

USDA Forest Service 638 Webinars Questions & Answers

August 2020

2018 Farm Bill (P.L. 115-334) Section 8703 authorizing
**Forest Service use of 638 authority for Tribal Forest Protection Act demonstration (TFPA)
projects**

**Questions and Answers: 2020 Webinars on Forest Service 638
Authority**

Note: The following questions were captured during the Forest Service webinars on the agency's new 638 authority held on July 29, 2020 and August 4, 2020. Responses provided are based on current information and are not to be considered policy. As additional information becomes available and pilot projects are implemented, the 638 agreement process will be refined and these may be updated.

General Questions

Question: Is a Tribe better positioned to enter into a 638 contract with the Forest Service if that Tribe already has 638 contracts through the Bureau of Indian Affairs for forestry and fire?

Answer: It is not necessary for a Tribe have a 638 contract with the Department of Interior (DOI)/Bureau of Indian Affairs (BIA) in order to have a 638 agreement with the Forest Service.

Question: Are there differences in funding processes for a “self-governance” Tribe, where funding is determined on the basis of on an annually-negotiated process with DOI Office of Self-Governance?

Answer: No, there is not a difference in funding processes.

Question: If we have 638 forestry program funding from DOI, can we still apply for Forest Service 638 projects?

Answer: Yes, they are not mutually exclusive. Forest Service 638 agreements are for work on National Forest System (NFS) lands, while the DOI forestry program funding is for work on tribal lands.

Question: Could 638 agreements work similarly to grants to do work on Forest Service lands adjacent to the reservation?

Answer: Yes, 638 agreements are for work on NFS lands under the Tribal Forest Protection Act (TFPA).

Question: I heard mention of hazardous fuel reduction projects. Can these projects include prescribed fire or will they be limited to mechanical fuel treatments/thinning projects?

Answer: Prescribed fire may be an element of hazardous fuel reduction work. Please note that there may be better tools to accomplish that work.

Question: Can 638 agreements include the removal of timber/wood products from NFS lands?

Answer: There is no mechanism for retention of revenue or retained receipts from the sale of wood products or timber under a Forest Service 638 agreement. There are better instruments, like stewardship contracts or agreements if this activity is contemplated.

Question: Do 638 agreements allow Tribes to collect revenue?

Answer: No, there is no authority for Tribes to collect revenue under a 638 agreement.

Question: Could a 638 agreement be used to provide wood/slash fuel to a tribal biomass project?

Answer: The 638 authority doesn't have any provision for the removal of timber. Depending on the value (if any) of the material to be removed, a stewardship agreement might be a better tool. However, the Forest Service has another authority – the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (P.L. 115-325) – for tribal biomass demonstration TFPA projects, that may fit as well.

Question: Can Tribes use this authority to carry out FS projects?

Answer: Yes, if it's part of a TFPA proposal.

Question: Can Tribes subcontract work under an agreement?

Answer: Yes, as long as they follow their procurement policies and procedures, and section 2.15.2 Requirements for Subcontracting of the 638 agreement template.

Question: Do we need to wait for the formal consultation to be completed before we can enter into a 638 agreement with a Tribe?

Answer: No. We are in the pilot phase, prior to any formal policy change. Formal consultation will be initiated when such change is proposed.

Question: How does Forest Service 638 authority affect the Forest Service Research Stations?

Answer: It is currently unclear how research activities intersect with TFPA purposes to reduce risk and restore trust assets on the National Forest System. There may be a possible overlap with the Forest Inventory and Analysis.

Question: How are 638 agreements different than stewardship agreement?

Answer: They are different authorities. A TFPA project may be executed using a stewardship agreement or mix of several different instruments to accomplish the proposed work, one of which might be a 638 agreement. Regardless, there must be an approved TFPA project in order to utilize the Forest Service 638 authority. One key difference is that a stewardship agreement or contract allows the dollar value of timber removed as offset to the cost of services performed.

Question: What are the differences between Good Neighbor Authority and 638?

Answer: The authorities are very similar. Good Neighbor Authority (GNA) is a little narrower in the activities allowed as it can only be used for authorized restoration services as defined in the law. In that aspect, 638 is broader. For example, heritage surveys may be performed under 638 but not Good Neighbor. GNA is designed for work with states, tribes, and counties to perform restoration services identified by the Forest Service on National Forest System land. 638 is a tool to fund work identified as a priority under an approved TFPA proposal by a Tribe for work on NFS land.

Question: TFPA proposals as discussed sound like the entire has to be shovel ready, with all funding identified and NEPA completed. How then does the project pre-planning happen? Is the Tribe responsible for packaging all that information?

Answer: It is not the full responsibility of the Tribe to package all of that information. TFPA projects can include pre-planning support work in their proposal, such as the development of the Environmental Analysis. It's essential that the Forest Service and the Tribe plan work together in order to ensure a quality project or program.

Question: How does the recently enacted Great American Outdoors Act affect TFPA 638 projects in terms of applicability and funding opportunities?

Answer: Analyses of the Great American Outdoors Act, and how the suite of new Forest Service tribal authorities and TFPA can be leveraged with or complement this latest authority, has begun. All of the tribal work is being discussed in the broader context of Shared Stewardship as well.

Question: Is there flexibility to add forests or Tribes to existing agreements where it makes sense? For example, Gifford Pinchot National Forest is the southern neighbor to the Mount Baker-Snoqualmie NF and there is lots of tribal interest in beaver habitat restoration here as well.

Answer: That's an idea to explore.

National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and National Historic Preservation Act (NHPA)

Question: Are NEPA activities allowed in a 638 agreement?

Answer: Yes.

Question: Who is responsible and pays for NEPA (and the California Environmental Quality Act) in California) for these projects?

Answer: The Farm Bill is very clear that the Forest Service “shall make any decisions required under the National Environmental Policy Act of 1969 ...” Though the Forest Service is responsible for ensuring compliance with NEPA requirements, a Tribe may certainly provide resources, information and technical skills for the preparation. This work may be included in a 638 agreement.

Question: Will the Forest Service also be responsible for compliance with the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA)?

Answer: The 638 agreement project must be in compliance with NEPA, ESA, and NHPA as applicable.

Question: If TFPA is required for use of 638 agreements, at what point in our NEPA process do we need to make that call? And can only part of the land in a NEPA document be under TFPA?

Answer: TFPA and NEPA are separate statutes with independent requirements. In order to move forward with a project identified under a TFPA proposal, the Forest Service must comply with NEPA and other applicable statutes and a decision made by the Forest Service responsible official. This does not mean that the Forest Service must complete the NEPA process prior to the TFPA proposal, as conducting the NEPA analysis or preparing the NEPA document may be a component of the TFPA proposal and subsequent 638 agreement.

Question: NEPA readiness was mentioned as part of the selection process. How does NHPA fit? Is there expectation that the Tribe or the Forest would be responsible for NHPA Section 106?

Answer: Any project on NFS land must be in compliance with NHPA regardless of who performs the work.

Definitions and Eligibility

Question: Are 638 agreements limited to federally-recognized Indian tribes or tribal organizations?

Answer: 638 TFPA agreements with the Forest Service are potentially open to federally recognized Indian tribes and tribal organizations as defined by 25 USC 5304:

"Indian" means a person who is a member of an Indian tribe;

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

"tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;

Question: Are Alaska Native Corporations eligible?

Answer: 638 TFPA agreements are only available to Tribes and tribal organizations that can meet a reasonable standard of "adjacency" of tribal trust lands under TFPA. The only tribal trust lands that exist in Alaska are the Metlakatla Reserve, which exists on Annette Island in SE Alaska. Ergo, 638 is not currently available to Alaska Natives or Alaska Native Corporations (included in the definition of "Indian tribe"). However, the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017 (P.L. 115-325) includes specific provision for Alaska Native biomass demonstration projects similar to TFPA that may be an option.

Question: Some Tribes utilize nongovernmental organizations (NGOs) that are formed and operated by tribal members to do projects. Can such NGOs enter into 638 agreements? What about larger NGOs that are partnering with tribal communities?

Answer: Tribal organizations that meet the definition in 25 USC 5304 (l) may enter into 638 agreements with the Forest Service.

“tribal organization” means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.”

Indirect Costs

Question: Are indirect costs covered over and above the request for funding, based on the negotiated rate?

Answer: Indirect costs should be included in the total request for funding/budget. Indirect costs should be calculated based on the Negotiated Indirect Cost Rate Agreement (NICRA).

Question: Are Tribes allowed to include indirect costs? If yes, who is responsible to fund them?

Answer: Indirect costs are allowable and should be included in the proposed budget for the 638 agreement. Indirect costs may be paid by the Forest Service.

Question: Will indirect costs be at the Tribe's approved indirect cost rate, set by Department of Interior, or will a different rate be negotiated with Forest Service?

Answer: Indirect cost rates are allowed at the rate approved by the Department of Interior. A different rate will not be negotiated.

Question: If 2 Code of Federal Regulations 200 does not apply, how will indirect costs be reviewed and/or treated?

Answer: Indirect costs are approved through a Negotiated Indirect Cost Rate Agreement (NICRA) negotiated between a Tribe and the DOI.

Tribal Forest Protection Act (TFPA)

Note: substantial TFPA resources (history, templates, reports, etc.) can be found at:

https://www.itcnet.org/issues_projects/issues_2/tfpa/tfpareports.html

Question: Can the TFPA proposal be the same as a 638 proposal or do they need to be separate?

Answer: The TFPA proposal must be submitted and approved prior to entering into a 638 agreement. Depending on the work to be performed and the goals, there may be another more appropriate instrument, like a stewardship contract or Good Neighbor Agreement to implement the project.

Question: If I understand correctly, a Forest Service 638 agreement may only be executed within approved TFPA work.

Answer: That is correct.

Question: Please explain the difference between a "tribal project" and "forest service project"?

Answer: TFPA proposals are collaborative, though the work occurs on National Forest System lands to achieve benefits for both the Tribe and the Forest Service. 638 agreements can be used to implement TFPA work that is identified by a Tribe and/or a National Forest/Grassland, with a Tribe identifying the risk or restoration need that addresses impacts to tribal lands and communities. This work can be initiated by either party.

Question: Is this agreement the only way to do project work or does the Forest Service have the option to award a contract or sale directly to a Tribe under 638 with an approved TFPA?

Answer: A 638 agreement is one of many instruments to implement an approved TFPA project. Depending on the project, several instruments (agreements and contracts) may be used for different phases or portions of the work.

Question: Is the Forest Service 638 authority broader than TFPA?

Answer: These are two very different but related topics. TFPA provides a process for a Tribe to propose projects that are of importance to the Tribe. 638 is one of many mechanisms to implement the project.

Question: Where in the 638 authority does it require it to be tied to a TFPA project? Once the Forest Service 638 policy and templates becomes formal, will it still have the requirement of being tied to a TFPA?

Answer: The requirement for the 638 agreement to be tied to a TFPA project is in Section 8703 of the 2018 Farm Bill, which gave the Forest Service authority to use PL 93-638:

SEC. 8703. TRIBAL FOREST MANAGEMENT DEMONSTRATION PROJECT.

- (a) IN GENERAL— The Secretary of the Interior and the Secretary may carry out demonstration projects by which federally recognized Indian Tribes or Tribal organizations may contract to perform administrative, management, and other functions of programs of the Tribal Forest Protection Act of 2004 (25 U.S.C. 3115a et seq.) through contracts entered into under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304 et seq.).

Question: Does TFPA apply to grasslands too?

Answer: Yes. TFPA allows for work on forests OR grasslands, which are defined as lands having, “a cover of grasses, brush, or any similar vegetation ... or formerly had a forest cover or vegetative cover that is capable of restoration.”

Question: Can the proposal come from the Bureau of Indian Affairs (BIA) for multiple Tribes?

Answer: The BIA is not involved in the creation or submission of a TFPA proposal by a Tribe to the Forest Service. The idea of multiple tribes under a single TFPA proposal hasn't been discussed as of yet, but is something to be considered.

Adjacency

Under the Tribal Forest Protection Act, adjacency is not intentionally defined as it is contingent upon the risks being addressed (fire, disease, insects, et al.), risk vectors, and the distances that those vectors can travel to negatively impact tribal lands and communities as well as traditional resources on a forest or grassland. Consistent with the intent of TFPA, adjacency is therefore dependent on the threat coming from Forest Service-administered lands and the type and extent of the risk to tribal lands, resources, and communities. Will the threat posed be able to extend to tribal lands? Does the project protect or restore the traditional resources of a Tribe? If yes, then the adjacency requirement will likely have been met.

Pilot Projects

Question: Even though there is no separate appropriation for the pilot projects is the Forest Service Washington Office providing budget direction to the field to prioritize support for a TFPA pilot project? How are the 10 projects selected?

Answer: Pilot projects will be selected based on a number of criteria: TFPA proposal, NEPA in place, funding availability, capacity, geographic diversity as well as a diversity in projects. As we are learning from these pilot projects, having a diversity of partners and projects will provide the greatest opportunity for learning.

Question: Can you clarify the 10 pilot project cap and why it exists, or what happens next?

Answer: The Forest Service has developed a new form to use for the 638 agreements – the cover sheet. This form requires the collection of information from a non-Federal entity and is therefore subject to Paperwork Reduction Act clearance through the Office of Management and Budget (OMB). In the interim, we may use the form up to 10 times prior to approval. That is why we are limited to 10 pilot projects. Once the form is approved by OMB then there is no limit to the number of 638 agreements that may be executed.

Question: When will we be able to use 638 post-pilot?

Answer: We will be able to use 638 post-pilot once the Forest Service receives approval of the new form from OMB. Policy/directives will be developed as we move out of the pilot phase.

Question: Will there be a webinar showing how the 10 pilot projects worked out with this?

Answer: We intend to have additional webinars to provide updates on Forest Service implementation of 638. The inclusion of learning from the pilot projects is a good suggestion.

Question: Where are the 638 pilot projects?

Answer: We currently have regulatory flexibility to implement 10 pilot projects, and only one is confirmed at this time. There is still opportunity for other pilot projects. We are looking for a geographic diversity, and for different types and complexity of projects to inform how we implement 638 authority.

Question: Can we nominate projects to be a pilot or are they predetermined?

Answer: The pilot projects are not predetermined and have not all been selected. Reminder: there are several requirements, the first of which is the approved TFPA proposal. Funding and capacity must also be considered.

Question: Is there a deadline for submission of proposals for the demonstration projects?

Answer: No.

Funding

Question: In the new Forest Service budget structure, beginning in FY21, it will be difficult for Forests/Grasslands to fund their own 638 projects. Will the Washington Office be considering competitive funding at the national level?

Answer: Not at the time of this webinar.

Question: Can Collaborative Forest Restoration Landscape Restoration Program (CFLRP) funding be used for 638 agreements?

Answer: Potentially yes, but only within the CFLRP boundary on NFS lands.

Question: Can I submit a proposal to another Forest Service project, such as to a CFLRP or Shared Stewardship funding opportunity, but submit as a TFPA project and get a waiver of any identified cost share for the program by doing it that way?

Answer: Although work is identified under a TFPA proposal, it does not provide for waiver of match. Match is determined by the instrument used to implement the project; for example stewardship agreements require a 20% match, while Good Neighbor and 638 do not require a match. We don't select the instrument type based on match, but rather the work that will be performed and the authority that best matches.

Question: Can an existing master or supplemental programmatic agreement be expanded or modified to include a 638 agreement?

Answer: No. An existing agreement cannot add 638 authority. A 638 agreement must be executed as a stand-alone agreement. The first step to authorizing this work under a 638 agreement is for the Tribe to negotiate and secure approval of a TFPA proposal. Once that's approved, then you could enter into a 638 agreement for work and potentially move toward a programmatic 638 agreement once the Forest Service is ready to implement the next step.

Question: Is funding provided advance or reimbursement? Are costs based on actual, or does the agreement approve profit?

Answer: Funding is provided lump sum in advance to cover actual incurred costs. No profit is allowed.

Question: Can Forest Service resources be used to complete TFPA project that is on tribal land?

Answer: No. TFPA proposals are for identifying work on NFS land that is a priority to Tribes.

Question: Can the Forest Service use the 638 authority/TFPA in conjunction with Reserve Treaty Rights Lands (RTRL) funds?

Answer: Yes, RTRL funding from the Department of Interior may be used to fund work under a Forest Service 638 TFPA agreement. To clarify, TFPA is not funded. Tribes would have to secure RTRL funds as the FS cannot access them though such funds are also to be used for work on non-tribal lands.

Question: Can Brush Disposal (BD) or Knudsen-Vandenberg (KV) Act funds be used for 638 agreements?

Answer: Yes, BD or KV funds may be used for a 638 agreement. BD funds are collected from timber sales and utilized by local Forest Service Districts to clean up slash created by the timber sale. KV funds are collected to do work within the sale area boundary. The Forest Service can use these funds to contract work.

Question: Please confirm, we can use retained receipts in a stewardship agreement with a Tribe, but not in a 638 agreement?

Answer: That is correct. Stewardship retained receipts may only be used with stewardship contracts and agreements.

Question: Can 638 authority be used to implement ecosystem restoration work? What are anticipated and appropriate funding sources?

Answer: 638 is another authority in the toolbox for restoration work. Like any other authority we need to make sure that the funding and authority is appropriate to use for the work being performed.

Question: Can a project be funded through outside funding sources, such as grants from state agencies or non-governmental organizations?

Answer: Yes. Outside funding may be brought to the agreement by either the Forest Service or the Tribe.

Question: Can you clarify if vegetation work, funded by timber receipts/credits or revenue may work with 638?

Answer: Retained receipts from stewardship contracts/agreements may not be used for 638 agreements. There is no authority within 638 to allow for removal of timber and the retention of revenue for project work. A better option for a project that includes timber removal would be a stewardship contract or agreement.

Liability

Question: Contingent upon level of risk associated with the project work, how will liability be addressed for the projects/agreements?

Answer: Tribes under a 638 agreement are considered to be Federal employees for tort coverage.

Project/Program

Question: It sounds like the Forest Service is looking at 638 contracting for "projects." This is different from what Tribes have done with the BIA where they have contracted under 638 for programs. Is this being explored at all with the Forest Service?

Answer: The Farm Bill provided the Forest Service with a demonstration authority. To start out, the Forest Service will pilot 638 agreements for projects as we all learn how this authority can work for the Forest Service and tribal partners for work on NFS lands.

Question: Programmatic 638 contracting does not have to be whole programs, it could be individual positions also. This is how 638 contracting with the BIA has occurred. It isn't always the whole program that is 638 contracted, it could be just individual positions.

Answer: Thanks for the clarification.

Staff/Process

Question: Does each Forest Service Region have a cadre of staff focused on TFPA/638 project design with tribal partners?

Answer: Not yet.

Question: Where does Forest Service Acquisition and Management fit in?

Answer: Although the 638 authority often refers to contracts, Forest Service TFPA agreements are a non-procurement arrangement. That's the reason that the Forest Service has elected to call it a 638 agreement to avoid confusion with procurement.

Question: Do these projects need to go through the Grants and Agreements office?

Answer: In order to obligate Federal funding or bind the Forest Service to performance, there must be either an agreement (G&A) or contract (AQM) in place to comply with Federal Appropriation Law.

Question: How are Grants and Agreements (G&A) staff being trained in 638/TFPA?

Answer: There will be training developed for G&A in addition to other training for Forest Service program managers. This webinar is just the beginning of learning around 638.

Question: When will we be able to use 638 post-pilot?

Answer: We will be able to use 638 post-pilot once the Forest Service receives approval of the new form from OMB. Policy/directives will be developed as we move out of the pilot phase.

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