

**Best Practices Guide**  
**to**  
**Execute a USDA Forest Service**  
**638 Agreement**  
**Under the Tribal Forest Protection Act**

August 2020

## What is 638?

Public Law 93-638 was passed in January, 1975 to provide “maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.” The Act is titled Indian Self-Determination and Education Assistance Act, and commonly referred to as ISDEAA or 638. The authority has had significant amendments since 1975. The Department of Interior (DOI) and Health and Human Services (HHS) are the principle Departments. Section 8703 of the 2018 Farm Bill (Public Law 115-334, 25 U.S.C. 3115b), provides authority to the Forest Service for “Tribal Forest Management Demonstration Project(s)”. The Assistance Listing for this authority (CFDA) is 10.711.

Note: The 2018 Farm Bill also granted 638 demonstration authority to the Department of Agriculture Food & Nutrition Service (FNS) (Public Law 115-334 Section 4003). While there was an attempt to coordinate policy and implementation strategies, it was quickly apparent that the two agencies have very different missions and that coordination was not practical. However, the Forest Service continues to engage with the FNS to share implementation experiences.

### §3115b. Tribal forest management demonstration project

(1) In general –

The Secretary of the Interior and the Secretary (of Agriculture) 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.).

(2) Requirements – With respect to any contract or project carried out under subsection (a) –

- (a) on National Forest System land, the Secretary shall carry out all functions delegated to the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304 et seq.);
- (b) the Secretary or the Secretary of the Interior, as applicable, shall make any decisions required to be made under-
- (c) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(continued)

(2) Requirements (concluded) –

- (d) the Tribal Forest Protection Act of 2004 (25 U.S.C. 3115a et seq.); and
- (e) the contract or project shall be entered into under, and in accordance with, section 403(b)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5363(b)(2)).

## Eligibility

The ISDEAA defines eligible cooperators for 638 as [25 U.S.C. 5304 (e) and (l)]:

Any **Indian tribe**, band, nation, or other organized group or community, including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or **tribal organization**, 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 (if a contract is made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to such contract or grant).

## Tribal Forest Protection Act

Section 8703 of the 2018 Farm Bill limits Forest Service implementation of 638 authority to projects and programs under the Tribal Forest Protection Act (TFPA) 25 U.S.C. 3115a. TFPA authorizes the Secretaries of Agriculture and Interior to give special consideration to tribal proposed projects meeting certain criteria on Forest Service (FS) or Bureau of Land Management (BLM) managed lands to protect the Indian trust lands and resources from threats such as fire, insects and disease. There is a wealth of information about TFPA on the Intertribal Timber Council website at: [https://www.itcnet.org/issues\\_projects/issues\\_2/tfpa/tfpareports.html](https://www.itcnet.org/issues_projects/issues_2/tfpa/tfpareports.html) In summary, a Tribe may propose a TFPA project on agency managed land which borders or is adjacent to Indian trust land and:

- Poses a fire, disease, or other threat to the trust land or community
- Is in need of restoration
- Is not subject to some other conflicting agreement or contract
- Does involve a feature or circumstance unique to the proposing Tribe (i.e., legal, cultural, archaeological, historic, or biological)

The adjacent Indian trust land (either Tribal or allotted) must be in trust or restricted status and must be forested or have a grass, brush, or other vegetative cover. Burned-over land capable of regenerating vegetative cover also qualifies.

Examples of TFPA proposed project (note that these were not implemented under 638):

- Produce timber and forest products (e.g., the McGinnis Cabin Project)
- Form partnerships between private industry, federal, and tribal entities for restoration and risk reduction (e.g., the Los Burros Project)
- Reduce the threat of catastrophic fire across jurisdictions and landscapes (e.g., the Tule RiverProject3)
- Bring communities together to support rural forest infrastructure and economies (e.g., 16 Springs Project)
- Scale up to address large-scale forest health issues (e.g., Mills Creek Project)

## General Requirements:

**Instrument format:** While the 638 authority refers to the instrument as a contract, it is a non-procurement instrument which creates some confusion as to the requirements and staff groups managing the instrument. The Forest Service will consider the instrument an agreement, and as such the Grants & Agreements staff will provide review, support, and oversight like any other agreement for work on NFS lands.

**Mutual Interest/Mutual Benefit:** It is not a requirement that mutual interest/benefit be met in order to enter into a 638 agreement.

**Matching Requirements:** There is no match required.

**Funding:** No specific funding was appropriated or authorized for 638. The expectation is that 638 is another tool to implement work on NFS lands and should be paid for with appropriated funding. Timber trust funds, like KV (reforestation), BD (brush disposal), or salvage sale funds may be used. Third party funding may also be used for 638 (RTRL from DOI, funding from the Rocky Mountain Elk Foundation, etc.) Stewardship retained receipts may NOT be used for 638.

**Payment:** 638 authority allows for advance lump sum payment on the request of the Tribal Cooperator. Advance liquidation is not required via SF-425, although the Tribal Cooperator will submit annual Financial Reports on the SF-425.

**Employee Status:** Congress has extended liability coverage to Indian tribes and as such, they are considered to be Federal employees for the purposes of the Federal Tort Claims Act.

**Project/Program location:** The 2018 Farm Bill is very clear that the work under this authority is performed on National Forest System (NFS) land. If necessary, Wyden Authority may be added to capture incidental related work off NFS land.

## Elements of a 638 Agreement:

Each 638 Agreement will be comprised of:

### Required:

- Cover Sheet (FS Form in draft awaiting OMB Approval)
- 638 Template Provisions
- Scope of Work
- Financial Plan/Budget (recommend using SF-424A)
- TFPA Proposal with approval letter

### Optional:

- Tribal Resolution
- Maps
- Other attachments necessary to provide information required by the Tribal Cooperator for best outcome of the project

## Cover Sheet Sample:

<b>UNITED STATES DEPARTMENT OF AGRICULTURE – FOREST SERVICE</b>		Clear Form
<b>Grant or Agreement Award Face Sheet</b>		
FAIN:		Title:
Cooperator Agreement#:		Instrument Type:
Assistance Listing (CFDA) Number and Title:		Authority:
Cooperator Unique Entity Identifier (UEI/DUNS):		Period of Performance Start date: _____ Expiration date: _____
Cooperator (Legal Name and Address – must match SAM) Name: Address: City: State: _____ Zip: _____		Forest Service Unit Address Name: Address: City: State: _____ Zip: _____
Cooperator Program Manager Name: Phone: Email:		Forest Service Program Manager Name: Phone: Email:
Cooperator Administrative Contact Name: Phone: Email:		Forest Service G&A Specialist Name: Phone: Email:
<b>Financial Information</b>		
Cooperator Matching Funds:		Federal Funding to Cooperator:
Cooperator Match %:		
Cooperator Indirect Cost Rate (approved rate and rate charged to award):		Payment Method: Advance & Reimbursement <input type="radio"/> Reimbursement Only <input type="radio"/>
Program Income/Revenue: N <input type="radio"/> Y <input type="radio"/>		
<b>Reporting Requirements</b>		
Performance Report Frequency: Quarterly <input type="radio"/> Semi-Annual <input type="radio"/> Annual <input type="radio"/> Other (High Risk) <input type="radio"/>		Financial Report Frequency: N/A <input type="radio"/> Quarterly <input type="radio"/> Semi-Annual <input type="radio"/> Annual <input type="radio"/> Other (High Risk) <input type="radio"/>
<b>ATTACHMENTS</b>		
The attachments listed below are hereby incorporated and made a part of this award.		
<b>REQUIRED FOR ALL INSTRUMENTS:</b> Scope of Work Budget/Financial Plan Provisions		
<b>REQUIRED DEPENDENT ON INSTRUMENT TYPE:</b> <input type="checkbox"/> Statement of Mutual Interest/Benefit <input type="checkbox"/> Federal Financial Assistance Forms (SF-424, SF-424A or 424 R&R forms) <input type="checkbox"/> Assurances <input type="checkbox"/> Good Neighbor/Stewardship Attachments <input type="checkbox"/> Conditional provisions		
This agreement, subject to the provisions above, is executed by		
Signature	Forest Service Signatory Official (SO) Name and Title	Federal Award Date
The authority and format of this instrument has been reviewed and approved for signature.		
Signature	Grant Management Specialist Name (if different than SO)	Date
By signing this agreement, the signor certifies that they are vested with the authority to enter into this agreement.		
Cooperator Signature	Name and Title	Date
Cooperator Signature	Name and Title	Date
FS 1500-100 6/10/2019	USDA-FS	Page: 1

## 638 Template/Provisions

This is a locked document that should be attached to every 638 agreement. The template was developed from the DOI Model Agreement in the 1994 amendment to PL 93-638 (25 USC 5329 (c)). The language was modified to align with the Forest Service's decision to implement the authority as an agreement rather than a non-procurement contract. The modifications were made with concurrence from OGC and the 638 working group that was comprised of Tribal partners and Forest Service staff. The format follows the Model Agreement to provided consistency with DOI and HHS.

If there is a need for adding any of the standard Forest Service provisions, or other mutually agreed upon language, then an additional attachment may be included in the agreement.

Throughout the template there are references to an annual funding agreement. An annual funding agreement is only used when the Forest Service is funding a program that will be managed on an annual basis by a Tribal Cooperator. When the Forest Service is funding a project, the provisions regarding annual funding agreements do not apply. They do not need to be removed.

Following is a brief synopsis/discussion of each section of the template:

### 1. Authority and Purpose:

This section identifies the authority for the agreement. The Forest Service was given authority to use the authority provided in PL 93-638 as amended, in section 8703 of the 2018 Farm Bill. The Farm Bill includes a requirement that there must be a Tribal Forest Protection Act (TFPA) proposal in place in order to use the 638 authority. Additionally, the law is also clear that any decision to be made under NEPA is the Forest Service's responsibility.

### 2. Terms, Provisions, and Conditions:

- 2.1 **Term:** Generally, we'll want to look at funding projects for up to 5 years. Keep in mind that if you only have funding for 1 year, then that's how long you should make the agreement for. You can modify to extend if you receive funding for another year and both parties are in agreement.

- 2.2 Effective Date:** The agreement is considered executed or effective on the date of the Forest Service signature (which should be last). If necessary, pre-award costs are allowed. If that's the case, then the agreed upon start date must be included on the cover sheet.
- 2.3 Program Standards:** This provision goes hand in hand with 2.11. The Forest Service will provide those standards that are required by law (ESA, NHPA, NEPA, etc.) and any others that may assist the Tribal Cooperator in the successful performance of the project (guidelines, designs, etc.). Both parties will agree to the standards that will be applied and that information will be included in the Scope of Work.
- 2.4 Funding.** Funds provided to the Tribal Cooperator will be identified on the cover sheet and any subsequent modifications.
- 2.5 Limitation of Costs.** This provision is very similar to the Forest Service standard provision. If the Forest Service has not provided sufficient funding to the Tribal Cooperator for the performance of the work identified in the Scope of Work, there is no expectation of performance beyond what it funded.
- 2.6 Payments.** Under 93-638, payments will be made lump sum, in advance. Payment will be made after execution of the agreement and prior to the performance of work upon request of the Tribal Cooperator. The request for lump sum payment will be made with an SF-270, submitted through the Albuquerque Service Center. These advance payments are not subject to the Treasury regulation that requires advance payments to only be made for expenses for up to 30 days. Tribal Cooperators will submit annual SF-425's to provide accounting of expenses.
- 2.7 Records and Monitoring.** Certain tribal records are not subject to the Freedom of Information Act and must be withheld from disclosure. This is in accordance with the Cultural and Heritage Cooperation Authority cited in the template. Note that this authority does not apply to DOI or other agencies.

**Financial Recordkeeping System.** A Tribal Cooperator must meet the standards for financial management that the Forest Service requires of other cooperators. We will use the Financial Capability Questionnaire and Checklist prior to entering into a 638 Agreement for the Tribal Cooperator to verify that they meet those basic standards. If there is a need for a financial management system review, such as those performed by the Forest Service's Financial Compliance and Oversight Branch (FCOB), the Tribal Cooperator will receive a request for the review well in advance. These reviews are not audits, but rather a review to ensure that the cooperator meets all of the standards for financial management systems and to provide guidance if there are areas that may need shoring up.

**Other Records.** The Tribal Cooperator will have other recordkeeping systems that may come into play, like payroll or property. These systems must meet general standards described in the Financial Capability Questionnaire/Checklist and will be made available in a format that the Forest Service can access if the need arises.

**2.8 Property.** The Tribal Cooperator may request, and the Forest Service should provide any equipment, personal property, or facilities that may be necessary for the successful performance of the work described in the agreement by the Tribal Cooperator. A list will be maintained by the Tribal Cooperator and the Forest Service of all property loaned or transferred under the agreement. The Forest Service should keep the list as part of the official agreement file and record the property in the Equipment Tab in NRM.

**Records.** The Tribal Cooperator will maintain property records according to their policies and procedures.

**Joint Use Agreements.** If there are any shared facilities or other property, it will be documented in a separate instrument. This should be done in coordination with Forest Service leasing/facilities staff.

**Acquisition of Property.** Under a 638 agreement, a Tribal Cooperator may gain access to federal excess and confiscated property systems that are available to Federal agencies.

**Building and Computer Access.** If a Tribal Cooperator requires access to Forest Service facilities or computer systems, standard background checks will be made and the established procedures for granting access to other partners will be followed, including any required training or assurances. This is the standard Forest Service provision.

**Capital Equipment.** Equipment may be purchased by the Tribal Cooperator if it is necessary for the performance of the project/program and is identified in the scope of work and budget/financial plan. The Tribal Cooperator will acquire, use, maintain, and keep records of the equipment according to their policies and procedures.

**2.9 Availability of funds.** Once the funds are advanced to the Tribal Cooperator (see 2.6 Payments) they will be held, managed, and expended by the Tribal Cooperator toward performance of the work identified in the agreement and remain available until expended. If there is funding remaining beyond what is necessary for the work identified in the agreement, the agreement may be modified to include additional work.

As a note, any of the funding transferred to a Tribal Cooperator under this authority may be used to meet matching requirements under any other Federal law. (25 USC 5325 (j)).

**2.10 Transportation.** Under a 638 agreement, the Forest Service may allow the Tribal Cooperators access to GSA pool vehicles as needed to perform work under the agreement.

- 2.11 Federal program guidelines, manuals, or policy directives.** These categories of guidance (guidelines, manuals, handbooks, or directives) are internal to the Forest Service and we cannot apply them to Forest Service cooperators. Regulations (CFR) and law (US Code) do apply to cooperators, and it’s important that we recognize the distinction between the two. There may be instances where the Forest Service may request that a Tribal Cooperator follow a specific policy in order to assure desired results from a project, but the specific language must be included in the agreement and agreed to by both parties.
- 2.12 Disputes.** This language is the same as the language in the Model Agreement and lays out the process should there be any disputes.
- 2.13 Administrative procedures of the Tribal Cooperator.** This provision is internal to the Tribal Cooperator and spells out the applicability of the Indian Civil Rights Act providing for equitable treatment for all tribal members.
- 2.14 Successor annual funding agreement.** This provision is ONLY applicable if the Forest Service is funding a program that is managed by the Tribal Cooperator. The provision details the timing and negotiation for the annual funding amounts provided by the Forest Service.
- 2.15 Contract requirements.**

  - 2.15.1** Refers to a number of statutes that apply to contracting by tribes that do not apply to any contracts entered into under this agreement.
  - 2.15.2** Provides the basic requirements for any sub-contract entered into under this agreement. Tribal Cooperators will follow their established contracting policy for any contract awarded under a 638 agreement.

### 3. Obligation of the Tribe

- 3.1 Performance.** This provision reinforces that performance of the activities or programs under this agreement are the responsibility and under the direction of the Tribal Cooperator.
- 3.2 Amount of funds.** The section of US Code that is cited in this provision provides for payment of contract support costs, negotiation of costs for performance, and pre-agreement costs. Contract support costs are those costs incurred for the Tribal Cooperator to ensure compliance and management of any contracts awarded under the agreement.
- 3.3 Fair and uniform services.** This provision relates to any service provided to tribal members under this agreement and the process to resolve any complaints, claims, or grievances.

## 4. Obligation of the United States (Forest Service)

**4.1 Trust Responsibility.** This provision reaffirms the Forest Service’s trust responsibility which includes:

- Ensuring actions never diminish the rights of Tribes and tribal members.
- Treating NFS resources as trust resources.
- Observing and enforcing all laws enacted for the protection of tribal cultural interests.
- Ensuring all Forest Service program benefits reach Tribes and tribal communities.
- Observing the principles of consultation whenever Forest Service policies, decisions, and actions affect tribal interests.

**4.2 Programs retained.** This provision primarily applies where a Tribe assumes responsibility for a program under a 638 agreement. Only the work, project, or program specifically included in the 638 agreement are the responsibility of the Tribal Cooperator.

## 5. Other Provisions

**5.1 Designated officials.** The designated officials for each party will be listed on the cover page of the agreement. Should there be a need to update the designated officials, it may be done through a formal modification to the agreement.

**5.2 Modifications.** Any modification to the agreement will be in writing and signed by both parties. The Forest Service will use the standard, approved Modification form FS-1500-19. Modifications are generally for changes to the budget, scope of work, timeframe, or contacts.

**5.3 Officials not to benefit.** This is a standard provision in most instruments ensuring that no members of Congress directly benefit from the activities under this agreement.

**5.4 Covenant against contingent fees.** This provision is an assurance that no third party has been employed to solicit or secure a contract under this agreement.

**5.5 Termination by Mutual Agreement.** This is the standard termination provision used in Forest Service agreements and outlines the process for termination by either party.

## 6. Attachments

- 6.1 Approval of agreement.** Some tribes require a tribal resolution prior to entering into an agreement. This is not a requirement by the Forest Service and is only applicable if required by the participating Tribal Cooperator.
- 6.2 Annual funding agreement.** Annual funding agreements only apply when the 638 agreement provides for a Tribal Cooperator to assume responsibility for a Forest Service program of work. Examples might include performance of heritage work for a Ranger District or National Forest, or assumption of a hazardous fuel reduction program. In that situation, the Tribal Cooperator would annually receive the Forest Service budgeted funding for that body of work, and it would be documented in the annual funding agreement and incorporated in the 638 agreement.