# United States Department of the Interior

OFFICE OF THE SOLICITOR

May 17, 1996

MEMORANDUM

To: Assistant Secretaries and Bureau Heads

From: Solicitor

Subject: Inherently Federal Functions under the Tribal Self-Governance Act

This memorandum analyzes and provides general guidance on the meaning of the term "inherently Federal function" as used in Title IV of the Indian Self-Determination and Education Assistance Act (ISDEA), as added by Pub. L. 103-413, Title II, 108 Stat. 4250 (Oct. 25, 1994) ("Tribal Self-Governance Act").

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. This memorandum outlines the analysis that an agency must conduct, in consultation with the Solicitor's Office, when a tribe submits such a request.

## I. INTRODUCTION

### A. Impact on Previous Opinions

This opinion supersedes the December 16, 1994 opinion signed by the Associate Solicitor for General Law on this subject. The Associate Solicitor had relied upon a 1990 opinion issued by the Department of Justice's Office of Legal Counsel (OLC), which concluded that the Appointments Clause of the U.S. Constitution prohibits assigning certain Federal functions to individuals who are not officers of the United States. On September 7, 1995, OLC modified its previous view to conclude that the Appointments Clause rarely prohibits the delegation of Federal functions to non-Federal parties. See also OLC, "The Constitutional Separation of Powers between the President and Congress," May 7, 1996, at 20-28. The recent OLC opinions require, in turn, amendment of our earlier advice on the Appointments Clause.

This opinion also amends three other previous opinions from this Office. Based upon the now withdrawn December 16, 1994 opinion on inherently Federal functions, the Associate Solicitors for Conservation and Wildlife and for Energy and Resources issued opinions on May 8, 1995 on how the inherently Federal function restriction would impact the ability of the National Park Service, the Fish and Wildlife Service, and the Bureau of Land Management to enter into self-governance agreements for their programs. I forwarded these memoranda to the Assistant to the Secretary with an explanatory memorandum also dated May 8, 1995. The May 8, 1995 opinions by the Associate Solicitors are superseded to the extent they rely upon the December 16, 1994 opinion by the Associate Solicitor for General Law. Their analysis of the Tribal Self-Governance Act in respects other than the inherently Federal function restriction remains in effect.

B. Overview and Summary

Under the Tribal Self-Governance Act, the Secretary may enter into annual funding agreements under which a tribe conducts certain non-Bureau of Indian Affairs (BIA) programs and activities. Specifically, the Secretary is authorized to contract to tribes non-BIA programs and activities that are (a) otherwise available to Indian tribes or Indians or (b) are of special geographic, historical, or cultural significance to a tribe. 25 U.S.C. §§ 458cc(b)(2) and (c).

Under section 403(k) of the Tribal Self-Governance Act, 25 U.S.C. § 458cc(k), the Secretary is specifically prohibited from contracting out to tribes any function involved in these non-BIA programs or activities that is inherently Federal. This memorandum interprets the meaning of section 403(k)'s inherently Federal restriction from the language of the Tribal Self-Governance Act, its legislative history, guidance produced by the Office of Management and Budget (OMB) that was in effect at the time the statute was drafted, and Federal case law.

Based on the statutory text and the legislative history, the agencies should use guidance on government contracting prepared by OMB and in effect at the time section 403(k) was adopted. That guidance is attached.

There are, however, some important qualifications in applying that guidance. First, federal law makes clear that tribes are not analogous to private contractors because they possess a substantial measure of independent sovereign authority. Agencies must therefore take into account, in applying section 403(k)'s restriction, the relation of the function being sought in a contract to the tribal sovereign power.

The Tribal Self-Governance Act leaves it to the informed discretion of the Secretary to decide whether and on what terms

to grant a request,[1] but it also directs the Secretary to apply federal law "in a manner that will facilitate ... the inclusion of programs, services, functions and activities" in self-governance compacts. 25 U.S.C. § 458cc(i). Moreover, the OMB guidance must yield to the extent it conflicts with specific provisions in the Tribal Self-Governance Act. Finally, agencies should bear in mind that section 406(b) of the Act, 25 U.S.C. § 458ff(b), specifically disclaims any intent to "diminish the Federal trust responsibility" with respect to Indian affairs.

## II. STATUTORY LANGUAGE

The statutory provision we are here concerned with, section 403(k) of the Tribal Self-Governance Act, provides, in pertinent part[2]:

> Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under sections 403(b)(2) and 405(c)(1) with respect to functions that are inherently Federal . . . .

Nothing in the section 403(k) or anywhere else in the Tribal Self-Governance Act defines or explains what constitutes "functions that are inherently Federal." Nor does the term have a freestanding meaning that can readily be applied to or incorporated into the Tribal Self-Governance Act.[3]

---

[1] See 25 U.S.C. § 458cc(b)(2), disclaiming any intent to "provide any tribe with a preference . . . [for administering] programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law."

[2] The remainder of this provision, which prohibits the Secretary from entering into agreements "where the statute establishing the existing program does not authorize the type of participation sought" by the tribes, was addressed in my May 8, 1995 memorandum. See also the last paragraph before the conclusion, below.

[3] The term "inherently federal responsibilities" was discussed in a January 20, 1994 notice of proposed rulemaking (NPR) by the Departments of the Interior and Health and Human Services under the Indian Self-Determination and Education Act Amendments of 1988 involving P.L. 93-638 contracts. See 59 Fed. Reg. 3166, 3181-82 (1994) (proposed January 20, 1994). Congress a few months later interrupted and reformulated the rulemaking of which this provision was part, limiting the areas in which rulemaking could be undertaken and requiring repromulgation through negotiated rulemaking. Pub. L. No. 103-413, § 105; 25 U.S.C. §

Federal court opinions that refer to "inherently Federal functions" are not helpful in the context of the Tribal Self-Governance Act. See, e.g., Caban v. United States, 728 F.2d 68, 77 (2d Cir. 1984) (Cardamore, J., concurring) (referring to the inherently Federal function of "border protection" without analysis); Anderson v. Gladden, 293 F.2d 463 (9th Cir. 1961) (police power over Indians was not so inherently Federal as to limit Federal Government's ability to relinquish jurisdiction to States -- a different matter from delegating authority to States to implement federal law).[4]

Without guidance from the language of the Act, we turn to the legislative history. See, e.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).

## III. LEGISLATIVE HISTORY

Section 403(k) was added to the Tribal Self-Governance Act late in its journey through the legislative process. Its inclusion was explained by one of the Act's principal sponsors, Senator McCain, on the Senate floor shortly before final passage:

> Mr. President, title II of H.R. 4842, the Tribal Self-Governance Act of 1994, is identical to H.R. 3508 and reflects the various agreements negotiated by the Senate Committee on Indian Affairs and the House Subcommittee on Native American Affairs with the Department of the Interior, Self-Governance tribes and the Senate Committee on Environment and Public Works. In addition, a new subsection (k) has been added which addresses further concerns raised by the International Association of Fish and Wildlife Agencies.

---

450k(a)(1); see S. Rep. No. 103-374, 103d Cong. 2d Sess. 3, 14 (1994). The January 1994 Notice was thereafter withdrawn. 60 Fed. Reg. 19,387 (1995). This NPR is not referred to in either the Tribal Self-Governance Act or its legislative history. All of this makes the NPR's discussion of "inherently federal responsibilities" of doubtful relevance to the meaning of § 403(k).

[4] The federal courts have occasionally used the term "inherently Federal" to describe either the supremacy of Federal law over state law or for the purpose of determining Federal court jurisdiction. See, e.g., Newberry v. United States, 256 U.S. 232 (1921). This is not applicable to the issue before us.

. . . .

Mr. President, in recent weeks concerns have been raised by the International Association of Fish and Wildlife Agencies [IAFWA] about the potential impact of self-governance legislation on the existing jurisdiction and authority of the tribal, State and Federal governments over natural resources, including fish and wildlife resources. . . .

. . . .

Consequently, I asked Secretary Babbitt to review H.R. 3508 in light of IAFWA's concerns. . . .

I fully agree with the Secretary's construction of H.R. 3508--which also applies to title II of H.R. 4842--that the bill is not intended to change the jurisdictional authorities of the tribal, State and Federal governments over natural resources, including fish and wildlife resources.

. . . .

Concerns have been raised as to the scope of non-BIA programs, services, functions and activities that are subject to compacts pursuant to sections 403(b)(2). Because National Parks and National Wildlife Refuges, for example, and programs such as the Endangered Species Act and the Marine Mammal Protection Act were established by Congress to benefit the general public, including Indians, a question could arise as to what elements, if any, of the Park and Refuge programs fall within the scope of section 403(b)(2). It is not intended that the Secretary's authority to enter into compacts under section 403(b)(2) permit the transfer of inherently Federal responsibilities vested by Congress in the Secretary which are determined by the Federal courts not to be delegable under the constitution.

It is not possible at this time to list all the elements of Federal programs which may not be subject to self-governance compacts, but such a list certainly could include discretionary administration of Federal fish and wildlife protection laws, promulgation of regulations, obligation and allocation of Federal funds, the exercise of certain prosecutorial powers, and other discretionary functions vested in Federal officials. . . .

To make clear that nothing in H.R. 4842 is intended to permit the Secretary to enter into a compact for the performance of responsibilities which are inherently Federal, that is, Federal responsibilities vested by the Congress in the Secretary which are determined by the courts

not to be delegable under the constitution, section 403 is amended by adding a new subsection (k) . . . .

140 Cong. Rec. S14678-79 (daily ed. Oct. 7, 1994) (statement of Senator McCain).[5]

Senator McCain describes two somewhat different types of limitations flowing from the concept of "inherently Federal." The first type concerns "discretionary functions vested in Federal officials," and the Senator lists several examples in the penultimate paragraph quoted above. The second type of limitation consists of those functions that have been determined by the courts not to be delegable under the Constitution.

If these two types of limitations were coterminous, the meaning of this part of section 403(k) would be clear -- inherently Federal functions would simply be those programs or activities that constitutionally cannot be delegated outside the Federal government. But, as explained further below in this memorandum, these two are not exactly congruent. The Constitution does not, as currently applied by the Executive Branch and the Supreme Court, prohibit the Secretary from delegating certain discretionary functions currently vested in the Federal government. That being the case, the question arises whether section 403(k), as explained by its sponsor, Senator McCain, incorporates only constitutional limits, or something broader.

It is possible to read section 403(k)'s reference to "inherently Federal" as incorporating only constitutional limitations. In parts of his floor statement Senator McCain seemed to refer only to constitutional limitations, by describing the restriction as applying to "Federal responsibilities which are inherently Federal, that is, Federal responsibilities vested by the Congress in the Secretary which are determined by the Federal courts not to be delegable under the constitution . . . ." Id.

Nevertheless, for three reasons, we reject such a reading. First, the text of section 403(k) does not refer specifically to the Constitution or any recognized constitutional doctrine. Used alone, the word "inherently" might suggest a constitutional principle, because the Constitution might be said to establish the most basic, or "inherent," aspects of the Federal system. But "inherently" is used here as part of a disclaimer of any intent to "alter" the Secretary's "existing statutory

---

[5] In another part of his floor statement, Senator McCain discussed the second part of section 403(k), which prohibits the Secretary from contracting out programs where the statute establishing the program does not authorize the participation sought by a tribe. This discussion is not applicable to the inherently Federal function restriction.

authorities" regarding certain functions (those "that are inherently Federal"). If the intent was merely to preserve the applicability of the Constitution, this is quite a long-winded way to say it.

Second, constitutional limitations automatically apply under the Supremacy Clause, regardless of whether a statute or its legislative history specifically refers to those limitations. See, e.g., Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935). Thus, interpreting section 403(k) to set out only constitutional limits makes it superfluous. This is not the ordinary way to interpret a statute; to the contrary, statutory provisions are ordinarily read to give each part genuine meaning. See, e.g., Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992).

Third, the chief sponsor's floor explanation for section 403(k) seemed plainly to contemplate that it made non-delegable certain Federal program elements -- such as "discretionary administration of Federal fish and wildlife protection laws . . . [and] obligation and allocation of Federal funds" -- where constitutional barriers to delegation are doubtful.[6]

For these reasons, we believe Congress intended the inherently Federal function restriction in section 403(k) to prohibit some delegations that would be acceptable under the Constitution.

## IV. CONSTITUTIONAL RESTRICTIONS

The principal constitutional restriction that might come into play here is the so-called non-delegation doctrine.[7] This

---

[6] At the time the Secretary and Senator McCain were addressing this issue, the OLC's 1990 published guidance considered the Appointments Clause of the Constitution to be a significant constitutional barrier to the exercise of substantial authority under federal law by non-federal actors. See Section I(A), supra; see also footnote 7, infra. It is not clear whether this influenced the Senator to characterize rather broadly what § 403(k) protected against delegation.

[7] As noted in part I(A) above, the Associate Solicitor for General Law's December 16, 1994 advice was based in part upon earlier OLC guidance on the Appointments Clause. Under that view private individuals (i.e., individuals who are not officers properly appointed under the Appointments Clause) were not able to determine the policy of the United States or interpret and apply Federal law in any way that bound the United States or affected the legal rights of third parties. OLC's September 7, 1995, opinion, by contrast, concludes that the Appointments Clause "simply is not implicated when significant authority is

doctrine holds that there is some constitutional limit on the ability of Congress to delegate its legislative powers. The Supreme Court has only rarely (twice in two centuries) used the doctrine to strike down federal statutes. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Court has, however, applied the doctrine in ways short of finding statutes unconstitutional, such as in narrowing the interpretation of statutes. See, e.g., Greene v. McElroy, 360 U.S. 474, 507 (1959); National Cable Television Ass'n Inc. v. United States, 415 U.S. 336 (1974). See also Laurence H. Tribe, American Constitutional Law 365-66 (2d ed. 1988). While the doctrine remains viable, the extent to which it may place any genuine limits on implementing the Tribal Self-Governance Act is not very clear.[8]

To the extent the doctrine contains limits, the courts, starting with the Supreme Court, have determined that those limits are relaxed where the delegation is to a tribe in an area where the tribe exercises sovereign authority. In United States v. Mazurie, 419 U.S. 544 (1975), a unanimous Supreme Court, speaking through then Justice Rehnquist, upheld 18 U.S.C. § 1161, a statute authorizing Indian tribes to regulate the introduction of liquor into Indian country. The statute had been challenged by non-tribal members who operated a tavern on non-Indian fee land within the reservation. The Court rejected the argument that Congress could not delegate such authority to tribes, explaining:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936). Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, Worcester v. Georgia, 6 Pet. 515, 557 (1832); they are "a

---

devolved upon non-federal actors." Id. at 5. See also OLC's May 7, 1996, opinion, at 20, 24-26. Accordingly, we do not consider the Appointments Clause to be applicable here.

[8] The September 1995 OLC Opinion discussed in Part I(A) and footnote 6, above, suggests in a footnote that "the delegation to private persons or non-federal government officials of federal law authority . . . can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and general separation of powers principles," id. at 6, n.7 (citations omitted), but provided no elaboration.

> separate people" possessing "the power of regulating their internal and social relations . . . ," United States v. Kagama, 118 U.S. 375, 381-2 (1886); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973).
>
> Cases such as Worcester, supra, and Kagama, supra, surely establish the proposition that Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations" . . . . These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes." Cf. United States v. Curtiss-Wright Export Corp., supra.

419 U.S. at 556-57. See also Rice v. Rehner, 463 U.S. 713, 721-24 (1983) (describing Mazurie's holding as hinging primarily on the tribe's status as governing body of the reservation).

Although Mazurie pertained specifically to a congressional delegation to tribes, it has been relied on to support Executive Branch delegations of a governmental function to a tribe. In Southern Pacific Transp. Co. v. Watt, 700 F.2d 550, 556 (9th Cir. 1983), the applicable statute authorized the Secretary to issue rights of way through Indian reservations, but made no mention of tribal approval. The Secretary's implementing regulations required tribal approval of all right of way applications. Id. at 552. The Court of Appeals viewed the Secretary's action as a subdelegation of his authority to disapprove the grant of a right of way, but upheld it because of the tribe's jurisdiction over the affected lands and the Mazurie decision. Id. at 556. Similarly, in Nance v. Environmental Protection Agency, 645 F.2d 701, 714 (9th Cir. 1981), the EPA Administrator promulgated regulations that allowed tribes with reservations to initiate a process under the Clean Air Act to raise regulatory protection for air quality on their reservations. The plaintiffs argued that if such a delegation were permitted by the Clean Air Act, as the court held it was, the delegation would be unconstitutional because it would give "the Indian tribes authority to affect land use by non-Indians outside the reservation area." Id. at 714. The court rejected the argument, relying on Mazurie, and upheld the EPA action. 645 F.2d at 715.

In both of these post-Mazurie cases upholding executive branch delegations to tribes, the courts relied to some extent on the agency's retention of ultimate authority for the delegated activity or decision. The court in Southern Pacific upheld the Secretary's delegation to the tribe in part on the ground the Secretary retained final authority to approve the right of way, see 700 F.2d at 556; and the court in Nance upheld EPA's delegation to the tribe in part because EPA retained certain checks on tribes' exercise of this authority, see 645 F.2d at 715. See also Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 Nw. U. L. Rev. 62, 95-101 (1990).

These authorities stand for the proposition that contracting out programs under the Tribal Self-Governance Act cannot be seriously questioned under the non-delegation doctrine, at least, or especially, where the Secretary retains responsibility for the management, oversight and resumption of programs for which he has statutory responsibility. Because the degree of retained responsibility will be determined through the terms of specific agreements negotiated between agencies and tribes, we must await further implementation of the Tribal Self-Governance Act to address whether any delegation problem might arise.

## V. DISCRETIONARY FUNCTIONS VESTED IN FEDERAL EMPLOYEES

In Part III above we concluded that section 403(k)'s prohibition on contracting inherently Federal functions under the Tribal Self-Governance Act is not limited to constitutional restrictions. We therefore must address the scope of these additional limits. The best place to start the analysis is Senator McCain's floor statement. The Senator disclaimed any attempt to "list all the elements of Federal programs which may not be subject to self-governance compacts," but said such a list "certainly could include" the following:

- discretionary administration of Federal fish and wildlife protection laws;
- promulgation of regulations;
- obligation and allocation of Federal funds;
- exercise of certain prosecutorial powers.

While this is useful guidance, it hardly provides a precise directive. The Secretary is still left with the task of arriving at a reasonable construction of this ambiguous statutory provision. Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984).

Because there is nothing more than Senator McCain's statement in the legislative record, we have looked elsewhere for guidance and have decided to follow, except as qualified further below, the policy guidance issued by the Office of Management and Budget (OMB) on inherently governmental functions. OMB prepared this guidance in addressing what functions of government may be contracted out to private entities, and it was in effect at the time section 403(k) was drafted and enacted into law. OMB Policy Letter 92-1, Inherently Governmental Functions (September 23, 1992) (hereafter, OMB guidance) (copy attached).

The OMB guidance expressly "does not purport to specify which functions are, as a legal matter, inherently governmental, or to define the factors used in making such legal determination." Id. at 2. Nevertheless, there is considerable symmetry between some of its principles and Senator McCain's characterizations on the Senate floor. Given this background, we believe the OMB guidance is an appropriate tool for determining what an "inherently Federal" function is in the context of the Indian Self-Governance Act.

By way of summary, the OMB guidance defines such a function as involving,

> among other things, the interpretation and execution of [U.S. laws] so as to:
>
> (1) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise;
>
> (2) determine, protect, and advance its economic, political, territorial, property, or other interest by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
>
> (3) significantly affect the life, liberty, or property of private persons;
>
> (4) commission, appoint, direct, or control officers or employees of the United States;
>
> (5) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.
>
> Inherently governmental functions do not normally include . . . functions that are primarily ministerial and internal in

nature, such as building security . . . or other routine . . . services.

Id. at 2. The OMB guidance includes, as an Appendix A (also attached), an illustrative list of functions considered by OMB to be inherently governmental and not to be contracted outside the Federal Government. The OMB guidance is necessarily quite general, and will not answer all the questions that may be raised. Still, we believe it is a useful tool for addressing, in the context of specific tribal requests, the limitations of section 403(k).

In applying the OMB guidance, however, we must keep in mind the idea that it was prepared in the context of government contracting with essentially private entities. Indeed, it was issued pursuant to the Office of Federal Procurement Policy Act, 41 U.S.C. § 405(a). Under the Tribal Self-Governance Act, by contrast, we are dealing with agreements with Indian tribes that generally possess sovereign authority. This creates an important limitation on how the OMB guidance ought to be applied here.

As discussed in the previous section, the Supreme Court's decision in United States v. Mazurie and its progeny relax the non-delegation doctrine in the tribal context. While these cases did not arise in the context of the Tribal Self-Governance Act, we believe the principle they apply is appropriate to apply in this context. This means, in turn, that the OMB guidance should not be applied as strictly in the tribal context. This is particularly true since the OMB guidance was developed in the context of contracting out functions to private entities, which tribes are not.

In addressing tribal requests for Self-Governance agreements, then, Departmental agencies should consider requests in relation to the extent of tribal sovereignty over the nature and scope of the functions sought to be delegated. The more a delegated function relates to tribal sovereignty over members or territory, the more likely it is that the inherently Federal exception of section 403(k) does not apply. This is so, moreover, even in circumstances where the OMB guidance would counsel against delegation.

While tribes have considerable sovereign powers, these powers are not unlimited, and their outer boundaries are not well-defined. See, e.g., Montana v. U.S., 450 U.S. 544 (1981); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). We caution, therefore, that it may not always be possible to reach definitive conclusions on the extent of tribal jurisdiction and how it should influence the application of section 403(k).

Four other cautions are necessary as we conclude this discussion of the general principles that should guide implementation of the act. First, close calls should go in favor of inclusion rather than exclusion, because section 403(i) of the Tribal Self-Governance Act directs the Secretary to "interpret each Federal law and regulation in a manner that will facilitate . . . the inclusion of programs, services, functions and activities in the agreements." 25 U.S.C §458cc(i). See also S. Rep. No. 205, 103d Cong., 1st Sess. 6, 11 (1993).

Second, apart from the Mazurie principle, the OMB guidance must yield to specific terms of the Tribal Self-Governance Act itself. For example, section 406(c) of the Act directs the Secretary to provide liability insurance and to take into consideration "the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act (FTCA)." 25 U.S.C. §458ff(c).[9] Similarly, section 406(c) authorizes the Secretary to acquire excess Federal property that can be transferred to a tribe under a self-governance agreement. 25 U.S.C. §458ff(c).[10] To the extent these things may be relevant in applying the OMB guidance, they must be taken into account.

Third, agencies should bear in mind that section 406(b) of the Act, 25 U.S.C. § 458ff(b), specifically disclaims any intent to "diminish the federal trust responsibility" with respect to Indian affairs. Thus, agencies' decisions to contract out functions to tribes related to the management of trust assets must be undertaken with the same level of care the trust responsibility demands of the agencies when they perform the function themselves. The terms of the particular contracts or annual funding agreements may need to define with some care how the federal trust obligations are being addressed.

Finally, as noted in footnote 2 above, this memorandum does not analyze the second clause of section 403(k), which prohibits the Secretary from entering into agreements where the statute establishing the existing program does not authorize the type of participation sought by the tribes. Agencies may need, with help from the Solicitor's Office, to analyze the statutes they administer to determine whether this second provision restricts

---

[9] Section 406(c) mandates that 25 U.S.C. § 450f(c) applies to self-governance agreements. 25 U.S.C. § 450f(c) requires that the Secretary obtain or provide liability insurance and in doing so take into consideration the extent to which liability is covered by the FTCA.

[10] Section 403(c) provides that 25 U.S.C § 450j(f)(3), which authorizes the Secretary to acquire excess or surplus Federal property for donation to a tribe, applies to self-governance agreements.

their ability to contract with tribes under the Tribal Self-Governance Act.

## VI. CONCLUSION

The OMB guidance and the Mazurie line of cases state some general principles, but section 403(k)'s inherently Federal restriction can only be applied on a case-by-case basis. Agencies considering contracting out a function which may be non-delegable under the attached OMB guidance should closely consult with the Solicitor's Office, including Regional and Field offices.

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL PROCUREMENT POLICY

September 23, 1992

Policy Letter 92-1

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Inherently Governmental Functions.

1. Purpose. This policy letter establishes Executive Branch policy relating to service contracting and inherently governmental functions. Its purpose is to assist Executive Branch officers and employees in avoiding an unacceptable transfer of official responsibility to Government contractors.

2. Authority. This policy letter is issued pursuant to subsection 6(a) of the Office of Federal Procurement Policy (OFPP) Act, as amended, codified at 41 U.S.C. § 405(a).

3. Exclusions. Services obtained by personnel appointments and advisory committees are not covered by this policy letter.

4. Background. Contractors, when properly used, provide a wide variety of useful services that play an important part in helping agencies to accomplish their missions. Agencies use service contracts to acquire special knowledge and skills not available in the Government, obtain cost effective services, or obtain temporary or intermittent services, among other reasons.

Not all functions may be performed by contractors, however. Just as it is clear that certain functions, such as the command of combat troops, may not be contracted, it is also clear that other functions, such as building maintenance and food services, may be contracted. The difficulty is in determining which of these services that fall between these extremes may be acquired by contract. Agencies have occasionally relied on contractors to perform certain functions in such a way as to raise questions about whether Government policy is being created by private persons. Also, from time to time questions have arisen regarding the extent to which de facto control over contract performance has been transferred to contractors. This policy letter provides an illustrative list of functions, that are, as a matter of policy, inherently governmental (see Appendix A), and articulates the practical and policy considerations that underlie such determinations (see § 7).

As stated in § 9, however, this policy letter does not purport to specify which functions are, as a legal matter, inherently governmental, or to define the factors used in making such legal determination. Thus, the fact that a function is listed in Appendix A, or a factor is set forth in § 7(b), does not necessarily mean that the function is inherently governmental as a legal matter or that the factor would be relevant in making the legal determination.

5. Definition. As a matter of policy, an "inherently governmental function" is a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.

An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

(a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(c) significantly affect the life, liberty, or property of private persons;

(d) commission, appoint, direct, or control officers or employees of the United States; or

(e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operations; operation of cafeterias; housekeeping; facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or other routine electrical or mechanical services.

The detailed list of examples of commercial activities found as an attachment to Office of Management and Budget (OMB) Cir. No. A-76 is an authoritative, nonexclusive list of functions that are not inherently governmental functions. These functions therefore may be contracted.

6. Policy.

(a) Accountability. It is the policy of the Executive Branch to ensure that Government action is taken as a result of informed, independent judgments made by Government officials who are ultimately accountable to the President. When the Government uses service contracts, such informed, independent judgment is ensured by:

(1) prohibiting the use of service contracts for the performance of inherently governmental functions (See Appendix A);

(2) providing greater scrutiny and an appropriate enhanced degree of management oversight (see subsection 7(f)) when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see Appendix B);

(3) ensuring, in using the products of these contracts, that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and

(4) ensuring that reasonable identification of contractors and contractor work products is made whenever there is a risk that the public, Congress, or other persons outside of the Government might confuse them with Government officials or with Government work products, respectively.

(b) OMB Circular No. A-76. This policy letter does not purport to supersede or otherwise effect any change in OMB Circular No. A-76, Performance of Commercial Activities.

(c) Drafting of Congressional testimony, responses to Congressional correspondence, and agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity. While the approval of a Government document is an inherently governmental function, its drafting is not necessarily such a function. Accordingly, in most situations the drafting of a document, or portions thereof, may be contracted, and the agency should review and revise the draft document, to the extent necessary, to ensure that the final

document expresses the agency's views and advances the public interest. However, even though the drafting function is not necessarily an inherently governmental function, it may be inappropriate, for various reasons, for a private party to draft a document in particular circumstances. Because of the appearance of private influence with respect to documents that are prepared for Congress or for law enforcement or oversight agencies and that may be particularly sensitive, contractors are not to be used for the drafting of Congressional testimony; responses to Congressional correspondence; or agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.

7. Guidelines. If a function proposed for contract performance is not found in Appendix A, the following guidelines will assist agencies in understanding the application of this policy letter, determining whether the function is, as a matter of policy, inherently governmental, and forestalling potential problems.

(a) The exercise of discretion. While inherently governmental functions necessarily involve the exercise of substantial discretion, not every exercise of discretion is evidence that such a function is involved. Rather, the use of discretion must have the effect of committing the Federal Government to a course of action when two or more alternative courses of action exist (e.g., purchasing a minicomputer rather than a mainframe computer, hiring a statistician rather than an economist, supporting proposed legislation rather than opposing it, devoting more resources to prosecuting one type of criminal case than another, awarding a contract to one firm rather than another, adopting one policy rather than another, and so forth).

A contract may thus properly be awarded where the contractor does not have the authority to decide on the course of action to be pursued but is rather tasked to develop options to inform an agency decision maker, or to develop or expand decisions already made by Federal officials. Moreover, the mere fact that decisions are made by the contractor in performing his or her duties (e.g., how to allocate the contractor's own or subcontractor resources, what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, what conclusions to emphasize, how frequently to test) is not determinative of whether he or she is performing an inherently governmental function.

(b) Totality of the circumstances. Determining whether a function is an inherently governmental function often is difficult and depends upon an analysis of the facts of the case. Such analysis involves consideration of a number of factors, and the presence or absence of any one is not in itself determinative of the issue. Nor will the same emphasis necessarily be placed on any one factor at different times, due to the changing nature of the Government's requirements.

(1) Exercise of approving or signature authority. Official responsibility to approve the work of contractors is a power reserved to Government officials. It should be exercised with a thorough knowledge and understanding of the contents of documents submitted by contractors and a recognition of the need to apply independent judgment in the use of these work products.

8. Responsibilities.

(a) Heads of agencies. Heads of departments and agencies are responsible for implementing this policy letter. While these policies must be implemented in the Federal Acquisition Regulation (FAR), it is expected that agencies will take all appropriate actions in the interim to develop implementation strategies and initiate staff training to ensure effective implementation of these policies.

(b) Federal Acquisition Regulatory Council. Pursuant to subsections 6(a) and 25(f) of the OFPP Act, as amended, 41 U.S.C. §§ 405(a) and 421(f), the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this policy letter is published in the Federal Register. Issuance of final regulations within this 210-day period shall be considered issuance "in a timely manner" as prescribed in 41 U.S.C. § 405(b).

(c) Contracting officers. When requirements are developed, when solicitations are drafted, and when contracts are being performed, contracting officers are to ensure:

(1) that functions to be contracted are not among those listed in Appendix A of this letter and do not closely resemble any functions listed there;

(2) that functions to be contracted that are not listed in Appendix A, and that do not closely resemble them, are not inherently governmental functions according to the totality of the circumstances test in subsection 7(b), above;

(3) that the terms and the manner of performance of any contract involving functions listed in Appendix B of this letter are subject to adequate scrutiny and oversight in accordance with subsection 7(f), above; and

(4) that all other contractible functions are properly managed in accordance with subsection 7(e), above.

(d) All officials. When they are aware that contractor advice, opinions, recommendations, ideas, reports, analyses, and other work products are to be considered in the course of their official duties, all Federal Government officials are to ensure

(1) developing carefully crafted statements of work and quality assurance plans, as described in OFPP Policy Letter 91-2, Service Contracting, that focus on the issue of Government oversight and measurement of contractor performance;

(2) establishing audit plans for periodic review of contracts by Government auditors;

(3) conducting preaward conflict of interest reviews to ensure contract performance in accordance with objective standards and contract specifications;

(4) physically separating contractor personnel from Government personnel at the worksite; and

(5) requiring contractors to (a) submit reports that contain recommendations and that explain and rank policy or action alternatives, if any, (b) describe what procedures they used to arrive at their recommendations, (c) summarize the substance of their deliberations, (d) report any dissenting views, (e) list sources relied upon, and/or (f) otherwise make clear the methods and considerations upon which their recommendations are based.

(g) Identification of contractor personnel and acknowledgement of contractor participation. Contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties must be required to identify themselves as such to avoid creating an impression in the minds of members of the public or the Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor products.

(h) Degree of reliance. The extent of reliance on service contractors is not by itself a cause for concern. Agencies must, however, have a sufficient number of trained and experienced staff to manage Government programs properly. The greater the degree of reliance on contractors the greater the need for oversight by agencies. What number of Government officials is needed to oversee a particular contract is a management decision to be made after analysis of a number of factors. These include, among others, the scope of the activity in question; the technical complexity of the project or its components; the technical capability, numbers, and workloads of Federal oversight officials; the inspection techniques available; and the importance of the activity. Current contract administration resources shall not be determinative. The most efficient and cost effective approach shall be utilized.

that they exercise independent judgment and critically examine these products.

9. Judicial review. This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.

10. Information contact. For information regarding this policy letter contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202)395-7209.

11. Effective date. This policy letter is effective 30 days after the date of publication.

Allan V. Burman

ALLAN V. BURMAN
Administrator

## APPENDIX A

The following is an illustrative list of functions considered to be inherently governmental functions:[1]

1. The direct conduct of criminal investigations.

2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).

3. The command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role.

4. The conduct of foreign relations and the determination of foreign policy.

5. The determination of agency policy, such as determining the content and application of regulations, among other things.

6. The determination of Federal program priorities or budget requests.

7. The direction and control of Federal employees.

8. The direction and control of intelligence and counter-intelligence operations.

9. The selection or nonselection of individuals for Federal Government employment.

10. The approval of position descriptions and performance standards for Federal employees.

11. The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).

---

[1] With respect to the actual drafting of congressional testimony, of responses to Congressional correspondence, and of agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity, see special provisions in subsection 6(c) of the text of the policy letter.