



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

To: Deputy Commissioner for Indian Affairs

From: Derril B. Jordan, Associate Solicitor
Division of Indian Affairs

Subject: Review of the Draft "Proposed List of Inherently Federal Functions and Non-Inherently Federal Functions of the Bureau of Indian Affairs"

You have asked us to review and comment on the May 1997 draft document entitled "Proposed List of Inherently Federal Functions and Non-Inherently Federal Functions of the Bureau of Indian Affairs" (List) and the accompanying Tribal/Federal Workgroup on Tribal Shares document titled "Assumptions and Principles." As we more fully explain below, we believe that the definition of the term "Inherently Federal Function" (IFF) used by the Workgroup may be misleading and inaccurate for purposes of determining tribal shares availability. Moreover, we believe that the List may not be useful to the Bureau as a tool for reviewing and negotiating proposed programs, services, functions, and activities for inclusion in self-determination contracts and self-governance annual funding agreements (AFAs).

We have two main concerns with the Workgroup's List: (1) developing such a list based on a definition of IFF departs from the guidance the Solicitor provided in his May 17, 1996 memorandum "Inherently Federal Functions under the Tribal Self-Governance Act"; and (2) any such list would be misleading because certain functions which are not inherently federal in nature may still be unavailable to tribes and tribal organizations under self-determination contracts and self-governance AFAs. We discuss each issue below.

Definition of Inherently Federal Functions. The May 17, 1996 Solicitor's memorandum provided all Bureaus within the Department guidance on evaluating each proposal to decide whether it includes activities which are inherently Federal. However, the Solicitor made clear in his memorandum that there could be no definitive definition of inherently federal functions.

This memorandum cannot, and is not intended to, provide a definitive answer regarding how the inherently Federal function provision applies to a tribal request to perform a specific activity under an annual funding agreement. Each request must be individually analyzed in terms of the specific function sought to be performed by a tribe, the applicable Federal law governing the activity at issue, and the amount of authority to be retained by the Department.

Solicitor's May 17, 1996 memorandum at 1 (emphasis added). The Solicitor's memorandum further advises Departmental Bureaus to evaluate requests for specific functions on a case-by-

case basis, utilizing the Office of Management and Budget's guidance on government contracting in conjunction with the qualifications set forth in the Solicitor's memorandum.

Nevertheless, as a part of the tribal shares process, the Workgroup developed an IFF definition¹ in order to simultaneously identify all Bureau IFFs. As the Solicitor's memorandum made clear, the final analysis of whether a particular function is an IFF requires a particularized legal review for each function. The Workgroup's brightline IFF definition and listing activity are inconsistent with the Solicitor's memorandum. The Bureau should use the Solicitor's guidance, and not the Workgroup's definition, in evaluating whether a specific function requested by a tribe is an IFF.

Activities available under Pub. L. 93-638, as amended. Our second concern with the List is that utilization of such a list for purposes of determining tribal shares availability is misleading. Certain functions which are not IFFs may still not be available to tribes and tribal organizations under self-determination contracts and self-governance AFAs.

Focusing solely on whether an activity is an IFF ignores the declination criteria. Title I of the Indian Self-Determination Act provides five specific reasons why the Secretary may decline to enter into a contract: (1) unsatisfactory services; (2) protection of trust resources is not assured; (3) the proposed project or function cannot be properly completed or maintained; (4) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract; or (5) that the contractor cannot lawfully carry out the program. See 25 U.S.C. § 450f(a)(2). Although the declination criteria are not specifically part of Title IV, the Secretary may refuse to include certain functions in an AFA on the basis of these factors.

Thus, if the Bureau focuses only on whether a function is inherently Federal, it may not look at the other reasons for not including functions in self-determination contracts and self-governance AFAs. The other reasons for not including functions, such as adverse impacts to the Secretary's fulfillment of the trust responsibility, must be considered when deciding whether to include certain functions in a self-determination contract or self-governance AFA. Based on the foregoing, we recommend that the Bureau refrain from using the proposed list as a method of identifying IFFs as a basis for determining tribal shares. The proposed IFF listing process is inconsistent with the Solicitor's May 17, 1996 memorandum advising that requested functions be reviewed on a case-by-case basis. Furthermore, it does not accurately reflect whether an activity is available for tribal shares.

¹ Under the Workgroup's definition, "[o]f all the functions which the BIA performs in carrying out its mission on behalf of all tribes, IFFs are those functions which by law (U.S. Constitution, treaties, federal statutes and federal court decisions) the federal government must provide, but which cannot be delegated to tribes for performance because the Secretary is constitutionally or statutorily barred from doing so."

cc: Solicitor
Assistant Secretary--Indian Affairs
Director, Office of Tribal Services
DIA