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**25 CFR Part 1000
Office of the Assistant Secretary—Indian
Affairs; Tribal Self-Governance; Final Rule**

DEPARTMENT OF THE INTERIOR

25 CFR Part 1000

RIN 1076-AD21

Office of the Assistant Secretary—Indian Affairs; Tribal Self-Governance

AGENCY: Office of the Assistant Secretary—Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This is a rule to implement Tribal Self-Governance, as authorized by Title IV of the Indian Self-Determination and Education Assistance Act. This rule has been negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the U.S. Department of the Interior. The intended effect is to transfer to participating Tribes control of, funding for, and decision making concerning certain Federal programs.

EFFECTIVE DATE: January 16, 2001.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: These regulations are to implement Title II of Pub. L. 103-413, the Indian Self-Determination Act Amendments of 1994. This Act established the Tribal Self-Governance program on a permanent basis and was added as Title IV (Tribal Self Governance Act of 1994) of the Indian Self-Determination and Education Assistance Act of 1975 (the ISDEA) (Pub. L. 93-638). Title I of Pub. L. 103-413 consisted of amendments to the self-determination contracting provision of the ISDEA and regulations for Title I of Pub. L. 103-413 have already been promulgated. When Pub. L. 93-638 is mentioned in these regulations, it generally refers to what are now Sections 109 and Title I of the ISDEA, as amended.

The ISDEA has been amended by Congress by the following:

- Pub. L. 98-250 Technical Amendments to Indian Self-Determination and Education Assistance Acts, April 3, 1984;
- Pub. L. 100-202 Continuing Appropriations, Fiscal year 1988, December 22, 1987;
- Pub. L. 100-446 Department of the Interior and Related Agencies Appropriations Act, 1989, September 27, 1988;
- Pub. L. 100-472 Indian Self-Determination And Education

Assistance Act Amendments of 1988, October 5, 1988;

Pub. L. 100-581 Review of Tribal Constitutions and Bylaws, November 1, 1988;

Pub. L. 101-301 Indian Law: Miscellaneous Amendments, May 24, 1990;

Pub. L. 101-512 Department of the Interior and Related Agencies Appropriations Act, 1991, November 5, 1990;

Pub. L. 101-644 Indian Arts and Crafts Act of 1990, November 29, 1990;

Pub. L. 102-184 Tribal Self-Governance Demonstration Project Act, December 4, 1991;

Pub. L. 103-413 Indian Self-Determination Act Amendments of 1994, October 25, 1994;

Pub. L. 103-435 Indian Technical Corrections, November 2, 1994;

Pub. L. 104-109 Technical Corrections to Law Relating to Native Americans, February 12, 1996;

Pub. L. 104-208 Omnibus Appropriations Act, September 30, 1996.

Since most of the legal citations are to Pub. L. 103-413, the Indian Self-Determination Act Amendments of 1994, the following table may be used to find pertinent parts of this act in 25 U.S.C.:

Section of Pub. L. 103-413	25 U.S.C. part
Sections 202, 203 and 401.	25 U.S.C. 458aa
Section 402	25 U.S.C. 458bb
Section 403	25 U.S.C. 458cc
Section 404	25 U.S.C. 458dd
Section 405	25 U.S.C. 458ee
Section 406	25 U.S.C. 458ff
Section 407	25 U.S.C. 458gg
Section 408	25 U.S.C. 458hh

The following table may be used to find the pertinent parts of Pub. L. 93-638, the ISDEA:

Section of Pub. L. 93-638	25 U.S.C. part
Section 3	25 U.S.C. 450a
Section 4	25 U.S.C. 450b
Section 5	25 U.S.C. 450c
Section 6	25 U.S.C. 450d
Section 9	25 U.S.C. 450e-1
Section 102	25 U.S.C. 450f
Section 103	25 U.S.C. 450h
Section 104	25 U.S.C. 450i
Section 105	25 U.S.C. 450j
Section 106	25 U.S.C. 450j-1
Section 107	25 U.S.C. 450k
Section 108	25 U.S.C. 450l
Section 109	25 U.S.C. 450m
Section 110	25 U.S.C. 450m-1
Section 111	25 U.S.C. 450n

The Indian Self-Determination Act Amendments of 1988 (Pub. L. 100-472),

authorized the Tribal Self-Governance Demonstration Project for a 5-year period and directed the Secretary to select up to 20 Tribes to participate. The purpose of the demonstration project was to transfer to participating Tribes the control of, funding for, and decision making concerning certain Federal programs, services, functions and activities or portions thereof. In 1991, there were 7 annual funding agreements under the project, and this expanded to 17 in 1992. In 1991, the demonstration project was extended for an additional 3 years and the number of Tribes authorized to participate was increased to 30 (Pub. L. 102-184). The number of self-governance agreements increased to 19 in 1993 and 28 in 1994. The 28 agreements in 1994 represented participation in self-governance by 95 Tribes authorized to participate.

After finding that the Demonstration Project had successfully furthered Tribal self-determination and self-governance, Congress enacted the "Tribal Self-Governance Act of 1994", Public Law 103-413 that was signed by the President on October 25, 1994. The Tribal Self-Governance Act of 1994 made the Demonstration Project a permanent program and authorized the continuing participation of those Tribes already in the program.

A key feature of the 1994 Act included the authorization of up to 20 Tribes per year in the program, based on their successfully completing a planning phase, being duly authorized by the Tribal government body and demonstrating financial stability and management capability. The Act was amended by Public Law 104-208 on September 30, 1996, to allow up to 50 Tribes annually to be selected from the applicant pool. In 1996, the Act was also amended by Public Law 104-109, "An Act to make certain technical corrections and law related to Native Americans". Section 403 was amended to state:

(1) INCORPORATE SELF-DETERMINATION PROVISIONS.—At the option of a participating Tribe or Tribes, any or all provisions of title I of this Act shall be made part of an agreement entered into under title III of this Act or this title. The Secretary is obligated to include such provisions at the option of the participating Tribe or Tribes. If such provision is incorporated, it shall have the same force and effect as if set out in full in title III or this title.

The number of annual funding agreements grew by one to 29 in 1995 and grew to 53 and 60 agreements in 1996 and 1997, respectively, to include 180 and 202 Tribes. Self-Governance has continued to grow. In 1999, there were 67 annual funding agreements

with BIA covering 209 Federally recognized Tribes. Also in 1999, there were three annual funding agreements between Self-Governance Tribes and non-BIA bureaus.

The Tribal Self-Governance Act of 1994, as amended, authorizes the following: (1) The Director of the Office of Self-Governance may select up to 50 Tribes annually from the applicant pool to participate in Tribal Self-Governance. (2) To be a member of the applicant pool each Tribe must have: (a) Successfully completed a planning phase that includes budgetary research and internal Tribal government planning and organizational preparation; (b) have requested to participate in Self-Governance by resolution; and (c) have demonstrated financial stability and financial management capability for the previous 3 years as evidenced by the Tribe having no material audit exceptions in their required annual audits of Self-Determination contracts. (3) The Secretary is to negotiate and enter into annual written funding agreements with the governing body of each participating Tribe that will allow that Tribe to plan, conduct, consolidate and administer programs that were administered by the Bureau of Indian Affairs (BIA) without regard to agency or office within which such programs were administered. Subject to such terms of the agreement, the Tribes are also authorized to redesign or consolidate programs and reallocate funds. (4) The Secretary is to negotiate annual funding agreements with Tribes for programs administered by the Department other than through BIA that are otherwise available to Indian Tribes. Annual funding agreements may also include programs from non-BIA bureaus that have a special geographic, historic or cultural significance to the participating Tribe. (5) Tribes may retrocede all or a portion of the programs. (6) For construction projects, the parties may negotiate specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations for inclusion in annual funding agreements. If not included, then such provisions do not apply. (7) Not later than 90 days before the effective date of the agreements, the agreements are to be sent to the Congress and to potentially affected Tribes. (8) Funding agreements shall provide for advance payments to the Tribes of amounts equal to what the Tribe would be eligible to receive under contracts and grants under this Act. This is to include direct program and contract support costs in addition to any funds that are specifically or

functionally related to the provision of benefits and services by the Secretary to the Tribe or its members without regard to the organizational level within the Department where such functions are provided. (9) Except as otherwise provided by law, the Secretary shall interpret laws and regulations in a manner that will facilitate the inclusion of programs and the implementation of the agreements. (10) The Secretary has 60 days from the receipt of a Tribal request for a waiver of Departmental regulations in which to approve or deny such a request; denial can only be based upon a finding that such a waiver is prohibited by Federal law. (11) An annual report is to be submitted to the Congress regarding, among other things, the identification of the costs and benefits of Self-Governance and the independent views of the participating Tribes. The Secretary is to publish in the **Federal Register**, after consultation with the Tribes, a list of, and programmatic targets for, non-BIA programs eligible for inclusion in annual funding agreements. (12) Nothing in the Act shall be construed to limit or reduce in any way the services, contracts or funds that any other Indian Tribes or Tribal organizations are eligible to receive under any applicable Federal law or diminish the Secretary's trust responsibility to Indian Tribes, individual Indian or Indians with trust allotments.

The Act also authorized the formation of a negotiated rulemaking committee if so requested by a majority of the Indian Tribes with Self-Governance agreements. Such a request was made to the Department of the Interior and a rule making committee was formed. Under section 407 of the Act, membership was restricted to Federal and Tribal government representatives, with a majority of the Tribal members representing Tribes with agreements under the Act. Eleven Tribal representatives joined the Committee. Seven Tribal representatives were from Tribes with Self-Governance agreements and four were from Tribes that were not in the Self-Governance Program. Formation of the Rulemaking Committee was announced in the **Federal Register** on February 15, 1995.

The first meeting of the Joint Tribal/Federal Self-Governance Negotiated Rule Making Committee was held in Washington, DC on May 18, 1995 prior to publication of the proposed rule, a total of 12 meetings of the full Committee were held in different locations throughout the country. Subsequently, several meetings were held to review public comments and to negotiate changes in the final rule. The

last meeting was held in Washington, DC in March 1999. There were numerous workgroup meetings and teleconferences during this period that were used to develop draft material and exchange information in support of the full Committee meetings. At the first meeting of the Committee, protocols were developed. The main provisions of the protocols were: (1) The Committee meetings were open, and minutes kept. The Federal Advisory Committee Act did not apply under the Unfunded Mandates Reform Act of 1995. (2) A quorum consisted of 8 members, including 7 Tribal members and 1 Federal member. The Tribal and Federal representatives each selected co-chairs for the Committee and an alternate. (3) The Committee operated by consensus of the Federal and Tribal members and formed 5 working groups to address specific issues and make recommendations to the Committee. (4) The intended product of the negotiations is proposed regulations developed by the Committee on behalf of the Secretary and Tribal representatives. The Secretary agreed to use the preliminary report and the recommendations on the final regulations, developed by the Committee, as the basis for the Notice of Proposed Rulemaking. (5) The Committee has reviewed all comments received from the notice of the Proposed Rule making and has submitted a final report with recommendations to the Secretary for promulgation of a final rule. (6) The Federal Mediation and Conciliation Services was used to facilitate meetings.

The proposed regulation was published in the **Federal Register** on February 12, 1998 with a 90-day public comment period. Topics on which the Negotiating Committee had not reached agreement were identified in a preamble section titled, "Key Areas of Disagreement." The **Federal Register** notice specifically invited comments on these areas. Fifty-four comments were received from a wide variety of Tribal groups and individual Tribes, Federal entities, and other groups and individuals. Many comments presented positions on the areas of disagreement. Subpart S, which pertained to Property Donation in the preamble of the proposed rule, pertains to Conflicts of Interest in the final rule. Property Donation is now in subpart Q of the final rule.

To facilitate comparison from the Proposed Rule to the Final Rule, the following table is reflective of the section numbers from proposed to final. Sections 1000.1–1000.73 maintain the

same section numbers from proposed to final rule.

Proposed	Final	Proposed	Final	Proposed	Final	Proposed	Final	Proposed	Final	Proposed	Final
.78	.80	.111	.121	.160	.170	.201	.221	.266	.307	.318	.359
.79	.81	.112	.122	.161	.171	.202	.222	.267	.308	.319	.360
.80	.82	.113	.125	.162	.172	.203	.223	.268	.309	.320	.361
.81	.83	.114	.126	.165	.173	.204	.224	.269	.310	.321	.362
.82	.84	.115	.128	.166	.173	.205	.225	.270	.311	.322	.363
.83	.85	.116	.129	.167	.173	.206	.226	.271	.312	.323	.364
.84	.86	.117	.130	.168	.174	.207	.227	.272	.313	.324	.365
.85	.87	.118	.131	.169	.175	.208	.228	.273	.314	.325	.366
.86	.88	.119	.132	.170	.176	.209	.229	.274	.315	.326	.367
.87	.89	.120	.133	.171	.177	.210	.230	.275	.316	.329	.380
.88	.91	.121	.134	.172	.178	.211	.231	.276	.317	.340	.381
.89	.92	.122	.135	.173	.179	.212	.232	.277	.318	.341	.382
.90	.93	.123	.136	.174	.180	.220	.240	.289	.330	.352	.390
.91	.94	.124	.137	.175	.181	.221	.241	.290	.331	.353	.391
.92	.95	.125	.138	.176	.182	.222	.242	.291	.332	.354	.392
.93	.96	.126	.139	.180	.190	.223	.243	.292	.333	.355	.393
.94	.97	.127	.140	.181	.191	.224	.245	.293	.334	.356	deleted
.95	.98	.128	.141	.182	.192	.225	.246	.294	.335	.357	.394
.96	.99	.129	.142	.183	.193	.226	.247	.295	.336	.358	.395
.97	.100	.130	.143	.184	.194	.227	.248	.296	.337	.359	.396
.98	.101	.150	.160	.185	.195	.228	.249	.297	.338	.360	.400
.99	.102	.151	.161	.186	.196	.229	.250	.298	.339	.361	.401
.100	.103	.152	.162	.187	.197	.230	.251	.310	.350	.362	.402
.101	.104	.153	.163	.188	.198	.259	.300	.311	.351	.363	.403
.102	.105	.154	.164	.190	.210	.260	.301	.312	.352	.364	.404
.103	.106	.155	.165	.191	.211	.261	.302	.313	.353	.365	.405
.104	.107	.156	.166	.192	.212	.262	.303	.314	.354	.366	.406
.105	.108	.157	.167	.193	.213	.263	.304	.315	.355	.367	.407
.106	.109	.158	.168	.194	.214	.264	.305	.316	.356		
.110	.120	.159	.169	.200	.220	.265	.306	.317	.358		

Summary of Regulations and Comments Received

The narrative and discussion of comments below is keyed to specific subparts of the rule. Matters addressed under the heading “Key Areas of Disagreement” in the Notice of Proposed Rulemaking are discussed under the appropriate subpart.

Subpart A—General Provisions

Summary of Subpart

This Subpart provides interpretation of the language used throughout the Self-Governance Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. 450. Subpart A also addresses the purpose and scope of the regulation and describes Congressional perspectives on the Tribal Self-Governance Act of 1994.

Comments

Several comments requested that the use of the word “Act” be clarified. The “Act” was then determined to mean the Tribal Self-Governance Act, Title IV of the Indian Self-Determination and Education Assistance Act of 1975.

A suggestion that the definition of construction management services be deleted from Section 1000.2 was accepted.

One comment suggested that a regulation be developed that would address tribal involvement in the budgets of non-BIA bureaus. This suggestion was not accepted. For budget consultation purposes, non-BIA bureaus can participate in the Self-Governance conferences, BIA budget consultations and their own consultations as a result of specific Self-Governance tribal requests. In addition, § 1000.4(c)(7) addresses communication with Tribal governments regarding budgetary matters.

There were many comments concerning the definition of inherently Federal functions. While there is no definition of inherently Federal functions contained in this rule, the Committee agreed that:

Sections 1000.91 through 1000.109 contain detailed provisions explaining what funds are available for inclusion in a BIA AFA. Sections 1000.94 and 1000.97 define “residual funds” and “Tribal shares”, respectively. In defining what is a residual, a critical step is to determine what functions are inherently Federal. The regulations do not define the term “inherently Federal” function. The Department will decide what functions are residual or inherently Federal on a case by case basis after consultation with the Office

of the Solicitor. For current guidance on inherently Federal functions (IFF) determinations, please see Solicitor’s memorandum dated May 17, 1997. The Memorandum is available on the Office of Self-Governance’s Internet web page or can be requested directly from the Office of Self-Governance. Determination that functions are inherently Federal shall be applied consistently in Central Office and all regional offices to all Tribes in a consistent and uniform manner. The Department shall provide information on why specific functions have been determined inherently Federal to Tribes in accordance with § 1000.95.

Several comments suggested that the definition of Tribal shares should reference the statute. This suggestion was accepted and the definition of Tribal shares was also changed to be identical with the definition of Tribal shares in § 1000.97.

Several comments noted that the definition of BIA and non-BIA programs does not mention program jointly administered with other Federal agencies. The definitions were not changed to accommodate this suggestion because the Committee believed that the issue has been addressed in § 1000.93. Several other comments suggested that annual

funding agreement for BIA and non-BIA programs be included in this definition section. This suggestion was not included and the definitions of annual funding agreement for BIA and non-BIA programs are covered in §§ 1000.81 and 1000.121 respectively.

Several comments recommended that a definition of a self-determination contract should be included in the definition section and be broad enough to have contracts also include as part of the definition the subcontracts between Tribal members and their Consortium for the operation of Federal programs. The suggestion to define self-determination contracts was not accepted because it is defined in Pub.L. 93-638. Further, the Act states that to be eligible for Self-Governance, a Tribe, among other things, must have “no material audit exception in the required annual audit of the self-determination contracts of the Tribes” [Title I sec. 402(c)]. Subcontracts between member Tribes and their Consortium are not considered to be the same as self-determination contracts.

Subpart B—Selection of Additional Tribes for Participation in Tribal Self-Governance

Summary of Subpart

This subpart describes the eligibility and selection process that the Secretary uses to decide which Indian Tribes may participate in Tribal self-governance as authorized by section 402 of the Tribal Self Governance Act of 1994. Subpart B also describes when a Tribe withdraws from an AFA. It also specifies the documents that Tribes must submit for admission into the applicant pool and describes what a Tribe must do during the planning phase. The subpart explains what a “material audit exception” is and what the consequences are of having a “material audit exception”. This subpart also summarizes what happens if a Tribe wishes to withdraw from a Consortium’s annual funding agreement and how disputes between the Consortium and withdrawing Tribe are handled.

Comments

A comment suggested that although the Act does not employ standard accounting terms, it seems that the intent of the law is that applicants must have three successive audits that do not disclose any material weakness; consequently the comment recommended that 1000.21 be changed to reflect that a material audit exception is one where there is an identified material weakness or finding of substantial financial mismanagement.

This suggestion was accepted. Another comment recommended that the level of disallowed costs should be changed from 5 percent of the total expenditures to a dollar threshold of anything in excess of \$10,000. This recommendation was accepted because the percentage threshold could conceivably allow Tribes to enter Self-Governance that had financially mismanaged several millions of dollars given that some Tribes have total expenditures that exceed \$100 million. Further, Office of Management and Budget (OMB) Circular A-133, which has been adopted as a common rule by the Department of the Interior requires auditors to report questioned costs that are greater than \$10,000.

A comment recommended that participating Tribes that are members of a Consortium and are recipients of contracts with the Consortium for the delivery of programs covered by the annual funding agreement should be considered as eligible for entrance into Self-Governance once they have had three years of subcontracting experience free of material audit exceptions as defined in § 1000.21. This suggestion was not accepted because the Act states that to be eligible a Tribe, among other things, must have “* * * no material audit exceptions in the required annual audit of the self-determination contracts of the Tribes” (Title IV sec. 402(c)(2)). Subcontracts between member Tribes and their Consortium are not considered to be the same as self-determination contracts.

Several comments addressed the concern about what happens to funding and project delivery schedules for Indian Reservation Road projects if a member Tribe withdraws from a Consortium. It is anticipated that this issue will be a subject of the separate Tribal-Federal negotiated rulemaking process established under Transportation Equity Act for the 21st Century (TEA-21) (23 U.S.C. 202(d)(2)(C)), Pub. L. 105-178, and therefore was not addressed in this regulation.

Another comment said that § 1000.33(b) implies that a Tribe may withdraw from a Consortium within the middle of the year and suggested deleting reference to the 90-day Congressional review period. However, § 1000.32(c) indicates that the effective date of any withdrawal is the date on which the current funding agreement expires unless there is mutual agreement between the Tribe, Consortium, OSG and the appropriate bureau, in which case any and all issues would have to be resolved at that time. This suggestion was not accepted.

A comment identified a confusion in § 1000.34(b)(1) with the words “within 10 days” because it was unclear as to the reference point. Those words have been replaced with “at least 5 days before the 90-day Congressional review”. Another comment suggested that the chart in § 1000.34 be modified to identify who the non-BIA official is who is receiving the decision from the non-BIA bureau head. This was accepted and the chart modified. The comment further asserts that the Office of Indian Education Programs (OIEP) is not properly identified. The chart was modified to specifically identify OIEP.

Subpart C—Section 402(d) Planning and Negotiation Grants

Summary of Subpart

Subpart C describes the criteria and procedures for awarding various self-governance negotiation and planning grants. These grants are discretionary and will be awarded by the Director of the Office of Self-Governance (OSG). The award amount and number of grants depends upon Congressional appropriation. If funding in any year is insufficient to meet total requests for grants and financial assistance, priority will be given first to negotiation grants and second to planning grants.

Negotiation grants are non-competitive. In order to receive a negotiation grant, a Tribe/Consortium must first be selected from the applicant pool and then submit a letter affirming its readiness to negotiate and requesting a negotiation grant. This subpart also indicates that Tribe/Consortium may also elect to negotiate for a self-governance agreement if selected from the applicant pool without applying for or receiving a negotiation grant. Planning grants will be awarded to Tribes/Consortia requesting financial assistance in order to complete the planning phase requirement for admission into the applicant pool.

Comments

A few comments requested that language be added to subpart C that indicate a commitment by the Department to provide funds annually for planning and negotiation grants as well as short fall funds to assist in implementing the Act. The Committee agreed that the Department cannot commit funding that is not appropriated. Another comment indicated that the language at § 1000.50(b), concerning material audit exceptions, was confusing and the Committee agreed to change the language from “be identified as eligible” to “be qualified as eligible.”

Subpart D—Other Financial Assistance for Planning and Negotiating Grants for Non-BIA Programs

Summary of Subpart

This subpart describes the financial assistance for planning and negotiating non-BIA programs available to any Tribe/Consortium that:

- (a) Has an existing AFA;
- (b) Is in the applicant pool; or
- (c) Has been selected from the applicant pool.

Tribes/Consortia may submit only one application per year for a grant under this subpart. This financial assistance will support information gathering, analysis, and planning activities that may involve consulting with appropriate non-BIA bureaus, and negotiation activities. The subpart also describes the selection criteria, scoring, and notification process that Office of Self Governance will use to award planning and negotiation grants for a non-BIA program. The decision of the Director of OSG to not award a planning or negotiation grant for a non-BIA program is final for the Department.

Comments

A comment asked that the Director of the Office of Self Governance establish selection criteria and a review committee to select grants. Selection criteria are established at § 1000.70. The Committee believes that a review committee is an unnecessary and burdensome requirement. Several comments indicated that Tribe should have a right to appeal the decision of the Director of OSG to not award a planning or negotiation grant for a non-BIA program. Subpart D does not provide for an appeals process because the decision to award a grant will be made using selection criteria with associated points established by this rule. Those criteria and the point system were agreed to by the Committee. A comment indicated that the Director of OSG should seek and consider the comments on grant applications by the affected non-BIA bureau. The Committee found that this was not a regulatory matter.

Subpart E—Annual Funding Agreements for Bureau of Indian Affairs Programs

Summary of Subpart

This subpart describes the components of an Annual Funding Agreement (AFA) for BIA programs. An AFA is a legally binding and mutually enforceable written agreement between a self-governance Tribe/Consortium and BIA. It specifies the programs that are to be performed by BIA as inherently

Federal functions identified as residuals, programs transferred to the Tribe/Consortium, and programs retained by BIA to be carried out for the self-governance Tribe. The division of the responsibilities between the Tribe/Consortium and BIA is to be clearly stated in the AFA.

Subpart E states that a Tribe/Consortium may include BIA-administered programs in its AFA regardless of BIA agency or office that performs the program. The Secretary must provide to the Tribe/Consortium:

- (a) Funds equal to what the Tribe/Consortium would have received under contracts and grants under Title I of Pub. L. 93-638 (25 U.S.C. 450);
- (b) Any funds specifically or functionally related to providing services to the Tribe/Consortium by the Secretary; and
- (c) Any funds that are otherwise available to Indian Tribes for which appropriations are made to other agencies other than the Department of the Interior and are administered by the Department of the Interior.

Except for construction or when a waiver of regulations is involved, a Tribe/Consortium may redesign a program without approval from BIA except when the redesign first requires a waiver of a Departmental regulation. Redesign does not entitle Tribes/Consortia to an increase in the negotiated funding amount.

In determining the funding amount to be included in an AFA, this subpart defines residual funds as those funds needed to carry out BIA residual functions should all Tribes assume programmatic responsibility. The residual level will be determined through a process that is consistent with the overall process used by BIA.

The subpart defines Tribal shares as the amount determined for that Tribe/Consortium from a particular program. Tribal share amounts may be determined by either:

- (a) A formula that has a reasonable basis in the function or service performed by BIA office and is consistently applied to all Tribes served by the regional and agency offices; or
- (b) On a Tribe-by-Tribe basis, such as awarded competitive grants or special project funding.

Funding amounts may be adjusted while the AFA is in effect in order to adjust for certain Congressional actions, correct a mistake, or if there is mutual agreement. During the year, a Tribe/Consortium may reallocate funds between programs, except construction programs (see §§ 1000.254 and 255 in Subpart K of this part), without Secretarial approval.

This subpart also defines base budgets as the amount of recurring funding identified in the annual budget of the President as adjusted by Congressional action. Base budgets are derived from:

- (a) A Tribe/Consortium's Pub. L. 93-638 contract amounts;
- (b) Negotiated amounts of agency, regional, and central office funding;
- (c) Other recurring funding;
- (d) Special projects, if applicable;
- (e) Programmatic shortfall; and
- (f) Any other general increases/decreases to Tribal priority allocations that might include pay, retirement, or other inflationary cost adjustments.

Base budgets do not include any non-recurring program funds, Congressional earmarks, or other funds specifically excluded by Congress or other recurring programs that are currently in Tribal priority applications (TPA) such as general assistance, housing improvement program (HIP), road maintenance and contract support.

Once base budgets are established, a Tribe/Consortium need not renegotiate these amounts unless it wants to. If the Tribe/Consortium wishes to renegotiate, it also would be required to renegotiate all funding included in the AFA on the same basis as all other Tribes.

Comments

Several comments indicated § 1000.82 implies that residuals are limited to inherently Federal functions. However, § 1000.94 makes it clear that BIA residual funds are those funds that are necessary to carry out BIA residual activities and that these residual activities are those that can only be performed by BIA employees and may include some functions that are not "inherently Federal." Further, the Secretary must take into consideration the other statutory mandates, such as Section 406(a), in determining residuals.

Several comments recommended that the term "annual funding agreement" be changed to "funding agreement" throughout the regulation contending that these two terms are used interchangeably throughout the Act. This would also be consistent with § 1000.85 that allows Tribes/Consortia to negotiate an AFA with a term that exceeds one year in accordance with Section 105(c)(1) of Title I of Pub. L. 93-638 and subject to the availability of Congressional appropriations. The decision was made to retain the term "annual funding agreement" in these regulations because the Act is clear that the Secretary is authorized to negotiate "annual funding agreements". Even though § 1000.85 allows Tribes to negotiate an AFA that exceeds one year, this only applies to BIA programs,

services, functions or activities. Moreover, most appropriations for non-BIA bureaus are annual in nature and do not permit multi-year terms in advance of appropriations.

Several comments expressed concerns about the effect of the proposed regulations on the Indian Reservation Road (IRR) program that is jointly administered by the Departments of Transportation and Interior. Following the publication of the proposed rule on February 12, 1998, the Transportation Equity Act for the 21st Century was enacted on June 9, 1998. This Act, known as TEA-21, made a number of changes to the Federal lands highway program, that includes IRR activities. Some of the comments received regarding the IRR program will be the subject of the separate Tribal-Federal negotiated rulemaking process established under TEA-21 (23 U.S.C. sec. 202(d)(2)(C)).

TEA-21 specifically makes funds for Indian roads and bridges available to Indian Tribes for Title I contracts and Title IV agreements in accordance with the Indian Self-Determination and Education Assistance Act of 1975, as amended. The pertinent provision reads as follows:

(3) CONTRACTS AND AGREEMENTS WITH INDIAN TRIBES.—

(A) IN GENERAL.—Notwithstanding any other provision of law or any interagency agreement, program guideline, manual or policy directive, all funds made available under this title for Indian reservation roads and for highway bridges located on Indian reservation roads to pay for the costs of programs, services, functions and activities or portions thereof, that are specifically or functionally related to the cost of planning, research, engineering and construction of any highway, road, bridge, parkway, or transit facility that provides access to or is located within the reservation or community of an Indian Tribes shall be made available upon request of the Indian Tribal government, to the Indian Tribal government for contracts and agreements for such planning, research, engineering, and construction in accordance with the Indian Self-Determination and Education Assistance Act.

Pub. L. 105-178, sec. 1115(b)(4)(3)(A)

Accordingly, the Committee believes that the TEA-21 statute and these final regulations provide the mechanism for including IRR programs, functions, services and activities or portions thereof in Self-Governance agreements subject to § 1000.93 that defers to the requirements of funding agencies other than the Department of the Interior.

Several comments recommended that the regulations be specific that inherently Federal functions can not be transferred and be more specific about what can be included in an AFA. The

Committee believes that what can be included in an AFA is adequately covered in § 1000.86. Further, § 1000.94 discusses residual and § 1000.95 discusses how residual information is determined. Several comments recommended that inherently Federal functions should be defined and included in the definition part of the regulation. The Solicitor has ruled that inherently Federal functions cannot be defined and must be determined on a case-by-case basis; consequently, this suggestion was not accepted.

In § 1000.92, the words “associated with programs” were added to the answer, following the word “funds”, for clarity.

Sections 1000.91 and 1000.97 deal with negotiated and Tribal share amounts of central office operations. Many comments were received supporting the retention of central office shares in these sections, even though there has been a prohibition in the Department of the Interior and Related Agencies Appropriations Acts for the past three years. Several comments argued that Title IV of Pub. L. 93-638 is clear that Tribes have a right to negotiated shares of the central office and that the legislative prohibition is only an annual prohibition. Several commentaries emphasized that the central office issue is related only to BIA and that for non-BIA programs, any funds transferred to a self-governance Tribe should be those that the Department would have spent, either directly or indirectly, for the benefit of those Tribes.

The Committee agreed to retain central office in §§ 1000.91 and 1000.97. Should the Congressional prohibition be lifted, then BIA would be willing to negotiate a portion of central office operations that are not a part of BIA residual or inherently Federal responsibilities and can be shown to be specifically and functionally related to the responsibilities being assumed by a self-governance Tribe.

Section 1000.94 has been rewritten by deleting specific reference to inherently Federal functions and to indicate that residual functions are those functions that can only be performed by BIA employees. The reason for deleting the reference to inherently Federal functions is that there could be some functions that are not inherently Federal in nature but that still must be performed by a BIA employee. An example would be a function that could be performed by Tribe but because of the indivisibility (e.g. one forester serving four Tribes) the function would remain a residual function.

Section 1000.95 has been rewritten to focus on the residual information that will be made available to Tribes. This section also identifies the overall process that BIA will follow and the general principles that will be used in determining and providing the residual information to Tribes. Also included are procedures to have the Deputy Commissioner reconsider residual levels for particular programs, and procedures to appeal the Deputy Commissioner's determination to the Assistant Secretary-Indian Affairs. A comment recommended that the Assistant Secretary—Indian Affairs provide a written determination on a Tribe's appeal within 30 days of receiving it and this suggestion was accepted.

Another comment suggested changes to Section 1000.95 to specify active tribal involvement in the determination of residuals. This suggestion was not accepted but a new subsection, (c)(9) was added to § 1000.4 that indicates that Executive Order 13084 on Consultation and Coordination with Indian Tribal governments will be applied in the implementation of these regulations.

Regarding § 1000.95, the Tribal team raised the issue that when BIA is determining residuals for a particular function, service, or activity, that consideration should be made without regard to the organizational level at which the functions are being performed. It is the intent of BIA in determining residuals to take into consideration those functions that the Secretary must retain to ensure that the Secretary's statutory and trust obligations are met. In making this determination, BIA will first look to the appropriate organization level at which the service is being provided which may be the agency, regional or central office when appropriate. Depending upon where the service is being provided, the residual determination will be made.

Section 1000.96 was modified by removing reference to an “annual list of residual activities” to be consistent with the changes made in § 1000.95.

Another comment suggested that the term “Tribal shares” comply with the language of the Act. This suggestion was accepted by adding references to section 403(g)(3) and 405(d) of the Act to § 1000.97.

A comment identified confusion in § 1000.100. This has been corrected by replacing the word “by” with the word “to” so that funds would be “distributed to a Tribe” not “distributed by a Tribe”. Another comment suggested that allowing Tribes to take a share of a competitive grant program violates section 403(g) and section 406(a) of the Act. No change was made because this

rule allows for a competitive grant funds to be distributed on a formula basis unless prohibited by Congress. If there is no Congressional prohibition to distributing all or a portion of a competitive grant program by formula, then other Tribes would be eligible to receive funds on a formula basis, as well.

The suggestion to change Section 1000.103 to allow funds to be reallocated to any program that is administered by the Tribe/Consortium rather than any program that the Tribe/Consortium administers under the AFA was not accepted. Section 403(b)(5) of the Act requires that the annual funding agreement specify “* * * the services to be provided, the functions to be performed and the responsibility of the tribe and the Secretary under the agreement.” The Department believes that allowing reallocation to programs included in the annual funding agreement is consistent with the Act.

A comment suggested that the word “between” be changed to “among” in the answer of § 1000.104(a)(3) and this suggestion was accepted. Another comment suggested that the answer be changed to allow for more BIA discretion in distributing increases in an equitable manner. This suggestion was accepted by adding the word “and Tribes” after the word “regions” in (a)(3). A similar change was made to § 1000.109(a)(3). Another comment suggested that before any reduction in funds, that Tribes be notified in writing and agree to the reduction. No change was made since any reduction being addressed in this section will be a change that reflects Congressional appropriation. Further, § 1000.104 states that Tribes will be notified and that the Tribes will be given an opportunity to reconcile.

A comment recommended deleting contract support from base budgets and this suggestion was accepted. An item (c) was added to § 1000.105 to clarify that other recurring programs that are in TPA, such as general assistance, housing improvement program (HIP), road maintenance and contract support are not to be included in the base unless any of them should become eligible for base transfer for all Tribes. The reason for including item (c) is to make clear about what is excluded from base budgets. An additional comment recommended that item (c) not be included and this suggestion was not accepted. The four programs included in (c) either have a special method for distributing funds, such as contract support, or are based upon neediest of the needy. Further, (c) does indicate that Self-Governance tribes could have these

four programs based transferred if such an option were made available to all tribes.

Several comments regarding §§ 1000.106 and 1000.107 objected to the language that requires a Tribe to negotiate all base budget funding in order to re-negotiate a specific line item contending that this is an incorrect interpretation of the Act. The Committee agreed to the wording in §§ 1000.106 and 1000.107 as the best way to handle the issue of re-negotiation of base amounts.

Another comment suggested that § 1000.109 needed to more thoroughly reflect BIA’s intent and the amount of discretion it seeks to retain in allocating any general increases/decreases. No action was taken because the Committee believed that answer is clear enough regarding BIA’s discretion for base budget adjustments.

Several comments noted that there is no statutory authority for the Secretary to suspend, withhold or delay payment under an annual funding agreement and such authority implies evaluation and oversight of Tribal actions. Even though such a provision is in Title I of the Act, it is absent in Title IV. Several other comments maintain that since annual funding agreements are legally binding and mutually enforceable written agreements that require some mechanism to withhold, delay, or suspend funds when there is a determination that the Tribe/Consortium has not substantially carried out the AFA. After discussion, the Committee agreed not to regulate this issue.

Subpart F—Non-BIA Annual Self-Governance Compacts and Funding Agreements

Summary of Subpart

This subpart describes program eligibility, funding for, and terms and conditions relating to, AFAs covering non-BIA programs. This subpart also establishes procedures for consultation with Tribes for preparation of an annual **Federal Register** listing of non-BIA programs that are eligible for negotiation by self-governance Tribes.

Sections 1000.122 through 1000.136 of this subpart contain rules on the eligibility of programs for inclusion in AFAs. Under the Tribal Self-Governance Act of 1994, non-BIA programs are eligible for negotiation and inclusion in AFAs based on either section 403(b)(2), (25 U.S.C. 485cc(b)(2)) (pertaining to programs available to Indians), or section 403(c), (25 U.S.C. 458cc(c)) (pertaining to programs of special geographic, historical, or cultural

significance to the participating Tribe/Consortium).

These provisions reflect the discretion afforded by the Act with respect to the terms of eligibility of non-BIA programs for inclusion in AFAs, as compared to agreements covering BIA programs. For instance, section 403(b)(2) authorizes a non-BIA bureau to negotiate terms that it may require in AFAs and section 403(b)(3) allows redesign and consolidation of non-BIA programs or reallocation of funds when the parties agree.

Sections 1000.137 through 1000.142 of this subpart describe how AFA funding is determined. Programs that would be eligible for self-determination contracts under Title I of the Indian Self-Determination and Education Assistance Act (ISDEA) (Pub. L. 93–638, as amended) are to be funded at the same level as required for self-determination contracts.

Programs that are only available because of a special geographic, historical, or cultural significance eligible under section 403(c) of the Act are not eligible for self-determination contracting. The regulations provide that such programs generally are to be funded at the level that would have been spent by the bureau to operate the program, plus provisions for allowable indirect costs. The latter are generally based on rates negotiated by the Department of the Interior Inspector General, or the Inspector General of another applicable Federal agency.

Comments

This subpart of the regulations was one of the most contentious both to the Committee and to the many who commented. The central focus of concerns expressed was the degree of discretion that should be accorded to the Secretary in entering into AFAs for non-BIA programs. While the Tribal team and representative comments from several Tribes and Tribal organizations supported limited discretion, the Federal team and representative comments from outside Federal bureaus and non-governmental organizations supported broad Secretarial discretion. In addition to the issue of Secretarial discretion, the comments discussed what could be included in an AFA for a non-BIA bureau and, specifically, the term “otherwise available”; the degree to which a non-BIA bureau program could be redesigned for Tribal needs; the method of entering into successor agreements; the explanation of “nexus” as it applied to 403(c) programs; and the calculation of indirect costs for such programs. Despite the wide range of differing views and comments, the

Committee did come to agreement on most disputed issues. Because the views of the Tribal team and representative comments from the several Tribes and Tribal organizations and the views of the Federal team and the representative comments from outside Federal bureaus and non-governmental organizations can be aligned between "Tribal" and "Federal", they are addressed as such below.

The Tribal view of "otherwise available" as it pertains to the inclusion of programs into AFAs for non-BIA bureaus is to interpret this phrase as meaning *any* Federal program unless it is an inherently Federal function of the non-BIA bureau. According to the Tribal comments, Section 403(b)(2) was meant to extend the reach of Title I and to increase Tribal operation of non-BIA programs within the Department of the Interior. The Federal team, however, views "otherwise available" under Section 403(b)(2) as essentially a different way of describing those programs that are eligible for contracting under Pub. L. 93-638. The Federal comments stressed the view that it was never the intention of Congress to give Tribes or Tribal organizations authority over non-BIA, non-Indian programs—such programs are not merely Tribal in scope but, rather, national in scope. The term "otherwise available," therefore, would simply extend the availability of those Indian programs "otherwise available" to Tribes for inclusion in AFAs with non-BIA bureaus. The Committee could not agree on this matter and the regulation, therefore, reflects the Federal view at §§ 1000.122 through 1000.136.

Tribal comments and Federal comments differed on the matter of whether non-BIA bureaus must negotiate and must contract with Tribes/Consortia on those programs that are not identified as "programs for the benefit of Indians because of their status as Indians." Tribal comments refer to the Congressional goal of providing opportunities for Tribes to have the dominant role in administering those programs that benefit Indians. Therefore, Tribal comments noted that unless a program, function, service or activity is inherently Federal, the non-BIA bureau must negotiate and enter into an AFA with the Tribe/Consortium. The Federal comments stressed that it is within the discretion of the Secretary to enter into an AFA with a Tribe/Consortium for those programs that may *coincidentally* benefit Indians but that are national in scope and were not by definition "programs for the benefit of Indians because of their status as Indians." The Committee did not agree

on this matter and the regulation, therefore, reflects the Federal view at §§ 1000.122 through 1000.136.

Intertwined with the perceptions of Secretarial discretion and programs available for inclusion in AFAs with non-BIA bureaus is whether or not Tribes may reallocate program funds and otherwise redesign non-BIA programs to better suit Tribal needs. Tribal comments reflected their contention that the Tribal Self-Governance Act was meant to be inclusive and, therefore, Tribes should have broad authority to assume non-BIA programs and redesign them in a manner that best suits their needs. Federal comments continued to stress that Congress did not intend Tribes to assume the administration and operation of non-BIA, non-Indian programs unless specifically authorized by the Secretary. After much discussion in committee, it was decided that the Federal view on this matter prevail. Therefore, the regulations at §§ 1000.144–1000.145 reflect that the Tribe/Consortium may reallocate funds or otherwise redesign non-BIA programs if mutually agreed to by the non-BIA bureau and the Tribe/Consortium as reflected in an executed AFA.

With respect to successor agreements, Tribal comments noted that successor agreements should be "more or less" automatic. The difficulties in negotiating fine points of an AFA should have already been worked out and, therefore, the Tribal comments asked the Committee to more closely review the mechanisms for negotiating successor AFAs. The Federal concerns were that the regulations not give the impression that multi-year funding agreements were being negotiated—in violation of Federal appropriation laws. The Committee discussed this matter in some detail and agreed that the mechanism for negotiating successor AFAs would be the same as for initial AFAs; however, since the terms of such agreements had already been worked out previously, unless major changes were to be included in a successor agreement the process would be an expedited one. The negotiation process for successor agreements is now found in subpart G and reflects the Committee's agreement at §§ 1000.180–1000.182.

Both Tribal and Federal comments discussed the need to have more "complete" definitions of the geographical, historic, and cultural "nexus" that would be found in Section 403(c) non-BIA programs. With some modest revisions, the Committee agreed to more explanatory definitions that are

reflected in the regulations at § 1000.126.

It was evident in reviewing Tribal and Federal comments that the notion of "indirect costs" is a confusing one. The Tribal comments indicated a confusion between "Tribal shares" and allowable indirect costs associated with the management and operation of a Federal program. In addition, the method of determining the rate of indirect costs was a matter of disagreement even among Tribal comments. The Federal comments noted a wariness of negotiating agreements that would require an indirect cost expense to the government that was above and beyond the funds that were available to expend. In committee it was clearly noted by the Federal team that the government was not opposed to giving Tribes/Consortia allowable indirect costs. However, the Federal team confessed confusion in determining how best to provide the Tribes/Consortia with all necessary funds to administer non-BIA programs and factor in a further indirect cost expense. The Committee agreed to allow the non-BIA bureaus and the Tribes/Consortia to negotiate the amount of indirect costs for one particular AFA that might be different from the established rate set by the Office of the Inspector General. Indeed, the non-BIA bureau and the Tribe are encouraged to negotiate fee-for-service alternatives that facilitate entering into an AFA. These agreements by the Committee are reflected in the regulations at §§ 1000.138–1000.142.

A suggestion was made to redraft Section 1000.145 to allow for the reallocation of funds in non-BIA annual funding agreements. This suggestion was accepted but modified to exclude construction projects.

Subpart G—Negotiation Process for Annual Funding Agreements

Summary of Subpart

This subpart establishes the process and time lines for a newly selected or participating Tribe/Consortium wishing to negotiate either an initial or a successor AFA with any DOI bureau. Under subpart G, the negotiation process consists of two phases, an information phase and a negotiation phase.

In the information phase, any Tribe/Consortium that has been admitted to the self-governance program or to the applicant pool may submit requests for information concerning programs they wish to administer under the Tribal Self-Governance Act of 1994. Although this phase is not mandatory, it is expected to facilitate successful

negotiations by providing for a timely exchange of information on the requested programs.

The negotiation phase establishes detailed time lines and procedures for conducting negotiations with Tribes that have been accepted into the self-governance program, identifying the responsibilities of the Tribe/Consortium and bureau representatives in the negotiation process, and for executing AFAs. The deadlines for the negotiation process were chosen by the Committee to reflect the availability of annual budget information and the time needed for the bureau and the Tribe/Consortium to reach an agreement and the requirement under the Tribal Self-Governance Act of 1994 that each AFA must be submitted for Congressional review at least 90 days before its proposed effective date.

This subpart also establishes, in §§ 1000.180 through 1000.182, rules for the negotiation process for successor AFAs. A successor agreement is a funding agreement negotiated with a particular bureau after an initial agreement with that bureau. The procedures for negotiating a successor agreement are the same as those for initial agreements. The Committee expects, however, that successor agreements will build upon the prior agreements and will result in an expedited and simplified negotiation process.

The model compact serves as an umbrella document to recognize the government-to-government relationship between the Tribe(s) and the Department. Self-governance Tribes may choose to execute a compact with the Secretary but are not required to do so in order to enter into AFAs with Departmental bureaus. A model self-governance compact is provided in Appendix A. The model compact is not the same as an AFA and is not intended to replace, duplicate or lessen the importance of the AFA. Section 1000.163 permits the parties to agree to additional terms and conditions for inclusion in compacts.

The Committee agreed that for BIA programs only, a Tribe/Consortium may elect to continue under the terms of its pre-regulation compact as long as those provisions are in compliance with other Federal laws and are consistent with these regulations. For BIA programs, a Tribe/Consortium may include any term that may be included in a contract under Title I (Pub. L. 93-638; 25 U.S.C. 450) in the model compact.

Comments

A comment noted that the wording of § 1000.162 could be interpreted to

require that Tribes/Consortia enter model compacts before an AFA could be negotiated. The Committee has noted this possible interpretation and has provided, in § 1000.164, that the Tribe/Consortium, at its option, can enter into an AFA without first entering into a model compact.

The Committee did not agree that any term under Title I could be included in a non-BIA bureau AFA at the Tribe's/Consortium's option. The Tribal team advocated for this position; however, the Federal team did not agree and noted that Title I programs are identified as Indian programs' and, therefore, would not necessarily have any relevance to non-BIA bureau programs. In a related matter, the Committee agreed that for BIA programs the Tribe/Consortium may include any provision of Title I in the model compact. The regulations at § 1000.163 reflect this position.

Several comments noted that Tribes/Consortia should be able to negotiate Tribal-specific provisions in their compacts. The Committee agreed with this premise as long as there was mutual agreement between the Tribe/Consortium and the bureau. The regulations at § 1000.163 reflect this position.

Compacts have been entered into with a number of Tribes/Consortia without final regulations in place. Therefore, concern was raised that compacts negotiated before the promulgation of final regulations should be validated after final regulations are in place. The Committee agreed and included a process in § 1000.165 that would allow for validation of existing compacts and renegotiation procedures for those terms and conditions from prior compacts that might be inconsistent with the final regulations. Disputes that might arise from this process are further provided for in subpart R of this part. A comment suggested that Section 1000.165 be modified to allow compacts to remain in effect even if they are inconsistent with these regulations. This suggestion was not accepted because initially compacts were created to clarify the relation between the Department and the Tribes/Consortia during the period when there were no regulations and many of the earlier compacts did not receive a careful legal review by the Department.

Concerns were raised about information collection from Departmental bureaus for initial and successor AFAs. The Committee has provided a comprehensive listing of information protocols in § 1000.172 that should address these concerns. Similarly, concerns were raised about the lack of a dispute resolution process.

The Committee has provided such processes under § 1000.172 that refers to subpart R (Appeals) of these regulations.

With respect to the negotiation process itself, comments were made that asked for guidance on the designation of negotiators for both the Tribe/Consortium and the bureau(s). The regulations clearly provide for the designation of such negotiators in § 1000.173 and § 1000.174. It is within the discretion of the Tribe/Consortium and the bureau(s) to name such representatives according to their own policies and procedures, however the Committee agreed that these representatives must be authorized to negotiate on behalf of their respective governments as noted at § 1000.175 of these regulations.

Some comments noted that there should be no distinction between BIA and non-BIA programs on the issue of successor AFAs. The Committee agreed and made no distinction between BIA and non-BIA in the procedures for negotiating successor AFAs.

The Committee agreed that dispute resolution should be referenced to subpart R of these regulations and that a waiver of fees under the Freedom of Information Act would be entertained under that Act's provisions.

Subpart H—Limitation and/or Reduction of Services, Contracts, and Funds

Summary of Subpart

This subpart describes the process used by the Secretary to determine whether the implementation of an AFA will cause a limitation or reduction in services, contracts or funds to any other Indian Tribe/Consortium or Tribal organization as prohibited by section 406(a) of Pub. L. 93-638 (25 U.S.C. 458ff(a)). Subpart H applies only to BIA programs and does not apply to the general public and non-Indians.

BIA may raise the issue of limitation and/or reduction of services, contracts, or funding to other Tribes from the beginning of the negotiation period until the end of the first year of implementation of the AFA. An adversely affected Tribe/Consortium may raise the issue of limitation or reduction of services, contracts, or funding during region-wide Tribal shares meetings before the first year of implementation, within the 90-day review period before the effective date of the AFA, and during the first year of implementation of the AFA. Claims not filed on time are barred.

A claim by either the Department or an adversely affected Tribe/Consortium or Tribal organization must be a written

notification that specifies the alleged limitation or reduction of services, contracts, or funding. If a limitation and/or reduction exists, then BIA must use shortfall funding, supplemental funding, or other available BIA resources to prevent the reduction during the existing AFA year. BIA may, in a subsequent AFA, adjust the funding to correct a finding of actual reduction in services, contracts, or funds for that subsequent year. All adjustments under this subpart must be mutually agreed to between BIA and the Tribe/Consortium.

Comments

Some comments questioned the applicability of this subpart only to BIA. The concern was that Tribes should have the right to protest limitations or reductions in services regardless of whether or not the program was managed by BIA or a non-BIA bureau. The Committee took great care to ascertain that Section 406(a) of the Act could only apply to BIA since non-BIA bureaus do not contemplate providing services to the entire Indian community that would necessitate any formal parceling of services, activities, and resources. The types of non-BIA programs for which Tribes/Consortia would contract under self-governance would be limited to those discretionary programs already being provided to the general community. Therefore, there would never be an instance of program limitation or reduction in services to another Tribe/Consortium since the Tribe/Consortium contracting with the non-BIA bureau would be merely stepping into the place of the Federal entity and continuing to provide the same services as always to the general community.

Another comment wondered whether or not individual Indians should have the right to protest a limitation or reduction in services. The Committee considered this concept; however, it was determined that the Tribal Self-Governance Act of 1994 applies to sovereign Tribal governments as an expression of government-to-government relations between the Federal entity and Indian Nations. The particular case of an individual Tribal member's personal concerns must be handled, then, by that Tribal member's government and is not the subject of regulation by the Federal entity. Therefore, no revisions were made to the regulations.

Another comment noted that the time-frame for raising the issue of limitation or reduction of services was inconsistent with the statute. However, the Committee determined that the

time-frames were necessary to allow for efficient management of the program.

Subpart I—Public Consultation Process Summary of Subpart

This subpart describes when public consultation is appropriate and the protocols that should be used in this process. The roles of the Tribe/Consortium and the bureau are outlined, including notification procedures and the commitment to share information concerning inquiries about AFAs.

Public consultation is used when required by law or when appropriate under bureau discretion. When the law requires a public consultation process, the bureau will include the Tribe/Consortium to the maximum extent possible. When a public consultation process is a matter of bureau discretion, the bureau and the Tribe/Consortium may develop guidelines for the conduct of public meetings.

When the bureau conducts a public meeting, it must notify the Tribe/Consortium and involve the Tribe/Consortium in as much of the conduct of the meeting as is practicable and allowed by law. When someone other than the bureau conducts a meeting to discuss a particular AFA and the bureau is invited to attend, the bureau will notify the Tribe/Consortium of the invitation and encourage the meeting sponsor to invite the Tribe/Consortium to participate.

The bureau and the Tribe/Consortium will exchange information about other inquiries relating to the AFA under negotiation from other affected or interested parties.

Comments

The Committee was asked to clarify when a Tribe/Consortium may work jointly with the bureau to establish public consultation guidelines. Clarifying edits were made. Also, a comment asked that corresponding requirements for bureau participation in establishing Tribal guidelines for Tribal public consultation procedures be included in the final regulation. The Committee rejected this comment, because the Tribes/Consortia are considered sovereign entities and the Department of the Interior has no authority, therefore, to dictate guidelines for their internal purposes.

Subpart J—Waiver of Regulations Summary of Subpart

This subpart implements section 403(i)(2)(A) of the Tribal Self-Governance Act of 1994 (25 U.S.C. 458cc(i)(2)(A)). It authorizes the Secretary to waive all DOI regulations

governing programs included in an AFA, as identified by the Tribe/Consortium.

Subpart J also provides time lines, explains how a Tribe/Consortium applies for a waiver, the basis for granting or denying a waiver request, the documentation requirements for a decision, and establishes a process for reconsideration of the Secretary's denial of a waiver request.

The basis for the Secretary's denial of a waiver request depends on whether the request is made for a BIA or non-BIA program. For a BIA program, denial of a requested waiver must be predicated on a prohibition of Federal law. For a non-BIA program, denial of a requested waiver must be predicated on a prohibition of Federal law, or inconsistency with the express provisions of the AFA. Examples of waivers prohibited by law are provided in the body of the regulation.

This subpart does not specify whether or not a granted waiver must be requested with subsequent funding agreements. Many of the waivers that are granted are on a one time basis or are waivers that are intended to continue unless there is a change in the law, Federal regulations or what the tribe wants to do. Section 1000.220 states that the parties should identify waived regulations in the AFA's and because the funding agreements are annual, both the tribes and the Federal government have an opportunity to determine whether or not the current waivers are still appropriate.

Comments

A comment asked that provisions be included for formal bureau comment on the advisability of granting a waiver request. The Committee rejected the comment, however, as it did not want to place additional administrative burdens on bureaus that may slow or impede action on waiver requests.

Another comment asked whether or not the waiver provisions of the regulation would be inconsistent with the Unfunded Mandates Act of 1995. The Committee found that the regulation imposed no unfunded mandates on Tribes.

A comment from the Department of Transportation expressed concern that waivers of Department of Transportation regulations be "jointly reviewed" by the Secretary of the Interior and the Secretary of Transportation. The Committee notes that the only regulations that may be waived by the Secretary of the Interior are Department of the Interior regulations.

Some comments proposed language that would limit the discretion of the

Secretary in granting waivers. The Committee agreed that the Act narrows the scope of Secretarial discretion and, therefore, the Committee would not be empowered to expand the scope of discretion beyond the limits already imposed by the statute.

Another comment proposed that waivers be disallowed only if prohibited by Federal law. The Committee agreed that this would be one of the factors to be considered in denying a waiver request. However, the Federal team allowed that a waiver request might *also* be denied if it was inconsistent with the express provisions of the AFA. This standard is included, therefore, in the final regulation.

A comment proposed that § 1000.226 be changed to deem a waiver request as being denied if a decision is not rendered by the Department within 60 days and this proposal was accepted.

A comment recommended that the regulations address appeals on the denial of a waiver request beyond the Secretary. The Committee rejected this comment, however, because it believes the regulations are clear that whenever all administrative appeals are exhausted, the Tribe/Consortium may avail itself of judicial review in a Federal District Court.

A comment noted that publication of approved waivers of regulations be published in the **Federal Register** to provide notice to Tribes/Consortia for prospective waiver requests. The Committee added language that would post approved waivers on the Office of Self-Governance web page and would additionally make such waivers available upon request from any Tribe/Consortium.

Subpart K—Construction

Summary of Subpart

Subpart K applies to all construction, both BIA and non-BIA. It is designed as a stand-alone subpart; that is, other subparts do not apply to construction agreements if they are inconsistent with the provisions in subpart K. The subpart specifies that construction program activities are subject to subpart K, such as design, construction management services, actual construction; and that are not, such as planning services, operation and maintenance activities, and certain construction programs that cost less than \$100,000. The subpart specifies the roles and responsibilities of the Tribes and the Secretary in construction programs, including performance, changes, monitoring, inspections, and a special reassumption provision for construction. It addresses whether inclusion of a construction

program in an AFA creates an agency relationship with self-governance Tribes.

Federal Acquisition Regulations provisions are specifically not incorporated into these regulations, however, they may be negotiated by the parties in the AFA. Also, construction AFAs must address applicable Federal laws, program statutes, and regulations. In addition to requirements for all AFAs referenced in subpart F, other special provisions are added for construction programs, including health and safety standards, brief progress reports, and suspension of work when appropriate. Building codes appropriate for the project must be used and the Federal agency must notify the Tribe when Federal standards are appropriate for any project.

Comments

Several comments expressed the view that all of the self-governance regulations should apply to all Title IV agreements, including construction. In the preamble to the proposed rule, the Federal team had recommended that several general sections of the rule should not apply to construction and that the construction subpart should be a stand-alone section. It was decided that the provisions of subpart K should take precedence over any other subpart provisions that are inconsistent with subpart K. A question and an answer were added to subpart K stating at § 1000.252, "Do all provisions of other subparts apply to construction portions of AFAs? Yes, unless they are inconsistent with this subpart."

Other issues raised in the preamble to the proposed rule are discussed separately below.

Several comments raised concerns about the effects that a withdrawal from a Consortium would have on AFAs concerning construction projects. The comments thereon involving Tribal withdrawals from Consortia, the comments were adopted and new questions and answers were agreed upon as reflected in §§ 1000.35 and 1000.253.

A comment regarding § 1000.82 (now § 1000.84) did not require a change in the regulation because a Tribe could not properly adopt construction provisions of Title I of the Act out of context; i.e., it would be inconsistent with a properly drafted construction AFA to adopt the Model Contract, section 108 of the Act, which is inapplicable to construction in Title I.

With regard to comments on inherent Federal functions, residuals, and the Secretary's responsibility to ensure construction safety, a new question and

an answer were added to the construction subpart to reserve a portion of project funds from the AFA so that the Secretary has the funds to carry out his statutory mandate of Title IV to ensure construction safety (see § 1000.256).

In response to comments in regarding BIA reallocation of funds in § 1000.100 (now § 1000.103), two new questions and answers were added to the final regulation, as §§ 1000.254 and 1000.255, discussing reallocation of funds.

A comment that recommended that Bureau of Land Management Cadastral Surveys in Alaska should be defined as being construction was not adopted because the regulations are sufficiently clear to provide guidance for cadastral surveys in AFAs.

Comments regarding proposed Title V to the Act involving the Indian Health Service were rejected as not relevant to Title IV.

A comment recommended that "construction management services" should be defined. The Committee agreed and a definition was added to the final regulation.

A comment that phrasing in Subpart K confuses the meaning of "design" as to whether it is included in construction or not was not adopted because the Committee believed that these two sections are clear on this subject.

A comment suggested that some activities described in § 1000.240(b) be deleted and not subject to Subpart K because they are more applicable to Subpart E. This suggestion was accepted and Section 1000.240(b)(1) was changed to make explicit what activities and functions are covered by Subpart K. In essence, those activities that are administrative in nature are not subject to Subpart K and those activities that are associated with the actual construction are subject to Subpart K. Another comment recommended that TEA-21 road construction funds derived from the Federal Highway Trust Fund and transferred to BIA should be exempt from Subpart K if the funds are for a tribe assuming the entire road construction program. This suggestion was not accepted. While some of the activities included in a road construction program can be regulated by Subpart E, the bulk of the activities involve specific road construction projects that should comply with Subpart K. Further the TEA-21 negotiated rule making effort currently underway assume that road construction projects included in a tribe's AFA need to comport to Subpart K.

Comments regarding the lack of clarity in § 1000.241 as to the meaning

of "an agency relationship" were accepted and this section was modified in the final regulation.

The Committee adopted a comment recommending that § 1000.244 should be changed to delete the 5-day notice to a Tribe before suspending work in a emergency.

The comment that § 1000.223(e) of the proposed rule should be made into a separate section was adopted and is now § 1000.244. A comment recommended that § 1000.244 be changed to limit suspension of construction to a condition of imminent jeopardy to public health and safety only and this suggestion was not accepted. Another comment recommended that a new section be inserted that would indicate that compensation costs due to a suspension would not be paid from construction costs. This suggestion was accepted in part. Section 1000.244 was modified to indicate that project funds will not be used to compensate for costs associated with a suspension of construction work that occurs through no fault of the Tribe/Consortium.

A comment was made concerning the last sentence of § 1000.246 concerning the Secretary's option of accepting commonly accepted industry construction standards. The comment noted that this issue may create a problem in Alaska where building permits are not required in much of the state and "common standards" could be none at all. This comment was not adopted since the language in the regulation regarding commonly accepted industry standards is permissive and this section does permit the Federal agency to provide Federal standards that are mandatory unless a Tribally proposed standard is consistent with or exceeds the Federal standard. Other comments were also rejected because the Committee believed that this section of the regulation is clear.

A comment recommending that § 1000.246 use the concept of "scope of work" was not adopted because "project design" is appropriate language for construction projects.

Comments relating to 23 U.S.C., such as for § 1000.249, did not require clarification because § 1000.243(b) requires compliance with applicable Federal laws and program statutes.

A recommendation to add the citation to the Contract Disputes Act referenced in § 1000.251 was adopted.

A comment that to comply with the Solicitor's July 9, 1997, memorandum entitled, "Tribal Self-Governance Draft Regulations—Construction Safety", that a provision should be added that if the requirements of § 1000.243 are not met

in an AFA, that the AFA should not be entered into, was considered unnecessary because it is obvious that the Secretary cannot properly enter into an AFA for construction projects if the criteria of § 1000.243 are not complied with in the AFA proposed by a Tribe/Consortium.

A comment suggested that § 1000.256 be deleted because it allows the Secretary to retain funds to monitor health and safety standards and that the residual funds identified in §§ 1000.94 to 1000.96 addresses this issue. This suggestion was not accepted because the funds identified in § 1000.256 are to cover the Secretary's necessary costs associated with specific construction projects. If the Secretary were not allowed to retain such costs from the specific project funds, then a higher than needed residual would be required at regional offices to accommodate for construction projects if and when they should be funded.

Subpart L—Federal Tort Claims

Summary of Subpart

This subpart explains the applicability of the Federal Tort Claims Act (FTCA).

Comments

A recommendation was made to incorporate FTCA rules from Title I. This suggestion was accepted and the appropriate Title I rules dealing with FTCA have been incorporated and modified slightly for Self-Governance. Sections 1000.270 to 100.286 replaced §§ 1000.240 to 1000.255 of the proposed rule.

Subpart M—Reassumption

Summary of Subpart

Reassumption is the Federally initiated action of reassuming control of Federal programs formerly performed by a Tribe. Subpart M explains the types of reassumption authorized under the Tribal Self-Governance Act of 1994, including the rights of a Consortium member, the types of circumstances necessitating reassumption, and Secretarial responsibilities including prior notice requirements and other procedures.

Subpart M also describes activities to be performed after reassumption has been completed, such as authorization for "windup" costs, Tribal obligations regarding the return of Federal property to the Secretary, and the effect of reassumption on other provisions of an AFA.

Comments

A comment recommended that language regarding those funds impacted by the notice of reassumption be more specific to the management of trust assets, resources, or the public health and safety. The Committee agreed. Other comments recommended editorial changes in the wording that were also agreed to by the Committee.

Subpart N—Retrocession

Summary of Subpart

Retrocession is the Tribally initiated action of returning control of certain programs to the Federal government. Subpart N defines retrocession, including how Tribes may retrocede, the effect of retrocession on future AFA negotiations, and Tribal obligations regarding the return of Federal property to the Secretary after retrocession.

Comments

A comment on this subpart recommended that the term "contractor status" be changed to read "contract status". The Committee agreed and the phrase was changed.

Subpart O—Trust Evaluation Review

Summary of Subpart

Subpart O establishes a procedural framework for the annual trust evaluation mandated by the Tribal Self-Governance Act of 1994. The purpose of the annual trust evaluation is to ensure that trust functions assumed by Tribes/Consortia are performed in a manner that does not place trust assets in imminent jeopardy.

Imminent jeopardy of a physical trust asset or natural resource (or their intended benefits) exists where there is an immediate threat and likelihood of significant devaluation, degradation, or loss to such asset. Imminent jeopardy to public health and safety means an immediate and significant threat of serious harm to human well-being, including conditions that may result in serious injury, or death, caused by Tribal action or inaction or as otherwise provided in an annual funding agreement.

Subpart O requires the Secretary's designated representative to prepare a written report for each AFA under which trust functions are performed by a Tribe. The regulation also authorizes a review of Federal performance of residual and nondelegable trust functions affecting trust resources.

Comments

Several comments were received on this subpart. A few dealt with editorial changes that the Committee agreed to

including: capitalizing “Federal” and “Tribal” throughout the regulation; striking a reference to the Code of Federal Regulations deemed to be unnecessary; and clarifying that the provisions of the AFA to be reviewed are the *trust* provisions. A comment recommended the addition of a question and answer that would address negotiating standards for review for purposes of the trust evaluation. The Committee agreed on the language to be used and that the question and answer should be added. A comment dealt with amending the section establishing standards to be used in the review of the Secretary’s residual trust functions. The Committee agreed to add language that would articulate the criteria to be used in reviewing the Secretary’s residual trust functions. A comment dealt with the need for clarification of the responsibilities of Consortia when a trust evaluation reveals problems in the performance of trust functions that do not rise to imminent jeopardy. The Committee agreed on clarifying language. A comment was concerned with establishing more Federal participation in assuring no breach of trust when a Tribe is operating a trust program and corrective action is necessary. The Committee agreed to language that clarified these responsibilities.

Subpart P—Reports

Summary of Subpart

This subpart describes the report on self-governance that the Secretary prepares annually for transmittal to Congress. It includes the requirements for the annual report that Tribes submit to the Secretary.

Comments

Comments noted that a Government Performance and Results Act (GPRA)-type reporting requirement should be applied to the Tribes and the bureaus as this would help justify more programs and services to Tribes/Consortia. While the Committee noted the merits of oversight and justification of further funding, it recognized that GPRA is a separate activity apart from self-governance. Further, there was no authority under the statute to mandate GPRA in this regulation. One comment suggested that the reporting requirement be made discretionary on the part of the tribes and this suggestion was accepted because there is no statutory basis requiring Tribes/Consortia to submit an annual report.

Subpart Q—Miscellaneous Provisions

Summary of Subpart

This subpart addresses many facets of self-governance not covered in the other subparts. Issues covered include the applicability of various laws and OMB circulars, how funds are handled in various situations, and the relationship between employees of the Tribe/Consortium and employees of the Federal government. Conflicts of Interest was moved to become Subpart S. For comments on Conflicts of Interest, see subpart S.

Comments

The committee agreed to delete § 1000.356 from the proposed rule which dealt with how payments will be made to self-governance Tribes/Consortia.

A suggestion was made to delete the requirement that tribe/consortium maintain minimum management standards that existed when the Tribe/Consortium first entered the Self-Governance program. This suggestion was not accepted. As an alternative § 1000.396 has been changed so that it is similar to what appears in the Title I regulations (§ 900.40)

Cash Management

It was suggested that § 1000.397, which addresses restrictions on the use of funds under the AFA, be deleted because it restricts the Tribe’s/Consortium’s ability to adopt programs and focus funds on local needs. This suggestion was not accepted. Section 403(b)(5) of the Act requires that the annual funding agreement specify “* * * the services to be provided, the functions to be performed and the responsibility of the tribe and the Secretary under the agreement.” It is critical that the regulations reflect the general parameters for use of funds transferred under AFA’s.

As to cash management, there was considerable discussion on the investment of funds transferred to the Tribe/Consortium under an AFA. In comment and committee, the overwhelming Tribal view was that the Tribe/Consortium should be allowed to invest any funds transferred to them under an AFA according to the prudent investor standard. It was stressed that such investments would allow the Tribes/Consortia to increase their cash holdings and, hence, allow for greater achievement in the management of their programs under Tribal Self-Governance. While the Federal team could agree that investment—when it paid off—was a good way to enhance cash reserves, the Federal team and comments from

agencies other than DOI questioned the propriety of investing Federal funds in other than secured vehicles. The chance to lose Federal funds seemed to be inapposite to the goals of self-governance. After consultation with the Office of the Solicitor, it was decided by the Federal team to allow limited investment in secured transactions. This decision is reflected in the regulations at § 1000.398.

Property Donation

Several comments were received regarding this subpart. The issues centered around the procedures and obligation of the Department to transfer BIA and non-BIA property to Tribes for use under an AFA. Much of the Committee’s discussion concerned the applicability of 105(f)(2)(A) of Pub. L. 93-638 to non-BIA bureaus. After consideration, the Committee concluded that it would not regulate this section. Instead, Tribes and the Department will be required to follow already existing statutes, regulations and guidance issued by the Federal government.

Supply Sources

Several comments were received supporting the Tribal proposal for language regarding supply sources. The Committee recognizes that Tribes have had difficulties with the General Services Administration (GSA). However, only the GSA has the legal authority over a Tribe’s/Consortium’s use of Federal supply sources. To assist Tribes in exercising their options with regard to Federal supply sources, the Committee agreed that the Department should help facilitate discussions between the GSA and a Tribe/Consortium. Therefore, the Committee agreed to accept the Tribal language with a modification to the last sentence. The last sentence to § 1000.408 now reads: While implementation of this provision is the responsibility of the General Services Administration, the Department shall assist the Tribes/Consortia to resolve any barriers to full implementation that may arise to the fullest extent possible.

Subpart R—Appeals

Summary of Subpart

Subpart R prescribes the process Tribes/Consortia may use to resolve disputes with the Department arising before or after execution of an AFA or compact and certain other disputes related to self-governance. This subpart also describes the administrative process for reviewing disputes related to compact provisions. This subpart describes the process for administrative

appeals to: (1) the Interior Board of Indian Appeals; (2) the Interior Board of Contract Appeals; (3) the Assistant Secretary for the bureau responsible for certain disputed decisions; (4) the Secretary for reconsideration of decisions involving self-governance compacts, and; (5) the bureau head for certain pre-award disputes.

Subpart R indicates those decisions that are *not* administratively appealable under this subpart and makes provisions for informal conferences to settle disputes before filing an appeal. Pre-award disputes of Title I-eligible programs, functions, services and activities may only be filed with the Interior Board of Indian Appeals under the regulations promulgated in 25 CFR 900.150(a)–(h), 900.152–169. Other pre-award disputes of non-Title I-eligible programs, functions, services, and activities may be appealed through the administrative route within the Department or directly to the Interior Board of Indian Appeals. With the exception of certain decisions concerning reassumption for imminent jeopardy, the Tribe/Consortium may appeal post-award administrative decisions to the Interior Board of Contract Appeals.

Subpart R does *not* provide an appeals process for disputes arising from construction AFAs, as these procedures are found in subpart K of these regulations.

Comments

Comments on this subpart asked the Committee to simplify the appeals process and otherwise refrain from unnecessary cross-referencing that only confuses the reader of the regulations. The Committee arranged the appeals subpart to clearly indicate areas of dispute resolution including informal conferences, administrative resolution of both pre-award and post-award disputes, and matters that were not administratively appealable under this subpart.

A comment indicated that Tribes/Consortia should be able to go to the Interior Board of Indian Appeals for reassumption for imminent jeopardy. The Committee agreed that the Tribe/Consortium may go to the Interior Board of Indian Appeals for Title I-eligible programs; however, non-Title I-eligible programs would go before the Interior Board of Contract Appeals. The Committee agreed that a Tribe/Consortium may choose to appeal directly to the Interior Board of Indian Appeals on an “abuse of discretion” standard. The Tribal team had advocated that this standard be further qualified “as governed by the applicable

canons of construction and the mandates of Section 403(i)(1).” However, the Federal team did not agree with this further qualification of the abuse of discretion of standard because it felt that canons of construction was a term of art during litigation and was inappropriate as a regulatory parameter. The regulations, therefore, do not refer to canons of construction.

There was some discussion of whether the appropriate assistant secretary or the bureau head should be the final arbitrator of administrative appeals. The Committee recognized that conflicts could arise where it would be inappropriate for the bureau to decide an appeal. Therefore, the regulations provide that the bureau head would be the first line of appeal, unless the decision being appealed was the decision of the bureau head in which case the appeal would go to the appropriate assistant secretary. If the Tribe/Consortium does not receive a favorable decision from the bureau head, the appeal is automatically sent forward to the appropriate assistant secretary for final decision.

Subpart S—Conflicts of Interest

Summary of Subpart

The conflict of interest regulation subpart applies only if the AFA fails to provide equivalent protection against conflict of interests to these regulations. Section 1000.460 defines an organizational conflict of interest and addresses only those conflicts discovered after an AFA is signed. Section 1000.463 defines personal conflicts of interest and requires a Tribe/Consortium to have a Tribally-approved mechanism to ensure that no officer, employee, or agent of the Tribe/Consortium has a financial or employment interest that conflicts with that of the trust beneficiary.

Comments

Several comments were received supporting the proposed Tribal position or questioning the need for a section on conflicts of interest. Ultimately, the Department must balance the Federal-Tribal government-to-government relationship with the Federal trust responsibilities. In recognition of this responsibility, and in an attempt to minimize any intrusion or burden on Tribes/Consortia, the Committee agreed to adopt the Federal regulations published in Pub. L. 93–638 (25 U.S.C. 450).

Comments suggested that it was improper to subject a Tribe/Consortium to conflicts of interest provisions and not impose similar regulations on

Federal employees. Federal employees are subject to conflicts of interest standards under 5 CFR 2635.

Some comments objected to the Federal proposal because they were inconsistent with the Federal policy on self-governance. While there is a strong Federal policy of self-governance, it does not diminish the Federal government’s trust responsibility. The standards adopted with this regulation balance the Federal government’s trust responsibilities with the policy of self-governance. The organizational conflicts of interest apply only if the AFA affects the interests of allottees, trust resources or statutory obligations to a third party. The personal conflicts of interest regulations only apply to trust programs. These provisions would only apply in the absence of a Tribal code or AFA provision that adequately protects trust beneficiaries from conflicts of interest. The rule also acknowledges that Tribal codes and negotiated AFA provisions, that are agreed to by the Department, are the preferred manner to address conflicts of interest. A proposal was made to replace §§ 1000.462–.464 with a single question and answer that allows the Tribe/Consortium to have some procedure in place that will avoid as is practicable possible conflicts of interest. This suggestion was not accepted even though the Department acknowledges that such regulations may be difficult for some smaller tribes to implement. However, the Department must ensure that there is no conflict of interest when a Tribe/Consortium manages trust programs so that the Secretary’s trust responsibility is not compromised.

Review Under Executive Order 12612

The Department has determined that this rule does not have significant Federalism effects because it pertains solely to Federal-Tribal relations and will not interfere with the roles, rights, and responsibilities of States.

Review Under Executive Order 12630

The Department has determined that this rule does not have significant “takings” implications. The rule does not pertain to “takings” of private property interests, nor does it impact private property.

Review Under Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), BIA must determine whether the regulatory action is “significant” and therefore subject to OMB review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations or recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The rule describes the process and procedures for negotiating annual funding agreements with Indian Tribes/consortia. Thus, the impact of the rule is confined to the federal government and the Indian trust beneficiaries and does not impose a compliance burden on the economy generally. No new monies are introduced into the stream of commerce with this rulemaking. Accordingly, it has been determined that this rule is not a "significant regulatory action" from an economic standpoint, or otherwise creates any inconsistencies or budgetary impacts to any other agency or federal program. However, the Department submitted the rule for review by the Office of Management and Budget (OMB) as a significant policy matter impacting federally-recognized tribes/consortia that participate in the Tribal Self-Governance Program administered by BIA.

Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section (b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting

simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under guidelines issues by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department of the Interior has determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

Review Under the Regulatory Flexibility Act

This rule was reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. This rule establishes the process and procedures for negotiating annual funding agreements with Indian Tribes/consortia. Indian tribes are not small entities under the Regulatory Flexibility Act. Accordingly, the Department of the Interior has determined that this proposed regulation will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

Review Under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of \$100 million or more. The rule establishes the process and procedures for negotiating annual funding agreements with Indian Tribes/consortia and no new monies are being introduced into the stream of commerce. The final rule will not result in a major increase in costs or prices. The effect of this final rule will be to ensure consistent administration of the Tribal Self-Governance Program. No increases in costs for administration will be realized and no prices would be impacted through this administrative rulemaking. The final rule will not result in any significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-

based companies in domestic and export markets. The impact of the final rule will be realized by Indian Tribes/Consortia, and the administrative process and procedures promulgated in the final rule will not otherwise have a significant impact on any small businesses or enterprises.

Review Under Executive Order 13132—Federalism

The final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. While this final rule will impact tribal governments, there is no Federalism impact on the trust relationship or balance of power between the United States government and the various Indian Tribes/consortia affected by this rulemaking. Therefore, in accordance with Executive Order 13132, it is determined that this rule will not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the Act, the Department generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. This final rule will not result in the expenditure by the state, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. The Department, however, determined that because the rulemaking will uniquely affect tribal governments it would follow Departmental and Administration protocols in consulting with tribal governments on the rulemaking. As this final rule was the result of a negotiated rulemaking process, with both a "Tribal Team" and a "Federal Team," the Department asserts that appropriate consultation was achieved. Results of the ongoing negotiated rulemaking process were periodically reported and discussed in Federal/Tribal fora and these consultations met the mandates established by the President's Executive Order 13084, "Consultation and

Coordination with Indian Tribal Governments.” Tribal officials and the effected tribal constituency were given the opportunity for meaningful and timely input in the development of the final rule.

NEPA Compliance

The Department has determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969.

Federal Paperwork Reduction Act

In accordance with 44 U.S.C. 3507(d), OSG submitted the information collection and record keeping requirements of 25 CFR Part 1000 to the Office of Management and Budget (OMB) for review and approval. The OMB approved the self-governance information collection and assigned control number 1076-0143 to it.

25 CFR Part 1000

Title: Annual Funding Agreements Under the Tribal Self-Governance Act Amendments to the Indian Self-Determination and Education Act.

OMB Control Number: 1076-0143.

Abstract: The Department of the Interior and Indian government representatives negotiated a rule to implement section 407 of Pub. L. 103-413, the Tribal Self-Governance Act of 1994. As required by section 407 of the Act, the Secretary, upon request of a majority of the self-governance Tribes, initiated procedures under subchapter III of Chapter 5 of Title 5, U.S.C., to negotiate and promulgate regulations that are necessary to carry out title IV. This rule will allow the Department to negotiate annual funding agreements with self-governance Tribes for programs, services, functions and activities conducted by the Department. The Department developed this negotiated rulemaking with active Tribal participation, and it contains the proposed information collection.

Need for and Use: The information provided by the Tribes will be used by the Department of the Interior for a variety of purposes. The first purpose will be to ensure that qualified applicants are admitted into the applicant pool consistent with the requirements of the Act. In addition, Tribes seeking grant assistance to meet the planning requirements for admission into the applicant pool will provide information so that grants can be awarded to Tribes meeting basic eligibility (i.e. Tribal resolution indicating that the Tribe wants to plan for self-governance and has no material audit exceptions for the last three years).

Other documentation is required to meet the reporting requirements as called for in Section 405 of the Act.

Respondents: Tribes and Tribal Consortia that may be affected by self-governance activities or request funding for projects or services.

Total Annual Burden: Refer to proposed 25 CFR 1000.3 for a detailed table of the burden estimates anticipated by this rulemaking.

Comments were invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of the Department of the Interior, including whether the information will have practical utility;

(b) The accuracy of OSG's estimate of the burden of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of collection on the respondents. No comments were received concerning the information collection requirements of this rule.

No comments were received on the information collection issues in the proposed regulation. Under the Paperwork Reduction Act, OSG must obtain OMB approval of all information and record keeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. This number appears in 25 CFR 1000.3. To obtain a copy of OSG's information collection clearance requests, explanatory information, and related form, contact the Information Collection Clearance Officer, Office of Self-Governance, at (202) 219-0240.

List of Subjects in 25 CFR Part 1000

Grant programs—Indians, Indians.

Dated: September 5, 2001.

Bruce Babbitt,

Secretary of the Interior.

For the reasons set out in the preamble, the Department of the Interior adds a new part 1000 in chapter VI of title 25 of the Code of Federal Regulations as set forth below.

PART 1000—ANNUAL FUNDING AGREEMENTS UNDER THE TRIBAL SELF-GOVERNMENT ACT AMENDMENTS TO THE INDIAN SELF-DETERMINATION AND EDUCATION ACT

Subpart A—General Provisions

Sec.

- 1000.1 Authority.
- 1000.2 Definitions.
- 1000.3 Purpose and scope.
- 1000.4 Policy statement.

Subpart B—Selection of Additional Tribes for Participation in Tribal Self-Governance

Purpose and Definitions

- 1000.10 What is the purpose of this subpart?
- 1000.11 What is the “applicant pool”?
- 1000.12 What is a “signatory”?
- 1000.13 What is a “nonsignatory Tribe”?

Eligibility

- 1000.14 Who is eligible to participate in Tribal self-governance?
- 1000.15 How many additional Tribes/Consortia may participate in self-governance per year?
- 1000.16 What criteria must a Tribe/Consortium satisfy to be eligible for admission to the “applicant pool”?
- 1000.17 What documents must a Tribe/Consortium submit to OSG to apply for admission to the applicant pool?
- 1000.18 May a Consortium member Tribe withdraw from the Consortium and become a member of the applicant pool?
- 1000.19 What is done during the “planning phase”?
- 1000.20 What is required in a planning report?
- 1000.21 When does a Tribe/Consortium have a “material audit exception”?
- 1000.22 What are the consequences of having a material audit exception?

Admission Into the Applicant Pool

- 1000.23 How is a Tribe/Consortium admitted to the applicant pool?
- 1000.24 When does OSG accept applications to become a member of the applicant pool?
- 1000.25 What are the deadlines for a Tribe/Consortium in the applicant pool to negotiate a compact and annual funding agreement (AFA)?
- 1000.26 Under what circumstances will a Tribe/Consortium be removed from the applicant pool?
- 1000.27 How does the Director select which Tribes in the applicant pool become self-governance Tribes?
- 1000.28 What happens if an application is not complete?
- 1000.29 What happens if a Tribe/Consortium is selected from the applicant pool but does not execute a compact and an AFA during the calendar year?
- 1000.30 May a Tribe/Consortium be selected to negotiate an AFA under section 403(b)(2) without having or negotiating an AFA under section 403(b)(1)?
- 1000.31 May a Tribe/Consortium be selected to negotiate an AFA under section 403(c) without negotiating an AFA under section 403(b)(1) and/or section 403(b)(2)?

Withdrawal From a Consortium Annual Funding Agreement

- 1000.32 What happens when a Tribe wishes to withdraw from a Consortium annual funding agreement?

- 1000.33 What amount of funding is to be removed from the Consortium's AFA for the withdrawing Tribe?
- 1000.34 What happens if there is a dispute between the Consortium and the withdrawing Tribe?
- 1000.35 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

Subpart C—Section 402(d) Planning and Negotiation Grants

Purpose and Types of Grants

- 1000.40 What is the purpose of this subpart?
- 1000.41 What types of grants are available?

Availability, Amount, and Number of Grants

- 1000.42 Will grants always be made available to meet the planning phase requirement as described in section 402(d) of the Act?
- 1000.43 May a Tribe/Consortium use its own resources to meet its self-governance planning and negotiation expenses?
- 1000.44 What happens if there are insufficient funds to meet the Tribal requests for planning/negotiation grants in any given year?
- 1000.45 How many grants will the Department make each year and what funding will be available?

Selection Criteria

- 1000.46 Which Tribes/Consortia may be selected to receive a negotiation grant?
- 1000.47 What must a Tribe/Consortium do to receive a negotiation grant?
- 1000.48 What must a Tribe do if it does not wish to receive a negotiation grant?

Advance Planning Grant Funding

- 1000.49 Who can apply for an advance planning grant?
- 1000.50 What must a Tribe/Consortium seeking a planning grant submit in order to meet the planning phase requirements?
- 1000.51 How will Tribes/Consortia know when and how to apply for planning grants?
- 1000.52 What criteria will the Director use to award advance planning grants?
- 1000.53 Can Tribes/Consortia that receive advance planning grants also apply for a negotiation grant?
- 1000.54 How will a Tribe/Consortium know whether or not it has been selected to receive an advance planning grant?
- 1000.55 Can a Tribe/Consortium appeal within DOI the Director's decision not to award a grant under this subpart?

Subpart D—Other Financial Assistance for Planning and Negotiations Grants for Non-BIA Programs

Purpose and Eligibility

- 1000.60 What is the purpose of this subpart?
- 1000.61 Are other funds available to self-governance Tribes/Consortia for

planning and negotiating with non-BIA bureaus?

Eligibility and Application Process

- 1000.62 Who can apply to OSG for grants to plan and negotiate non-BIA programs?
- 1000.63 Under what circumstances may planning and negotiation grants be awarded to Tribes/Consortia?
- 1000.64 How does the Tribe/Consortium know when and how to apply to OSG for a planning and negotiation grant?
- 1000.65 What kinds of activities do planning and negotiation grants support?
- 1000.66 What must be included in the application?
- 1000.67 How will the Director award planning and negotiation grants?
- 1000.68 May non-BIA bureaus provide technical assistance to a Tribe/Consortium in drafting its planning grant application?
- 1000.69 How can a Tribe/Consortium obtain comments or selection documents received or utilized after OSG has made a decision on a planning grant application?
- 1000.70 What criteria will the Director use to rank the applications and how many maximum points can be awarded for each criterion?
- 1000.71 Can an applicant appeal a decision not to award a grant?
- 1000.72 Will OSG notify Tribes/Consortia and affected non-BIA bureaus of the results of the selection process?
- 1000.73 Once a Tribe/Consortium has been awarded a grant, may the Tribe/Consortium obtain information from a non-BIA bureau?

Subpart E—Annual Funding Agreements for Bureau of Indian Affairs Programs

- 1000.80 What is the purpose of this subpart?
- 1000.81 What is an annual funding agreement (AFA)?

Contents and Scope of Annual Funding Agreements

- 1000.82 What types of provisions must be included in a BIA AFA?
- 1000.83 Can additional provisions be included in an AFA?
- 1000.84 Does a Tribe/Consortium have the right to include provisions of Title I of Pub. L. 93-638 in an AFA?
- 1000.85 Can a Tribe/Consortium negotiate an AFA with a term that exceeds one year?

Determining What Programs May Be Included in an AFA

- 1000.86 What types of programs may be included in an AFA?
- 1000.87 How does the AFA specify the services provided, functions performed, and responsibilities assumed by the Tribe/Consortium and those retained by the Secretary?
- 1000.88 Do Tribes/Consortia need Secretarial approval to redesign BIA programs that the Tribe/Consortium administers under an AFA?
- 1000.89 Can the terms and conditions in an AFA be amended during the year it is in effect?

- 1000.90 What happens if an AFA expires before the effective date of the successor AFA?

Determining AFA Amounts

- 1000.91 What funds must be transferred to a Tribe/Consortium under an AFA?
- 1000.92 What funds may not be included in an AFA?
- 1000.93 May the Secretary place any requirements on programs and funds that are otherwise available to Tribes/Consortia or Indians for which appropriations are made to agencies other than DOI?
- 1000.94 What are BIA residual funds?
- 1000.95 How is BIA's residual determined?
- 1000.96 May a Tribe/Consortium continue to negotiate an AFA pending an appeal of residual functions and amounts?
- 1000.97 What is a Tribal share?
- 1000.98 How does BIA determine a Tribe's/Consortium's share of funds to be included in an AFA?
- 1000.99 Can a Tribe/Consortium negotiate a Tribal share for programs outside its region/agency?
- 1000.100 May a Tribe/Consortium obtain funding that is distributed on a discretionary or competitive basis?
- 1000.101 Are all funds identified as Tribal shares always paid to the Tribe/Consortium under an AFA?
- 1000.102 How are savings that result from downsizing allocated?
- 1000.103 Do Tribes/Consortia need Secretarial approval to reallocate funds between programs that the Tribe/Consortium administers under the AFA?
- 1000.104 Can funding amounts negotiated in an AFA be adjusted during the year it is in effect?

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- 1000.105 What are self-governance base budgets?
- 1000.106 Once a Tribe/Consortium establishes a base budget, are funding amounts renegotiated each year?
- 1000.107 Must a Tribe/Consortium with a base budget or base budget-eligible program amounts negotiated before January 16, 2001 negotiate new Tribal shares and residual amounts?
- 1000.108 How are self-governance base budgets established?
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Subpart F—Non-BIA Annual Self-Governance Compacts and Funding Agreements

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- 1000.120 What is the purpose of this subpart?
- 1000.121 What is an annual funding agreement for a non-BIA program?

Eligibility

- 1000.122 What non-BIA programs are eligible for inclusion in an AFA?
- 1000.123 Are there non-BIA programs for which the Secretary must negotiate for inclusion in an AFA subject to such terms as the parties may negotiate?
- 1000.124 What programs are included under section 403(b)(2) of the Act?

- 1000.125 What programs are included under section 403(c)?
- 1000.126 What does "special geographic, historical or cultural" mean?
- 1000.127 Under section 403(b)(2), when must programs be awarded non-competitively?
- 1000.128 Is there a contracting preference for programs of special geographic, historical, or cultural significance?
- 1000.129 Are there any programs that may not be included in an AFA?
- 1000.130 Does a Tribe/Consortium need to be identified in an authorizing statute in order for a program or element of a program to be included in a non-BIA AFA?
- 1000.131 Will Tribes/Consortia participate in the Secretary's determination of what is to be included on the annual list of available programs?
- 1000.132 How will the Secretary consult with Tribes/Consortia in developing the list of available programs?
- 1000.133 What else is on the list in addition to eligible programs?
- 1000.134 May a bureau negotiate with a Tribe/Consortium for programs not specifically included on the annual section 405(c) list?
- 1000.135 How will a bureau negotiate an annual funding agreement for a program of special geographic, historical, or cultural significance to more than one Tribe?
- 1000.136 When will this determination be made?

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- 1000.138 How are indirect cost rates determined?
- 1000.139 Will the established indirect cost rate always apply to new AFAs?
- 1000.140 How does the Secretary determine the amount of indirect contract support costs?
- 1000.141 Is there a predetermined cap or limit on indirect cost rates or a fixed formula for calculating indirect cost rates?
- 1000.142 Instead of the negotiated indirect cost rate, is it possible to establish a fixed amount or another negotiated rate for indirect costs where funds are limited?

Other Terms and Conditions

- 1000.143 May the bureaus negotiate terms to be included in an AFA for non-Indian programs?

Reallocation, Duration and Amendments

- 1000.144 Can a Tribe reallocate funds for a non-BIA non-Indian program?
- 1000.145 Do Tribes/Consortia need Secretarial approval to reallocate funds between Title-I eligible programs that the Tribe/Consortium administers under a non-BIA AFA?
- 1000.146 Can a Tribe/Consortium negotiate an AFA with a non-BIA bureau for which the performance period exceeds one year?

- 1000.147 Can the terms and conditions in a non-BIA AFA be amended during the year it is in effect?
- 1000.148 What happens if an AFA expires before the effective date of the successor AFA?

Subpart G—Negotiation Process for Annual Funding Agreements

Purpose

- 1000.160 What is the purpose of this subpart?

Negotiating a Self-Governance Compact

- 1000.161 What is a self-governance compact?
- 1000.162 What is included in a self-governance compact?
- 1000.163 Can a Tribe negotiate other terms and conditions not contained in the model compact?
- 1000.164 Can a Tribe/Consortium have an AFA without entering into a compact?
- 1000.165 Are provisions in compacts negotiated before January 16, 2001, effective after implementation?

Negotiation of Initial Annual Funding Agreements

- 1000.166 What are the phases of the negotiation process?
- 1000.167 Who may initiate the information phase?
- 1000.168 Is it mandatory to go through the information phase before initiating the negotiation phase?
- 1000.169 How does a Tribe/Consortium initiate the information phase?
- 1000.170 What is the letter of interest?
- 1000.171 When should a Tribe/Consortium submit a letter of interest?
- 1000.172 What steps does the bureau take after a letter of interest is submitted by a Tribe/Consortium?
- 1000.173 How does a newly selected Tribe/Consortium initiate the negotiation phase?
- 1000.174 How and when does the bureau respond to a request to negotiate?
- 1000.175 What is the process for conducting the negotiation phase?
- 1000.176 What issues must the bureau and the Tribe/Consortium address at negotiation meetings?
- 1000.177 What happens when the AFA is signed?
- 1000.178 When does the AFA become effective?
- 1000.179 What happens if the Tribe/Consortium and bureau negotiators fail to reach an agreement?

Negotiation Process for Successor Annual Funding Agreements

- 1000.180 What is a successor AFA?
- 1000.181 How does the Tribe/Consortium initiate the negotiation of a successor AFA?
- 1000.182 What is the process for negotiating a successor AFA?

Subpart H—Limitation and/or Reduction of Services, Contracts, and Funds

- 1000.190 What is the purpose of this subpart?
- 1000.191 To whom does this subpart apply?

- 1000.192 What services, contracts, or funds are protected under section 406(a)?
- 1000.193 Who may raise the issue of limitation or reduction of services, contracts, or funding?
- 1000.194 When must BIA raise the issue of limitation or reduction of services, contracts, or funding?
- 1000.195 When must an affected Tribe/Consortium or Tribal organization raise the issue of a limitation or reduction of services, contracts, or funding for which it is eligible?
- 1000.196 What must be included in a finding by BIA or in a claim by or an affected Tribe/Consortium or Tribal organization regarding the issue of a limitation or reduction of services?
- 1000.197 How will BIA resolve a claim?
- 1000.198 How must a limitation or reduction in services, contracts, or funds be remedied?

Subpart I—Public Consultation Process

- 1000.210 When does a non-BIA bureau use a public consultation process related to the negotiation of an AFA?
- 1000.211 Will the bureau contact the Tribe/Consortium before initiating public consultation process for a non-BIA AFA under negotiation?
- 1000.212 What is the role of the Tribe/Consortium when a bureau initiates a public meeting?
- 1000.213 What should the bureau do if it is invited to attend a meeting with respect to the Tribe's/Consortium's proposed AFA?
- 1000.214 Will the bureau and the Tribe/Consortium share information concerning inquiries about the Tribes/Consortia and the AFA?

Subpart J—Waiver of Regulations

- 1000.220 What regulations apply to self-governance Tribes?
- 1000.221 Can the Secretary grant a waiver of regulations to a Tribe/Consortium?
- 1000.222 How does a Tribe/Consortium obtain a waiver?
- 1000.223 When can a Tribe/Consortium request a waiver of a regulation?
- 1000.224 How can a Tribe/Consortium expedite the review of a regulation waiver request?
- 1000.225 Are meetings or discussions mandatory?
- 1000.226 On what basis may the Secretary deny a waiver request?
- 1000.227 What happens if the Secretary denies the waiver request?
- 1000.228 What are examples of waivers prohibited by law?
- 1000.229 May a Tribe/Consortium propose a substitute for a regulation it wishes to be waived?
- 1000.230 How is a waiver approval documented for the record?
- 1000.231 How does a Tribe/Consortium request a reconsideration of the Secretary's denial of a waiver?
- 1000.232 When must DOI respond to a request for reconsideration?

Subpart K—Construction

- 1000.240 What construction programs included in an AFA are subject to this subpart?
- 1000.241 Does this subpart create an agency relationship?
- 1000.242 What provisions relating to a construction program may be included in an AFA?
- 1000.243 What special provisions must be included in an AFA that contains a construction program?
- 1000.244 May the Secretary suspend construction activities under an AFA?
- 1000.245 May a Tribe/Consortium continue work with construction funds remaining in an AFA at the end of the funding year?
- 1000.246 Must an AFA that contains a construction project or activity incorporate provisions of Federal construction standards?
- 1000.247 May the Secretary require design provisions and other terms and conditions for construction programs or activities included in an AFA under section 403(c) of the Act?
- 1000.248 What is the Tribe's/Consortium's role in a construction program included in an AFA?
- 1000.249 What is the Secretary's role in a construction program in an AFA?
- 1000.250 How are property and funding returned if there is a reassumption for substantial failure to carry out an AFA?
- 1000.251 What happens when a Tribe/Consortium is suspended for substantial failure to carry out the terms of an AFA without good cause and does not correct the failure during the suspension?
- 1000.252 Do all provisions of other subparts apply to construction portions of AFAs?
- 1000.253 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?
- 1000.254 May a Tribe/Consortium reallocate funds from a construction program to a non-construction program?
- 1000.255 May a Tribe/Consortium reallocate funds among construction programs?
- 1000.256 Must the Secretary retain project funds to ensure proper health and safety standards in construction projects?

Subpart L—Federal Tort Claims

- 1000.270 What does this subpart cover?
- 1000.271 What other statutes and regulations apply to FTCA coverage?
- 1000.272 Do Tribes/Consortia need to be aware of areas which FTCA does not cover?
- 1000.273 Is there a deadline for filing FTCA claims?
- 1000.274 How long does the Federal government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?
- 1000.275 Is it necessary for a self-governance AFA to include any clauses about FTCA coverage?

- 1000.276 Does FTCA apply to a self-governance AFA if FTCA is not referenced in the AFA?
- 1000.277 To what extent shall the Tribe/Consortium cooperate with the Federal government in connection with tort claims arising out of the Tribe's/Consortium's performance?
- 1000.278 Does this coverage extend to subcontractors of self-governance AFAs?
- 1000.279 Is FTCA the exclusive remedy for a tort claim, including a claim concerning personal injury or death, resulting from the performance of a self-governance AFA?
- 1000.280 What employees are covered by FTCA for medical-related claims?
- 1000.281 Does FTCA cover employees of the Tribe/Consortium who are paid by the Tribe/Consortium from funds other than those provided through the self-governance AFA?
- 1000.282 May persons who are not Indians or Alaska Natives assert claims under FTCA?
- 1000.283 If the Tribe/Consortium or the Tribe's/Consortium's employee receives a summons and/or complaint alleging a tort covered by FTCA, what should a Tribe/Consortium do?

Subpart M—Reassumption

- 1000.300 What is the purpose of this subpart?
- 1000.301 When may the Secretary reassume a Federal program operated by a Tribe/Consortium under an AFA?
- 1000.302 What is "imminent jeopardy" to a trust asset?
- 1000.303 What is imminent jeopardy to natural resources?
- 1000.304 What is imminent jeopardy to public health and safety?
- 1000.305 In an imminent jeopardy situation, what must the Secretary do?
- 1000.306 Must the Secretary always reassume a program, upon a finding of imminent jeopardy?
- 1000.307 What happens if the Secretary's designated representative determines that the Tribe/Consortium cannot mitigate the conditions within 60 days?
- 1000.308 What will the notice of reassumption include?
- 1000.309 How much time will a Tribe/Consortium have to respond to a notice of imminent jeopardy?
- 1000.310 What information must the Tribe's/Consortium's response contain?
- 1000.311 How will the Secretary reply to the Tribe's/Consortium's response?
- 1000.312 What happens if the Secretary accepts the Tribe's/Consortium's proposed measures?
- 1000.313 What happens if the Secretary does not accept the Tribe's/Consortium's proposed measures?
- 1000.314 What must a Tribe/Consortium do when a program is reassumed?
- 1000.315 When must the Tribe/Consortium return funds to the Department?
- 1000.316 May the Tribe/Consortium be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of retrocession?

- 1000.317 Is a Tribe's/Consortium's general right to negotiate an AFA adversely affected by a reassumption action?
- 1000.318 When will the Secretary return management of a reassumed program?

Subpart N—Retrocession

- 1000.330 What is the purpose of this subpart?
- 1000.331 Is a decision by a Tribe/Consortium not to include a program in a successor agreement considered a retrocession?
- 1000.332 Who may retrocede a program in an AFA?
- 1000.333 How does a Tribe/Consortium retrocede a program?
- 1000.334 When will the retrocession become effective?
- 1000.335 How will retrocession affect the Tribe's/Consortium's existing and future AFAs?
- 1000.336 Does the Tribe/Consortium have to return funds used in the operation of a retroceded program?
- 1000.337 Does the Tribe/Consortium have to return property used in the operation of a retroceded program?
- 1000.338 What happens to a Tribe's/Consortium's mature contractor status if it has retroceded a program that is also available for self-determination contracting?
- 1000.339 How does retrocession affect a bureau's operation of the retroceded program?

Subpart O—Trust Evaluation Review

- 1000.350 What is the purpose of this subpart?
- 1000.351 Does the Tribal Self-Governance Act of 1994 alter the trust responsibility of the United States to Indian Tribes and individuals under self-governance?
- 1000.352 What are "trust resources" for the purposes of the trust evaluation process?
- 1000.353 What are "trust functions" for the purposes of the trust evaluation process?

Annual Trust Evaluations

- 1000.354 What is a trust evaluation?
- 1000.355 How are trust evaluations conducted?
- 1000.356 May the trust evaluation process be used for additional reviews?
- 1000.357 May the parties negotiate standards of review for purposes of the trust evaluation?
- 1000.358 Can an initial review of the status of the trust asset be conducted?
- 1000.359 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?
- 1000.360 Is the trust evaluation standard or process different when the trust asset is held in trust for an individual Indian or Indian allottee?
- 1000.361 Will the annual review include a review of the Secretary's residual trust functions?
- 1000.362 What are the consequences of a finding of imminent jeopardy in the annual trust evaluation?
- 1000.363 What if the trust evaluation reveals problems that do not rise to the level of imminent jeopardy?

- 1000.364 Who is responsible for corrective action?
- 1000.365 What are the requirements of the review team report?
- 1000.366 Can the Department conduct more than one trust evaluation per Tribe per year?
- 1000.367 Will the Department evaluate a Tribe's/Consortium's performance of non-trust related programs?

Subpart P—Reports

- 1000.380 What is the purpose of this subpart?
- 1000.381 How is information about self-governance developed and reported?
- 1000.382 What may the Tribe's/Consortium's annual report on self-governance address?

Subpart Q—Miscellaneous Provisions

- 1000.390 How can a Tribe/Consortium hire a Federal employee to help implement an AFA?
- 1000.391 Can a Tribe/Consortium employee be detailed to a Federal service position?
- 1000.392 How does the Freedom of Information Act apply?
- 1000.393 How does the Privacy Act apply?
- 1000.394 What audit requirements must a self-governance Tribe/Consortium follow?
- 1000.395 Do OMB circulars and revisions apply to self-governance funding agreements?
- 1000.396 Does a Tribe/Consortium have additional ongoing requirements to maintain minimum standards for Tribe/Consortium management systems?
- 1000.397 Are there any restrictions on how AFA funds may be spent?
- 1000.398 May a Tribe/Consortium invest funds received under a self-governance agreement?
- 1000.399 How may interest or investment income that accrues on AFAs be used?
- 1000.400 Can a Tribe/Consortium retain savings from programs?
- 1000.401 Can a Tribe/Consortium carry over funds not spent during the term of the AFA?
- 1000.402 After a non-BIA AFA has been executed and the funds transferred to a Tribe/Consortium, can a bureau request the return of funds?
- 1000.403 How can a person or group appeal a decision or contest an action related to a program operated by a Tribe/Consortium under an AFA?
- 1000.404 Must self-governance Tribes/Consortia comply with the Secretarial approval requirements of 25 U.S.C. 81, 82a, and 476 regarding professional and attorney contracts?
- 1000.405 Are AFA funds non-Federal funds for the purpose of meeting matching requirements?
- 1000.406 Does Indian preference apply to services, activities, programs and functions performed under a self-governance AFA?
- 1000.407 Do the wage and labor standards in the Davis-Bacon Act apply to Tribes and Tribal Consortia?

Supply Sources

- 1000.408 Can a Tribe/Consortium use Federal supply sources in the performance of an AFA?

Prompt Payment Act

- 1000.409 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a non-BIA, non-Indian program AFA?

Subpart R—Appeals

- 1000.420 What does "Title-I eligible programs" mean in this subpart?
- 1000.421 What is the purpose of this subpart?
- 1000.422 How must disputes be handled?
- 1000.423 Are there any decisions that are not administratively appealable under this subpart?
- 1000.424 Does a Tribe/Consortium have a right to an informal conference to resolve any disputes?
- 1000.425 How does a Tribe/Consortium request an informal conference?
- 1000.426 How is an informal conference held?
- 1000.427 What happens after the informal conference?
- 1000.428 How may a Tribe/Consortium appeal a decision made after the AFA or compact or amendment to an AFA or compact has been signed?
- 1000.429 What statutes and regulations govern resolution of disputes concerning signed AFAs or compacts that are appealed to IBCA?
- 1000.430 To whom are appeals directed regarding reassumption for imminent jeopardy?
- 1000.431 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?
- 1000.432 To whom may a Tribe appeal a decision made before the AFA or an amendment to the AFA or compact is signed?
- 1000.433 When and how must a Tribe/Consortium appeal an adverse pre-award decision?
- 1000.434 When must the bureau head (or appropriate Assistant Secretary) issue a final decision in the pre-award appeal?
- 1000.435 When and how will the Assistant Secretary respond to an appeal by a Tribe/Consortium?
- 1000.436 How may a Tribe/Consortium seek reconsideration of the Secretary's decision involving a self-governance compact?
- 1000.437 When will the Secretary respond to a request for reconsideration of a decision involving a self-governance compact?
- 1000.438 May Tribes/Consortia appeal Department decisions to a Federal court?

Subpart S—Conflicts of Interest

- 1000.460 What is an organizational conflict of interest?
- 1000.461 What must a Tribe/Consortium do if an organizational conflict of interest arises under an AFA?
- 1000.462 When must a Tribe/Consortium regulate its employees or subcontractors to avoid a personal conflict of interest?
- 1000.463 What types of personal conflicts of interest involving Tribal officers,

employees or subcontractors would have to be regulated by a Tribe/Consortium?

- 1000.464 What personal conflicts of interest must the standards of conduct regulate?

- 1000.465 May a Tribe/Consortium negotiate AFA provisions on conflicts of interest to take the place of this subpart?

Appendix A—to Part 1000—Model Compact of Self-Governance Between the Tribe and the Department of the Interior

Authority: 25 U.S.C. 458aa-gg.

Subpart A—General Provisions

§ 1000.1 Authority.

This part is prepared and issued by the Secretary of the Interior under the negotiated rulemaking procedures in 5 U.S.C. 565.

§ 1000.2 Definitions.

403(c) Program means a non-BIA program eligible under section 403(c) of the Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. 450 *et seq.* and, specifically, a program, function, service, or activity that is of special geographic, historical or cultural significance to a self-governance Tribe/Consortium. These programs may be referred to, also, as "nexus" programs.

Act means the Tribal Self-Governance Act, Title IV of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, as added by Pub. L. 103-413, amended by Pub. L. 104-109, as amended.

Applicant pool means Tribes/Consortia that the Director of the Office of Self-Governance has determined are eligible to participate in self-governance in accordance with § 1000.16 of these regulations.

BIA means the Bureau of Indian Affairs of the Department of the Interior.

BIA Program means any program, service, function, or activity, or portion thereof, that is performed or administered by the Department through the Bureau of Indian Affairs.

Bureau means a bureau or office of the Department of the Interior.

Compact means an executed document that affirms the government-to-government relationship between a self-governance Tribe and the United States. The compact differs from an annual funding agreement (AFA) in that parts of the compact apply to all bureaus within the Department of the Interior rather than a single bureau.

Consortium means an organization of Indian Tribes that is authorized by those Tribes to participate in self-governance under this part and is responsible for negotiating, executing, and implementing annual funding agreements and compacts.

Construction management services (CMS) means activities limited to

administrative support services, coordination, oversight of engineers and construction activities. CMS services include services that precede project design: all project design and actual construction activities are subject to Subpart K of these regulations whether performed by a Tribe subcontractor, or consultant.

Days means calendar days, except where the last day of any time period specified in this part falls on a Saturday, Sunday, or a Federal holiday, the period must carry over to the next business day unless otherwise prohibited by law.

Director means the Director of the Office of Self-Governance (OSG).

DOI or Department means the Department of the Interior.

Funding year means either fiscal or calendar year.

Indian means a person who is a member of an Indian Tribe.

Indian Tribe or Tribe means any Indian Tribe, band, nation or other organized group or community, including pueblos, rancherias, colonies and any Alaska Native village, or regional or village corporations as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

Indirect cost rates means the rate(s) arrived at through negotiation between an Indian Tribe/Consortium and the appropriate Federal agency.

Indirect costs means costs incurred for a common or joint purpose benefitting more than one program and that are not readily assignable to individual programs.

Nexus Program means a 403(c) Program as defined in this section.

Non-BIA Bureau means any bureau or office within the Department of the Interior other than the Bureau of Indian Affairs.

Non-BIA programs means those programs administered by bureaus or offices other than the Bureau of Indian Affairs within the Department of the Interior.

Office of Self-Governance (OSG) means the office within the Office of the Assistant Secretary-Indian Affairs responsible for the implementation and development of the Tribal Self-Governance Program.

Program means any program, service, function, or activity, or portions of programs administered by a bureau within the Department of the Interior.

Pub. L. 93-638 means sections 1-9 and Title I of the Indian Self-Determination and Education Assistance Act of 1975, as amended.

Reassumption means that the Secretary reassumes control or operation of a program under § 1000.300 *et seq.*

Retained Tribal shares means those funds that were available as a Tribal share but under the AFA were left with BIA to administer.

Retrocession means the voluntary return by a Tribe/Consortium to a bureau of a program operated under an AFA before the agreement expires.

Secretary means the Secretary of the Interior (DOI) or his or her designee authorized to act on the behalf of the Secretary as to the matter at hand.

Self-governance Tribe/Consortium means a Tribe or Consortium that participates in permanent self-governance through application and selection from the applicant pool or has participated in the Tribal self-governance demonstration project. May also be referred to as "participating Tribe/Consortium."

Successor AFA means a funding agreement negotiated after a Tribe's/Consortium's initial agreement with a bureau for continuing to perform a particular program. The parties to the AFA should generally use the terms of the existing AFA to expedite and simplify the exchange of information and the negotiation process.

Tribal share means the amount determined for that Tribe/Consortium for a particular program at BIA region, agency, and central office levels under sec. 403(g)(3) and 405(d) of the Act.

§ 1000.3 Purpose and scope.

(a) *General.* This part codifies uniform and consistent rules for the Department of the Interior (DOI) in implementing Title IV of the Indian Self-Determination and Education Assistance Act (ISDEA) Public Law 93-638, 25 U.S.C. 450 *et seq.*, as amended by Title II of Pub. L. 103-413, the Tribal Self-Governance Act of 1994 (108 Stat. 4250, October 25, 1994).

(b) *Information Collection.* The information provided by the Tribes will be used by the Department for a variety of purposes. The first purpose will be to ensure that qualified applicants are admitted into the applicant pool consistent with the requirements of the Act. In addition, Tribes seeking grant assistance to meet the planning requirements for admission into the applicant pool, will provide information so that grants can be awarded to Tribes meeting basic eligibility (*i.e.* Tribal resolution indicating that the Tribe wants to plan for Self-Governance and has no material audit exceptions for the last three years of audits). There is no confidential information being solicited

and confidentiality is not extended under the law. Other documentation is required to meet the reporting requirements as called for in section 405 of the Act. The information being provided by the Tribes is required to obtain a benefit, however, no person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. Comments were solicited from the Tribes and the general public with respect to this collection. No adverse comments were received. The information collection has been cleared by OMB. The number is OMB control #1076-0143. The approval expires on April 30, 2003.

§ 1000.4 Policy statement.

(a) *Congressional findings.* In the Tribal Self-Governance Act of 1994, the Congress found that:

(1) The Tribal right of self-governance flows from the inherent sovereignty of Indian Tribes and nations;

(2) The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of the Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;

(3) Although progress had been made, the Federal bureaucracy, with its centralized rules and regulations, had eroded Tribal self-governance and dominated Tribal affairs;

(4) The Tribal Self-Governance Demonstration Project was designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen Tribal control over Federal funding and program management; and

(5) Congress has reviewed the results of the Tribal Self-Governance demonstration project and finds that:

(i) Transferring control over funding and decision making to Tribal governments, upon Tribal request, for Federal programs is an effective way to implement the Federal policy of government-to-government relations with Indian Tribes; and

(ii) Transferring control over funding and decision making to Tribal governments, upon request, for Federal programs strengthens the Federal policy of Indian self-determination.

(b) *Congressional declaration of policy.* It is the policy of the Tribal Self-Governance Act to permanently establish and implement self-governance:

(1) To enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian Tribes;

(2) To permit each Tribe to choose the extent of its participation in self-governance;

(3) To coexist with the provisions of the Indian Self-Determination and Education Assistance Act relating to the provision of Indian services by designated Federal agencies;

(4) To ensure the continuation of the trust responsibility of the United States to Indian Tribes and Indian individuals;

(5) To permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual Tribal communities; and

(6) To provide for an orderly transition through a planned and measurable parallel reduction in the Federal bureaucracy.

(c) *Secretarial self-governance policies.* (1) It is the policy of the Secretary to fully support and implement the foregoing policies to the full extent of the Secretary's authority.

(2) It is the policy of the Secretary to recognize and respect the unique government-to-government relationship between Tribes, as sovereign governments, and the United States.

(3) It is the policy of the Secretary to have all bureaus of the Department work cooperatively and pro-actively with Tribes and Tribal Consortia on a government-to-government basis within the framework of the Act and any other applicable provision of law, so as to make the ideals of self-determination and self-governance a reality.

(4) It is the policy of the Secretary to have all bureaus of the Department actively share information with Tribes and Tribal Consortia to encourage Tribes and Tribal Consortia to become knowledgeable about the Department's programs and the opportunities to include them in an annual funding agreement.

(5) It is the policy of the Secretary that all bureaus of the Department will negotiate in good faith, interpret each applicable Federal law and regulation in a manner that will facilitate the inclusion of programs in each annual funding agreement authorized, and enter into such annual funding agreements under Title IV, whenever possible.

(6) It is the policy of the Secretary to afford Tribes and Tribal Consortia the maximum flexibility and discretion necessary to meet the needs of their

communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious, and institutional needs. These policies are designed to facilitate and encourage Tribes and Tribal Consortia to participate in the planning, conduct, and administration of those Federal programs, included, or eligible for inclusion in an annual funding agreement.

(7) It is the policy of the Secretary, to the extent of the Secretary's authority, to maintain active communication with Tribal governments regarding budgetary matters applicable to programs subject to the Act, and that are included in an individual self-governance annual funding agreement.

(8) It is the policy of the Secretary to implement policies, procedures, and practices at the Department to ensure that the letter, spirit, and goals of the Tribal Self-Governance Act are fully and successfully implemented.

(9) Executive Order 13084 on Consultation and Coordination with Indian Tribal Governments and any subsequent Executive Orders regarding consultation will apply to the implementation of these regulations.

Subpart B—Selection of Additional Tribes for Participation in Tribal Self-Governance

Purpose and Definitions

§ 1000.10 What is the purpose of this subpart?

This subpart describes the selection process and eligibility criteria that the Secretary uses to decide that Indian Tribes may participate in Tribal self-governance as authorized by section 402 of the Tribal Self-Governance Act of 1994.

§ 1000.11 What is the "applicant pool"?

The applicant pool is the pool of Tribes/Consortia that the Director of the Office of Self-Governance has determined are eligible to participate in self-governance.

§ 1000.12 What is a "signatory"?

A signatory is a Tribe or Consortium that meets the eligibility criteria in § 1000.16 and directly signs the agreements. A signatory may exercise all of the rights and responsibilities outlined in the compact and annual funding agreement and is legally responsible for all financial and administrative decisions made by the signatory.

§ 1000.13 What is a "nonsignatory Tribe"?

(a) A nonsignatory Tribe is a Tribe that either:

(1) Does not meet the eligibility criteria in § 1000.16 and, by resolution of its governing body, authorizes a Consortium to participate in self-governance on its behalf.

(2) Meets the eligibility criteria in § 1000.16 but chooses to be a member of a Consortium and have a representative of the Consortium sign the compact and AFA on its behalf.

(b) A non-signatory tribe under paragraph (a)(1) of this section:

(1) May not sign the compact and AFA. A representative of the Consortium must sign both documents on behalf of the Tribe.

(2) May only become a "signatory Tribe" if it independently meets the eligibility criteria in § 1000.16.

Eligibility

§ 1000.14 Who is eligible to participate in Tribal self-governance?

Two types of entities are eligible to participate in Tribal self-governance:

- (a) Indian Tribes; and
- (b) Consortia of Indian Tribes.

§ 1000.15 How many additional Tribes/Consortia may participate in self-governance per year?

(a) Sections 402(b) and (c) of the Act authorize the Director to select up to 50 additional Indian Tribes per year from an "applicant pool". A Consortium of Indian Tribes counts as one Tribe for purposes of calculating the 50 additional Tribes per year.

(b) Any signatory Tribe that signed a compact and AFA under the Tribal Self-Governance Demonstration project may negotiate its own compact and AFA in accordance with this subpart without being counted against the 50-Tribe limitation in any given year.

§ 1000.16 What criteria must a Tribe/Consortium satisfy to be eligible for admission to the "applicant pool"?

To be admitted into the applicant pool, a Tribe/Consortium must either be an Indian Tribe or a Consortium of Indian Tribes and comply with § 1000.17.

§ 1000.17 What documents must a Tribe/Consortium submit to OSG to apply for admission to the applicant pool?

In addition to the application required by § 1000.23, the Tribe/Consortium must submit to OSG documentation that shows all of the following:

(a) *Successful completion of a planning phase and a planning report.* The requirements for both of these are described in § 1000.19 and § 1000.20. A Consortium's planning activities satisfy this requirement for all its member Tribes for the purpose of the Consortium meeting this requirement;

(b) *A request for participation in self-governance by a Tribal resolution and/or a final official action by the Tribal governing body.* For a Consortium, the governing body of each Tribe must authorize its participation by a Tribal resolution and/or a final official action by the Tribal governing body that specifies the scope of the Consortium's authority to act on behalf of the Tribe.

(c) *A demonstration of financial stability and financial management capability for the previous 3 fiscal years.* This will be done by providing, as part of the application, an audit report prepared in accordance with procedures promulgated under the Single Audit Act Amendments of 1996, 31 U.S.C. 7501, *et seq.*, for the previous 3 years of the self-determination contracts. These audits must not contain material audit exceptions as defined in § 1000.21.

§ 1000.18 May a Consortium member Tribe withdraw from the Consortium and become a member of the applicant pool?

In accordance with the expressed terms of the compact or written agreement of the Consortium, a Consortium member Tribe (either a signatory or nonsignatory Tribe) may withdraw from the Consortium to directly negotiate a compact and AFA. The withdrawing Tribe must do the following.

(a) Independently meet all of the eligibility criteria in §§ 1000.14 through 1000.20. If a Consortium's planning activities and report specifically consider self-governance activities for a member Tribe, that planning activity and report may be used to satisfy the planning requirements for the member Tribe if it applies for self-governance status on its own.

(b) Submit a notice of withdrawal to OSG and the Consortium as evidenced by a resolution of the Tribal governing body.

§ 1000.19 What is done during the "planning phase"?

The Act requires that all Tribes/Consortia seeking to participate in Tribal self-governance complete a planning phase. During the planning phase, the Tribe/Consortium must conduct legal and budgetary research and internal Tribal government and organizational planning. The availability of BIA grant funds for planning activities will be in accordance with subpart C. The planning phase may be completed without a planning grant.

§ 1000.20 What is required in a planning report?

As evidence that the Tribe/Consortium has completed the planning phase, the Tribe/Consortium must

prepare and submit to the Secretary a final planning report.

(a) The planning report must:

(1) Identify BIA and non-BIA programs that the Tribe/Consortium may wish to subsequently negotiate for inclusion in a compact and AFA;

(2) Describe the Tribe's/Consortium's planning activities for both BIA and non-BIA programs that may be negotiated;

(3) Identify the major benefits derived from the planning activities;

(4) Identify the process that the Tribe/Consortium will use to resolve any complaints by service recipients;

(5) Identify any organizational planning that the Tribe/Consortium has completed in anticipation of implementing Tribal self-governance; and

(6) Indicate if the Tribe's/Consortium's planning efforts have revealed that its current organization is adequate to assume programs under Tribal self-governance.

(b) In supplying the information required by paragraph (a)(5) of this section:

(1) For BIA programs, a Tribe/Consortium should describe the process that it will use to debate and decide the setting of priorities for the funds it will receive from its AFA.

(2) For non-BIA programs that the Tribe/Consortium may wish to negotiate, the report should describe how the Tribe/Consortium proposes to perform the programs.

§ 1000.21 When does a Tribe/Consortium have a "material audit exception"?

A Tribe/Consortium has a material audit exception if any of the audits that it submitted under § 1000.17(c) identifies:

(a) A material weakness, that is a condition in which the design or operation of one or more of the internal control components does reduce to a relatively low level the risk that misstatements in amounts that would be material in relation to the financial statements being audited may occur and not be detected within a timely period by employees in the normal course of performing their assigned functions;

(b) a single finding of known questioned costs subsequently disallowed by a contracting officer or awarding official that exceeds \$10,000. If the audits submitted under § 1000.17(c) identify any of the conditions described in this section, the Tribe/Consortium must also submit copies of the contracting officer's findings and determinations.

§ 1000.22 What are the consequences of having a material audit exception?

If a Tribe/Consortium has a material audit exception, the Tribe/Consortium is ineligible to participate in self-governance until the Tribe/Consortium meets the eligibility criteria in § 1000.16.

Admission Into the Applicant Pool

§ 1000.23 How is a Tribe/Consortium admitted to the applicant pool?

To be considered for admission in the applicant pool, a Tribe/Consortium must submit an application to the Director, Office of Self-Governance, 1849 C Street NW; MS 2542-MIB; Department of the Interior; Washington, DC 20240. The application must contain the documentation required in § 1000.17.

§ 1000.24 When does OSG accept applications to become a member of the applicant pool?

OSG accepts applications to become a member of the applicant pool at any time.

§ 1000.25 What are the deadlines for a Tribe/Consortium in the applicant pool to negotiate a compact and annual funding agreement (AFA)?

(a) To be considered for negotiations in any year, a Tribe/Consortium must be a member of the applicant pool on March 1 of the year in which the negotiations are to take place.

(b) An applicant may be admitted into the applicant pool during one year and selected to negotiate a compact and AFA in a subsequent year. In this case, the applicant must, before March 1 of the negotiation year, submit to OSG updated documentation that permits OSG to evaluate whether the Tribe/Consortium still satisfies the application criteria in 1000.17.

§ 1000.26 Under what circumstances will a Tribe/Consortium be removed from the applicant pool?

Once admitted into the applicant pool, a Tribe/Consortium will only be removed if it:

(a) Fails to satisfy the audit criteria in § 1000.17(c); or

(b) Submits to OSG a Tribal resolution and/or official action by the Tribal governing body requesting removal.

§ 1000.27 How does the Director select which Tribes in the applicant pool become self-governance Tribes?

The Director selects up to the first 50 Tribes from the applicant pool in any given year ranked according to the earliest postmark date of complete applications. If multiple complete applications have the same postmark

date and there are insufficient slots available for that year, the Director will determine priority through random selection. A representative of each Tribe/Consortium that has submitted an application subject to random selection may, at the option of the Tribe/Consortium, be present when the selection is made.

§ 1000.28 What happens if an application is not complete?

(a) If OSG determines that a Tribe's/Consortium's application is deficient, OSG will immediately notify the Tribe/Consortium of the deficiency by letter, certified mail, return receipt requested. The letter will explain what the Tribe/Consortium must do to correct the deficiency.

(b) The Tribe/Consortium will have 20 working days from the date of receiving the letter to mail or telefax the corrected material and retain the applicant's original postmark.

(c) If the corrected material is deficient, the date of entry into the applicant pool will be the date the complete application is postmarked.

(d) If the postmark or date on the applicant's response letter or telefax is more than 20 working days after the date the applicant received the notice-of-deficiency letter, the date of entry into the applicant pool will be the date of full receipt of a completed application.

§ 1000.29 What happens if a Tribe/Consortium is selected from the applicant pool but does not execute a compact and an AFA during the calendar year?

(a) The Tribe/Consortium remains eligible to negotiate a compact and annual funding agreement at any time unless:

(1) It notifies the Director in writing that it no longer wishes to be eligible to participate in the Tribal Self-Governance Program;

(2) Fails to satisfy the audit requirements of § 1000.17(c); or

(3) Submits documentation evidencing a Tribal resolution requesting removal from the application pool.

(b) The failure of the Tribe/Consortium to execute an agreement has no effect on the selection of up to 50 additional Tribes/Consortia in a subsequent year.

§ 1000.30 May a Tribe/Consortium be selected to negotiate an AFA under section 403(b)(2) without having or negotiating an AFA under section 403(b)(1)?

Yes, a Tribe/Consortium may be selected to negotiate an AFA under section 403(b)(2) without having or

negotiating an AFA under section 403(b)(1).

§ 1000.31 May a Tribe/Consortium be selected to negotiate an AFA under section 403(c) without negotiating an AFA under section 403(b)(1) and/or section 403(b)(2)?

No, section 403(c) of the Act states that any programs of special geographic, cultural, or historical significance to the Tribe/Consortium must be included in AFAs negotiated under section 403(a) and/or section 403(b). A Tribe may be selected to negotiate an AFA under section 403(c) at the same time that it negotiates an AFA under section 403(b)(1) and/or section 403(b)(2).

Withdrawal From a Consortium Annual Funding Agreement

§ 1000.32 What happens when a Tribe wishes to withdraw from a Consortium annual funding agreement?

(a) A Tribe wishing to withdraw from a Consortium's AFA must notify the Consortium, bureau, and OSG of the intent to withdraw. The notice must be:

(1) In the form of a Tribal resolution or other official action by the Tribal governing body; and

(2) Received no later than 180 days before the effective date of the next AFA.

(b) The resolution referred to in paragraph (a)(1) of this section must indicate whether the Tribe wishes the withdrawn programs to be administered under a Title IV AFA, Title I contract, or directly by the bureau.

(c) The effective date of the withdrawal will be the date on which the current agreement expires, unless the Consortium, the Tribe, OSG, and the appropriate bureau agree otherwise.

§ 1000.33 What amount of funding is to be removed from the Consortium's AFA for the withdrawing Tribe?

When a Tribe withdraws from a Consortium, the Consortium's AFA must be reduced by the portion of funds attributable to the withdrawing Tribe. The Consortium must reduce the AFA on the same basis or methodology upon which the funds were included in the Consortium's AFA.

(a) If there is not a clear identifiable methodology upon which to base the reduction for a particular program, the Consortium, Tribe, OSG, and the bureau must negotiate an appropriate amount on a case-by-case basis.

(b) If a Tribe withdraws in the middle of a funding year, the Consortium agreement must be amended to reflect:

(1) A reduction based on the amount of funds passed directly to the Tribe, or already spent or obligated by the Consortium on behalf of the Tribe; and

(2) That the Consortium is no longer providing those programs associated with the withdrawn funds.

(c) Carryover funds from a previous fiscal year may be factored into the amount by which the Consortium agreement is reduced if:

(1) The Consortium, Tribe, OSG, and bureau agree it is appropriate; and

(2) The funds are clearly identifiable.

§ 1000.34 What happens if there is a dispute between the Consortium and the withdrawing Tribe?

(a) At least 15 days before the 90-day Congressional review period of the next AFA, the Consortium, OSG, bureau, and the withdrawing Tribe must reach an agreement on the amount of funding and other issues associated with the program or programs involved.

(b) If agreement is not reached:

(1) For BIA and OIEP programs, at least 5 days before the 90-day Congressional review, the Director must make a decision on the funding or other issues involved.

(2) For non-BIA programs, the bureau head will make a decision on the funding or other issues involved.

(c) A copy of the decision made under paragraph (b) of this section must be distributed in accordance with the following table.

If the program is . . .	then a copy of the decision must be sent to . . .
(1) A BIA program.	BIA regional director, the Deputy Commissioner of Indian Affairs, the withdrawing Tribe, and the Consortium.
(2) An OIEP program.	the OIEP line officer, the Director of OIEP, the withdrawing Tribe, and the Consortium.

(d) Any decision made under paragraph (b) of this section is appealable under subpart R of this part.

§ 1000.35 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

Under § 1000.32 of this part, a Tribe may withdraw from a Consortium and request that the Secretary award the Tribe its portion of a construction project's funds. The Secretary may decide not to award these funds if the Secretary determines that the award of the withdrawing Tribe's portion of funds would affect the ability of the remaining members of the Consortium to complete a severable or non-severable phase of the project within available funding.

(a) An example of a non-severable phase of a project would be the construction of a single building to serve all members of a Consortium.

(b) An example of a severable phase of a project would be the funding of a road in one village where the Consortium would be able to complete the roads in other villages that were part of the project approved initially in the AFA.

(c) The Secretary's decision under this section may be appealed under § 1000.428 of these regulations.

Subpart C—Section 402(d) Planning and Negotiation Grants

Purpose and Types of Grants

§ 1000.40 What is the purpose of this subpart?

This subpart describes the availability and process of applying for planning and negotiation grants authorized by section 402(d) of the Act to help Tribes meet costs incurred in:

(a) Meeting the planning phase requirement of the Act, including planning to negotiate for non-BIA programs; and

(b) Conducting negotiations.

§ 1000.41 What types of grants are available?

Three categories of grants may be available:

(a) Negotiation grants may be awarded to the Tribes/Consortia that have been selected from the applicant pool as described in subpart B of this part;

(b) Planning grants may be available to Tribes/Consortia requiring advance funding to meet the planning phase requirement of the Act; and

(c) Financial assistance may be available to Tribes/Consortia to plan for negotiating for non-BIA programs, as described in subpart D and §§ 1000.42–1000.45 of this subpart.

Availability, Amount, and Number of Grants

§ 1000.42 Will grants always be made available to meet the planning phase requirement as described in section 402(d) of the Act?

No, grants to cover some or all of the planning costs that a Tribe/Consortium may incur, depend upon the availability of funds appropriated by Congress. Notice of availability of grants will be published in the **Federal Register** as described in § 1000.45.

§ 1000.43 May a Tribe/Consortium use its own resources to meet its self-governance planning and negotiation expenses?

Yes, a Tribe/Consortium may use its own resources to meet these costs.

Receiving a grant is not necessary to meet the planning phase requirement of the Act or to negotiate a compact and an AFA.

§ 1000.44 What happens if there are insufficient funds to meet the Tribal requests for planning/negotiation grants in any given year?

If appropriated funds are available but insufficient to meet the total requests from Tribes/Consortia:

(a) First priority will be given to Tribes/Consortia that have been selected from the applicant pool to negotiate an AFA; and

(b) Second priority will be given to Tribes/Consortia that require advance funds to meet the planning requirement for entry into the self-governance program.

§ 1000.45 How many grants will the Department make each year and what funding will be available?

The number and size of grants awarded each year will depend on Congressional appropriations and Tribal interest. By no later than January 1 of each year, the Director will publish a notice in the **Federal Register** that provides relevant details about the application process, including the funds available, timeframes, and requirements for negotiation grants, advance planning grants, and financial assistance as described in subpart D of this part.

Selection Criteria

§ 1000.46 Which Tribes/Consortia may be selected to receive a negotiation grant?

Any Tribe/Consortium that has been accepted into the applicant pool and has been accepted to negotiate a self-governance AFA may apply for a negotiation grant. By March 15 of each year, the Director will publish a list of additional Tribes/Consortia that have been selected for negotiation along with information on how to apply for negotiation grants.

§ 1000.47 What must a Tribe/Consortium do to receive a negotiation grant?

If funds are available, a grant will be awarded to help cover the costs of preparing for and negotiating a compact and an AFA. These grants are not competitive. To receive a negotiation grant, a Tribe/Consortium must:

(a) Be selected from the applicant pool to negotiate an AFA;

(b) Be qualified as eligible to receive a negotiation grant in the **Federal Register** notice discussed in § 1000.45;

(c) Not have received a negotiation grant within the 3 years preceding the date of the latest **Federal Register** announcement;

(d) Submit a letter affirming its readiness to negotiate; and

(e) Formally request a negotiation grant to prepare for and negotiate an AFA.

§ 1000.48 What must a Tribe do if it does not wish to receive a negotiation grant?

A selected Tribe/Consortium may elect to negotiate without applying for a negotiation grant. In such a case, the Tribe/Consortium should notify OSG in writing so that funds can be reallocated for other grants.

Advance Planning Grant Funding

§ 1000.49 Who can apply for an advance planning grant?

Any Tribe/Consortium that is not a self-governance Tribe and needs advance funding to complete the planning phase requirement may apply. Tribes/Consortia that have received a planning grant within 3 years preceding the date of the latest **Federal Register** announcement are not eligible.

§ 1000.50 What must a Tribe/Consortium seeking a planning grant submit in order to meet the planning phase requirements?

A Tribe/Consortium must submit the following material:

(a) A Tribal resolution or other final action of the Tribal governing body indicating a desire to plan for Tribal self-governance.

(b) Audits from the last 3 years that document that the Tribe/Consortium is free from material audit exceptions. In order to meet this requirement, a Tribe/Consortium may use the audit currently being conducted on its operations if this audit is submitted before the Tribe/Consortium completes the planning activity.

(c) A proposal that includes:

(1) The Tribe's/Consortium's plans for conducting legal and budgetary research;

(2) The Tribe's/Consortium's plans for conducting internal Tribal government and organizational planning;

(3) A timeline indicating when planning will start and end, and;

(4) Evidence that the Tribe/Consortium can perform the tasks associated with its proposal (i.e., resumes and position descriptions of key staff or consultants to be used).

§ 1000.51 How will Tribes/Consortia know when and how to apply for planning grants?

The number and size of grants awarded each year will depend on Congressional appropriations. By no later than January 1 of each year, the Director will publish in the **Federal Register** a notice concerning the availability of planning grants for

additional Tribes. This notice must identify the specific details for applying.

§ 1000.52 What criteria will the Director use to award advance planning grants?

Advance planning grants are discretionary and based on need. The Director will use the following criteria to determine whether or not to award a planning grant to a Tribe/Consortium before the Tribe/Consortium is selected into the applicant pool.

(a) Completeness of application as described in § 1000.50.

(b) Financial need. The Director will rank applications according to the percent of Tribal resources that comprise total resources covered by the latest A-133 audit. Priority will be given to applications that have a lower level of Tribal resources as a percent of total resources.

(c) Other factors that the Tribe may identify as documenting its previous efforts to participate in self-governance and demonstrating its readiness to enter into a self-governance agreement.

§ 1000.53 Can Tribes/Consortia that receive advance planning grants also apply for a negotiation grant?

Yes, Tribes/Consortia that successfully complete the planning activity and are selected may apply to be included in the applicant pool. Once approved for inclusion in the applicant pool, the Tribe/Consortium may apply for a negotiation grant according to the process in §§ 1000.46–1000.48.

§ 1000.54 How will a Tribe/Consortium know whether or not it has been selected to receive an advance planning grant?

No later than June 1, the Director will notify the Tribe/Consortium by letter whether it has been selected to receive an advance planning grant.

§ 1000.55 Can a Tribe/Consortium appeal within DOI the Director's decision not to award a grant under this subpart?

No, the Director's decision to award or not to award a grant under this subpart is final for the Department.

Subpart D—Other Financial Assistance for Planning and Negotiation Grants for Non-BIA Programs

Purpose and Eligibility

§ 1000.60 What is the purpose of this subpart?

This subpart describes the availability and process of applying for other financial assistance that may be available for planning and negotiating for a non-BIA program.

§ 1000.61 Are other funds available to self-governance Tribes/Consortia for planning and negotiating with non-BIA bureaus?

Yes, Tribes/Consortia may contact OSG to determine if OSG has funds available for the purpose of planning and negotiating with non-BIA bureaus under this subpart. A Tribe/Consortium may also ask a non-BIA bureau for information on any funds that may be available from that bureau.

Eligibility and Application Process

§ 1000.62 Who can apply to OSG for grants to plan and negotiate non-BIA programs?

Any Tribe/Consortium that is in the applicant pool, or has been selected from the applicant pool or that has an existing AFA.

§ 1000.63 Under what circumstances may planning and negotiation grants be awarded to Tribes/Consortia?

At the discretion of the Director, grants may be awarded when requested by the Tribe. Tribes/Consortia may submit only one application per year for a grant under this section.

§ 1000.64 How does the Tribe/Consortium know when and how to apply to OSG for a planning and negotiation grant?

When funds are available, the Director will publish a notice in the **Federal Register** announcing their availability and a deadline for submitting an application.

§ 1000.65 What kinds of activities do planning and negotiation grants support?

The planning and negotiation grants support activities such as, but not limited to, the following:

- (a) Information gathering and analysis;
- (b) Planning activities, that may include notification and consultation with the appropriate non-BIA bureau and identification and/or analysis of activities, resources, and capabilities that may be needed for the Tribe/Consortium to assume non-BIA programs; and
- (c) Negotiation activities.

§ 1000.66 What must be included in the application?

The application for a planning and negotiation grant must include:

- (a) Written notification by the governing body or its authorized representative of the Tribe's/Consortium's intent to engage in planning/negotiation activities like those described in § 1000.65;
- (b) Written description of the planning and/or negotiation activities that the Tribe/Consortium intends to undertake, including, if appropriate,

documentation of the relationship between the proposed activities and the Tribe/Consortium;

(c) The proposed timeline for completion of the planning and/or negotiation activities to be undertaken; and

(d) The amount requested from OSG.

§ 1000.67 How will the Director award planning and negotiation grants?

The Director must review all grant applications received by the date specified in the announcement to determine whether or not the applications include the required elements outlined in the announcement. OSG must rank the complete applications submitted by the deadline using the criteria in § 1000.70.

§ 1000.68 May non-BIA bureaus provide technical assistance to a Tribe/Consortium in drafting its planning grant application?

Yes, upon request from the Tribe/Consortium, a non-BIA bureau may provide technical assistance to the Tribe/Consortium in the drafting of its planning grant application.

§ 1000.69 How can a Tribe/Consortium obtain comments or selection documents received or utilized after OSG has made a decision on a planning grant application?

A Tribe/Consortium may request comments or selection documents under the Freedom of Information Act.

§ 1000.70 What criteria will the Director use to rank the applications and how many maximum points can be awarded for each criterion?

The Director will use the following criteria and point system to rank the applications:

- (a) The application contains a clear statement of objectives and timelines to complete the proposed planning or negotiation activity and demonstrates that the objectives are legally authorized and achievable. (20 points)
- (b) The proposed budget expenses are reasonable. (10 points)
- (c) The proposed project demonstrates a new or unique approach to Tribal self-governance or broadens self-governance to include new activities within the Department. (5 points)

§ 1000.71 Can an applicant appeal a decision not to award a grant?

No, all decisions made by the Director to award or not to award a grant under this subpart are final for the Department.

§ 1000.72 Will OSG notify Tribes/Consortia and affected non-BIA bureaus of the results of the selection process?

Yes, OSG will notify all applicant Tribes/Consortia and affected non-BIA

bureaus in writing as soon as possible after completing the selection process.

§ 1000.73 Once a Tribe/Consortium has been awarded a grant, may the Tribe/Consortium obtain information from a non-BIA bureau?

Yes, see § 1000.169.

Subpart E—Annual Funding Agreements for Bureau of Indian Affairs Programs

§ 1000.80 What is the purpose of this subpart?

This subpart describes the components of annual funding agreements for BIA programs.

§ 1000.81 What is an annual funding agreement (AFA)?

Annual funding agreements are legally binding and mutually enforceable written agreements negotiated and entered into annually between a self-governance Tribe/Consortium and BIA.

Contents and Scope of Annual Funding Agreements

§ 1000.82 What types of provisions must be included in a BIA AFA?

Each AFA must specify the programs and it must also specify the applicable funding:

(a) Retained by BIA for “inherently Federal functions” identified as “residuals” (See § 1000.94);

(b) Transferred or to be transferred to the Tribe/Consortium (See § 1000.91); and

(c) Retained by BIA to carry out functions that the Tribe/Consortium could have assumed but elected to leave with BIA. (See § 1000.101).

§ 1000.83 Can additional provisions be included in an AFA?

Yes, any provision that the parties mutually agreed upon may be included in an AFA.

§ 1000.84 Does a Tribe/Consortium have the right to include provisions of Title I of Pub. L. 93–638 in an AFA?

Yes, under Pub. L. 104–109, a Tribe/Consortium has the right to include any provision of Title I of Pub. L. 93–638 in an AFA.

§ 1000.85 Can a Tribe/Consortium negotiate an AFA with a term that exceeds one year?

Yes, at the option of the Tribe/Consortium, and subject to the availability of Congressional appropriations, a Tribe/Consortium may negotiate an AFA with a term that exceeds one year in accordance with section 105(c)(1) of Title I of Pub. L. 93–638.

Determining What Programs May Be Included in an AFA

§ 1000.86 What types of programs may be included in an AFA?

A Tribe/Consortium may include in its AFA programs administered by BIA, without regard to the BIA agency or office that administers the program, including any program identified in section 403(b)(1) of the Act.

§ 1000.87 How does the AFA specify the services provided, functions performed, and responsibilities assumed by the Tribe/Consortium and those retained by the Secretary?

(a) The AFA must specify in writing the services, functions, and responsibilities to be assumed by the Tribe/Consortium and the functions, services, and responsibilities to be retained by the Secretary.

(b) Any division of responsibilities between the Tribe/Consortium and BIA should be clearly stated in writing as part of the AFA. Similarly, when there is a relationship between the program and BIA’s residual responsibility, the relationship should be in writing.

§ 1000.88 Do Tribes/Consortia need Secretarial approval to redesign BIA programs that the Tribe/Consortium administers under an AFA?

No, the Secretary does not have to approve a redesign of a program under the AFA, except when the redesign involves a waiver of a regulation.

(a) The Secretary must approve any waiver, in accordance with subpart J of this part, before redesign takes place.

(b) This section does not authorize redesign of programs where other prohibitions exist.

(c) Redesign shall not result in the Tribe/Consortium being entitled to receive more or less funding for the program from BIA.

(d) Redesign of construction project(s) included in an AFA must be done in accordance with subpart K of this part.

§ 1000.89 Can the terms and conditions in an AFA be amended during the year it is in effect?

Yes, terms and conditions in an AFA may be amended during the year it is in effect as agreed to by both the Tribe/Consortium and the Secretary.

§ 1000.90 What happens if an AFA expires before the effective date of the successor AFA?

If the effective date of the successor AFA is not on or before the expiration of the current AFA, subject to terms mutually agreed upon by the Tribe/Consortium and the Department at the time the current AFA was negotiated or in a subsequent amendment, the Tribe/

Consortium may continue to carry out the program authorized under the AFA to the extent adequate resources are available. During this extension period, the current AFA shall remain in effect, including coverage of the Tribe/Consortium under the Federal Tort Claims Act (FTCA) 28 U.S.C. 2671–2680 (1994), and the Tribe/Consortium may use any funds remaining under the AFA, savings from other programs or Tribal funds to carry out the program. Nothing in this section authorizes an AFA to be continued beyond the completion of the program authorized under the AFA or the amended AFA. This section also does not entitle a Tribe/Consortium to receive, nor does it prevent a Tribe from receiving, additional funding under any successor AFA. The successor AFA must provide funding to the Tribe/Consortium at a level necessary for the Tribe/Consortium to perform the programs, functions, services, and activities or portions thereof (PFSAs) for the full period it was or will be performed.

Determining AFA Amounts

§ 1000.91 What funds must be transferred to a Tribe/Consortium under an AFA?

(a) At the option of the Tribe/Consortium, the Secretary must provide the following program funds to the Tribe/Consortium through an AFA:

(1) An amount equal to the amount that the Tribe/Consortium would have been eligible to receive under contracts and grants for direct programs and contract support under Title I of Pub. L. 93–638, as amended;

(2) Any funds that are specifically or functionally related to providing services and benefits to the Tribe/Consortium or its members by the Secretary without regard to the organizational level within BIA where such functions are carried out; and

(3) Any funds otherwise available to Indian Tribes or Indians for which appropriations are made to agencies other than the Department of the Interior;

(b) Examples of the funds referred to in paragraphs (a)(1) and (a)(2) of this section are:

(1) A Tribe’s/Consortium’s Pub. L. 93–638 contract amounts;

(2) Negotiated amounts of agency, regional and central office funds, including previously undistributed funds or new programs on the same basis as they are made available to other Tribes;

(3) Other recurring funding;

(4) Non-recurring funding;

(5) Special projects, if applicable;

(6) Construction;

- (7) Wildland firefighting accounts;
 - (8) Competitive grants; and
 - (9) Congressional earmarked funding.
- (c) An example of the funds referred to in paragraph (a)(3) of this section is Federal Highway Administration funds.

§ 1000.92 What funds may not be included in an AFA?

Funds associated with programs prohibited from inclusion under section 403(b)(4) of the Act may not be included in an AFA.

§ 1000.93 May the Secretary place any requirements on programs and funds that are otherwise available to Tribes/Consortia or Indians for which appropriations are made to agencies other than DOI?

No, unless the Secretary is required to develop terms and conditions that are required by law or that are required by the agency to which the appropriation is made.

§ 1000.94 What are BIA residual funds?

BIA residual funds are the funds necessary to carry out BIA residual

functions. BIA residual functions are those functions that only BIA employees could perform if all Tribes were to assume responsibilities for all BIA programs that the Act permits.

§ 1000.95 How is BIA's residual determined?

(a) Generally, residual information will be determined through a process that is consistent with the overall process used by the BIA. Residual information will consist of residual functions performed by the BIA, brief justification why the function is not compactible, and the estimated funding level for each residual function. Each regional office and the central office will compile a single document for distribution each year that contains all the residual information of that respective office. The development of the residual information will be based on the following principles. The BIA will:

- (1) Develop uniform residual information to be used to negotiate residuals;
 - (2) Ensure functional consistency throughout BIA in the determination of residuals;
 - (3) Make the determination of residuals based upon the functions actually being performed by BIA at the respective office;
 - (4) Annually consult with Tribes on a region-by-region basis as requested by Tribes/Consortia; and
 - (5) Notify Tribal leaders each year by March 1 of the availability of residual information.
- (b) BIA shall use the residual information determined under subparagraph (a) as the basis for negotiating with individual Tribes.
- (c) In accordance with the appeals procedures in subpart R of this part, if BIA and a participating Tribe/Consortium disagree over the content of residual functions or amounts, Tribe/Consortium can appeal as shown in the following table.

If a Tribe/Consortium . . .	the Tribe/Consortium may . . .	and . . .
(1) Disagrees with BIA's determination	appeal to the Deputy Commissioner	the Deputy Commissioner must make a written determination within 30 days of receiving the request.
(2) Disagrees with the Deputy Commissioner's determination.	appeal to the Assistant Secretary—Indian Affairs.	the Assistant Secretary's determination is final for the Department.

(d) Information on residual functions may be amended if programs are added or deleted, if statutory or final judicial determinations mandate or if the Deputy Commissioner makes a determination that would alter the residual information or funding amounts. The decision may be appealed to the Assistant Secretary in accordance with subpart R of this part. The Assistant Secretary shall make a written determination within 30 days.

§ 1000.96 May a Tribe/Consortium continue to negotiate an AFA pending an appeal of residual functions or amounts?

Yes, pending appeal of a residual function or amount, any Tribe/Consortium may continue to negotiate an AFA using the residual information that is being appealed. The residual information will be subject to later adjustment based on the final determination of a Tribe's/Consortium's appeal.

§ 1000.97 What is a Tribal share?

A Tribal share is the amount determined for a particular Tribe/Consortium for a particular program at BIA regional, agency and central office

levels under section 403(g)(3) and 405(d) of the Act.

§ 1000.98 How does BIA determine a Tribe's/Consortium's share of funds to be included in an AFA?

There are typically two methods for determining the amount of funds to be included in the AFA:

(a) *Formula-driven.* For formula-driven programs, a Tribe's/Consortium's amount is determined by first identifying the residual funds to be retained by BIA and second, by applying the distribution formula to the remaining eligible funding for each program involved.

(1) Distribution formulas must be reasonably related to the function or service performed by an office, and must be consistently applied to all Tribes within each regional and agency office.

(2) The process in paragraph (a) of this section for calculating a Tribe's funding under self-governance must be consistent with the process used for calculating funds available to non-self-governance Tribes.

(b) *Tribal-specific.* For programs whose funds are not distributed on a formula basis as described in paragraph

(a) of this section, a Tribe's funding amount will be determined on a Tribe-by-Tribe basis and may differ between Tribes. Examples of these funds may include special project funding, awarded competitive grants, earmarked funding, and construction or other one-time or non-recurring funding for which a Tribe is eligible.

§ 1000.99 Can a Tribe/Consortium negotiate a Tribal share for programs outside its region/agency?

Yes, where BIA services for a particular Tribe/Consortium are provided from a location outside its immediate agency or region, the Tribe may negotiate its share from BIA location where the service is actually provided.

§ 1000.100 May a Tribe/Consortium obtain discretionary or competitive funding that is distributed on a discretionary or competitive basis?

Funds provided for Indian services/programs that have not been mandated by Congress to be distributed on a competitive/discretionary basis may be distributed to a Tribe/Consortium under a formula-driven method. In order to receive such funds, a Tribe/Consortium must be eligible and qualified to receive

such funds. A Tribe/Consortium that receives such funds under a formula-driven methodology would no longer be eligible to compete for these funds.

§ 1000.101 Are all funds identified as Tribal shares always paid to the Tribe/Consortium under an AFA?

No, at the discretion of the Tribe/Consortium, Tribal shares may be left, in whole or in part, with BIA for certain programs. This is referred to as a "retained Tribal share".

§ 1000.102 How are savings that result from downsizing allocated?

Funds that are saved as a result of downsizing in BIA are allocated to Tribes/Consortia in the same manner as Tribal shares as provided for in § 1000.98.

§ 1000.103 Do Tribes/Consortia need Secretarial approval to reallocate funds between programs that the Tribe/Consortium administers under the AFA?

No, unless otherwise required by law, the Secretary does not have to approve the reallocation of funds between programs that a Tribe/Consortium administers under an AFA.

§ 1000.104 Can funding amounts negotiated in an AFA be adjusted during the year it is in effect?

Yes, funding amounts negotiated in an AFA may be adjusted under the following circumstances:

(a) *Congressional action.* (1) Increases/decreases as a result of Congressional appropriations and/or a directive in the statement of managers accompanying a conference report on an appropriations bill or continuing resolution.

(2) General decreases due to Congressional action must be applied consistently to BIA, self-governance Tribes/Consortia, and Tribes/Consortia not participating in self-governance.

(3) General increases due to Congressional appropriations must be applied consistently, except where used to achieve equitable distribution among regions and Tribes.

(4) A Tribe/Consortium will be notified of any decrease and be provided an opportunity to reconcile.

(b) *Mistakes.* If the Tribe/Consortium or the Secretary can identify and document substantive errors in calculations, the parties will renegotiate the amounts and make every effort to correct such errors.

(c) *Mutual Agreement.* Both the Tribe/Consortium and the Secretary may agree to renegotiate amounts at any time.

Establishing Self-Governance Base Budgets

§ 1000.105 What are self-governance base budgets?

(a) A Tribe/Consortium self-governance base budget is the amount of recurring funding identified in the President's annual budget request to Congress. This amount must be adjusted to reflect subsequent Congressional action. It includes amounts that are eligible to be base transferred or have been base transferred from BIA budget accounts to self-governance budget accounts. As allowed by Congress, self-governance base budgets are derived from:

(1) A Tribe's/Consortium's Pub. L. 93-638 contract amounts;

(2) Negotiated agency, regional, and central office amounts;

(3) Other recurring funding;

(4) Special projects, if applicable;

(5) Programmatic shortfall;

(6) Tribal priority allocation increases and decreases;

(7) Pay costs and retirement cost adjustments; and

(8) Any other inflationary cost adjustments.

(b) Self-governance base budgets must not include any non-recurring program funds, construction and wildland firefighting accounts, Congressional earmarks, or other funds specifically excluded by Congress. These funds are negotiated annually and may be included in the AFA but must not be included in the self-governance base budget.

(c) Self-governance base budgets may not include other recurring type programs that are currently in Tribal priority allocations (TPA) such as general assistance, housing improvement program (HIP), road maintenance and contract support. Should these later four programs ever become base transferred to Tribes, then they may be included in a self-governance Tribe's base budget.

§ 1000.106 Once a Tribe/Consortium establishes a base budget, are funding amounts renegotiated each year?

No, unless otherwise requested by the Tribe/Consortium, these amounts are not renegotiated each year. If a Tribe/Consortium renegotiates funding levels:

(a) It must negotiate all funding levels in the AFA using the process for determining residuals and funding amounts on the same basis as other Tribes; and

(b) It is eligible for funding amounts of new programs or available programs not previously included in the AFA on the same basis as other Tribes.

§ 1000.107 Must a Tribe/Consortium with a base budget or base budget-eligible program amounts negotiated before January 16, 2001 negotiate new Tribal shares and residual amounts?

No, if a Tribe/Consortium negotiated amounts before January 16, 2001, it does not need to renegotiate new Tribal shares and residual amounts.

(a) At Tribal option, a Tribe/Consortium may retain funding amounts that:

(1) Were either base eligible or in the Tribe's base; and

(2) Were negotiated before this part is promulgated.

(b) If a Tribe/Consortium desires to renegotiate the amounts referred to in paragraph (a) of this section, the Tribe/Consortium must:

(1) Negotiate all funding included in the AFA; and

(2) Use the process for determining residuals and funding amounts on the same basis as other Tribes.

(c) Self-governance Tribes/Consortia are eligible for funding amounts for new or available programs not previously included in the AFA on the same basis as other Tribes/Consortia.

§ 1000.108 How are self-governance base budgets established?

At the request of the Tribe/Consortium, a self-governance base budget identifying each Tribe's funding amount is included in BIA's budget justification for the following year, subject to Congressional appropriation.

§ 1000.109 How are self-governance base budgets adjusted?

Self-governance base budgets must be adjusted as follows:

(a) *Congressional action.* (1) Increases/decreases as a result of Congressional appropriations and/or a directive in the statement of managers accompanying a conference report on an appropriations bill or continuing resolution.

(2) General decreases due to Congressional action must be applied consistently to BIA, self-governance Tribes/Consortia, and Tribes/Consortia not participating in self-governance.

(3) General increases due to Congressional appropriations must be applied consistently, except where used to achieve equitable distribution among regions and Tribes.

(4) A Tribe/Consortium will be notified of any decrease and be provided an opportunity to reconcile.

(b) *Mistakes.* If the Tribe/Consortium or the Secretary can identify and document substantive errors in calculations, the parties will renegotiate such amounts and make every effort to correct the errors.

(c) *Mutual agreement.* Both the Tribe/Consortium and the Secretary may agree to renegotiate amounts at any time.

Subpart F—Non-BIA Annual Self-Governance Compacts and Funding Agreements

Purpose

§ 1000.120 What is the purpose of this subpart?

This subpart describes program eligibility, funding, terms, and conditions of AFAs for non-BIA programs.

§ 1000.121 What is an annual funding agreement for a non-BIA program?

Annual funding agreements for non-BIA programs are legally binding and mutually enforceable agreements between a bureau and a Tribe/Consortium participating in the self-governance program that contain:

(a) A description of that portion or portions of a bureau program that are to be performed by the Tribe/Consortium; and

(b) Associated funding, terms and conditions under which the Tribe/Consortium will assume a program, or portion of a program.

Eligibility

§ 1000.122 What non-BIA programs are eligible for inclusion in an annual funding agreement?

Programs authorized by sections 403(b)(2) and 403(c) of the Act are eligible for inclusion in AFAs. The Secretary will publish annually a list of these programs in accordance with section 405(c)(4).

§ 1000.123 Are there non-BIA programs for which the Secretary must negotiate for inclusion in an AFA subject to such terms as the parties may negotiate?

Yes, those programs, or portions thereof, that are eligible for contracting under Pub. L. 93–638.

§ 1000.124 What programs are included under Section 403(b)(2) of the Act?

Those programs, or portions thereof, that are eligible for contracting under Pub. L. 93–638.

§ 1000.125 What programs are included under Section 403(c)?

Department of the Interior programs of special geographic, historical, or cultural significance to participating Tribes, individually or as members of a Consortium, are eligible for inclusion in AFAs under section 403(c).

§ 1000.126 What does “special geographic, historical or cultural” mean?

(a) *Geographic* generally refers to all lands presently “on or near” an Indian

reservation, and all other lands within “Indian country,” as defined by 18 U.S.C. 1151. In addition, “geographic” includes:

- (1) Lands of former reservations;
- (2) Lands on or near those conveyed or to be conveyed under the Alaska Native Claims Settlement Act (ANCSA);
- (3) Judicially established aboriginal lands of a Tribe or a Consortium member or as verified by the Secretary; and
- (4) Lands and waters pertaining to Indian rights in natural resources, hunting, fishing, gathering, and subsistence activities, provided or protected by treaty or other applicable law.

(b) *Historical* generally refers to programs or lands having a particular history that is relevant to the Tribe. For example, particular trails, forts, significant sites, or educational activities that relate to the history of a particular Tribe.

(c) *Cultural* refers to programs, sites, or activities as defined by individual Tribal traditions and may include, for example:

- (1) Sacred and medicinal sites;
- (2) Gathering of medicines or materials such as grasses for basket weaving; or
- (3) Other traditional activities, including, but not limited to, subsistence hunting, fishing, and gathering.

§ 1000.127 Under Section 403(b)(2), when must programs be awarded non-competitively?

Programs eligible for contracts under Pub. L. 93–638 must be awarded non-competitively.

§ 1000.128 Is there a contracting preference for programs of special geographic, historical, or cultural significance?

Yes, if there is a special geographic, historical, or cultural significance to the program or activity administered by the bureau, the law affords the bureau the discretion to include the programs or activities in an AFA on a non-competitive basis.

§ 1000.129 Are there any programs that may not be included in an AFA?

Yes, section 403(k) of the Act excludes from the program:

- (a) Inherently Federal functions; and
- (b) Programs where the statute establishing the existing program does not authorize the type of participation sought by the Tribe/Consortium, except as provided in § 1000.134.

§ 1000.130 Does a Tribe/Consortium need to be identified in an authorizing statute in order for a program or element of a program to be included in a non-BIA AFA?

No, the Act favors the inclusion of a wide range of programs.

§ 1000.131 Will Tribes/Consortia participate in the Secretary's determination of what is to be included on the annual list of available programs?

Yes, the Secretary must consult each year with Tribes/Consortia participating in self-governance programs regarding which bureau programs are eligible for inclusion in AFAs.

§ 1000.132 How will the Secretary consult with Tribes/Consortia in developing the list of available programs?

(a) On, or as near as possible to, October 1 of each year, the Secretary must distribute to each participating self-governance Tribe/Consortium the previous year's list of available programs in accordance with section 405(c)(4) of the Act. The list must include:

- (1) All of the Secretary's proposed additions and revisions for the coming year with an explanation; and
- (2) Programmatic targets and an initial point of contact for each bureau.

(b) The Tribes/Consortia receiving the proposed list will have 30 days from receipt to comment in writing on the Secretary's proposed revisions and to provide additions and revisions of their own for the Secretary to consider.

(c) The Secretary will carefully consider these comments before publishing the list as required by section 405(c)(4) of the Act.

(d) If the Secretary does not plan to include a Tribal suggestion or revision in the final published list, he/she must provide an explanation of his/her reasons if requested by a Tribe.

§ 1000.133 What else is on the list in addition to eligible programs?

The list will also include programmatic targets and an initial point of contact for each bureau. Programmatic targets will be established as part of the consultation process described in § 1000.132.

§ 1000.134 May a bureau negotiate with a Tribe/Consortium for programs not specifically included on the annual section 405(c) list?

Yes, the annual list will specify that bureaus will negotiate for other programs eligible under section 403(b)(2) when requested by a Tribe/Consortium. Bureaus may negotiate for section 403(c) programs whether or not they are on the list.

§ 1000.135 How will a bureau negotiate an annual funding agreement for a program of special geographic, historical, or cultural significance to more than one Tribe?

(a) If a program is of special geographic, historical, or cultural significance to more than one Tribe, the bureau may allocate the program among the several Tribes/Consortia or select one Tribe/Consortium with whom to negotiate an AFA.

(b) In making a determination under paragraph (a) of this section, the bureau will, in consultation with the affected Tribes, consider:

(1) The special significance of each Tribe's or Consortium member's interest; and

(2) The statutory objectives being served by the bureau program.

(c) The bureau's decision will be final for the Department.

§ 1000.136 When will this determination be made?

It will occur during the pre-negotiation process, subject to the timeframes in § 1000.171 and § 1000.172.

Funding

§ 1000.137 What funds are included in an AFA?

Bureaus determine the amount of funding to be included in the AFA using the following principles:

(a) *403(b)(2) programs.* In general, funds are provided in an AFA to the Tribe/Consortium in an amount equal to the amount that it is eligible to receive under section 106 of Pub. L. 93-638.

(b) *403(c) programs.* (1) The AFA will include:

(i) Amounts equal to the direct costs the bureau would have incurred were it to operate that program at the level of work mutually agreed to in the AFA; and

(ii) Allowable indirect costs.

(2) A bureau is not required to include management and support funds from the regional or central office level in an AFA, unless:

(i) The Tribe/Consortium will perform work previously performed at the regional or central office level;

(ii) The work is not compensated in the indirect cost rate; and

(iii) Including management and support costs in the AFA does not result in the Tribe/Consortium being paid twice for the same work when negotiated indirect cost rate is applied.

(c) *Funding Limitations.* The amount of funding must be subject to the availability and level of Congressional appropriations to the bureau for that program or activity. As the various bureaus use somewhat differing

budgeting practices, determining the amount of funds available for inclusion in the AFA for a particular program or activity is likely to vary among bureaus or programs.

(1) The AFA may not exceed the amount of funding the bureau would have spent for direct operations and indirect support and management of that program in that year.

(2) The AFA must not include funding for programs still performed by the bureau.

§ 1000.138 How are indirect cost rates determined?

The Department's Office of the Inspector General (OIG) or other cognizant Federal agency and the Tribe/Consortium negotiate indirect cost rates. These rates are based on the provisions of the Office of Management and Budget (OMB) Circular A-87 or other applicable OMB cost circular and the provisions of Title I of Pub. L. 93-638 (See § 1000.142). These rates are used generally by all Federal agencies for contracts and grants with the Tribe/Consortium, including self-governance agreements.

§ 1000.139 Will the established indirect cost rates always apply to new AFAs?

No, the established indirect cost rates will not always apply to new AFAs.

(a) A Tribe's/Consortium's existing indirect cost rate should be reviewed and renegotiated with the inspector general or other cognizant agency if:

(1) Using the previously negotiated rate would include the recovery of indirect costs that are not reasonable, allocable, or allowable to the relevant program; or

(2) The previously negotiated rate would result in an under-recovery by the Tribe/Consortium.

(b) If a Tribe/Consortium has a fixed amount indirect cost agreement under OMB Circular A-87, then:

(1) Renegotiation is not required and the duration of the fixed amount agreement will be that provided for in the fixed amount agreement; or

(2) The Tribe/Consortium and bureau may negotiate an indirect cost amount or rate for use only in that AFA without the involvement of the inspector general or other cognizant agency.

§ 1000.140 How does the Secretary determine the amount of indirect contract support costs?

The Secretary determines the amount of indirect contract support costs by:

(a) Applying the negotiated indirect cost rate to the appropriate direct cost base;

(b) Using the provisional rate; or

(c) Negotiating the amount of indirect contract support.

§ 1000.141 Is there a predetermined cap or limit on indirect cost rates or a fixed formula for calculating indirect cost rates?

No, indirect cost rates vary from Tribe to Tribe. The Secretary should refer to the appropriate negotiated indirect cost rates for individual Tribes, that apply government-wide. Although this cost rate is not capped, the amount of funds available for inclusion is capped at the level available under the relevant appropriation.

§ 1000.142 Instead of the negotiated indirect cost rate, is it possible to establish a fixed amount or another negotiated rate for indirect costs where funds are limited?

Yes, OMB Circular A-87 encourages agencies to test fee-for-service alternatives. If the parties agree to a fixed price, fee-for-service agreement, then they must use OMB Circular A-87 as a guide in determining the appropriate price (OMB circulars are available at <http://www.whitehouse.gov/omb/> or see 5 CFR 1310.3). Where limited appropriated funds are available, negotiating the fixed cost option or another rate may facilitate reaching an agreement with that Tribe/Consortium.

Other Terms and Conditions

§ 1000.143 May the bureaus negotiate terms to be included in an AFA for non-Indian programs?

Yes, as provided for by section 403(b)(2) and 403(c) and as necessary to meet program mandates.

Reallocation, Duration, and Amendments

§ 1000.144 Can a Tribe reallocate funds for a non-BIA non-Indian program?

Yes, section 403(b) permits such reallocation upon joint agreement of the Secretary and the Tribe/Consortium.

§ 1000.145 Do Tribes/Consortia need Secretarial approval to reallocate funds between Title-I eligible programs that the Tribe/Consortium administers under a non-BIA AFA?

No, unless otherwise required by law, the Secretary does not have to approve the reallocation of funds with the exception of construction projects.

§ 1000.146 Can a Tribe/Consortium negotiate an AFA with a non-BIA bureau for which the performance period exceeds one year?

Yes, subject to the terms of the AFA, a Tribe/Consortium and a non-BIA bureau may agree to provide for the performance under the AFA to extend beyond the fiscal year. However, the

Department may not obligate funds in excess and advance of available appropriations.

§ 1000.147 Can the terms and conditions in a non-BIA AFA be amended during the year it is in effect?

Yes, terms and conditions in a non-BIA AFA may be amended during the year it is in effect as agreed to by both the Tribe/Consortium and the Secretary.

§ 1000.148 What happens if an AFA expires before the effective date of the successor AFA?

If the effective date of a successor AFA is not on or before the expiration of the current AFA, subject to terms mutually agreed upon by the Tribe/Consortium and the Department at the time the current AFA was negotiated or in a subsequent amendment, the Tribe/Consortium may continue to carry out the program authorized under the AFA to the extent resources permit. During this extension period, the current AFA shall remain in effect, including coverage of the Tribe/Consortium under the Federal Tort Claims Act (FTCA) 28 U.S.C. 2671–2680 (1994); and the Tribe/Consortium may use any funds remaining under the AFA, savings from other programs or Tribal funds to carry out the program. Nothing in this section authorizes an AFA to be continued beyond the completion of the program authorized under the AFA or the amended AFA. This section also does not entitle a Tribe/Consortium to receive, nor does it prevent a Tribe from receiving, additional funding under any successor AFA. The successor AFA must provide funding to the Tribe/Consortium at a level necessary for the Tribe/Consortium to perform the programs, functions, services, and activities (PFSA) or portions thereof for the full period they were or will be performed.

Subpart G—Negotiation Process for Annual Funding Agreements

Purpose

§ 1000.160 What is the purpose of this subpart?

This subpart provides the process and timelines for negotiating a self-governance compact with the Department and an AFA with any bureau.

(a) For a newly selected or currently participating Tribe/Consortium negotiating an initial AFA with any bureau, see §§ 1000.173 through 1000.179.

(b) For a participating Tribe/Consortium negotiating a successor AFA

with any bureau, see §§ 1000.180 through 1000.182.

Negotiating a Self-Governance Compact

§ 1000.161 What is a self-governance compact?

A self-governance compact is an executed document that affirms the government-to-government relationship between a self-governance Tribe and the United States. The compact differs from an AFA in that parts of the compact apply to all bureaus within the Department of the Interior rather than a single bureau.

§ 1000.162 What is included in a self-governance compact?

A model format for self-governance compacts appears in appendix A. A self-governance compact should generally include the following:

- (a) The authority and purpose;
- (b) Terms, provisions, and conditions of the compact;
- (c) Obligations of the Tribe and the United States; and
- (d) Other provisions.

§ 1000.163 Can a Tribe/Consortium negotiate other terms and conditions not contained in the model compact?

Yes, the Secretary and a self-governance Tribe/Consortium may negotiate into the model compact contained in appendix A additional terms relating to the government-to-government relationship between the Tribe(s) and the United States. For BIA programs, a Tribe/Consortium and the Secretary may agree to include any term in a contract and funding agreement under Title I in the model compact contained in appendix A to this part.

§ 1000.164 Can a Tribe/Consortium have an AFA without entering into a compact?

Yes, at the Tribe's/Consortium's option.

§ 1000.165 Are provisions in compacts negotiated before January 16, 2001, effective after implementation?

(a) Yes, all provisions in compacts that were negotiated with BIA before January 16, 2001, shall remain in effect for BIA programs only after January 16, 2001, provided that each compact contains provisions:

- (1) That are authorized by the Tribal Self-Governance Act of 1994;
 - (2) Are in compliance with other applicable Federal laws; and,
 - (3) Are consistent with this part.
- (b) BIA will notify the Tribe/Consortium in writing when BIA asserts that a provision or provisions of that Tribe's/Consortium's previously negotiated compact is not in compliance with the terms and conditions of this

part. BIA and the Tribe/Consortium will renegotiate the provision within 60 days of the Tribe's/Consortium's receipt of the notification.

(c) If renegotiation is not successful within 60 days of the notice being provided, BIA's determination is final for the bureau and enforceability of the provisions shall be subject to the appeals process described in subpart R of this part. Pending a final appeal through the appeals process, BIA's determination shall be stayed.

Negotiation of Initial Annual Funding Agreements

§ 1000.166 What are the phases of the negotiation process?

There are two phases of the negotiation process:

- (a) The information phase; and
- (b) The negotiation phase.

§ 1000.167 Who may initiate the information phase?

Any Tribe/Consortium that has been admitted to the program or to the applicant pool may initiate the information phase.

§ 1000.168 Is it mandatory to go through the information phase before initiating the negotiation phase?

No, a Tribe/Consortium may go directly to the negotiation phase.

§ 1000.169 How does a Tribe/Consortium initiate the information phase?

A Tribe/Consortium initiates the information phase by submitting a letter of interest to the bureau administering a program that the Tribe/Consortium may want to include in its AFA. A letter of interest may be mailed, telefaxed, or hand-delivered to:

- (a) The Director, OSG, if the request is for information about BIA programs;
- (b) The non-BIA bureau's self-governance representative identified in the Secretary's annual section 405(c) listing in the **Federal Register**, if the request is for information concerning programs of non-BIA bureaus.

§ 1000.170 What is the letter of interest?

A letter of interest is the initial indication of interest submitted by the Tribe/Consortium informing the bureau of the Tribe's/Consortium's interest in seeking information for the possible negotiation of one or more bureau programs. For non-BIA bureaus, the program and budget information request should relate to the program and activities identified in the Secretary's section 405(c) list in the **Federal Register** or a section 403(c) request. A letter of interest should identify the following:

(a) As specifically as possible, the program a Tribe/Consortium is interested in negotiating under an AFA;

(b) A preliminary brief explanation of the cultural, historical, or geographic significance to the Tribe/Consortium of the program, if applicable;

(c) The scope of activity that a Tribe/Consortium is interested in including in an AFA;

(d) Other information that may assist the Bureau in identifying the programs that are included or related to the Tribe's/Consortium's request;

(e) A request for information that indicates the type and/or description of information that will assist the Tribe/Consortium in pursuing the negotiation process;

(f) A designated Tribal contact;

(g) A request for information on any funds that may be available within the bureau or other known possible sources of funding for planning and negotiating an AFA;

(h) A request for information on any funds available within the bureau or from other sources of funding that the Tribe/Consortium may include in the AFA for planning or performing programs or activities; and

(i) Any requests for technical assistance to be provided by the bureau in preparing documents of materials that may be required for the Tribe/Consortium in the negotiation process.

§ 1000.171 When should a Tribe/Consortium submit a letter of interest?

A letter of interest may be submitted at any time. To meet the negotiation deadlines below, letters should be submitted to the appropriate non-BIA bureaus by March 1; letters should be submitted to BIA by April 1 for fiscal

year Tribes/Consortia or May 1 for calendar year Tribes/Consortia.

§ 1000.172 What steps does the bureau take after a letter of interest is submitted by a Tribe/Consortium?

(a) Within 15 calendar days of receipt of a Tribe's/Consortium's letter of interest, the bureau will notify the Tribe/Consortium about who will be designated as the bureau's representative to be responsible for responding to the Tribal requests for information. The bureau representative shall act in good faith in fulfilling the following responsibilities:

(1) Providing all budget and program information identified in paragraph (b) of this section, from each organizational level of the bureau(s); and

(2) Notifying any other bureau requiring notification and participation under this part.

(b) Within 30 calendar days of receipt of the Tribe's/Consortium's letter of interest:

(1) To the extent that such reasonably related information is available, the bureau representative is to provide the information listed in paragraph (c) of this section, if available and consistent with the bureau's budgetary process;

(2) A written explanation of why the information is not available or not being provided to the Tribe's/Consortium's contact and the date by which other available information will be provided; or

(3) If applicable, a written explanation of why the program is unavailable for negotiation.

(c) Information to be made available to the Tribe's/Consortium's contact, subject to the conditions of paragraph (b) of this section, includes:

(1) Information regarding program, budget, staffing, and locations of the

offices administering the program and related administrative support program identified by the Tribe/Consortium,

(2) Information contained in the previous year, present year, and next year's budget proposed by the President at the national program level and the regional/local level.

(3) When appropriate, the bureau will be available to meet the Tribal representatives to explain the budget information provided.

(4) Information used to support budget allocations for the programs identified (e.g., full time equivalents and other relevant factors).

(5) Information used to operate and/or evaluate a program, such as statutory and regulatory requirements and program standards.

(6) If applicable, information regarding how a program is administered by more than one bureau, including a point of contact for information for the other bureau(s); and

(7) Other information requested by the Tribe/Consortium in its letter of interest.

(d) If a bureau fails to provide reasonably related information requested by a Tribe/Consortium, the Tribe/Consortium may appeal the failure in accordance with subpart R of this part. These requests shall be considered for a fee waiver under the Freedom of Information Act.

§ 1000.173 How does a newly selected Tribe/Consortium initiate the negotiation phase?

(a) To initiate the negotiation phase, an authorized official of the newly selected Tribe/Consortium submits a written request to negotiate an AFA as indicated in the following table:

For a . . .	the Tribe/Consortium should submit the request to . . .	and the request should identify . . .
(1) BIA program	the Director, OSG.	the lead negotiator(s) for the Tribe/Consortium.
(2) Non-BIA program	the bureau representative designated to respond to the Tribe's/Consortium's request for information.	the lead negotiator(s) for the Tribe/Consortium and the specific program(s) that the Tribe/Consortium seeks to negotiate.

(b) The Tribal/Consortium official must submit the information required by paragraph (a) of this section by the deadline shown in the following table:

Type of program	Type of tribe/consortium	Submission deadline
(1) BIA	Fiscal year	April 1.
(2) BIA	Calendar year	May 1.
(3) Non-BIA	Fiscal year or calendar year	May 1*.

* The request may be submitted later than this date where the bureau and the Tribe/Consortium agree that administration for a partial year funding agreement is feasible.

§ 1000.174 How and when does the bureau respond to a request to negotiate?

(a) Within 15 days of receiving a Tribe's/Consortium's request to negotiate, the bureau will take the steps in this section. If more than one bureau is involved, a lead bureau must be designated to conduct negotiations.

(b) If the program is contained on the section 405(c) list, the bureau will identify the lead negotiator(s) and awarding official(s) for executing the AFA.

(c) If the program is potentially of a special geographic, cultural, or historic significance to a Tribe/Consortium, the bureau will schedule a pre-negotiation meeting with the Tribe/Consortium as soon as possible. The purpose of the meeting is to assist the bureau in determining if the program is available for negotiation.

(d) Within 10 days after convening a meeting under paragraph (c) of this section:

(1) If the program is available for negotiation, the bureau will identify the lead negotiator(s) and awarding official(s); or

(2) If the program is unavailable for negotiation, the bureau will give to the Tribe/Consortium a written explanation of why the program is unavailable for negotiation.

§ 1000.175 What is the process for conducting the negotiation phase?

(a) Within 30 days of receiving a written request to negotiate, the bureau and the Tribe/Consortium will agree to a date to conduct an initial negotiation meeting. Subsequent meetings will be held with reasonable frequency at reasonable times.

(b) Tribe/Consortium and bureau lead negotiators must:

(1) Be authorized to negotiate on behalf of their government; and

(2) Involve all necessary persons in the negotiation process.

(c) Once negotiations have been successfully completed, the bureau and Tribe/Consortium will prepare and either execute or disapprove an AFA within 30 days or by a mutually agreed upon date.

§ 1000.176 What issues must the bureau and the Tribe/Consortium address at negotiation meetings?

The negotiation meetings referred to in § 1000.175 must address at a minimum the following:

(a) The specific Tribe/Consortium proposal(s) and intentions;

(b) Legal or program issues that the bureau or the Tribe/Consortium identify as concerns;

(c) Options for negotiating programs and related budget amounts, including

mutually agreeable options for developing alternative formats for presenting budget information to the Tribe/Consortium;

(d) Dates for conducting and concluding negotiations;

(e) Protocols for conducting negotiations;

(f) Responsibility for preparation of a written summary of the discussions; and

(g) Who will prepare an initial draft of the AFA.

§ 1000.177 What happens when the AFA is signed?

(a) After all parties have signed the AFA, a copy is sent to the Tribe/Consortium.

(b) The Secretary forwards copies of the AFA to:

(1) The House Subcommittee on Native Americans and Insular Affairs; and

(2) The Senate Committee on Indian Affairs;

(c) For BIA programs, the AFA is also forwarded to each Indian Tribe/Consortium served by the BIA Agency that serves any Tribe/Consortium that is a party to the AFA.

§ 1000.178 When does the AFA become effective?

The effective date is not earlier than 90 days after the AFA is submitted to the Congressional committees under § 1000.177(b).

§ 1000.179 What happens if the Tribe/Consortium and bureau negotiators fail to reach an agreement?

(a) If the Tribe/Consortium and bureau representatives do not reach agreement during the negotiation phase by the mutually agreed to date for completing negotiations, the Tribe/Consortium and the bureau may each make a last and best offer to the other party.

(b) If a last and best offer is not accepted within 15 days, the bureau will provide a written explanation to the Tribe/Consortium explaining its reasons for not entering into an AFA for the requested program, together with the applicable statement prescribed in subpart R of this part, concerning appeal or review rights.

(c) The Tribe/Consortium has 30 days from receipt of the bureau's written explanation to file an appeal. Appeals are handled in accordance with subpart R of this part.

Negotiation Process for Successor Annual Funding Agreements**§ 1000.180 What is a successor AFA?**

A successor AFA is a funding agreement negotiated after a Tribe's/

Consortium's initial agreement with a bureau for continuing to perform a particular program. The parties to the AFA should generally use the terms of the existing AFA to expedite and simplify the exchange of information and the negotiation process.

§ 1000.181 How does the Tribe/Consortium initiate the negotiation of a successor AFA?

Although a written request is desirable to document the precise request and date of the request, a written request is not mandatory. If either party anticipates a significant change in an existing program in the AFA, it should notify the other party of the change at the earliest possible date so that the other party may plan accordingly.

§ 1000.182 What is the process for negotiating a successor AFA?

The Tribe/Consortium and the bureau use the procedures in §§ 1000.173—1000.179.

Subpart H—Limitation and/or Reduction of BIA Services, Contracts, and Funds**§ 1000.190 What is the purpose of this subpart?**

This subpart prescribes the process that the Secretary uses to determine whether a BIA self-governance funding agreement causes a limitation or reduction in the services, contracts, or funds that any other Tribe/Consortium or Tribal organization is eligible to receive under self-determination contracts, other self-governance compacts, or direct services from BIA. This type of limitation is prohibited by section 406(a) of Pub. L. 93-638. For the purposes of this subpart, Tribal organization means an organization eligible to receive services, contracts, or funds under section 102 of Pub. L. 93-638.

§ 1000.191 To whom does this subpart apply?

Participating and non-participating Tribes/Consortia and Tribal organizations are subject to this subpart. It does not apply to the general public and non-Indians.

§ 1000.192 What services, contracts, or funds are protected under section 406(a)?

Section 406(a) protects against the actual reduction or limitations of services, contracts, or funds.

§ 1000.193 Who may raise the issue of limitation or reduction of services, contracts, or funding?

BIA or any affected Tribe/Consortium or Tribal organization may raise the issue that a BIA self-governance AFA

limits or reduces particular services, contracts, or funding for which it is eligible.

§ 1000.194 When must BIA raise the issue of limitation or reduction of services, contracts, or funding?

(a) From the beginning of the negotiation period until the end of the first year of implementation of an AFA, BIA may raise the issue of limitation or reduction of services, contracts, or funding. If BIA and a participating Tribe/Consortium disagree over the residual information, a participating Tribe/Consortium may ask the Deputy Commissioner—Indian Affairs to reconsider residual levels for particular programs. [See § 1000.95(d)]

(b) After the AFA is signed, BIA must raise the issue of any undetermined funding amounts within 30 days after the final funding level is determined. BIA may not raise this issue after this period has elapsed.

§ 1000.195 When must an affected Tribe/Consortium or Tribal organization raise the issue of a limitation or reduction of services, contracts, or funding for which it is eligible?

(a) A Tribe/Consortium or Tribal organization may raise the issue of limitation or reduction of services, contracts, or funding for which it is eligible during:

- (1) Region-wide Tribal shares meetings occurring before the first year of implementation of an AFA;
- (2) Within the 90-day review period before the effective date of the AFA; and
- (3) The first year of implementation of an AFA.

(b) Any Tribe/Consortium or Tribal organization claiming a limitation or reduction of contracts, services, or funding for which it is eligible must notify, in writing, both the Department and negotiating Tribe/Consortium. Claims may only be filed within the periods specified in paragraph (a) of this section.

§ 1000.196 What must be included in a finding by BIA or in a claim by an affected Tribe/Consortium or Tribal organization regarding the issue of a limitation or reduction of services?

An affected Tribe/Consortium must include in its claim a written explanation identifying the alleged limitation or reduction of services, contracts, or funding for which it is eligible. A finding by BIA must likewise identify the limitation or reduction.

§ 1000.197 How will BIA resolve a claim?

All findings and claims timely made in accordance with §§ 1000.194 through 1000.195 will be resolved in accordance with 25 CFR part 2.

§ 1000.198 How must a limitation or reduction in services, contracts, or funds be remedied?

(a) If funding a participating Tribe/Consortium will limit or reduce services, contracts, or funds for which another Tribe/Consortium or Tribal organization is eligible, BIA must remedy the reduction as follows:

(1) In the current AFA year BIA must use shortfall funding, supplemental funding, or other available BIA resources; and

(2) In a subsequent AFA year, BIA may adjust the AFA funding in an AFA to correct a finding of actual reduction in services, contracts, or funds for that subsequent year.

(b) All adjustments under this section must be mutually agreed between BIA and the participating Tribe/Consortium.

Subpart I—Public Consultation Process

§ 1000.210 When does a non-BIA bureau use a public consultation process related to the negotiation of an AFA?

When required by law or when appropriate under bureau discretion, a bureau may use a public consultation process in negotiating an AFA.

§ 1000.211 Will the bureau contact the Tribe/Consortium before initiating public consultation process for a non-BIA AFA under negotiation?

Yes, the bureau and the Tribe/Consortium will discuss the consultation process to be used in negotiating a non-BIA AFA.

(a) When public consultation is required by law, the bureau will follow the required process and will involve the Tribe/Consortium in that process to the maximum extent possible.

(b) When public consultation is a matter of bureau discretion, at Tribal request the Tribe/Consortium and the bureau, unless prohibited by law, will jointly develop guidelines for that process, including the conduct of any future public meetings. The bureau and the Tribe/Consortium will jointly identify a list of potential project beneficiaries, third-party stakeholders, or third-party users (affected parties) for use in the public consultation process.

§ 1000.212 What is the role of the Tribe/Consortium when a bureau initiates a public meeting?

When a bureau initiates a public meeting with affected parties it will take the following actions:

(a) The bureau will notify the Tribe/Consortium of the meeting time, place, and invited parties:

- (1) Ten days in advance, if possible; or

(2) If less than 10 days in advance, at the earliest practical time.

(b) When the bureau notifies the Tribe/Consortium, the bureau will invite the Tribe/Consortium to participate in and, unless prohibited by law, to co-sponsor or co-facilitate the meeting.

(c) When possible, the bureau and the Tribe/Consortium should meet to plan and discuss the conduct of the meeting, meeting protocols, and general participation in the proposed consultation meeting.

(d) The bureau and the Tribe/Consortium will conduct the meeting in a manner that facilitates and does not undermine the government-to-government relationship and self-governance;

(e) The Tribe/Consortium may provide technical support to the bureau to enhance the consultation process, as mutually agreed.

§ 1000.213 What should the bureau do if it is invited to attend a meeting with respect to the Tribe's/Consortium's proposed AFA?

If the bureau is invited to participate in meetings, hearings, etc., held or conducted by other parties, where the subject matter of the AFA under negotiation is expected to be raised, the bureau:

(a) Shall notify the Tribe/Consortium at the earliest practical time; and

(b) Should encourage the meeting sponsor to invite the Tribe/Consortium to participate.

§ 1000.214 Will the bureau and the Tribe/Consortium share information concerning inquiries about the Tribes/Consortia and the AFA?

Yes, the bureau and the Tribe/Consortium will exchange information about inquiries from affected or interested parties relating to the AFA under negotiation.

Subpart J—Waiver of Regulations

§ 1000.220 What regulations apply to self-governance Tribes?

All regulations that govern the operation of programs included in an AFA apply unless waived under this subpart. To the maximum extent practical, the parties should identify these regulations in the AFA.

§ 1000.221 Can the Secretary grant a waiver of regulations to a Tribe/Consortium?

Yes, a Tribe/Consortium may ask the Secretary to grant a waiver of some or all Department of the Interior regulation(s) applicable to a program, in whole or in part, operated by a Tribe/Consortium under an AFA.

§ 1000.222 How does a Tribe/Consortium obtain a waiver?

To obtain a waiver, the Tribe/Consortium must:

- (a) Submit a written request from the designated Tribal official to the Director for BIA programs or the appropriate bureau/office director for non-BIA programs;
- (b) Identify the regulation to be waived and the reasons for the request;
- (c) Identify the programs to which the waiver would apply;
- (d) Identify what provisions, if any, would be substituted in the AFA for the regulation to be waived; and
- (e) When applicable, identify the effect of the waiver on any trust programs or resources.

§ 1000.223 When can a Tribe/Consortium request a waiver of a regulation?

A Tribe/Consortium may request a waiver of a regulation:

- (a) As part of the negotiation process; or
- (b) After an AFA has been executed.

§ 1000.224 How can a Tribe/Consortium expedite the review of a regulation waiver request?

A Tribe/Consortium may request a meeting or other informal discussion with the appropriate bureau officials before submitting a waiver request.

- (a) To set up a meeting, the Tribe/Consortium should contact:
 - (1) For BIA programs, the Director, OSG; or
 - (2) For non-BIA programs, the designated representative of the bureau.
- (b) The meeting or discussion is intended to provide:
 - (1) A clear understanding of the nature of the request;
 - (2) Necessary background and information; and
 - (3) An opportunity for the bureau to offer appropriate technical assistance.

§ 1000.225 Are meetings or discussions mandatory?

No, a meeting with the bureau officials is not necessary to submit a waiver request.

§ 1000.226 On what basis may the Secretary deny a waiver request?

The Secretary may deny a waiver request if:

- (a) For a Title-I-eligible program, the requested waiver is prohibited by Federal law; or
- (b) For a non-Title-I-eligible program, the requested waiver is:
 - (1) Prohibited by Federal law; or
 - (2) Inconsistent with the express provisions of the AFA.

§ 1000.227 What happens if the Secretary denies the waiver request?

If the Secretary denies a waiver request, the Secretary issues a written decision stating:

- (a) The basis for the decision;
- (b) The decision is final for the Department; and
- (c) The Tribe/Consortium may request reconsideration of the denial.

§ 1000.228 What are examples of waivers prohibited by law?

Examples of when a waiver is prohibited by Federal law include:

- (a) When the effect would be to waive or eliminate express statutory requirements;
- (b) When a statute authorizes civil and criminal penalties;
- (c) When it would result in a failure to ensure that proper health and safety standards are included in an AFA (section 403(e)(2));
- (d) When it would result in a reduction of the level of trust services that would have been provided by the Secretary to individual Indians (section 403(g)(4));
- (e) When it would limit or reduce the services, contracts, or funds to any other Indian Tribe or Tribal organization (section 406(a));
- (f) When it would diminish the Federal trust responsibility to Tribes, individual Indians or Indians with trust allotments (Section 406(b)); or
- (g) When it would violate Federal case law.

§ 1000.229 May a Tribe/Consortium propose a substitute for a regulation it wishes to be waived?

Yes, where a Tribe/Consortium wishes to replace the waived regulation with a substitute that otherwise maintains the requirements of the applicable Federal law, the Secretary may be able to approve the waiver request. The Tribe/Consortium and bureau officials must negotiate to develop a suggested substitution.

§ 1000.230 How is a waiver approval documented for the record?

The waiver decision is made part of the AFA by attaching a copy of it to the AFA and by mutually executing any necessary conforming amendments to the AFA. The decisions announcing the waiver also will be posted on the Office of Self-Governance web site and all such decisions shall be made available on request.

§ 1000.231 How does a Tribe/Consortium request reconsideration of the Secretary's denial of a waiver?

(a) The Tribe/Consortium may request reconsideration of a waiver denial. To do so, the Tribe/Consortium must submit a request to:

- (1) The Director, OSG, for BIA programs; or
 - (2) The appropriate bureau head, for non-BIA programs.
- (b) The request must be filed within 30 days of the day the decision is received by certified mail (return receipt requested) or by hand delivery. A request submitted by mail will be considered filed on the postmark date.
- (c) The request must identify the issues to be addressed, including a statement of reasons supporting the request.

§ 1000.232 When must DOI respond to a request for reconsideration?

The Secretary must issue a written decision within 30 days of the Department's receipt of a request for reconsideration. This decision is final for the Department and no administrative appeal may be made.

Subpart K—Construction**§ 1000.240 What construction programs included in an AFA are subject to this subpart?**

(a) All BIA and non-BIA construction programs included in an AFA are subject to this subpart. This includes design, construction, repair, improvement, expansion, replacement or demolition of buildings or facilities, and other related work for Federal, or Federally funded Tribal, facilities and projects.

(b) The following programs and activities are not construction programs and activities:

- (1) Activities limited to providing planning services, administrative support services, coordination, responsibility for the construction project, day-to-day on-site management on site-management and administration of the project, which may include cost management, project budgeting, project scheduling and procurement except that all project design and actual construction activities are subject to all the requirements of subpart K, whether performed by a Tribe/Consortium, subcontractor, or consultant.
- (2) Housing Improvement Program or road maintenance program activities of BIA;
- (3) Operation and maintenance programs; and
- (4) Non-403(c) programs that are less than \$100,000, subject to section 403(e)(2) of the Act, other applicable Federal law, and § 1000.256 of this subpart.

§ 1000.241 Does this subpart create an agency relationship?

No, a BIA or non-BIA construction program does not automatically create

an agency relationship. However, Federal law, provisions of an AFA, or Federal actions may create an agency relationship.

§ 1000.242 What provisions relating to a construction program may be included in an AFA?

The Secretary and the Tribe/Consortium may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction part of an AFA. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

§ 1000.243 What special provisions must be included in an AFA that contains a construction program?

An AFA that contains a construction program must address the requirements listed in this section.

(a) The AFA must specify how the Secretary and the Tribe/Consortium must ensure that proper health and safety standards are provided for in the implementation of the AFA, including but not limited to:

- (1) The use of architects and engineers licensed to perform the type of construction involved in the AFA;
- (2) Applicable Federal, state, local or Tribal building codes and applicable engineering standards, appropriate for the particular project; and
- (3) Necessary inspections and testing by the Tribe.

(b) The AFA must comply with applicable Federal laws, program statutes and regulations.

(c) The AFA must specify the services to be provided, the work to be performed, and the responsibilities of the Tribe/Consortium and the Secretary under the AFA.

(d) The Secretary may require the Tribe/Consortium to provide brief progress reports and financial status reports. The parties may negotiate in the AFA the frequency, format and content of the reporting requirement. As negotiated, these reports may include:

- (1) A narrative of the work accomplished;
- (2) The percentage of the work completed;
- (3) A report of funds expended during the reporting period; and
- (4) The total funds expended for the project.

§ 1000.244 May the Secretary suspend construction activities under an AFA?

(a) The Secretary may require a Tribe/Consortium to suspend certain work under a construction portion of an AFA for up to 30 days only if:

- (1) Site conditions adversely affect health and safety; or

(2) Work in progress or completed fails to substantially carry out the terms of the AFA without good cause.

(b) The Secretary may suspend only work directly related to the criteria specified in paragraph (a) of this section unless other reasons for suspension are specifically negotiated in the AFA.

(c) Unless the Secretary determines that a health and safety emergency requiring immediate action exists, before suspending work the Secretary must provide:

- (1) A 5 working days written notice; and
- (2) An opportunity for the Tribe/Consortium to correct the problem.

(d) The Tribe/Consortium must be compensated for reasonable costs due to any suspension of work that occurred through no fault of the Tribe/Consortium. Project funds will not be used for this purpose. However, if suspension occurs due to the action or inaction of the Tribe/Consortium, then project funds will be used to cover suspension related activities.

§ 1000.245 May a Tribe/Consortium continue work with construction funds remaining in an AFA at the end of the funding year?

Yes, any funds remaining in an AFA at the end of the funding year may be spent for construction under the terms of the AFA.

§ 1000.246 Must an AFA that contains a construction project or activity incorporate provisions of Federal construction standards?

No, the Secretary may provide information about Federal standards as early as possible in the construction process. If Tribal construction standards are consistent with or exceed applicable Federal standards, then the Secretary must accept the Indian Tribe/Consortium's proposed standards. The Secretary may accept commonly accepted industry construction standards.

§ 1000.247 May the Secretary require design provisions and other terms and conditions for construction programs or activities included in an AFA under section 403(c) of the Act?

Yes, the relevant bureau may provide to the Tribe/Consortium project design criteria and other terms and conditions that are required for such a project. The project must be completed in accordance with the terms and conditions set forth in the AFA.

§ 1000.248 What is the Tribe's/Consortium's role in a construction program included in an AFA?

The Tribe/Consortium has the following role regarding a construction portion of an AFA:

(a) Under the Act, the Indian Tribe/Consortium must successfully complete the project in accordance with the terms and conditions in the AFA.

(b) The Tribe/Consortium must give the Secretary timely notice of any proposed changes to the project that require an increase to the negotiated funding amount or an increase in the negotiated performance period or any other significant departure from the scope or objective of the project. The Tribe/Consortium and Secretary may negotiate to include timely notice requirements in the AFA.

§ 1000.249 What is the Secretary's role in a construction program in an AFA?

The Secretary has the following role regarding a construction program contained in an AFA:

(a) Except as provided in § 1000.256, the Secretary may review and approve planning and design documents in accordance with terms negotiated in the AFA to ensure health and safety standards and compliance with Federal law and other program mandates;

(b) Unless otherwise agreed to in an AFA, the Secretary reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use for Federal Government purposes, designs produced in the construction program that are funded by AFA monies, including:

(1) The copyright to any work developed under a contract or subcontract; and

(2) Any rights of copyright that an Indian Tribe/Consortium or a Tribal contractor purchases through the AFA;

(c) The Secretary may conduct on-site monitoring visits as negotiated in the AFA;

(d) The Secretary must approve any proposed changes in the construction program or activity that require an increase in the negotiated AFA funding amount or an increase in the negotiated performance period or are a significant departure from the scope or objective of the construction program as agreed to in the AFA;

(e) The Secretary may conduct final project inspection jointly with the Indian Tribe/Consortium and may accept the construction project or activity as negotiated in the AFA;

(f) Where the Secretary and the Tribe/Consortium share construction program activities, the AFA may provide for the exchange of information;

(g) The Secretary may reassume the construction portion of an AFA if there is a finding of:

(1) A significant failure to substantially carry out the terms of the AFA without good cause; or

(2) Imminent jeopardy to a physical trust asset, to a natural resource, or that adversely affects public health and safety as provided in subpart M of this part.

§ 1000.250 How are property and funding returned if there is a reassumption for substantial failure to carry out an AFA?

If there is a reassumption for substantial failure to carry out an AFA, property and funding will be returned as provided in subparts M and N of this part.

§ 1000.251 What happens when a Tribe/Consortium is suspended for substantial failure to carry out the terms of an AFA without good cause and does not correct the failure during the suspension?

(a) Except when the Secretary makes a finding of imminent jeopardy to a physical trust asset, a natural resource, or public health and safety as provided in subpart M of these regulations a finding of substantial failure to carry out the terms of the AFA without good cause must be processed under the suspension of work provision of § 1000.244.

(b) If the substantial failure to carry out the terms of the AFA without good cause is not corrected or resolved during the suspension of work, the Secretary may initiate a reassumption at the end of the 30-day suspension of work if an extension has not been negotiated. Any unresolved dispute will be processed in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 601, *et seq.*

§ 1000.252 Do all provisions of other subparts apply to construction portions of AFAs?

Yes, all provisions of other subparts apply to construction portions of AFAs unless those provisions are inconsistent with this subpart.

§ 1000.253 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

Under § 1000.35 of this part, a Tribe may withdraw from a Consortium and request its portion of a construction project's funds. The Secretary may decide not to award these funds if the award will affect the Consortium's ability to complete a non-severable phase of the project within available funding. An example of a non-severable phase of a project would be the

construction of a single building serving all members of the Consortium. An example of a severable phase of a project would be the funding for a road in one village where the Consortium would be able to complete the roads in the other villages that were part of the project approved initially in the AFA. The Secretary's decision under this section may be appealed under subpart R of this part.

§ 1000.254 May a Tribe/Consortium reallocate funds from a construction program to a non-construction program?

No, a Tribe/Consortium may not reallocate funds from a construction program to a non-construction program unless otherwise provided under the relevant appropriation acts.

§ 1000.255 May a Tribe/Consortium reallocate funds among construction programs?

Yes, a Tribe/Consortium may reallocate funds among construction programs if permitted by appropriation law or if approved in advance by the Secretary.

§ 1000.256 Must the Secretary retain project funds to ensure proper health and safety standards in construction projects?

Yes, the Secretary must retain project funds to ensure proper health and safety standards in construction projects. Examples of purposes for which bureaus may retain funds include:

(a) Determining or approving appropriate construction standards to be used in AFAs;

(b) Verifying that there is an adequate Tribal inspection system utilizing licensed professionals;

(c) Providing for sufficient monitoring of design and construction by the Secretary; and

(d) Requiring corrective action during performance when appropriate.

Subpart L—Federal Tort Claims

§ 1000.270 What does this subpart cover?

This subpart explains the applicability of the Federal Tort Claims Act (FTCA). This section covers:

(a) Coverage of claims arising out of the performance of functions under Self-Governance AFA's; and

(b) Procedures for filing claims under FTCA.

§ 1000.271 What other statutes and regulations apply to FTCA coverage?

A number of other statutes and regulations apply to FTCA coverage, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671–2680) and related Department of Justice regulations in 28 CFR part 14.

§ 1000.272 Do Tribes/Consortia need to be aware of areas which FTCA does not cover?

Yes, there are claims against Self-Governance Tribes/Consortia which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. The following general guidance is not intended as a definitive description of coverage, which is subject to review by the Department of Justice and the courts on a case-by-case basis.

(a) What claims are expressly barred by FTCA and therefore may not be made against the United States, a Tribe or Consortium? Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

(b) What claims may not be pursued under FTCA?

(1) Claims against subcontractors arising out of the performance of subcontracts with a Self-Governance Tribe/Consortium;

(2) Claims for on-the-job injuries which are covered by workmen's compensation;

(3) Claims for breach of contract rather than tort claims; or

(4) Claims resulting from activities performed by an employee which are outside the scope of employment.

(c) What remedies are expressly excluded by FTCA and therefore are barred?

(1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and (2) Other remedies not permitted under applicable state law.

§ 1000.273 Is there a deadline for filing FTCA claims?

Yes, claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

§ 1000.274 How long does the Federal government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

The Federal government has 6 months to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed.

§ 1000.275 Is it necessary for a self-governance AFA to include any clauses about FTCA coverage?

No, clauses about FTCA coverage are optional. At the request of Tribes/Consortia, self-governance AFA's shall include the following clause to clarify the scope of FTCA coverage:

For purposes of Federal Tort Claims Act coverage, the Tribe/Consortium and its employees (including individuals performing personal services contracts with the tribe/consortium) are deemed to be employees of the Federal government while performing work under this AFA. This status is not changed by the source of the funds used by the Tribe/Consortium to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the Tribe/Consortium.

§ 1000.276 Does FTCA apply to a self-governance AFA if FTCA is not referenced in the AFA?

Yes, FTCA applies even if the AFA does not mention it.

§ 1000.277 To what extent shall the Tribe/Consortium cooperate with the Federal government in connection with tort claims arising out of the Tribe's/Consortium's performance?

(a) The Tribe/Consortium shall designate an individual to serve as tort claims liaison with the Federal government.

(b) As part of the notification required by 28 U.S.C. 2679(c), the Tribe/Consortium shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the Tribe/Consortium or any of its employees that relates to performance of a self-governance AFA or subcontract.

(c) The Tribe/Consortium, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include as appropriate:

- (1) The date, time and exact place of the accident or incident;
- (2) A concise and complete statement of the circumstances of the accident or incident;
- (3) The names and addresses of Tribal and/or Federal employees involved as participants or witnesses;
- (4) The names and addresses of all other eyewitnesses;
- (5) An accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;
- (6) A statement as to whether any person involved was cited for violating a Federal, State or tribal law, ordinance, or regulation;
- (7) The Tribe's/Consortium's determination as to whether any of its

employees (including Federal employees assigned to the Tribe/Consortium) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the contract at the time the incident occurred;

(8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The Tribe/Consortium shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Secretary, the Tribe/Consortium shall make an assignment and subrogation of all the Tribe's/Consortium's rights and claims (except those against the Federal government) arising out of a tort claim against the Tribe/Consortium.

(f) If requested by the Secretary, the Tribe/Consortium shall authorize representatives of the Secretary to settle or defend any claim and to represent the Tribe/Consortium in or take charge of any action.

(g) If the Federal government undertakes the settlement or defense of any claim or action, the Tribe/Consortium shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 1000.278 Does this coverage extend to subcontractors of self-governance AFAs?

No, subcontractors or subgrantees providing services to a Pub. L. 93-638 Tribe/Consortium are generally not covered.

§ 1000.279 Is FTCA the exclusive remedy for a tort claim, including a claim concerning personal injury or death, resulting from the performance of a self-governance AFA?

Yes, except as explained in § 1000.272(b). No claim may be filed against a self-governance Tribe/Consortium or employee based upon performance of functions under a self-governance AFA. All claims shall be filed against the United States and are subject to the limitations and restrictions of FTCA.

§ 1000.280 What employees are covered by FTCA for medical-related claims?

The following employees are covered by FTCA for medical-related claims:

- (a) Permanent employees;
- (b) Temporary employees;
- (c) Persons providing services without compensation in carrying out a contract;
- (d) Persons required because of their employment by a self-governance Tribe/Consortium to serve non-IHS beneficiaries (even if the services are provided in facilities not owned by the Tribe/Consortium; and,
- (e) Federal employees assigned to the AFA.

§ 1000.281 Does FTCA cover employees of the Tribe/Consortium who are paid by the Tribe/Consortium from funds other than those provided through the self-governance AFA?

Yes, FTCA covers employees of the Tribe/Consortium who are not paid from AFA funds as long as the services out of which the claim arose were performed in carrying out the self-governance AFA.

§ 1000.282 May persons who are not Indians or Alaska Natives assert claims under FTCA?

Yes, non-Indian individuals served under the self-governance AFA, may assert claims under this Subpart.

§ 1000.283 If the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or a complaint alleging a tort covered by FTCA, what should the Tribe/Consortium do?

As part of the notification required by 28 U.S.C. 2679(c), if the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or complaint alleging a tort covered by FTCA, the Tribe/Consortium should immediately:

- (a) Inform the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240,
- (b) Inform the Tribe's/Consortium's tort claims liaison, and
- (c) Forward all of the materials identified in § 1000.277(c) to the contacts given in § 1000.283 (a) and (b).

Subpart M—Reassumption

§ 1000.300 What is the purpose of this subpart?

This subpart explains when the Secretary can reassume a program without the consent of a Tribe/Consortium.

§ 1000.301 When may the Secretary reassume a Federal program operated by a Tribe/Consortium under an AFA?

The Secretary may reassume any Federal program operated by a Tribe/Consortium upon a finding of imminent jeopardy to:

- (a) A physical trust asset;
- (b) A natural resource; or
- (c) Public health and safety.

§ 1000.302 "What is imminent jeopardy" to a trust asset?

Imminent jeopardy means an immediate threat and likelihood of significant devaluation, degradation, damage, or loss of a trust asset, or the intended benefit from the asset caused by the actions or inactions of a Tribe/Consortium in performing trust functions. This includes disregarding Federal trust standards and/or Federal law while performing trust functions if the disregard creates such an immediate threat.

§ 1000.303 What is imminent jeopardy to natural resources?

The standard for natural resources is the same as for a physical trust asset, except that a review for compliance with the specific mandatory statutory provisions related to the program as reflected in the funding agreement must also be considered.

§ 1000.304 What is imminent jeopardy to public health and safety?

Imminent jeopardy to public health and safety means an immediate and significant threat of serious harm to human well-being, including conditions that may result in serious injury, or death, caused by Tribal action or inaction or as otherwise provided in an AFA.

§ 1000.305 In an imminent jeopardy situation, what must the Secretary do?

In an imminent jeopardy situation, the Secretary must:

- (a) The Secretary must immediately notify the Tribe/Consortium in writing following discovery of imminent jeopardy; or
- (b) If there is an immediate threat to human health, safety, or welfare, the Secretary may immediately reassume operation of the program regardless of the timeframes specified in this subpart.

§ 1000.306 Must the Secretary always reassume a program, upon a finding of imminent jeopardy?

Yes, the Secretary must reassume a program within 60 days of a finding of imminent jeopardy, unless the Secretary's designated representative determines that the Tribe/Consortium is able to mitigate the conditions.

§ 1000.307 What happens if the Secretary's designated representative determines that the Tribe/Consortium cannot mitigate the conditions within 60 days?

The Secretary will proceed with the reassumption in accordance with this subpart by sending the Tribe/Consortium a written notice of the Secretary's intent to reassume.

§ 1000.308 What will the notice of reassumption include?

The notice of reassumption under § 1000.307 will include all of the following items. In addition, if resources are available, the Secretary may offer technical assistance to mitigate the imminent jeopardy.

- (a) A statement of the reasons supporting the Secretary's finding.
- (b) To the extent practical, a description of specific measures that must be taken by the Tribe/Consortium to eliminate imminent jeopardy.
- (c) A notice that funds for the management of the trust asset, natural resource, or public health and safety found to be in imminent jeopardy may not be reallocated or otherwise transferred without the Secretary's written consent.

(d) A notice of intent to invoke the return of property provision of the AFA.

(e) The effective date of the reassumption if the Tribe/Consortium does not eliminate the imminent jeopardy. If the deadline is less than 60 days after the date of receipt, the Secretary must include a justification.

(f) The amount of funds, if any, that the Secretary believes the Tribe/Consortium should refund to the Department for operation of the reassumed program. This amount cannot exceed the amount provided for that program under the AFA and must be based on such factors as the time or functions remaining in the funding cycle.

§ 1000.309 How much time will a Tribe/Consortium have to respond to a notice of imminent jeopardy?

The Tribe/Consortium will have 5 days to respond to a notice of imminent jeopardy. The response must be written and may be mailed, telefaxed, or sent by electronic mail. If sent by mail, it must be sent by certified mail, return receipt requested; the postmark date will be considered the date of response.

§ 1000.310 What information must the Tribe's/Consortium's response contain?

(a) The Tribe's/Consortium's response must indicate the specific measures that the Tribe/Consortium will take to eliminate the finding of imminent jeopardy.

(b) If the Tribe/Consortium proposes mitigating actions different from those prescribed in the Secretary's notice of imminent jeopardy, the response must explain the reasons for deviating from the Secretary's recommendations and how the proposed actions will eliminate imminent jeopardy.

§ 1000.311 How will the Secretary reply to the Tribe's/Consortium's response?

The Secretary will make a written determination within 10 days of the Tribe's/Consortium's written response as to whether the proposed measures will eliminate the finding of imminent jeopardy.

§ 1000.312 What happens if the Secretary accepts the Tribe's/Consortium's proposed measures?

The Secretary must notify the Tribe/Consortium in writing of the acceptance and suspend the reassumption process.

§ 1000.313 What happens if the Secretary does not accept the Tribe's/Consortium's proposed measures?

(a) If the Secretary finds that the Tribes/Consortia proposed measures will not mitigate imminent jeopardy, he/she will notify the Tribe/Consortium in writing of this determination and of the Tribe's/Consortium's right to appeal.

(b) After the reassumption, the Secretary is responsible for the reassumed program, and will take appropriate corrective action to eliminate the imminent jeopardy which may include sending Department employees to the site.

§ 1000.314 What must a Tribe/Consortium do when a program is reassumed?

On the effective date of reassumption, the Tribe/Consortium must, at the request of the Secretary, deliver all property and equipment, and title thereto:

- (a) That the Tribe/Consortium received for the program under the AFA; and
- (b) That has a per item value in excess of \$5,000, or as otherwise provided in the AFA.

§ 1000.315 When must the Tribe/Consortium return funds to the Department?

The Tribe/Consortium must repay funds to the Department as soon as practical after the effective date of the reassumption.

§ 1000.316 May the Tribe/Consortium be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of retrocession?

Yes, the Tribe/Consortium may be reimbursed for actual and reasonable

“wind up costs” to the extent that funds are available.

§ 1000.317 Is a Tribe's/Consortium's general right to negotiate an AFA adversely affected by a reassumption action?

A reassumption action taken by the Secretary does not affect the Tribe's/Consortium's ability to negotiate an AFA for programs not affected by the reassumption.

§ 1000.318 When will the Secretary return management of a reassumed program?

A reassumed program may be included in future AFAs, but the Secretary may include conditions in the terms of the AFA to ensure that the circumstances that caused jeopardy to attach do not reoccur.

Subpart N—Retraction

§ 1000.330 What is the purpose of this subpart?

This subpart explains what happens when a Tribe/Consortium voluntarily returns a program to a bureau.

§ 1000.331 Is a decision by a Tribe/Consortium not to include a program in a successor agreement considered a retrocession?

No, a decision by a Tribe/Consortium not to include a program in a successor agreement is not a retrocession because the Tribe/Consortium is under no obligation beyond an existing AFA.

§ 1000.332 Who may retrocede a program in an AFA?

A Tribe/Consortium may retrocede a program. However, the right of a Consortium member to retrocede may be subject to the terms of the agreement among the members of the Consortium.

§ 1000.333 How does a Tribe/Consortium retrocede a program?

The Tribe/Consortium must submit:

- (a) A written notice to:
 - (1) The Office of Self-Governance for BIA programs; or
 - (2) The appropriate bureau for non-BIA programs; and
- (b) A Tribal resolution or other official action of its governing body.

§ 1000.334 When will the retrocession become effective?

Unless subsequently rescinded by the Tribe/Consortium, a retrocession is only effective on a date mutually agreed upon by the Tribe/Consortium and the Secretary, or as provided in the AFA.

§ 1000.335 How will retrocession affect the Tribe's/Consortium's existing and future AFAs?

Retrocession does not affect other parts of the AFA or funding agreements with other bureaus. A Tribe/Consortium

may request to negotiate for and include retroceded programs in future AFAs or through a self-determination contract.

§ 1000.336 Does the Tribe/Consortium have to return funds used in the operation of a retroceded program?

The Tribe/Consortium and the Secretary must negotiate the amount of funding to be returned to the Secretary for the operation of the retroceded program. This amount must be based on such factors as the time remaining or functions remaining in the funding cycle or as provided in the AFA.

§ 1000.337 Does the Tribe/Consortium have to return property used in the operation of a retroceded program?

On the effective date of any retrocession, the Tribe/Consortium must return all property and equipment, and title thereto:

- (a) That was acquired under the AFA for the program being retroceded; and
- (b) That has a per item value in excess of \$5,000 at the time of the retrocession, or as otherwise provided in the AFA.

§ 1000.338 What happens to a Tribe's/Consortium's mature contract status if it has retroceded a program that is also available for self-determination contracting?

Retrocession has no effect on mature contract status, provided that the 3 most recent audits covering activities administered by the Tribe have no unresolved material audit exceptions.

§ 1000.339 How does retrocession affect a bureau's operation of the retroceded program?

The level of operation of the program will depend upon the amount of funding that is returned with the retrocession.

Subpart O—Trust Evaluation Review

§ 1000.350 What is the purpose of this subpart?

This subpart describes how the trust responsibility of the United States is legally maintained through a system of trust evaluations when Tribes/Consortia perform trust functions through AFAs under the Tribal Self-Governance Act of 1994. It describes the principles and processes upon which trust evaluations will be based.

§ 1000.351 Does the Tribal Self-Governance Act of 1994 alter the trust responsibility of the United States to Indian Tribes and individuals under self-governance?

No, the Act does, however, permit a Tribe/Consortium to assume management responsibilities for trust assets and resources on its own behalf and on behalf of individual Indians.

Under the Act, the Secretary has a trust responsibility to conduct annual trust evaluations of Tribal performance of trust functions to ensure that Tribal and individual trust assets and resources are managed in accordance with the legal principles and standards governing the performance of trust functions if trust assets or resources are found to be in imminent jeopardy.

§ 1000.352 What are “trust resources” for the purposes of the trust evaluation process?

(a) Trust resources include property and interests in property:

- (1) That are held in trust by the United States for the benefit of a Tribe or individual Indians; or
- (2) That are subject to restrictions upon alienation.

(b) Trust assets include:

- (1) Other assets, trust revenue, royalties, or rental, including natural resources, land, water, minerals, funds, property, assets, or claims, and any intangible right or interest in any of the foregoing;
- (2) Any other property, asset, or interest therein, or treaty right for which the United States is charged with a trust responsibility. For example, water rights and off-reservation treaty rights.

(c) This definition defines trust resources for purposes of the trust evaluation process only.

(c) This definition defines trust resources for purposes of the trust evaluation process only.

§ 1000.353 What are “trust functions” for the purposes of the trust evaluation process?

Trust functions are those programs necessary to the management of assets held in trust by the United States for an Indian Tribe or individual Indian.

Annual Trust Evaluations

§ 1000.354 What is a trust evaluation?

A trust evaluation is an annual review and evaluation of trust functions performed by a Tribe/Consortium to ensure that the functions are performed in accordance with trust standards as defined by Federal law. Trust evaluations address trust functions performed by the Tribe/Consortium on its own behalf as well as trust functions performed by the Tribe/Consortium for the benefit of individual Indians or Alaska Natives.

§ 1000.355 How are trust evaluations conducted?

(a) Each year the Secretary's designated representative(s) will conduct trust evaluations for each self-governance AFA. The Secretary's designated representative(s) will coordinate with the designated Tribe's/Consortium's representative(s)

throughout the review process, including the written report required by § 1000.365.

(b) This section describes the general framework for trust reviews. However, each Tribe/Consortium may develop, with the appropriate bureau, an individualized trust evaluation process to allow for the Tribe's/Consortium's unique history and circumstances and the terms and conditions of its AFA. An individualized trust evaluation process must, at a minimum, contain the measures in paragraph (d) of this section.

(c) To facilitate the review process so as to mitigate costs and maximize efficiency, each Tribe/Consortium must provide access to all records, plans, and other pertinent documents relevant to the program(s) under review not otherwise available to the Department.

(d) The Secretary's designated representative(s) will:

- (1) Review trust transactions;
- (2) Conduct on-site inspections of trust resources, as appropriate;
- (3) Review compliance with applicable statutory and regulatory requirements;
- (4) Review compliance with the trust provisions of the AFA;
- (5) Ensure that the same level of trust services is provided to individual Indians as would have been provided by the Secretary;
- (6) Document deficiencies in the performance of trust functions discovered during the review process; and

(7) Ensure the fulfillment of the Secretary's trust responsibility to Tribes and individual Indians by documenting the existence of:

- (i) Systems of internal controls;
- (ii) Trust standards; and
- (iii) Safeguards against conflicts of interest in the performance of trust functions.

(e) At the request of a Tribe/Consortium, at the time the AFA is negotiated, the standards will be negotiated, except where standards are otherwise provided for by law.

§ 1000.356 May the trust evaluation process be used for additional reviews?

Yes, if the parties agree.

§ 1000.357 May the parties negotiate standards of review for purposes of the trust evaluation?

Yes, unless standards are otherwise provided by Federal treaties, statutes, case law or regulations not waived, the Secretary's designated representative will negotiate standards of review at the request of the Tribe/Consortium.

§ 1000.358 Can an initial review of the status of the trust asset be conducted?

If the parties agree and it is practical, the Secretary may determine the status of the trust resource at the time of the transfer of the function or at a later time.

§ 1000.359 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?

The Secretary's representative(s) must prepare a written report documenting the results of the trust evaluation.

(a) Upon Tribal/Consortium request, the representative(s) will provide the Tribal/Consortium representative(s) with a copy of the report for review and comment before finalization.

(b) The representative(s) will attach to the report any Tribal/Consortium comments that the representative does not accept.

§ 1000.360 Is the trust evaluation standard or process different when the trust asset is held in trust for an individual Indian or Indian allottee?

No, Tribes/Consortia are under the same obligation as the Secretary to perform trust functions and related activities in accordance with trust protection standards and principles whether managing Tribally or individually owned trust assets. The process for conducting annual trust evaluations of Tribal performance of trust functions on behalf of individual Indians is the same as that used in evaluating performance of Tribal trust functions.

§ 1000.361 Will the annual review include a review of the Secretary's residual trust functions?

Yes, if the annual evaluation reveals that deficient performance of a trust function is due to the action or inaction of a bureau, the evaluation report will note the deficiency and the appropriate Department official will be notified of the need for corrective action. The review of the Secretary's trust functions shall be based on the standards in this subpart, other applicable law, and other Federal law.

§ 1000.362 What are the consequences of a finding of imminent jeopardy in the annual trust evaluation?

(a) A finding of imminent jeopardy triggers the Federal reassumption process (see subpart M of this part), unless the conditions in paragraph (b) of this section are met.

(b) The reassumption process will not be triggered if the Secretary's designated representative determines that the Tribe/Consortium:

- (1) Can cure the conditions causing jeopardy within 60 days; and

(2) Will not cause significant loss, harm, or devaluation of a trust asset, natural resources, or the public health and safety.

§ 1000.363 What if the trust evaluation reveals problems that do not rise to the level of imminent jeopardy?

Where problems not rising to the level of imminent jeopardy are caused by Tribal action or inaction, the conditions must be:

(a) Documented in the annual trust evaluation report;

(b) Reported to the Secretary; and

(c) Reported in writing to:

(1) The governing body of the Tribe; and

(2) In the case of a Consortium, to the governing body of each Tribe on whose behalf the Consortium is performing the trust functions.

§ 1000.364 Who is responsible for corrective action?

The Tribe/Consortium is primarily responsible for identifying and implementing corrective actions for matters contained in the AFA, but the Department may also suggest possible corrective measures for Tribal consideration.

§ 1000.365 What are the requirements of the review team report?

A report summarizing the results of the trust evaluation will be prepared and copies provided to the Tribe/Consortium. The report must:

(a) Be written objectively, concisely, and clearly; and

(b) Present information accurately and fairly, including only relevant and adequately supported information, findings, and conclusions.

§ 1000.366 Can the Department conduct more than one trust evaluation per Tribe per year?

Trust evaluations are normally conducted annually. When the Department receives information of a threat of imminent jeopardy to a trust asset, natural resource, or the public health and safety, the Secretary, as trustee, may conduct a preliminary investigation. If the preliminary investigation shows that appropriate, sufficient data are present to indicate there may be imminent jeopardy, the Secretary's designated representative:

(a) Will notify the Tribe/Consortium in writing; and

(b) May conduct an on-site inspection upon 2 days' advance written notice to the Tribe/Consortium.

§ 1000.367 Will the Department evaluate a Tribe's/Consortium's performance of non-trust related programs?

This depends on the terms contained in the AFA.

Subpart P—Reports

§ 1000.380 What is the purpose of this subpart?

This subpart describes what reports are developed under self-governance.

§ 1000.381 How is information about self-governance developed and reported?

Annually, the Secretary will compile a report on self-governance for submission to the Congress. The report will be based on:

- (a) Audit reports routinely submitted by Tribes/Consortia;
- (b) The number of retrocessions requested by Tribes/Consortia in the reporting year;
- (c) The number of reassumptions that occurred in the reporting year;
- (d) Federal reductions-in-force and reorganizations resulting from self-governance activity;
- (e) The type of residual functions and amount of residual funding retained by BIA; and
- (f) An annual report submitted to the Secretary by each Tribe/Consortium as described in

§ 1000.382 What may the Tribe's/Consortium's annual report on self-governance address?

- (a) The Tribe's/Consortium's annual self-governance report may address:
 - (1) A list of unmet Tribal needs in order of priority;
 - (2) The approved, year-end Tribal budget for the programs and services funded under self-governance, summarized and annotated as the Tribe may deem appropriate;
 - (3) Identification of any reallocation of trust programs;
 - (4) Program and service delivery highlights, which may include a narrative of specific program redesign or other accomplishments or benefits attributed to self-governance; and
 - (5) At the Tribe's/Consortium's option, a summary of the highlights of the report referred to in paragraph (a)(2) of this section and other pertinent information the Tribes may wish to report.
- (b) The report submitted under this section is intended to provide the Department with information necessary to meet its Congressional reporting responsibilities and to fulfill its responsibility as an advocate for self-governance. The Tribal reporting requirement is not intended to be burdensome, and Tribes are encouraged

to design and present the report in a brief and concise manner.

Subpart Q—Miscellaneous Provisions

§ 1000.390 How can a Tribe/Consortium hire a Federal employee to help implement an AFA?

If a Tribe/Consortium chooses to hire a Federal employee, it can use one of the arrangements listed in this section:

- (a) The Tribe can use its own Tribal personnel hiring procedures. Federal employees hired by the Tribe/Consortium are separated from Federal service.
- (b) The Tribe can "direct hire" a Federal employee as a Tribal employee. The employee will be separated from Federal service and work for the Tribe/Consortium, but maintain a negotiated Federal benefit package that is paid for by the Tribe/Consortium out of AFA program funds; or
- (c) The Tribe can negotiate an agreement under the Intergovernmental Personnel Act, 25 U.S.C. 48, or other applicable Federal law. The employee will remain a Federal employee during the term of the agreement.

§ 1000.391 Can a Tribe/Consortium employee be detailed to a Federal service position?

Yes, under the Intergovernmental Personnel Act, 25 U.S.C. 48, or other applicable law, when permitted by the Secretary.

§ 1000.392 How does the Freedom of Information Act apply?

- (a) Access to records maintained by the Secretary is governed by the Freedom of Information Act (5 U.S.C. 552) and other applicable Federal law.
- (b) At the option of the Tribe/Consortium under section 108 of the Pub. L. 93-638, except for previously provided copies of Tribe/Consortium records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping system of the Department of the Interior, records of the Tribe/Consortium shall not be considered Federal records for the purpose of the Freedom of Information Act.
- (c) The Freedom of Information Act does not apply to records maintained solely by Tribes/Consortia.

§ 1000.393 How does the Privacy Act apply?

At the option of the Tribe/Consortium, section 108(b) of Pub. L. 93-638, as amended, provides that records of the Tribe/Consortium must not be considered Federal records for the purposes of the Privacy Act.

§ 1000.394 What audit requirements must a self-governance Tribe/Consortium follow?

The Tribe/Consortium must provide to the designated official an annual single organization-wide audit as prescribed by the Single Audit Act of 1984, 31 U.S.C. 7501, *et seq.*

§ 1000.395 Do OMB circulars and revisions apply to self-governance funding agreements?

- Yes, OMB circulars and revisions apply, except for:
 - (a) Listed exceptions for Tribes and Tribal Consortia;
 - (b) Exceptions in 25 U.S.C. 450j-1(k); and
 - (c) Additional exceptions that OMB may grant.

§ 1000.396 Does a Tribe/Consortium have additional ongoing requirements to maintain minimum standards for Tribe/Consortium management systems?

Yes, the Tribe/Consortium must maintain management systems that are determined to be adequate by an independent audit through the annual single agency audit report that is required by the Act and OMB Circular A-133.

§ 1000.397 Are there any restrictions on how AFA funds may be spent?

Yes, funds may be spent only for costs associated with programs, services, functions, and activities contained in self-governance AFAs.

§ 1000.398 May a Tribe/Consortium invest funds received under a self-governance agreement?

- Yes, self-governance funds may be invested if such investment is in:
 - (a) Obligations of the United States;
 - (b) Obligations or securities that are within the limits guaranteed or insured by the United States or mutual (or other) funds registered with the Securities and Exchange Commission and that only invest in obligations of the United States or securities that are guaranteed or insured by the United States; or
 - (c) Deposits insured by an agency or instrumentality of the United States or are fully collateralized to ensure protection of the funds even in the event of a bank failure.

§ 1000.399 How may interest or investment income that accrues on AFAs be used?

Unless restricted by the AFA, interest or income earned on investments or deposits of self-governance awards may be:

- (a) Placed in the Tribe's general fund and used for any purpose approved by the Tribe; or
- (b) Used to provide expanded services under the self-governance AFA and to

support some or all of the costs of investment services.

§ 1000.400 Can a Tribe/Consortium retain savings from programs?

Yes, for BIA programs, the Tribe/Consortium may retain savings for each fiscal year during which an AFA is in effect. A Tribe/Consortium must use any savings that it realizes under an AFA, including a construction contract:

(a) To provide additional services or benefits under the AFA; or

(b) As carryover; and

(c) For purposes of this subpart only, programs administered by BIA using appropriations made to other Federal agencies, such as the Department of Transportation, will be treated in accordance with paragraph (b) of this section.

§ 1000.401 Can a Tribe/Consortium carry over funds not spent during the term of the AFA?

This section applies to BIA programs, services, functions, or activities, notwithstanding any other provision of law. Any funds appropriated under the Snyder Act of 1921 (42 Stat. 208), for any fiscal year that are not obligated or spent by the end of the fiscal year for which they were appropriated shall remain available for obligation or expenditure during the following fiscal year. In the case of amounts made available to a Tribe/Consortium under an AFA, if the funds are to be expended in the succeeding fiscal year for the purpose for which they were originally appropriated, contracted or granted, or for which they are authorized to be used under the provisions of § 106(a)(3) of the Act, no additional justification or documentation of such purposes need be provided by the Tribe/Consortium to the Secretary as a condition of receiving or expending such funds.

§ 1000.402 After a non-BIA AFA has been executed and the funds transferred to a Tribe/Consortium, can a bureau request the return of funds?

The bureau may request the return of funds already transferred to a Tribe/Consortium only under the following circumstances:

(a) Retrocession;

(b) Reassumption;

(c) Construction, when there are special legal requirements; or

(d) As otherwise provided for in the AFA.

§ 1000.403 How can a person or group appeal a decision or contest an action related to a program operated by a Tribe/Consortium under an AFA?

(a) *BIA programs.* A person or group who is aggrieved by an action of a Tribe/

Consortium with respect to programs that are provided by the Tribe/Consortium under an AFA must follow Tribal administrative procedures.

(b) *Non-BIA programs.* Procedures will vary depending on the program. Aggrieved parties should initially contact the local program administrator (the Indian program contact). Thereafter, appeals will follow the relevant bureau's appeal procedures.

§ 1000.404 Must self-governance Tribes/Consortia comply with the Secretarial approval requirements of 25 U.S.C. 81; 82a; and 476 regarding professional and attorney contracts?

No, for the period that an agreement entered into under this part is in effect, the provisions of 25 U.S.C. 81, 82a, and 476, do not apply to attorney and other professional contracts by participating Tribes/Consortia.

§ 1000.405 Are AFA funds non-Federal funds for the purpose of meeting matching requirements?

Yes, self-governance AFA funds can be treated as non-Federal funding for the purpose of meeting matching requirements under Federal law.

§ 1000.406 Does Indian preference apply to services, activities, programs, and functions performed under a self-governance AFA?

Tribal law must govern Indian preference in employment, where permissible, in contracting and subcontracting in performance of an AFA.

§ 1000.407 Do the wage and labor standards in the Davis-Bacon Act apply to Tribes and Tribal Consortia?

No, wage and labor standards of the Davis-Bacon Act do not apply to employees of Tribes and Tribal Consortia. They do apply to all other laborers and mechanics employed by contractors and subcontractors in the construction, alteration, and repair (including painting or redecorating of buildings or other facilities) in connection with an AFA.

Supply Sources

§ 1000.408 Can a Tribe/Consortium use Federal supply sources in the performance of an AFA?

A Tribe/Consortium and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) that must be available to the Tribe/Consortium and to its employees to the same extent as if the Tribe/Consortium were a Federal agency. While implementation of this provision is the responsibility of

the General Services Administration, the Department shall assist the Tribe/Consortium to resolve any barriers to full implementation that may arise. While implementation of this provision is the responsibility of the General Services Administration, the Department shall assist the Tribes/Consortia to resolve any barriers to full implementation that may arise to the fullest extent possible.

Prompt Payment Act

§ 1000.409 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a non-BIA, non-Indian program AFA?

Yes, upon mutual agreement of the parties, an AFA may incorporate the Prompt Payment Act.

Subpart R—Appeals

§ 1000.420 What does "Title-I eligible programs" mean in this subpart?

Throughout this subpart, the phrase "Title I-eligible programs" is used to refer to all programs, functions, services, and activities that the Secretary provides for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department within which the programs, functions, services, and activities have been performed.

§ 1000.421 What is the purpose of this subpart?

This subpart prescribes the process Tribes/Consortia may use to resolve disputes with the Department arising before or after execution of an AFA or compact and certain other disputes related to self-governance. It also describes the administrative process for reviewing disputes related to compact provisions. This subpart describes the process for administrative appeals to:

(a) The Interior Board of Indian Appeals (IBIA) for certain pre-AFA disputes;

(b) The Interior Board of Contract Appeals (IBCA) for certain post-AFA disputes;

(c) The Assistant Secretary for the bureau responsible for certain disputed decisions;

(d) The Secretary for reconsideration of decisions involving self-governance compacts; and

(e) The agency head for certain pre-award AFA disputes.

§ 1000.422 How must disputes be handled?

(a) The Department encourages its Bureaus to seek all means of dispute resolution before the Tribe/Consortium files a formal appeal(s).

(b) Disputes shall be addressed through government-to-government

discourse. This discourse must be respectful of government-to-government relationships and relevant Federal-Tribal agreements, treaties, judicial decisions, and policies pertaining to Indian Tribes.

(c) Title I-eligible program disputes may use an informal conference as set forth in 25 CFR 900.153–157.

(d) All disputes arising under this rule, including but not limited to Title I-eligible program disputes may use non-binding informal alternative dispute resolution at the option of the Tribe/Consortium, as prescribed in § 402 of this subpart. The Tribe/Consortium may ask for this alternative dispute resolution any time before the issuance of an initial decision of a formal appeal(s). The appeals timetable will be suspended while alternative dispute resolution is pending.

§ 1000.423 Are there any decisions that are not administratively appealable under this subpart?

Yes, the following types of decisions are not administratively appealable under this subpart but may be appealable under other substantive provisions of the Code of Federal Regulations:

(a) Decisions relating to planning and negotiation grants (subparts C and D of this part) and certain discretionary grants not awarded under Title IV (25 CFR part 2);

(b) Decisions involving a limitation and/or reduction of services for BIA programs (subpart H of this part)(25 CFR part 2);

(c) Decisions regarding requests for waivers of regulations (subpart J of this part);

(d) Decisions regarding construction (subpart K of this part) addressed in § 1000.251(b); and

(e) Decisions under any other statute, such as the Freedom of Information Act and the Privacy Act (see 43 CFR part 2).

§ 1000.424 Does a Tribe/Consortium have a right to an informal conference to resolve any disputes?

Yes, the Tribe/Consortium may request an informal conference (a non-binding alternative dispute resolution process). An informal conference is a way to resolve both Title I-eligible program and other disputes as quickly as possible, without the need for a formal appeal.

§ 1000.425 How does a Tribe/Consortium request an informal conference?

The Tribe/Consortium shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision.

(a) The Tribe/Consortium may either hand-deliver the request for an informal conference to that person's office, fax the request with confirmation or mail it by certified mail, return receipt requested.

(b) If the Tribe/Consortium mails the request, it will be considered filed on the date the Tribe/Consortium mailed it by certified mail.

§ 1000.426 How is an informal conference held?

For all purposes relating to these informal conference procedures, the parties are the designated representatives of the Tribe/Consortium and the bureau.

(a) The informal conference shall be held within 30 days of the date the request was received, unless the parties agree on another date.

(b) Where practicable, at the option of the Tribe/Consortium, the informal conference will be held at the Tribe's/Consortium's office. If the meeting cannot be held at the Tribe's/Consortium's office, the parties must agree on an alternative meeting place.

(c) The informal conference shall be conducted by a designated representative of the Secretary.

(d) Only the parties may make presentations at the informal conference.

(e) The informal conference is not a hearing on the record. Nothing said during an informal conference may be used by either party in litigation.

§ 1000.427 What happens after the informal conference?

(a) Within 10 business days of the informal conference, the person who conducted the informal conference shall mail to the Tribe/Consortium a brief summary of the informal conference.

The summary must include any agreements reached or changes from the initial position of the bureau or the Tribe/Consortium.

(b) If in its judgment no agreement was reached, the Tribe/Consortium may choose to appeal the initial decision, as modified by any changes made as a result of the informal conference, under § 1000.421 of this subpart to the IBIA, bureau head/Assistant Secretary, or IBCA.

§ 1000.428 How may a Tribe/Consortium appeal a decision made after the AFA or compact or amendment to an AFA or compact has been signed?

With the exception of certain decisions concerning reassumption for imminent jeopardy (see § 1000.408 of this subpart), the Tribe/Consortium may appeal post-award administrative decisions to the IBCA.

§ 1000.429 What statutes and regulations govern resolution of disputes concerning signed AFAs or compacts that are appealed to IBCA?

Section 110 of Pub. L. 93–638 (25 U.S.C. 450 m–1) and the regulations at 25 CFR 900.216–900.230 apply to disputes concerning signed AFAs and compacts that are appealed to the IBCA, except that any references to the Department of Health and Human Services are inapplicable. For the purposes of such appeals:

(a) The terms “contract” and “self-determination contract” mean compacts and AFAs under the Tribal Self-Governance Act; and

(b) The term “Tribe” means “Tribe/Consortium”.

§ 1000.430 To whom are appeals directed regarding reassumption for imminent jeopardy?

Appeals regarding reassumption of Title I-eligible PFSAs are handled by the IBIA under those procedures set out in 25 CFR 900.171 through 900.176. Appeals regarding reassumption of PFSAs that are not Title I-eligible are handled by the IBCA under those procedures set out in 43 CFR part 4.

§ 1000.431 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes, EAJA claims against the DOI will be heard by IBIA or IBCA, as appropriate, under 43 CFR 4.601 through 4.619, Equal Access to Justice Act (Pub. L. No. 96–481, 92 Stat. 2325, as amended), section 504 of Title 5 U.S.C. and Section 2412 of Title 28 U.S.C.

§ 1000.432 To whom may a Tribe appeal a decision made before the AFA or an amendment to the AFA or compact is signed?

(a) *Title I-eligible PFSA pre-award disputes.* For Title I—eligible PFSA disputes, appeal may only be filed with IBIA under the provisions set forth in 25 CFR 900.150(a) through (h), 900.152 through 900.169.

(b) *Other pre-award disputes.* For all other pre-award disputes, including those involving PFSAs that are not Title I-eligible, appeals may be filed with the bureau head/Assistant Secretary or IBIA as noted below. However, the Tribe/Consortium may not avail itself of both paths for the same dispute.

(1) *Bureau head/Assistant Secretary appeal.* Unless the initial decision being appealed is one that was made by the bureau head (those appeals are forwarded to the appropriate Assistant Secretary—see § 1000.433(c) of this subpart), the bureau head will decide appeals relating to these pre-award

matters, that include but are not limited to disputes regarding:

- (i) PFSAAs that are not Title 1-eligible;
- (ii) Eligibility for the applicant pool of self-governance Tribes;
- (iii) BIA residual functions;
- (iv) Decisions declining to provide requested information as addressed in § 1000.172 of this part;
- (v) Allocations of program funds when a dispute arises between a Consortium and a withdrawing Tribe; and
- (vi) Inherently Federal functions.

(2) *IBIA appeal.* The Tribe/Consortium may choose to forego the administrative appeal through the bureau or the Assistant Secretary, as described in the paragraph (b)(1) of this section, and instead appeal directly to IBIA. The standard of review for such IBIA appeals will be an "abuse of discretion" standard.

§ 1000.433 When and how must a Tribe/Consortium appeal an adverse pre-award decision?

(a) If a Tribe/Consortium wishes to exercise its appeal rights under § 1000.432(b)(1), it must make a written request for review to the appropriate bureau head within 30 days of receiving the initial adverse decision. In addition, the Tribe/Consortium may request the opportunity to have a meeting with appropriate bureau personnel in an effort to clarify the matter under dispute before a formal decision by the bureau head.

(b) The written request for review should include a statement describing its reasons for a review, with any supporting documentation, or indicate that such a statement or documentation will be submitted within 30 days. A copy of the request must also be sent to the Director of the Office of Self-Governance.

(c) If the initial decision was made by the bureau head, any appeal shall be directed to the appropriate Assistant Secretary. If a Tribe does not request a review within 30 days of receipt of the decision, the initial decision will be final for the Department.

§ 1000.434 When must the bureau head (or appropriate Assistant Secretary) issue a final decision in the pre-award appeal?

Within 30 days of receiving the request for review and the statement of reasons described in § 1000.433, the bureau head or, where applicable, the appropriate Assistant Secretary must:

- (a) Issue a written final decision stating the reasons for the decision; and
- (b) Send the decision to the Tribe/Consortium.

§ 1000.435 When and how will the Assistant Secretary respond to an appeal by a Tribe/Consortium?

The appropriate Assistant Secretary will decide an appeal of any initial decision made by a bureau head (see § 1000.433). If the Tribe/Consortium has appealed the bureau's initial adverse decision of the bureau to the bureau head and the bureau head's decision on initial appeal is contrary to the Tribe's/Consortium's request for relief, or the bureau head fails to make a decision within 30 days of receipt by the bureau of the Tribe's/Consortium's initial request for review and any accompanying statement and documentation, the Tribe's/Consortium's appeal will be sent automatically to the appropriate Assistant Secretary for decision. The Assistant Secretary must either concur with the bureau head's decision or issue a separate decision within 60 days of receipt by the bureau of the Tribe's/Consortium's initial request for review and any accompanying statement and documentation. The decision of the Assistant Secretary is final for the Department.

§ 1000.436 How may a Tribe/Consortium seek reconsideration of the Secretary's decision involving a self-governance compact?

A Tribe/Consortium may request reconsideration of the Secretary's decision involving a self-governance compact by sending a written request for reconsideration to the Secretary within 30 days of receipt of the decision. A copy of this request must also be sent to the Director of the Office of Self-Governance.

§ 1000.437 When will the Secretary respond to a request for reconsideration of a decision involving a self-governance compact?

The Secretary must respond in writing to the Tribe/Consortium within 30 days of receipt of the Tribe's/Consortium's request for reconsideration.

§ 1000.438 May Tribes/Consortia appeal Department decisions to a Federal court?

Yes, Tribes/Consortia may appeal decisions of Department officials relating to the self-governance program to an appropriate Federal court, as authorized by section 110 of Pub. L. 93-638 (25 U.S.C. 405m-1), or any other applicable law.

Subpart S—Conflicts of Interest

§ 1000.460 What is an organizational conflict of interest?

(a) An organizational conflict of interest arises when there is a direct

conflict between the financial interests of the self-governance Tribe/Consortium and:

- (1) The financial interests of beneficial owners of Indian trust resources;
- (2) The financial interests of the United States relating to trust resources, trust acquisitions, or lands conveyed or to be conveyed under the Alaska Native Claims Settlement Act 43 U.S.C. 1601 *et seq.*; or

(3) An express statutory obligation of the United States to third parties. This section only applies if the conflict was not addressed when the AFA was first negotiated.

(b) This section only applies where the financial interests of the Tribe/Consortium are significant enough to impair the Tribe's/Consortium's objectivity in carrying out the AFA, or a portion of the AFA.

§ 1000.461 What must a Tribe/Consortium do if an organizational conflict of interest arises under an AFA?

This section only applies if the conflict was not addressed when the AFA was first negotiated. When a Tribe/Consortium becomes aware of an organizational conflict of interest, the Tribe/Consortium must immediately disclose the conflict to the Secretary.

§ 1000.462 When must a Tribe/Consortium regulate its employees or subcontractors to avoid a personal conflict of interest?

A Tribe/Consortium must maintain written standards of conduct to govern officers, employees, and agents (including subcontractors) engaged in functions related to the management of trust assets.

§ 1000.463 What types of personal conflicts of interest involving tribal officers, employees or subcontractors would have to be regulated by a Tribe/Consortium?

The Tribe/Consortium would need a tribally-approved mechanism to ensure that no officer, employee, or agent (including a subcontractor) of the Tribe/Consortium reviews a trust transaction in which that person has a financial or employment interest that conflicts with that of the trust beneficiary, whether the tribe/consortium or an allottee. Interests arising from membership in, or employment by, a Tribe/Consortium or rights to share in a tribal claim need not be regulated.

§ 1000.464 What personal conflicts of interest must the standards of conduct regulate?

The personal conflicts of interest standards must:

- (a) Prohibit an officer, employee, or agent (including a subcontractor) from

participating in the review, analysis, or inspection of trust transactions involving an entity in which such persons have a direct financial interest or an employment relationship;

(b) Prohibit such officers, employees, or agents from accepting any gratuity, favor, or anything of more than nominal value, from a party (other than the Tribe/Consortium) with an in the trust transactions under review; and

(c) Provide for sanctions or remedies for violation of the standards.

§ 1000.465 May a Tribe/Consortium negotiate AFA provisions on conflicts of interest to take the place of this subpart?

(a) A Tribe/Consortium and the Secretary may agree to AFA provisions, concerning either personal or organizational conflicts, that:

(1) Address the issues specific to the program and activities contracted; and

(2) Provide equivalent protection against conflicts of interest to these regulations.

(b) Agreed-upon AFA provisions shall be followed, rather than the related provisions of this subpart. For example, the Tribe/Consortium and the Secretary may agree that using the Tribe's/Consortium's own written code of ethics satisfies the objectives of the personal conflicts provisions of subpart, in whole or in part.

Appendix A to Part 1000—Model Compact of Self-Governance Between The Tribe and the Department of the Interior

Article I—Authority and Purpose

Section 1—Authority

This agreement, denoted a compact of Self-Governance (hereinafter referred to as the "compact"), is entered into by the Secretary of the Interior (hereinafter referred to as the "Secretary"), for and on behalf of the United States of America under the authority granted by Title IV of the Indian Self Determination and Education Assistance Act, Pub. L. 93–638, as amended, and by the Tribe, under the authority of the Constitution and By-Laws of the Tribe (hereinafter referred to as the "Tribe").

Section 2—Purpose

This compact shall be liberally construed to achieve its purposes:

(a) This compact is to carry out Self-Governance as authorized by Title IV of Pub. L. 93–638, as amended, that built upon the Self Governance Demonstration Project, and

transfer control to Tribal governments, upon Tribal request and through negotiation with the United States government, over funding and decision-making of certain Federal programs as an effective way to implement the Federal policy of government-to-government relations with Indian Tribes.

(b) This compact is to enable the United States to maintain and improve its unique and continuing relationship with and responsibility to the Tribe through Tribal self-governance, so that the Tribe may take its rightful place in the family of governments; remove Federal obstacles to effective self-governance; reorganize Tribal government programs and services; achieve efficiencies in service delivery; and provide a documented example for the development of future Federal Indian policy. This policy of Tribal self-governance shall permit an orderly transition from Federal domination of Indian programs and services to allow Indian Tribes meaningful authority to plan, conduct, and administer those programs and services to meet the needs of their people. In implementing Self-Governance, the Bureau of Indian Affairs is expected to provide the same level of service to other Tribal governments and to demonstrate new policies and methods to improve service delivery and address Tribal needs. In fulfilling its responsibilities under the compact, the Secretary hereby pledges that the Department will conduct all relations with the Tribe on a government-to-government basis.

Article II—Terms, Provisions and Conditions

Section 1—Term

This compact shall be effective when signed by the Secretary or an authorized representative and the authorized representative of the Tribe. The term of this compact shall commence [negotiated effective date] and must remain in effect as provided by Federal law or agreement of the parties.

Section 2—Funding Amount

In accordance with Section 403(g) of Title IV of Pub. L. 93–638, as amended, and subject to the availability of appropriations, the Secretary shall provide to the Tribe the total amount specified in each annual funding agreement.

Section 3—Reports to Congress

To implement Section 405 of Pub. L. 93–638, as amended, on each January 1 throughout the period of the compact, the Secretary shall make a written report to the Congress that shall include the views of the Tribe concerning the matters encompassed by Section 405(b) and (d).

Section 4—Regulatory Authority

The Tribe shall abide by all Federal regulations as published in the **Federal Register** unless waived in accordance with Section 403(i)(2) of Pub. L. 93–638, as amended.

Section 5—Tribal Administrative Procedure

The Tribe shall provide administrative due process right under the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, *et seq.*, to protect all rights and interests that Indians, or groups of Indians, may have with respect to services, activities, programs, and functions that are provided under the compact.

Article III—Obligations of the Tribe

Section 1—AFA Programs

The Tribe will perform the programs as provided in the specific AFA negotiated under the Act. The Tribe pledges to practice utmost good faith in upholding its responsibility to provide such programs, under the Act.

Section 2—Trust Services for Individual Indians

To the extent that the AFAs have provisions for trust services to individual Indians that were formerly provided by the Secretary, the Tribe will maintain at least the same level of service as was previously provided by the Secretary. The Tribe pledges to practice utmost good faith in upholding their responsibility to provide such service.

Article IV—Obligations of the United States

Section 1—Trust Responsibility

The United States reaffirms the trust responsibility of the United States to the _____ Tribe(s) to protect and conserve the trust resources of the Tribe(s) and the trust resources of individual Indians associated with this compact and any annual funding agreement negotiated under the Tribal Self-Governance Act.

Section 2—Trust Evaluations

Under Section 403(d) of Pub. L. 93–638, as amended, annual funding agreements negotiated between the Secretary and an Indian Tribe shall include provisions to monitor the performance of trust functions by the Tribe through the annual trust evaluation.

Article V—Other Provisions

Section 1—Facilitation

Nothing in this compact may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the Tribe(s) or individual Indians. The Secretary shall

act in good faith in upholding such trust responsibility.

Section 2—Officials Not To Benefit

No Member of Congress, or resident commissioner, shall be admitted to any share or part of any annual funding agreement or contract thereunder executed under this compact, or to any benefit that may arise from such compact. This paragraph may not be construed to apply to any contract with a third party entered into under an annual funding agreement under this compact if such contract is made with a corporation for the general benefit of the corporation.

Section 3—Covenant Against Contingent Fees

The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed under this compact upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Section 4—Sovereign Immunity

Nothing in this compact or any AFA shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by the Tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

In witness whereof, the parties have executed, delivered and formed this compact, effective the _____ day of _____, 20____.

THE _____ Tribe
The Department of the Interior.

By: _____

By: _____

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