

UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D.C. 20240

March 5, 1998

In Reply Refer To:  
8160 (240) N

EMS TRANSMISSION 3/5/98  
Information Bulletin No. 98-88

To: SDs and WO Officials  
Attn: Native American Coordinators

From: Group Manager, Cultural Heritage, Wilderness, Special Areas & Paleontology

Subject: Bureau of Land Management (BLM) Comments on 25 CFR Part 1000: Self-Governance, Proposed Rule DD: 4/10/98

On February 12, 1998, the Department of the Interior (DOI), Bureau of Indian Affairs (BIA), published a proposed rule implementing Title IV of P.L. 93-638, the Indian Self-Determination and Education Assistance Act, as amended by Title II of P.L. 103-413, the Tribal Self-Governance Act of 1994. The proposed rule has been negotiated among representatives of Self-Governance Tribes and the DOI. The BLM participated in the negotiated rulemaking process; I served as the bureau's representative.

The regulations published in the Federal Register ask for comments by May 13, 1998. The proposed rule is 50 pages in length. Approximately half of the text is preamble to the rule. This is due to the fact that the negotiated rulemaking process surfaced fundamental disagreements between the DOI and the tribes on legal interpretations of many sections of the law, especially those applying to non-BIA bureaus and their programs. As a result, only portions of the rule could be agreed upon by the Federal-tribal teams. These sections are published for comment. They are preceded by a lengthy preamble, which outlines key areas of disagreement and asks for comments on both the Federal and tribal positions.

The intended effect of the Self-Governance Act is to transfer to participating tribes control of, funding for, and decision making concerning certain Federal programs. Since the law allows Self-Governance tribes an opportunity to enter into annual funding agreements to assume responsibility for non-BIA programs which are of special geographic, historical or cultural significance to the tribes, the potential impact on the BLM and its programs could be significant. Therefore, it is essential that the BLM managers and relevant staff comment on the proposed rule. **Note: the Self-Governance Act is different from the Self-Determination (638) contracting program: Regulations for the 638 contracting program have already been issued in final.**

We are asking that all States and Washington Office (WO) Directorates and bureauwide offices participate in this review. It would be most helpful if comments from States, WO Directorates and bureauwide offices could be consolidated before submission. Since many BLM Field Offices have had little involvement in this program to date, it may be sufficient for the State Native American Coordinator to supply comments, drawing on expertise in the State as needed. We presume that all offices can obtain access to copies of the Self-Governance Act (Title IV of the Indian Self-Determination Act Amendments of 1994, October 25, 1994 (P.L. 103-413) and the Federal Register notice of proposed rules, contained at FR, vol. 63, no. 29, February 12, 1998, pp. 7201-7251. If you are unable to obtain a copy, please call the contact persons listed below.

In order to assist the process of developing a bureauwide report, we recommend the following format be used in the comment process.

### **INTRODUCTORY COMMENTS**

States and WO Directorates should indicate the extent to which they have been affected by the Self-Governance Act to date, that is, been approached by a Self-Governance tribe with an interest in negotiating an annual funding agreement with the BLM. Only certain tribes are participating in the Self-Governance program, so all States have not been affected equally. However, we are interested in ensuring that any specific State experience with the program is incorporated into BLM comments.

### **KEY AREAS OF DISAGREEMENT (Preamble: pp. 7203-7220)**

States and WO Directorates are asked to comment on sections of the preamble which are relevant to BLM and about which they feel they have sufficient background to comment. **ALL States and WO Directorates are asked to comment on the first area of disagreement, called "General Issues," pp. 7203-7204. This is at the heart of the disagreement between the Department and the tribes. The Secretary of the Interior has held throughout the rulemaking process that Directors of non-BIA bureaus have discretion to enter or not enter into annual funding agreements regarding non-Indian programs, including terms and conditions to be met in taking over such programs.**

The format to be followed for commenting on the preamble section should look like this:

pp. 7203-04: General Issues  
(comment)

p. 7204: BIA/Non-BIA References  
(comment)

p. 7204: Annual Funding Agreements  
(comment)

(Continue as above through the preamble, as appropriate; skipped sections do not need to be noted.)

**PROPOSED RULE (Body of the agreed upon proposed rule: pp. 7228-7251)**

Offices should comment upon those portions of the rule which are relevant to BLM and about which they feel they have knowledge. (Some portions apply only to BIA programs.) The outline on pp. 7224-7228 can help to guide the process of determining relevant sections. It is very important to comment on relevant sections of the rule itself, since they represent agreed upon language by the Federal-tribal teams and, if there are no substantive objections or suggestions by outside commenters, could be published as final regulation.

The format to be followed in commenting on this part of the rule should look like this:

1000.1 Authority  
(comment)

1000.2 Definitions  
(comment)

(Continue as above through the regulation, as appropriate; skipped sections do not need to be noted.)

In addition to this comment process, we ask you to alert those public land user groups and others who may wish to comment, that this proposed rule has been published. In this manner, we can ensure broad public participation in this important process.

**DEADLINE: Comments are due to WO (240), attention Sheila Morton, by COB April 10, 1998. Copies should also be supplied in electronic format to smorton.**

Jan Townsend, Native American Coordinator for the Eastern States Office, has agreed to work with a committee of field Native American Coordinators to compile the comments. If you have questions concerning this review, please call Jan Townsend at (703) 440-1678, or me at (202) 452-0331.

Signed by:  
Marilyn W. Nickels, Ph.D.  
Group Manager, Cultural Heritage  
Wilderness, Special Areas & Paleontology

Authenticated by:  
Robert M. Williams  
Directives, Records  
& Internet Group, WO540

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Part II

Department of the Interior

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Bureau of Indian Affairs

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25 CFR Part 1000

Tribal Self-Governance; Proposed Rule

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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.

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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 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

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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

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(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 Sec. 1000.83. Consistent with Sec. 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

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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(1)). 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

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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(1) 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:

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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

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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(I)(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

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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

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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 Sec. 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. 450l) 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

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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

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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:

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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(1)) states:

(1) 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 Sec. 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(1)). The federal proposal delineates limited circumstances that would not allow

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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(1)),

(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; (1)), 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

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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, contracts, 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

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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

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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

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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.

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#### 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.

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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

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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,

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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 Consortiums 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?

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### 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?

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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?

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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?

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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?

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1000.169 What is the process for conducting the negotiation phase?

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1000.181 To whom does this subpart apply?

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

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1000.202 How does a tribe/consortium obtain a waiver?

1000.203 When can a tribe/consortium request a waiver of a

regulation?

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1000.205 Are such meetings or discussions mandatory?

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

1000.207 What happens if the Secretary denies the waiver request?

1000.208 What are examples of waivers prohibited by law?

1000.209 May a tribe/consortium propose a substitute for a regulation it wishes to be waived?

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1000.220 What construction programs included in an AFA are subject to this subpart?

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1000.224 May a tribe/consortium continue work with construction funds remaining in an AFA at the end of the funding year?

1000.225 Must an AFA that contains a construction project or activity incorporate federal 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?

1000.227 What role does the Indian tribe/consortium have regarding a construction program included in an AFA?

1000.228 What role does the Secretary have regarding a construction program in an AFA?

1000.229 How are property and funding returned if there is a reassumption for substantial failure to carry out an AFA?

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?

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1000.240 What does this subpart cover?

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

1000.243 Is there a deadline for filing FTCA claims?

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FTCA claim after the claim is received by the federal agency, before a lawsuit may be filed?

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

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

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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?

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

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

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

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

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

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

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

1000.265 Must the Secretary always reassume a program, upon a finding of imminent jeopardy?

1000.266 What happens if the Secretary's designated representative determines that the tribe/consortium cannot mitigate the conditions within 60 days?

1000.267 What will the notice of reassumption include?

1000.268 How much time will a tribe/consortium have to respond to a notice of imminent jeopardy?

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

- 1000.270 How will the Secretary reply to the tribe/consortium's response?
- 1000.271 What happens if the Secretary accepts the tribe/consortium's proposed measures?
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- 1000.273 What must a tribe/consortium do when a program is reassumed?
- 1000.274 When must the tribe/consortium return funds to the Department?
- 1000.275 May the tribe/consortium be reimbursed for actual and reasonable ``wind up costs" incurred after the effective date of recession?
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- 1000.292 How does a tribe/consortium retrocede a program?
- 1000.293 When will the retrocession become effective?
- 1000.294 What effect will retrocession have on the tribe/consortium's existing and future annual funding agreements?
- 1000.295 What obligation does the tribe/consortium have to return funds that were used in the operation of the retroceded program?
- 1000.296 What obligation does the tribe/consortium have to return property that was used in the operation of the retroceded program?
- 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?
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#### Subpart O--Trust Evaluation Review

- 1000.310 What is the purpose of this subpart?
- 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?
- 1000.312 What are ``trust resources" for the purposes of the trust evaluation process?
- 1000.313 What are ``trust functions" for the purposes of the trust evaluation process?

## Annual Trust Evaluations

- 1000.314 What is a trust evaluation?
- 1000.315 How are trust evaluations conducted?
- 1000.316 May the trust evaluation process be used for additional reviews?
- 1000.317 Can an initial review of the status of the trust asset be conducted?
- 1000.318 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?
- 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?
- 1000.320 Will the annual review include a review of the Secretary's residual trust functions?
- 1000.321 What are the consequences of a finding of imminent jeopardy in the annual trust evaluation?
- 1000.322 What if the trust evaluation reveals problems which do not rise to the level of imminent jeopardy?
- 1000.323 Who is responsible for corrective action?
- 1000.324 What are the requirements of the review team report?
- 1000.325 Can the Department conduct more than one trust evaluation per tribe per year?
- 1000.326 Will the Department evaluate a tribe/consortium's performance of non-trust related programs?

## Subpart P--Reports

- 1000.339 What is the purpose of this subpart?
- 1000.340 How is information about self-governance developed and reported?
- 1000.341 What will the tribe/consortium's annual report on self-governance address?

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- 1000.352 How can a tribe/consortium hire a federal employee to assist with the implementation of an annual funding agreement?
- 1000.353 Can a tribe/consortium employee be detailed to a federal service position?
- 1000.354 How does the Freedom of Information Act apply?
- 1000.355 How does the Privacy Act apply?
- 1000.356 How will payments be made to self-governance tribes/tribal consortia?
- 1000.357 What audit requirements must a self-governance tribe/consortium follow?
- 1000.358 Do OMB circulars and revisions apply to self-governance funding agreements?
- 1000.359 Does a tribe/consortium have additional ongoing requirements to maintain minimum standards for tribe/consortium management systems?

- 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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- 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?
- 1000.367 Do the wage and labor standards in the Davis-Bacon Act of March 3, 1931 (40 U.S.C., Sec. 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?

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

Sec. 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.

Sec. 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 Sec. 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 Sec. 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.

### Sec. 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

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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

Sec. 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

#### Sec. 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.

#### Sec. 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.

#### Sec. 1000.12 What is a ``signatory"?

A signatory is an Indian tribe or consortium that meets the eligibility criteria in Sec. 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.

Sec. 1000.13 What is a "nonsignatory tribe"?

A nonsignatory tribe is an Indian tribe that either:

(a) Does not meet the eligibility criteria in Sec. 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 Sec. 1000.15; or

(b) Meets the eligibility criteria in Sec. 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

Sec. 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.

Sec. 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.

Sec. 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 Sec. 1000.17.

Sec. 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 Secs. 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 Sec. 1000.21.

Sec. 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 Secs. 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.

Sec. 1000.19 What is done during the "planning phase"?

The Act requires that all tribes/consortia seeking to participate in tribal

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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.

#### Sec. 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.

#### Sec. 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 Sec. 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 Sec. 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.

#### Sec. 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 Sec. 1000.16.

## Admission Into the Applicant Pool

Sec. 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 Sec. 1000.17.

Sec. 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.

Sec. 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 Sec. 1000.17.

Sec. 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 Sec. 1000.17(c); or
- (b) Submits to OSG a tribal resolution and/or official action by the tribal governing body requesting removal.

Sec. 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.

Sec. 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.

Sec. 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 Sec. 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.

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Sec. 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).

Sec. 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

Sec. 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.

Sec. 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.

Sec. 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.

##### Sec. 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

Sec. 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 Sec. 1000.45.

Sec. 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.

Sec. 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

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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.

Sec. 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

Sec. 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.

Sec. 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 Sec. 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.

Sec. 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

Sec. 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.

Sec. 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).

Sec. 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.

Sec. 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 Secs. 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.

Sec. 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 Secs. 1000.46-1000.48.

Sec. 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.

Sec. 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

Sec. 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.

Sec. 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 Sec. 1000.160(g).

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### Eligibility and Application Process

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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 Sec. 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.

Sec. 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 Sec. 1000.70.

Sec. 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.

Sec. 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.

Sec. 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)

Sec. 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.

Sec. 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.

Sec. 1000.73 Once a tribe/consortium has been awarded a grant, may the tribe/consortium obtain information from a non-BIA bureau?

Yes. See Secs. 1000.159-162.

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

Sec. 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.

Sec. 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

Sec. 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 Sec. 1000.91.)

(b) Transferred or to be transferred to the tribe/consortium. (See Sec. Sec. 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 Sec. 1000.98.)

Sec. 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.

Sec. 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.

Sec. 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

Sec. 1000.84 What types of programs may be included in an AFA?

A tribe/consortium may include in its AFA programs administered by BIA,

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without regard to the BIA agency or office which administers the program, including any program identified in section 403(b)(1) of the Act.

Sec. 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.

Sec. 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.

Sec. 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

Sec. 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.

Sec. 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.

Sec. 1000.90 May the Secretary place any requirements on programs and funds that are otherwise available to tribes/consortia or Indians for  
whi