department of Transportation

- [How was 638 expanded to the USDOT?](#)
- [How long did it take the USDOT to implement 638?](#)
- [Was there a flood of Tribes assuming activities pursuant to a 638 agreement?](#)

Self-Determination and Self-Governance 101

Q: What is “638”? The Indian Self Determination and Education Assistance Act of 1975 (“ISDEAA”) (P.L. 93-638 or “638”) established contracting and compacting authority that allows for the direct Tribal administration of programs, services, functions, and activities (“PSFAs”) housed in the Indian Health Service (“IHS”) and the Bureau of Indian Affairs (“BIA”). For more than 50 years, 638 has authorized Tribes to assume the operational responsibility and federal funding for certain programs previously administered by the federal government for the benefit of Indians. 638 has consistently proven to be the most cost-effective approach in administering federally supported programs in Indian Country. 638 authority enables a practical expression of Tribal sovereignty – Tribes know how to best meet the needs of their own people and how to do so most efficiently. 638 consistently produces the biggest Indian Country bang for the federal buck.

Q: What is the difference between 638 self-determination contracting (Title I) and self-governance compacting (Titles IV and V)? ISDEAA establishes self-determination contracting (Title I) and self-governance compacting (BIA Title IV and IHS Title V) as two unique options that Tribal governments can elect to use to assume control and decision-making authority over select federal programs and resources benefiting their citizens and communities. The major difference between the two is oversight. Under Title I, a Tribe may redesign or consolidate PSFAs with IHS or BIA approval, as well as reallocate or redirect funding without IHS or BIA approval in accordance with ISDEAA. Under Titles IV and V, a Tribe has even greater flexibility to do these things without IHS or BIA approval. This IHS [chart](#) outlines the differences between the Tribal options for self-determination contracting and self-governance compacting. Additionally, Jay Spaan, executive director of the Tribal Self-Governance Communication and Education Tribal Consortium (“SGCETC”), testified before the House Natural Resources Subcommittee on Indian and Insular Affairs on March 6, 2024, summarizing the differences between self-determination contracting and self-governance compacting. To watch the hearing, click [here](#). Spaan’s written testimony can be found [here](#).

Q: What does it mean, as a practical matter, for a Tribe to assume 638 administration of a federal program? It means the Tribe “steps into the shoes” of the federal agency, taking

NativeFarmBill.com



on the responsibility to spend funds the federal government would have otherwise spent to administer the functions, services, and activities of a specified program, or portions thereof. The Tribe acts in the place of the federal agency, but with federal funds and authority.

Q: Does a Tribe’s use of its 638 authority cost more federal money? No. The statute requires only that the Secretary transfer the funds that the Secretary would have otherwise spent on the same beneficiaries for the same purposes. 25 U.S.C. 5325 (a)(1) reads: The amount transferred “*shall not be less than the... Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.*” However, it should be noted that this amount includes more than just a program amount on a single budget line. It also includes the federal money the U.S. Department of Agriculture (“USDA”) uses to support its delivery of an identified benefit. For example, a lawfully negotiated funding amount should include a full share of costs expended in non-program administrative offices for personnel, equipment, supplies, space, transportation, legal, health care, and retirement, among other “back-of-the-house” services that support the USDA operations that are transferred under 638 to a Tribe.

Q: What federal programs does 638 apply to? Decades ago, Congress extended 638 authority to IHS, BIA, and non-BIA agencies within the Department of the Interior. Congress also extended somewhat similar authority to the U.S. Department of Housing and Urban Development,¹ the U.S. Department of Labor,² the U.S. Department of Transportation (“USDOT”) Tribal Transportation Self-Governance Program (“TTSGP”),³ and most recently, USDA⁴ through two pilot programs for the Food Distribution Program on Indian Reservations⁵ (“FDPIR”) and activities authorized by the Tribal Forest Protection Act⁶ (“TFPA”).

Q: What do USDA’s Equity Action Plans (2022 Plan & 2023 Update) say about 638? USDA’s 2022 Equity Action Plan (“2022 Plan”) calls for the successful implementation and expansion of 638 at USDA.⁷ In terms of implementing the 2018 pilot programs, the report provided the following goals: “*Tracking Progress, Next 1-2 years: ...Implement and incorporate*

¹ Native American Housing Assistance and Self-Determination Act (“NAHASDA”), P.L. 104-330, as amended (1996) (codified at [25 U.S. Code § 4101](#) et seq.).

² Indian Employment, Training and Related Services Demonstration Act, P.L. 102-477 (1992) (codified at [25 U.S.C. 3401](#) et seq.).

³ Fixing America’s Surface Transportation Act, P.L. 114-94 (2015) (codified at [23 U.S.C. 207](#)).

⁴ Agricultural Improvement Act of 2018, P.L. 115-334 (2018).

⁵ *Id.* (codified at [7 U.S.C. 2013](#) note).

⁶ *Id.* (codified at [25 U.S.C. 3115b](#)).

⁷ U.S. Dep’t of Agric., *2022 Equity Action Plan* (Feb. 10, 2022), available at <https://www.usda.gov/sites/default/files/documents/usda-equity-action-plan-508c.pdf>.

*FDPIR and FS tribal demonstration pilots and resolve identified issues...*⁸ Additionally, the report called on USDA to expand 638 policies and establish an office of self-governance. The report reads: *“USDA will take steps to... expand Tribal self-determination policies...”*⁹ and *“stabilize a permanent self-determination office...”*¹⁰ In a February 15, 2024 meeting between the Native Farm Bill Coalition and USDA, a Coalition representative inquired on the status of stabilizing a self-determination office. USDA officials seemed unaware of the inclusion of this priority in the 2022 Plan.

USDA’s Equity Action Plan 2023 Update (“2023 Update”) furthermore states that it will promote tribal self-determination.¹¹ The 2023 Update provides:

“B. USDA will promote tribal self-determination principles.

- USDA currently makes most of the food purchases for the FDPIR program, crowding out self-determination and economic development opportunities for the affected tribal entities. Going forward, USDA will support ongoing tribal self-determination demonstration projects for the Food and Nutrition Service and Forest Service, expanding tribal self-determination policies to enable greater self-governance and decision-making.*
- A dedicated Office of Tribal Relations Tribal Empowerment Team will increase awareness about Forest Service, RD, and NRCS Inflation Reduction Act opportunities that promote tribal self-determination principles.”*

Of concern to the Coalition is USDA’s reference to “self-determination principles” rather than true 638 self-determination contracting and self-governance compacting.

Q: What does the Forest Service’s Action Plan on Tribal Consultation and Strengthening Nation-to-Nation Relationships say about 638? In February 2023, the Forest Service issued its Action Plan on Strengthening Tribal Consultations and Nation-to-Nation Relationships (“Action Plan”).¹² As part of the Action Plan, the Forest Service not only recommitted itself to self-determination, but also, discussed its expansion. The Action Plan reads: *“The strategy seeks to reinforce existing collaborative efforts and authorities by greatly expanding scope and scale of Tribal involvement in agency work, planning, and decision making, as well as Tribal self-determination.”*

⁸ *Id.* at 20.

⁹ *Id.* at 4, 18, 19-20.

¹⁰ *Id.* at 20.

¹¹ U.S. Dep’t of Agric., Equity action Plan 2023 Update (Feb. 14, 2024), available at <https://www.usda.gov/sites/default/files/documents/usda-equity-action-plan-2023.pdf>.

¹² U.S. Dep’t of Agric., Strengthening Tribal Consultations and Nation-to-Nation Relationships - A USDA Forest Service Action Plan (Feb. 2023), available at https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/Strengthening-Tribal-Relations.pdf.

Q: What does Executive Order 14112 say about 638? President Biden’s December 2023 Executive Order (“EO”) 14112 - Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination - solidifies the Administration’s commitment to protecting and supporting Tribal sovereignty and self-determination.¹³ Sec. 1 of the EO reads: *“We recognize the right of Tribal Nations to self-determination, and that Federal support for Tribal self-determination has been the most effective policy for the economic growth of Tribal Nations and the economic well-being of Tribal citizens... [T]he self-determination policies of the last 50 years— whereby the Federal Government has worked with Tribal Nations to promote and support Tribal self-governance and the growth of Tribal institutions— have revitalized Tribal economies, rebuilt Tribal governments, and begun to heal the relationship between Tribal Nations and the United States... As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they are able to make their own decisions about where and how to meet the needs of their communities. No less than for any other sovereign, Tribal self-governance is about the fundamental right of a people to determine their own destiny and to prosper and flourish on their own terms.”*

Additionally, the EO specifically directs agencies to promote the use of self-determination contracting and compacting. Sec. 5 of the EO reads: *“Agencies shall ... administer Federal funding and support programs for Tribal Nations to achieve the following objectives, to the maximum extent practicable and consistent with applicable law: (i) promote compacting, contracting, co-management, co-stewardship, and other agreements with Tribal Nations that allow them to partner with the Federal Government to administer Federal programs and services...”*

Self-Determination and Self-Governance in the 2018 Farm Bill

Q: Were the 638 FDPIR pilot and the 638 TFPA demonstration program authorized by the 2018 Farm Bill successful? Yes. To date, 16 Tribes are participating in the FDPIR pilot program and the Forest Service (“FS”) has negotiated 13 self-determination agreements for activities under the TFPA.¹⁴ Tribal administration of these programs has yielded major success in building regional food economies, improving the health and well-being of their communities, and undertaking activities that promote the well-being of the environment. These programs

¹³ Exec. Order No. 14112 (Dec. 11, 2023), available at <https://www.federalregister.gov/documents/2023/12/11/2023-27318/reforming-federal-funding-and-support-for-tribal-nations-to-better-embrace-our-trust>.

¹⁴ U.S. Dep’t of Agric., *USDA Tribal Accomplishments 2023* (2023), available at www.usda.gov/sites/default/files/documents/fact-sheet-usda-2023-actions-indian-country.pdf.

have demonstrated that Tribes are fully capable of not only providing federal services, but improving upon them.

- **FDPIR.** Through the 638 FDPIR Pilot Program, Tribes have successfully replaced USDA FDPIR food items with traditional foods. One specific example is the Menominee Indian Tribe of Wisconsin and the Oneida Nation, which partnered to participate in the pilot project.¹⁵¹⁶ Replacing FDPIR food items with traditional foods for their citizens has been a key point of success for this pilot project. Through the project, they have also been able to source much higher quality food products than with USDA's national sourcing and secure more foods from Tribal producers, including bison, beef, apples, wild rice, and fish. The project has been successful in promoting Tribal sovereignty, providing better, more nutritious foods to Tribal citizens, expanding cultural and historical knowledge through the use of traditional foods, and providing economic benefit to Tribal vendors and other local food vendors.
- **TFPA.** The first agreement was negotiated between the Tulalip Tribes and the Mt. Baker-Snoqualmie National Forest.¹⁷ This agreement focuses on watershed restoration through efforts to capture, relocate, and monitor beavers in the South Fork Stillaguamish watershed in Washington State. Another successfully negotiated agreement is between the Colville Confederated Tribes and the Colville National Forest. This agreement focuses on addressing threats caused by wildfire, insects (e.g., spruce budworm, mountain pine beetle, etc.), or disease that can be spread to tribal lands from the untreated Forest Service lands adjacent to the Tribe's Reservation. The agreement also adequately provides for cultural resources, access to traditional foods and medicines, protection of sacred sites, and access to water, fish, and wildlife resources. The Leech Lake Band of Ojibwe entered into a 638 agreement with the FS to improve growth conditions around non-red pine species (notable hardwoods) to promote tree diversity and climate change resistance. Additionally, the agreement includes prescribed burnings to enhance berry shrub production and to spread native seed (e.g., aster, prairie rose, blueberry, Canada mayflower, strawberry, dewberry, false lily of the valley, dogbane, fly honeysuckle, pea, wood anemone, meadow rue, bedstraw, bracken fern, solidago (golden rod), blue

¹⁵ See SGCETC, *For Our People, Stories of Self-Governance & Sovereignty*, available at www.tribalseg.gov/fop_episode/s1-episode-two/ (In Episode 2, the Oneida Nation and Menominee Nation share their experience participating in the Food Distribution Program for Indian Reservations' Self-Determination Demonstration Project.).

¹⁶ See SGCETC, available at www.tribalseg.gov/fop_episode/s1-episode-two.

¹⁷ U.S. Dep't of Agric., *USDA Forest Service 638 Authority* (Sept. 2020), available at www.fs.usda.gov/sites/default/files/638-FS-ITC-Joint-Statement-SEP2020.pdf.

hyssop, blue bells, grasses). The USDA Forest Service issued a very helpful Q&A on the 638 authority that contains additional information on the TFPA authority.¹⁸

Indian Country's Priorities for the Upcoming Farm Bill

Q: Why is Indian Country prioritizing 638 in the upcoming Farm Bill? Tribes sought the full application of 638 authority to all PSFAs within USDA during the development of the 2018 Farm Bill, but opposition within the Department based on unsubstantiated doubts as to Tribal capacity caused Congress to sharply scale back the application of 638 authority to just two temporary and limited demonstration projects. The application of full 638 authority to federal programs has been a Tribal priority since President Nixon first responded positively to the requests of Indian Country for self-determination and self-governance in the early 1970s. After decades of unfounded opposition, now is the time for demonstrations to end and permanent authority be extended to all USDA programs, so that Tribes are allowed to choose, on a case-by-case basis, to negotiate the depth and breadth of their Tribal assumptions of federal administration with any USDA office and program.

Q: Why must the 638 FDPIR pilot authorized by the 2018 Farm Bill be made permanent? Making the FDPIR pilot program permanent is crucial for the 16 Tribes already

¹⁸ U.S. Dep't of Agric., *USDA Forest Service 638 Webinars Questions and Answers* (Aug. 2020), available at <https://www.fs.usda.gov/sites/default/files/638-Webinars-QA-20200909.pdf#:~:text=638%20agreements%20can%20be%20used%20to%20implement,work%20can%20be%20initiated%20by%20either%20party>.

administering the program.¹⁹ Through Tribal administration of FDPIR, these Tribes have been able to increase Tribal member access to foods that are culturally and nutritiously beneficial, as well as establish regional food economies that support both Tribal and non-Tribal producers. According to USDA's annual report to Congress, in Fiscal Year 2022, 70,473 pounds of food, totaling \$504,676, were purchased by Tribal government pilot sites.²⁰ To accommodate for this new purchasing power, participating Tribes and Tribal producers have invested their own resources in production and distribution infrastructure. For this reason, producers who have relied on the pilot as a new revenue stream are also calling on Congress to make the program permanent – and as expected, these pilot programs are operating more effectively and efficiently with the local control of Tribes. Discontinuing the program would be a step backward. Tribes have been able to better serve their citizens and be more responsive to their citizens'

¹⁹ **Round 1:**

- **Oneida Nation and Menominee Indian Tribe of Wisconsin (WI):** Tribal procurement includes bison, ground beef, beef roast, fish, wild rice, and apples.
- **Red Cliff Band of Lake Superior Chippewa (WI) :** Tribal procurement includes frozen white fish, apples, carrots, potatoes of various colors, cucumbers, lettuces, frozen squash, fresh and frozen blueberries, and wild rice.
- **Little Traverse Bay Bands of Odawa Indians (MI):** Tribal procurement includes all fresh fruits and vegetables currently offered by the USDA, fresh eggs, and walleye.
- **Mississippi Band of Choctaw Indians (MS):** Tribal procurement includes turnip greens, collard greens, yellow squash, tomatoes (red/green), tomato berries, bell peppers, variety hot/sweet peppers, and cucumbers.
- **Chickasaw Nation (OK):** Tribal procurement includes ground beef, roast beef, dry hominy, and pecans.
- **Alaska Native Tribal Health Consortium (AK):** Tribal procurement includes Alaskan halibut, cod, and Alaskan-grown potato.
- **Lummi Nation (WA):** Tribal procurement includes salmon, halibut, prawn/shrimp, and crab.

Round 2:

- **Sokaogon Chippewa Community (WI):** Tribal procurement includes wild rice, carrots, cauliflower, pickling and slicing cucumbers, sweet corn, roma and slicing tomatoes, zucchini, bison burger, ground beef, pork chops, and chicken breast.
- **Spirit Lake Tribe (ND):** Tribal procurement includes bison.
- **Cherokee Nation (OK):** Tribal procurement includes beef chuck roast and ground beef chub.
- **Gila River Indian Community (AZ):** Tribal procurement includes tepary beans.
- **Tohono O'odham Nation (AZ):** Tribal procurement includes soft wheat berries (various), hard wheat berries, wheat flour (various), white tepary beans, brown tepary beans, and garbanzo beans.
- **White Mountain Apache Tribe (AZ):** Tribal procurement includes barbecue corn, corn, summer squash, patty pan squash, green chilies, blue corn meal, ground beef, tongue, intestines (beef), steak, liver, sweetbread, walnuts, acorns, and pine nuts.
- **Confederated Tribes of the Umatilla (OR):** Tribal procurement includes ground beef, beef chuck roast, celery, lettuce, cabbage, carrot, squash, cucumber, honeydew melon, peaches, oranges, apples, cherries, apricots, and eggs.
- **Quinault Indian Nation (WA):** Tribal procurement includes canned albacore tuna, canned coho salmon, canned king salmon, king salmon filet, razor clams, ling cod, and rock fish.

²⁰ U.S. Dep't of Agric., *Report on the Food Distribution Program on Indian Reservations (FDPIR): Demonstration Project for Tribal Organizations, Congressional Directive* (Oct. 2023), available at www.drive.google.com/file/d/1Psto86IXGvQlp7rV3p8P9WEmLK136smX/view?usp=sharing.

needs and day-to-day issues that may arise. Pilot projects are not feasible long-term and discourage Tribal producers and other non-Tribal vendors from engaging because funding is finite and future revenue streams are uncertain. This is especially true for small producers who would need to increase production capacity but are unlikely to do so without a known market for their product.

Q: What is the NFBC advocating for in making the 638 FDPIR pilot permanent? In addition to making the FDPIR pilot program permanent, Tribal governments are urging the House and Senate Agriculture committees to remove the separate line item budget that funds the 638 FDPIR pilot, as funding could continue to be a barrier to preventing its successful implementation. For example, as part of the 2018 Farm Bill, the FDPIR pilot was authorized at \$5 million annually. However, it has only been funded at \$3 million each year since enacted. While some money is better than none, certain Tribes, including Tribes with large FDPIR programs, were unable to participate in the FDPIR pilot because there simply was not enough funding. Therefore, NFBC members are advocating for this separate line item to be removed and for Tribes to be able to enter into 638 agreements with the funding they *already receive*.

Q: Why must the 638 TFPA demonstration program authorized by the 2018 Farm Bill be made permanent? The 2018 TFPA pilot must be made permanent to continue the important work already being undertaken through the 13 self-determination agreements the FS entered into with Tribes for activities under the TFPA since the 2018 Farm Bill's enactment. In an effort to ensure the success of these projects, the FS and the Intertribal Timber Council ("ITC"), a member of the Native Farm Bill Coalition, worked together for 18 months to create a library of TFPA resources and templates. The FS has since encouraged its employees to take advantage of technical assistance provided by the ITC and the FS Washington Office of Forest Management, which negotiated the first TFPA pilot, to pilot additional 638 agreements. To simply throw away all of this important work would be a waste of federal resources and an unnecessary step backwards in promoting mutually beneficial, cross-boundary work to improve forest and grassland conditions, protect tribal lands and communities from risks, and restore trust assets with the National Forest System.

Q: As part of the upcoming Farm Bill, what additional programs do Tribes want to enter into 638 agreements for? As part of the ongoing Farm Bill negotiations, Tribes have advocated for the expansion of 638 to the:

- Supplemental Nutrition Assistance Program ("SNAP"), including all nutrition education and training programs and functions supported through the USDA;
- Any program, function, service, or activity of the Forest Service (e.g., recreation, visitor centers, trails, boat launches, etc.);

- Any program function, service, or activity provided by the Natural Resources Conservation Service (“NRCS”); and
- Food Safety and Inspection Services (“FSIS”) to allow Tribal governments to inspect beef, bison, chicken, and other products put into their food programs.

Q: What Forest Service programs, functions, services, or activities do Tribes want to administer? Although the 2018 Farm Bill provided Tribes and the FS with the authority to negotiate 638 agreements for activities housed under the TFPA, Tribal governments are fully capable of administering additional FS PFSAs within National Forests. For example, NFBC members have expressed interest in activities related to protection, enhancement, harvesting, and sales, as well as managing trails and visitor centers to ensure the culture and history of the Tribal government are properly incorporated. NFBC members are also interested in managing FS sites that the FS currently lacks funds to upkeep, but could promote tourism and economic development within the Tribe’s region.

Q: What NRCS programs, functions, services, or activities do Tribes want to administer? Similar to the management of FS lands, Tribal governments possess a wealth of knowledge and expertise when it comes to being stewards of their lands and natural resources. For example, NFBC members have expressed interest in entering into 638 agreements for funding they receive through NRCS programs like the Environmental Quality Incentives Program (“EQIP”), the Conservation Reserve Program (“CRP”), the Regional Conservation Partnership Program (“RCPP”), NRCS watershed programs, Agriculture Management Assistance (“AMA”), and Conservation Innovation Grants (“CIG”).

Q: Why do Tribal governments want to administer SNAP? At least 25% of all American Indian and Alaska Native people today rely on SNAP each month, making SNAP a critical nutrition safety net program for Tribal citizens. Nevertheless, Tribes are not able to fully administer this program, even though they can and do administer its statutory sister program, FDPIR. This creates a complicated and unnecessary bureaucratic framework for Tribes to navigate as they try to support their citizens, and removes the ability of Tribes to provide wraparound or one-stop services to their citizens. This would be a cost savings to those programs and reduce bureaucratic burdens. Full 638 administration of SNAP would also enable Tribal Nations to directly utilize the multitude of additional opportunities SNAP provides, including workforce development education and training, SNAP Farmers Market opportunities, and nutrition education via SNAP-Ed.

Q: What would expanding 638 to Food Safety and Inspection Services look like? Tribes simply want each Tribe to have the opportunity to administer any FSIS PSFA under 638 authority. This will look different depending on what each sovereign Tribe chooses to negotiate to assume Tribal administration pursuant to 638 authority, and develop organically. It cannot be prescribed without turning 638 into a federally controlled “program” rather than the statutory 638 framework of a Tribally driven initiative.

Q: Why is the Coalition not advocating for a study on 638 at USDA? Simply put: this issue has already been studied, including by the USDA. In November 2021, when Secretary Vilsack committed all of USDA to expanding Tribal self-governance authorities, he specifically committed the Department to the following: “1) conduct a review of USDA’s current statutory authorities that can be used to empower tribal nations, 2) identify possibilities for increased use of these statutory authorities, and 3) report out what additional statutory authorities might be needed to more broadly support tribal self-determination, where appropriate, throughout USDA programs.”²¹ USDA has now had three years to complete this review. They have also had nearly five years of successful self-determination contracting, some of which also required reporting back to Congress. Sec. 4003(b)(5) of the 2018 Farm Bill requires the USDA to report annually on activities under the FDPIR 638 pilot. Activities under the first several reports should have included the work necessary to support 638 activities, since these were the first that the USDA-FNS had ever done. If USDA did not follow through on its promises or statutory obligations, Tribes should not be penalized. The USDA's delay in completing its homework, some of which was self-assigned, is not a reason to deny Tribal governments the opportunity to act as the sovereign nations they are, lifting up their citizens and rural communities in the process.

Q: Why won't applying 638 to USDA programs increase the cost to the federal budget and “score”? Applying 638 to USDA programs only affects *who* spends the federal money. It does not affect *how* much federal money is spent. 638 in purpose and practice lessens the federal bureaucracy and transfers those “savings” to the Tribe to enhance Tribal accountability and expand Tribal benefits. Providing Tribal 638 saves the federal government time, money, and resources, maximizes the benefits provided, and empowers Tribal self-governance and service to Tribal citizens.

Tribal Capacity

²¹ U.S. Dep’t of Agric., *In Historic Announcement by Agriculture Secretary Vilsack, USDA Commits to Expanding Tribal Self-Determination* (Nov. 15, 2021), available at www.usda.gov/sites/default/files/documents/otr-self-determination-stakeholder-notification.pdf.

Q: Are Tribes actually able to run complicated USDA-funded programs such as forestry management, conservation, meat inspection, and feeding programs? Yes. Hundreds of Tribes have already demonstrated their capability to run far more complex programs. To date, virtually every Tribe has some experience with 638 to deliver programs and services in the most cost-effective and efficient manner. Each year, several billion dollars in federal funding is transferred from BIA and IHS to Indian Tribes for the Tribal administration of hospitals, clinics, schools, colleges, social service programs, land management, prisons, and law enforcement agencies. Likewise, USDA has witnessed firsthand the capabilities of Tribes to administer FDPIR and activities pursuant to the TFPA. There can be no question that Indian Tribes have the capacity to administer additional programs impacting access to nutritional food, promoting regional economic development, and managing resources located within and adjacent to their traditional homelands.

Q: Do Tribes have the capacity to serve non-Indians through a 638 agreement? Yes. Tribes have long assumed various federal programs that serve both Indians and non-Indians in their communities. Below is a sample of the broad scope of Tribally operated federal programs serving non-Indians.

- **Summer Feeding Program.** Just this year, the states of Oklahoma and Mississippi, among others, opted out of a new federal summer food program aimed at reducing childhood hunger – the Summer Electronic Benefits Transfer (“EBT”) program. In response, four Tribal governments – Cherokee Nation, Chickasaw Nation, Osage Nation, and Mississippi Band of Choctaw Indians – have announced their intent to offer EBT benefits to *any* child residing within their reservation boundaries.²²
- **Forest and Wildfire Management Co-Stewardship.** The FS has entered into several co-stewardship agreements with a vast range of Tribes. These agreements, such as the one struck with the Turtle Mountain Band of Chippewa Indians²³ in 2023, help Tribes develop community wildfire management plans that protect the interests of both on-reservation Tribal members and off-reservation non-Indians in the surrounding area.
- **Health care.** Utilizing federal funding, IHS facilities often serve non-Indians. In fact, there are statutory provisions allowing the following non-Indian individuals to receive IHS care: U.S. Public Health Service Commissioned Corps active and retired members and their dependents,²⁴ federal employees and their dependents at remote stations,²⁵ children

²² U.S. Dep’t of Agric., *2024 Summer EBT Implementing States, Territories, and Tribes* (2024), available at www.fns.usda.gov/sebt/implementation.

²³ U.S. Dep’t of Agric., *Annual Report on Tribal Co-Stewardship* (2023), available at www.usda.gov/sites/default/files/documents/co-stewardship-authorities-november-508.pdf.

²⁴ 42 U.S.C. § 253.42; CFR 31.2(c) and 42 CFR 31.9.

²⁵ 42 U.S.C. § 251(b).

and spouses of eligible Indians,²⁶ individuals receiving emergency treatment,²⁷ non-Natives in Alaska (excluding major elective surgery and extensive diagnostic studies),²⁸ and eligible veterans through the Veteran Affairs (“VA”) IHS/Tribal Health Programs (“THP”)/Urban Indian Organization (“UIO”) Reimbursement Agreements Program (“RAP”).²⁹ Additionally, Tribal governments utilize programs like Medicare and Medicaid to deliver health care to non-Indians under a 638 agreement without using their limited IHS federal dollars.

- **Public Safety.** Tribal governments, operating public safety programs under 638 agreements, are authorized by federal law to arrest and prosecute non-Indians who commit certain crimes within their jurisdictions against Tribal members. The Violence Against Women Reauthorization Act of 2013 authorized Tribal police to arrest non-Indians within their jurisdiction for violent crimes such as domestic violence, sexual assault, or dating violence.³⁰ The Violence Against Women Act Reauthorization Act of 2022 expanded this authority to additional crimes of assault of Tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of a protection order.³¹ Also, cross-deputation agreements with federal, state, and local law enforcement agencies enable Tribal police to investigate and arrest non-Indians for state law violations within their jurisdiction.
- **Education.** Through agreements with the Bureau of Indian Education (“BIE”), including grant-based agreements, many Tribes operate their own schools, colleges, or universities with federal funding. These schools provide an additional choice to prospective students in the surrounding community, both Indian and non-Indian.

U.S. Department of Agriculture Capacity

Q: Will USDA be overwhelmed by hundreds of Tribes if 638 authority is expanded throughout the department? No. The 638 regulations and statute establish a framework for growth, requiring negotiations on a case-by-case basis that would permit the USDA to make incremental decisions. The track record with the expansion of 638 authority at BIA, IHS, and all other federal agencies confirms that interest starts with a handful of Tribes and expands at a moderate pace, year after year, as Tribes wait to evaluate how earlier Tribes have fared. There are models now in place at other federal agencies that can help the USDA facilitate a smooth transfer of funds and establish a flexible Federal-Tribal administrative system of oversight

²⁶ 25 U.S.C. § 1680c(a).

²⁷ 25 U.S.C. § 1680c(c).

²⁸ 48 U.S.C. 49.

²⁹ In Alaska, non-Indian Veterans can also access services with VA preauthorization.

³⁰ Violence Against Women Act of 2013, P.L. 113-4 (2013) (codified at 25 U.S.C. 1304).

³¹ Consolidated Appropriations Act of 2022, P.L. 117–103, div. W (2022) (codified at 34 USC 10101 note).

control. 638 has been in place and operating for years. The USDA only needs to begin to negotiate, Tribe by Tribe, the amount of funds the Secretary is using to support the delivery of a specific benefit before restructuring itself to make that specific amount available to the Tribe in a negotiated agreement, pursuant to existing and well-used statutory and regulatory authority. The statute makes a 638 proposal a voluntary, Tribal choice. It allows a Tribe to participate under 638 on its own, or in partnership with other Tribes. It also allows a Tribe to decide to identify some or all portions of a program, function, service, or activity it proposes to administer under 638 authority. Concerns about an overwhelming Tribal floodgate are without basis in fact. As Deputy Chief Bryan Warner recently noted in the FDPIR Tribal Leaders Working Group Consultation, *“This is something that wouldn’t happen overnight. This would take time even a few years working with the USDA Food and Nutrition Service on the best route for implementing 638 determination contracting.”*

Q: What if only a few Tribal Nations utilize a 638 opportunity? Federal agencies have sometimes pushed back against 638 by noting that only a handful of Tribes might participate, making a change in the law unnecessary. First, this is a fundamental misunderstanding of the purpose of 638 authority, which is to recognize Tribal sovereignty. As governments, Tribes make decisions daily as they support the health, safety, and welfare of their citizens. Each Tribe makes different decisions about how to best provide such support. Further, even just one Tribal government accessing a program means that thousands of Tribal citizens – and in many cases, thousands of non-Tribal rural citizens alongside them – are benefitting from the service the Tribe is able to directly provide. Finally, in the history of 638 programs, it is clear that they grow and expand over time. A small number of Tribes will likely want to participate first. Often, these are Tribes with longstanding 638 programs that will be able to navigate the creation of federal infrastructure needed in partnership with the federal agency doing the contracting or compacting. After the program is established, more Tribes join. Given the amount of support for 638 expansion at the USDA, there is no reason to think the number of Tribes utilizing these opportunities will be limited.

Q: Why does USDA need an office of self-governance? In an effort to implement the FDPIR 638 pilot authorized by the 2018 Farm Bill, the USDA paid BIA a total of \$250,000 in FY2021 and

FY2022 to negotiate round one 638 agreements with Tribes on behalf of the USDA.³² USDA paid an additional \$250,000 to BIA in FY2023 and FY2024 to negotiate round two 638 agreements with Tribes.³³ While BIA is more familiar with 638 agreements, pilot participants reported BIA officials negotiating the agreements were often unfamiliar with their regions and available agricultural/food options. Establishing an office of self-governance at the USDA would assist the agency in institutionalizing and uniformly negotiating 638 contracts and compacts throughout the agency, especially as Indian Country and Congress alike continue to advocate for expanded self-determination and self-governance opportunities at USDA. Additionally, the USDA's own 2022 Equity Action Plan declares it will "stabilize a permanent self-determination office" as a "priority action" by 2024.³⁴ Since the USDA has not done what it said it would do, Congress should include a provision in the Farm Bill that requires it to do so.

Q: Will the expansion of 638 to more USDA programs subject the agency to litigation over contract support costs? No. Simply extending 638 authority to a USDA program would not expose the USDA to litigation. Of course, the USDA is not immune from a lawsuit. USDA must give each Tribe it enters into a 638 agreement with the same amount of money it spent itself on the PFSA, making contract support costs ("CSC") a simple dollar for dollar transfer. Thus, if USDA violates its statutory obligations pursuant to a 638 agreement, for example, by providing a Tribe with less CSC than the Department would have otherwise used to carry out a given PFSA, then it could subject itself to litigation.

Q: Why is the ongoing contract support costs litigation not applicable to USDA? The CSC cases pending before the U.S. Supreme Court are not applicable to the USDA because they

³² Food Distribution Program on Indian Reservations Self-Determination Demonstration Project: Solicitation of Proposals for Additional Tribal Organizations To Participate, 87 Fed. Reg. 63023, 63025 (Oct. 18, 2022), available at www.federalregister.gov/documents/2022/10/18/2022-22570/food-distribution-program-on-indian-reservations-self-determination-demonstration-project ("FNS also transferred \$250,000 of the \$6 million to the Department of the Interior, Bureau of Indian Affairs (BIA), which awarded the round one self-determination contracts and modifications and extensions on behalf of FNS."); See also Oversight Hearing on "Native communities' priorities for the 118th Congress", Senate Comm. on Indian Affairs, 118th Cong. (Mar. 8, 2023) (written testimony of Kari Jo Lawrence, Intertribal Agriculture Council), available at <https://www.indian.senate.gov/wp-content/uploads/2023%2003%2006%20Kari%20Jo%20Lawrence%20Written%20Testimony%20for%20March%208%20SCIA%20Hrg%20-%20Google%20Docs.pdf>.

³³ Barbara Lopez, Senior Technical Advisor, Food and Nutrition Service during the SGCETC panel entitled, "Implementation of Self-Determination Authority at USDA's Food and Nutrition Service" (Apr. 17, 2024), agenda available at <https://www.tribalsef.gov.org/2024-tribal-self-governance-conference-registration-open/>; See also U.S. Dep't of Agric., Food Distribution Program on Indian Reservations (FDPIR) and Commodity Supplemental Food Program (CSFP): Briefing Paper, P. 4 (Jun. 2023), available at <https://www.usda.gov/sites/default/files/documents/FDPIR-CSFP-Briefing-Paper-6.27.23.pdf> ("FNS plans to work with self-determination contracting officers at the Department of the Interior, Bureau of Indian Affairs (BIA) to execute self-determination contracts with the 8 selected Tribal Organizations by July 2023.")

³⁴ U.S. Dep't of Agric., 2022 Equity Action Plan, P. 20 (2022), available at www.usda.gov/sites/default/files/documents/usda-equity-action-plan-508c.pdf.

center on whether CSC must be paid by IHS on “program income” earned by a Tribe’s performance of PFSA’s under 638 authority.³⁵ That “program income” involves only Medicare, Medicaid, and private health insurance reimbursement funding that a Tribe receives. How that “program income” is handled is the subject of specific statutory mandates in the Indian Health Care Improvement Act and related appropriations statutes. There is no such “program income” involved with BIA 638 agreements, and there would be no such “program income” produced by a Tribe administering a USDA PFSA unless there are comparable statutory mandates that apply to a specific ISDEAA PFSA (e.g., conceivably, a timber harvest revenue requirement). All this being said, the current TFWA 638 agreement does not provide authority for a Tribe to collect revenue.³⁶

Lessons Learned From the Expansion of Self-Determination and Self-Governance to the U.S. Department of Transportation (USDOT)

Q: How was 638 expanded to USDOT? Sec. 1121 of the Fixing America’s Surface Transportation Act (P.L. 114-94) as enacted by Congress in 2015 established the Tribal Transportation Self-Governance Program (“TTSGP”) at the USDOT. Previous transportation act authority had permitted Tribes to operate their USDOT programs to a limited degree under partial 638 authority by incorporating their USDOT agreements into their 638 agreements with the U.S. Interior Department.

Q: How long did it take USDOT to fully implement 638? It was not until 2022 – seven years after the date of enactment of the TTSGP – that the USDOT entered into the first self-governance agreement with the Cherokee Nation.³⁷ Note that it took USDA’s FS 18 months to roll out its 638 demonstration program and FNS three years to finalize the details of its 638 agreements with round one Tribes. No agency is expected to negotiate 638 agreements immediately upon receiving authorization from Congress. This, however, works to the benefit of both federal agencies and Tribes who work together to sort out the kinks of applying 638 to a new program, negotiation by negotiation, and agreement by agreement.

³⁵ See *N. Arapaho Tribe v. Becerra*, 61 F.4th 810 (10th Cir. 2023) *** currently pending before the Supreme Court; See also *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236 (2022) *** currently pending before the Supreme Court.

³⁶ U.S. Dep’t of Agric., *USDA Forest Service 638 Webinars Questions and Answers*, P. 3 (Aug. 2020), available at <https://www.fs.usda.gov/sites/default/files/638-Webinars-QA-20200909.pdf#:~:text=638%20agreements%20can%20be%20used%20to%20implement,work%20can%20be%20initiated%20by%20either%20party>. (“Question: Do 638 agreements allow Tribes to collect revenue? Answer: No, there is no authority for Tribes to collect revenue under a 638 agreement.”)

³⁷ U.S. Dep’t of Transp., *Cherokee Nation Sign First Ever Tribal Transportation Self-Governance Compact* (Jun. 8, 2022), available at www.transportation.gov/briefing-room/usdot-chokeee-nation-sign-first-ever-tribal-transportation-self-governance-compact#:~:text=of%20the%20Cherokee%20Nation%20to,having%20to%20seek%20federal%20permission.

Q: Was there a flood of Tribes assuming USDOT activities pursuant to a 638 agreement? No. Since the announcement of the Cherokee Nation’s compact with USDOT, only two additional Tribal Nations have successfully completed negotiations for a Self-Governance agreement. This is often the case with the expansion of 638 to new agencies and its programs for several reasons. First, it takes time for the department to rearrange its internal infrastructure to begin negotiations, sometimes with the assistance of either negotiated rulemaking committees or cooperative agreements with Tribal organizations that have a particular subject matter expertise. This time spent can be critical to the success of the program. Second, most Tribes tend to prefer to hold back and observe the experience of the first wave of Tribes, evaluating their experiences and their results. Once the early kinks are worked out, other Tribes begin to feel comfortable navigating the process, aided by the fact that the initial Tribes freely share information and best practices. However, nothing can happen if the Farm Bill fails to incorporate expanded 638 authority. Adding broad 638 authority will require a change in statutory authority, and the opportunity to do so in the Farm Bill arises only every five or so years. If broad 638 statutory authority is not stitched into this Farm Bill to enable Tribal implementation to ramp up over the rest of this decade, Tribes will very likely have to wait until sometime in the next decade to begin to fully implement 638 authority at the USDA. This is why Congress needs to add 638 authority to this Farm Bill. This is why the Tribes and organizations of the Native Farm Bill Coalition say “638 NOW!”