

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 1000**

RIN 1076-AD20

**Tribal Self-Governance**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** This is a proposed rule to implement tribal Self-Governance, as authorized by Title IV of the Indian Self-Determination and Education Assistance Act. This proposed 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.

**DATES:** Comments must be received by May 13, 1998.

**ADDRESSES:** Comments regarding this proposed rule should be directed to: William Sinclair, Director, Office of Self-Governance, MS-2542 MIB, 1849 C Street NW, Washington, DC, 20240; telephone: 202-219-0240; electronic mail: William\_Sinclair@IOS.DOI.GOV

**FOR FURTHER INFORMATION CONTACT:** Questions concerning this proposed rule should be directed to: William Sinclair, Director, Office of Self-Governance, MS-2542 MIB, 1849 C Street NW, Washington, DC, 20240; telephone: 202-219-0240; electronic mail: William\_Sinclair@IOS.DOI.GOV

**SUPPLEMENTARY INFORMATION:** These draft 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 proposed 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 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 of Pub. L. 93-638	25 U.S.C. part
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 which 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 twenty 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 say the following:

(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, respectively, either individually or through consortium of tribes.

The Tribal Self-Governance Act of 1994, as amended, authorizes the following things: (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 for the previous 3 fiscal years financial stability and financial management capability 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 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 for inclusion in AFAs specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations. 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 AFA's. (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. Pursuant to 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 4 were from tribes that were not in Self-Governance. 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. A

total of 12 meetings of the full committee were held in different locations throughout the country. The last meeting was held in Washington, DC on May 15 and 16, 1997. 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 pursuant to the Unfunded Mandates Reform Act of 1995. (2) A quorum consisted of 8 members, including 7 tribal members and one 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 five 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 proposed regulations, developed by the Committee, as the basis for the Notice of Proposed Rulemaking. (5) The Committee will review all comments received from the notice of the Proposed Rulemaking and submit a final report with recommendations to the Secretary for promulgation of a final rule. Any modifications that the Secretary proposes prior to the final rule shall be provided to the Committee with notice and an opportunity to comment. (6) The Federal Mediation and Conciliation Services was used to facilitate meetings.

At the conclusion of the May 15 and 16, 1997 negotiation session, there were a number of provisions on which no agreement could be reached.

### Key Areas of Disagreement

Tribal and federal negotiators did not reach consensus on the following issues, the federal and tribal suggested language for each area of disagreement are presented below, in order, by subpart and section, where appropriate. In addition to comments on the proposed rule, we are also requesting comments on each of the areas of disagreement.

#### General Issues

*Tribal view:* The fundamental disagreement between the federal representatives and the tribal representatives goes to the heart of the Tribal Self-Governance Act of 1994

(Title IV) (Pub. L. 103-413). The tribal representatives emphasized the importance of the compact as a vehicle for government-to-government relations and the funding agreements as a vehicle for the transfer of funds.

The tribal representatives also point to the groundwork that has been established under Title I of Pub. L. 93-638 and the regulations published pursuant thereto. Self-Governance is the next logical sequence in the era of self-determination policy. Hence, only steps forward, only progressive policies, only those regulations which went beyond Title I and advanced tribal empowerment over federal dominance were advocated by the tribal representatives. It is thus the tribal view that pursuant to these fundamental tenets and principles, notwithstanding any language to the contrary in the proposed regulations, a tribe assuming responsibility for any program contractible under title I is entitled to all the rights that attach to a program of the Bureau of Indian Affairs (BIA) under these regulations.

The tribal representatives viewed the inclusion of many of the non-BIA programs as mandatory and sought to negotiate the parameters of the mandate. The Act provides the tribes with flexibility; the empowerment to redesign programs and prioritize spending themselves; the opportunity to get out from under the dominance of federal agencies; and transferring the funds that support excessive federal oversight, reporting and decision-making to the local tribal level.

*Federal view:* The federal team agrees that government-to-government compacts and annual funding agreements are important within the context of the Act. The federal views as to the differences between compacts and annual funding agreements and the differences between programs administered by BIA and the other departmental bureaus are set forth in greater detail elsewhere in this Preamble. As a general matter, where the program involved entails a tribe administering its own affairs, the Department has sought to ensure that the tribe does have the control and authority needed to govern itself and its members. However, where the program instead involves programs administered for the Nation as a whole, where it is not a matter of a tribe governing itself and its members, then different standards apply under the law and in the regulatory proposals that the federal team has made.

The federal team also agrees that self-governance is "the next logical sequence in the era of self-determination policy."

However, tribal participation in a non-BIA program which is not administered for the benefit of Indians does not necessarily raise issues of either self-determination or self-governance. Such programs instead entail a cooperative spirit of working together with the local communities in the administration of programs designed for the benefit of the Nation as a whole.

#### *BIA/Non-BIA References*

*Tribal view:* A fundamental problem developed throughout the negotiation process, which culminated in the delineation of Department of the Interior programs into three distinct categories: (1) Bureau of Indian Affairs programs; (2) non-Bureau of Indian Affairs programs available under Title I of Pub. L. 93-638; and (3) non-Bureau of Indian Affairs programs not available under Title I of Pub. L. 93-638. The statute mandates that all tribal rights acquired under these regulations with regard to BIA programs are equally applicable to non-BIA programs when those non-BIA programs could have been contracted under Title I of Pub. L. 93-638.

*Federal view:* The Department has treated programs administered by BIA differently from both non-BIA programs eligible for contracting under Pub. L. 93-638 and non-BIA programs of a special geographic, historic or cultural significance to a self-governance tribe because the law so provides. Unlike for BIA programs under subsection 403(b)(1), (25 U.S.C. 458cc(b)(1)) subsections 403(b)(2) and (3) (25 U.S.C. 458cc(b)(2) and (3)) of the Tribal Self-Governance Act of 1994 authorize the Department to negotiate for terms and conditions for non-BIA programs eligible for contracting under Pub. L. 93-638, as well as requiring approval of the Department before their reallocation, consolidation and redesign. Section 403(c), (25 U.S.C. 458cc(c)) affords the Secretary discretion to include other programs which are of special historical, cultural or geographic significance to a tribe in annual funding agreements. The federal team's proposals follow this statutory framework.

#### *Annual Funding Agreements*

*Tribal view:* Section 1000.83 under Subpart E (Annual Funding Agreements for BIA Programs) of the proposed regulations states that:

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. [Emphasis added.]

The terms "agreement," "funding agreement," and "annual funding agreement" are used interchangeably throughout the Tribal Self-Governance Act itself. During the Self-Governance rulemaking negotiations process, the term "Annual Funding Agreement (AFA)" was used in many of the initial draft documents prior to the drafting § 1000.83. Consistent with § 1000.83, the term "Funding Agreement" should replace "Annual Funding Agreement" to reflect the intent of this Subpart.

As outlined in section 1000.83, funding amounts which may be included in a Tribe's agreement are clearly subject to annual appropriation levels. However, the "funding agreement" is a negotiated document which may also include other terms and conditions relative to the transfer and assumption of BIA programs to a tribe/consortium. The tribal representatives contend that the proposed consistent use of this term provides clarification to this definition.

*Federal view:* The Tribal Self-Governance Act of 1994 is explicit in requiring the Secretary to "to negotiate and enter into an annual written funding agreement," (Pub. L. 103-413, 25 U.S.C. 458 cc (a)). The federal team has used this statutory language throughout the entire regulation; however, it has made an exception in section 1000.83 which applies only to BIA. The legislative history supports the federal position:

The Committee intends for the Secretary of the Interior to enter into government-to-government negotiations with a participating tribal government on an annual basis for the purpose of establishing annual written funding agreements for periods. S. Rpt. No. 205, 103d Cong., 1st Sess. 6 (1993) at 8.

Moreover, most appropriations for the non-BIA bureaus are annual in nature and do not permit multi-year terms in advance of future appropriations. Accordingly, whenever the term "funding agreement" is mentioned in the Tribal Self-Governance Act and also in this regulation, the term "annual" will always be applied.

#### *Central Office Issue*

*Tribal view:* The Tribal Self-Governance Act of 1994 is clear that "central office" funds are to be included in funding Agreements in sections 403 (b)(1), 405 (b)(5) and 405 (d), (25 U.S.C. 458cc(b)(1); 458ee(b)(5) and (d)). Congress was especially clear in emphasizing the importance of the inclusion of Central Office funds:

The bill language makes plain the Committee's intention that all BIA central office funds are to be negotiable and that tribal shares should be developed as a

percentage of the function transferred. If the Department of the Interior does not take positive action to fully implement this commitment to Self-Governance Tribes, the Committee will be compelled to consider mandating specific tribal share negotiation requirements for BIA central office. While the inflexibility of a statutory approach may well be less than desirable, the Department of the Interior's delay on this issue can no longer be ignored. The Committee strongly urges the Department of the Interior to immediately implement the commitment it has made to these Tribes and to the Committee. S. Rpt. No. 205, 103d Cong., 1st Sess. 6 (1993) at 10.

It is the Committee's firm intent that BIA Central Office funds and resources be included in the tribe-by-tribe negotiations for tribal shares. The Committee is partially distressed by the Department of the Interior's recent policy reversal regarding their intent to engage in serious negotiations on tribal shares of programs, services, activities, and functions controlled by BIA Central Office. This decision is in clear violation of the spirit and intent of Tribal Self-Governance. The committee strongly urges the Department to reexamine this policy reversal and pursue negotiations of tribal shares of programs, services, activities, and functions controlled by BIA Central Office. Should the Department fail to take action, the Committee will consider a legislative solution to ensure that tribes in Tribal Self-Governance receive a fair share of the programs, services, activities, and functions in the BIA Central Office accounts. H. R. Rep. No. 653, 103d Cong., 2nd Sess. 7 (1994) at 11.

The Committee also is troubled by the continuing refusal of the Department of the Interior for the past four years to negotiate, on a line-by-line basis with Indian tribes participating in Tribal Self-Governance for the tribal shares of BIA Central office funds and resources despite clear directives to do so from various Congressional Committees. This bill language makes clear that all BIA Central office funds are to be negotiated and that tribal shares should be developed as a percentage of the function transferred. The language in the bill "all funds specifically or functionally related" means all funds appropriated or administered \* \* \* The Committee intends any funds that are specifically or functionally related to the delivery of services or benefits to the tribe and its members, regardless of the source of the funds or the location in the Department, shall be available for self-governance compacting. H. R. Rep. No. 653, 103d Cong., 2nd Sess. 7 (1994) at 12.

Hence, the authorizing Committees intended that the permanent policy of the United States Department of the Interior should be to include central office shares in tribal funding agreements. While appropriation committees may set policies on an annual basis, they are generally limited to directives for the fiscal year only. The clear intent of Congress was to include central office shares on a permanent basis and the regulations must follow the statute and the Congressional intent.

*Federal view:* The sections of these proposed regulations that deal with central office tribal shares are 1000.88 and 1000.94 and are adopted by the Rulemaking Committee prior to enactment of the FY 1997 Department of the Interior and Related Agencies Appropriations Act (Pub. L. 104-20) which prohibited the inclusion of central office tribal shares in annual funding agreements. In light of this prohibition, the Department specifically requests comments on whether sections 1000.88 and 1000.94 of the proposed regulation should be amended to explicitly provide that central office funding may not be available as a result of such appropriations provisions.

#### Definitions

##### Inherently Federal Functions

*Tribal view:* The committee was not able to reach consensus on a definition for "inherently federal functions." The definition of inherently federal functions has been an issue of great controversy during the rulemaking process. It is a critical concept because it defines a term found in Pub. L. 103-413, sec. 403 (25 U.S.C. 458cc(k)) by identifying those functions and activities of programs that may not be included in a funding agreement. The Solicitor's Memorandum of May 17, 1996, entitled "Inherently Federal Functions under the Tribal Self-Governance Act of 1994" is one with which the tribal representatives substantially agrees. The tribal representatives propose citing the Solicitor's Memorandum as guidance in the definitions as follows:

*Inherently federal functions* means those functions that must be performed by federal officials, and only federal officials, as defined in accordance with general guidelines of the May 17, 1996 Department of the Interior Solicitor's Memorandum.

As an alternative, the tribal representatives proposed the following definition, which is consistent with the Solicitor's Memorandum and substantially similar to the definition developed by the Tribal Work Group on Tribal Shares formed to review BIA work on determining tribal shares for all programs, services, functions and activities of the BIA:

*Inherently federal functions* means of all functions provided by a federal agency in carrying out its duties, inherently federal functions are those which by law (U.S. Constitution, treaties, federal statutes, and federal court decisions) can only be performed by federal employees, and which the agency cannot delegate to tribes or tribal organizations for performance because it is constitutionally or statutorily barred from doing so.

A well understood definition that narrowly construes this concept as clearly derived from the Constitution and statutes, while recognizing that tribes as self-governing entities stand in a different relationship to the United States than do mere grantees or contractors, is essential to successful implementation of the Tribal Self-Governance Act of 1994.

*Federal view:* The federal team agrees that the concept of inherently federal functions is important. The federal team believes that "inherently federal" is one of several factors that must be considered during the negotiation of an AFA. Pub. L. 103-413, section 403 (k) (25 U.S.C. Section 458cc(k)) provides that the Tribal Self-Governance Act of 1994 does not " \* \* \* authorize the Secretary to enter into any agreement under Pub. L. 103-413, sections 403(b)(2) and 403(c)(1), (25 U.S.C. sections 458cc(b)(2) and 458ee(c)(1)) with respect to functions that are inherently federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe. \* \* \* " Thus, the type of participation sought by the tribe is equally a factor that must be considered in negotiations.

The federal team further believes that the concept of "inherently federal" will not apply to entire programs which may be eligible for negotiation, but instead to functions or activities within those programs required under federal law to be carried out by federal officials.

As recognized in the above mentioned opinion of the Solicitor and because the scope of programs available for inclusion in an AFA is dependent upon the underlying programmatic statutes and annual appropriations, such decisions are best made on a case-by-case basis during the government-to-government negotiation process. In this manner, all relevant factors can be considered by the parties.

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

##### Suspension, Withhold or Delay Payment Under Annual Funding Agreements

*Tribal view:* Under Title I of Pub. L. 93-638 as amended, the Secretary is specifically given authority to withhold, suspend or delay payments (25 U.S.C. section 450j-1(I)). Such authority implies evaluations and oversight of tribal actions. However, a close review of Title IV the Tribal Self-Governance Act of 1994 (Pub. L. 103-413) reveals that Title IV provides no authority for the Secretary with the authority to suspend, withhold or delay payment

under an AFA. Congress determined that the funds would be better spent for services, rather than funding an additional federal compliance bureaucracy. The tribes recognize that some funds are appropriated by Congress with explicit statutory limitations regarding their expenditure and that tribes are required to meet these explicit limitations.

The tribal representatives propose this question and answer:

*Does the Secretary or a designated representative have authority to suspend, withhold, or delay payment under an AFA?*

No, unless the funds subject to suspension, withholding or delay are subject to a statutory limitation on their expenditure and the tribe/consortium has agreed to the terms under which such an action may be imposed. The Secretary must notify the affected tribe/consortium of the determination so that the tribe/consortium may appeal the determination. The Secretary's determination will be stayed pending the appeal.

*Federal view:* The federal team believes that there should be guidance regarding the conditions under which the federal government may enforce compliance with annual funding agreements by withholding, suspending or delaying payments. Pub. L. 93-638 statutory and regulatory language has a similar provision in 25 U.S.C. section 450j-1(l) and 25 CFR 900, as proposed below in the federal question and answer. Proposed section 1000.79 provides that AFAs "are legally binding and mutually enforceable written agreements. \* \* \*" The federal team believes that in order for agreements to be binding and enforceable, the federal government needs some enforcement mechanism to suspend, withhold or delay payments when there is a determination that the tribe has not complied with the AFA. The federal team believes that this will have no serious effect on tribes because tribes would have an automatic emergency appeal of this governmental action. This enforcement mechanism will not require any additional federal bureaucracy. It is not anticipated that BIA will have staff for or evaluations for oversight and compliance purposes. This proposal addresses those times when a tribe has substantially failed to carry out the AFA without good cause. The federal proposal is as follows:

*Does the Secretary or a designated representative have authority to suspend, withhold, or delay payment under an AFA?*

No, unless otherwise provided in this part or when the Secretary makes a determination that the tribe/consortium has failed to substantially carry out the AFA without good cause. The Secretary must notify the affected tribe/consortium of the determination so that

the tribe/consortium may appeal the determination. The Secretary's determination will be stayed pending the appeal.

#### *Subpart F—Non-BIA Annual Funding Agreement*

*Tribal view:* The tribal representatives disagree with the federal view of Pub. L. 103-413 section 403(b)(2), (25 U.S.C. 458cc(b)(2)) which is set forth below:

(b) Contents—Each funding agreement shall—\* \* \*

(2) subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, that are otherwise available to Indian tribes or Indians, as identified in section 405(c) [25 U.S.C. 458ee(c)] of this title, except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law; [Emphasis added.]

This provision mandates that certain non-BIA programs must be included in tribal Self-Governance compacts and funding agreements upon the request of a tribe. The word "shall," which appears at the beginning of this section, is an express, clear and specific statement by the Congress that there are some non-BIA programs in the Interior Department which are mandatorily compactable under the Tribal Self-Governance Act of 1994; specifically, those programs which are deemed to be "otherwise available" to tribes. The tribal representatives acknowledge that the section limits these matters to terms which are subject to negotiation—in contrast, the federal representatives viewed all non-BIA Interior programs, not eligible for contracting under Pub. L. 93-638, and can only be included in the Self-Governance program upon the approval of the Department.

The tribal representatives noted that Pub. L. 103-413 section 403(c), (25 U.S.C. 458cc(c)) includes the discretionary programs for non-BIA agencies, whereas Pub. L. 103-413 section 403(b)(2), (25 U.S.C. 458cc(b)(2)) clearly is meant to provide for the mandatory non-BIA programs. Congress provided two separate sections of the Tribal Self-Governance Act of 1994 for a reason and the mandatory versus discretionary dichotomy is both logical and consistent with the plain language of that Act. Congress clearly intended that the Department err on the side of including Interior Department programs in tribal Self-Governance agreements. Congress created a presumption in favor

of inclusion under the "facilitation clause" of Pub. L. 103-413 section 403(i), (25 U.S.C. 458cc(i)) which requires the Secretary to interpret laws and regulations in a manner that will facilitate the inclusion of programs and the implementation of agreements, but the Congress left it to the Self-Governance Negotiated Rulemaking Committee to determine which types of programs would be mandatory and which would be discretionary with the understanding that both were presumptively inclusive. Indeed, in discussing these non-BIA provisions, the House Report states:

The Committee intends this provision in conjunction with the rest of the Act, to ensure that any federal activity carried out by the Secretary within the exterior boundaries of the reservation shall be presumptively eligible for inclusion in the Self-Governance funding agreement. H. Rpt. No. 653, 103d Cong., 2nd Sess. 7 (1994) at 10.

The tribal representatives propose the following:

*Are there non-BIA programs for which the Secretary must negotiate for inclusion in an Annual Funding Agreement subject to such terms as the parties may negotiate?*

Subject to such terms as may be negotiated, the Secretary shall negotiate and enter into an Annual Funding Agreement authorizing the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, that are otherwise available to Indian tribes or Indians, as identified in section 405(c), to the extent authorized and not otherwise prohibited by law.

*What programs are included under section 403(b)(2) of the Act?*

(a) Those programs, or portions thereof, eligible for contracting under Pub. L. 93-638; and

(b) Other programs in a non-BIA bureau of the Department that are "otherwise available to Indian tribes and Indians" to the extent authorized by this section of the Act, including other programs that the Secretary is not prohibited by law from awarding by contract, grant or cooperative agreement, and for competitive programs for which the tribe has received the award.

There is a clear difference between the types of programs contemplated in Pub. L. 93-638 [Title I] and those contemplated in 103-413 [Title IV]. Pub. L. 93-638 only encompasses programs for the "benefit of Indians because of their status as Indians" whereas Pub. L. 100-472 and Pub. L. 103-413 encompass all programs "otherwise available to Indian tribes or Indians". This standard was created in Pub. L. 100-472 in 1988 and its meaning for Pub. L. 103-413 is delineated in report language:

The Committee wishes to make clear to the Department of the Interior, the Committee's intention with regard to what funds are to be negotiable. At a minimum, the Secretary must provide the money that a Tribe would have been eligible to receive under Self-Determination Act contracts and grants. *In addition to this*, the Secretary must provide all funds specifically or functionally related to the Department of the Interior's provision of services and benefits to the Tribe and its members. This means the Department of the Interior must include in a Tribe's Self-Governance Funding Agreement all those funds and resources sought by the Tribe which the Federal government would have used in any way to carry out its programs and operations if it had provided services and benefits, either directly or through contracts, grants or other agreements, to the Tribe or its members in lieu of a Self-Governance agreement. This would include all funds and resources regardless of the geographic location or administrative level at which the Department of the Interior would have expended funds in lieu of a Self-Governance agreement. *The only funds the Department is legally permitted to hold back from negotiation are those which are expressly excluded by statute or those funds necessary to carry out certain limited functions which by statute may be performed only by a Federal official.* S. Rpt. No. 205, 103rd Cong., 1st Sess. 6 1996 at 9. [Emphasis added.]

Hence, the Congress meant Title IV Pub. L. 103-413 self-governance agreements to include Title I Pub. L. 93-638 programs in addition to other funds. The best support for this position is provided in the Tribal Self Governance Act of 1994 itself under section 403(g)(3), (25 U.S.C. 458cc(g)(3)), which applies to both BIA and non-BIA agreements:

(3) Subject to paragraph (4) of this subsection and paragraphs (1) through (3) of subsection (b), the Secretary shall provide funds to the tribe under an agreement under this title for programs, services, functions, and activities, or portions thereof, in an amount equal to the amount that the tribe would have been eligible to receive under contracts and grants under this Act, including amounts for direct program and contract support costs and, *in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the tribe or its members, without regard to the organization level within the Department where such functions are carried out.* [Emphasis added.]

The tribal representatives propose the following:

*Under Pub. L. 103-413 section 403(b)(2), (25 U.S.C. 458cc(b)(2)) when must programs be awarded non-competitively?*

(a) Pub. L. 93-638 Programs.

Programs eligible for contracting under Title I of Pub. L. 93-638 must be awarded non-competitively.

(b) Non-Pub. L. 93-638 Programs.

Other programs otherwise available to Indian tribes or Indians must be awarded

non-competitively, except when a statute requires a competitive process.

The tribal representatives are seeking in this regulation to require the Department to treat Pub. L. 93-638 programs and non-Pub. L. 93-638 programs similarly. Without this regulation, the Department would be allowed to remove certain programs from eligibility for all tribes and arbitrarily establish its own competitive process.

Under Pub. L. 103-413 section 403(b), (2), (25 U.S.C. 458cc(b)(2)), the non-BIA bureaus have little discretion as to what funds get included in agreements, and no discretion as far as establishing competitive processes, unless allowed to do so by the Congress. The House Report states:

The language in the bill "all funds specifically or functionally related" means all funds appropriated or administered, not just by BIA, but also every office or agency or bureau with the Department of the Interior, including, but not limited to, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, the Office of Policy Management and Budget, the National Park Service, the Bureau of Land Management, the Minerals Management Service, the U.S. Geological Survey, the Office of Surface Mining and Enforcement, and the Bureau of Mines. The Committee intends any funds that are specifically or functionally related to the delivery of services or benefits to the tribe and its members, regardless of the source of the funds or the location in the Department, shall be available for self-governance compacting. H.R. Rep. No. 653, 103d. Cong., 2nd Sess 7 (1994) at 12.

The Senate Report, using similar language to that reprinted above, added:

Neither the source of the appropriated funds, nor the location in which it would have been otherwise spent, may limit the negotiability of these funds. S. Rep. No. 205, 103d Cong., 1st Sess 6 (1993) at 10-11.

Hence, the negotiability of funds from all divisions, bureaus and offices within the Interior Department was clearly intended by the Congress. Nowhere in the Act or in the legislative history did the Congress indicate that the Department would be allowed to make funds competitive on its own or arbitrarily take funds off the negotiating table. Each division of the Interior Department is required to make a determination, through negotiations, of the appropriate allocation of funds to a particular tribe, and once that allocation is determined, the Department is to provide that funding in a Self-Governance agreement.

The funds to be provided for non-BIA programs should not be constricted by the programmatic requirements of the non-BIA bureaus. Thus the tribal representatives propose the following:

*How is funding for non-BIA programs determined?*

The amount of funding is determined pursuant to section 403(g), (25 U.S.C. 458cc(g)) and applicable provisions of law, regulation, or Office of Management and Budget (OMB) Circulars.

The Tribal Self-Governance Act of 1994 makes no distinction between the method of determining funding for BIA and non-BIA programs. Section 403(g), (25 U.S.C. 458cc(g)) provides that tribes are to receive an amount equal to the amount the tribe would have received under "Pub. L. 93-638" contracts and grants, plus contract support, plus funds specifically and functionally related to the provision of services by the Secretary without regard to the level within the Department where such services are carried out. Section 403(g), (25 U.S.C. 458cc(g)) applies across the board to BIA and non-BIA bureaus. Hence, the tribal proposed regulation merely requires that the Department follow the law with regard to making payments to the tribes under the Tribal Self-Governance Act of 1994.

*Federal view:* The federal team notes that when Congress established a permanent Self-Governance program to replace the demonstration phase, it clearly distinguished between the scope of and treatment for programs administered by the Bureau of Indian Affairs under Pub. L. 103-413 403(b)(1), (25 U.S.C. 458cc(b)(1)), and programs "otherwise available to Indian tribes or Indians" which are administered by the other Departmental bureaus. This distinction is consistent with the objective of the Tribal Self-Governance Act of 1994 for Self-Governance tribes to have the opportunity to elect how and to what extent, they intend to administer programs that have been historically run for their benefit, "[T]he 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. \* \* \*" section 202(2) of the Tribal Self-Governance Act of 1994, (25 U.S.C. 458aa) (emphasis added).

Much of the difficulty in interpreting the law and how it applies to the non-BIA bureaus is the lack of agreement on the meaning of the term "otherwise available to Indian tribes or Indians."

The legislative history of the Tribal Self-Governance Act of 1994 supports the federal team's view that "otherwise available to" programs under section 403(b)(2) is essentially a different way of describing those programs which are eligible for contracting under Pub. L.

93-638. Significantly in this regard, the Tribal Self-Governance Act continued the scope of programs that were eligible for inclusion in AFAs under the Self-Governance Demonstration Program which stated, "shall authorize the tribe to plan, conduct, consolidate, and administer programs, services and functions of the Department of the Interior \* \* \* that are otherwise available to Indian tribes or Indians. \* \* \*" [Title III of Pub. L. 93-638, as added by Pub. L. 100-472, Title II, section 209, 25 U.S.C. 450f (note)].

The Congressional Committee reports give no indication that Congress had expanded the scope of the Program to other than programs for Indian tribes and individual Indians:

Self-Governance promises an orderly transition from the federal domination of programs and services benefitting Indian tribes to tribal authority and control over those programs and services. (H.R. Report No. 653, 103d Congress, 2nd Session, at 7 (1994)).

Since 1988, Interior has conducted Self-Governance under demonstration authority. The Self-Governance Demonstration Project has had measurable success. It has achieved the goals it set out to achieve—examining the benefits of allowing tribes to assume more control and responsibility over programs, services, functions and activities provided to their members previously furnished by the federal agency administering these programs, services, functions and activities. (S. Rpt. No. 205 at 5, 103d Cong., 1st Sess. (1993)).

The funds transferred to Self-Governance tribes should include only those fun[d]s that otherwise would have been spent by the Department of the Interior, either directly or indirectly for the benefit of these tribes. Therefore, this bill should have no impact on federal outlays if it is properly administered in conformity with the intent of the Congress. (S. Rpt. No. 205 at 14, 103d Cong., 1st Sess. (1993)).

Thus, the federal team believes that programs which "benefit" tribes are those eligible for contracting under Pub. L. 93-638. These statements of Congressional intent are consistent with both the concept of tribes choosing how to administer programs previously administered by the Department for their benefit, and the federal team's interpretation of programs eligible for contracting under Pub. L. 103-413 section 403(b)(2), (25 U.S.C. 458cc(b)(2)).

The exception clause of Pub. L. 103-413 (25 U.S.C. 458cc(b)(2)) section 403(b)(2), i.e., "\* \* \* except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided

by law \* \* \*," also supports this interpretation. This clause effectively precludes the inclusion of programs in annual funding agreements for which no exemption from the competitive contracting rules apply. Programs eligible for Pub. L. 93-638 contracting are both exempt from competitive contracting and are the only programs intended specifically for Indian tribes and their members. Only Pub. L. 93-638 programs involve tribes assuming "more control and responsibility over programs" provided to their members and previously furnished by one or more of the non-BIA bureaus.

Congress further distinguished between BIA programs and programs administered by other bureaus in the Department in stipulating that annual funding agreements negotiated under Pub. L. 93-638 section 403(b)(2), (25 U.S.C. 458cc(b)(2)) are subject to such terms as may be negotiated. Similarly, under Pub. L. 93-638 section 403(b)(3), (25 U.S.C. 458cc(b)(3)), consolidation and redesign of only non-BIA programs authorized by section 403(b)(2), (25 U.S.C. 458cc(b)(2)) are subject to joint agreements between the parties. Congress authorized annual funding agreements for additional programs of "special geographic, historical, or cultural significance" to a Self-Governance tribe under Pub. L. 103-413 section 403(c), (25 U.S.C. 458cc(c)) on a discretionary basis.

The federal representatives agree with the tribal representatives that the Act was meant, primarily, to provide a means for tribes to have an opportunity to assume the dominant role in administering programs established for the benefit of Indians. The House and Senate reports to which the tribal representatives refer, however, do not support the view that non-BIA, "non-Indian" programs were meant to be treated the same as either BIA or non-BIA programs eligible under Pub. L. 93-638. Nor do these reports even suggest that Congress intended Title III of Pub. L. 100-472 and Title IV of Pub. L. 103-413 programs "otherwise available" to Indians to extend to non-BIA, non-Indian programs. Rather, such funds must be used in accordance with the specific programmatic and appropriations requirements imposed by Congress. Consistent with the federal position, Pub. L. 103-413 section 403(b)(3), (25 U.S.C. 458cc(b)(3)) permits the reallocation of funds for non-BIA programs only in accordance with a joint agreement of the tribe and the Department in order to ensure that funds are not used for purposes different from those provided in the relevant appropriations act.

The federal team also does not agree that non-BIA bureaus have little discretion as to the funding levels to be included in AFAs for programs not eligible for contracting under Pub. L. 93-638. Pub. L. 103-413 section 403(g)(3), (25 U.S.C. 458cc(g)(3)) of the Act directs the Secretary to include funds "in an amount equal to the amount that the tribe would have been eligible to receive under contracts and grants under this Act \* \* \*." The reference to the "Act" in this quotation is to Pub. L. 93-638. This provision also supports the federal view that programs "otherwise available to Indians" is simply another way of describing programs eligible for contracting under Pub. L. 93-638, i.e., those programs established for the benefit of Indians because of their status as Indians, since it directs funding only for such programs. Thus, for non-Public Law 93-638 programs, the self-governance statute does not direct the inclusion of funds for such programs. The federal proposals, below, require that funding for such programs instead be at levels that the relevant bureau would have spent to administer the program at the level of activity recognized by the AFA. This balances the needs of the tribe for adequate funds to administer programs under AFA's, with the requirements of the Secretary and the bureaus to determine how to allocate their financial resources for non-Indian programs to address national, regional, and local priorities.

The federal proposal is the following:

*Are there non-BIA programs for which the Secretary must negotiate for inclusion in an Annual Funding Agreement 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.

*What programs are included under Pub. L. 103-413, section 403(b), (2) (25 U.S.C. 103-413)?*

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

*Under Pub. L. 103-413, section 403(b), (2), (25 U.S.C. 103-413) when must programs be awarded non-competitively?*

They must be awarded non-competitively for programs eligible for contracts under Pub. L. 93-638.

The annual listing of programs, functions, and activities or portions thereof that are eligible for inclusion in AFAs required by Pub. L. 103-413 section 405(c), (25 U.S.C. 458ee(c)) are of two types. First are those programs eligible for contracting under Pub. L. 103-413, section 403(b), (2), (25 U.S.C. 458cc(b)(2)) that are available to Indians

or Indian tribes for which there is a contracting preference provided by law. Second are those programs authorized by 403(c) (25 U.S.C. 458cc(c)) that may be included in AFAs that are of special geographic, historical, or cultural significance to the Self-Governance tribe, subject to such terms as may be mutually agreed upon. These programs are listed as eligible for inclusion in AFAs at the discretion of the Secretary. The annual listing required by section 405(c) (25 U.S.C. 458ee(c)) provides a framework for discussion with Self-Governance tribes concerning what programs might be available for inclusion in AFAs under section 403(b)(2), (25 U.S.C. 458cc(b)(2)), and section 403(c) (25 U.S.C. 458cc(c)).

#### *Subpart G—Negotiation Process for Annual Funding Agreements*

##### Self-Governance Compact

*Tribal view:* The tribal position is that Compacts are important vehicles to reflect the government-to-government relationship between tribes and the United States. This relationship by definition permits variation among tribes. Additionally, individual tribes may desire to emphasize specific aspects of the relationship that have particular importance for such tribes. In interpreting what provisions permissibly may be part of a Compact, it is important to consider the guiding principles of Indian law as well as the Secretary's obligations enunciated in the Tribal Self-Governance Act of 1994 as the basis for inclusion.

25 U.S.C. section 458cc(l)(1) also provides that the Secretary is to construe laws and regulations in a manner that favors inclusion of programs in Self-Governance. In this context, it is not necessary to find specific statutory authorization to justify adding appropriate terms and conditions to Compacts. Compacts were created without statutory authorization by the tribes and the Department in the exercise of reasonable discretion to further the implementation of Self-Governance. To the extent that the tribe's desired terms and conditions for Compacts do not conflict with these regulations, when promulgated, that same discretion that created Compacts should allow such terms and conditions.

One area in which there should be no question is the inclusion of any provision authorized by Pub. L. 104-109 which provides that any and all provisions of Title I of Pub. L. 93-638 may be included in Self-Governance agreements. It reads:

At the option of a participating tribe or tribes, any or all provisions of part A of this subchapter shall be made part of an agreement entered into under title III of this Act or this part. 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 part. Pub. L. 104-109

The term "agreement" as used in Title III of Pub. L. 104-109 and Title IV of Pub. L. 104-413 means both compacts and funding agreements. Congress was aware that both documents existed and, had it wished to limit the application to funding agreements or only agreements for BIA programs, it would have done so. In the same provision, Congress made clear through the use of the terms "shall," "obligated," and "option of the participating tribe" that the Secretary has no discretion to refuse to incorporate such provisions. Therefore, the provisions of Title I can be incorporated into a compact applicable to BIA programs and non-BIA programs.

The tribal proposal is the following:

*Can a tribe negotiate other terms and conditions not contained in the model compact?*

Yes. The Secretary and a self-governance tribe/consortium may negotiate additional terms relating to the government-to-government relationship between the tribe(s) and the United States. A tribe/consortium may include any term that may be included in a contract and funding agreement under Title I in the model compact contained in appendix A.

*Federal view:* The federal team acknowledges the significant role played by the negotiated compacts during the Tribal Demonstration Program. With no regulations in place, those compacts established the rules pertaining to the particular BIA programs that were covered in AFAs. The proposed regulations in subpart G recognize that the role of compacts for the permanent program is somewhat different. Section 1000.151, for instance, provides that a "self-governance compact is an executed document which affirms the government-to-government relationship between a self-governance tribe and the United States." It is important to remember that the Act does not explicitly authorize or require the Secretary to enter into compacts, nor does it require that a tribe have a compact in order to participate in the Self-Governance Program. The Secretary lacks the authority from Congress under this Act to enter into binding agreements of a perpetual term applicable to all programs administered by the Department.

The federal team distinguishes between compacts which set forth the terms of the government-to-government relationship generally and AFAs which detail the funding, terms and conditions pertaining to the specific programs established by Congress and which are eligible to be administered under the Tribal Self-Governance Act of 1994 by a tribe/consortium. With the promulgation of regulations under the Act, the federal team views compacts as serving primarily the policy function of emphasizing the government-to-government relationship between the United States and tribes. The federal team believes that the reference in Pub. L. 104-109 to "agreements" is intended to refer to annual funding agreements. The particular programs of the non-BIA bureaus are performed under a number of different programmatic statutes and appropriations provisions which vary substantially from the administration of BIA programs. It is difficult, if not impossible, to develop and apply rules applicable to all such programs. Rather, the federal team believes that Congress intended that this is best left to the individual AFAs. At the same time, by explicitly recognizing the discretion of the Secretary in proposed section 1000.153 to include additional terms in compacts not included in the Model Compact, the regulations provide the Secretary with the flexibility to include particular terms that address specific situations that may arise in the future. Because of this the federal team does not believe any additional language is required in proposed section 1000.153.

The federal position is reflected in the proposed regulation at section 1000.153.

##### *Successor Annual Funding Agreements*

*Tribal view:* Successor funding agreements are important to protect against gaps in funding and to provide legal protections that may occur from unintended breaks between agreements. For example, if the Department and the tribe/consortium reach a point where a gap occurs and no agreement is in place, the Federal Tort Claims Act may not protect the tribe. Such gaps, whether caused by the inability to negotiate new terms or a delay in processing funding agreements, are also dangerous in numerous other areas ranging from the protection of trust assets to law enforcement.

The Secretary has ample discretion, as demonstrated throughout these regulations, to adopt successor funding agreements. There is nothing in Title IV, Tribal Self-Governance Act of 1994, that would prohibit the Secretary from utilizing successor funding agreements. These agreements are, of course, subject

to appropriations and would not create any new funding obligations for the Department. Successor agreements, which are equally applicable to BIA and non-BIA programs, are clearly within the discretion of the Secretary and serve important governmental purposes. As noted in previous sections, the Secretary has an obligation to utilize discretion to make Self-Governance effective and inclusive.

The tribal proposal is the following:

*How are successor annual funding agreements completed?*

At the conclusion of the negotiations of the successor AFA, the tribe/consortium is responsible for submission of the proposed AFA to the Secretary. If the successor AFA is submitted to the Secretary no less than 105 days prior to its effective date, prior to 90 days before the effective date of the AFA,

(a) the Annual Funding Agreement shall be executed by the Secretary or proposed amendments delivered in writing to the tribe/consortium; or

(b) the previous year's AFA shall, subject to appropriations, be deemed to have been extended until a successor AFA is acted upon and becomes effective when executed by the Secretary on the 90th day prior to the proposed effective date.

*Federal view:* The federal team believes the following: (1) There is no authorization in the Tribal Self-Governance Act of 1994 for an AFA to be automatically extended; (2) the Department lacks the legal authority to "deem" agreements to be extended; (3) such action in advance of an appropriation would be considered a violation of the Anti-Deficiency Act, 31 U.S.C. 1341; and (4) there is no legally permissible means of dealing with the problem of the potential gap caused by the 90 day Congressional review period. Accordingly, the federal team has not proposed a question and answer for this issue.

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

*Tribal view:* Proposed regulations 1000.81 through 1000.88 implement section 406(a) of the Tribal Self-Governance Act of 1994 (25 U.S.C. 458ff(a)), which provides:

Nothing in this title shall be construed to limit or reduce in any way the services, contracts, or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law.

These provisions were designed to assure that funds transferred to Self-Governance tribes/consortia do not have negative consequences for non-self-governance tribes/consortia with respect to programs which they were entitled to

receive. The concept that another party may be injured requires an examination of which programs tribes have a right to expect under existing law. The proposed regulations as drafted apply only to BIA programs and not to non-BIA programs. The regulations should apply to non-BIA programs as well.

The crux of the issue, as reflected in a number of disputed regulations, is whether any non-BIA programs are mandatory—programs for which tribes/consortia have a right to the program in a funding agreement. At least some non-BIA programs are "mandatory" programs, through pre-existing language that predicates the Secretary's requirement to include programs of special significance to Indians in Self-Governance. The discretionary authority provided to the Secretary to negotiate special terms and conditions in agreements for such programs does not in the tribal view remove the "mandatory" inclusion requirement as reflected by the Congressional use of the term "shall" rather than the term "may." Pub. L. 103-413, section 403(b), 25 U.S.C. section 458cc(b).

The tribal representatives find the federal argument in this subpart inconsistent with the federal position in subpart F for non-BIA programs. The Federal team, without ever conceding in these regulations that any of these programs may be available as a matter of right, view that the individuals and tribes might suffer unfairly from the limits on remedies under the provisions applicable to the BIA. The tribal representatives believe that the federal argument is for rejecting application of plain language of the statute to their programs. Regardless of the bureau responsible for a program, an individual or tribe with concerns that arise under this subpart should have the opportunity to formally raise them and have them considered.

*Federal view:* The federal team acknowledges that the proposed regulations concerning limitation and/or reduction of services, contracts and awards apply only to agreements covering programs administered by BIA. The proposed regulations implement section 406(a) of Pub. L. 104-413 (25 U.S.C. 458ff(a)) which provides:

Nothing in this title shall be construed to limit or reduce in any way the services, contracts, or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law.

This provision applies on its face whenever another tribe or tribal organization is "eligible" to receive funding, and not only when such funding is mandatory.

The Department disagrees with the tribal proposal for several reasons. First, it is not clear to what extent this provision will impact programs of the non-BIA bureaus and the Department is uncertain in what situations or how this issue is likely to arise. Until some experience in this regard is gained, and because the non-BIA bureaus will handle such issues on a case-by-case basis in the absence of regulations, the Department has not supported issuing regulations which are applicable to the non-BIA bureaus. The Department encourages comments to be submitted on how this provision should be viewed in relation to non-BIA programs which in many cases are funded quite differently from those of BIA. In particular, can or should this provision be construed to apply only to programs eligible for contracting under Pub. L. 93-638? In some cases, multiple tribes or tribal organizations could be eligible to carry out a "nexus" program administered by a non-BIA bureau. In such cases, a literal reading of section 406(a), (25 U.S.C. 458ff(a)) would imply that no AFA could be entered for such programs since it reduces the amount of funding that the other eligible tribes or tribal organizations could receive. Could or should the other eligible tribes be able to "waive" any rights they might have under this statutory provision?

Second, the federal team has concerns about whether the provisions proposed for BIA programs are appropriate for the non-BIA bureaus. Proposed regulation 1000.183 does not allow this issue to be raised administratively by individual Indians who might be affected or aggrieved by an AFA within the context of section 406(a) of Pub. L. 104-413 (25 U.S.C. 458ff(a)). Proposed regulation 1000.185 only permits the issue to be raised at certain times, although an affected tribe or tribal organization may not have actual knowledge that it has been impacted by that AFA, or the limitation does not actually affect that other tribe or organization until some later year. While the proposed regulations would deny administrative appeals, it would appear that aggrieved parties could still seek judicial review under section 110 of Pub. L. 93-638 (25 U.S.C. 450m-1). In such cases, there would not be an administrative record for review by the court. The federal team does not support limiting the rights of aggrieved parties at the administrative level for the programs that they administer. Moreover, proposed regulation 1000.188 provides that "shortfall funding, supplemental funding, or other available" resources would be used to remedy these

situations in the current fiscal year. The non-BIA bureaus do not have "shortfall" funding; it is quite possible that they will lack the resources to commit additional resources to such programs as this provision proposes, and they cannot support a regulatory provision with which they could be unable to comply.

#### *Subpart K—Construction*

*Tribal view:* Tribal representatives have proposed a regulation which explains that all provisions of the regulations apply to funding agreements that include construction projects to the extent that they are not inconsistent with provisions in the regulations that are specific to construction activities. The tribal proposal is as follows:

*Do all provisions or other subparts apply to construction portions of AFAs?*

Yes, unless they are inconsistent with this subpart.

Federal representatives argue that this provision should specifically identify provisions in the regulations which under no circumstances apply to construction funding agreements. Tribal representatives reject the federal proposal because it is overbroad—it requires that specific regulations not apply to construction funding agreements, when in fact they may apply to such agreements in certain circumstances.

For example, federal representatives assert that sections 1000.32, 1000.33 and 1000.34 cannot apply to construction funding agreements because they allow tribes to withdraw from a tribal organization's funding agreement a portion of funds which is attributable to that tribe. Under the federal proposal, these provisions cannot apply to construction funding agreements because there are no circumstances under which a tribe can withdraw from a tribal organization and take out its share of the funds. While this may be correct for construction projects that are funded on a lump sum, project specific basis (i.e. building a dam that affects a number of tribes), this is not true if the construction project is funded through an accumulation of tribal shares from tribes that make up the tribal organization that is responsible for the construction activities (i.e. constructing roads for a number of tribes). In the latter scenario there is no reason why a withdrawing tribe would not have a right to its tribal share if it wishes to do the construction itself. The tribal proposal makes it clear that a withdrawing tribe is only entitled to a portion of the funds that were included in the funding agreement on

the same basis or methodology upon which the funds were included in the consortium's funding agreement.

Another example is the applicability of § 1000.82 of these regulations to construction funding agreements. Federal representatives argue that a tribe may not select any provision of Title I (Pub. L. 93-638) for inclusion in a construction funding agreement because doing so would be inconsistent with all of the construction regulations. This argument completely ignores that there are provisions in Title I (Pub. L. 93-638) which a tribe may choose to include in its construction funding agreement that are not inconsistent with the construction regulations. For example, Pub. L. 93-638, section 106 (25 U.S.C. 450j-1(h)) explains how indirect costs for construction programs are to be calculated. This provision is not inconsistent with the subpart in these regulations that address construction issues, and therefore there is no reason why a tribe would not have the right as provided for in section 1000.82 to incorporate it in a construction funding agreement.

These examples illustrate how the federal proposal is overbroad because it would not make applicable to construction funding agreements a number of provisions in the regulations which may apply in specific circumstances. The tribal proposal addresses the federal concern by making clear that no regulations apply to construction funding agreements if they are inconsistent with the construction-specific regulations.

*Federal view:* The federal and tribal representatives agree that where other provisions of these regulations are inconsistent with the construction subpart, the construction subpart shall govern. It is the Federal team's view, however, that in addition to this general exception, specific sections are inconsistent and that these sections should be specifically identified. The federal team proposes the following question and answer:

*Do all provisions of other subparts apply to construction portions of AFAs?*

Yes, except for sections 1000.32, 1000.33, 1000.34, 1000.82, 1000.83, 1000.88, 1000.92, 1000.94, 1000.95, 1000.96, 1000.97, 1000.98, and 1000.100 or unless they are inconsistent with this subpart.

The justification for excluding these sections of the proposed regulations from the construction subpart follows:

*Sections 1000.32, 1000.33, and 1000.34.* These sections allow tribes(s) in a consortium to withdraw from the consortium's AFA and take out the portion of funds attributable to the

withdrawing tribe. Whether the construction project was in the design or construction phase, the project would immediately become underfunded without any basis to resolve the shortfall of funds. Unlike most other programs, construction is a nonrecurring service; any suspension or delay in construction automatically results in an increase in costs and a delay in the delivery date agreed to in the AFA. For example, any delays in a segment of a critical path project, such as an aqueduct, delays the entire construction project. This conflicts with the construction subpart, particularly sections 1000.227 and 1000.228(d), which requires performance in accordance with the AFA delivery schedule and only allows changes in the work which increase the negotiated funding amount, the performance period or the scope or objective of the project, with prior Secretarial approval.

*Section 1000.82.* This section is inconsistent with the entire construction subpart, since a tribe could select "any" provision of Title I of Pub. L. 93-638 in an AFA. Section 403(e)(1), (25 U.S.C. 458cc(e)(1)) allows the negotiation of Federal Acquisition Regulations provisions and 403(e)(2) of Pub. L. 103-413, (25 U.S.C. 458cc(e)(2)) requires the Secretary to ensure health and safety for construction. The basic premise of many exceptions for construction in Pub. L. 93-638 (25 U.S.C. 450j) was to enable the Secretary to ensure health and safety. For example, the model contract in section 108 of Pub. L. 93-638 (25 U.S.C. 450j) was expressly excluded from construction by section 105(m) of Pub. L. 93-638 (25 U.S.C. 450j(m)). The model contract permits only one performance monitoring visit by the Secretary for the contract. The engineering staffs of the Department of Health and Human Services and the Department of the Interior concluded that the Secretary could not ensure health and safety with the right to conduct only one performance inspection during the contract. Also, the model contract allows design changes during performance without Secretarial approval and does not allow termination of a construction contract by the Secretary for substantial failures of performance. Further, the model contract excludes federal program guidelines, manuals or policy directives, which is inconsistent with the construction subpart. These are only a couple of Pub. L. 93-638 provisions that are inconsistent with the construction subpart.

*Section 1000.83.* This provision would extend the term of a construction

contract at the option of a tribe, which would generally increase the cost of the project.

*Sections 1000.88 and 1000.92.* These sections will eliminate a pro rata portion of Facilities Management Construction Center and the BIA Road Construction Division for the central office, area offices, and field offices for these functions for the portion of the appropriation allocable to Self-Governance AFAs. However, the BIA is still responsible under agreement with the Department of Transportation and under Pub. L. 103-413 section 403(e)(2), (25 U.S.C. 458cc(e)(2)) to ensure safe construction.

*Sections 1000.94 through 1000.98.* These sections raise the same issues discussed for sections 1000.88 and 1000.92 above.

*Section 1000.100.* This section allows the tribe to reallocate funds at its option in BIA AFAs, unless otherwise required by law. Many construction projects are decided on a priority basis out of many needy projects. Others are simply listed in the relevant bureau's budget. However, these projects are not "required" by law, since they are not usually earmarked in writing in the Appropriation Act. It is clear, however, that the bureau is "required" by the appropriate Congressional committee to obligate and expend the funds as approved in the budget submitted to Congress. Accordingly, the answer to this question should at a minimum state: "Unless otherwise required by budget submitted to Congress or law, and except for construction projects, the Secretary does not have to approve the reallocation of funds between programs."

#### *Subpart Q—Miscellaneous Provisions Cash Management*

*Tribal view:* Federal representatives propose below regulations that restrict the manner in which tribes or tribal organizations can invest funds that are received through Self-Governance agreements. There is no statutory authority for such regulations in Pub. L. 103-413; Pub. L. 93-638 similarly contains no such statutory authority and, appropriately, no regulations under Title I impose such limitations on the ability of tribes to invest funds. The federal proposal undermines the Tribal Self-Governance Act of 1994 by precluding tribes from managing and investing funds as responsible stewards in a manner which allows maximum return on their investments while insuring the integrity of the funds.

Recognizing that the federal representatives expressed an interest shared by tribes which is to insure that

funds are held in a manner that insures financial integrity tribal representatives propose language on investments which imposes the same financial management standards that the special trustee has proposed for managing Indian monies entrusted in the care of the federal government, the "prudent investor" standard. The tribal proposal is:

*1. Are there any restrictions on how funds transferred to a tribe/consortium under a funding agreement may be spent?*

Yes, funds may be spent only for costs associated with purposes authorized under the funding agreement.

*2. May a tribe/consortium invest funds received under self-governance agreements?*

Yes. Any such funds must be invested in accordance with the "prudent investor standard," and must be managed with care and prudence in a manner which would ensure against any significant loss of principal.

*3. Are there restrictions on how interest or investment income which accrues on funds provided under self-governance agreements may be used?*

Unless restricted by the annual funding agreement, interest or income earned on investments or deposits of self-governance awards may be placed in the tribe's general fund and used for any governmental purpose approved by the tribe. The tribe may also use the interest earned to provide expanded services under the self-governance funding agreement and to support some or all of the costs of investment services.

*Federal view:* It is the concern of federal team that federal funds be safeguarded pending expenditure for purposes approved under an AFA. The federal representatives assert that placing federal cash in non-secured investments poses a significant risk of loss of federal funds. Where the Congress by statute has allowed other Indian grantees to invest federal funds (e.g. the Tribally Controlled Community College Assistance Amendments of 1986 and the Tribally Controlled Community Schools Act of 1988) such investments have been limited to obligations of the United States or in obligations that are fully insured by the United States. The same limitations on investments are proposed for federal funds advanced to Indian tribes under self-governance AFAs.

The federal team believes that the following proposals impose minimal requirements on Self-Governance tribes/consortia, yet are critical to the maintenance of federal financial integrity. As such, these proposals are authorized as part of maintaining the federal trust responsibility under section 406(b) of the Public Law 103-413 (25 U.S.C. 458ff(b)).

*1. Are there any restrictions on how funds transferred to a tribe/consortium under an AFA may be spent?*

Yes, funds may be spent only for costs associated with programs, services, functions and activities contained in the self-governance AFAs.

*2. May a tribe/consortium invest funds received under self-governance agreements?*

Yes, self-governance funds may be invested if such investment is in (1) obligations of the United States; (2) obligations or securities that are within the limits guaranteed or insured by the United States, or; (3) deposits insured by an agency or instrumentality of the United States.

*3. Are there restrictions on how interest or investment income which accrues on any funds provided under self-governance AFAs may be used?*

Unless restricted by the AFA, interest or income earned on investments or deposits of self-governance awards may be placed in the tribe's general fund and used for any purpose approved by the tribe. The tribe may also use the interest earned to provide expanded services under the self-governance AFA and to support some or all of the costs of investment services.

#### **Waiver Request**

*Tribal view:* The tribal representatives note that Pub. L. 103-413, sec. 403 (I)(2) (25 U.S.C. section 458cc(I)(2)) authorizes the Secretary, upon request of a tribe/consortium, to waive the application of a federal regulation included in a self-governance funding agreement. The provision provides as follows:

Not later than 60 days after receipt by the Secretary of a written request by a tribe to waive application of a Federal regulation for an agreement entered into under this section, the Secretary shall either approve or deny the waiver in writing to the tribe. A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. The Secretary's decision shall be final for the Department.

This language authorizes waiver of all federal regulations that may apply to funding agreements and the provision includes a strong presumption in favor of waiving regulations. Further, tribal representatives note that section 107(e) of Title I (25 U.S.C. 450k(e)) has been interpreted by the Department of the Interior to permit a waiver to be automatically granted in the event the Department does not provide a response to the request within a certain time-frame. Regulations implementing these provisions provide for the automatic granting of a waiver if the Department fails to act within a period of 90 days. See 25 CFR 900.144. There is no reason why this right should not be extended

to tribes under Title IV, the Tribal Self-Governance Act of 1994. Accordingly, tribal representatives proposed a waiver regulation, set forth below, which is consistent with the waiver of regulations adopted under Pub. L. 93-638, Title I:

*How much time does the Secretary have to process a waiver request?*

The Secretary must approve or deny a waiver request within 60 days of receipt of the request. The decision must be in writing. Unless a waiver request is denied within sixty (60) days after the date it was received it shall be deemed approved.

*Federal view:* The federal team acknowledges that the Tribal Self-Governance Act of 1994 (Pub. L. 103-413; Title IV requires a written decision be made within a 60-day period. Consistent with that Act, the regulations also should state this point. Unlike under Pub. L. 93-638 (25 U.S.C. 450), there is no authorization in Tribal Self-Governance Act of 1994 for automatic approval of waiver requests when a deadline is missed. Furthermore, the nature and scope of the Pub. L. 93-638 waiver provision is substantially different from that of the self-governance waiver provision. The Pub. L. 93-638 regulations at 25 CFR 900.144 authorize waiver of only the Self-Determination regulations which are procedural regulations. The waiver provision of Title IV of Pub. L. 103-413 addresses the waiver of substantive Department-wide regulations. Because this waiver provision is broader in scope, and because the Department lacks statutory authority to deem approval, the federal team wants to ensure that when a waiver is granted, there has been active federal participation in the approval process.

*How much time does the Secretary have to process a waiver request?*

The Secretary must approve or deny a waiver request for an existing AFA within 60 days of receipt of the request. The decision must be in writing.

### Conflicts of Interest

*Tribal view:* The tribal representatives object to the federal proposal on conflicts of interest for a number of fundamental reasons. First, there is no statutory basis in Title IV (Pub. L. 103-413) for requiring such rules for tribes. Indeed, the point of this Act is to allow tribes greater autonomy to run their internal affairs in their own way. Second, at the heart of the Act is the compact and the AFAs which are to reflect the government-to-government relations between the tribe and the United States. Any specific requirements for matters such as

conflict of interest should be the subject of the specific agreements entered into by individual tribes. Third, establishing a single set of rules fails to take into account the diversity of tribes and tribal situations. Providing flexibility, as the tribal representatives believe their proposed language does, does not diminish the likelihood of adequate safeguards; it improves the likelihood by allowing tribes to set standards consistent with the tribe's size, history, culture, and tradition.

The tribal representatives propose language limiting the application of the regulations to situations where in the financial interests of tribes and beneficial owners conflict and are significant enough to impair a tribe's objectivity.

### Organizational Conflicts

*What is an organizational conflict of interest?*

An organization conflict of interest arises when there is a direct conflict between the financial interests of the Indian tribe/consortium and the financial interests of the beneficial owners relating to Indian trust resources. This section only applies where the financial interests of the Indian tribe/consortium are significant enough to impair the Indian tribe/consortium's objectivity in carrying out an AFA, or a portion of an AFA. Further, this section only applies if the conflict was not addressed when the AFA was first negotiated.

*What must an Indian 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 an Indian tribe/consortium becomes aware of a conflict of interest, the Indian tribe/consortium must immediately disclose the conflict to the Secretary.

### Personal Conflicts

*What is a personal conflict of interest?*

A personal conflict of interest may arise when a person with authority within the tribe/consortium has a financial interest that may conflict with an interest of the tribe/consortium or an individual beneficial owner of a trust resource.

*When must an Indian tribe/consortium regulate its employees or subcontractors to avoid a personal conflict of interest?*

An Indian tribe/consortium must maintain written standards of conduct, consistent with tribal law and custom, to govern officers, employees, and agents (including subcontractors) engaged in functions related to the management of trust assets and provide for a tribally approved mechanism to resolve such conflicts of interest.

The federal proposal is overbroad and unnecessarily burdensome. The proposed regulation imposes requirements on tribes with regard to the "statutory obligations of the United

States to third parties." Exactly how the tribes are to be given notice of these obligations is unclear, yet the regulations proposed impose a duty on the tribes to avoid conflicts with these third parties. The federal proposal includes three regulations on "personal conflicts" which impose federal-type standards onto tribes. Such requirements inhibit tribes from legislating and regulating on their own and are a significant breach of tribal sovereignty.

*Federal view:* The federal team believes that conflicts of interest regulations are required to balance the federal-tribal government relationship with the Secretary's trust responsibility under section 406(b) of Pub. L. 103-413 (25 U.S.C. 458ff(b)) to Indian tribes, individual Indians and Indians with Trust allotments. The federal proposal is essentially identical to the Pub. L. 93-638 (25 U.S.C. 450) regulation adopted by the Secretaries of the Interior and Health and Human Services. The federal proposal addresses two types of conflicts: conflicts of the tribe or tribal organization itself (an "organizational conflict"), and; conflicts of individual employees involved in trust resource management.

Under the federal proposal, the conflicts of interest regulations only apply if the AFA fails to provide equivalent protection against conflicts of interest to these regulations.

The proposed federal regulations for an organizational conflict of interest address only those conflicts discovered after the AFA is signed.

Such conflicts occur when there is a direct conflict between the financial interests of the Indian tribe/consortium and the financial interests of the beneficial owners relating to trust resources; the tribe and the United States relating trust resources; or an express statutory obligation of the United States to third parties. If the Indian tribe/consortium's AFA does not address conflicts of interest, then the Indian tribe/consortium must immediately disclose the conflict to the Secretary.

The proposed federal regulations for personal conflicts of interest would require an Indian tribe/consortium to have a tribally-approved mechanism to ensure that no officer, employee, or agent of the Indian tribe/consortium has a financial or employment interest that conflicts with that of the trust beneficiary. The proposal also prohibits such individuals from receiving gratuities.

The federal proposal is as follows:

*What is an organizational conflict of interest?*

An organizational conflict of interest arises when there is a direct conflict between the financial interests of the Indian tribe/consortium and:

(a) The financial interests of beneficial owners of trust resources;

(b) The financial interests of the United States relating to trust resources, trust acquisitions, or lands conveyed or to be conveyed pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*); or

(c) An express statutory obligation of the United States to third parties. This section only applies where the financial interests of the Indian tribe/consortium are significant enough to impair the Indian tribe/consortium's objectivity in carrying out an AFA.

*What must an Indian tribe/consortium do if an organization conflict of interest arises under an AFA?*

This section only applies if the conflict was not addressed when the AFA was first negotiated. When an Indian tribe/consortium becomes aware of a conflict of interest, the Indian tribe/consortium must immediately disclose the conflict to the Secretary.

*When must an Indian tribe/consortium regulate its employees or subcontractors to avoid a personal conflict of interest?*

An Indian 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.

*What types of personal conflicts of interest involving tribal officers, employees or subcontractors would have to be regulated by an Indian tribe/consortium?*

The Indian tribe/consortium must have a tribally approved mechanism to ensure that no officer, employee, or agent (including a subcontractor) of the Indian 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 Indian tribe/consortium or an allottee. Interests arising from membership in, or employment by, an Indian tribe/consortium, or rights to share in a tribal claim need not be regulated.

*What personal conflicts of interest must the standards of conduct regulate?*

The standards must prohibit an officer, employee, or agent (including a subcontractor) from participating in the review, analysis, or inspection of a trust transaction involving an entity in which such persons have a direct financial interest or an employment relationship. It must also prohibit such officers, employees, or agents from accepting any gratuity, favor, or anything of more than nominal value, from a party (other than the Indian tribe/consortium) with an interest in the trust transactions under review. Such standards must also provide for sanctions or remedies for violating the standards.

*May an Indian tribe/consortium elect to negotiate AFA provision on conflict of interest to take the place of this regulation?*

Yes. An Indian tribe/consortium and the Secretary may agree to AFA provisions concerning either personal or organizational conflicts that address the issues specific to the program included in the AFA. Such provisions must provide equivalent protection against conflicts of interests to these regulations. Agreed-upon provisions shall be followed, rather than the related provisions of this regulation. For example, the Indian tribe/consortium and the Secretary may agree that using the Indian tribe/consortium's own written code of ethics satisfied the objectives of the personal conflicts provision of this regulation, in whole or in part.

**Supply Sources**

*Tribal view:* The tribal proposal differs from that of the federal team in that the tribal representatives believe that it should be the duty of the Department of the Interior to facilitate the relationship with the General Services Administration. The tribal proposal would so require in the regulation given the continuing difficulties tribes have in accessing their full rights to receive services through the General Services Administration. The tribal proposal reads:

*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) which must be available to the tribe/consortium and to its employees to the same extent as if the tribe/consortium were a federal agency. Implementation of this section is the responsibility of the General Services Administration (GSA). The Department of the Interior shall facilitate the tribe/consortium's use of supply sources and assist it to resolve any barriers to full implementation that may arise in the GSA.

*Federal view:* The federal team maintains that only General Services Administration (GSA) has the legal authority concerning a tribe's/consortium's use of federal supply sources. Pub. L. 93-638 requires that the tribes/consortia be treated as any other federal agency in use of federal supply sources. The GSA is responsible for implementation and approval for all federal agencies with respect to sources of federal supplies. The federal proposal alerts the tribes/consortia to the fact that they will receive the same treatment from GSA as all other federal agencies. The Department of the Interior intends to work with GSA to implement this provision. The federal proposal is as follows:

*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) which must be available to the tribe/consortium and to its employees to the same extent as if the tribe/consortium were a federal agency. Implementation of this section is the responsibility of the General Services Administration (GSA).

**Leasing**

*Tribal view:* There is no authority in the statute to limit the rights of Self-Governance tribes compared to the rights of contracting tribes or to impose limitations regarding the acquisition of property not otherwise imposed by any existing statute or regulation Pub. L. 93-638, section 105 (25 U.S.C. 450j(J)) states:

(J) Lease of facility used for administration and delivery of services

(1) Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this Act.

(2) The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

Indeed, the regulation (25 CFR § 900.69-900.72) adopted under Title I, provides a laundry list of costs that may be included in the lease compensation, but, consistent with the statute, nowhere does the Title I regulation proscribe leases on buildings acquired from the federal government or purchased with federal resources. The source of the building is not relevant to the terms of the lease, nor does the fact that the building may have been acquired through federal assistance mean that the tribe is not experiencing costs associated with the building that need to be compensated. The tribal representatives propose either deleting this section entirely or making the Title I, (Pub. L. 93-638) regulations, 25 CFR 900.69-900.72, applicable.

*Federal view:* The federal team proposal is drafted so that it complies with Pub. L. 93-638, section 106 (25 U.S.C. section 450j(I)). The federal proposal delineates limited circumstances that would not allow

leasing arrangements if title to the facility was obtained by the tribe through excess federal government property or if the construction of the facility was federally financed. There is no rationale for the federal government to pay twice—once for the construction of the facility and again for the leasing back of that facility from the tribe. The federal proposal is as follows:

*Can a tribe/consortium lease its tribal facilities to the federal government for use in the performance of an AFA?*

(a) For BIA programs, the Secretary must enter into a lease with the tribe/consortium to use tribal facilities for AFA programs. The Secretary may enter into a lease only if appropriations are available for implementation of section 105(l)(1) and (2) of Pub. L. 93-638, as amended (25 U.S.C. 450j(l)).

(b) This section does not apply to former federal facilities acquired by a tribe/consortium as excess or surplus property, or to construction projects by the tribe/consortium paid for with federal funds, except to the extent that improvements to the facilities have been made from other than federal funds.

**Prompt Payment Act (Pub. L. 97-452, as Amended)**

*Tribal view:* Tribal representatives note that Pub. L. 103-413, section 403(g), (25 U.S.C. 458cc(g)) gives tribes and consortia the right to receive payments under a self-governance agreement in advance in the form of an annual or semi-annual installment, at the discretion of the tribe or consortium. In addition, this section requires the Secretary to provide funding for BIA and non-BIA programs that are included in a self-governance agreement that are equal to the amount that the tribe or consortium would be eligible to receive under Title I of Pub. L. 103-413. Under section 108 of Title I (25 U.S.C. 450; (l)), the Prompt Payment Act is made applicable to all advance payments of funds that are made to tribes under that Title. The Prompt Payment Act should apply to all Department of the Interior programs which tribes may assume under the Tribal Self-Governance Act of 1994, including all BIA and non-BIA programs. No distinction between BIA and non-BIA programs is drawn in Title I of Pub. L. 103-413 and none should be drawn in Title IV of Pub. L. 103-413. Accordingly, tribal representatives proposed the following regulation:

*Does the Prompt Payment Act apply?*

Yes, the Prompt Payment Act applies to all programs funded under the Tribal Self-Governance Act of 1994.

*Federal view:* The federal team understands that the Prompt Payment Act is generally applicable to the extent

goods and services are provided in advance of payment rather than where the payment is made in advance of the delivery. The Prompt Payment Act, (31 U.S.C. 3902(a)), provides in pertinent part: “\* \* \* the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due.” Congress established, in 31 U.S.C. 3902(h)(2)(B) statutory deadlines addressing the “required payment or loan closing date” for various types of transactions. No such statutory deadline is provided for agreements under the Tribal Self-Governance Act of 1994, and the federal team is uncertain of its authority to prescribe or how to prescribe such deadlines for advance payments in the absence of more explicit instructions from Congress. Appropriations law makes it impossible for the Department to distribute funds in advance of the first day of a fiscal year, and delays in bureaus receiving their annual appropriations and resulting funding allocations often also result in delays beyond the Department’s control. Prompt payment interest penalties must be derived from “amounts made available to carry out the program for which the penalty is incurred” and are not an authorization for additional appropriations (31 U.S.C. 3902(e)). Pub. L. 103-413, 403(g)(3), (25 U.S.C. 458cc(g)(3)) generally requires the bureau to include all funds it would have expended directly or indirectly for that portion of the program, except for functions retained by the bureau either because they are inherently federal or by agreement of the parties. It would appear that Congress has not authorized funds to pay the interest penalty without in turn first directly or indirectly reducing the programs to be provided for that Self-Governance tribe. Moreover, using funds intended for programs for other tribes or tribal organizations would violate Pub. L. 103-413, section 406(a), (25 U.S.C. 458ff(a)). While the Model Agreement contained in section 108 of the ISDEA (Pub. L. 93-638), as amended provides for the application of the Prompt Payment Act, the Title I regulations (Pub. L. 93-638 (25 U.S.C. 450)) do not contain any language to implement that provision. Thus, the federal team does not know how to implement this provision without reducing funding or programs for the tribe involved, and therefore requests public comments addressing such provisions.

*Does the Prompt Payment Act (Pub. L. 97-452, as amended) apply?*

Yes, the Prompt Payment Act (Pub. L. 97-452, as amended) applies to programs eligible for contracting under Pub. L. 93-638 (25 U.S.C. 450).

**Subpart R—Appeals**

*Tribal view:* The tribal representatives have organized the appeals section to provide a user-friendly format, without extensive internal cross reference. The tribal representatives believe that it is easier to identify the proper appeal forum based on the issue at hand rather than reviewing the different forums available first and then deciding whether the issue at hand fits.

A crucial part of the tribal proposal is that appeals be heard at the level of the Assistant Secretary for the different bureaus. It is the tribal view that the Tribal Self-Governance Act of 1994 vested authority and discretion exclusively in the Secretary of the Interior. Accountability for official decisions should be vested at a similarly high level. Tribal representatives feel it would be inappropriate for appeals to be heard by “bureau heads” who would likely be the officials responsible for initial adverse decisions. The purpose of “appeals” is review by a higher authority who is removed from the initial dispute. Moving discretionary decision-making down the organizational level of the Department without clear and consistent guideposts for the exercise of discretion should not be permitted below the Assistant Secretary’s level. The tribal representatives propose the following:

*1. What is the purpose of this subpart?*

This subpart prescribes the process for resolving disputes with Department officials which arise before or after execution of an AFA 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:

- (a) The Interior Board of Indian Appeals (IBIA) for certain pre-AFA disputes and reassumption of programs eligible for contracting under Pub. L. 93-638 (25 U.S.C. 450);
- (b) The Interior board of Contract Appeals (IBCA) for certain post-AFA disputes;
- (c) The bureau head for the bureau responsible for certain disputed decisions; and
- (d) The Secretary for reconsideration of decisions involving self-governance compacts.

*2. In general, how can a tribe appeal a decision of a bureau once it has signed an AFA?*

The tribes may refer to section 110 of Pub. L. 93-638 which directs them to follow the

procedures found within the Contract Disputes Act Pub. L. 95-563 (41 U.S.C 601)), as amended. Generally, the provisions of section 110 of Pub. L. 93-638 (25 U.S.C. 450m-1) apply to all issues arising from agreements under the Tribal Self-Governance Act of 1994. The tribe may sign an agreement, as well, and reserve issues for appeal under the provisions of section 110. Exceptions are noted below in tribal Question 3.

**3. Are there any decisions which are not appealable under this subpart?**

Yes. The following types of decisions are not appealable under this subpart.

(a) Decisions regarding requests for waivers of regulations which are addressed in Subpart J of these regulations (Waivers).

(b) Decisions under any other statute, such as the Freedom of Information Act and the Privacy Act. See 43 CFR Part 2.

(c) Decisions for which Subpart K—Construction provides otherwise.

**4. How can a tribe appeal a decision of a bureau official relative to a Title I, Pub. L. 93-638 eligible program before it has signed an AFA?**

Any bureau decision regarding the self-governance program not governed under the provisions of the Contract Disputes Act pursuant to section 406(c) of Pub. L. 103-413 (25 U.S.C. 458ff(c)), and except those listed under tribal Question 5, may be appealed within 30 days of notification to the IBIA under the provisions of 25 CFR 900.150(a)-(h), and 900.152-900.169. Tribes/consortiums wishing to appeal an adverse decision must do so within 30 days of receiving such decision. For purposes of such appeals only, the terms "contract" and "self-determination contract" shall mean annual funding agreements under the Tribal Self-Governance Act of 1994. The terms "tribe" and "tribal organization" shall mean "tribe/consortium." References to the Department of Health and Human Services therein are inapplicable.

**5. To whom are appeals directed regarding pre-award AFA decisions of Department officials, other than those described in tribal Question 4?**

Using the procedures described in tribal Question 6, the following pre-AFA disputes and decisions are appealable to the Assistant Secretary of the bureau responsible for the decision or dispute:

(a) Decisions regarding non-Title I (non Pub. L. 93-638) eligible programs and disputes over failure to reach an agreement in an AFA negotiation for non-Title I (non Pub. L. 93-638) eligible programs pursuant to section 1000.173 of these regulations ("last and best offer").

(b) Decisions relating to planning and negotiation grants (Subpart C—Planning and Negotiation Grants);

(c) Decisions involving a limitation and/or reduction of services for BIA programs. (Subpart H—Limitation and/or Reduction of Services for BIA Services, Contracts and Funds);

(d) Decisions regarding the eligibility of a tribe for admission to the applicant pool;

(e) Decisions involving BIA residual functions or inherently federal functions;

(f) Decisions declining to provide requested information on federal programs, budget, staffing, and locations which are addressed in Section 1000.162 of these regulations.

(g) Decisions related to a dispute between a consortium and a withdrawing tribe.

**6. How should a tribe/consortium appeal a pre-AFA decision described in tribal Question 5?**

A tribe/consortium may appeal such decision by making a written request for review to the appropriate Assistant Secretary within 30 days of failure to reach agreement under section 1000.173. The request should include a statement describing its reasons for requesting the review, with any supporting documentation or indicate that such a statement will be submitted within 30 days. A copy of the request must also be sent to the Director of the Office of Self-Governance.

**7. Does the tribe have a right to an informal conference?**

Yes. Within 30 days of submitting an appeal to the Assistant Secretary under Question 5 above, the tribe may request an informal conference with the Assistant Secretary or an appointed representative of the Secretary. The Secretary cannot appoint the official whose decision is being appealed as his representative. This conference will be held within 20 days of request, unless otherwise agreed between the parties, and 25 CFR 900.154 to 900.157 will govern the procedure of the informal conference.

**8. When must an Assistant Secretary issue a decision in the administrative review?**

The Assistant Secretary must issue a written final decision stating the reasons for such decision, and transmit it to the tribe/consortium within 60 days of receipt of the request for review and tribal statement of reasons. The Assistant Secretary's decision shall be final for the Department unless reversed by the Secretary upon a discretionary review in accordance with 43 CFR 4.4.

**9. Can a tribe seek reconsideration of the Assistant Secretary's decision?**

Yes. The Tribe may request that the Secretary reconsider a final Department decision by sending a written request for reconsideration within 30 days of the receipt of the decision to the Secretary or under 43 CFR 4.4. A copy of this request should also be sent to the Director of the Office of Self-Governance.

**10. How can 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.

**11. When will the Secretary respond to a request for reconsideration of a decision involving a self-governance compact?**

The Secretary will respond in writing to the tribe/consortium within 30 days of receipt of the tribe/consortium's request for reconsideration.

**12. How should a tribe/consortium appeal a Department decision or dispute regarding a signed AFA?**

Sections 110 and 406(c) of the Pub. L. 103-413 (25 U.S.C. 450m-1 and 458ff(d), respectively) make the Contracts Disputes Act (CDA) (Pub. L. 95-563; 41 U.S.C. 601), as amended applicable to all disputes regarding signed self-governance AFAs, and give tribes/consortiums the right to appeal directly to federal district court or to appeal administratively to the Interior Board of Contract Appeals (IBCA). Administrative appeals regarding post-AFA are governed by 25 CFR 900.216-900.230, except that appeals of decisions regarding reassumption of programs are governed by 25 CFR 900.170-900.176, and except for the types of decisions described in tribal Question 3, which are not appealable under this subpart.

*Federal view:* The Federal proposals would establish a process for resolving disputes with Department officials which arise both before and after the execution of AFAs. Depending upon the precise matter for which review is sought, appeals of decisions are made to either the IBIA, the IBCA or the head of the particular bureau. Reconsideration of decisions relating to the terms of compacts (as opposed to AFAs) between a tribe/consortium and the Secretary would be submitted to the Secretary. As a general matter, the IBIA would be responsible for appeals relating to pre-award issues and reassumption for imminent jeopardy concerning programs eligible for contracting under Pub. L. 93-638; the IBCA under the Contract Disputes Act (Pub. L. 93-563) for appeals concerning post-award disputes other than reassumption for imminent jeopardy; and bureau heads for matters entailing some degree of discretionary decision-making by an appropriate bureau official. This role for the bureau heads is consistent with normal Departmental practices and also recognizes the generally greater familiarity of bureau heads than the programmatic assistant secretaries for the types of issues to be decided. In accordance with Subpart K of the proposed regulations, appeals from disputes surrounding suspension of work under section 1000.230 of these regulations are made like other post-award disputes under the CDA.

The federal proposal follows:

**1. What is the purpose of this subpart?**

This subpart prescribes the process for resolving disputes with Department officials

which arise before or after execution of an AFA or as a result of a reassumption of an AFA 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:

(a) The Interior Board of Indian Appeals (IBIA) for certain pre-AFA disputes and reassumption of programs eligible for contracting under Pub. L. 93-638 (25 U.S.C. 450);

(b) The Interior Board of Contract Appeals (IBCA) for certain post-AFA disputes;

(c) The bureau head for the bureau responsible for certain disputed decisions; and

(d) The Secretary for reconsideration of decisions involving self-governance compacts.

#### 2. What decisions are appealable to the IBIA?

(a) Except for pre-award matters described in federal Question 5(b)-(d), (f) and (g), decisions of Department officials made before the signing of an AFA under the Tribal Self-Governance Act of 1994 that involve programs eligible for contracting under Pub. L. 93-638 are appealable to the IBIA. The provisions of 25 CFR 900.150(a)-(h), 900.151-900.169 are applicable. For purposes of such appeals only, the terms "contract" and "self-determination contract" shall mean annual funding agreements under the Tribal Self-Governance Act of 1994. The term "tribe" shall mean "tribe/consortium." References to the Department of Health and Human Services therein are inapplicable.

(b) Decisions to reassume a program that is eligible for contracting under Pub. L. 93-638, after the failure of the tribe to adequately respond or mitigate, or decisions to suspend or delay payment for a program that is eligible for contracting under Pub. L. 93-638. The provisions of 25 CFR 900.170 to 900.175 apply, except as otherwise provided in Subpart K—Construction.

(c) If a tribe does not appeal a decision to the IBIA within 30 days of receipt of the decision, the decision will be final for the Department.

#### 3. What decisions are appealable to the Interior Board of Contract Appeals (IBCA) under this section?

Post-award AFA decisions of Department officials are appealable to IBCA, except appeals covered in federal Questions 2(b), 5(c), 5(e), and 5(g) of this subpart and decisions involving reassumption for imminent jeopardy, non-Pub. L. 93-638 programs, and all construction disputes.

#### 4. What statutes and regulations govern resolution of disputes concerning signed AFAs that are appealed to the IBCA?

Section 110 of Pub. L. 93-638 (25 U.S.C. 450m-1) and the regulations at 25 CFR 900.216-900.230 apply to disputes concerning signed AFAs 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 only, the terms "contract" and "self-determination contract" shall apply to AFAs

under the Tribal Self-Governance Act of 1994.

#### 5. What decisions are appealable to the bureau head for review?

(a) Pre-award AFA decisions of Department officials, other than those described in federal Question 2 of this subpart, shall be directed to the bureau head. For example, a review involving a non-Pub. L. 93-638 program.

(b) Decisions of Department officials that a tribe is not eligible for admission to the applicant pool.

(c) Pre-AFA and post-AFA decisions of a Department official, other than a BIA official, on whether an AFA would limit or reduce other AFAs, services, contacts, or funds under Pub. L. 93-638, or other applicable federal law, to an Indian tribe/consortium or tribal organization that is not a party to the AFA.

(d) Decisions involving BIA residual functions. (See sections 1000.91 and 1000.92—BIA AFAs in these draft regulations.)

(e) Decisions involving reassumption for imminent jeopardy for non-Pub. L. 98-638 programs.

(f) Decisions declining to provide requested information on federal programs, budget, staffing, and locations which are addressed in subpart 1000.162 of these regulations.

(g) Decisions related to a dispute between a consortium and a withdrawing tribe (1000.34).

#### 6. When and how must a tribe/consortium appeal a decision to the bureau head?

If a tribe/consortium wishes to appeal a decision to the bureau head it must make a written request for review to the appropriate bureau head within 30 days of receiving the initial adverse decision. The request should include a statement describing its reasons for requesting a review, with any supporting documentation or indicate that such a statement will be submitted within 30 days. A copy of the request must also be sent to the Director of the Office of Self-Governance.

If a tribe does not request a review within 30 days of receipt of the decision, the decision will be final for the Department.

#### 7. When must the bureau head issue a decision in the administrative review?

The bureau head must issue a written final decision stating the reasons for such decision, and transmit it to the tribe/consortium within 60 days of receipt of the request for review and the statement of reasons.

#### 8. What is the effect of the bureau head's decision in an administrative review?

The decision is final for the Department.

#### 9. May tribes/consortia appeal Department decisions to a U.S. District Court?

Yes. Tribes/consortia may choose to appeal decisions of Department officials relating to the self-governance program to a U.S. Court, as authorized by section 110 of Pub. L. 93-638 (25 U.S.C. 450m-1), or other applicable law.

#### 10. How can 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 within 30 days of receipt of the decision to the Secretary. A copy of this request must also be sent to the Director of the Office of Self-Governance.

#### 11. When will the Secretary respond to a request for reconsideration of a decision involving a self-governance compact?

The Secretary will respond in writing to the tribe/consortium within 30 days of receipt of the tribe/consortium's request for reconsideration.

#### 12. Are there any decisions which are not appealable under this section?

Yes. The following types of decisions are not appealable under this subpart:

(a) Decisions regarding requests for waivers of regulations which are addressed in Subpart J of these regulations. (Waivers)

(b) Decisions relating to planning and negotiation grants in section 1000.71 of these regulations. Subpart D—Other Financial Assistance for Planning and Negotiation Grants for Non-BIA Programs.

(c) Decisions relating to discretionary grants under section 103 of Pub. L. 93-638 (25 U.S.C. 450h) which may be appealed under 25 CFR Part 2.

(d) Decisions under any other statute, such as the Freedom of Information Act and the Privacy Act. See 43 CFR Part 2.

(e) Decisions involving a limitation and/or reduction of service for BIA programs. Subpart H—Limitation and/or Reduction of Services for BIA Services, Contracts, and Funds.

(f) Decisions for which Subpart K—Construction provides otherwise.

#### 13. What procedures apply to post-award construction disputes except for reassumptions for imminent jeopardy?

The Contract Disputes Act procedures (Pub. L. 95-593 (41 U.S.C. 601), as amended)

#### Subpart S—Property Donation Procedures

**Tribal view:** Section 406(c) of Title IV (Pub. L. 103-413; 25 U.S.C. 458ff (c)) specifically incorporates section 105(f) of Pub. L. 93-638 (25 U.S.C. 450; (f)), a provision which gives tribes significant rights relating to the transfer of BIA and non-BIA property to tribes for use under a contract or AFA. In June 1996, the Departments of the Interior and Health and Human Services promulgated joint regulations implementing Pub. L. 93-638, including section 105(f). See 25 CFR 900 *et seq.* The regulations make clear that transfer of property under section 105(f) applies to BIA and non-BIA property.

The regulations promulgated under Pub. L. 93-638 implementing section 105(f) apply equally to Title IV—for

both BIA and non-BIA programs. Tribal representatives proposed regulations that closely tracked 25 CFR 900.85-900.107.

### Government-Furnished Property

*1. How does an Indian tribe/consortium obtain title to property furnished by the federal government for use in the performance of a self-governance agreement pursuant to section 105(f)(2)(A) of Pub. L. 93-638 (25 U.S.C. 450; (f)(2)(A))?*

(a) For federal government-furnished personal property made available to an Indian tribe/consortium before October 25, 1994:

(1) The Secretary, in consultation with each Indian tribe/consortium, shall develop a list of the property used in a self-governance agreement.

(2) The Indian tribe/consortium shall indicate any items on the list to which the Indian tribe/consortium wants the Secretary to retain title.

(3) The Secretary shall provide the Indian tribe/consortium with any documentation needed to transfer title to the remaining listed property to the Indian tribe/consortium.

(b) For federal government-furnished real property made available to an Indian tribe/consortium before October 25, 1994:

(1) The Secretary, in consultation with the Indian tribe/consortium, shall develop a list of the property furnished for use in a self-governance agreement.

(2) The Secretary shall inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101-47.202.2(b)(10). If the Indian tribe/consortium desires to take title to any real property on the list, the Indian tribe/consortium shall inform the Secretary, who shall take such steps as necessary to transfer title to the Indian tribe/consortium.

(c) For federal government-furnished real and personal property made available to an Indian tribe/consortium on or after October 25, 1994:

(1) The Indian tribe/consortium shall take title to all property unless the Indian tribe/consortium requests that the United States retain the title.

(2) The Secretary shall determine the presence of any hazardous substance activity, as defined in 41 CFR 101-47.202.2(b)(10).

*2. What should the Indian tribe/consortium do if it wants to obtain title to federal government-furnished real property that includes land not already held in trust?*

If the land is owned by the United States but not held in trust for an Indian

tribe or individual Indian, the Indian tribe/consortium shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of a tribe.

(a) If the Indian tribe/consortium requests fee title, the Secretary shall take the necessary action under federal law and regulations to transfer fee title.

(b) If the Indian tribe/consortium requests beneficial ownership with fee title to be held by the United States in trust for an Indian tribe:

(1) The Indian tribe/consortium shall submit with its request a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered.

(2) The Secretary of the Interior shall expeditiously process all requests in accordance with applicable federal law and regulations.

(3) The Secretary shall not require the Indian tribe/consortium to furnish any information in support of a request other than that required by law or regulation.

*3. When may the Secretary elect to reacquire federal government-furnished property whose title has been transferred to an Indian tribe/consortium?*

(a) Except as provided in paragraph (b) of this section, when a self-governance agreement, or portion thereof, is retroceded, reassumed, terminated or expires, the Secretary shall have the option to take title to any item of federal government-furnished property for which:

(1) title has been transferred to an Indian tribe/consortium;

(2) is still in use in the program; and

(3) has a current fair market value, less the cost of improvements borne by the Indian tribe/consortium, in excess of \$5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing self-governance agreements and a self-governance agreement is retroceded, reassumed, terminated or expires, and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the Indian tribe/consortium using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

*4. Does government-furnished real property to which an Indian tribe/consortium has taken title continue to be eligible for facilities operation and maintenance funding from the Secretary?*

Yes.

### Property Purchased by an Indian Tribe/Consortium

*5. Who takes title to property purchased with funds under a self-governance agreement pursuant to section 105(f)(2)(A) of Pub. L. 93-638 (25 U.S.C. 450j (f)(2)(A))?*

The Indian tribe/consortium takes title to such property, unless the Indian tribe/consortium chooses to have the United States take title. In that event, the Indian tribe/consortium must inform the Secretary of the purchase and identify the property and its location in such manner as the Indian tribe/consortium and the Secretary deem necessary. A request for the United States to take title to any item of Indian tribe/consortium-purchased property may be made at any time. A request for the Secretary to take fee title to real property shall be expeditiously processed in accordance with applicable federal law and regulation.

*6. What should the Indian tribe/consortium do if it wants Indian tribe/consortium-purchased real property that it has purchased to be taken into trust?*

The Indian tribe/consortium shall submit a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered. The Secretary of the Interior shall expeditiously process all requests in accord with applicable federal law and regulation.

*7. When may the Secretary elect to acquire title to Indian tribe/consortium-purchased property?*

(a) Except as provided in paragraph (b) of this section when a self-governance agreement, or portion thereof, is retroceded, reassumed, terminated or expires, the Secretary shall have the option to take title to any item of tribe/consortium-purchased property:

(1) Whose title has been transferred to an Indian tribe/consortium;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe/consortium, in excess of \$5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing self-governance agreements and a self-governance agreement that is retroceded, reassumed, terminated or expires, and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the Indian tribe/consortium using such property

shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

**8. Is Indian tribe/consortium-purchased real property to which an Indian tribe/consortium holds title eligible for facilities operation and maintenance funding from the Secretary?**

Yes.

Tribal representatives believe that the federal position misinterprets section 105(f) (25 U.S.C. 450j(f)) and is incorrect in any conclusion that section 105(f) does not apply to non-BIA property. Initially, it should be pointed out that the federal representatives position is inconsistent with the position taken by the Department of the Interior during the Title I (Pub. L. 93-638) rulemaking process—the final rules promulgated in 25 CFR sections 900.87-900.94 clearly apply to non-BIA, as well as BIA, programs. There is no reason why the Department should change this interpretation in Title IV; doing so would violate Congressional direction that self-governance “co-exist” with the Self-Determination Act (see section 203 of Title IV (Pub. L. 103-413) and section 1000.4(b)(3) of the proposed regulations). Clearly, if regulations implementing the same statutory provisions under Title I conflict with regulations under Title IV, the two titles do not “co-exist,” they “conflict.”

The federal representatives argument is based on an incorrect reading of section 105(f)(2). First, section 105(f)(2) provides that the Secretary “may” “donate” IHS, BIA, or GSA property—clearly a discretionary act, while section 105(f)(2)(A) provides that title to property and equipment furnished by the federal government, “shall vest” in the tribe, clearly a command where the Secretary has no discretion.

It is evident from the different language used in these two provisions that they have very different purposes; they address different types of property and give the Secretary some or no discretion. Furthermore, if Congress wanted to limit section 105(f)(2)(A) to GSA, IHS, and BIA property, as the federal representatives assert, it would have said so in the section. The use of “government-furnished property” clearly indicated an intent to refer to property other than GSA, IHS, or BIA. Finally, the term “except” can grammatically be read as a signal that the contents of section 105(f)(2)(A) are not subject to the limitations set forth in section 105(f)(2), which would as the federal representatives assert, give meaning to every word in the statute.

*Federal view:* It is the federal team’s view that section 105(f)(2)(A) of Pub. L. 93-638 (25 U.S.C. 450j(f)(2)(A)) does not apply to non-BIA bureaus.

Prior to the 1994 amendments, section 105(f)(2) of Pub. L. 93-638 gave the Secretary discretion to donate personal BIA excess property, including contractor-purchased property as one type of “excess” BIA property:

(f) In connection with any self-determination contract or grant made pursuant to section 102 or 103 of this Act, the appropriate Secretary may—

(2) donate to an Indian tribe or tribal organization the title to any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, *including property and equipment purchased with funds under any self-determination contract or grant agreement; and (emphasis added)*

But, as the legislative history of section 2(12) of S. 2036 (the Senate Bill section which revised section 105(f)(2)(A), (B) and (C)) indicates, Congress decided to treat contractor-purchased property and federal government-furnished property exactly the same as under federal grant procedures:

Section 2(12) amends section 105(f)(2) to address both the acquisition of property with contract funds after a contract has been awarded and also the management of government-furnished property. Currently, standard grant regulations provide that title to property purchased with grant funds vests in the grantee. The amendment extends the same policy to property purchased with self-determination contract funds. The policy reasons underlying the Self-Determination Act strongly counsel in favor of such a regime, and the amendment eliminates the need for a technical “donation” of the property in such circumstances. At the same time, the amendment provides a mechanism for the return of property still in use to the Secretary, in the event a contracting program is retroceded back to the federal government. Finally, in conjunction with Paragraph 1(b)(7) of the model contract set forth in section 3 of the bill, the amendment assures that, although title to such property will vest in the tribe or tribal organization, the Secretary is to treat such property in the same manner for purposes of replacement as he or she would have had title to the property vested of the government. S. Rpt. No. 103-374, 103d Cong., 2d Sess. 7 (1994).

Thus, section 105(f)(2)(A) of Pub. L. 93-638 (25 U.S.C. 450j (f)(2)(A)) now gives title to a tribe just as grant procedures give title to a grantee. Also, Congress eliminated the need to go through time consuming donation procedures applicable to other excess property and allow for automatic vesting of title at the option of the tribe for contractor-purchased and federal

government-furnished property. There was no intent to change the agencies to which these provisions applied; i.e., BIA, IHS, and GSA, and indeed, no such change was made.

The significance of this modification of section 105(f)(2) of Pub. L. 93-638 is that the recrafting of section 105(f)(2)(A) continued to be limited to BIA, IHS and GSA:

(f) In connection with any self-determination contract or grant made pursuant to section 102 or 103 of this Act, the appropriate Secretary may—

(2) donate to an Indian tribe or tribal organization title to any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, except that—

“(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the contract or purchased with funds under any self-determination contract or grant agreement shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization;

Had Congress intended to change the clear limitation of the pre-1994 Amendment language of section 105(f)(2) of Pub. L. 93-638 to include non-BIA bureaus, it surely would have modified this continued reference to only BIA, IHS, and GSA in this section. However, it did not. While making a significant change by allowing title to automatically pass to tribes for contractor-purchased and federal government-furnished excess property, it made absolutely no change to the above-referenced agencies to which these rights apply. Even though section 105(f)(2)(A) refers to the “Federal Government” and “any self-determination contract” this subsection must be read within the context of its antecedent parent clause in subsection (2), which limits applicability to only the BIA, IHS, and GSA. This is the most reasonable interpretation of these provisions. To do otherwise, would require reading the terms “Bureau of Indian Affairs, Indian Health Service, and General Services Administration” completely out of section 105(f)(2), (25 U.S.C. 450j(f)(2)), when interpreting subsection (A) of section 105(f)(2). This would certainly ignore the mandate of statutory interpretation to give meaning to all words of a statute.

In addition, the term “except” preceding “(A),” is defined in Webster’s Collegiate Dictionary to mean “to take out from a number or whole,” i.e., a part of the whole. Thus, the whole is section 105(f)(2), which applies to BIA, IHS, and GSA, and “A” is part of section

105(f)(2) and is also limited to BIA, IHS, and GSA.

Furthermore, the legislative history for this section, as discussed above, indicates it was intended that title to property purchased with contract funds or furnished by the federal government should vest "automatically" and the amendment eliminates the need for a technical donation of the property. Thus, the Congressional intent was that donation procedures should be avoided for federal government-furnished and contract-funded property. Clearly, paragraphs (A), (B), and (C) were not stand-alone provisions, but were an integral part of subsection (2), in order to limit "donation" procedures in subsection (2) to only excess property, while providing the automatic vesting concept in paragraph (A) for federal government-furnished and contract-funded property. Therefore, it also follows that paragraphs (A), (B), and (C), like subsection (2), apply only to the agencies referenced in subsection (2); i.e., BIA, IHS, and GSA.

Nor do we agree with the tribal representatives that subpart I of Pub. L. 93-638 regulations, published on June 24, 1996, resolved the issue of applicability of section 105(f)(2)(A), (25 U.S.C. 450j (f)(2)(A)) to non-BIA bureaus. The 25 CFR sections 900.87 and 900.91 refer only to title transfers when section 105(f)(2)(A) applies, but do not state to which bureaus section 105(f)(2)(A) does apply. The Pub. L. 93-638 rulemaking therefore left open for litigation whether it applies to non-BIA bureaus. The Department of the Interior believes that section 105(f)(2)(A) does not apply to non-BIA programs under the Tribal Self-Governance Act of 1994 or Pub. L. 93-638.

The Tribal Self-Governance Act of 1994 does not authorize and other statutes prohibit the transfer of title to non-BIA real property. For example, nothing in that Act provides a basis for transferring title from the United States to a Self-Governance tribe of a portion of a national park or a national wildlife refuge because an AFA permits a tribe to administer a program within a park or refuge under section 403(c), (25 U.S.C. 458cc(c)) of the Act. An AFA with BLM to conduct cadastral survey work in Alaska relating to conveyances for Native allotments would not permit the transfer of title to such property to the Self-Governance tribe/consortium. Similarly, federal reclamation law prohibits the transfer of title to reclamation projects without the specific approval of Congress.

## Summary of Regulations

### Subpart A—General Provisions

This subpart contains the Congressional policy as stated in the Tribal Self-Governance Act of 1994 and adds the Secretarial policy that will guide the implementation of the Act by the Secretary and the various bureaus of the Department of the Interior. The subpart also defines terms used throughout the rule.

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

This subpart describes the steps a tribe/consortium must take to participate in tribal self-governance and how a tribe can withdraw from a consortium's AFA. Under the Act, a tribe/consortium must first be admitted into the applicant pool and then be selected for participation. The applicant pool contains those tribes/consortia that the Director of the Office of Self-Governance (OSG) has determined are eligible to participate in self-governance.

The Director, OSG may select up to 50 tribes or consortia of tribes from the applicant pool for negotiation. If there are more tribes in the applicant pool than are to be selected to negotiate in any given year, the Director will choose tribes/consortia based upon the earliest postmark date of completed applications.

The rule also stipulates that a tribe/consortium may be selected to negotiate an AFA for non-BIA programs that are otherwise available to Indian tribes without first negotiating an AFA for BIA programs. However, to negotiate for a non-BIA program under Pub. L. 103-413, section 403(c), (25 U.S.C. 458cc(c)) for which the tribe/consortium has only a geographic, cultural, or historical connection, the Act requires that the tribe/consortium must first have an AFA with the BIA, under section 403(b)(1) Pub. L. 103-413; (25 U.S.C. 458cc(b)(1)) or any non-BIA bureau under section 403(b)(2), (25 U.S.C. 458cc(b)(2)). (The term "programs" as used in the rule and in this preamble refers to complete or partial programs, services, functions, or activities.)

Subpart B also describes what happens when a tribe wishes to withdraw from a consortium's AFA. In such instances, the withdrawing tribe must notify the consortium, appropriate DOI bureau, and OSG of its intent to withdraw 180 days before the effective date of the next AFA. Unless otherwise agreed to, the effective date of the withdrawal will be the date on which the current agreement expires.

In completing the withdrawal, the consortium's AFA must be reduced by that portion of funds attributable to the withdrawing tribe on the same basis or methodology upon which the funds were included in the consortium's AFA. If such a basis or methodology does not exist, then the tribe, consortium, appropriate DOI bureau, and OSG must negotiate an appropriate amount. A tribe may not withdraw from a consortium's AFA in any other part of the year unless all parties agree.

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

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 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.

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

This subpart describes the other 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.

Subpart D outlines what must be submitted in the application and the criteria used to rank the applications.

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

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 the BIA. It specifies the programs that are to be performed by the BIA as inherently federal functions, programs transferred to the tribe/consortium, and programs retained by the BIA to carry out for the self-governance tribe. The division of the responsibilities between the tribe/consortium and the 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 the 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.

Except for construction, a tribe/consortium may redesign a program without approval from the 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 the inherently federal functions of the BIA should all tribes assume programmatic responsibility. The residual level will be determined through a process that is consistent with the overall process used by the 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 the BIA office and is consistently applied to all tribes served by the area 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 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, area, 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.

If a tribe/consortium had funding amounts included in its base budgets or was base eligible before these regulations, the tribe/consortium may retain the amounts previously negotiated. 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.

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

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 listing in the **Federal Register** of non-BIA programs that are eligible for negotiation by self-governance tribes. Although the committee reached a consensus on most of the provisions pertaining to AFAs for non-BIA programs, no agreement was reached on several questions concerning program eligibility. See the explanation of matters in disagreement found elsewhere in this preamble.

Sections 1000.112 through 1000.125 of these proposed regulations 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. 458cc(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 or 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 1000.126 through 1000.131 of these proposed regulations 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 which are only available because of a special geographic, historical, or cultural significance eligible under section 403" of the Tribal Self-Governance Act of 1994 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.

*Subpart G—Negotiation Process for Annual Funding Agreements*

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 proposed 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 sections 1000.173 through 1000.175, 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. Proposed section 1000.153 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.

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

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.

The 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 area 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 the BIA must use shortfall funding, supplemental funding, or other available BIA resources to prevent the reduction during the existing AFA year. The 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.

#### *Subpart I—Public Consultation Process*

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.

#### *Subpart J—Waiver of Regulations*

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 proposed regulation.

No consensus was reached with respect to the time limit by which the Secretary must approve or deny a waiver request. For a brief discussion on this point, see the discussion of areas of disagreement elsewhere in this preamble.

#### *Subpart K—Construction*

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 which construction program activities are subject to Subpart K, such as design, construction management services, actual construction; and which 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.

#### *Subpart L—Federal Tort Claims*

This subpart explains the applicability of the Federal Tort Claims Act.

#### *Subpart M—Reassumption*

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.

#### *Subpart N—Retrocession*

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.

#### *Subpart O—Trust Evaluation Review*

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.

#### *Subpart P—Reports*

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.

#### *Subpart Q—Miscellaneous Provisions*

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.

#### **Executive Order 12988**

The Department has certified to the Office of Management and Budget (OMB) that these proposed regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **Executive Order 12866**

This proposed rule is a significant regulatory action and has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### **Regulatory Flexibility Act**

This rule will not have a significant economic impact on a substantial number of small entities as the term is defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### **Executive Order 12630**

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

#### **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.

#### **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), the OSG has submitted the information collection and recordkeeping requirements of 25 CFR Part 1000 to the Office of Management and Budget (OMB) for review and approval.

#### *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:* Not yet assigned.

*Abstract:* The Department of the Interior and Indian government representatives developed 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, United States Code, 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 have 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 which 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 are 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 the 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.

Under the Paperwork Reduction Act, the OSG must obtain OMB approval of all information and recordkeeping 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 will appear in 25 CFR 1000.3 upon approval. To obtain a copy of the 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.

By law, the OMB must submit comments to the OSG within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by the OMB, please send comments regarding these burden estimates or any other aspect of these information collection and recordkeeping requirements by March 16, 1998, to the Information Collection Clearance Officer, Office of Self-Governance, Room 2542, 1849 C Street, NW., Washington, DC 20240, and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer,

725 17th Street, NW., Washington, DC 20503.

### Unfunded Mandates Act of 1995

This rule imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

### List of Subjects in 25 CFR Part 1000

Grant programs—Indians, Indians.

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

Dated: February 3, 1998.

**Bruce Babbitt,**

*Secretary of the Interior.*

## 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?

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 annual funding agreement during the calendar year?

1000.30 May a tribe/consortium be selected to negotiate an annual funding agreement pursuant to section 403(b)(2) without having or negotiating an annual funding agreement pursuant to section 403(b)(1)?

1000.31 May a tribe/consortium be selected to negotiate an annual funding agreement pursuant to section 403(c) without negotiating an annual funding agreement 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?

### 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 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 Is there an appeal within DOI of a decision by the Director not to award a grant under this subpart?
- 1000.72 Will the 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**

- 1000.78 What is the purpose of this subpart?
- 1000.79 What is an annual funding agreement (AFA)?

**Contents and Scope of Annual Funding Agreements**

- 1000.80 What types of provisions must be included in a BIA AFA?
- 1000.81 Can additional provisions be included in an AFA?
- 1000.82 Does a tribe/consortium have the right to include provisions of Title I of Pub. L. 93-638 in an AFA?
- 1000.83 Can a tribe/consortium negotiate an AFA with a term that exceeds one year?

**Determining What Programs May Be Included in an AFA**

- 1000.84 What types of programs may be included in an AFA?
- 1000.85 How does the AFA specify the services provided, functions performed, and responsibilities assumed by the tribe/consortium and those retained by the Secretary?
- 1000.86 Do tribes/consortia need Secretarial approval to redesign BIA programs that the tribe/consortium administers under an AFA?
- 1000.87 Can the terms and conditions in an AFA be amended during the year it is in effect?

**Determining AFA Amounts**

- 1000.88 What funds must be transferred to a tribe/consortium under an AFA?
- 1000.89 What funds may not be included in an AFA?
- 1000.90 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?
- 1000.91 What are BIA residual funds?
- 1000.92 How is BIA's residual determined?
- 1000.93 May a tribe/consortium continue to negotiate an AFA pending an appeal of the residual list?
- 1000.94 What is a tribal share?
- 1000.95 How is a tribe/consortium's share of funds to be included in an AFA determined?
- 1000.96 Can a tribe/consortium negotiate a tribal share for programs outside its area/agency?
- 1000.97 May a tribe/consortium obtain funding that is distributed on a discretionary or competitive basis?
- 1000.98 Are all funds identified as tribal shares always paid to the tribe/consortium under an AFA?
- 1000.99 How are savings that result from downsizing allocated?
- 1000.100 Do tribes/consortia need Secretarial approval to reallocate funds between programs that the tribe/consortium administers under the AFA?
- 1000.101 Can funding amounts negotiated in an AFA be adjusted during the year it is in effect?

**Establishing Self-Governance Base Budgets**

- 1000.102 What are self-governance base budgets?
- 1000.103 Once a tribe/consortium establishes a base budget, are funding amounts renegotiated each year?
- 1000.104 Must a tribe/consortium with a base budget or base budget-eligible program amounts negotiated before the implementation of this part negotiate new tribal shares and residual amounts?
- 1000.105 How are self-governance base budgets established?
- 1000.106 How are self-governance base budgets adjusted?

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

- 1000.110 What is the purpose of this subpart?
- 1000.111 What is an annual funding agreement for a non-BIA program?

**Eligibility**

- 1000.112 What non-BIA programs are eligible for inclusion in an annual funding agreement?
- 1000.113 What programs are included under section 403(c)?
- 1000.114 What does "special geographic, historical or cultural" mean?
- 1000.115 Does the law establish a contracting preference for programs of special geographic, historical, or cultural significance?
- 1000.116 Are there any programs that may not be included in an AFA?
- 1000.117 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?
- 1000.118 Will tribes/consortia participate in the Secretary's determination of what is to be included on the annual list of available programs?
- 1000.119 How will the Secretary consult with tribes/consortia in developing the list of available programs?
- 1000.120 What else is on the list in addition to eligible programs?
- 1000.121 May a bureau negotiate with a tribe/consortium for programs not specifically included on the annual section 405(c) list?
- 1000.122 How will a bureau negotiate an annual funding agreement for a program of special geographic, historical, or cultural significance to more than one tribe?
- 1000.123 When will this determination be made?

**Funding**

- 1000.124 What funds are to be provided in an AFA?
- 1000.125 How are indirect cost rates determined?
- 1000.126 Will the established indirect cost rate always apply to new AFAs?
- 1000.127 How does the Secretary's designee determine the amount of indirect contract support costs?

- 1000.128 Is there a predetermined cap or limit on indirect cost rates or a fixed formula for calculating indirect cost rates?
- 1000.129 Instead of the appropriate OIG rate, is it possible to establish a fixed amount or negotiated rate for indirect costs where funds are limited?

#### Other Terms and Conditions

- 1000.130 May the bureaus negotiate terms to be included in an AFA for non-Indian programs?

#### Subpart G—Negotiation Process for Annual Funding Agreements

##### Purpose

- 1000.150 What is the purpose of this subpart?

##### Negotiating a Self-Governance Compact

- 1000.151 What is a self-governance compact?
- 1000.152 What is included in a self-governance compact?
- 1000.153 Can a tribe negotiate other terms and conditions not contained in the model compact?
- 1000.154 Can a tribe/consortium have an AFA without entering into a compact?
- 1000.155 Are provisions included in compacts that were negotiated before this part is implemented effective after implementation?

#### Negotiation of Initial Annual Funding Agreements

- 1000.156 What are the phases of the negotiation process?
- 1000.157 Who may initiate the information phase?
- 1000.158 Is it mandatory to go through the information phase before initiating the negotiation phase?
- 1000.159 How does a tribe/consortium initiate the information phase?
- 1000.160 What is the letter of interest?
- 1000.161 When should a tribe/consortium submit a letter of interest?
- 1000.162 What steps does the bureau take after a letter of interest is submitted by a tribe/consortium?
- 1000.165 How does a newly selected tribe/consortium initiate the negotiation phase?
- 1000.166 To whom does the newly selected tribe/consortium submit the requests to negotiate an AFA and what information should it contain?
- 1000.167 What is the deadline for a newly selected tribe/consortium to submit a request to negotiate an AFA?
- 1000.168 How and when does the bureau respond to a request to negotiate?
- 1000.169 What is the process for conducting the negotiation phase?
- 1000.170 What issues must the bureau and the tribe/consortium address at negotiation meetings?
- 1000.171 What happens when the AFA is signed?
- 1000.172 When does the AFA become effective?
- 1000.173 What happens if the tribe/consortium and bureau negotiators fail to reach an agreement?

#### Negotiation Process for Successor Annual Funding Agreements

- 1000.174 What is a successor AFA?
- 1000.175 How does the tribe/consortium initiate the negotiation of a successor AFA?
- 1000.176 What is the process for negotiating a successor AFA?

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

- 1000.180 What is the purpose of this subpart?
- 1000.181 To whom does this subpart apply?
- 1000.182 What services, contracts, or funds are protected under section 406(a)?
- 1000.183 Who may raise the issue of limitation or reduction of services, contracts, or funding?
- 1000.184 When may the BIA raise the issue of limitation or reduction of services, contracts, or funding?
- 1000.185 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?
- 1000.186 What must be included in a finding by the BIA or in a claim by or an affected tribe/consortium or tribal organization regarding the issue of a limitation or reduction of services?
- 1000.187 How will the BIA resolve a claim?
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#### Subpart I—Public Consultation Process

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- 1000.360 Can a tribe/consortium retain savings from programs?
- 1000.361 Can a tribe/consortium carry over funds not spent during the term of the AFA?
- 1000.362 After a non-BIA annual funding agreement has been executed and the funds transferred to a tribe/consortium, can a bureau request the return of funds?
- 1000.363 How can a person or group appeal a decision or contest an action related to a program operated by a tribe/consortium under an annual funding agreement?
- 1000.364 Must self-governance tribes/consortia comply with the Secretarial approval requirements of 25 U.S.C. 81 and 476 regarding professional and attorney contracts?
- 1000.365 Can funds provided under a self-governance annual funding agreement be treated as non-federal funds for the purpose of meeting matching requirements under any federal law?

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**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 non-BIA programs 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, those programs, functions, services, and activities which are of a 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 of 1994, as amended, which is Title IV of the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638), as amended, 25 U.S.C. 450 *et seq.* The Tribal Self-Governance Act of 1994 was originally enacted as Title II of Pub. L. 103-413, 25 U.S.C. 458aa *et seq.*

**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 this part.

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

**BIA Program** means any program, service, function, or activity, or portions 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 which affirms the government-to-government relationship between a self-governance tribe and the United States. The compact differs from an annual funding agreement 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. A consortium that has negotiated compacts and annual funding agreements under the Tribal Self-Governance Demonstration Project must be treated in the same manner as a consortium under the permanent Self-Governance Program.

**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 Alaskan Native Village, or regional or village corporation as defined in or established pursuant to the Alaskan Native Claims Settlement Act, which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

**Indirect cost rate** 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 benefiting more than one program which are not readily assignable to individual programs.

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

**Non-BIA program** 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 thereof, 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 § 1000.260.

**Retained tribal share** means those funds which were available as a tribal share but under the annual funding agreement (AFA) were left with the 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 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/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 from a particular program at the BIA area, agency and central office levels.

**§ 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) Pub. L. 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, 25 U.S.C. 458aa *et seq.* (108 Stat. 4250, October 25, 1994).

(b) **Information Collection.** (1) 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 have 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.

(2) The Office of Self-Governance has estimated the public reporting and recordkeeping burden for this part, including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The following table depicts the burden for each section of 25 CFR part 1000.

Send comments regarding this burden estimate or any other aspect of these information collection and recordkeeping requirements, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Self-Governance, Room 2542, 1849 C Street, NW, Washington, DC 20240; and the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, 725 17th Street, NW, Washington, DC 20503.

25 CFR section	Number of respondents	Frequency of response	Total annual responses	Burden hours per response	Annual burden hours
1000.17 .....	10	1	10	3	30
1000.18 .....	10	1	10	0.25	2.50
1000.19–21 .....	10	1	10	400	4,000
1000.32 .....	3	1	3	3	9
1000.47 .....	10	1	10	0.50	5
1000.50(a) .....	10	1	10	3	30
1000.50(b) .....	10	1	10	0.25	2.50
1000.50(c) .....	10	1	10	40	400
1000.66 .....	15	1	15	40	600
1000.159, .160 .....	40	1	40	2	80
1000.165, .166 .....	12	1	12	3	36
1000.175 .....	1	1	1	3	3
1000.202 .....	5	1	5	10	50
1000.223 .....	5	4	20	3	60
1000.227 .....	5	1	5	3	15
1000.292 .....	1	1	1	3	3
1000.341 .....	85	1	85	64	5,440
Totals .....	85	.....	257	3	10,766

**§ 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 decisionmaking 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 decisionmaking 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 Indian 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 which 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 of the Interior to ensure that the letter, spirit, and goals of the Tribal Self-Governance Act are fully and successfully implemented.

### 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 which 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 an Indian tribe or consortium that meets the eligibility criteria in § 1000.15 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 nonsignatory tribe is an Indian tribe that either:

(a) Does not meet the eligibility criteria in § 1000.15 and, by resolution of its governing body, authorizes a consortium to participate in self-governance on its behalf.

(1) The tribe may not sign the compact and annual funding agreement. A representative of the consortium must sign both documents on behalf of the tribe.

(2) The tribe may only become a "signatory tribe" if it independently meets the eligibility criteria in § 1000.15; or

(b) Meets the eligibility criteria in § 1000.15 but chooses to be a member of a consortium and have a representative of the consortium sign the compact and AFA on its behalf.

#### 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?

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 as prescribed by the Single Audit Act of 1984, 31 U.S.C. Section 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 §§ 1000.13–1000.20. If a consortium's planning activities and report specifically consider self-governance activities for a member tribe, those planning activities 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 of this part. The planning phase may be completed without a planning grant.

**§ 1000.20 What is contained 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 the BIA and non-BIA programs that the tribe/consortium may wish to subsequently negotiate for inclusion in a compact and AFA;

(2) Identify the tribe/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 may wish to describe the process that it will use to debate and decide the setting of priorities for the funds it will receive from its annual funding agreement.

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

(1) Identifies a material weakness, or a finding of substantial financial mismanagement or misapplication of funds, that has not been resolved; or

(2) Has any questioned costs subsequently disallowed by a contracting officer which total 5 percent

or more of the total expenditures identified in the audit.

(b) If the audits submitted under § 1000.17(c) identify material weaknesses or contain questioned costs, 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 2548-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?**

(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 annual funding agreement 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 annual funding agreement 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 annual funding agreement pursuant to section 403(b)(2) without having or negotiating an annual funding agreement pursuant to section 403(b)(1)?**

Yes. A tribe/consortium may be selected to negotiate an AFA pursuant to section 403(b) without having or negotiating an AFA pursuant to section 403(b)(1).

**§ 1000.31 May a tribe/consortium be selected to negotiate an annual funding agreement pursuant to section 403(c) without negotiating an annual funding agreement 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 pursuant to section 403(a) and/or section 403(b). A tribe may be selected to negotiate an annual funding agreement pursuant to section 403(c) at the same time that it negotiates an AFA pursuant to 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?**

The consortium's AFA must be reduced by the portion of funds attributable to the withdrawing tribe, 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 bureau must negotiate an appropriate amount on a case-by-case basis.

(b) If a tribe withdraws in the middle of a 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 programs, within 10 days 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 . . .
A BIA program .....	The BIA Area director, the Deputy Commissioner of Indian Affairs, the withdrawing tribe, and the consortium.
A non-BIA program .....	The non-BIA bureau official, the withdrawing tribe, and the consortium.

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

**Subpart C—Section 402(d) Planning and Negotiation Grants Purpose and Types of 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 F of this part.

**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** which 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 identified 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 which 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/consortium's plans for conducting legal and budgetary research;
  - (2) The tribe/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 and 1000.51.

(b) Financial need. The Director will rank applications according to the percent of tribal resources that comprise total resources covered by the latest A-128 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 the OSG to determine if the 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 which may be available from that bureau in accordance with § 1000.160(g).

## 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, which 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?

- (a) Written notification by the governing body or its authorized representative of the tribe/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 the 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. The 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 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 Is there an appeal within DOI of a decision by the Director not to award a grant under this subpart?

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

### § 1000.72 Will the OSG notify tribes/consortia and affected non-BIA bureaus of the results of the selection process?

Yes. The 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 §§ 1000.159–162.

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

### § 1000.78 What is the purpose of this subpart?

This subpart describes the components of annual funding agreements for Bureau of Indian Affairs (BIA) programs.

### § 1000.79 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 the Bureau of Indian Affairs.

## Contents and Scope of Annual Funding Agreements

### § 1000.80 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 § 1000.91.)
- (b) Transferred or to be transferred to the tribe/consortium. (See §§ 1000.94–1000.97.)
- (c) Retained by the BIA to carry out functions that the tribe/consortium could have assumed but elected to leave with BIA. (See § 1000.98.)

### § 1000.81 Can additional provisions be included in an AFA?

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

### § 1000.82 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.

### § 1000.83 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

### § 1000.84 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 which administers the program, including any program identified in section 403(b)(1) of the Act.

**§ 1000.85 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.

**§ 1000.86 Do tribes/consortia need Secretarial approval to redesign BIA programs that the tribe/consortium administers under an AFA?**

No.

(a) 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. In such cases, the Secretary must approve, in accordance with subpart J of this part, the waiver before redesign takes place.

(b) This section does not authorize redesign of programs where other prohibitions exist. Redesign shall not result in the tribe/consortium being entitled to receive more or less funding for the program from the BIA.

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

**§ 1000.87 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.

**Determining AFA Amounts**

**§ 1000.88 What funds must be transferred to a tribe/consortium under an AFA?**

(a) At the option of the tribe/consortium, the Secretary must provide funds to the tribe/consortium through an AFA for programs, including:

(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 the 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/consortium's Pub. L. 93-638 contract amounts;

(2) Negotiated amounts of Agency, Area, 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.

**§ 1000.89 What funds may not be included in an AFA?**

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

**§ 1000.90 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 which are required by law or which are required by the agency to which the appropriation is made.

**§ 1000.91 What are BIA residual funds?**

BIA residual funds are the funds necessary to carry out the inherently federal functions that must be performed by federal officials if all tribes assume responsibilities for all BIA programs.

**§ 1000.92 How is BIA's residual determined?**

(a) Generally, residual levels will be determined through a process that is consistent with the overall process used by the BIA. For purposes of negotiation, by March 1 or within 30 days following release of the President's budget, whichever is later, the Department must publish a notice in the **Federal Register** notifying tribes/consortia of the availability of a list which identifies:

(1) Those functions it believes are residual, in accordance with the definition in § 1000.91;

(2) The legal authority for its determination;

(3) The estimated funding level; and

(4) The organizational level within the BIA where the programs are being performed.

(b) There must be functional consistency throughout BIA in the determination of residuals. The determination must be based upon the functions actually being performed by BIA at the respective office.

(c) The list of residual functions may be amended annually if programs are added or deleted or if statutory or final judicial determinations mandate.

(d) If the BIA and a participating tribe/consortium disagree over the content of the list of residual functions or amounts, a participating tribe/consortium may request the Deputy Commissioner-Indian Affairs to reconsider residual levels for particular programs.

(1) The Deputy Commissioner must make a written determination on the request within 30 days of receiving it.

(2) The tribe/consortium may appeal the Deputy Commissioner's determination to the Assistant Secretary—Indian Affairs.

(3) The decision by the Assistant Secretary—Indian Affairs is final for the Department.

**§ 1000.93 May a tribe/consortium continue to negotiate an AFA pending an appeal of the residual list?**

Yes. Pending appeal of an item on the annual list of residual activities, any tribe/consortium may continue to negotiate an AFA using the Assistant Secretary's list of residual activities. This list will be subject to later adjustment based on the final determination of a tribe/consortium's appeal.

**§ 1000.94 What is a tribal share?**

A tribal share is the amount determined for that tribe/consortium for a particular program at the BIA area, agency, and central office levels.

**§ 1000.95 How is a tribe/consortium's share of funds to be included in an AFA determined?**

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/consortium's amount is determined by first identifying the residual funds to be retained by the BIA to perform its inherently federal functions 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 area 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.

**§ 1000.96 Can a tribe/consortium negotiate a tribal share for programs outside its area/agency?**

Yes. Where BIA services for a particular tribe/consortium are provided from a location outside its immediate agency or area, the tribe may negotiate its share from the BIA location where the service is actually provided.

**§ 1000.97 May a tribe/consortium obtain funding that is distributed on a discretionary or competitive basis?**

Yes. Unless otherwise provided for in this part, funds provided for Indian services/programs which have not been mandated by Congress to be distributed to a competitive/discretionary basis may be distributed by a tribe/consortium under a formula-driven method. In order to receive such funds, a tribe/consortium must be eligible and qualify. A tribe/consortium that receives such funds under a formula-driven methodology would no longer be eligible to compete for these funds.

**§ 1000.98 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 the BIA for certain programs. This is referred to as a "retained tribal share." (See § 1000.80.)

**§ 1000.99 How are savings that result from downsizing allocated?**

Funds that are saved as a result of downsizing in the BIA are allocated to tribes/consortia in the same manner as tribal shares as provided for in § 1000.95.

**§ 1000.100 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.

**§ 1000.101 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 the 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 between areas.

(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**

**§ 1000.102 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 which 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/consortium's Pub. L. 93-638 contract amounts;
- (2) Negotiated agency, area, and central office amounts;
- (3) Other recurring funding;
- (4) Special projects, if applicable;
- (5) Programmatic shortfall;

(6) Tribal priority allocation increases and decreases (including contract support funding);

(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.

**§ 1000.103 Once a tribe/consortium establishes a base budget, are funding amounts renegotiated each year?**

No. Unless the tribe/consortium desires to renegotiate these amounts. If the tribe/consortium renegotiates funding levels, 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. Self-governance tribes/consortia will be eligible for funding amounts of new programs or available programs not previously included in the AFA on the same basis as other tribes.

**§ 1000.104 Must a tribe/consortium with a base budget or base budget-eligible program amounts negotiated before the implementation of this part negotiate new tribal shares and residual amounts?**

No.

(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 negotiate all funding included in the AFA utilizing 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.

**§ 1000.105 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 the BIA's budget justification for the following year, subject to Congressional appropriation.

**§ 1000.106 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 the 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 between areas.

(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 such 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****§ 1000.110 What is the purpose of this subpart?**

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

**§ 1000.111 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 description of that portion or portions of a bureau program that are to be performed by the tribe/consortium and associated funding, terms, and conditions under which the tribe/consortium will assume a program, or portion thereof.

**Eligibility****§ 1000.112 What non-BIA programs are eligible for inclusion in an annual funding agreement?**

Programs authorized by sections 403(b)(2) and section 403(c) of the Act are eligible for inclusion in AFAs. The

Secretary will annually publish a list of these programs in accordance with section 405(c)(4).

**§ 1000.113 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).

**§ 1000.114 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 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 and 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 medicines or materials such as grasses for basket weaving; or
- (3) Other traditional activities, including, but not limited to, subsistence hunting, fishing, and gathering.

**§ 1000.115 Does the law establish 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.

**§ 1000.116 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 § 1000.117.

**§ 1000.117 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.

**§ 1000.118 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.

**§ 1000.119 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 indicate all of the Secretary's proposed additions and revisions for the coming year with an explanation.

(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 consideration by the Secretary.

(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.

**§ 1000.120 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 § 1000.119.

**§ 1000.121 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.

**§ 1000.122 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.

**§ 1000.123 When will this determination be made?**

It will occur during the pre-negotiation process, subject to the timeframes in §§ 1000.161 and 1000.162.

**Funding**

**§ 1000.124 What funds are to be provided in an AFA?**

The amount of funding to be included in the AFA is determined 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 that does not result in the tribe/consortium being paid twice for the same work when the Office of the Inspector General (OIG) 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.

**§ 1000.125 How are indirect cost rates determined?**

The Department's Inspector General or other cognizant inspector general and the tribe/consortium negotiate indirect cost rates based on the provisions of OMB Circular A-87 or other applicable Office of Management and Budget cost circular and the provisions of Title I of Pub. L. 93-638. These rates are used generally by all federal agencies for contracts and grants with the tribe/consortium, including self-governance agreements. See § 1000.129.

**§ 1000.126 Will the established indirect cost rate always apply to new AFAs?**

No.

(a) A tribe/consortium's existing indirect cost rate should be reviewed and renegotiated with the inspector general or other cognizant agency's inspector general 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) If the previously negotiated rate would result in an underrecovery 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 appropriate inspector general.

**§ 1000.127 How does the Secretary's designee determine the amount of indirect contract support costs?**

The Secretary's designee 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.

**§ 1000.128 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's designee should refer to the appropriate OIG's rates for individual tribes, which 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.

**§ 1000.129 Instead of the appropriate OIG rate, is it possible to establish a fixed amount or 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. 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**

**§ 1000.130 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.

**Subpart G—Negotiation Process for Annual Funding Agreements**

**Purpose**

**§ 1000.150 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, §§ 1000.156-1000.170.

(b) For a participating tribe/consortium negotiating a successor AFA with any bureau, §§ 1000.174-1000.176.

**Negotiating a Self-Governance Compact**

**§ 1000.151 What is a self-governance compact?**

A self-governance compact is an executed document which 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 to a single bureau.

**§ 1000.152 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.

**§ 1000.153 Can a tribe negotiate other terms and conditions not contained in the model compact?**

Yes. The Secretary and a self-governance tribe/consortium may negotiate additional terms relating to the government-to-government relationship between the tribe(s) and the United States. For BIA programs, a tribe/consortium may include any term that may be included in a contract and funding agreement under Title I in the model compact contained in appendix A.

**§ 1000.154 Can a tribe/consortium have an AFA without entering into a compact?**

Yes, at the tribe's/consortium's option.

**§ 1000.155 Are provisions included in compacts that were negotiated before this part is implemented effective after implementation?**

Yes.

(a) All provisions in compacts that were negotiated with the BIA prior to this part being finally promulgated by the Department shall remain in effect for BIA programs only after promulgation of this part, provided that each compact contains:

(1) Provisions that are authorized by the Tribal Self-Governance Act of 1994; and

(2) Are in compliance with other applicable federal laws; and

(3) Are consistent with this part.

(b) The BIA will notify the tribe/consortium with a previously negotiated compact whenever it asserts that a provision in such compact is not in accordance with the foregoing conditions and upon such notification the parties shall renegotiate the provision within 60 days.

(c) If renegotiation is not successful within 60 days of the notice being provided, the BIA's determination is final for the bureau and enforceability of

the provisions shall be subject to the appeals process of this part. Pending a final decision through the appeals process, BIA's determination shall be stayed.

**Negotiation of Initial Annual Funding Agreements**

**§ 1000.156 What are the phases of the negotiation process?**

There are two phases in the negotiation process:

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

**§ 1000.157 Who may initiate the information phase?**

Any tribe/consortium which has been admitted to the program or to the applicant pool may initiate the information phase.

**§ 1000.158 Is it mandatory to go through the information phase before initiating the negotiation phase?**

No. Tribes may go directly to the negotiation phase.

**§ 1000.159 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.

**§ 1000.160 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/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/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 or materials that may be required for the tribe/consortium in the negotiation process.

**§ 1000.161 When should a tribe/consortium submit a letter of interest?**

A letter of interest may be submitted at any time. 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.

**§ 1000.162 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/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);

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

(b) Within 30 calendar days of receipt of the tribe/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 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/consortium's contact and the date by which other available information will be provided; or

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

(c) Information to be made available to the tribe/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 with 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 request in writing that the relevant bureau head make a final decision for the bureau and/or make an appropriate filing under the Freedom of Information Act.

**§ 1000.165 How does a newly selected tribe/consortium initiate the negotiation phase?**

An authorized tribal/consortium official submits a written request to negotiate an AFA under the Act.

**§ 1000.166 To whom does the newly selected tribe/consortium submit the request to negotiate an AFA and what information should it contain?**

(a) For BIA programs, the tribe/consortium should submit the request to negotiate to the Director, OSG. The request should identify the lead negotiator(s) for the tribe/consortium.

(b) For non-BIA bureaus, the tribe/consortium should submit the request to negotiate to the bureau representative

designated to respond to the tribe/consortium's request for information. The request should identify the lead negotiator(s) for the tribe/consortium and, to the extent possible, the specific program(s) that the tribe/consortium seeks to negotiate.

**§ 1000.167 What is the deadline for a newly selected tribe/consortium to submit a request to negotiate an AFA?**

(a) For BIA programs, by April 1 or May 1, respectively, for fiscal year or calendar year tribes/consortia.

(b) For non-BIA programs, by May 1. The request may be submitted later than this date when the bureau and the tribe/consortium agree that administration for a partial year funding agreement is feasible.

**§ 1000.168 How and when does the bureau respond to a request to negotiate?**

Within 15 days of receiving a tribe/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.

(a) 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.

(b) 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. Within 10 days after the meeting:

(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.

**§ 1000.169 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.

**§ 1000.170 What issues must the bureau and the tribe/consortium address at negotiation meetings?**

The negotiation meetings referred to in § 1000.169 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.

**§ 1000.171 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.

**§ 1000.172 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 § 1000.171(b).

**§ 1000.173 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**

#### **§ 1000.174 What is a successor AFA?**

A successor AFA is a funding agreement negotiated after a tribe/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.

#### **§ 1000.175 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.

#### **§ 1000.176 What is the process for negotiating a successor AFA?**

The tribe/consortium and the bureau use the procedures in §§ 1000.169–1000.170.

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

#### **§ 1000.180 What is the purpose of this subpart?**

This subpart prescribes the process which 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 Indian 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 purposes of this subpart, tribal organization means an organization eligible to receive services, contracts, or funds under Section 102 of Pub. L. 93–638.

#### **§ 1000.181 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.

#### **§ 1000.182 What services, contracts, or funds are protected under section 406(a)?**

Section 406(a) protects against the actual reduction or limitation of services, contracts, or funds.

#### **§ 1000.183 Who may raise the issue of limitation or reduction of services, contracts, or funding?**

The 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.

#### **§ 1000.184 When must the 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, the BIA may raise the issue of limitation or reduction of services, contracts, or funding. If the BIA and a participating tribe/consortium disagree over the content of the list of residual functions or amounts, a participating tribe/consortium may ask the Deputy Commissioner—Indian Affairs to reconsider residual levels for particular programs. [See § 1000.92 (d)(1)–(3)]

(b) After the AFA is signed, the BIA must raise the issue of any undetermined funding amounts within 30 days after the final funding level is determined. The BIA may not raise this issue after this period has elapsed.

#### **§ 1000.185 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) Area-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 the negotiating tribe/consortium.

Claims may only be filed within the periods specified in paragraph (a) of this section.

#### **§ 1000.186 What must be included in a finding by the BIA or in a claim by or an affected tribe/consortium or tribal organization regarding the issue of a limitation or reduction of services?**

Written explanation identifying the alleged limitation or reduction of services, contracts, or funding for which it is eligible.

#### **§ 1000.187 How will the BIA resolve a claim?**

All findings and claims timely made in accordance with §§ 1000.184–1000.185 will be resolved in accordance with 25 CFR part 2.

#### **§ 1000.188 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, the BIA must use shortfall funding, supplemental funding, or other available BIA resources; and

(2) In a subsequent AFA year, the 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 the BIA and the participating tribe/consortium.

### **Subpart I—Public Consultation Process**

#### **§ 1000.190 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.

#### **§ 1000.191 Will the bureau contact the tribe/consortium before initiating public consultation for a non-BIA AFA under negotiation?**

Yes. The bureau and the tribe/consortium will discuss the consultation process to be used.

(a) When the public consultation process 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 the public consultation process 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.

**§ 1000.192 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 ten days in advance, at the earliest practical time.

(b) At the time of notifying the tribe/consortium, the bureau will invite the tribe/consortium to participate in and, when not prohibited by law, to co-sponsor or co-facilitate the meeting.

(c) When possible, the bureau and 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 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.

**§ 1000.193 What should the bureau do if it is invited to attend a meeting with respect to the tribe/consortium 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 will notify the tribe/consortium at the earliest practical time, and should encourage the meeting sponsor to invite the tribe/consortium to participate.

**§ 1000.194 Will the bureau and the tribe/consortium share information concerning inquiries about the tribes/consortia and the annual funding agreement?**

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

**Subpart J—Waiver of Regulations**

**§ 1000.200 What regulations apply to self-governance tribes?**

All promulgated regulations that govern the operation of programs included in an AFA will apply unless waived under this subpart. To the maximum extent practical, the parties should identify such regulations in the AFA.

**§ 1000.201 Can the Secretary grant a waiver of regulations to a tribe/consortium?**

Yes. A tribe/consortium may request the Secretary to grant a waiver of all or any part of the Department of the Interior regulation(s) applicable to a program, in whole or in part, operated by a tribe/consortium under an AFA.

**§ 1000.202 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.

**§ 1000.203 When can a tribe/consortium request a waiver of a regulation?**

A tribe/consortium may request waiver of a regulation;

- (a) As part of the negotiation process; and
- (b) After an AFA has been executed.

**§ 1000.204 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;
  - (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.

**§ 1000.205 Are such meetings or discussions mandatory?**

No.

**§ 1000.206 On what basis may the Secretary deny a waiver request?**

The Secretary may deny a waiver request if:

- (a) For a BIA program, the requested waiver is prohibited by federal law; or
- (b) For a non-BIA program, the requested waiver is
  - (1) Prohibited by federal law; or
  - (2) Inconsistent with the express provisions of the AFA.

**§ 1000.207 What happens if the Secretary denies the 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) That the tribe/consortium may request reconsideration of the denial.

**§ 1000.208 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 Indian tribes, individual Indians or Indians with trust allotments (section 406(b)); or
- (g) When it would violate federal case law.

**§ 1000.209 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 officials of the relevant bureau must negotiate to develop a suggested substitution.

**§ 1000.210 How is a waiver request 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.

**§ 1000.211 How does a tribe/consortium request a 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.

**§ 1000.212 Is there a deadline for the agency to respond to a request for reconsideration?**

Yes. 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****§ 1000.220 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;
- (2) Housing Improvement Program or road maintenance program activities of the 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 § 1000.226 of this subpart.

**§ 1000.221 Is an agency relationship created by this subpart?**

No, except as provided by federal law, by the provisions of an AFA or by federal actions taken pursuant to this subpart which constitutes an agency relationship.

**§ 1000.222 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.

**§ 1000.223 What provisions must be included in an AFA that contains a construction program?**

As part of an AFA which contains a construction program, the following requirements must be addressed:

- (a) The manner in which 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) Applicable federal laws, program statutes, and regulations;

(c) 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, such 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.

(e) The Secretary may require a tribe/consortium to suspend all or part of the work under a construction portion of an AFA for up to 30 days for reasons such as differing site conditions that adversely affect health and safety or the discovery of work that fails to

substantially carry out the terms of the AFA without good cause. Reasons for suspension other than specified in this paragraph must be specifically negotiated in the AFA.

(1) Unless otherwise required by federal law, before suspending work the Secretary must provide a 5-working-day written notice and an opportunity for the Indian tribe/consortium to correct the problem.

(2) 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-specific funds available in the AFA must be used for this purpose.

**§ 1000.224 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.

**§ 1000.225 Must an AFA that contains a construction project or activity incorporate 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.

**§ 1000.226 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 which are required for such a project. The project must be completed in accordance with the terms and conditions set forth in the AFA.

**§ 1000.227 What role does the Indian tribe/consortium have regarding 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.

**§ 1000.228 What role does the Secretary have regarding 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 § 1000.223, 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.

**§ 1000.229 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.

**§ 1000.230 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 this part, a finding of substantial failure to carry out the terms of the AFA without good cause must be processed pursuant to the suspension of work provision of § 1000.223(e).

(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 Contracts Dispute Act.

**Subpart L—Federal Tort Claims**

**§ 1000.240 What does this subpart cover?**

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

(a) Claims arising out of the performance of functions under self-governance AFAs; and

(b) Procedures for filing claims under the FTCA.

**§ 1000.241 What principal statutes and regulations apply to FTCA coverage?**

The Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671–2680) and related Department of Justice regulations at 28 CFR 14.

**§ 1000.242 Do tribes/consortia need to be aware of areas which the FTCA does not cover?**

Yes. There may be claims against self-governance tribes/consortia which are not covered by the FTCA, claims which may not be pursued under the FTCA, and remedies that are excluded by the FTCA. This section contains general guidance on these matters but is not intended as a definitive description. Coverage is subject to review by the Department of Justice and the courts on a case-by-case basis.

(a) *Claims expressly barred by the FTCA and which therefore may not be made against the United States or an*

*Indian tribe/consortium.* Any claim 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) *Claims which may not be pursued under the FTCA.*

(1) Claims against contractors arising out of the performance of contracts with self-governance tribes/consortia;

(2) Claims for on-the-job injuries that are covered by worker's compensation;

(3) Claims for breach of contract rather than tort claims;

(4) Claims resulting from activities performed by an employee which are outside the scope of employment; or

(5) A claim which is brought for a violation of a statute of the United States under which an action against an individual is otherwise authorized.

(c) *Remedies expressly excluded by the FTCA and therefore barred.*

(1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674;

(2) other remedies not permitted under applicable law; and

(3) Interest before judgment.

**§ 1000.243 Is there a deadline for filing FTCA claims?**

Yes. Claims must be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

**§ 1000.244 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?**

Six months.

**§ 1000.245 Is it necessary for a self-governance AFA to include any clauses about FTCA coverage?**

No, it is optional. At the request of Indian tribes/consortia self-governance AFAs must 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 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.

**§ 1000.246 Does the FTCA apply to a self-governance AFA if the FTCA is not referred to in the AFA?**

Yes.

**§ 1000.247 To what extent must the tribe/consortium cooperate with the federal government in connection with tort claims arising out of the tribe/consortium's performance?**

A tribe/consortium must follow the requirements in this section if a tort claim (including any proceeding before an administrative agency or court) is filed against the tribe/consortium or any of its employees that relates to performance of a self-governance AFA or tribal contract.

(a) The tribe/consortium must designate an individual to serve as tort claims liaison with the federal government.

(b) The tribe/consortium must notify the Assistant Solicitor immediately in writing, as required by 28 U.S.C. 2679(c) and § 1000.254.

(c) The tribe/consortium, through its designated tort claims liaison, must help the appropriate federal agency prepare 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 whether any person involved was cited for violating a federal, state, or tribal law, ordinance, or regulation;

(7) The tribe/consortium's determination 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 terms of an AFA when 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 must 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 must assign and subrogate all the tribe/consortium's rights and claims (except those against the federal government) arising out of a tort claim against the tribe/consortium cognizable under the FTCA.

(f) If requested by the Secretary, the tribe/consortium must authorize representatives of the Secretary to settle or defend any tort claim cognizable under FTCA and to represent the tribe/consortium in or take charge of any such action.

(g) If the federal government undertakes the settlement or defense of any claim or action, the tribe/consortium must provide all reasonable additional assistance in reaching a settlement or asserting a defense.

**§ 1000.248 Does this coverage extend to contractors of self-governance AFAs?**

No. Contractors or grantees providing services to the tribe/consortium are generally not covered.

**§ 1000.249 Are federal employees assigned to a self-governance tribe/consortium under the Intergovernmental Personnel Act covered by the FTCA?**

Yes. Federal employees assigned to a self-governance tribe/consortium under the Intergovernmental Personnel Act are covered by the FTCA to the same extent that they would be if working directly for a federal agency.

**§ 1000.250 Is the FTCA the exclusive remedy for a tort claim arising out of the performance of a self-governance AFA?**

Yes.

**§ 1000.251 To what claims against self-governance tribes/consortia does the FTCA apply?**

It applies to all tort claims arising from the performance of self-governance AFAs under the authority of Pub. L. 93-638, as amended, on or after October 1, 1989.

**§ 1000.252 Does the FTCA cover employees of self-governance tribe/consortia?**

Yes. If employees are working within the scope of an AFA, they are considered part of the Department of the Interior for FTCA purposes.

**§ 1000.253 How are tort claims filed for the Department of the Interior?**

Tort claims arising out of the performance of self-governance AFAs should be filed with the appropriate designated Department of the Interior official and with the Assistant Solicitor, Branch of Procurement and Patents, Division of General Law, Office of the Solicitor, Department of the Interior, 1849 C Street NW., Washington, DC 20240.

**§ 1000.254 What should a self-governance tribe/consortium or tribe's/consortium's employee do on receiving a tort claim?**

The tribe/consortium or tribe's/consortium's employee should immediately notify the appropriate designated Department of the Interior official and the Assistant Solicitor, Branch of Procurement and Patents, Division of General Law, Office of the Solicitor, Department of the Interior, 1849 C Street NW., Washington, DC 20240, and the tribe/consortium's tort claims liaison.

**§ 1000.255 If the tribe/consortium or its employee receives a summons and/or complaint alleging a tort covered by the FTCA, what should a tribe/consortium or employee do?**

The tribe/consortium or tribe's/consortium's employee should immediately notify the appropriate designated Department of the Interior official and the Assistant Solicitor, Branch of Procurement and Patents, Division of General Law, Office of the Solicitor, Department of the Interior, 1849 C Street NW., Washington, DC 20240, and the tribe/consortium's tort claims liaison.

**Subpart M—Reassumption**

**1000.259 What is the purpose of this subpart?**

This subpart explains when the Secretary can reassume a program without the consent of a tribe/consortium.

**§ 1000.260 When may the Secretary reassume a federal program operated by a tribe/consortium under an annual funding agreement?**

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.

**§ 1000.261 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.

**§ 1000.262 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.

**§ 1000.263 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.

**§ 1000.264 In an imminent jeopardy situation, what is the Secretary required to do?**

(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.

**§ 1000.265 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.

**§ 1000.266 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.

**§ 1000.267 What will the notice of reassumption include?**

The notice of reassumption 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 which must be taken by the tribe/consortium to eliminate imminent jeopardy.

(c) A notice that funds to carry out the program 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.

**§ 1000.268 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.

**§ 1000.269 What information must the tribe/consortium's response contain?**

(a) The tribe/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.

**§ 1000.270 How will the Secretary reply to the tribe/consortium's response?**

The Secretary will make a written determination within 10 days of the tribe/consortium's written response as to whether the proposed measures will eliminate the finding of imminent jeopardy.

**§ 1000.271 What happens if the Secretary accepts the tribe/consortium's proposed measures?**

The Secretary must notify the tribe/consortium in writing of the acceptance and suspend the reassumption process.

**§ 1000.272 What happens if the Secretary does not accept the tribe/consortium's proposed measures?**

(a) If the Secretary finds that the tribe/consortium's proposed measures will not mitigate imminent jeopardy, he/she will notify the tribe/consortium in writing of this determination and of the tribe/consortium's right to appeal.

(b) After the reassumption, the Secretary is responsible for administering the reassumed program and will take appropriate corrective action to eliminate the imminent jeopardy, which may include sending Department employees to the site.

**§ 1000.273 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 if otherwise provided in the AFA.

**§ 1000.274 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.

**§ 1000.275 May the tribe/consortium be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of recession?**

Yes, to the extent that funds are available.

**§ 1000.276 Is a tribe/consortium's general right to negotiate an annual funding agreement adversely affected by a reassumption action?**

A reassumption action taken by the Secretary does not affect the tribe/consortium's ability to negotiate an AFA for programs not affected by the reassumption.

**§ 1000.277 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 which caused jeopardy to attach do not reoccur.

**Subpart N—Retrocession****§ 1000.289** What is the purpose of this subpart?

This subpart explains what happens when a tribe/consortium voluntarily returns a program to a bureau.

**§ 1000.290** 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.

**§ 1000.291** Who may retrocede a program in an annual funding agreement?

A tribe/consortium. However, the right of a consortium member to retrocede may be subject to the terms of the agreement among the members of the consortium.

**§ 1000.292** 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.

**§ 1000.293** 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.

**§ 1000.294** What effect will retrocession have on the tribe/consortium's existing and future annual funding agreements?

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.

**§ 1000.295** What obligation does the tribe/consortium have to return funds that were used in the operation of the 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.

**§ 1000.296** What obligation does the tribe/consortium have to return property that was used in the operation of the retroceded program?

On the effective date of any retrocession, the tribe/consortium must return all property and equipment, and title thereto:

- (a) 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.

**§ 1000.297** What happens to a tribe/consortium's mature contractor status if it retrocedes a program that is also available for self-determination contracting?

Retrocession has no effect on mature contractor status, provided that the three most recent audits covering activities administered by the tribe have no unresolved material audit exceptions.

**§ 1000.298** How does retrocession effect 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****§ 1000.310** 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.

**§ 1000.311** 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 in the event that trust assets or resources are found to be in imminent jeopardy.

**§ 1000.312** 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. (See for example 25 CFR 272.2(r))

(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.

**§ 1000.313** 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****§ 1000.314** 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.

**§ 1000.315** 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 § 1000.324.

(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 (e) 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 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) 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;

(7) Document deficiencies in the performance of trust function discovered during the review process.

(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.

**§ 1000.316 May the trust evaluation process be used for additional reviews?**

Yes, if the parties agree.

**§ 1000.317 Can an initial review of the status of the trust asset be conducted?**

If the parties agree and it is practical, the status of the trust resource may be determined at the time of the transfer of the function or at a later time.

**§ 1000.318 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?**

(a) The representative(s) must prepare a written report documenting the results of the trust evaluation.

(b) 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.

(c) The representative(s) will attach to the report any tribal/consortium comments that the representative does not accept.

**§ 1000.319 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.

**§ 1000.320 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.

**§ 1000.321 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.

**§ 1000.322 What if the trust evaluation reveals problems which do not rise to the level of imminent jeopardy?**

Where problems 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 the tribe on whose behalf the consortium is performing the trust functions.

**§ 1000.323 Who is responsible for corrective action?**

The tribe/consortium is primarily responsible for identifying and implementing corrective actions, but the

Department may also suggest possible corrective measures for tribal consideration.

**§ 1000.324 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.

**§ 1000.325 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.

**§ 1000.326 Will the Department evaluate a tribe/consortium's performance of non-trust related programs?**

This depends on the terms contained in the AFA.

**Subpart P—Reports**

**§ 1000.339 What is the purpose of this subpart?**

This subpart describes what reports are developed under self-governance.

**§ 1000.340 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 § 1000.341.

**§ 1000.341 What will the tribe/consortium's annual report on self-governance address?**

(a) The report will 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/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**

**§ 1000.352 How can a tribe/consortium hire a federal employee to assist with the implementation of an annual funding agreement?**

If a tribe/consortium chooses to hire a Federal employee, it can:

(a) Use its own tribal personnel hiring procedures. Federal employees are separated from federal service;

(b) "Direct hire" 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 which is paid for by the tribe/consortium out of AFA program funds; or

(c) Negotiate an agreement under the Intergovernmental Personnel Act, 25 U.S.C. 48, or other applicable federal law.

**§ 1000.353 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.

**§ 1000.354 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 pursuant to section 108 of 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 recordkeeping 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.

**§ 1000.355 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.

**§ 1000.356 How will payments be made to self-governance tribes/tribal consortia?**

Payments must be made in advance, as expeditiously as feasible in compliance with any applicable federal laws. At the option of the tribe/consortia, payments must be paid on an annual, semi-annual, or other basis.

**§ 1000.357 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.*

**§ 1000.358 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.

**§ 1000.359 Does a tribe/consortium have additional ongoing requirements to maintain minimum standards for tribe/consortium management systems?**

Yes. The tribe/consortium must maintain systems and practices at least comparable to those in existence when the tribe/consortium entered the self-governance program.

**§ 1000.360 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 under § 1000.362.

**§ 1000.361 Can a tribe/consortium carry over funds not spent during the term of the AFA?**

For BIA programs, services, functions or activities, notwithstanding any other provision of law, any funds appropriated pursuant to the Snyder Act of 1921 (42 Stat. 208), for any fiscal year which are not obligated or expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation or expenditure during such succeeding fiscal year. In the case of amounts made available to a tribe/consortium under an annual funding agreement, 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 or for which they are authorized to be used pursuant to the provisions of Section 106 (a)(3), 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.

**§ 1000.362 After a non-BIA annual funding agreement 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 only under the following circumstances:

(a) Retrocession;

(b) Reassumption;

(c) For construction, when there are special legal requirements; or

(d) As otherwise provided for in the AFA.

**§ 1000.363 How can a person or group appeal a decision or contest an action related to a program operated by a tribe/consortium under an annual funding agreement?**

(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 pursuant to an AFA must first exhaust tribal administrative due process rights. After that, the person or group may bring an appeal under 25 CFR part 2.

(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 bureau's appeal procedures.

**§ 1000.364 Must self-governance tribes/consortia comply with the Secretarial approval requirements of 25 U.S.C. 81 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 and 25 U.S.C. 476, do not apply to attorney and other professional contracts by participating tribes/consortia.

**§ 1000.365 Can funds provided under a self-governance annual funding agreement be treated as non-Federal funds for the purpose of meeting matching requirements under any federal law?**

Yes. Self-governance AFA funds are eligible to be treated as non-federal funding for the purpose of meeting matching requirements under federal law.

**§ 1000.366 Will Indian preference in employment, contracting, and subcontracting apply to services, activities, programs, and functions performed under a self-governance annual funding agreement?**

Tribal law must govern Indian preference in employment, where permissible, in contracting and subcontracting in performance of an AFA.

**§ 1000.367 Do the wage and labor standards in the Davis-Bacon Act of March 3, 1931 (40 U.S.C., 276a-276a-f) (46 Stat. 1494), as amended and with respect to construction, alteration and repair, the Act of March 3, 1921, apply to tribes and tribal consortia?**

No. Wage and labor standards 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.

**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 pursuant to 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, pursuant to 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, which 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 which 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 rights pursuant to 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 pursuant to 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 pursuant to the Act. The tribe pledges to practice utmost good faith in upholding its responsibility to provide such programs, pursuant to 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*

Pursuant to 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 pursuant to 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 pursuant to 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 pursuant to 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, \_\_\_\_\_ 19\_\_\_\_.

THE \_\_\_\_\_ Tribe

The Department of the Interior.

By: \_\_\_\_\_

By: \_\_\_\_\_

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