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# News

## Homeland Security Legislation

### Compliance with NIMS:

The Department of Homeland Security (DHS) through HSPD-5 has mandated that effective September 30, 2005 any government that receives funding from the DHS must be in compliance with the National Incident Management System (NIMS). Since tribal governments are defined as local governments for the purposes of the *Homeland Security Act of 2002*, they are also required to be in compliance with the NIMS in order to receive FY 2006 preparedness funding from the DHS. Compliance issues to be achieved during FY 2005 include training requirements and adoption of NIMS with full compliance by FY 2006. In FY 2007, federal preparedness assistance will be conditioned by full compliance with NIMS. States, territories, TRIBES, and local entities can use existing initiatives such as the Office of Domestic Preparedness (ODP) Homeland Security grant programs to assist with the mandate to develop strategies. The primary issue for Indian Country has been the fact that States are listed as the only grantee with beneficiaries listed as "local and tribal governments". Even though tribes are listed as beneficiaries to these grant programs, many of the states fail to provide an adequate funding mechanism to pass through or set aside the federal grant funds to tribes. States and local government agencies are able to utilize the Emergency Management Performance (EMPG) and Homeland Security planning grant funding to become NIMS compliant. There still has been no administrative or adjudicative process for tribal governments to seek redress when the state governments leave tribes out of the emergency plans or deny DHS funding. This continues to hinder tribes in meeting federal mandates that ultimately endanger tribal lives.

### S. 536:

S. 536, *the Native American Omnibus Act of 2005*, was introduced to the Senate on March 7<sup>th</sup> 2005 by Senator John McCain [AZ] and was cosponsored by Senator Byron L. Dorgan [ND] on April 18<sup>th</sup> 2005. The bill was then read twice by the Senate and then referred to the Senate Committee on Indian Affairs for further revision. As of May 12<sup>th</sup> Senator McCain reported S.536 out of committee without amendment, at which time the senate placed the bill on the senate legislative calendar under general orders.

Within this legislation there are two substantial amendments to current Indian policy regarding tribal law enforcement and boarder security. The first amendment is in regard to the Indian Tribal Justice Technical and Legal Assistance Act. The amendment reauthorizes training and technical assistance, civil and criminal assistance grants, as well as grants that enable tribes

to carry out programs to support the development, enhancement, and continuing operation of tribal justice systems. If the proposed amendment is enacted, funding to promote these opportunities would be extended from the year 2007 to the year 2010.

Amendments to the Homeland Security Act of 2002 deal specifically with its relation to tribal border preparedness. The changes to this section come in five parts

- 1) Definitions for various terms through the Act
- 2) The purpose for these coordination and assistance programs within the act
- 3) The creation of a Pilot Program
- 4) The guidelines sent forth for tribal governments with regards to the reporting of their information to the Secretary of the Department of Homeland Security
- 5) Authorization of appropriations to facilitate these changes and enact them

### **1) Definitions:**

(1) INDIAN LAND- The term 'Indian land' means—

(A) all land within the boundaries of any Indian reservation; and

(B) any land the title to which is—

(i) held in trust by the United States for the benefit of an Indian tribe or individual; or

(ii) held by any Indian tribe or individual—

(I) subject to a restriction by the United States against alienation; and

(II) over which an Indian tribe exercises governmental authority

(2) INDIAN TRIBE- The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community that is recognized by the Secretary as—

(A) eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(B) possessing powers of self-government

(3) TRIBAL GOVERNMENT- The term 'tribal government' means the governing body of an Indian tribe

### **2) Purpose:**

The proposed amendments in this section are put in place to require the Secretary, acting through the Under Secretary for Border and Transportation Security, to establish a pilot program for tribal governments on Indian land located on or near the border of the United States with Canada or Mexico in order to--

(1) facilitate the coordination of the response of an Indian tribe to a threat to the security of an international border of the United States with the responses of Federal, State, and local governments;

(2) enhance the capability of an Indian tribe as a first responder to an illegal crossing of an immigrant over an international border of the United States; and

(3) provide assistance to Indian tribes in the use by the tribes of effective aerial and ground surveillance technologies, integrated communication systems and equipment, and personnel training.

### **3) Creation of a Tribal Border Security Pilot Program**

(1) IN GENERAL- Not later than 180 days after the date of enactment of this section, the Secretary, acting through the Undersecretary for Border and Transportation Security,

shall provide funds and other assistance to tribal governments in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).

(2) USE OF FUNDS AND ASSISTANCE-

(A) IN GENERAL- A tribal government shall use any funds or assistance provided under paragraph (1) consistent with the purposes of this section.

(B) ADMINISTRATION BY TRIBAL GOVERNMENTS- A tribal government that receives any funds or assistance under paragraph (1) shall administer the funds or assistance in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.).

(3) SELECTION CRITERIA- In selecting a tribal government to receive funds or assistance under paragraph (1), the Secretary may take into consideration--

(A) the distance between the Indian land in the jurisdiction of the tribal government and an international border of the United States;

(B) the extent to which a border enforcement effort effects the resources of the Indian tribe; and

(C) the interests of the Indian tribe.

**4) Reporting of Information Regarding Tribal Homeland Security**

(1) TRIBAL GOVERNMENTS-

(A) IN GENERAL- Not later than 1 year after receiving funds or assistance under subsection (c), a tribal government shall submit to the Secretary a report in such a manner and containing such information as the Secretary may require.

(B) INCLUSION- A report under subparagraph (A) shall include a description of-

- (i) any funds or assistance received by the tribal government under this section;
- (ii) the use of the funds or assistance by the tribal government; and
- (iii) any obstacle encountered by the tribal government in administering the funds or assistance

**5) Authorization for Appropriations for these programs**

The Bill authorizes Congress to appropriate “such sums as are necessary to carry out this section for each of fiscal years 2006 through 2008.”

**Implications for Tribes:**

Within this legislation each of these amendments draws more upon tribe’s ability to use the appropriate federal resources to govern their communities. It becomes more and more imperative that tribes begin to put into place, within their own communities, the necessary infrastructure to show their ability to adequately use these appropriations. With these guidelines being set by the federal government the relationship that exists between tribes and departments such as the DHS and the office of Border and Transportation Security will become one that allows tribes to better claim their stake in sovereignty and self governance.

The Senate Homeland Security and Governmental Affairs Committee marked up its first-responder funding bill S.21 on April 13, 2005, and Senator Collins (R-ME) Chairwomen of the committee reported it out to the Senate on May 24<sup>th</sup>. Currently S.21 is awaiting review by the senate, and as of May 24<sup>th</sup> has been placed on the Senate Legislative calendar under General Orders. S.21, known by its short title as *Homeland Security Grant Enhancement Act of 2005*, provides each state with a minimum of 0.55 percent of the first-responder funding pool. The current state minimum for formula grants is 0.75 percent. There have not been any earmarks for specific programs or areas allowed on the appropriations markups that have occurred in the Senate. Chairman Cox and Chairwoman Collins have stated that they are willing to work together to come to a compromise on the amounts of funding that states are eligible to receive. The allocations in the House version and the Senate version differ by fractions of a percent, however, both houses of Congress have agreed that the funding should be tied directly to a threat based funding criteria. The Senate version maintains the current system of administering grants to Indian tribes by treating tribes as local governments that must apply to the state where they are located to receive homeland security funds.

### **Implications for Tribes:**

S.21 directs the Secretary of Homeland Security to establish clearly defined essential capabilities for state and local governments (tribes are defined within this legislation as local governments). Required within these capabilities would be necessary objectives that would include specificity, flexibility, measurability, and comprehensiveness. S.21 requires the Secretary, in establishing such capabilities, to consider the variables of threat, vulnerability, and consequences with respect to population, areas of high population density, critical infrastructure, coastline, and international borders. There are problem that arise for tribes as a result of these qualifying measures for Homeland Security funding. While tribes maintain vulnerability within much of their critical infrastructure, they fall short of the population requirements that are necessary to receive Homeland Security funding. Many tribes, even though they are not along boarders or near areas of high population density, host facilities and infrastructure that are susceptible to acts of terrorism, which if compromised, could have consequences far reaching tribal citizens affecting other non-tribal entities as well. To make sure that these qualifications are being set forth without prejudice S.21 requires the Secretary to establish a Task Force on Essential Capabilities for First Responders to assist in establishing required capabilities. The Taskforce will be required to make public comment and reporting available as well.

### **S.1033:**

S.1033, the *Secure America and Orderly Immigration Act*, was introduced by Senator McCain (R-AZ) on May 12<sup>th</sup> 2005. Border security is critical to fighting terrorism and homeland security integrity. Tribes along the international borders and coastal tribes are among the tribes left out of federal DHS funding. Scarce tribal dollars which should be going for dire health care needs, law enforcement and emergency response, are being diverted to dealing with illegal immigration costs. Senators McCain, Kennedy, Kobe, Flake and Gutierrez introduced legislation that might better coordinate tribal inclusion in a national border protection strategy. The Secure America and Orderly Immigration Act (S.1033), directs the DHS Secretary to develop and implement a national border strategy. The strategy among other provisions includes coordination among federal, state, regional, local and tribal authorities to provide for effective border management and security enforcement; a design for the most appropriate and cost effective means of defending the border against threats; and, risk based priorities for assuring border security. A Border Security Advisory Committee established by the Secretary would include tribal authorities. Reimbursement of health care dollars is provided in S. 1033, but it may be that tribes

want to urge and amendment to recover law enforcement, trash and property damage, and other related undocumented immigrant costs.

#### **S.477:**

S.477 known by its short title as the *Tribal Government Amendments to the Homeland Security Act of 2002* is a bill which seeks to amend the *Homeland Security Act of 2002*, as amended by the *Intelligence Reform and Terrorism Prevention Act of 2004*, to include the participation of Indian tribes in the activities of the Secretary of Homeland Security. The bill also amends the *Cyber Security Enhancement Act of 2002*, the *Omnibus Crime Control and Safe Streets Act of 1968*, the Federal Rules of Criminal Procedure, the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA Patriot Act), and the *Foreign Intelligence Surveillance Act of 1978* to include Indian tribes among the participating entities. The bill would allow the Secretary to provide for funds made available under the *Homeland Security Act of 2002* directly to any Indian tribe, band, nation, or other organized group or community located in the continental United States that is recognized as being eligible for the special programs and services provided by the United States to Indians because of their status as Indians. This bill reinforces the government-to-government relationship that the federal government and tribal governments should have been acting upon since the beginning of Homeland Security appropriations. The bill was introduced by two democratic senators, Senator Dorgan (D-ND) and Senator Inouye (D-HI) with no sponsors from the Republican Party, on March 1<sup>st</sup> 2005 was read twice and then sent to the Senate Committee on Homeland Security and Governmental Affairs where there has been no action on the bill since.

#### **Implications for Tribes:**

If this legislation moves forward the impact that it would have for tribal emergency response and homeland security planning would be substantially beneficial. Under this legislation tribes would be able to petition to receive their Homeland Security funding directly.

#### **H.R. 1544:**

On April 12, 2005, Chairman Chris Cox (R-CA) of the House Homeland Security Committee introduced legislation H.R. 1544, the *Faster and Smarter Funding for First Responders Act*, which seeks to allocate homeland security dollars to police, firefighters, and other first-responders based on the threat of terrorist attack. Chairman Cox's bill would assign money based on threat and would make a guarantee that each state receive at least 0.25 percent of the first-responder grant pool. States that abut an international border would receive at least 0.45 percent. On May 12, 2005, the bill was passed by the House of Representatives after a floor vote and has been referred to the Senate for consideration. The provisions of the bill would allow Indian tribes to apply to the Department of Homeland Security for funding after submission of such grant proposal to the state where the tribe is located and after the state is allowed to comment directly to the Secretary of Homeland Security before any grant is given to any Indian tribe. The Secretary of Homeland Security is allowed to grant funds to no more than 20 Indian tribes per fiscal year, if the tribes meet certain eligibility criteria. The bill also provides penalties to States if they fail the funding obligations to local governments, first responders, and other local groups set forth in this act. For tribes this means an opportunity to seek direct funding, through covered grants, if the state fails to provide the funding or resources necessary for tribal first responders to function appropriately within 45 days of receipt of funding from the DHS.

#### **Implications for Tribes:**

Listed within this bill is the requirement of states to coordinated regional and tribal applications with State applications for Homeland Security funding. The importance of this measure is its requirement by the State to work with tribal governments in collaborative efforts to bring forth a Homeland Security plan that meets the criteria of keeping individuals, tribal and non-tribal, safe.

### **H.R 418:**

The Real ID Act of 2005, H.R 418, is titled an “act to establish and rapidly implement regulations for State driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, and to ensure expeditious construction of the San Diego border fence.” Rep James F, Sensenbrenner Jr. (WI-5) introduced the bill on January 26, 2005. On February 17, 2005 H.R 418, known by it’s short title as the REAL ID Act of 2005, was referred to the Senate were it was read twice and referred again to the Senate Committee on the Judiciary. Sen. Arlan Specter (R-PA) chairs the Committee and Sen. Patrick Leahy (D-VT) is the Committee’s Ranking Democratic Member.

The Real ID Act has three Titles. Each Title has implications for tribal governments. Title I will alter how the Department of Homeland Security can waive tribal, state and federal law that may protect tribal interests such as sacred sites and natural resources on reservation lands. Title II has implications for tribally issued identification cards that tribal members previously used to cross borders. Title III directly addresses the role of tribes in a technology assessment of border security.

### **Title I:**

#### **Amendments to Federal Laws to Protect Against Terrorists Entry-**

(Sec. 102) Amends the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to authorize the Secretary of Homeland Security (the Secretary), in the Secretary's sole discretion, to waive all laws as necessary to ensure expeditious construction of certain barriers and roads at the U.S. border. Section 102 also prohibits courts, administrative agencies, and other entities from reviewing the Secretary's decision or from ordering relief for damages alleged to have resulted from such decision.

#### **Implications for tribes:**

According to Section 102 of Title I the Secretary of the U.S Department of Homeland Security will be able to waive all laws, as the Secretary deems fit, to ensure that U.S boarder security is able to function as efficiently and expeditiously as possible. As a result many federal policies such as NAGRPA and other federal standards put into place to protect tribes could be placed in danger of being denied. In addition to federal protections of tribal interests, the Secretary may waive tribal laws and intergovernmental agreements between tribes and states that govern tribal lands and sacred sites. Such waivers by the Secretary could occur with little or no consultation from tribal governments.

### **Title II:**

#### **Improved Security for Driver’s Licenses and Personal Identification Cards-**

(Sec. 202) Prohibits Federal agencies from accepting State issued driver's licenses or identification cards unless such documents are determined by the Secretary to meet minimum security requirements, including the incorporation of specified data, a common machine-readable technology, and certain anti-fraud security features.

Section 202 sets forth minimum issuance standards for such documents that require: (1) verification of presented information; (2) evidence that the applicant is lawfully present in the United States; and (3) issuance of temporary driver's licenses or identification cards to persons temporarily present that are valid only for their period of authorized stay (or for one year where the period of stay is indefinite).

Section 205 makes available funding grants for state governments in order to make state issued driver's licenses to conform the minimum issuance standards.

### **Implications for Tribes:**

As outlined in section 201 of Title II Federal Agencies will be prohibited from accepting State issued documents verifying identification of individuals unless certain security standards put forth under federal guidelines are met. This provision presents a change for tribes that are located near major international boarder crossing and typically issue forms of tribal I.D. Although tribal I.D are government issued forms of identification, the question to be addressed is if they meet the federal standards for forms of I.D. that would allow for boarder crossing.

As is the case with state driver's licenses, it is typically the case that tribal I.D. does not meet the Section 202 standards. Despite this, Section 205 neglects to mention tribes as eligible for grants to conform I.D. cards that tribal members have used for boarder crossing in the past.

Also pertinent to tribes is the third section within the Minimum Issuance Standards for documents necessary during boarder crossings. This section states that "issuance of temporary driver's licenses or identification cards to persons temporarily present are valid only for their period of authorized stay (or for one year where the period of stay is indefinite)." Currently there is a necessity for most tribes to address a protocol for regard the "period of authorized stay" for aliens residing within tribal boarders on a temporary status. The implications for tribes in respect to this standard would be their handling of individuals either worked within tribal lands but were residents of another country or tribal residents that were residing on tribal land but worked in locations that were outside U.S boarders.

### **Title III:**

#### **Boarder Infrastructure and Technology Integration-**

(Sec. 301) Directs the Under Secretary of Homeland Security for Border and Transportation Security to study the technology, equipment, and personnel needed to address security vulnerabilities within the United States for each Customs and Border Protection field office that has responsibility for U.S. borders with Canada and Mexico.

(Sec. 303) Requires the Secretary, acting through the Under Secretary for Border and Transportation Security, to develop and implement a plan to: (1) improve communications systems of Federal agencies to facilitate integrated communications among such agencies, State and local government agencies, and Indian tribes on border security matters; and (2) enhance related information sharing among such entities.

### **Implications for Tribes:**

According to sections 301 and 302 of Title III the Under Secretary of the U.S. Department of Homeland Security for Border and Transportation Security will be reviewing and seeing where vulnerabilities lie within technological standards that will be set forth in regard to boarder security. As such tribes should find it necessary to update and improve their technological facilities to meet these guidelines or if not show the disconnect that exists between what tribes have and the standards that are being set forth under these federal guidelines. The Act does not

specify funding for the Under Secretary's reporting. This may limit the amount of funding available for an adequate assessment and reporting.

## **H.R 1137:**

U.S. Rep Alcee L. Hastings [FL-23] introduced H.R 1137 the "Responding Equitably, Swiftly, Proportionally, and On-time to Natural Disasters Act of 2005" on March 3<sup>rd</sup> 2005. The Bill was then referred to the House Committee on Transportation and Infrastructure. The resolution was then referred again to the House Subcommittee on Economic Development, Public Buildings and Emergency Management on March 8<sup>th</sup>, 2005.

Within the Responding Equitably, Swiftly, Proportionally, and On-time to Natural Disasters Act of 2005 two major sections should draw concern from tribal governments and require further review. Under the ENSURING DECLARATION section, the Bill amends provisions that ensure funding is available and allocated equitably to all groups needing assistance in different communities during a post disaster state.

Under the section REIMBURSEMENT FOR DEBRIS REMOVAL IN PRIVATE COMMUNITIES, the Bill amends provisions to ensure that states and local governments are able to collect reimbursement for debris removal within their community so long as they met set guideline.

The House Subcommittee on Economic Development, Public Buildings and Emergency Management, where H.R. 1137 currently is being reviewed, held an oversight hearing on April 14, 2005 titled "The National Preparedness System: What are we preparing for?" While the hearing broadly addressed homeland security directives, national preparedness and national response issues, the hearing's background addressed the issue of appropriations. The Subcommittee's background material stated the following:

Finally, many aspects of the National Preparedness System impose new requirements on State, local and tribal governments. It also remains unclear under what legal authority the Administration will impose these requirements in the absence of providing funding. While the Spending Clause of the Constitution of the United States would allow the Administration to require compliance with a broad set of regulations, any requirement for which funding is not provided could potentially be seen as an unfunded mandate, or worse, not be adopted at all.

This statement may indicate the Subcommittee's future analysis of the H.R 1137 provisions in Sections 2 ENSURING DECLARATION and 3 REIMBURSEMENT FOR DEBRIS REMOVAL IN PRIVATE COMMUNITIES that describe funding for tribes.

### **Section 2: ENSURING DECLARATION**

The Responding Equitably, Swiftly, Proportionally, and On-time to Natural Disasters Act of 2005 - Amends the Robert T. Stafford Disaster Relief and Emergency Assistance Act to include, "1) ensuring that Federal assistance is adequate and allows individuals to maintain a quality of life that is, to the extent possible and practicable, similar to that before a disaster without adversely affecting a State or local government's ability to provide the necessary services to its citizens; 2) ensuring that minority and low-income individuals and households and those living in underserved communities receive the equitable technical, human, and financial assistance."

### **Implications for Tribes:**

These amendments help ensure that tribes are given an equitable chance to receive those funds available to communities that qualify for post disaster relief, that is vital to a tribe's ability to regain the community's pre-disaster quality of life.

### **SECTION 3: REIMBURSEMENT FOR DEBRIS REMOVAL IN PRIVATE COMMUNITIES.**

Reimbursement for Debris Removal on Private-Lands and Communities-

(1) IN GENERAL- A State or local government shall be eligible for reimbursement under this title for debris removal on private lands if the State or local government maintains the roads utilized for access to such lands, provides public safety services, or provides individual and communal garbage removal services to the residents of such lands.'

(2) SPECIAL RULE- A State or local government shall be eligible for reimbursement under this title for debris removal on private lands in a community if failure to remove debris in that community places the lives, health, and safety of those living in the community at immediate risk.

### **Implications for Tribes:**

Debris removal is a significant and necessary step in post-disaster clean up. Like state and local governments, tribes have a responsibility to reservations residents in a post-disaster setting. According to these amendments tribal communities, tribes will be able to receive reimbursement for debris removal in a post disaster time if they meet the eligibility requirements. These requirements include maintaining roads that will be utilized for access to provide public safety services and/or individual and community garbage removal services to those living in the disaster relief area. These are the same requirements that States or local governments must meet OFFICE OF TRIBAL SECURITY to receive the same funding.

### **H.R 1320:**

H.R 1320, known as the Security Boarders Act, was introduced into the House by Representative Silvestre Reyes (TX-16) on March 15<sup>th</sup> 2005. The Act was referred to the House Committee on the Judiciary as well as the House Committee on Homeland Security, at which point the Committee on Homeland Security referred the Act again to the House Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity on March 29<sup>th</sup> 2005. The House Judiciary referred the Act as well to the House Subcommittee on Immigration, Border Security, and Claims on April 4<sup>th</sup> 2005.

The most important provision in this legislation that is now being discussed within these two subcommittees falls under Section 151, the establishment within the U.S. Department of Homeland Security of an OFFICE OF TRIBAL SECURITY.

Under Section 151 the responsibilities of the Office of Tribal Security would include:

- 1) Coordinating relations with the DHS and federally recognized tribes on issues regarding matters of homeland security.

- 2) A position will be established entitled the Director of Tribal Homeland Security to head this office. The director would act as the point person to liaison between the tribes and the DHS.
- 3) The director of the Office of Tribal Security would also have to be accountable for making sure that the responsibilities owed by the federal government to tribes would be recognized by the DHS.
- 4) Also the director would be responsible for soliciting the concerns of these tribal groups as well as other organizations interested in Indian affairs.
- 5) The director would also be responsible for making sure that the Office of Tribal Security met the uniform standard put forth by the DHS.
- 6) In addition to these requirements the Director's biggest responsibilities would lie within their responsibility to coordinate between the various governmental agencies that work with the DHS and making sure to liaison the relationship between these offices and the federally recognized tribes.

**Implications for Tribe:**

These changes in the DHS structure will better enable DHS to understand the needs of tribal communities located along the boarder. While many tribes are now struggling just to meet the minimum standard, or worse fall short of it, this piece of legislation will help the DHS understand the need to better equip tribal communities with the materials necessary to protect not only the tribes receiving the assistance but rather the nation as a whole.