



# United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

July 1, 2024

Dear Tribal Leader:

The Department of the Interior (Department) is pleased to announce its proposed rule amending regulations governing implementation of subchapter IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) and the Department's Tribal Self-Governance Program. The Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes (PROGRESS) Act called for these updates. Pub. L. No. 116-180 § 413, *as amended by* Pub. L. No. 118-15, § 2102. The Department has submitted the Proposed Rule to the *Federal Register*. Once the proposed rule is published it can be found here: <https://www.federalregister.gov/agencies/indian-affairs-bureau#documents>.

This Proposed Rule came from a Negotiated Rulemaking Committee (Committee) process, as required by the PROGRESS Act, and subject to the Federal Advisory Committee Act. 5 U.S.C. § 1001, et seq., Pub. L. No. 116-180, § 413. Members of the Committee included seven primary Tribal representatives, seven alternate Tribal representatives, six primary Federal representatives, and six alternate Federal representatives. The Committee met 15 times between August 2022 and April 2024 to negotiate and generate text of the Proposed Rule. The Committee's report detailing its deliberations and areas of consensus and non-consensus is available at: <https://www.bia.gov/service/tribal-consultations/self-governance-progress-act-regulations-25-cfr-1000>. The Department extends its sincere gratitude to Tribal and Federal members of the Committee for their extended time investment.

The Department proposes in this letter to schedule the first consultation session on the text of this Proposed Rule related to self-governance with less than 30 days after its publication in the *Federal Register*. See Proposed Rule, § 1000.2615(b). As noted in the Committee's report, scenarios may occur that require the need for Tribal consultation on an expedited basis to address urgent issues related to self-governance. See Committee report at p. 41. Since the Department has authority to issue a final rule only until December 21, 2024, Pub. L. No. 118-15, § 2102, the Department views an expedited consultation schedule on the Proposed Rule as necessary to allow sufficient time for review of comments, Committee negotiations, and issuance of a final rule before that date. These factors support a compressed consultation timeline. The Department has met and conferred with Tribal members of the Committee who have collectively expressed their strong support for the Department to move forward with consultation on this Proposed Rule on a compressed timeline. As the Proposed Rule is not legally effective at present, the Department has neither authority nor obligation to waive applicable notice requirements at the request of a Tribe/Consortium, though the Department reaffirms its commitment to complying with applicable regulations in the future. Therefore, the Department will consult on the text of the Proposed Rule related to self-governance as soon as the rule is published in the *Federal Register*.

Request for Tribal Input on Proposed Rule

Given the nature of collaborative drafting inherent to the Committee’s work, the Department seeks any comments on the enclosed Proposed Rule, including input on the following question:

1. Are there further revisions to the Proposed Rule that the Committee could undertake to support Tribal Self-Governance?

Consultation Schedule and Deadline for Submission of Comments

The Department will conduct three in-person Tribal consultation sessions and one virtual consultation session and will accept oral and written comments. Since the Department has authority to issue a final rule only until December 21, 2024, Pub. L. No. 118-15, § 2102, the Department does not anticipate adding more consultation sessions or extending the comment period on the Proposed Rule identified below.

Please note the Tribal consultation sessions will be closed to the press and the public to protect any confidential information that may be discussed during the sessions. We look forward to speaking with you at one or more of the following sessions:

<b>Date</b>	<b>Time</b>	<b>Location</b>	<b>Notes – Access and Connectivity</b>
Monday, July 15, 2024	1:00pm- 4:00pm PT	Henry M. Jackson Federal Building North Auditorium 915 2nd Ave. Seattle, WA 98174	There is no on-site parking available. Public parking is available at garages and parking lots on 1st Avenue and Western Avenue. Metered street parking is nearby. The Building is located one city block east of Seattle’s main Washington State ferry terminal, which services water taxis on both the Vashon and West Seattle routes as well as passenger and vehicle ferries on the Bainbridge and Bremerton routes. King County Metro bus stops and SoundTransit light rail/train stops are also in close proximity.
Wednesday, July 17, 2024	1:00pm- 4:00pm CT	Minnesota Valley National Wildlife Refuge Auditorium U.S. Fish & Wildlife Service 3815 American Blvd E, Bloomington, MN 55425	Driving Directions from Interstate 494: Exit 34th Ave and head south. At the stop light on American Blvd. East, proceed east for 1/4 mile around the bend and up a small rise to find the entrance on the right.  Access by Metro Transit Blue Line Train: Exit at American Blvd Station and cross 34th Avenue to the east. Proceed east on American Blvd East and follow the sidewalk 1/4 mile around the bend and up a small rise to find the entrance on the right.

Friday, July 19, 2024	1:00pm- 4:00pm MST	U.S. Bureau of Land Management National Training Center Classroom 9828 N 31st Ave Phoenix, AZ 85051	The BLM's National Training offers free parking on the grounds with overflow parking across the street.
Monday, July 22, 2024	1:00pm- 4:00pm ET	Virtual via Zoom	Please register at this link:  <a href="https://tinyurl.com/5938njym">https://tinyurl.com/5938njym</a>

We also welcome your written comments, which must be submitted by email to [consultation@bia.gov](mailto:consultation@bia.gov) by **11:59pm ET on Thursday, August 22, 2024**.

If you have any questions regarding this effort, please contact Samuel Kohn, Senior Counselor to the Assistant Secretary – Indian Affairs, via email at [samuel.kohn@bia.gov](mailto:samuel.kohn@bia.gov), or Meghan Bishop, Senior Counselor to the Assistant Secretary – Indian Affairs, via email at [meghan.bishop@bia.gov](mailto:meghan.bishop@bia.gov).

We look forward to receiving your input on this matter.

Sincerely,



Bryan Newland  
Assistant Secretary – Indian Affairs

Enclosure

Disclaimer: This document is being posted for public awareness only and does not yet have the force and effect of law. This document has been transmitted to the Office of the Federal Register (OFR) for review and is pending filing for public inspection at the OFR and publication in the Federal Register. This version of the regulation is subject to change during the OFR review process. Only the version published in the Federal Register is the official regulation.

**34337-15****DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 1000****[Docket No. BIA-2024-0001; 245A2100DD/AAKC001030/A0A501010.999900]****RIN 1076-AF62****Self-Governance PROGRESS Act Regulations****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Proposed Rule.

**SUMMARY:** The U.S. Department of the Interior (Department), Office of the Assistant Secretary for Indian Affairs, proposes to revise the regulations that 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 Department.

**DATES:**

- *Proposed Regulations:* Please submit your comments on or before August 22, 2024.
- *Tribal Government-to-Government Consultations:* The Department will conduct in-person consultation sessions with federally recognized Tribes on July 15, 2024, July 17, 2024, and July 19, 2024. Additionally, the Department will conduct a virtual consultation session with federally recognized Tribes on July 22, 2024.
- *Information Collection Requirements:* If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the

collection of information contained in this proposed rule between 30 and 60 days after publication of this proposed rule in the *Federal Register*. Therefore, comments should be submitted to OMB (see “Information Collection Requirements” section below under **ADDRESSES**) by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** All comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. You may submit comments by any one of the following methods.

- *Federal eRulemaking Portal:* Please visit <https://www.regulations.gov>. Enter “RIN 1076-AF67” in the webpage’s search box and follow the instructions for submitting comments.
- *Email:* Please send comments to [consultation@bia.gov](mailto:consultation@bia.gov) and include “RIN 1076-AF62 – 25 CFR part 1000” in the subject line of your email.
- *Mail:* Please mail comments to Department of the Interior, Office of Regulatory Affairs and Collaborative Action, 1001 Indian School Road NW, Suite 229, Albuquerque, NM 87104.
- *Accessibility:* On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals can obtain this document in an alternate format, usable by people with disabilities, at the Office of the Assistant Secretary – Indian Affairs, Room 4660, 1849 C Street NW, Washington, DC 20240.
- *Information Collection Requirements:* Written comments and recommendations for the proposed information collection request (ICR)

should be sent within 30 days of publication of this notice to the Office of Information and Regulatory Affairs (OIRA) through [https://www.reginfo.gov/public/do/PRA/icerPublicCommentRequest?ref\\_nbr=202405-1076-004](https://www.reginfo.gov/public/do/PRA/icerPublicCommentRequest?ref_nbr=202405-1076-004) or by visiting <https://www.reginfo.gov/public/do/PRAMain> and selecting “Currently under Review - Open for Public Comments” and then scrolling down to the “Department of the Interior.”

**FOR FURTHER INFORMATION CONTACT:** Oliver Whaley, Director, Office of Regulatory Affairs and Collaborative Action (RACA), Office of the Assistant Secretary – Indian Affairs, Department of the Interior, telephone (202) 738-6065, [consultation@bia.gov](mailto:consultation@bia.gov). Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services.

**SUPPLEMENTARY INFORMATION:** This proposed rule is published in exercise of authority delegated by the Secretary of the Interior (Secretary) to the Assistant Secretary—Indian Affairs (Assistant Secretary; AS–IA) by 209 Department Manual 8 (209 DM 8).

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#### **I. Background**

##### **A. Statutory Authority**

On October 21, 2020, the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes Act (PROGRESS Act) was signed into law. *See* Pub L. 116-180. The PROGRESS Act



amends subchapter I of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 5301, which addresses Indian Self-Determination, and subchapter IV of the ISDEAA, which addresses the Department's Tribal Self-Governance Program.

Section 413 of Pub. L. 116-180, 25 U.S.C. § 5363 directs the Secretary to promulgate regulations using the negotiated rulemaking process to carry out subchapter IV of the ISDEAA, the Department's Tribal Self-Governance Program. Section 413(a)(3) of Pub. L. 116-180 establishes expiration of authority for the promulgation of such regulations. A Committee was established and commenced with the negotiated rulemaking process for this proposed rule. On April 20, 2023, the Committee's authority to promulgate regulations to meet the directive of the Progress Act expired under section 413(a)(3) of the same statute, thus leaving the Committee with no authority to continue the negotiated rulemaking for this proposed rule. Congress, however, on September 30, 2023, extended the Committee's authority until December 21, 2024. Pub. L. 118-15 at section 2102.

The Department is requesting comment on this proposed rule to update regulations implementing Tribal Self-Governance at the Department. While the proposed rule does incorporate terms and processes that may be common to self-governance at the Department of Health and Human Services (HHS) authorized by Title V of ISDEAA, and the Department of Transportation (DOT) authorized by 23 U.S.C. § 207, it is not the intent of this proposed rule to define or regulate any term or process that is applicable to HHS or DOT, even where such terms or processes are common between the agencies. The proposed rule should not be construed to bind HHS or DOT to any particular

interpretation of a term or process. Accordingly, we seek comment on how to incorporate this distinction into a final rule.

This proposed rule has been negotiated by representatives of Self-Governance and non-Self-Governance Tribes, and the Department. The intended effect is to transfer to participating Tribes control of, funding for, and decision making concerning certain Federal programs, consistent with updates contained in the PROGRESS Act. The Department anticipates this proposed rule will have a negligible cost burden for Tribes currently participating in Self-Governance, some startup costs for Tribes not currently participating in Self-Governance, and no new costs to the Federal Government.

### **B. Negotiated Rulemaking Process**

The PROGRESS Act directed the Secretary to adapt negotiated rulemaking procedures regarding the unique context of self-governance and the government-to-government relationship between the United States and Indian Tribes. The PROGRESS Act also called for a negotiated rulemaking committee (Committee) to be established under 5 U.S.C. 565, with membership comprised only of representatives of Federal agencies and Tribal governments, with the Office of Self-Governance (OSG) serving as the lead agency for the Department. The Secretary charged the Committee with developing proposed regulations for the Secretary's implementation of the PROGRESS Act's provisions regarding the Department's Self-Governance Program.

The Department published a *Federal Register* notice on February 1, 2021, 86 FR 7656, announcing the intent to establish a committee and soliciting nominations for membership on the Committee. The Department published a *Federal Register* notice on

May 18, 2022, 87 FR 30256, announcing the formation of the committee and identifying 14 Tribal representatives, and 12 Federal representatives.

To fulfill the requirements for negotiated rulemaking and the Federal Advisory Committee Act, representatives reflect those currently participating in the Tribal Self-Governance Program and those that are not currently participating in, but are interested in, the Tribal Self-Governance Program. In addition, Tribal representatives reflect a balance in terms of geographical location and size of the Tribe. Membership consists of only representatives of Federal and Tribal governments, with OSG serving as the lead agency.

The Committee met fifteen times to negotiate the proposed regulations. The Committee members and technical advisors organized themselves into two subcommittees and used the scheduled subcommittee meetings to develop draft materials and exchange information. The Committee's meeting minutes, and any materials approved by the full Committee, were made a part of the official record.

The Committee reached consensus, as reflected by votes documented in its meeting minutes, on:

- Subpart A (General Provisions);
- Subpart B (Selection of Additional Tribes for Participation in Tribal Self-Governance);
- Subpart C (Planning and Negotiation Grants for BIA Programs);
- Subpart D (Financial Assistance for Planning and Negotiations Activities for Non-BIA Bureau Programs);
- Subpart H (Negotiation Process);

- Subpart I (Final Offer);
- Subpart J (Waiver of Regulations);
- Subpart L (Federal Tort Claims);
- Subpart M (Reassumption);
- Subpart N (Retrocession);
- Subpart O (Trust Evaluation);
- Subpart P (Reports);
- Subpart Q (Operational Provisions);
- Subpart S (Conflicts of Interest); and
- Subpart T (Tribal Consultation Process).

The Committee did not reach consensus on:

- Subpart E (Compacts);
- Subpart F (Funding Agreements for BIA Programs);
- Subpart G (Funding Agreements for Non-BIA Programs);
- Subpart K (Construction); and
- Subpart R (Appeals).

Regardless of the consensus reached thus far, the Department will consider all relevant comments submitted and will make modifications to the proposed rule as the Department determines is appropriate. The Department expressly reserves its right to modify the final rule.

## **II. Subpart-by-Subpart Summary of the Proposed Rule**

The following summary describes each subpart of the Department's proposed regulations to implement the PROGRESS Act. Except for four areas of disagreement discussed below, the proposed regulations are the product of consensus.

#### **A. Subpart A – General Provisions**

This subpart contains the authority, purpose and scope of the proposed rule, and the Congressional and Secretarial policies that will guide the implementation of the ISDEAA, as amended by the PROGRESS Act, by the Secretary and the various bureaus of the Department. The subpart also defines terms used throughout the proposed rule consistent with the PROGRESS Act.

This subpart further clarifies the effect of 25 CFR part 1000 on existing Tribal rights, including Tribal sovereign immunity from suit, the United States' trust responsibility, a Tribe's choice to participate in self-governance, or the issuance of awards by other departments or agencies to Tribes. Additionally, this subpart identifies the application of any agency circular, policy, manual, guidance, or rule adopted by the Department on self-governance Tribes/Consortia.

#### **B. 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 the selection process and eligibility criteria that the Secretary will use to decide whether a Tribe/Consortium may participate. Under the PROGRESS Act, a Tribe/Consortium is eligible to participate in self-governance if it submits documentation to OSG demonstrating: (1) successful completion of a planning phase; (2) a request to participate in self-governance by a Tribal resolution and/or final official

action; and (3) financial stability and financial management capability through evidence of having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency for the three fiscal years preceding the date on which the Tribe/Consortium requests participation. When a Tribe/Consortium submits documentation to participate in self-governance, this proposed rule requires the OSG within 45 days to: (1) select and notify the Tribe/Consortium to participate in self-governance; or (2) notify the Tribe/Consortium that the documentation submitted to participate in self-governance is incomplete.

The OSG Director may select up to 50 eligible Tribes or Consortia for negotiation. If there are more Tribes selected to negotiate in any given year, this proposed rule provides that the first 50 Tribes/Consortia who apply, and are determined to be eligible, will have the option to participate.

This proposed rule also stipulates that a Tribe/Consortium may be selected to negotiate a funding agreement for non-Bureau of Indian Affairs (BIA) programs that are otherwise available to Tribes without first negotiating a funding agreement for BIA programs. However, to negotiate for a non-BIA program under 25 U.S.C. 5363(c) for which the Tribe/Consortium has only a geographic, cultural, or historical connection, the ISDEAA requires that the Tribe/Consortium must first have a funding agreement with the BIA under 25 U.S.C. 5363(b)(1) or any non-BIA bureau under 25 U.S.C. 5363(b)(2). (The term “programs” as used in this proposed rule refers to complete or partial programs, services, functions, or activities (PSFAs)).

This subpart also describes what happens when a Tribe wishes to withdraw from a Consortium's funding agreement. In such instances, the withdrawing Tribe must notify the Consortium, appropriate Department bureau, and OSG of its intent to withdraw 180 days before the effective date of the next funding agreement. Unless otherwise agreed to, the effective date of the withdrawal will be the earlier date of one year after the date of submission of the request, or when the current agreement expires.

In completing the withdrawal, the Consortium's funding agreement 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 funding agreement. If such a basis or methodology does not exist, then the Tribe, the Consortium, appropriate Department bureau, and OSG must negotiate an appropriate amount.

### **C. Subpart C – Planning and Negotiation Grants**

This subpart describes the criteria and procedures for awarding various self-governance negotiation and planning grants. These grants are discretionary and will be awarded by the OSG Director. The award amount and number of grants depends upon Congressional appropriations. 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 to join self-governance and then submit a letter affirming its readiness to negotiate and requesting a negotiation grant. This subpart further provides that a Tribe/Consortium may elect to negotiate a self-governance

agreement if selected 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 joining self-governance.

**D. Subpart D – Financial Assistance for Planning and Negotiations Activities for Non-BIA Programs**

This subpart describes the additional requirements and criteria applicable to receiving financial assistance to assist Tribes/Consortia with planning and negotiating for funding agreements involving non-BIA programs. This financial assistance is available to any Tribe/Consortium that:

- (a) Applied to participate in self-governance;
- (b) Has been selected to participate in self-governance; or
- (c) Has negotiated and entered into an existing funding agreement.

Subject to the availability of funds, this subpart requires the Secretary to publish a notice in the *Federal Register* that includes the number of available grants, application process, award criteria, and designated point-of-contact for each non-BIA bureau. This financial assistance will support information gathering, analysis, and planning activities that may involve consulting with appropriate non-BIA bureaus, and negotiation activities. This subpart also provides requirements for communicating award decisions to applying Tribes/Consortia.

**E. Subpart E – Compacts**

The Committee proposes to insert this new subpart to implement section 404 of title IV, as amended, which requires the Secretary to enter into a written compact with each participating Tribe/Consortium. The previous version of title IV included no such



requirement and compacts were negotiated and executed at the option of the participating Tribe/Consortium.

The current rule at 25 CFR part 1000 that became effective on January 16, 2001 (“current rule”), includes provisions addressing compacts at §§ 1000.161 through 1000.165. The Committee proposes to amend and move those sections to the new subpart E (Compacts) and to include additional sections. This new subpart is proposed to be inserted before the respective subparts for funding agreements because compacts are applicable to funding agreements both for BIA programs and for non-BIA programs.

The current rule also includes a model format for a compact at Appendix A. The Committee proposes to omit the model format for a compact and Appendix A from this proposed rule. In lieu of a model format, compacts will be negotiated and executed in accordance with title IV, as amended, and with this proposed rule.

This subpart describes self-governance compacts and the minimum content requirements of a self-governance compact. Unlike a funding agreement, parts of a compact apply to all bureaus within the Department rather than a single bureau. Therefore, a Tribe/Consortium needs only to negotiate and execute one self-governance compact to participate in self-governance.

This subpart also establishes a compact’s effective term and addresses how a compact may be amended. Further, this subpart clarifies that a Tribe/Consortium who executed a compact prior to the enactment of the PROGRESS Act has the option to either retain its existing compact, in whole or in part, to the extent that the provisions are not directly contrary to any express provisions of the PROGRESS Act or negotiate a new compact.

## **F. Subpart F – Agreements for BIA Programs**

This subpart describes the components of a funding agreement for BIA programs. The current rule includes “Subpart E – Annual Funding Agreements for Bureau of Indian Affairs Programs.” The Committee proposes to amend the title of the subpart and move it within this proposed rule. The title of the subpart is proposed to be amended to “Funding Agreements for BIA Programs” because title IV now excludes the term “Annual Funding Agreements” and uses in its place, “Funding Agreements.” The acronym “BIA” is proposed in lieu of “Bureau of Indian Affairs” because BIA is now proposed as a defined term within subpart A (General Provisions). The Committee proposes to relocate the subpart from subpart E of the current rule to become subpart F of the proposed rule because a new subpart E for compacts is proposed to be inserted.

A funding agreement is a legally binding and mutually enforceable written agreement between a Tribe/Consortium and the Secretary. Funding agreements must include at a minimum, but are not limited to, provisions specifying the programs transferred to the Tribe/Consortium, providing for the Secretary to monitor the performance of trust functions administered by the Tribe/Consortium, providing the funding amount(s), providing a stable base budget, and specifying the funding agreement’s effective date.

Parties to a funding agreement can mutually agree to include additional provisions and/or include and incorporate by reference additional documents such as funding tables or construction project agreements. Additionally, Tribes/Consortia may elect to negotiate a funding agreement with a term that exceeds one year, subject to the availability of appropriations.

This subpart also provides that a Tribe/Consortium with a funding agreement executed before the enactment of the PROGRESS Act has the option to either retain that funding agreement, in whole or in part, to the extent that the provisions are not directly contrary to any express provisions of the PROGRESS Act or negotiate a new funding agreement.

This subpart establishes that a funding agreement shall remain in full force and effect following the end of its term until a subsequent funding agreement is executed. When a subsequent funding agreement is executed, its terms will be retroactive to the term of the preceding funding agreement for purposes of calculating the amount of funding for the Tribe/Consortium.

This subpart states that a Tribe/Consortium may include BIA-administered programs in its funding agreement regardless of the BIA agency or office performing 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. 5321, *et seq.*);
- (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 and transferred to the Department as directed by law, an Interagency Agreement, or other means.

Except for construction programs or projects governed by subpart K (Construction), or where a statute contains specific limitations on the use of funds, a Tribe/Consortium may redesign or consolidate programs and reallocate funds in any

manner the Tribe/Consortium deems to be in the best interest of the Indian community being served without the Secretary's approval except for programs described in 25 U.S.C. 5363(b)(2) or (c), or that involve a request to waive a Department regulation. However, a redesign or consolidation may not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

In determining the funding amount available to a Tribe/Consortium, this subpart identifies funds that are used to carry out inherent Federal functions<sup>1</sup> that cannot be included in a funding agreement. This subpart also establishes the process for determining the funding amount to carry out inherent Federal functions and clarifies that the amount withheld to carry out inherent Federal functions can be negotiated between the Secretary and a Tribe/Consortium.

This subpart defines Tribal shares as the amount determined for that Tribe/Consortium that supports any program within the BIA, the Bureau of Indian Education (BIE), the Bureau of Trust Funds Administration (BTFA), or the Office of the Assistant Secretary for Indian Affairs and are not required by the Secretary for the performance of an inherent Federal function. 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

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<sup>1</sup> The Department notes that 25 USC 5363(k) uses the phrase "inherently Federal" while 25 USC 5367(c) uses the phrase "inherent Federal." It is unclear why Congress used differing phrases, but the proposed rule generally uses the phrase "inherent Federal," except where a provision directly follows statutory language. The Department does not view the difference between the two phrases as meaningful.

(b) On a Tribe-by-Tribe basis, such as competitive grant awards or special project funding.

Funding amounts may be modified during the term of a funding agreement to adjust for certain Congressional actions, correct a mistake, or if there is mutual agreement to do so.

This subpart also defines stable base budgets as the amount of recurring funding to be transferred to the Tribe/Consortium for a period specified in the funding agreement.

Stable 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;
- (f) Tribal priority allocation increases and decreases;
- (g) Pay costs and retirement cost adjustments; and
- (h) Any other inflationary cost adjustments.

Stable base budgets do not include any non-recurring program funds, construction and wildland firefighting accounts, Congressional earmarks, or other funds specifically excluded by Congress.

A stable base budget is established at the request of the Tribe/Consortium and will be included in BIA's budget justification for the following year, subject to Congressional appropriation. Once stable 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 funding agreement on the same basis as all other Tribes and is eligible for funding amounts of new programs or available programs not previously included in the funding agreement on the same basis as other Tribes. Stable base budgets must be adjusted for certain Congressional actions, to correct a mistake, or if there is mutual agreement.

### **G. Subpart G – Funding Agreements for Non-BIA Programs**

This subpart describes program eligibility, funding for, and terms and conditions relating to Self-Governance funding agreements covering non-BIA programs that can help further Secretarial co-stewardship objectives as set forth in Joint Secretarial Order No. 3403. This section was renamed from Subpart F, as detailed in the Committee Report. Funding agreements for non-BIA programs are legally binding and mutually enforceable agreements between a bureau and a Tribe/Consortium participating in the self-governance program that contain a description of that portion or portions of a bureau program that are to be performed by the Tribe/Consortium; and associated funding, terms and conditions under which the Tribe/Consortium will assume a program, or portion of a program. Funding agreements may include Federal programs, services, functions, or activities administered by the Department other than through the BIA that are otherwise available to Indian tribes or Indians and may also include other programs, services, functions, and activities, or portions thereof which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact. This subpart contains a definition of which functions may be considered “inherently Federal” for purposes of 25 U.S.C. § 5363(k) and a provision making non-mandatory contract support costs associated with administration of the programs, services, functions, or activities that

are transferred in non-BIA agreements. The Committee did not achieve consensus on these two provisions.

## **H. Subpart H – Negotiation Process**

The current rule includes “Subpart G – Negotiation Process for Annual Funding Agreements.” The Committee proposes to amend the title of this subpart and move it within this proposed rule. The subpart title is proposed to be amended to “Negotiation Process” because the amended subpart addresses the process for negotiating compacts and funding agreements. The location of the subpart within this proposed rule is to be moved from subpart G of the current rule to become subpart H because a new subpart E for compacts is proposed to be inserted. Items addressed in subpart H of the current rule are proposed to be addressed in proposed new subpart Q (Operational Provisions).

Sections 1000.161 through 1000.165 of the current rule addresses the negotiation of compacts and are proposed to be amended and moved to the new subpart E (Compacts).

This subpart establishes the process and timelines for negotiating a self-governance compact with the Secretary and a funding agreement with any Departmental bureau. Under this subpart, the negotiation process consists of two phases, an information phase and a negotiation phase.

In the information phase, any Tribe/Consortium that has been selected to participate in the self-governance program may submit a written request clearly identified as a “Request to Initiate the Information Phase,” which notifies the Secretary of a Tribe/Consortium’s interest in negotiating for a program(s) and requesting information about the program(s). 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. This subpart establishes the information a Tribe/Consortium is encouraged to include in its Request to Initiate the Information Phase and the steps a bureau must take after receiving a request.

The negotiation phase establishes detailed timelines and procedures for conducting negotiations with Tribes that have been selected into the self-governance program, including the minimum issues that must be addressed at negotiation meetings. A Tribe/Consortium initiates this phase by submitting a Request to Initiate the Negotiation Phase. This subpart also establishes the required response that the Secretary must provide a Tribe/Consortium after receipt of a Request to Initiate the Negotiation Phase, including identifying the lead Federal negotiator. Further, this subpart establishes the process for finalizing and executing a compact and/or funding agreement when the parties are in agreement on such terms and conditions following the completion of negotiations.

This subpart also establishes proposed rules for the negotiation process for subsequent funding agreements. A subsequent funding agreement is a funding agreement negotiated with a particular bureau after an existing agreement with that bureau. The process for negotiating a subsequent agreement is the same as the process provided in this subpart for funding agreements. The Committee expects, however, that subsequent funding agreements will build upon the prior funding agreements. As such, most provisions of the funding agreement will carry forward and not require renegotiation. This will result in an expedited and simplified negotiation process.

## **I. Subpart I – Final Offer**



The Committee proposes to insert this new subpart to implement section 406(c) of title IV, as amended by the PROGRESS Act, 25 U.S.C. 5366(c), that prescribes the process to be followed if the Secretary and the participating Tribe/Consortium are unable to come to agreement, in whole or in part, on the terms of a compact or funding agreement during negotiations. The previous version of title IV included no such provisions, nor does the current rule.

The new subpart is proposed to be inserted at this location to immediately follow the proposed amended subpart H for the negotiation process. Doing so allows the reader to move sequentially from the negotiation process to determine options for next steps if those negotiation efforts do not result in agreement.

This subpart explains the final offer process provided by the Act for resolving disputes when the Secretary and a Tribe/Consortium are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels) during a negotiation. Under this subpart a Tribe/Consortium may submit a final offer to resolve these disputes. A final offer must be emailed to GROUPADDRESS@ois.gov [note: this is placeholder e-mail address] or mailed to the Director at OSG's headquarters. A final offer under this subpart must contain a description of the disagreement, the Tribe/Consortium's final proposal to resolve the disagreement (including any proposed terms for a compact, funding agreement, or amendment), and the name and contact information for the Tribe's/Consortium's authorized official.

In accordance with 25 U.S.C. 5366(c)(6), the Secretary may reject all or part of a final offer for one of six specified reasons. If the Secretary does not act on a final offer within 60 days, the final offer is accepted automatically by operation of law for any

compact or funding agreement except as to its application to a program described under section 403(c) of title IV. Final offers with respect to any program described under section 403(c) of title IV that the Secretary does not act on within 60 days are rejected automatically by operation of law. This subpart also addresses what happens if the Secretary rejects all or part of a final offer, including provision of technical assistance to overcome a rejection, the ability to appeal a rejection, and the portions of a final offer not in dispute taking effect.

#### **J. Subpart J – Waiver of Regulations**

This subpart implements 25 U.S.C. 5363(i)(2)(A) that authorizes the Secretary to waive all Department regulations governing programs included in a funding agreement, as identified by the Tribe/Consortium.

This subpart also provides timelines, 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 resubmittal of a Tribe/Consortium's request in the event of the Secretary's denial of a waiver request.

The basis for the Secretary's denial of a waiver request must be predicated on a prohibition of Federal law.

#### **K. Subpart K – Construction**

This subpart applies to all construction programs and projects, both BIA and non-BIA. 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. All provisions of the proposed rule

apply to this subpart except where such provisions are inconsistent; in such case the regulatory provisions of this subpart will govern.

This subpart specifies the roles and responsibilities of the Tribe/Consortium and the Secretary in construction programs, including environmental determinations, performance, changes, monitoring, inspections, and reassumption. This subpart details the process by which a Tribe/Consortium, at its election and with the approval of the Secretary, designates a certifying Tribal officer to represent the Tribe/Consortium and accepts the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer in order for the certifying Tribal officer to assume some responsibilities of the official under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and related provisions of other laws and regulations.

While the proposed text in this subpart reflects the consensus of the committee, subsequent to the approving its report to the Secretary, the Council on Environmental Quality (CEQ) revised its NEPA implementing regulations, 40 CFR parts 1500 through 1508, which are effective July 1, 2024.<sup>2</sup> Therefore, DOI invites comment on whether to revise the proposed regulatory text in any final rule for consistency with NEPA and the NEPA implementing regulations. For example, updating § 1000.1390 to incorporate text from and for consistency with 42 U.S.C. 4332(2)(E) and 40 CFR 1506.6(a), which direct agencies to make use of “high-quality information, including reliable data and resources;” (2) updating § 1000.1385(a)(2) to incorporate text making clear that NEPA requires agencies to assess “reasonably foreseeable environmental effects” of a proposed agency

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<sup>2</sup> See Council on Environmental Quality (CEQ), NEPA Implementing Regulations Revisions Phase 2, Final Rule, 88 FR 35442 (May 1, 2024).

action, not all potential effects, for consistency with 42 U.S.C. 4332(2)(C)(i) and the definition of “effects” in 40 CFR 1508.1(i); and (3) updating § 1000.1385(a)(5) to state that in applying a categorical exclusion under NEPA, evaluate whether extraordinary circumstances exist, in which a normally excluded project may have a significant effect, and therefore requires preparation of an environmental assessment or environmental impact statement, for consistency with 40 CFR 1501.4. DOI seeks public comment on these and any other edits that the public considers appropriate for consistency with NEPA and the NEPA implementing regulations.

Federal Acquisition Regulations provisions are specifically not incorporated into this proposed rule; however, they may be negotiated by the parties in the funding agreement. Also, construction project agreements, made part of a funding agreement, must address applicable Federal laws, program statutes, and regulations. In addition to requirements for all funding agreements referenced in subpart F (Funding Agreements for BIA Programs), other provisions are added for construction project agreements and programs and funding agreements that include a construction project or program to implement the requirements of the PROGRESS Act, including health and safety standards, brief progress reports, financial 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.

Lastly, this subpart provides that the Secretary may accept funds from other departments for construction projects or programs, subject to an interagency agreement between the Secretary, with Tribal concurrence.

#### **L. Subpart L – Federal Tort Claims**

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

#### **M. Subpart M – Reassumption**

Reassumption is the federally initiated action of reassuming control of Federal programs formerly performed by a Tribe/Consortium. This subpart explains the types of reassumption authorized under title IV, as amended by the PROGRESS Act, including the rights of a Consortium member, the types of circumstances necessitating reassumption, and Secretarial responsibilities including prior notice requirements and other procedures. The subpart explains what is meant by imminent jeopardy to trust assets, natural resources, and public health and safety that may be grounds for reassumption.

This subpart also describes the hearing rights a Tribe/Consortium has before or after reassumption by the Secretary, the activities to be performed after reassumption has been completed, and the effect of reassumption on other provisions of a funding agreement.

#### **N. Subpart N – Retrocession**

Retrocession is the Tribally-initiated voluntary action of returning control of certain programs to the Federal Government. This subpart defines retrocession, including how Tribes/Consortia may retrocede, the effect of retrocession on future funding agreement negotiations, and Tribal/Consortium obligations regarding the return of Federal property to the Secretary after retrocession.

#### **O. Subpart O – Trust Evaluation**

This subpart establishes a procedural framework for the Secretary's annual trust evaluation mandated by the PROGRESS Act. The purpose of the Secretary's 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 a funding agreement.

This subpart requires the Secretary's designated representative to prepare a written report for each funding agreement under which trust functions are performed by a Tribe. This proposed rule also authorizes a review of Federal performance of residual and nondelegable trust functions affecting trust resources. The name of this subpart has been changed from "Trust Evaluation Review" to "Trust Evaluation." It was redundant to have both evaluation and review in the title.

#### **P. Subpart P – Reports**

This subpart describes the report on self-governance that the Secretary prepares annually for transmittal to Congress. It also includes the requirements for the annual report that Tribes/Consortia submit to the Secretary and other data requirements the Secretary may request of Tribes/Consortia. The issue related to the inclusion of BIE in the BIA programs for purposes of the reporting requirements surfaces in this subpart and is addressed in subpart A (General Provisions).

#### **Q. Subpart Q – Operational Provisions**

The current rule includes “Subpart Q–Miscellaneous Provisions.” The Committee proposes to amend the title of this subpart to “Operational Provisions” to be more descriptive and instructive to the reader and to bring consistency with regulations promulgated at 42 CFR subchapter M part 137-Tribal Self-Governance under the Indian Health Service as authorized by title V of the ISDEAA, as amended.

The proposed changes to this subpart address many facets of self-governance not covered in the other subparts. Issues covered include the applicability of various laws such as the Freedom of Information Act (FOIA), the Privacy Act, the Prompt Payment Act, and the Single Agency Audit Act, applicable provisions of OMB circulars, how funds are handled in various situations, including carryover of funds, savings from programs, and the use of funds to meet matching or cost participant requirements under other laws.

Certain provisions of this subpart are proposed to be amended to become current with the PROGRESS Act, and with applicable regulations promulgated by OMB at 2 CFR part 200. References to outdated OMB circulars within this subpart are proposed to be updated throughout. New sections within this subpart are proposed to address new provisions within the Act, as amended, such as claims against a Tribe/Consortium in relation to disallowance of costs, and limitation of costs.

#### **R. Subpart R – Appeals**

This subpart prescribes the process Tribes/Consortia may use to resolve disputes with the Department arising before or after execution of a funding agreement or compact and certain other disputes related to self-governance.

#### **S. Subpart S – Conflicts of Interest**

This subpart sets out the minimum requirements a Tribe/Consortium must have in place, pursuant to Tribal law and procedures, to address conflicts of interest, including organizational and personal conflicts.

#### **T. Subpart T – Tribal Consultation Process**

This subpart describes the process for engaging in consultations related to self-governance with Tribes/Consortia. The current rule includes “Subpart I–Public Consultation Process.” The Committee proposes to move and rename this subpart to reflect that the subpart applies to Tribal consultation, and to conform to more recent Federal and Department policy on Tribal consultation. Under this subpart, consultations related to self-governance commenced after this rule’s effective date, should it become final, will comply with the Tribal consultation process outlined in the revised version of this subpart, and such previous regulations governing public consultation shall be superseded.

This subpart establishes when the Secretary shall consult on matters related to self-governance and identifies that consultation will occur: (1) to determine eligible programs for inclusion in a funding agreement; (2) to establish programmatic targets for the inclusion of non-BIA programs in funding agreements; and (3) on any secretarial action with Tribal implications on matters related to self-governance. This subpart also establishes the applicable process for engaging in Tribal consultations, which is inspired by the President’s November 30, 2022, Memorandum on Uniform Standards for Tribal Consultation, and the Department’s current Departmental Manuals.

This subpart also establishes guiding principles applicable to Tribal consultation related to self-governance. Additionally, this subpart requires the Secretary to provide



notice of upcoming consultations to Tribes/Consortia, allow written comments, and develop a record reflecting a Tribal consultation. Finally, this subpart establishes how the Secretary will handle confidential or sensitive information provided by a Tribe/Consortium during a consultation.

The Committee agreed to require at least 30 days' notice to Tribes/Consortia prior to any planned consultation sessions. However, the Committee recognizes that situations may occur that require the need for Tribal consultation on an expedited basis to address urgent issues. Therefore, the Committee expects that the Secretary could waive applicable notice requirements at the request of a Tribe/Consortium pursuant to subpart J (Waiver of Regulations) in such urgent situations. However, the Committee views the requirement for 30 days' notice as the norm and expects any such waivers to be at the request of a Tribe/Consortium.

### **III. Areas of Disagreement**

The Committee did not reach consensus on four issues. These include: (1) the minimum contents that must be included in a compact and funding agreement; (2) inclusion of language about which functions may be considered "inherently Federal" for purposes of 25 U.S.C. 5363(k); (3) whether certain responsibilities pursuant to NEPA and related statutes are "inherent Federal functions;" and (4) when a Tribe/Consortium may choose to pursue an administrative appeal with the appropriate bureau head/Assistant Secretary as an alternative path to filing an administrative appeal with the Interior Board of Indian Appeals (IBIA).

Each area of disagreement is summarized below, in order, by subpart and section, as appropriate. To the extent a disagreement could not be resolved, the Department has

incorporated the Federal language proposal into the proposed regulatory text. A summary of the Tribal and Federal views on these areas of disagreement are set forth below. More detail is available in the Committee's report, which is a part of the official record in this rulemaking and is available upon request. The Department solicits comments on these areas of disagreement.

#### **A. Subpart E – Compacts**

One issue of disagreement encountered by the Tribal and Federal representatives concerns the minimum contents that must be included in a compact and funding agreement in order to reflect the requirements of title IV as required under 25 U.S.C. 5365(a).

##### **1. Tribal View**

25 U.S.C. 5365(a) provides that “[a]n Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this subchapter,” *i.e.*, Subchapter IV – Tribal Self-Governance - Department of the Interior. The Tribal and Federal representatives disagree on how the contents of compacts and funding agreements can satisfy this requirement.” The Tribal position is that this statutory requirement can be satisfied through simplified Tribal assurances included in a compact and/or funding agreement that the Tribe/Consortium will comply with title IV. Such Tribal assurances would reflect the requirements of title IV in these agreements without burdening parties to negotiate lengthy documents which may add little additional substance beyond quoting statutory provisions in title IV.

The Tribal position is that the proposed language in §§ 1000.510(e) and 1000.515 is excessive and not properly tailored to satisfying the requirement to reflect the

requirements of title IV under 25 U.S.C. 5365(a). The identified topics in these regulatory sections correspond with general topics set out in 25 U.S.C. 5365. These topics include, for example, Tribal assurances that it has procedures in place to address conflicts of interest (25 U.S.C. 5365(b)), will apply applicable cost principles under OMB circulars in performing the title IV compact and funding agreement (25 U.S.C. 5365(c)), and will maintain a recordkeeping system and provide the Secretary with reasonable access to the records to permit the Secretary to meet the requirements of 44 U.S.C. 3101 through 3106 (25 U.S.C. 5365(g)).

The Tribal position is that a title IV compact or funding agreement can include language that satisfies 25 U.S.C. 5365(a), which states that the Tribe/Consortium will carry out the compact or funding agreement “*in accordance with the requirements of Title IV.*”

## **2. Federal View**

The Federal position on the proposed §§ 1000.510(e) and 1000.515 is based on the language of 25 U.S.C. 5365(a) providing that “[a]n Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this subchapter.” The Federal committee members read this statutory language to direct that the parties include in a compact or funding agreement each of the provisions reflecting the requirements of Title IV.

The Federal position is that relevant provisions of the PROGRESS Act indicate that particular language or provisions must be included in a funding agreement or a compact. For example, 25 U.S.C. 5366(b)(1) directs that “[a] compact or funding agreement shall include provisions for the Secretary to reassume a program and

associated funding if there is specific finding relating to that program.” As another example, 25 U.S.C. 5363(e)(2) authorizes the parties to specify an effective date for retrocession. The Federal position is that the best way to fulfill these statutory requirements is to include provisions matching each of the headings set forth in 25 U.S.C. 5365.

## **B. Subpart F – Funding Agreements for BIA Programs**

Similar to subpart E (Compacts), an issue of disagreement encountered by the Tribal and Federal representatives concerns the minimum contents that must be included in a compact and funding agreement in order to reflect the requirements of title IV as required under 25 U.S.C. 5365(a).

### **1. Tribal View**

For the reasons explained in the Tribal view associated with subpart E (Compacts), the Tribal representatives did not agree to the inclusion of the proposed § 1000.610(b) concerning language which “must be included in either a compact or funding agreement.” In parallel to the replacement of the proposed § 1000.515, this language should be replaced by a provision that requires either a compact and funding agreement to “include a general attestation that, in implementing the agreement, the Tribe will comply with all requirements of Title IV.”

There was also disagreement between the Tribal and Federal representatives regarding negotiations about inherent Federal functions. Both Federal and Tribal representatives agree that the identification of a particular function as an inherent Federal function is a pre-award dispute that is appealable to either the IBIA or the appropriate Bureau head/Assistant Secretary (covered in subpart R – Appeals). And both Federal and

Tribal representatives agree that that the amount of funding withheld to cover the cost of inherent Federal functions is subject to pre-award negotiations (covered in this subpart). Tribal representatives proposed language in § 1000.695 to create consistency between subpart R (Appeals) and subpart F (Funding Agreements for BIA Programs) by clarifying, in subpart F (Funding Agreements for BIA Programs), that the identification of an inherent Federal function is a topic of negotiation.

## **2. Federal View**

The Federal position on proposed § 1000.610(b), for reasons explained in the Federal narrative associated with subpart E (Compacts), is based on the language of 25 U.S.C. 5365(a) providing that “[a]n Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this subchapter.” The Federal Committee members read this statutory language to direct that the parties include in a compact or funding agreement each of the provisions reflecting the requirements of title IV. This position is informed by the Department’s experience when encountering a problem in the execution of a funding agreement. In that situation, the primary question that arises involves what the agreed upon terms of a funding agreement provide as to a particular outcome.

## **C. Subpart G – Funding Agreements for Non-BIA Programs**

A disagreement arose surrounding the inclusion of language about which functions may be considered “inherently Federal” for purposes of 25 U.S.C. 5363(k) and may therefore not be contracted to Tribes. In addition, a disagreement arose as to whether contract support costs are limited by Congressional appropriations.

## **1. Tribal View**

Tribal representatives proposed to include a single sentence from a Department Solicitor guidance memorandum, “Inherently Federal Functions under the Tribal Self-Governance Act,” dated May 17, 1996 (Solicitor Memo), which has been in place for close to 30 years. Those parts of the proposed sentence that are not copied verbatim from the Solicitor Memo are substantively identical to the statement from the memo, according to the Tribal representatives.

The Tribally proposed sentence would state that “[w]hen determining whether a function is inherently Federal within the meaning of the Act, the more a delegated PSFA relates to Tribal sovereignty over citizens or territory, the more likely it is that the function is not inherently Federal.”<sup>3</sup>

Tribal representatives initially requested that the proposed rule clarify that the Department will provide all necessary contract support costs, as calculated under section 106(a) of the ISDEAA, for all Self-Governance agreements entered into by non-BIA Agencies. Such a regulatory commitment would create predictability, transparency, and the necessary financial footing for increasing the abysmally low level of non-BIA Self-Governance agreements. The Federal representatives did not agree to such a commitment in this proposed rule.

As a compromise, the Committee proposes to keep the existing regulatory language requiring that agreements with non-BIA agencies under 25 U.S.C. 5363(c) include funding for allowable indirect costs, while separately addressing direct contract support costs. Tribal representatives proposed language that would make it clear to

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<sup>3</sup> By comparison, the sentence in the Solicitor Memo reads, “The more a delegated function relates to tribal sovereignty over members or territory, the more likely it is that the inherently exception of section 403(k) does not apply.” See U.S. Department of the Interior, Office of the Solicitor, Memorandum on Inherently Functions under the Tribal Self-Governance Act (May 17, 1996), at 12.

Tribal and Federal negotiators that the baseline for determining such direct contract support costs should be the same as for any other ISDEAA agreement, as provided for in the statutory text found in section 106(a) of the ISDEAA.

## **2. Federal View**

The Federal position on the proposed § 1000.845(a) is that particular quotations taken out of context from legal guidance issued by the Department's Solicitor to DOI bureaus and offices should not be codified in regulation. A single sentence in isolation fails to capture the complete standard for identifying an inherently Federal function under the legal guidance. Furthermore, if the sentence in isolation became the regulatory standard for an inherently Federal function, that would create an administrative process by which an applicant Tribe asks a bureau or office of the Department to opine on the Tribe's sovereignty, and attendant obligation under the Administrative Procedure Act, could unintentionally create roadblocks or limitations upon the Tribe's sovereignty in a manner that the Department cannot endorse.

Additionally, the Department notes that provision of contract support costs is subject to Congressional appropriations. While individual bureaus and offices may support providing contract support costs, as discussed in the Tribal narrative, the Department is unable to reallocate funds to provide those contract support costs without Congressional authorization.

## **C. Subpart K: Construction**

A number of disagreements arose regarding whether certain responsibilities pursuant to the NEPA and related statutes are "inherent Federal functions."

### **1. Tribal View**

25 U.S.C. 5367(b) provides that, “subject to the agreement of the Secretary,” a Tribe or Consortium may “elect to assume some Federal responsibilities under” NEPA by (a) designating a Tribal official to “assume the status of a responsible Federal official” for purposes of NEPA and (b) issuing a limited waiver of sovereign immunity for the purposes of “enforcing the responsibilities” of that official. Because making environmental determinations, such as whether to approve NEPA documents, including categorical exclusions (CEs), environmental assessments (EAs), and environmental impact statements (EISs), is one of the responsibilities of a Federal official under NEPA, and because Tribal officials have been issuing such decisions for years under similar language in Title V, the Tribal representatives proposed several regulatory provisions to clarify the rights and responsibilities of a Tribe or Consortium that elects to assume Federal responsibilities pursuant to 25 U.S.C. 5367(b).

Tribal negotiators proposed regulatory provisions to clarify the rights and responsibilities of a Tribe or Consortium that elects to assume Federal responsibilities pursuant to 25 U.S.C. 5367(b). Tribal negotiators proposed a regulatory provision reflecting the process by which a Tribe/Consortium is recognized as having led, cooperating, or joint lead agency status on a project. Tribal representatives to the Committee argued that the proposed rule should define the term “categorical exclusion” for ease of use by Tribal and Federal officials, and because the term is used in proposed § 1000.1385.

## **2. Federal View**

The Federal position is that the Committee must follow the language of the PROGRESS Act, which only allows Tribes to assume under title IV “*some* Federal



responsibilities under the National Environmental Policy Act of 1969,” 25 U.S.C. 5367(b) (emphasis added). This language) differs from the statutory language allowing Tribes to assume “*all* Federal responsibilities under the National Environmental Policy Act of 1969,” 25 U.S.C. 5389(a) (emphasis added), in title V. Moreover, under title IV, the Secretary is prohibited from delegating to a Tribe or Consortium “duties of the Secretary under [NEPA, the NHPA,] and other related provisions of law that are inherent Federal functions.” 25 U.S.C. 5367(c). The Committee is duty bound to follow Congress’s guidance in developing proposed regulations. The Federal representatives of the Committee read Congress’s use of the term *some* to mean something different than when Congress uses the term *all*. See, e.g., *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698 (2022) (Supreme Court restating its “usual presumption that differences in language like this convey differences in meaning.”).

### **C. Subpart R – Appeals**

A disagreement arose about when a Tribe/Consortium may choose to pursue an administrative appeal with the appropriate bureau head/Assistant Secretary as an alternative path to filing an administrative appeal with the IBIA.

#### **1. Tribal View**

The Tribal position is that the proposed regulations should empower, and not limit, Tribes/Consortia to have options to decide how to proceed with an administrative appeal. Tribal representatives are aware that Tribes/Consortia have encountered difficulties and delays when pursuing appeals with the IBIA. Although changes to the IBIA itself are outside the scope of this negotiated rulemaking, the Tribal representatives urged that this proposed rule should provide Tribes/Consortia with the greatest flexibility

to address the realities of the IBIA appeals process. Further, the Tribal representatives emphasize that the Department and Congress should pursue all available routes to improve the IBIA appeals process to decide appeals in a just, efficient, and time-sensitive manner.

To address the realities of the IBIA system, Tribal negotiators argue that *all* pre-award dispute decisions that fall within § 1000.2345 should be eligible to be decided by a bureau head/Assistant Secretary, in lieu of an appeal to the IBIA, if a Tribe/Consortium so chooses. This position would establish two mutually exclusive paths that a Tribe/Consortium could choose from to pursue *any* pre-award dispute under § 1000.2345: either through (1) the IBIA; or (2) the bureau head/Assistant Secretary. Section 1000.2345 identifies the types of decisions that may be appealed to either a bureau head/Assistant Secretary or the IBIA under certain sections in subpart R (Appeals) and includes decisions such as rejecting a final offer, rejecting a proposed amendment to a compact or funding agreement, determinations that a provision in a retained funding agreement and/or compact are directly contrary to title IV, non-immediate reassumption, and certain construction-related decisions.

## **2. Federal View**

The Federal position on the proposed §§ 1000.2302 and 1000.2351 is that these sections, which provide the appeals process for certain types of disputes under the current regulations—and were not otherwise changed, amended, or even addressed by the PROGRESS Act—provide an avenue for Tribes to appeal their disputes in a manner that empowers Tribes to pursue potential options beyond those available to Tribes under subpart L (Appeals) of 25 CFR part 900, applicable to disputes under title I, and subpart

P (Appeals) of 42 CFR part 137, applicable to disputes under title V (IHS). Under 25 CFR part 900, the only avenue of appeal available to Tribes after efforts at informal dispute resolution have not resolved the dispute is to file a notice of appeal with the IBIA. Likewise, 42 CFR part 137, which follows the appeals procedures set forth in 25 CFR part 900, provides for appeals to be heard only by the IBIA. By contrast, as to certain types of disputes, proposed subpart R (Appeals) provides for appeals to be made to either the IBIA or a bureau head/Assistant Secretary. These types of appeals are for pre-award non-title I eligible PSFA disputes, which encompasses a broad range of issues including, but not limited to, PSFAs transferred under section 403(c) of title IV, decisions declining to provide requested information, allocations of program funds when a dispute arises between a Consortium and a withdrawing Tribe, and inherently Federal functions.

#### **IV. Procedural Requirements**

##### **A. Regulatory Planning and Review (E.O. 12866, 14094 and E.O. 13563)**

Executive Order (E.O.) 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this proposed rule is significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes

further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The Department has developed this proposed rule in a manner consistent with these requirements.

In accordance with 5 U.S.C. 553(b)(4), a summary of this proposed rule may be found at <https://www.regulations.gov> by searching for “RIN 1076-AF62.”

### **E.O. 12866 Interagency Feedback Received on Proposed Rule**

The Department is proposing new regulations to update the manner in which it implements self-governance at the Department. This Notice discusses the rationale for the changes that should have no major impacts on regulations or programs administered by other agencies. Overall, the proposed rule is expected to apply only to those Tribes/Consortia that enter into a self-governance compact with the Department and conclude a funding agreement under that compact.

However, during OIRA’s E.O. 12866 review, the Department received comment expressing concerns about how the Department’s proposed rule might intersect with another agency’s self-governance regulations and program. The Department currently lacks information to describe the manner, if any, in which its self-governance regulations might affect self-governance compacts and funding agreements between Tribes/Consortia and agencies other than the Department. Some priority learning questions, where we seek information, include:

- How or whether the provisions of the proposed rule, especially those terms and processes in common between the Department and self-governance regulations at

other agencies could affect any term of any other agency's self-governance procedures?

- How or whether the Department could specify that its proposed rule implementing self-governance at the Department does not bear upon either interpretation of language in another agency's self-governance regulations or authorizing statute, nor language in a compact or funding agreement between a Tribe/Consortia and another agency.
- How or whether the Department could address potential inconsistencies between its proposed rule, based on the Department's authorizing legislation, and similar provisions in other agencies' self-governance regulations, which are based on their respective, different authorizing statutes.

## **B. Regulatory Flexibility Act**

The Department has evaluated the effects of this proposed rule on small entities, such as local governments and businesses. Based on its evaluation, the Department certifies that this document would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Based on the evaluation, the Department anticipates that this action would not have a significant economic impact on small entities. The Department only foresees this proposed rule having an impact on the Federal Government and Indian Tribes, which are not considered to be small entities for purposes of this Act.

## **C. Congressional Review Act (CRA)**

While any determination will not be made until any final rule is published, the Department does not anticipate that this rule, if finalized, would meet the criteria under 5

U.S.C. 804(2), because it would not have an annual effect on the economy of \$100 million or more, would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, and would not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

**D. Unfunded Mandates Reform Act of 1995**

This proposed rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. This proposed rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector because this proposed rule affects only putative exporters and their related businesses. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

**E. Takings (E.O. 12630)**

This proposed rule would not affect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

**F. Federalism (E.O. 13132)**

Under the criteria in section 1 of E.O. 13132, this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

**G. Civil Justice Reform (E.O. 12988)**

This proposed rule complies with the requirements of E.O. 12988. Specifically, this proposed rule: (a) meets the criteria of section 3(a) requiring that all regulations be

reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

#### **H. Consultation With Indian Tribes (E.O. 13175)**

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this proposed rule under the Department's consultation policy and under the criteria in E.O. 13175 and have determined that the NPRM would not impose substantial direct compliance costs on Indian Tribal governments, would not preempt Tribal law, would not have any potentially adverse effects, economic or otherwise, on the viability of Indian Tribes. Rather, this action will reduce the administrative burden of Indian Tribes participating in this program. Therefore, a Tribal summary impact statement is not required.

The Department initiated a negotiated rulemaking process, with both Tribal and Federal representatives, which the Department asserts fulfills its obligations to consult to develop the text of this proposed rule. The results of these ongoing negotiated rulemaking meetings were periodically reported and discussed in other Federal and Tribal fora. The Tribal and Federal representatives reached consensus on the proposed rule text and Preamble, except for the four areas of disagreement discussed above.

The Department anticipates seeking Tribal input through the comment period and until publication of a Final Rule.

#### **I. Paperwork Reduction Act**

This proposed rule contains existing information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Self-Governance program is authorized by the Tribal Self-Governance Act of 1994, 25 U.S.C. 5301, Public Law 103–413, as amended. Tribes interested in entering into Self-Governance must submit certain information as required by the Act. In addition, those Tribes and Consortia that have entered into Self-Governance funding agreements will be requested to submit certain information as described in this proposed rule. This information will be used to justify a budget request submission on their behalf and to comport with section 405 of the Act that calls for the Secretary to submit an annual report to the Congress.

The following revision to the existing information collections require approval by OMB.

- *Summary of Proposed Revision:* Projected increase in respondent participation and total number of annual respondents.
- *Title of Collection:* Tribal Self-Governance Program.
- *OMB Control Number:* 1076-0143.
- *Form Number:* Annual Self-Governance Report Form.
- *Type of Review:* Revision of a currently approved collection.
- *Respondents/Affected Public:* Federally recognized Indian Tribes and Tribal Consortia participating in or wishing to enter into Tribal Self-Governance.
- *Total Estimated Number of Annual Respondents:* 115.
- *Total Estimated Number of Annual Responses:* 130.
- *Estimated Completion Time per Response:* Varies from 1 to 400 hours.



- *Total Estimated Number of Annual Burden Hours:* 5,073 hours.
- *Respondent's Obligation:* Required to obtain a benefit.
- *Frequency of Collection:* On occasion or annually.
- *Total Estimated Annual Non-hour Burden Cost:* \$10,600 for cost associated with attending training and hiring consultants to provide services for entering the Self-Governance Program.
- *Annual Costs to Federal Government:* \$1,592,490.

As part of our continuing effort to reduce paperwork and respondents' burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

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

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.

Send your written comments and suggestions on this information collection to OIRA listed in **ADDRESSES** by the date indicated in **DATES**. Please also send a copy

to [consultation@bia.gov](mailto:consultation@bia.gov) and reference “OMB Control Number 1076-0143” in the subject line of your comments. You may also view the ICR at

<https://www.reginfo.gov/public/Forward?SearchTarget=PRA&textfield=1076-0143>.

#### **J. National Environmental Policy Act (NEPA)**

Under NEPA, categories of Federal actions that normally do not significantly impact the human environment may be categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement. *See* 40 CFR 1501.4. The Department’s regulations categorically exclude the promulgation of “regulations ... that are of an administrative ... or procedural nature,” because the promulgation of such regulations normally does not have a significant effect on the human environment, individually or in the aggregate. *See* 43 CFR 46.210(i). This rule is administrative and procedural in nature, and therefore is within the scope of this categorical exclusion. Further, the Department determined that the rule would not involve any extraordinary circumstances that might require preparation of an environmental assessment or an environmental impact statement. *See* 43 CFR 46.215.

#### **K. Energy Effects (E.O. 13211)**

This proposed rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

#### **L. Clarity of This Regulation**

The Department is required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, and so forth.

#### **M. Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### **List of Subjects in 25 CFR part 1000**

Administrative practice and procedure, Indian Tribes, Tribal Consortium.

For the reasons set forth in the preamble above, the Department of the Interior, Assistant Secretary – Indian Affairs, proposes to revise 25 CFR part 1000 to read as follows:

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

The authority of this entire part 1000 is as follows:

Authority: 25 U.S.C. 5373

**Subpart A – General Provisions**

Sec.

1000.1 What is the authority of this part?

1000.5 What key terms do I need to know?

1000.10 What is the purpose and scope of this part?

1000.15 What is the congressional policy statement of this part?

1000.20 What is the Secretarial policy of this part?

1000.25 What is the effect on existing Tribal rights?

1000.30 What is the effect of these regulations on Federal program guidelines, manual, or policy directives?

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

Sec.

**PURPOSE AND DEFINITIONS**

1000.101 What is the purpose of this subpart?

1000.105 What is a “signatory”?

1000.110 What is a “nonsignatory Tribe”?

**ELIGIBILITY**

1000.115 Who may participate in Tribal self-governance?

1000.120 How many additional Tribes/Consortia may participate in self-governance per year?

1000.125 What must a Tribe/Consortium submit to be selected to participate in Self-Governance?

1000.130 What additional information may be submitted to the Secretary to facilitate negotiations?

1000.135 May a Consortium member Tribe withdraw from the Consortium and be selected to participate in Self-Governance?

1000.140 What is required during the “planning phase”?

1000.145 When does a Tribe/Consortium have an uncorrected “significant and material audit exception”?

1000.150 What are the consequences of having an uncorrected significant and material audit exception?

1000.155 Is the Secretary required to provide technical assistance to improve a Tribe’s/Consortium’s internal controls?

#### SELECTION TO PARTICIPATE IN SELF-GOVERNANCE

1000.160 How is a Tribe/Consortium selected to participate in Self-Governance?

1000.165 When does OSG accept requests to participate in Self-Governance?

1000.170 Are there any time frames to negotiate an initial compact or funding agreement for a Tribe not presently participating in self-governance?

1000.175 How does a Tribe/Consortium withdraw its request to participate in Self-Governance?

1000.180 What if more than 50 Tribes/Consortium apply to participate in Self-Governance?

1000.185 What happens if a request is not complete?

1000.190 What happens if a Tribe/Consortium is selected to participate but does not execute a compact and a funding agreement?

1000.195 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(b)(2) (25 U.S.C. 5363(b)(2)) without having or negotiating a funding agreement under 25 U.S.C. 5363(b)(1)?

1000.200 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(c) (25 U.S.C. 5363(c)) without negotiating a funding agreement under 25 U.S.C. 5363(b)(1) and/or section 403(b)(2) (25 U.S.C. 5363(b)(2))?

#### WITHDRAWAL FROM A CONSORTIUM FUNDING AGREEMENT

1000.205 What happens when a Tribe wishes to withdraw from a Consortium funding agreement?

1000.210 How are funds redistributed when a withdrawing Tribe fully or partially withdraws from a compact and funding agreement and enters a new contract or compact?

1000.215 If the withdrawing Tribe elects to operate a program carried out under a compact and funding agreement under title IV through a contract under title I, is the resulting contract considered a mature contract under 25 U.S.C. 5304(h)?

1000.220 How are funds distributed when a withdrawing Tribe fully or partially withdraws from a Consortium's compact and funding agreement and the withdrawing Tribe does not enter a new contract or compact?

1000.225 What amount of funding is to be removed from the Consortium's funding agreement for the withdrawing Tribe?

1000.230 What happens if there is a dispute between the Consortium and the withdrawing Tribe?

1000.235 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

### **Subpart C – Planning and Negotiation Grants for BIA Programs**

Sec.

1000.301 What is the purpose of this subpart?

1000.305 Are there grants available to assist Tribes/Consortia to meet the requirements to participate in self-governance?

1000.310 What is required to request planning and negotiation grants?

1000.315 Are planning and negotiation grants available?

1000.320 Must a Tribe/Consortium receive a planning or negotiation grant to be eligible to participate in self-governance?

1000.325 What happens if there are insufficient funds to award all of the requests for planning and negotiation grants in any given year?

1000.330 May a Tribe/Consortium that has received a planning grant also receive a negotiation grant?

1000.335 What are the Secretary's responsibilities upon a decision not to award a planning or negotiation grant?

1000.340 May a Tribe/Consortium administratively appeal the Secretary's decision to not award a grant under this subpart?

**Subpart D – Financial Assistance for Planning and Negotiation Activities for Non-BIA Bureau Programs**

Sec.

1000.401 What is the purpose of this subpart?

1000.405 What funds are available to Tribes/Consortium for planning and negotiating activities with non-BIA bureaus?

1000.410 What kinds of planning and negotiation activities for non-BIA programs does financial assistance from non-BIA bureaus support?

1000.415 Who can apply to a non-BIA bureau for financial assistance to plan and negotiate non-BIA programs?

1000.420 Under what circumstances may financial assistance for planning and negotiation activities with non-BIA bureaus be awarded to Tribes/Consortia?

1000.425 How does the Tribe/Consortium know when and how to apply for financial assistance for planning and negotiation activities for a non-BIA program?

1000.430 What must be included in the application for financial assistance for planning and negotiation activities for a non-BIA program?

1000.435 How will the non-BIA bureau director/commissioner award financial assistance for planning and negotiation activities for a non-BIA program?

1000.440 May non-BIA bureaus provide technical assistance to a Tribe/Consortium in drafting its application?



1000.445 What are the non-BIA bureau director's/commissioner's responsibilities upon a decision to decline financial assistance?

1000.450 Can an applicant administratively appeal a decision not to award financial assistance?

1000.455 May a Tribe/Consortium reapply through a future planning and negotiation application if it has been previously denied?

1000.460 Will the non-BIA bureau notify Tribes/Consortium of the results of the selection process?

### **Subpart E – Compacts**

Sec.

1000.501 What is a self-governance compact?

1000.505 Which DOI office negotiates self-governance compacts?

1000.510 What is included in a self-governance compact?

1000.515 What provisions must be included in either a compact or funding agreement?

1000.520 Is a compact required to participate in self-governance?

1000.525 Can a Tribe/Consortium negotiate other terms and conditions?

1000.530 What is the duration of a compact?

1000.535 May a compact be amended?

1000.540 Can a Tribe/Consortium have a funding agreement without having negotiated a compact?

1000.545 May a participating Tribe/Consortium retain its existing compact which was executed prior to the enactment of Pub. L. 116–180?

1000.550 What happens if the Tribe/Consortium and Secretary fail to reach an agreement on a compact?

## **Subpart F – Funding Agreements for BIA Programs**

Sec.

1000.601 What is the purpose of this subpart?

1000.605 What is a funding agreement?

### CONTENTS AND SCOPE OF FUNDING AGREEMENTS

1000.610 What must be included in a funding agreement?

1000.615 Can additional provisions be included in a funding agreement?

1000.620 Does a Tribe/Consortium have the right to include provisions of title I of Pub. L. 93–638 in a funding agreement?

1000.625 What is the term of a funding agreement?

1000.630 Can a Tribe/Consortium negotiate a funding agreement with a term that exceeds one year?

1000.635 Does a funding agreement remain in effect after the end of its term?

1000.640 May a participating Tribe/Consortium retain its existing funding agreement which was executed prior to the enactment of Pub. L. 116–180?

### DETERMINING WHAT PROGRAMS MAY BE INCLUDED IN A FUNDING AGREEMENT

1000.645 What PSFAs may be included in a funding agreement?

1000.650 How does the funding agreement specify the services provided, functions performed, and responsibilities assumed by the Tribe/Consortium and those retained by the Secretary?

1000.655 May a Tribe/Consortium redesign or consolidate the programs that are included in a funding agreement and reallocate funds for such programs?

1000.660 Do Tribes/Consortium need Secretarial approval to redesign BIA programs that the Tribe/Consortium administers under a funding agreement?

1000.665 Can the terms and conditions in a funding agreement be amended during the year it is in effect?

#### DETERMINING FUNDING AGREEMENT AMOUNTS

1000.670 What funds must be transferred to a Tribe/Consortium under a funding agreement?

1000.675 What funds may not be included in a funding agreement?

1000.680 May the Secretary place any requirements on programs and funds that are otherwise available to Tribes/Consortium or Indians for which appropriations are made to agencies other than DOI?

1000.685 What funds are used to carry out inherent Federal functions?

1000.690 How does BIA determine the funding amount to carry out inherent Federal functions?

1000.695 Is the amount of funds withheld by the Secretary to cover the cost of inherent Federal functions subject to negotiation?

1000.700 May a Tribe/Consortium continue to negotiate a funding agreement pending an appeal of funding amounts associated with inherent Federal functions?

1000.705 What is a Tribal share?

1000.710 How does BIA determine a Tribe's/Consortium's share of funds to be included in a funding agreement?

1000.715 Can a Tribe/Consortium negotiate a Tribal share for programs outside its region/agency?

1000.720 May a Tribe/Consortium obtain discretionary or competitive funding that is distributed on a discretionary or competitive basis?

1000.725 Are all funds identified as Tribal shares always paid to the Tribe/Consortium under a funding agreement?

1000.730 How are savings that result from downsizing allocated?

1000.735 Do Tribes/Consortium need Secretarial approval to reallocate funds between programs that the Tribe/Consortium administers under the funding agreement?

1000.740 Can funding amounts negotiated in a funding agreement be adjusted during the year it is in effect?

#### ESTABLISHING SELF-GOVERNANCE STABLE BASE BUDGETS

1000.745 What are self-governance stable base budgets?

1000.750 Once a Tribe/Consortium establishes a stable base budget, are funding amounts renegotiated each year?

1000.755 How are self-governance stable base budgets established?

1000.760 How are self-governance stable base budgets adjusted?

#### **Subpart G – Funding Agreements for Non-BIA Programs**

Sec.

1000.801 What is the purpose of this subpart?

1000.805 What is a funding agreement for a non-BIA program?

1000.810 What non-BIA programs are eligible for inclusion in a funding agreement?

1000.815 Are there non-BIA programs for which the Secretary must negotiate for inclusion in a funding agreement subject to such terms as the parties may negotiate?

1000.820 What programs are included under section 403(b)(2) (25 U.S.C. 5363(b)(2))?

1000.825 What programs are included under section 403(c) (25 U.S.C. 5363(c))?

1000.830 What does “special geographic, historical or cultural” mean?

1000.835 Under section 403(b)(2) (25 U.S.C. 5363(b)(2)), when must programs be awarded non-competitively?

1000.840 May a non-BIA bureau include in a funding agreement, on a non-competitive basis, programs of special geographic, historical, or cultural significance?

1000.845 Are there any non-BIA programs that may not be included in a funding agreement?

1000.850 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 funding agreement?

1000.855 Will Tribes/Consortia participate in the Secretary’s determination of what is to be included on the annual list of available programs?

1000.860 How will the Secretary consult with Tribes/Consortia in developing the list of available programs?

1000.865 What else is on the list in addition to eligible programs?

1000.870 May a bureau negotiate with a Tribe/Consortium for programs not specifically included on the annual list pursuant to 25 U.S.C. 5372(c)?

1000.875 How will a bureau negotiate a funding agreement for a program of special geographic, historical, or cultural significance to more than one Tribe/Consortium?

- 1000.880 When will this determination be made?
- 1000.885 What funds are included in a non-BIA funding agreement?
- 1000.890 How are indirect cost rates determined?
- 1000.895 How does the Secretary determine the amount of indirect costs?
- 1000.900 May the bureaus negotiate terms to be included in a funding agreement for non-BIA programs?
- 1000.905 Can a Tribe/Consortium reallocate, consolidate, and redesign funds for a non-BIA program?
- 1000.910 Do Tribes/Consortia need Secretarial approval to reallocate funds between title I eligible programs that the Tribe/Consortium administers under a non-BIA funding agreement?
- 1000.915 Can a Tribe/Consortium negotiate a funding agreement with a non-BIA bureau for which the performance period exceeds one year?
- 1000.920 Can the terms and conditions in a non-BIA funding agreement be amended during the year it is in effect?
- 1000.925 What happens if a funding agreement expires before the effective date of the successor Funding Agreement?

#### **Subpart H – Negotiation Process**

##### **Sec.**

- 1000.1001 What is the purpose of this subpart?
- 1000.1005 What are the phases of the negotiation process?
- 1000.1010 Who may initiate the information phase?

- 1000.1015 Is it mandatory to go through the information phase before initiating the negotiation phase?
- 1000.1020 How does a Tribe/Consortium initiate the information phase?
- 1000.1025 What information is a Tribe/Consortium encouraged to include in a Request to Initiate the Information Phase?
- 1000.1030 When should a Tribe/Consortium submit a Request to Initiate the Information Phase to the Secretary?
- 1000.1035 What steps does the bureau take after a Request to Initiate the Information Phase is submitted by a Tribe/Consortium?
- 1000.1040 How does a Tribe/Consortium initiate the negotiation phase?
- 1000.1045 How and when does the Secretary respond to a request to negotiate a compact or BIA funding agreement?
- 1000.1050 How and when does the Secretary respond to a request to negotiate a non-BIA funding agreement?
- 1000.1055 What is the process for conducting the negotiation phase?
- 1000.1060 What issues must the bureau and the Tribe/Consortium address at negotiation meetings?
- 1000.1065 What happens when a compact or funding agreement is signed?
- 1000.1070 What happens if the Tribe/Consortium and bureau negotiators fail to reach an agreement on a compact or funding agreement?
- 1000.1075 When does the funding agreement become effective?
- 1000.1080 What is a subsequent funding agreement?
- 1000.1085 How is the negotiation of a subsequent funding agreement initiated?

1000.1090 What is the process for negotiating a subsequent funding agreement?

### **Subpart I – Final Offer**

Sec.

1000.1101 What is the purpose of this subpart?

1000.1105 When should a final offer be submitted?

1000.1110 How does a Tribe/Consortium submit a final offer?

1000.1115 What does a final offer contain?

1000.1120 When does the 60-day review period begin?

1000.1125 How does the Department acknowledge receipt of final offer?

1000.1130 May the Secretary request and obtain an extension of time of the 60-day review period?

1000.1135 What happens if the Secretary takes no action within the 60-day period (or any extensions thereof)?

1000.1140 Once the Tribe/Consortium's final offer has been accepted or accepted by operation of law, what is the next step?

1000.1145 On what basis may the Secretary reject a final offer?

1000.1150 How does the Secretary reject a final offer?

1000.1155 What is the "significant danger" or "risk" to the public health or safety, to natural resources, or to trust resources?

1000.1160 Is technical assistance available to a Tribe/Consortium to overcome the objections stated in the Secretary's rejection of a final offer?

1000.1165 If the Secretary rejects all or part of a final offer, is the Tribe/Consortium entitled to an appeal?



1000.1170 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?

1000.1175 Does appealing the final offer decision prevent the Secretary and the Tribe/Consortium from entering into any accepted compact, funding agreement or amendment provisions that are not in dispute?

1000.1180 What is the burden of proof in an appeal of a rejection of a final offer?

### **Subpart J – Waiver of Regulations**

Sec.

1000.1201 What regulations apply to Tribes/Consortia?

1000.1205 Can the Secretary grant a waiver of regulations to a Tribe/Consortium?

1000.1210 When can a Tribe/Consortium request a waiver of a regulation?

1000.1215 How does a Tribe/Consortium obtain a waiver?

1000.1220 How does a Tribe/Consortium operating a Pub. L. 102-477 Plan obtain a waiver?

1000.1225 May a Tribe /Consortium request an optional meeting or other informal discussion to discuss a waiver request?

1000.1230 Is a bureau required to provide technical assistance to a Tribe/Consortium concerning waivers?

1000.1235 How does the Secretary respond to a waiver request?

1000.1240 When must the Secretary make a decision on a waiver request?

1000.1245 How does the Secretary make a decision on the waiver request?

1000.1250 What happens if the Secretary neither approves nor denies a waiver request within the time specified in § 1000.1240?

1000.1255 May a Tribe/Consortium appeal the Secretary's decision to deny its request for a waiver of a regulation?

1000.1260 What is the term of a waiver?

1000.1265 May a Tribe/Consortium withdraw a waiver request?

1000.1270 May a Tribe/Consortium have more than one waiver request pending before the Secretary at the same time?

1000.1275 May a Tribe/Consortium continue to negotiate a funding agreement pending final decision on a waiver request?

1000.1280 How is a waiver decision documented for the record?

### **Subpart K – Construction**

Sec.

#### CONSTRUCTION DEFINITIONS

1000.1301 What key construction terms do I need to know?

#### PURPOSE AND SCOPE

1000.1305 What construction projects and programs included in a funding agreement or construction project agreement are subject to this subpart?

1000.1306 May a program or project-specific grant or contracting mechanism involving construction and related activities satisfy the requirements of this subpart?

1000.1307 May the Secretary accept funds from another Department for a program or project involving construction and related activities for transfer to the Tribe/Consortium under its funding agreement or construction project agreement?

1000.1310 What alternatives are available for a Tribe/Consortium to perform a construction program or project?

1000.1315 Does this subpart create an agency relationship?

#### NOTIFICATION AND PROJECT ASSUMPTION

1000.1320 Is the Secretary required to consult with affected Tribes/Consortia concerning construction projects and programs?

1000.1325 When does the Secretary confer with a Tribe/Consortium concerning Tribal preferences as to size, location, type, and other characteristics of a project?

1000.1330 What does a Tribe/Consortium do if it wants to perform a construction project or program under 25 U.S.C. 5367?

1000.1335 What must a Tribal proposal for a construction program or project contain?

1000.1340 May multiple projects be included in a single construction project agreement or funding agreement that includes a construction project?

1000.1345 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?

1000.1350 What provisions relating to a construction project or program may be included in a funding agreement or construction project agreement?

1000.1355 What provisions must a Tribe/Consortium include in a construction project agreement or funding agreement that contains a construction project or program?

#### REQUIREMENTS AND STANDARDS

1000.1360 What codes, standards and architects and engineers must a Tribe/Consortium use when performing a construction project under this part?

#### NEPA PROCESS

1000.1365 Are Tribes/Consortia required to carry out activities involving NEPA in order to enter into a construction project agreement?

1000.1370 How may a Tribe/Consortium elect to assume some Federal responsibilities under NEPA?

1000.1375 How may a Tribe/Consortium carry out activities involving NEPA without assuming some Federal responsibilities?

1000.1379 Are Tribes/Consortia required to adopt a separate resolution or take equivalent Tribal action to assume some environmental responsibilities of the Secretary under NEPA, NHPA, and related laws and regulations for each construction project?

1000.1380 What additional provisions of law are related to NEPA and NHPA?

1000.1385 What is the typical environmental review process for construction projects?

1000.1390 Is the Secretary required to take into account the Indigenous Knowledge of Tribes/Consortia when preparing environmental studies under NEPA, NHPA, and related provisions of other laws and regulations?

1000.1395 May a Tribe/Consortium act as a cooperating agency or joint lead agency for environmental review purposes regardless of whether it exercises its option under §

1000.1370(a)(1)?

1000.1400 How does a Tribe/Consortium comply with NEPA and NHPA?

1000.1405 If a Tribe/Consortium adopts the environmental review procedures of a Federal agency, is the Tribe/Consortium responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?

1000.1410 Are Federal funds available to cover the cost of Tribes/Consortia carrying out environmental responsibilities?

1000.1415 How are project and program environmental review costs identified?

1000.1420 What costs may be included in the budget for a construction project or program?

1000.1425 May the Secretary reject a Tribe's/Consortium's final offer of a construction project proposal submitted under subpart I – Final Offer based on a determination of Tribal capacity or capability?

1000.1430 On what basis may the Secretary reject a final offer of a construction project proposal made by a Tribe/Consortium?

#### ROLE OF THE SECRETARY

1000.1435 What is the Secretary's role in a construction project performed under this subpart?

1000.1440 What constitutes a "significant change" in the original scope of work?

1000.1445 May the Secretary suspend construction activities under a funding agreement or construction project agreement?

1000.1450 How are property and funding returned if there is a reassumption for substantial failure to carry out a construction project?

1000.1455 What happens when a Tribe/Consortium, suspended under § 1000.1445 for substantial failure to carry out the terms of construction project agreement or funding agreement that includes a construction project or program without good cause, does not correct the failure during the suspension?

1000.1460 How does the Secretary make advance payments to a Tribe/Consortium under a funding agreement or construction project agreement?

1000.1465 Is a facility built under this subpart eligible for annual operation and maintenance funding?

## ROLE OF THE TRIBE/CONSORTIUM

1000.1470 What is the Tribe's/Consortium's role in a construction project included in a funding agreement or construction project agreement under this subpart?

1000.1475 Is a Tribe/Consortium required to submit construction project progress and financial reports for construction projects?

## OTHER

1000.1480 May a Tribe/Consortium continue work with construction funds remaining in a funding agreement or construction project agreement at the end of the funding year?

1000.1485 Must a construction project agreement or funding agreement that contains a construction project or activity incorporate provisions of Federal construction standards?

1000.1490 May the Secretary require design provisions and other terms and conditions for construction projects or programs included in a funding agreement or construction project agreement under section 403(c) (25 U.S.C. 5363(c))?

1000.1495 Do all provisions of other subparts apply to construction portions of a funding agreement or construction project agreement?

1000.1500 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?

1000.1505 May a Tribe/Consortium reallocate funds from a construction program to a non-construction program?

1000.1510 May a Tribe/Consortium reallocate funds among construction programs?

1000.1515 Must the Secretary retain project funds to ensure proper health and safety standards in construction projects?

1000.1520 What funding must the Secretary provide in a construction project agreement or funding agreement that includes a construction project or program?

1000.1525 Must Federal funds from other DOI sources be incorporated into a construction project agreement or funding agreement that includes a construction project or program?

1000.1530 May a Tribe/Consortium contribute funding to a project?

### **Subpart L – Federal Tort Claims**

Sec.

1000.1601 What is the purpose of this subpart?

1000.1605 What other statutes and regulations apply to FTCA coverage?

1000.1610 Do Tribes/Consortia need to be aware of areas which FTCA does not cover?

1000.1615 Is there a deadline for filing FTCA claims?

1000.1620 How long does the Federal Government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

1000.1625 Is it necessary for a compact or funding agreement to include any clauses about FTCA coverage?

1000.1630 Does FTCA apply to a compact and funding agreement if FTCA is not referenced in the compact or funding agreement?

1000.1635 To what extent shall the Tribe/Consortium cooperate with the Federal Government in connection with tort claims arising out of the Tribe's/Consortium's performance of a compact, funding agreement, or subcontract?

1000.1640 Does this coverage extend to subcontractors of compacts and funding agreements?

1000.1645 Is FTCA the exclusive remedy for a tort claim, including a claim concerning personal injury or death, resulting from the performance of a compact or funding agreement?

1000.1650 What employees are covered by FTCA for claims arising out of a Tribe's/Consortia's performance of a compact or funding agreement?

1000.1655 Does FTCA cover employees of the Tribe/Consortium who are paid by the Tribe/Consortium from funds other than those provided through the funding agreement?

1000.1660 May persons who are not Indians or Alaska Natives assert claims under FTCA arising out of the performance of a compact or funding agreement by a Tribe/Consortium?

1000.1665 If the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or a complaint alleging a tort covered by FTCA and arising out of the performance of a compact or funding agreement, what should the Tribe/Consortium do?

### **Subpart M – Reassumption**

Sec.

1000.1701 What is the purpose of this subpart?

1000.1705 What does reassumption mean?

1000.1710 Under what circumstances may the Secretary reassume a program operated by a Tribe/Consortium under a funding agreement?

1000.1715 What is “imminent jeopardy” to a trust asset?

1000.1720 What is “imminent jeopardy” to natural resources?

1000.1725 What is “imminent jeopardy” to public health and safety?

1000.1730 What steps must the Secretary take prior to reassumption becoming effective?



1000.1735 Does the Tribe/Consortium have a right to a hearing prior to a non-immediate reassumption becoming effective?

1000.1740 What happens if the Secretary determines that the Tribe/Consortium has not corrected the conditions that the Secretary identified in the written notice?

1000.1745 What is the earliest date on which a reassumption by the Secretary can be effective?

1000.1750 Does the Secretary have the authority to immediately reassume a program?

1000.1755 What must a Tribe/Consortium do when a program is reassumed?

1000.1760 When must the Tribe/Consortium return funds to the Department?

1000.1765 May the Tribe/Consortium be reimbursed for actual and reasonable “wind up costs” incurred after the effective date of retrocession?

1000.1770 Is a Tribe’s/Consortium’s general right to negotiate a funding agreement adversely affected by a reassumption action?

1000.1775 When will the Secretary return management of a reassumed program?

### **Subpart N – Retrocession**

Sec.

1000.1801 What is the purpose of this subpart?

1000.1805 Is a decision by a Tribe/Consortium not to include a program in a successor agreement considered a retrocession?

1000.1810 Who may retrocede a program in a funding agreement?

1000.1815 How does a Tribe/Consortium retrocede a program?

1000.1820 When will the retrocession become effective?

1000.1825 How will retrocession affect the Tribe's/Consortium's existing and future funding agreements?

1000.1830 Does the Tribe/Consortium have to return funds used in the operation of a retroceded program?

1000.1835 Does the Tribe/Consortium have to return property used in the operation of a retroceded program?

1000.1840 What happens to a Tribe's/Consortium's mature contract status if it has retroceded a program that is also available for self-determination contracting?

1000.1845 How does retrocession affect a bureau's operation of the retroceded program?

### **Subpart O – Trust Evaluation**

Sec.

1000.1901 What is the purpose of this subpart?

1000.1905 Does the Act alter the trust responsibility of the United States to Indian Tribes and individuals under self-governance?

1000.1910 What are “trust resources” for the purposes of the trust evaluation process?

1000.1915 What are “trust PSFAs” for the purposes of the trust evaluation process?

1000.1920 Can a Tribe /Consortium request the Secretary to conduct an assessment of the status of the trust assets, resource, and PSFAs?

### **ANNUAL TRUST EVALUATION**

1000.1925 What is a trust evaluation?

1000.1930 How are trust evaluations conducted?

1000.1935 May the trust evaluation process be used for additional reviews?

- 1000.1936 May the parties negotiate review methods for purposes of the trust evaluation?
- 1000.1940 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?
- 1000.1945 Is the trust evaluation standard or process different when the trust resource or asset is held in trust for an individual Indian or Indian allottee?
- 1000.1950 Does the annual trust review evaluation include a review of the Secretary's inherent Federal and retained operation trust PSFAs?
- 1000.1955 What are the consequences of a finding of imminent jeopardy in the Secretary's annual trust evaluation?
- 1000.1960 What if the Secretary's trust evaluation reveals problems that do not rise to the level of imminent jeopardy?
- 1000.1965 Who is responsible for taking corrective action?
- 1000.1970 What are the requirements of the Department's review team report?
- 1000.1975 May the Department conduct more than one trust evaluation per Tribe per year?

### **Subpart P – Reports**

Sec.

- 1000.2001 What is the purpose of this subpart?
- 1000.2005 Is the Secretary required to report on Self Governance?
- 1000.2010 What will the Secretary's annual report to Congress contain?
- 1000.2011 Is the Secretary required to review programs of the Department other than BIA, BIE, the Office of the Assistant Secretary for Indian Affairs, and the BTFA?

1000.2012 Is the Secretary required to annually publish information under this subpart in the *Federal Register*?

1000.2015 Must the Secretary seek comment on the report from Tribes/Consortia before submitting it to Congress?

1000.2020 What may the Tribe's/Consortium's annual report on self-governance address?

1000.2025 Are there other data submissions or reports that Tribes/Consortia may be requested to submit?

1000.2030 Are Tribes/Consortia required to submit Single Audit Act reports?

1000.2035 Is there an exemption available for the requirement to submit Single Audit Act reports?

1000.2040 Are Tribes/Consortia required to maintain reports and records in accordance with 25 U.S.C. 5305?

### **Subpart Q – Operational Provisions**

Sec.

1000.2101 How can a Tribe/Consortium hire a Federal employee to help implement a funding agreement?

1000.2105 Can a Tribe/Consortium employee be detailed to a Federal service position?

1000.2110 How does the Freedom of Information Act apply?

1000.2115 How does the Privacy Act apply?

1000.2120 What audit requirements must a Tribe/Consortium follow?

1000.2125 How do OMB circulars and the Act apply to funding agreements?

1000.2130 How much time does the Federal Government have to make a claim against a Tribe/Consortium relating to any disallowance of costs, based on an audit?

1000.2135 Does a Tribe/Consortium have additional ongoing requirements to maintain minimum standards for Tribe/Consortium management systems?

1000.2140 Are there any restrictions on how funds awarded to a Tribe/Consortium under a funding agreement may be spent?

1000.2145 What standard applies to a Tribe's/Consortium's management of funds awarded under a funding agreement?

1000.2150 How may interest or investment income that accrues on funds awarded under a funding agreement be used?

1000.2155 Can a Tribe/Consortium retain savings from programs?

1000.2160 Can a Tribe/Consortium carry over funds not spent during the term of the funding agreement?

1000.2165 After a non-BIA funding agreement has been executed and the funds transferred to a Tribe/Consortium, can a bureau request the return of unexpended funds?

1000.2170 How can a person or group appeal a decision or contest an action related to a program operated by a Tribe/Consortium under a funding agreement?

1000.2175 Must Tribes/Consortia comply with the Secretarial approval requirements of 25 U.S.C. 81; 82a; and 476 regarding professional and attorney contracts?

1000.2180 Are funds awarded under a funding agreement non-Federal funds for the purpose of meeting matching or cost participation requirements?

1000.2185 Does Indian preference apply to services, activities, programs, and functions performed under a funding agreement?

1000.2190 Do the wage and labor standards in the Davis-Bacon Act apply to Tribes and Tribal Consortia?

1000.2195 Can a Tribe/Consortium use Federal supply sources in the performance of a funding agreement?

1000.2200 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a BIA funding Agreement?

1000.2205 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a non-BIA program funding agreement?

1000.2210 Is a Tribe/Consortium obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

### **Subpart R – Appeals**

Sec.

1000.2301 What is the purpose of this subpart?

1000.2302 What does “title-I eligible programs” mean in this subpart?

1000.2305 How must disputes be handled?

1000.2310 Does a Tribe/Consortium have any options besides an appeal?

1000.2315 What is the Secretary’s burden of proof for appeals in this subpart?

### INFORMAL CONFERENCE

1000.2320 How does a Tribe/Consortium request an informal conference?

1000.2325 How is an informal conference held?

1000.2330 What happens after the informal conference?

### POST-AWARD DISPUTES

1000.2335 How may a Tribe/Consortium appeal a decision made after the funding agreement or compact or an amendment to a funding agreement or compact has been signed?

1000.2340 What statutes and regulations govern resolution of disputes concerning signed funding agreements or compacts (and any signed amendments) that are appealed to the CBCA?

#### PRE-AWARD DISPUTES

1000.2345 What decisions may a Tribe/Consortium appeal under §§ 1000.2345 through 1000.2395?

1000.2350 What decisions may not be appealed under §§ 1000.2345 through 1000.2395?

1000.2351 To Whom may a Tribe/Consortium appeal a decision made before the Funding Agreement, Amendment to the Funding Agreement, or Compact is signed?

1000.2355 How does a Tribe/Consortium know where and when to file an appeal?

#### APPEALS TO BUREAU HEAD/ASSISTANT SECRETARY

1000.2360 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the bureau head/Assistant Secretary?

1000.2365 When must the bureau head (or appropriate Assistant Secretary) issue a final decision in the pre-award appeal?

1000.2370 When and how will the Assistant Secretary respond to an appeal by a Tribe/Consortium?

#### APPEALS TO IBIA

1000.2375 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the IBIA?

1000.2380 What happens after a Tribe/Consortium files an appeal?

1000.2385 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?

1000.2386 What regulations govern resolution of disputes that are appealed to the IBIA?

1000.2390 Will an appeal adversely affect the Tribe's/Consortium's rights in other compact, funding negotiations, or construction project agreement?

1000.2395 Will the decision on appeal be available for the public to review?

#### APPEALS OF AN IMMEDIATE REASSUMPTION OF A SELF-GOVERNANCE PROGRAM

1000.2405 What happens in the case of an immediate reassumption under 25 U.S.C. 5366(b)?

1000.2410 Will there be a hearing?

1000.2415 What happens after the hearing?

1000.2420 Is the recommended decision always final?

1000.2425 If a Tribe/Consortium objects to the recommended decision, what action will the IBIA take?

1000.2430 Will an immediate reassumption appeal adversely affect the Tribe's/Consortium's rights in other self-governance negotiations?

#### EQUAL ACCESS TO JUSTICE ACT

1000.2435 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

#### **Subparts S – Conflicts of Interest**

Sec.



1000.2501 Is a Tribe/Consortium required to have policies in place to address conflicts of interest?

1000.2505 What is an organizational conflict of interest?

1000.2510 What must a Tribe/Consortium do if an organizational conflict of interest arises under a funding agreement?

1000.2515 When must a Tribe/Consortium regulate its employees or subcontractors to avoid a personal conflict of interest?

1000.2520 What types of personal conflicts of interest involving Tribal officers, employees, or subcontractors would have to be regulated by a Tribe/Consortium?

1000.2525 What personal conflicts of interest must the standards of conduct regulate?

### **Subpart T – Tribal Consultation Process**

Sec.

1000.2601 What is the purpose of this subpart?

1000.2605 When does the Secretary consult with Tribes and Consortia on matters related to self-governance?

1000.2610 What principles should guide consultations with Tribes and Consortia?

1000.2615 What notice must the Secretary provide to Tribes and Consortia of an upcoming consultation?

1000.2620 Is the Secretary required to allow written comments by Tribes and Consortia following a consultation?

1000.2625 What record must the Secretary maintain following a consultation with Tribes and Consortia?

1000.2630 How must the Secretary handle confidential or sensitive information provided by Tribes and Consortia during a consultation?

### **Subpart A – General Provisions**

*§ 1000.1 What is the authority of this part?*

This part is prepared and issued by the Secretary of the Interior with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia under the negotiated rulemaking procedures required by section 413 of the Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, as amended by the PROGRESS for Indian Tribes Act, Pub. L. 116–180 (25 U.S.C. 5373).

*§ 1000.5 What key terms do I need to know?*

*403(c) Program or Nexus Program* means a non–BIA program eligible under 25 U.S.C. 5363(c) and, specifically, a program, function, service, or activity that is of special geographic, historical, or cultural significance to a self-governance Tribe/Consortium. These programs may also be referred to as “nexus programs.”

*Act* means title IV of the Indian Self–Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended by Pub. L. 103–413, Pub. L. 104–109, and Pub. L. 116-180.

*BIA* means the Bureau of Indian Affairs of the Department or any successor bureau. For purposes of this part, BIA shall include the Office of the Assistant Secretary for Indian Affairs, BIE, and BTFA, or any successor bureau, unless specified otherwise.

*BIA Program* means any program, service, function, or activity, or portion thereof, that is performed or administered by the Department through the BIA. For purposes of this part, BIA Program shall also include any PSFA performed or

administered by the Department through the Office of the Assistant Secretary for Indian Affairs, BIE, or BTFA which are eligible for inclusion in a compact or funding agreement under the Act unless specified otherwise.

*BIE* means the Bureau of Indian Education of the Department, or any successor bureau.

*BIE Program* means any program, service, function, or activity, or portion thereof, that is performed or administered by the Department through the BIE and is eligible for inclusion in a compact and funding agreement under the Act.

*BTFA* means the Bureau of Trust Funds Administration of the Department, or any successor bureau, to which the Department has transferred fiduciary programs, services, functions, and activities from the Office of Special Trustee for American Indians, as it is referenced in 25 U.S.C. 5361, *et seq.*, as amended.

*Bureau* means a bureau, service, office, agency, and other such subsidiary entity within the Department.

*Compact* means a self-governance compact entered under 25 U.S.C. 5364.

*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 funding agreements and compacts.

*Construction management services (CMS)* means activities limited to administrative support services, coordination, oversight of engineers and construction activities. CMS services include services that precede project design: all project design and actual construction activities are subject to subpart K of these regulations whether performed by a Tribe subcontractor, or consultant.

*Construction program or construction project* means a Tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems, or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control, transportation, or port facilities, or for other Tribal purposes.

*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 agreement* means a funding agreement entered into under 25 U.S.C. 5363.

*Funding year* means either fiscal or calendar year.

*Gross mismanagement* means a significant violation, shown by a preponderance of the evidence, of a compact, funding agreement, or statutory or regulatory requirement applicable to Federal funds for a PSFA administered by an Indian Tribe under a compact or funding agreement.

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

*Indian Tribe or Tribe* means any Indian Tribe, band, nation or other organized group or community, including pueblos, rancherias, colonies and any Alaska Native village, or regional or village corporations as defined in or established pursuant to the

Alaska Native Claims Settlement Act, that is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.

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

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

*Inherent Federal function* means a Federal function that may not legally be delegated to an Indian Tribe.

*Non-BIA Bureau* means any bureau within the Department other than the BIA, the BIE, the BTFA, or the Office of the Assistant Secretary for Indian Affairs.

*Non-BIA bureaus director/commissioner* means the director of Non-BIA bureaus and the commissioner of the Bureau of Reclamation.

*Non-BIA Programs* means all or a portion of a program, function, service, or activity that is administered by any bureau other than the BIA, the BIE, the BTFA, or the Office of the Assistant Secretary for Indian Affairs within the Department.

*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* or *PSFA* means any program, service, function, or activity (or portions thereof) within the Department that is included in a funding agreement.

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

*Reassumption* means the Secretary, without consent of the Tribe/Consortium, takes control or operation of the PSFAs and associated funding in a compact or funding agreement, in whole or in part, and assumes the responsibility to provide such PSFAs.

*Residual Funds* means funding that is necessary for the Department to carry out inherent Federal functions that cannot be delegated to a Tribe/Consortia by law.

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

*Retrocession* means the voluntary full or partial return by a Tribe/Consortium to a bureau of a PSFA operated under a funding agreement before the agreement expires.

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

*Self-determination contract* means a self-determination contract entered into under 25 U.S.C. 5321.

*Self-governance* means the Tribal Self-Governance Program established under 25 U.S.C. § 5362.

*Self-governance Tribe/Consortium* means a Tribe or Consortium that has been selected to participate in self-governance. May also be referred to as “participating Tribe/Consortium.”

*Subsequent funding agreement* means a funding agreement negotiated after a Tribe’s/Consortium’s initial agreement with a bureau.

*Tribal share* means the portion of all funds and resources determined for that Tribe/Consortium that supports any program within BIA, the BIE, the BTFA, or the

Office of the Assistant Secretary for Indian Affairs and are not required by the Secretary for the performance of an inherent Federal function.

*§ 1000.10 What is the purpose and scope of this part?*

(a) *Purpose.* This part codifies uniform and consistent rules for the Department implementing title IV of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, 25 U.S.C. 5361 *et seq.*, as amended by title II of Pub. L. 103-413, the Tribal Self-Governance Act of 1994 (108 Stat. 4250, October 25, 1994) and title I of Pub. L. 116-180, the PROGRESS for Indian Tribes Act (134 Stat. 857, October 21, 2020).

(b) *Scope.* These regulations are binding on the Secretary and on Tribes/Consortia carrying out programs, services, functions, and activities (PSFAs) (or portions thereof) under title IV except as otherwise specifically authorized by a waiver under 25 U.S.C. 5369(b) and this part.

(c) *Information Collection.* The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned control number 1076-0143. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*§ 1000.15 What is the congressional policy statement of this part?*

(a) *Congressional findings.* In the Act, 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 has discouraged, to some degree, the further compacting of Indian programs or hindered negotiations between the Department and Tribes for renewing self-governance compacts and funding agreements;

(4) Tribal Self-Governance 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 further finds that:

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

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

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

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



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

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

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

(5) To permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority to plan, conduct, redesign, and administer PSFAs 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) As reflected in H. Rept. 116-422 and S. Rept. 116-34, it is the policy of the PROGRESS for Indian Tribes Act, Pub. L. 116-180:

(1) To clarify and streamline the Department's process for approving self-governance compacts and funding agreements;

(2) To create consistency and administrative efficiencies between title IV and title V of Pub. L. 93-638, as amended; and

(3) To minimize delays to self-governance compacting or funding.

*§ 1000.20 What is the Secretarial policy of this part?*

In carrying out Tribal self-governance under title IV, it is the policy of the Secretary:

(a) To fully support and implement the foregoing policies to the full extent of the Secretary's authority.

(b) To recognize and respect the unique government-to-government relationship between Tribes, as sovereign governments, and the United States.

(c) To have all bureaus of the Department work to further and protect the trust responsibility of the United States with respect to Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(d) To have all bureaus of the Department work cooperatively and pro-actively with Tribes/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.

(e) To have all bureaus of the Department work to streamline the process for Tribes/Consortia participating in or applying to participate in self-governance to establish administrative efficiencies and consistency with the processes under title IV and title V of Pub. L. 93-638, as amended.

(f) 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 a funding agreement.

(g) To interpret each Federal law and regulation in a manner that facilitates the inclusion of programs in funding agreements and the implementation of funding agreements.

(h) That all bureaus of the Department will negotiate in good faith, liberally construe each applicable Federal law and regulation in a manner that will benefit Tribes and Tribal Consortia participating in self-governance and facilitate the inclusion of programs in each funding agreement authorized, and timely enter into such funding agreements under title IV, whenever possible.

(i) 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 a funding agreement.

(j) To the extent of the Secretary's authority, to maintain active communication with Tribal governments regarding budgetary matters applicable to programs subject to the Act, and that are included in an individual funding agreement.

(k) To implement policies, procedures, and practices at the Department to ensure that the letter, spirit, and goals of the Act are fully and successfully implemented to the maximum extent allowed by law.

(l) To ensure that Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments and any subsequent Executive Orders regarding consultation will apply to the implementation of these regulations.

*§ 1000.25 What is the effect on existing Tribal rights?*

Nothing in this part shall be construed as:

- (a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian Tribes;
- (b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians. The Secretary must act in good faith in upholding this trust responsibility;
- (c) Requiring an Indian Tribe to participate in self-governance; or
- (d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.

*§ 1000.30 What is the effect of these regulations on Federal program guidelines, manual, or policy directives?*

Unless expressly agreed to by the Tribe/Consortium in a compact or funding agreement, the Tribe/Consortium shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except for the eligibility provisions of 25 U.S.C. 5324(g) and the regulations under this part to the extent a regulatory provision is not waived by the Secretary.

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

### **PURPOSE AND DEFINITIONS**

*§ 1000.101 What is the purpose of this subpart?*

This subpart describes the selection process and eligibility criteria that the Secretary uses to decide that Indian Tribes may participate in Tribal self-governance as authorized by 25 U.S.C. 5362.

*§ 1000.105 What is a “signatory”?*

A signatory is a Tribe or Consortium that meets the eligibility criteria in §§ 1000.115 and 1000.125 and directly signs the agreements. A signatory may exercise all of the rights and responsibilities outlined in the compact and funding agreement and is legally responsible for all financial and administrative decisions made by the signatory.

*§ 1000.110 What is a “nonsignatory Tribe”?*

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

(1) Does not meet the eligibility criteria in §§ 1000.115 and 1000.125 and, by resolution of its governing body, authorizes a Consortium to participate in self-governance on its behalf.

(2) Meets the eligibility criteria in §§ 1000.115 and 1000.125 but chooses to be a member of a Consortium and have a representative of the Consortium sign the compact and funding agreement on its behalf.

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

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

(2) May only become a “signatory Tribe” if it independently meets the eligibility criteria in §§ 1000.115 and 1000.125.

## ELIGIBILITY

*§ 1000.115 Who may participate in Tribal self-governance?*

There are two types of entities who may participate in Tribal self-governance:

(a) Indian Tribes; and

(b) Consortia of Indian Tribes.

*§ 1000.120 How many additional Tribes/Consortia may participate in self-governance per year?*

(a) The Secretary, acting through the Director of the OSG, may select not more than 50 new Indian Tribes per year from those Tribes eligible under 25 U.S.C. 5362(c) to participate in self-governance. A Consortium of Indian Tribes counts as one Tribe for purposes of calculating the 50 additional Tribes per year.

(b) The limitation of not more than 50 new Tribes per year does not preclude a signatory Tribe from negotiating a new or amended compact or funding agreement. Such new or amended compacts or funding agreements do not count against the limitation of not more than 50 new Tribes per year.

*§ 1000.125 What must a Tribe/Consortium submit to be selected to participate in Self-Governance?*

The Tribe/Consortium must submit to OSG documentation that demonstrates the following:

(a) Successful completion of a planning phase as described in § 1000.140. 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) For a Tribe/Consortium required to perform an annual audit under the Single Audit Act and Subpart F of 2 CFR part 200, financial stability and financial management capability as evidenced by the Tribe (or participating Tribes in a Consortium) having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency for the three fiscal years preceding the date on which the Tribe/Consortium requests participation, provided that documentation demonstrating the correction of any significant and material audit exceptions may include, but is not limited to, Agency Management Decision Letters issued in accordance with 2 CFR 200.521, Summary Schedule of Prior Audit Findings included in subsequent audit reports in accordance with 2 CFR 200.511, or any documentation provided by the Tribe/Consortium.

*§ 1000.130 What additional information may be submitted to the Secretary to facilitate negotiations?*

At the option of the Tribe/Consortium, a Tribe/Consortium may identify BIA and non-BIA programs that the Tribe/Consortium may wish to subsequently negotiate for inclusion in a funding agreement. The inclusion of PSFAs in a funding agreement is not limited by the provision of this additional information.

*§ 1000.135 May a Consortium member Tribe withdraw from the Consortium and be selected to participate in Self-Governance?*

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 fully or partially withdraw from a participating Consortium its share of any program

included in a compact or funding agreement to directly negotiate a compact and funding agreement. The withdrawing Tribe must do the following:

(a) Independently meet all of the eligibility criteria in §§ 1000.115 through 1000.140. If a Consortium's planning activities specifically consider self-governance activities for a member Tribe, that planning activity may be used to satisfy the planning requirements for the member Tribe if it applies for self-governance status on its own.

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

*§ 1000.140 What is required during the "planning phase"?*

The planning phase must be conducted to the satisfaction of the Tribe/Consortium and must include:

(a) Legal and budgetary research; and

(b) Internal Tribal government, planning, training, and organizational preparation related to the operation of PSFAs contemplated by the Tribe/Consortium.

*§ 1000.145 When does a Tribe/Consortium have an uncorrected "significant and material audit exception"?*

A Tribe/Consortium has an uncorrected significant and material audit exceptions if any of the audits that it submitted under § 1000.125(c) identifies:

(a) Significant deficiencies and material weaknesses in internal control over major programs and significant instances of abuse relating to major programs which the Tribe/Consortium has not corrected.



(b) Material noncompliance with the provisions of Federal statutes, regulations, or the terms and conditions of Federal awards related to a major program which the Tribe/Consortium has not corrected.

(c) A single finding of known questioned costs subsequently disallowed by a contracting officer or awarding official that exceeds \$25,000 (or such higher amount as may be established in 2 CFR 200.516).

*§ 1000.150 What are the consequences of having an uncorrected significant and material audit exception?*

If a Tribe/Consortium has an uncorrected significant and material audit exception, the Tribe/Consortium is ineligible to be selected to participate in self-governance until the Tribe/Consortium meets the documentation requirements in § 1000.125.

*§ 1000.155 Is the Secretary required to provide technical assistance to improve a Tribe's/Consortium's internal controls?*

Yes. In considering proposals by a Tribe/Consortium for participation in Self-Governance, if the Secretary determines that the Tribe/Consortium lacks adequate internal controls necessary to manage PSFAs proposed for inclusion in a compact or funding agreement under this part, the Secretary shall, as soon as practicable, provide the necessary technical assistance to assist the Tribe/Consortium in developing adequate internal controls in accordance with 25 U.S.C. 5324(q)(1).

#### SELECTION TO PARTICIPATE IN SELF-GOVERNANCE

*§ 1000.160 How is a Tribe/Consortium selected to participate in Self-Governance?*

(a) For a Tribe not presently participating in Self Governance to be selected, the Tribe/Consortium may submit a request to the Director at any time, but no later than 180

days before the proposed effective date of the funding agreement (e.g., October 1, January 1, or such other date as the parties agree). The request must contain the documentation required in § 1000.125.

(b) OSG shall select a Tribe/Consortium to participate in self-governance upon a determination that the Tribe/Consortium has provided the required documentation in § 1000.125, consistent with 25 U.S.C. 5362(b)(1)(A).

(c) OSG shall notify the Tribe/Consortium no later than 45-days after receipt of the Tribe's/Consortium's request that the Tribe/Consortium has been selected to participate in self-governance or does not have a complete request under § 1000.185.

*§ 1000.165 When does OSG accept requests to participate in Self-Governance?*

OSG accepts requests at any time. A Tribe/Consortium may request a meeting or other informal discussion with the OSG before submitting its request to participate.

*§ 1000.170 Are there any time frames to negotiate an initial compact or funding agreement for a Tribe not presently participating in self-governance?*

Yes.

(a) Once selected to participate in self-governance, the parties should begin negotiations at least 180 days before the proposed effective date of the initial funding agreement and compact (e.g., October 1, January 1, or such other date as the parties agree in the initial funding agreement or compact).

(b) A Tribe/Consortium may be selected to participate during one year but negotiate a compact and funding agreement in a subsequent year. In this case, the Tribe/Consortium must, before the applicable period established in § 1000.160, submit to OSG documentation demonstrating continued eligibility under 25 U.S.C. 5362(c).

*§ 1000.175 How does a Tribe/Consortium withdraw its request to participate in Self-Governance?*

A Tribe/Consortium may withdraw its request to participate in Self Governance by submitting a Tribal resolution or official action by the Tribal governing body to the Director of OSG.

*§1000.180 What if more than 50 Tribes/Consortium apply to participate in Self-Governance?*

The first 50 Tribes/Consortium who apply and are determined to be eligible under § 1000.160 shall have the option to begin to participate in self-governance. Any Tribe/Consortium denied participation due to the limitation in number of Tribes/Consortium is entitled to participate in the next fiscal year, provided the Tribe/Consortium remains eligible under 25 U.S.C. 5362(c).

*§ 1000.185 What happens if a request is not complete?*

If OSG determines that a Tribe's/Consortium's request is not complete, OSG will notify the Tribe/Consortium that the request is not complete under § 1000.125 by electronic mail and by letter, certified mail, return receipt requested no later than 45-days after receipt of the Tribe's/Consortium's request. The email and letter will explain what the Tribe/Consortium must do to complete the request.

*§ 1000.190 What happens if a Tribe/Consortium is selected to participate but does not execute a compact and a funding agreement?*

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

(1) It does not satisfy the eligibility requirements under 25 U.S.C. 5362(c); or

(2) Submits a Tribal resolution or official action by the Tribal governing body to the Director, OSG requesting to withdraw its request to participate in Self Governance.

(b) Whether or not a Tribe/Consortium executes an agreement has no effect on the selection of up to 50 new Tribes/Consortia in a subsequent year.

*§ 1000.195 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(b)(2) (25 U.S.C. 5363(b)(2)) without having or negotiating a funding agreement under 25 U.S.C. 5363(b)(1)?*

Yes, a Tribe/Consortium may be selected to negotiate a funding agreement under 25 U.S.C. 5363(b)(2) without having or negotiating a funding agreement under 25 U.S.C. 5363(b)(1).

*§ 1000.200 May a Tribe/Consortium be selected to negotiate a funding agreement under section 403(c) (25 U.S.C. 5363(c)) without negotiating a funding agreement under 25 U.S.C. 5363(b)(1) and/or section 403(b)(2) (25 U.S.C. 5363(b)(2))?*

No, 25 U.S.C. 5363(c) of the Act states that any programs of special geographic, cultural, or historical significance to the Tribe/Consortium must be included in funding agreements negotiated under 25 U.S.C. 5363(a) and/or 25 U.S.C. 5363(b). A Tribe may be selected to negotiate a funding agreement under 25 U.S.C. 5363(c) at the same time that it negotiates a funding agreement under 25 U.S.C. 5363(b)(1) and/or 25 U.S.C. 5363(b)(2).

#### WITHDRAWAL FROM A CONSORTIUM FUNDING AGREEMENT

*§ 1000.205 What happens when a Tribe wishes to withdraw from a Consortium funding agreement?*

(a) A Tribe wishing to withdraw from all or a part of a Consortium's funding agreement must notify the parties to the compact and funding agreement. The notice must:

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

(2) Be received no later than 180 days before the effective date of the next Consortium funding agreement, unless the parties agree to another date.

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

(c) The effective date of the withdrawal will be the date specified in the Tribal resolution and mutually agreed upon by the parties that signed the compact and funding agreement. In the absence of a specific time set forth in the resolution, such withdrawal becomes effective on:

(1) The earlier of one year after the date of submission of the request, or the date on which the funding agreement expires; or

(2) Such date as may be mutually agreed upon by the withdrawing Tribe and the parties that signed the compact and funding agreement.

*§ 1000.210 How are funds redistributed when a withdrawing Tribe fully or partially withdraws from a compact and funding agreement and enters a new contract or compact?*

When a Tribe eligible to enter into a contract under title I or a compact or funding agreement under title IV fully or partially withdraws from a participating Consortium,

and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:

(a) The withdrawing Tribe is entitled to its Tribal share of funds supporting those programs that the Tribe will be carrying out under its own contract or compact and funding agreement (calculated on the same basis or methodology upon which the funds were included in the Consortium's funding agreement); and

(b) The funds referred to in paragraph (a) of this section must be transferred from the Consortium's funding agreement, on the condition that the provisions of 25 U.S.C. 5321 and 5324(i), as appropriate, apply to the withdrawing Tribe.

*§ 1000.215 If the withdrawing Tribe elects to operate a program carried out under a compact and funding agreement under title IV through a contract under title I, is the resulting contract considered a mature contract under 25 U.S.C. 5304(h)?*

If a Tribe withdrawing from a Consortium's funding agreement elects to operate a program carried out under a compact and funding agreement under title IV through a contract under title I, at the option of the Tribe, the resulting contract is considered a mature contract as long as the Tribe meets the requirements set forth in 25 U.S.C. 5304(h).

*§ 1000.220 How are funds distributed when a withdrawing Tribe fully or partially withdraws from a Consortium's compact and funding agreement and the withdrawing Tribe does not enter a new contract or compact?*

All funds not obligated by the Consortium associated with the withdrawing Tribe's returned Tribal share of funds, less close out costs, shall be returned by the Consortium to DOI for operation of the programs included in the withdrawal.

*§ 1000.225 What amount of funding is to be removed from the Consortium's funding agreement for the withdrawing Tribe?*

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

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

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

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

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

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

(1) The parties to the compact and funding agreement and the withdrawing Tribe agree it is appropriate; and

(2) The funds are clearly identifiable.

*§ 1000.230 What happens if there is a dispute between the Consortium and the withdrawing Tribe?*

(a) The withdrawing Tribe and the parties to the compact and funding agreement must reach an agreement on the amount of funding and other issues associated with the program(s) involved.

(b) If agreement is not reached:

(1) For BIA Programs, the Director of OSG must make a decision on the funding or other issues involved within 45-days of the Tribe’s or Consortium’s written submittal of the dispute to the Director of OSG with a copy to the other party.

(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:

<b>If the program is administered through . . .</b>	<b>then a copy of the decision must be sent to. . .</b>
(1) The BIA	The BIA Regional Director, the BIA Director, the withdrawing Tribe, and the Consortium.
(2) The BIE	The BIE Associate Deputy Director, the BIE Director, the withdrawing Tribe, and the Consortium.
(3) The BTFA	The BTFA Director, the withdrawing Tribe, and the Consortium.



(4) The Office of the Assistant Secretary- Indian Affairs	The Assistant Secretary for Indian Affairs, the withdrawing Tribe, and the Consortium.
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(d) Any decision made under paragraph (b) of this section is appealable under subpart R of this part.

*§ 1000.235 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?*

Under § 1000.205, a Tribe may withdraw from a Consortium and request that the Secretary award the Tribe its portion of a construction project’s funds. The Secretary may decide not to award these funds if the Secretary determines that the award of the withdrawing Tribe’s portion of funds would affect the ability of the remaining members of the Consortium to complete a severable or non-severable phase of the project within available funding.

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

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

(c) The Secretary’s decision under this section may be appealed under subpart R of this part.

**Subpart C – Planning and Negotiation Grants for BIA Programs**

*§ 1000.301 What is the purpose of this subpart?*

This subpart describes how a Tribe/Consortium seeking to begin or expand its participation in self-governance may request grants to assist with its required planning phase and to negotiate a compact and funding agreement.

*§ 1000.305 Are there grants available to assist Tribes/Consortia to meet the requirements to participate in self-governance?*

Yes, any Tribe/Consortium may apply, as provided in § 1000.315, for a grant to assist it to:

- (a) Plan to participate in self-governance; and
- (b) Negotiate the terms of the compact and funding agreement between the Tribe/Consortium and the Secretary.

*§ 1000.310 What is required to request planning and negotiation grants?*

A Tribe/Consortium seeking a planning or negotiation grant must submit the following:

(a) A resolution or other final action by the Tribe's/Consortium's governing body requesting to begin or expand its participation in self-governance and to receive a grant; and

(b) For a Tribe/Consortium required to perform an annual audit under the Single Audit Act and subpart F of 2 CFR part 200, evidence showing that the Tribe/Consortium has no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency for the three fiscal years preceding its current request to participate in self-governance.

*§ 1000.315 Are planning and negotiation grants available?*

Subject to the availability of funds, the Department will annually publish a notice of the number of planning and negotiation grants available, an explanation of the application process for such grants, and the criteria for award. Questions may be directed to the OSG.

*§ 1000.320 Must a Tribe/Consortium receive a planning or negotiation grant to be eligible to participate in self-governance?*

No, a Tribe/Consortium may use other resources to meet the planning requirement and to negotiate. The award of a planning grant or a negotiation grant is not required in order to meet the planning phase requirement of the Act or to negotiate a compact or funding agreement.

*§ 1000.325 What happens if there are insufficient funds to award all of the requests for planning and negotiation grants in any given year?*

The Secretary must give funding priority to approved requests for negotiation grants if there are insufficient funds to award all the approved requests for planning and negotiation grants in any given year.

*§ 1000.330 May a Tribe/Consortium that has received a planning grant also receive a negotiation grant?*

Yes. A planning grant and a negotiation grant may be awarded to the same Tribe/Consortium in the same or separate years.

*§ 1000.335 What are the Secretary's responsibilities upon a decision not to award a planning or negotiation grant?*

The Secretary must communicate in writing the reasons for declining to award a planning or negotiation grant, and offer the Tribe/Consortium any technical assistance that might make an award possible.

*§ 1000.340 May a Tribe/Consortium administratively appeal the Secretary's decision to not award a grant under this subpart?*

No. The Secretary's decision to not award a grant under this subpart is final for the Department.

#### **Subpart D – Financial Assistance for Planning and Negotiation Activities for Non-BIA Bureau Programs**

*§ 1000.401 What is the purpose of this subpart?*

This subpart describes additional requirements and criteria applicable to receiving financial assistance for planning and negotiating activities for a non-BIA program.

*§ 1000.405 What funds are available to Tribes/Consortium for planning and negotiating activities with non-BIA bureaus?*

(a) Tribes/Consortium may contact a non-BIA bureau to determine if funds may be available for the purpose of planning and negotiating activities with non-BIA bureaus under this subpart, including grants awarded pursuant to 25 U.S.C. 5362(e).

(b) Tribes/Consortium may also request information identified in § 1000.1025(b)(2).

*§ 1000.410 What kinds of planning and negotiation activities for non-BIA programs does financial assistance from non-BIA bureaus support?*

Financial assistance received by a Tribe/Consortium from non-BIA bureaus for planning and negotiation activities for non-BIA programs may support activities such as, but not limited to, the following:

(a) Information gathering and analysis;

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

(c) Negotiation activities.

*§ 1000.415 Who can apply to a non-BIA bureau for financial assistance to plan and negotiate non-BIA programs?*

A Tribe/Consortium may apply for financial assistance to plan and negotiate non-BIA programs if the Tribe/Consortium meets the requirements of 25 U.S.C. 5362(e) and;

(a) Applied to participate in self-governance; or

(b) Been selected to participate in self-governance; or

(c) Has negotiated and entered into an existing funding agreement.

*§ 1000.420 Under what circumstances may financial assistance for planning and negotiation activities with non-BIA bureaus be awarded to Tribes/Consortia?*

At the discretion of the non-BIA bureau's director/commissioner, financial assistance to plan and negotiate non-BIA programs may be awarded when requested by the Tribe/Consortium. A Tribe/Consortium may submit only one application per year for financial assistance under this section.

*§ 1000.425 How does the Tribe/Consortium know when and how to apply for financial assistance for planning and negotiation activities for a non-BIA program?*

Subject to the availability of funds, the Secretary will annually publish a notice in the *Federal Register* identifying the number of planning and negotiation grants available from non-BIA bureaus that includes an explanation for each non-BIA bureau describing the application process and criteria for award. The notice will identify a point-of-contact for each non-BIA bureau where questions about the grants can be directed. Notices for planning and negotiation grants for BIA programs are covered in § 1000.315.

*§ 1000.430 What must be included in the application for financial assistance for planning and negotiation activities for a non-BIA program?*

The application for financial assistance for planning and negotiation activities for a non-BIA program must include:

(a) Written notification by the governing body or its authorized representative of the Tribe's/Consortium's intent to engage in planning/negotiation activities like those described in § 1000.410;

(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.

*§ 1000.435 How will the non-BIA bureau director/commissioner award financial assistance for planning and negotiation activities for a non-BIA program?*

The non-BIA bureau director/commissioner must review all 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 non-BIA bureau must rank the complete applications submitted by the deadline using the criteria in the notice of funding availability.

*§ 1000.440 May non-BIA bureaus provide technical assistance to a Tribe/Consortium in drafting its application?*

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

*§ 1000.445 What are the non-BIA bureau director's/commissioner's responsibilities upon a decision to decline financial assistance?*

The non-BIA bureau director/commissioner must communicate in writing the reasons for declining to award financial assistance and offer the Tribe/Consortium technical assistance that might make an award successful through a future application.

*§ 1000.450 Can an applicant administratively appeal a decision not to award financial assistance?*

No, all decisions made by the non-BIA bureau director/commissioner to award or not to award financial assistance under this subpart are final for the Department.

*§ 1000.455 May a Tribe/Consortium reapply through a future planning and negotiation application if it has been previously denied?*

Yes, a Tribe/Consortium may reapply through a future planning and negotiation application.

*§ 1000.460 Will the non-BIA bureau notify Tribes/Consortium of the results of the selection process?*

Yes, the non-BIA bureau will notify all applicant Tribes/Consortium in writing as soon as possible after completing the selection process.

### **Subpart E – Compacts**

*§ 1000.501 What is a self-governance compact?*

A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a self-governance Tribe and the United States consistent with the trust responsibility of the Federal Government with respect to Indian Tribes that exists under treaties, Executive orders, court decisions, and other laws. The compact differs from a funding agreement in that parts of the compact apply to all bureaus within the Department rather than a single bureau.

*§ 1000.505 Which DOI office negotiates self-governance compacts?*

The DOI OSG negotiates self-governance compacts.

*§ 1000.510 What is included in a self-governance compact?*

A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility with respect to Indian Tribes that exists under treaties, Executive orders, court decisions, and other laws and such other terms as the parties intend to control during the term of the compact.

Each self-governance compact must:



- (a) Specify and affirm the general terms of the government-to-government relationship between the Tribe and the Secretary;
- (b) State the general terms and conditions of the compact;
- (c) Identify the effective date of the compact;
- (d) Identify the duration of the compact; and
- (e) Include provisions that reflect the requirements of the Act in accordance with § 1000.515.

*§ 1000.515 What provisions must be included in either a compact or funding agreement?*

Subject to 25 U.S.C. 5365, the following must be included in either a compact or funding agreement. The Tribe/Consortium may include the following in either a compact or funding agreement:

- (a) Conflicts of interest;
- (b) Applicable cost principles and application of the Single Audit Act;
- (c) Limitations on remedies relating to cost disallowances;
- (d) For non-construction programs, authorization for the Tribe/Consortium to redesign or consolidate eligible programs and to reallocate funds for such programs;
- (e) Reassumption;
- (f) Retrocession; and
- (g) Recordkeeping.

*§ 1000.520 Is a compact required to participate in self-governance?*

Yes, a Tribe/Consortium must have a compact in order to participate in self-governance.

*§ 1000.525 Can a Tribe/Consortium negotiate other terms and conditions?*

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 consistent with the trust responsibility of the Federal Government with respect to Indian Tribes that exists under treaties, Executive orders, court decisions, and other laws. A Tribe/Consortium and the Secretary may agree to include any provision from title I of the Act, as amended, in a compact provided that the inclusion of any such provision shall be subject to, and shall not conflict with, section 101(a) of the PROGRESS for Indian Tribes Act, Pub. L. 116–180 (25 U.S.C. 5361 note).

*§ 1000.530 What is the duration of a compact?*

Upon approval and execution of a compact, the compact remains in effect for so long as authorized by Federal law or until terminated by mutual written agreement or retrocession or reassumption of all programs.

*§ 1000.535 May a compact be amended?*

A compact may be amended at any time subject to the applicable negotiation procedures contained in this part, or by written agreement of the parties.

*§ 1000.540 Can a Tribe/Consortium have a funding agreement without having negotiated a compact?*

No, a compact is a separate document from a funding agreement, and the compact may be negotiated prior to or at the same time as a funding agreement.

*§ 1000.545 May a participating Tribe/Consortium retain its existing compact which was executed prior to the enactment of Pub. L. 116–180?*

Yes, a participating Tribe/Consortium with a negotiated compact executed prior to October 21, 2020, the enactment of Pub. L. 116–180, shall have the option at any time after that date to:

(a) Retain its existing compact, in whole or in part, to the extent that the provisions of the compact are not directly contrary to any express provision of the Act, as amended, or

(b) Negotiate a new compact in accordance with the Act.

*§ 1000.550 What happens if the Tribe/Consortium and Secretary fail to reach an agreement on a compact?*

If the Secretary and the Tribe/Consortium have negotiated and are unable to reach agreement, in whole or in part, on the terms of a compact then the Tribe/Consortium may submit a final offer in accordance with subpart I of this part.

#### **Subpart F – Funding Agreements for BIA Programs**

*§ 1000.601 What is the purpose of this subpart?*

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

*§ 1000.605 What is a funding agreement?*

Funding agreements are legally binding and mutually enforceable written agreements negotiated and entered into between a self-governance Tribe/Consortium and the Secretary.

#### **CONTENTS AND SCOPE OF FUNDING AGREEMENTS**

*§ 1000.610 What must be included in a funding agreement?*

(a) Each funding agreement must:

(1) Specify the PSFAs that the Tribe/Consortium is authorized to plan, conduct, consolidate, and administer and the responsibilities of the Secretary as outlined in § 1000.650;

(2) Provide for the Secretary to monitor the performance of trust functions administered by the Tribe/Consortium through the annual trust evaluation as specified in subpart O of this part;

(3) Provide for annual or semi-annual installments of advance payment(s), at the option of the Tribe/Consortium;

(4) Provide for the incorporation of required provisions of title I of Pub. L. 93-638, as amended, pursuant to section 201(d) of the PROGRESS for Indian Tribes Act, and for the incorporation of other provisions of title I of Pub. L. 93-638, as amended, at the option of the Tribe/Consortium;

(5) Provide for a stable base budget as outlined in §§1000.745 through 1000.760, at the option of the Tribe/Consortium;

(6) Prohibit the Secretary from waiving, modifying, or diminishing the trust responsibility of the United States;

(7) Specify the funding agreement's effective date;

(8) Prohibit the Tribe/Consortium from contracting with the Secretary for duplicative funds and/or PSFAs under title I;

(9) Provide that the Tribe/Consortium shall be eligible for new programs and new funding on the same basis as other Indian Tribes; and shall be responsible for the administration of programs in accordance with the compact or funding agreement;

(10) Provide the funding amount(s); and

(11) Include as attachments and incorporate by reference additional documents agreed upon by the parties.

(b) Subject to 25 U.S.C. 5365, the following must be included in either a compact or funding agreement. The Tribe/Consortium may include the following in either a compact or funding agreement:

- (1) Conflicts of Interest;
- (2) Applicable Cost Principles and application of the Single Audit Act;
- (3) Limitations on remedies relating to cost disallowances;
- (4) For non-construction programs, authorization for the Tribe/Consortium to redesign or consolidate programs and to reallocate funds for such programs;
- (5) Reassumption;
- (6) Retrocession; and
- (7) Recordkeeping.

*§ 1000.615 Can additional provisions be included in a funding agreement?*

Yes, any provision that the parties mutually agreed upon may be included in a funding agreement.

*§ 1000.620 Does a Tribe/Consortium have the right to include provisions of title I of Pub. L. 93–638 in a funding agreement?*

Yes, a Tribe/Consortium has the right to include any provision of title I of Pub. L. 93–638, as amended, in a funding agreement.

*§ 1000.625 What is the term of a funding agreement?*

A funding agreement shall have the term mutually agreed to by the parties. Absent notification from a Tribe/Consortium that it is withdrawing or retroceding the

operation of one or more programs identified in a funding agreement or by the nature of any noncontinuing PSFA contained in a funding agreement, the funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

*§ 1000.630 Can a Tribe/Consortium negotiate a funding agreement 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 a funding agreement with a term that exceeds one year under 25 U.S.C. 5363(p)(4).

*§ 1000.635 Does a funding agreement remain in effect after the end of its term?*

Yes, the provisions of a funding agreement, including all recurring increases received and continuing eligibility for other increases, remain in full force and effect until a subsequent funding agreement is executed, including coverage of the Tribe/Consortium under the Federal Tort Claims Act (FTCA) 28 U.S.C. 2671 through 2680. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the term of the preceding funding agreement for purposes of calculating the amount of funding to which the Tribe/Consortium is entitled.

*§ 1000.640 May a participating Tribe/Consortium retain its existing funding agreement which was executed prior to the enactment of Pub. L. 116–180?*

Yes, a participating Tribe/Consortium with a funding agreement executed prior to October 21, 2020, the enactment of Pub. L. 116–180, shall have the option at any time after that date to:

(a) Retain its existing funding agreement, in whole or in part, to the extent that the funding agreement is not contrary to the Act, as amended by Pub. L. 116–180; or

(b) Negotiate a new funding agreement.

## DETERMINING WHAT PROGRAMS MAY BE INCLUDED IN A FUNDING AGREEMENT

*§ 1000.645 What PSFAs may be included in a funding agreement?*

A Tribe/Consortium may include in its funding agreement PSFAs administered by the Secretary for the benefit of Indians because of their status as Indian, including, but not limited to those provided through the BIA, the BIE, the BTFA, the Office of the Assistant Secretary for Indian Affairs, and the Appraisal and Valuation Services Office, without regard to the agency or office of that Bureau or Office, including any PSFA identified in 25 U.S.C. 5363(b)(1).

*§ 1000.650 How does the funding agreement specify the services provided, functions performed, and responsibilities assumed by the Tribe/Consortium and those retained by the Secretary?*

(a) The funding agreement 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 must be clearly stated in writing as part of the funding agreement. Similarly, when there is a relationship between the program and BIA's inherent Federal functions, the relationship must be explained in the funding agreement.

*§ 1000.655 May a Tribe/Consortium redesign or consolidate the programs that are included in a funding agreement and reallocate funds for such programs?*

Except where a statute contains specific limitations on the use of funds, a Tribe/Consortium may redesign or consolidate programs included in a funding agreement and reallocate funds for such programs in any manner which it deems to be in the best interest of the Indian community being served, so long as the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law; provided however, that a reduction in funds available for a program or service shall not be considered a denial of eligibility for services. However, redesign of construction project(s) included in a funding agreement must be done in accordance with subpart K of this part.

*§ 1000.660 Do Tribes/Consortium need Secretarial approval to redesign BIA programs that the Tribe/Consortium administers under a funding agreement?*

No, the Secretary does not have to approve a redesign of a program under the funding agreement, except when the redesign involves:

- (a) Programs described in 25 U.S.C. 5363(b)(2) or (c); or
- (b) A request to waive a regulation.

*§ 1000.665 Can the terms and conditions in a funding agreement be amended during the year it is in effect?*

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

#### DETERMINING FUNDING AGREEMENT AMOUNTS

*§ 1000.670 What funds must be transferred to a Tribe/Consortium under a funding agreement?*



(a) Subject to the terms of a funding agreement, the Secretary must transfer to a Tribe/Consortium all funds provided for in the funding agreement, pursuant to 25 U.S.C. 5368. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolution.

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

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

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

(3) Any funds otherwise available to Indian Tribes or Indians for which appropriations are made to other Federal agencies and transferred to the Department as directed by law, an Interagency Agreement, or other means.

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

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

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

(3) Other recurring funding;

- (4) Non-recurring funding;
  - (5) Special projects, if applicable;
  - (6) Construction;
  - (7) Wildland firefighting accounts;
  - (8) Competitive grants; and
  - (9) Congressional earmarked funding.
- (d) Examples of the funds referred to in paragraph (b)(3) of this section are:
- (1) Federal Highway Administration funds;
  - (2) Federal Transit Administration funds; and
  - (3) Funding pursuant to an approved plan under Pub. L.102-477, as amended.

*§ 1000.675 What funds may not be included in a funding agreement?*

Funds associated with programs prohibited from inclusion under 25 U.S.C. 5363(m)(1) may not be included in a funding agreement.

*§ 1000.680 May the Secretary place any requirements on programs and funds that are otherwise available to Tribes/Consortium or Indians for which appropriations are made to agencies other than DOI?*

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

*§ 1000.685 What funds are used to carry out inherent Federal functions?*

The funds for BIA to carry out inherent Federal functions are the funds to support functions that may not legally be delegated to an Indian Tribe if all Tribes were to assume responsibilities for all BIA programs that the Act permits.

*§ 1000.690 How does BIA determine the funding amount to carry out inherent Federal functions?*

(a) Between October 1st and December 31st of each fiscal year, each regional and central office shall develop a document that contains its inherent Federal function information and cost calculation for that office based either on an enacted budget or Continuing Resolution budgetary guidance, and promptly distribute that document to each Tribe/Consortium served by that office.

(b) The Secretary shall amend the document throughout the year if programs are added or changed in ways that affect the inherent Federal functions directly associated with a PSFA transferred, or proposed to be transferred, into the funding agreement of the Tribe/Consortium, and distribute that revised document to any Tribe/Consortium served by that office and seeking to transfer a PSFA into a funding agreement under the Act.

(c) Once final budget amounts are known and suballocated, the Secretary will provide an updated document within 90 days to each Tribe/Consortium.

(d) Inherent Federal function information must clearly identify the legal authority that specifically precludes delegation to a Tribe.

(e) Cost calculations must be limited to the minimum amount of funds necessary to carry out specific inherent Federal functions necessary for that office to administer PSFAs transferred to the funding agreement.

(f) The development of the document in subsection (a) must be based on the following principles:

(1) Uniformity and consistency in the identification of inherent Federal functions and in the calculation of their associated costs;

(2) The determination of inherent Federal functions in each office is based only on those inherent Federal functions actually being performed at that office; and

(3) The Secretary shall consult with Tribes/Consortium on inherent Federal function determinations and associated cost calculations at various forums, including the Tribal Interior Budget Council (TIBC).

(g) In negotiating the amount of funds due a Tribe/Consortium in a funding agreement, the Secretary may withhold from transfer to the funding agreement only those funds to carry out inherent Federal functions directly associated with the PSFAs assumed in the funding agreement, unless otherwise expressly agreed to by the Tribe/Consortium in the funding agreement.

(h) Upon the request of a Tribe/Consortium, the Secretary must promptly provide a specific description of each inherent Federal function directly associated with a PSFA transferred, or proposed to be transferred, into the funding agreement of the Tribe/Consortium, along with the detailed basis for the Secretary's associated cost calculation.

*§1000.695 Is the amount of funds withheld by the Secretary to cover the cost of inherent Federal functions subject to negotiation?*

Yes, the Secretary's calculation of such costs is an appropriate subject during the negotiation of a funding agreement because it affects the amount of funds available for transfer to the funding agreement. If the Tribe/Consortium and the Secretary are unable to agree on the amount of funds to be withheld by the Secretary to cover the Secretary's expense of carrying out inherent Federal functions directly associated with the PSFAs

assumed in the funding agreement, the Tribe/Consortium may exercise any of its options under 25 U.S.C. 5366(c), including the final offer process in subpart I of this part.

*§ 1000.700 May a Tribe/Consortium continue to negotiate a funding agreement pending an appeal of funding amounts associated with inherent Federal functions?*

Yes, pending appeal of funding amounts associated with inherent Federal functions, any Tribe/Consortium may continue to negotiate a funding agreement using the information under § 1000.690 that is being appealed. This information will be subject to later adjustment based on the final determination of a Tribe's/Consortium's appeal.

*§ 1000.705 What is a Tribal share?*

A Tribal share is the portion of all funds and resources determined for a particular Tribe (or Tribes within a Consortium) that support any program within BIA, BIE, BTFA, or the Office of the Assistant Secretary for Indian Affairs and are not required by the Secretary for the performance of an inherent Federal function as described in §§ 1000.685 through 1000.695.

*§ 1000.710 How does BIA determine a Tribe's/Consortium's share of funds to be included in a funding agreement?*

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

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

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

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

(b) *Tribal-specific.* For programs whose funds are not distributed on a formula basis as described in paragraph (a) of this section, a Tribe's funding amount will be determined on a Tribe-by-Tribe basis and may differ between Tribes. Examples of these funds may include special project funding, awarded competitive grants, earmarked funding, and construction or other one-time or non-recurring funding for which a Tribe is eligible.

*§ 1000.715 Can a Tribe/Consortium negotiate a Tribal share for programs outside its region/agency?*

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

*§ 1000.720 May a Tribe/Consortium obtain discretionary or competitive funding that is distributed on a discretionary or competitive basis?*

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

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

*§ 1000.725 Are all funds identified as Tribal shares always paid to the Tribe/Consortium under a funding agreement?*

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

*§ 1000.730 How are savings that result from downsizing allocated?*

Funds that are saved as a result of downsizing in BIA are allocated to Tribes/Consortium in the same manner as Tribal shares as provided for in § 1000.710.

*§ 1000.735 Do Tribes/Consortium need Secretarial approval to reallocate funds between programs that the Tribe/Consortium administers under the funding agreement?*

No, except with respect to programs described in 25 U.S.C. 5363(b)(2) or (c) or as otherwise required by law, the Secretary does not have to approve the reallocation of funds between programs that a Tribe/Consortium administers under a funding agreement. However, reallocation of funds for construction project(s) included in a funding agreement must be done in accordance with subpart K of this part.

*§ 1000.740 Can funding amounts negotiated in a funding agreement be adjusted during the year it is in effect?*

Yes, funding amounts negotiated in a funding agreement may be adjusted under the following circumstances:

(a) *Congressional action:*

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

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

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

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

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

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

## ESTABLISHING SELF-GOVERNANCE STABLE BASE BUDGETS

### § 1000.745 *What are self-governance stable base budgets?*

(a) A Tribe/Consortium self-governance stable base budget is the amount of recurring funding to be transferred to the Tribe/Consortium, for a period specified in the funding agreement. This amount must be adjusted to reflect subsequent annual changes in Congressional appropriations. It includes amounts that are eligible to be base transferred or have been base transferred from BIA budget accounts to self-governance



budget accounts. As allowed by Congress, self-governance stable base budgets are derived from:

- (1) A Tribe's/Consortium's Pub. L. 93-638 contract amounts;
- (2) Negotiated agency, regional, and central office amounts;
- (3) Other recurring funding;
- (4) Special Projects, if applicable;
- (5) Programmatic shortfall;
- (6) Tribal priority allocation increases and decreases;
- (7) Pay costs and retirement cost adjustments; and
- (8) Any other inflationary cost adjustments.

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

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

(d) A funding agreement shall not specify the funding associated with a program described in 25 U.S.C. 5363(b)(2) or (c) without the Secretary's agreement.

*§ 1000.750 Once a Tribe/Consortium establishes a stable base budget, are funding amounts renegotiated each year?*

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

(a) It must negotiate all funding levels in the funding agreement using the process for determining funds for BIA to carry out inherent Federal functions on the same basis as other Tribes; and

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

*§ 1000.755 How are self-governance stable base budgets established?*

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

*§ 1000.760 How are self-governance stable base budgets adjusted?*

Self-governance stable base budgets must be adjusted as follows:

(a) *Congressional action.*

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

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

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

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

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

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

### **Subpart G – Funding Agreements for Non-BIA Programs**

*§ 1000.801 What is the purpose of this subpart?*

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

*§ 1000.805 What is a funding agreement for a non-BIA program?*

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

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

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

*§ 1000.810 What non-BIA programs are eligible for inclusion in a funding agreement?*

Programs authorized by sections 403(b)(2) and 403(c) (25 U.S.C. 5363(b)(2) and 5363(c)), as amended, are eligible for inclusion in a funding agreement. The Secretary will publish annually a list of these programs in accordance with 25 U.S.C. 5372(c)(3) and (4).

*§ 1000.815 Are there non-BIA programs for which the Secretary must negotiate for inclusion in a funding agreement subject to such terms as the parties may negotiate?*

Yes, those programs, or portions thereof, that are eligible for inclusion in funding agreements under section 403(b)(2) (25 U.S.C. 5363(b)(2)).

*§ 1000.820 What programs are included under section 403(b)(2) (25 U.S.C. 5363(b)(2))?*

Those non-BIA programs, or portions thereof, that are eligible for inclusion in funding agreements under the Act, as amended.

*§ 1000.825 What programs are included under section 403(c) (25 U.S.C. 5363(c))?*

Non-BIA programs within the Department of special geographic, historical, or cultural significance to participating Tribes, individually or as members of a Consortium, are eligible for inclusion in funding agreements under section 403(c) (25 U.S.C. 5363(c)).

*§ 1000.830 What does “special geographic, historical or cultural” mean?*

(a) Geographic generally refers to all lands presently “on or near” an Indian reservation, and all other lands within “Indian country,” as defined by 18 U.S.C. 1151.

In addition, “geographic” includes:

- (1) Lands of former reservations;
- (2) Lands on or near those conveyed or to be conveyed under the Alaska Native Claims Settlement Act (ANCSA);

(3) Judicially established aboriginal lands of a Tribe or a Consortium member or as verified by the Secretary; and

(4) Lands and waters pertaining to Indian rights in natural resources, hunting, fishing, gathering, and subsistence activities, provided or protected by treaty or other applicable law.

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

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

(1) Sacred and medicinal sites;

(2) Gathering of medicines or materials such as grasses for basket weaving; or

(3) Other traditional activities, including, but not limited to, subsistence hunting, fishing, and gathering.

(d) In determining whether a Tribe/Consortium has demonstrated a non-BIA program's special geographic, historical or cultural significance to such Tribe/Consortium, the Secretary shall interpret each Federal law and regulation in a manner that will facilitate the inclusion of a program in, and the implementation of, a funding agreement.

*§ 1000.835 Under section 403(b)(2) (25 U.S.C. 5363(b)(2)), when must programs be awarded non-competitively?*

Non-BIA programs eligible for inclusion in funding agreements under the Act, as amended, must be awarded non-competitively.

*§ 1000.840 May a non-BIA bureau include in a funding agreement, on a non-competitive basis, programs of special geographic, historical, or cultural significance?*

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

*§ 1000.845 Are there any non-BIA programs that may not be included in a funding agreement?*

(a) Inherently Federal functions in accordance with 25 U.S.C. 5361(6) and 5363(k).

(b) Programs where the statute establishing the existing program does not authorize the type of participation sought by the Tribe/Consortium. In determining whether a statute “does not authorize the type of participation sought by” the Tribe/Consortium within the meaning of 25 U.S.C. 5363(k), the Department shall take the following factors into consideration:

(1) Tribes need not be identified in an authorizing statute in order for a program, or element of a program, to be included in a funding agreement;

(2) The lack of specificity in a statute by itself does not create a blanket exclusion from inclusion of a program, or element of a program, in a funding agreement; and

(3) It is not an adequate ground to refuse to compact specific functions that are not inherently Federal in character, simply because an organic statute vests an agency with generic management authority over a broad category of land.

(c) The Secretary shall interpret each Federal law and regulation in a manner that facilitates:

- (1) The inclusion of programs in funding agreements; and
- (2) The implementation of funding agreements.

*§ 1000.850 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 funding agreement?*

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

*§ 1000.855 Will Tribes/Consortia participate in the Secretary's determination of what is to be included on the annual list of available programs?*

Yes, the Secretary must consult each year with Tribes/Consortia participating in self-governance programs regarding which bureau programs are eligible for inclusion in funding agreements. If a Tribe/Consortium makes a written request for a program to be included on the annual list for non-BIA reporting found in subpart P of this part (§§ 1000.2010(c) and 1000.2012), the Secretary must provide a written rationale if the Secretary does not include such program.

*§ 1000.860 How will the Secretary consult with Tribes/Consortia in developing the list of available programs?*

(a) The Secretary shall consult with Tribes/Consortia in developing the list of available programs in accordance with subpart T of this part.

(b) In addition to the requirements in subpart T of this part:

(1) The Secretary must publish the previous year's list of available programs in accordance with 25 U.S.C. 5372(c)(3) in the *Federal Register* prior to October 1 of each year. The list must include:

(i) All of the Secretary's proposed additions and revisions for the coming year with an explanation; and

(ii) Programmatic targets detailed in § 1000.2010(e) and an initial point of contact for each bureau.

(2) If the Secretary does not plan to include a Tribal suggestion or revision in the final published list, the Secretary must provide to such Tribe/Consortium a written explanation of reasons consistent with § 1000.855.

*§ 1000.865 What else is on the list in addition to eligible programs?*

The list will also include programmatic targets and an initial point of contact for each bureau. Programmatic targets will be established as part of the consultation process described in § 1000.860.

*§ 1000.870 May a bureau negotiate with a Tribe/Consortium for programs not specifically included on the annual list pursuant to 25 U.S.C. 5372(c)?*

Yes, the annual list will specify that bureaus will negotiate for other programs eligible under 25 U.S.C. 5363(b)(2) when requested by a Tribe/Consortium. Bureaus may negotiate for 25 U.S.C. 5363(c) programs whether or not they are on the list.

*§ 1000.875 How will a bureau negotiate a funding agreement for a program of special geographic, historical, or cultural significance to more than one Tribe/Consortium?*

(a) If a program is of special geographic, historical, or cultural significance to more than one Tribe/Consortium, the bureau may allocate the program among the several



Tribes/Consortia through separate funding agreements or select one Tribe/Consortium with whom to negotiate a funding agreement.

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

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

and

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

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

*§ 1000.880 When will this determination be made?*

It will occur during the pre-negotiation process, subject to the timeframes in subpart H of this part (*see e.g.*, §§ 1000.1035 and 1000.1050).

*§ 1000.885 What funds are included in a non-BIA funding agreement?*

Non-BIA bureaus determine the amount of funding to be included in the funding agreement using the following principles:

(a) *403(b)(2) Programs (25 U.S.C. 5363(b)(2))*. In general, funds are provided in a funding agreement to the Tribe/Consortium in an amount equal to the amount that it is eligible to receive under section 106 of the Act, as amended.

(b) *403(c) Programs (25 U.S.C. 5363(c))*.

(1) The funding agreement will include:

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

(ii) Allowable indirect costs; and

(iii) Such amounts as the Tribe/Consortium and the Secretary may negotiate for pre-award, start-up and direct contract support costs, or upon appropriations of such funds by Congress.

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

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

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

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

*§ 1000.890 How are indirect cost rates determined?*

The Department's Interior Business Center (IBC) or other cognizant Federal agency and the Tribe/Consortium negotiate indirect cost rates. These rates are based on the applicable provisions of subpart E of 2 CFR part 200, or other applicable OMB cost circular and the provisions of title I of the Act, as amended. These rates are used generally by all Federal agencies for contracts and grants with the Tribe/Consortium, including self-governance agreements.

*§ 1000.895 How does the Secretary determine the amount of indirect costs?*

The Secretary determines the amount of indirect costs by:

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

or

(b) At the Tribe's/Consortium's option, negotiating a lump sum amount for indirect costs.

*§ 1000.900 May the bureaus negotiate terms to be included in a funding agreement for non-BIA programs?*

Yes, as provided for by 25 U.S.C. 5363(b)(2) and 5363(c) and as necessary to meet program mandates while consistent with this subpart, provided, however, that a bureau may not require in a funding agreement that a Tribe/Consortium retain, hire or assign a Federal employee in a contracted program, nor may a bureau condition its approval of a funding agreement upon a requirement that a Tribe/Consortium retain, hire or assign a Federal employee in a contracted program.

*§ 1000.905 Can a Tribe/Consortium reallocate, consolidate, and redesign funds for a non-BIA program?*

Yes, 25 U.S.C. 5365(d)(2) permits such reallocation, consolidation, and redesign upon joint agreement of the Secretary and the Tribe/Consortium.

*§ 1000.910 Do Tribes/Consortia need Secretarial approval to reallocate funds between title I eligible programs that the Tribe/Consortium administers under a non-BIA funding agreement?*

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

*§ 1000.915 Can a Tribe/Consortium negotiate a funding agreement with a non-BIA bureau for which the performance period exceeds one year?*

Yes, subject to the terms of the funding agreement, a Tribe/Consortium and a non-BIA bureau may agree to provide for the performance under the funding agreement

to extend beyond the fiscal year. However, the Secretary may not obligate funds in excess and advance of available appropriations.

*§ 1000.920 Can the terms and conditions in a non-BIA funding agreement be amended during the year it is in effect?*

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

*§ 1000.925 What happens if a funding agreement expires before the effective date of the successor Funding Agreement?*

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

funding to the Tribe/Consortium at a level necessary for the Tribe/Consortium to perform the PSFA, or portions thereof, for the full period they were or will be performed.

## **Subpart H – Negotiation Process**

*§ 1000.1001 What is the purpose of this subpart?*

This subpart provides the process and timelines for negotiating a self-governance compact with the Secretary and a funding agreement with any bureau.

*§ 1000.1005 What are the phases of the negotiation process?*

There are two phases of the negotiation process:

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

*§ 1000.1010 Who may initiate the information phase?*

Any Tribe/Consortium that has been selected to participate in self-governance may initiate the information phase.

*§ 1000.1015 Is it mandatory to go through the information phase before initiating the negotiation phase?*

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

*§ 1000.1020 How does a Tribe/Consortium initiate the information phase?*

A Tribe/Consortium initiates the information phase by sending to the Secretary a written request clearly identified as a “Request to Initiate the Information Phase”. This request notifies the Secretary of the Tribe’s/Consortium’s interest in negotiating for a program(s) and request for information about the program(s). This request must be sent:

- (a) If in electronic form (PDF), which is the preferred method, to

**GROUPADDRESS@ois.gov** [note: this is placeholder e-mail address]; or

(b) If in paper form by United States Mail or express courier to Director, Office of Self-Governance, at the headquarters address indicated on the official Department, OSG website.

*§ 1000.1025 What information is a Tribe/Consortium encouraged to include in a Request to Initiate the Information Phase?*

(a) A Tribe/Consortium is encouraged to include the following in a Request to Initiate the Information Phase:

(1) As specifically as possible, the program(s) for which the Tribe/Consortium is interested in negotiating under this subpart;

(2) The bureau, service, office, or agency (bureau) that administers the program(s) of interest;

(3) The scope(s) of program activity in which the Tribe/Consortium is interested;

(4) If applicable, a brief explanation of the cultural, historical, or geographic significance to the Tribe/Consortium of the program(s);

(5) A request for budget, staffing, and other locations of the offices providing administrative support;

(6) Other information that the Tribe/Consortium may choose to submit for the Secretary's consideration; and

(7) The Tribe's/Consortium's designated contact.

(b) The Tribe/Consortium may choose to request information and technical assistance in a Request to Initiate the Information Phase notice including, but not limited to:

- (1) Information that will assist the Tribe/Consortium in initiating and/or implementing the negotiation process;
- (2) Information regarding grants or funds within the bureau, or other known possible sources of funding, that may be available to the Tribe/Consortium for planning and negotiating, or renegotiating a compact and/or funding agreement;
- (3) Information on any funds available within the bureau, or from other sources of funding, that the Tribe/Consortium may include in the funding agreement for performing the program(s);
- (4) Information contained in the previous year, present year, and, if available, next year's budget proposed by the President at the national program level and the regional/local level;
- (5) Information used to support budget allocations for the programs identified (e.g., full time equivalents and other relevant factors);
- (6) Information used to operate and/or evaluate a program, such as statutory and regulatory requirements and program standards;
- (7) If applicable, information regarding how a program is administered by more than one bureau, including a point of contact for information for the other bureau(s); and
- (8) Technical assistance from the bureau in preparing documents or materials that may be required for the Tribe/Consortium in the negotiation process.

*§ 1000.1030 When should a Tribe/Consortium submit a Request to Initiate the Information Phase to the Secretary?*

A Tribe/Consortium may submit a Request to Initiate the Information Phase to the Secretary at any time.

*§ 1000.1035 What steps does the bureau take after a Request to Initiate the Information Phase is submitted by a Tribe/Consortium?*

(a) Within 15 days of receipt of a Tribe's/Consortium's Request to Initiate the Information Phase, the bureau will respond in writing to the Tribe's/Consortium's identified point of contact and identify the person designated as the bureau's representative responsible for providing information under this subpart. The bureau representative shall in good faith fulfill the following responsibilities:

(1) In accordance with paragraph (b) of this section, provide the Tribe/Consortium with all program budget and program information from each organizational level of the bureau(s); and

(2) Notify any other bureau as required under this subpart.

(b) Within 30 calendar days of receipt of the Tribe's/Consortium's request, the bureau representative must provide to the Tribe/Consortium the information responsive to the Tribe's/Consortium's Request to Initiate the Information Phase, if otherwise consistent with the bureau's budgetary process including, at a minimum:

(1) Information regarding program, budget, staffing, and locations of the offices administering the program identified by the Tribe/Consortium and related administrative support programs; and

(2) Such other information requested by the Tribe/Consortium in its request.

(c) Upon request by a Tribe/Consortium, the bureau will provide technical assistance to the Tribe/Consortium and be available to meet with Tribal/Consortium representatives to explain the information provided and discuss other questions from the Tribe/Consortium;



(d) The bureau shall issue a written explanation if it determines it cannot provide information required under paragraph (b) within the 30-day period. If a bureau makes such a determination, then the bureau must provide any other information that is reasonably related to the Tribe/Consortium's request and the date when other information, not provided within 30 days but available for disclosure to the Tribe/Consortium, can be provided;

(e) The Secretary shall provide information under this section in a manner that facilitates the inclusion of programs in funding agreements and the implementation of funding agreements (25 USC 5369);

(f) If a bureau fails to timely provide information under this subpart, the Tribe/Consortium may:

(1) File a Freedom of Information Act request. These requests shall be considered for a fee waiver under the Freedom of Information Act; and/or

(2) Appeal in accordance with subpart R of this part.

*§ 1000.1040 How does a Tribe/Consortium initiate the negotiation phase?*

A Tribe/Consortium initiates the negotiation phase by sending to the Secretary a written request clearly identified as a Request to Initiate the Negotiation Phase. This request notifies the Secretary of the Tribe's/Consortium's interest in negotiating for a program(s). This request must be sent:

(a) If in electronic form (PDF), which is the preferred method, to **GROUPADDRESS@ois.gov** [note: this is placeholder e-mail address]; or

(b) If in paper form by United States Mail or express courier to the Director, Office of Self-Governance, at the headquarters address indicated on the official Department, OSG website.

*§ 1000.1045 How and when does the Secretary respond to a request to negotiate a compact or BIA funding agreement?*

Within 15 days of receiving a Request to Initiate the Negotiation Phase for a compact or BIA funding agreement, OSG will respond in writing to the Tribe's/Consortium's identified point of contact and identify the person designated as the lead Federal negotiator. OSG and the Tribe/Consortium will negotiate a compact or funding agreement in accordance with applicable provisions of this part.

*§ 1000.1050 How and when does the Secretary respond to a request to negotiate a non-BIA funding agreement?*

Within 15 days of receiving a Tribe's/Consortium's Request to Initiate the Negotiation Phase for a non-BIA funding agreement, the Department will take the steps in this section:

(a) If the program involves multiple bureaus, the Secretary will identify the lead Federal negotiator(s);

(b) If the program is authorized for negotiations by 25 U.S.C. 5363(b)(2), the bureau will identify the lead Federal negotiator(s).

(c) If the program may be authorized for negotiations by 25 U.S.C. 5363(c), the bureau will identify the lead Federal negotiator(s) and schedule a pre-negotiation discussion with the Tribe/Consortium as soon as possible. The purpose of the discussion is to assist the bureau in determining if the program is available for negotiation. If there

is agreement that a program is eligible for inclusion in a funding agreement, the parties may jointly agree to waive this discussion.

(d) Within 10 days after convening a discussion under paragraph (c), or no later than 30 days of receipt by the Secretary of the Tribe's/Consortium's Request to Initiate the Negotiation Phase:

(1) If the program is available for inclusion in a funding agreement, the bureau will begin negotiating a non-BIA funding agreement in accordance with subpart G of this part; or

(2) If the program is unavailable for negotiation, the bureau will provide a written explanation of why the program is unavailable for inclusion in a funding agreement.

*§ 1000.1055 What is the process for conducting the negotiation phase?*

(a) Within 30 days of receiving a written Request to Initiate the Negotiation Phase, the bureau and the Tribe/Consortium will agree to a date to conduct an initial negotiation meeting. Subsequent meetings will be held with reasonable frequency at reasonable times.

(b) Tribe/Consortium and bureau lead negotiators must:

(1) Be authorized to negotiate on behalf of their government; and

(2) Involve all necessary persons in the negotiation process.

(c) Once negotiations have been completed, with the parties in agreement concerning all terms and conditions of a compact and/or funding agreement, the parties will acknowledge in writing the date on which agreement was reached and:

(1) The Secretary and Tribe/Consortium will finalize the compact and/or funding agreement for submission to the Tribe/Consortium within 15 days or by a mutually agreed upon date; and

(2) Upon the Secretary's receipt of a compact or funding agreement signed by the Tribe/Consortium, the Secretary will execute and return the funding agreement by a mutually agreed upon date not to exceed 45 days, and the compact by a mutually agreed upon date not to exceed 90 days.

*§ 1000.1060 What issues must the bureau and the Tribe/Consortium address at negotiation meetings?*

The negotiation meetings referred to in § 1000.1055 must address at a minimum the following:

- (a) The specific Tribe/Consortium proposal(s) and intentions;
- (b) Legal or program issues that the bureau or the Tribe/Consortium identify as concerns;
- (c) Options for negotiating programs and related budget amounts, including mutually agreeable options for developing alternative formats for presenting budget information to the Tribe/Consortium;
- (d) Dates for conducting and concluding negotiations;
- (e) Protocols for conducting negotiations;
- (f) Responsibility for preparation of a written summary of the discussions; and
- (g) Who will prepare an initial draft of the compact or funding agreement, as applicable.

*§ 1000.1065 What happens when a compact or funding agreement is signed?*

(a) After all necessary parties have signed the compact or funding agreement, a copy is sent to the Tribe/Consortium.

(b) No later than 90 days before the proposed effective date of an executed funding agreement, the Secretary shall forward a copy of the funding agreement to each Indian Tribe/Consortium served by the local BIA Agency office that serves any Tribe/Consortium that is a party to the funding agreement. The Secretary's obligation under 25 U.S.C. 5363(f) shall not impact the funding agreement's effective date as specified under § 1000.1075.

*§ 1000.1070 What happens if the Tribe/Consortium and bureau negotiators fail to reach an agreement on a compact or funding agreement?*

If the bureau and Tribe/Consortium are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels) then the final offer process in subpart I of this part shall apply.

*§1000.1075 When does the funding agreement become effective?*

A funding agreement shall become effective on the date it is fully executed or as identified by its terms.

*§ 1000.1080 What is a subsequent funding agreement?*

A subsequent funding agreement is negotiated after a Tribe's/Consortium's existing funding agreement. The parties to the funding agreement should generally use the terms of the existing funding agreement to expedite and simplify the exchange of information and the negotiation process.

*§ 1000.1085 How is the negotiation of a subsequent funding agreement initiated?*

Although a written request is desirable to document the precise request and date of the request, a written request is not mandatory. If either party anticipates a significant change in an existing program in the funding agreement, it should notify the other party of the change at the earliest possible date so that the other party may plan accordingly.

*§ 1000.1090 What is the process for negotiating a subsequent funding agreement?*

The Tribe/Consortium and the bureau shall use the procedures in §§ 1000.1005 through 1000.1070.

### **Subpart I – Final Offer**

*§ 1000.1101 What is the purpose of this subpart?*

This subpart explains the final offer process provided by the Act for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.

*§ 1000.1105 When should a final offer be submitted?*

The Tribe/Consortium may submit a final offer when it has determined that the Tribe/Consortium and the Secretary are unable to agree, in whole or in part, on the terms of a compact, funding agreement, or amendment (including funding levels).

*§ 1000.1110 How does a Tribe/Consortium submit a final offer?*

(a) A Tribe/Consortium must submit its written final offer for a compact or funding agreement, or amendment thereof:

(1) If in electronic form (PDF), which is the preferred method, to **GROUPADDRESS@ois.gov** [note: this is placeholder e-mail address] for any DOI program; or

(2) If in paper form by United States Mail or express courier to the Director, Office of Self-Governance, at the headquarters address indicated in the official Department, OSG website.

(b) The document should be separate from the compact, funding agreement or amendment and clearly identified as a “Final Offer.”

*§ 1000.1115 What does a final offer contain?*

A final offer must contain a description of the disagreement between the Secretary and the Tribe/Consortium, the Tribe’s/Consortium’s final proposal to resolve the disagreement, including any draft proposed terms to be included in a compact, funding agreement, or amendment, and the name and contact information for the person authorized to act on behalf of the Tribe/Consortium.

*§ 1000.1120 When does the 60-day review period begin?*

The 60-day review period begins on the date the final offer is received at the office’s mailing or email address identified in this subpart. Demonstration of receipt includes a postal return receipt, express delivery service receipt, or date stamp; all email submissions are presumed received by the Secretary no later than the next business day following transmission from the Tribe/Consortium.

*§ 1000.1125 How does the Department acknowledge receipt of final offer?*

(a) Within 10 days of receipt by the officials designated by the Secretary in § 1000.1110, the Department will send the Tribe/Consortium a written acknowledgement of the final offer.

(b) The acknowledgement reference in subsection (a) shall include:

(1) A statement acknowledging receipt of the final offer;

(2) The date the final offer was received and the last day of the applicable statutory review period;

(3) If applicable, the Secretary may request additional information. A request for more information has no effect on deadlines for a response under this subpart; and

(4) A statement notifying the Tribe/Consortium that technical assistance is available upon request to comply with subsection (b)(3).

*§ 1000.1130 May the Secretary request and obtain an extension of time of the 60-day review period?*

(a) Yes, the Secretary may request an extension of time before the expiration of the 60-day review period. The Tribe/Consortium may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person authorized by the Tribe/Consortium to grant the extension before the expiration of the 60-day review period.

(b) The deadline described in paragraph (a) may be extended for any additional length of time as agreed upon in writing by the Tribe/Consortium and the Secretary, and

(c) The 60-day period may be extended up to 30 days for circumstances beyond the control of the Secretary, upon written request from the Secretary to the Tribe/Consortium.

(d) A Tribe/Consortium must respond within 10 days of receiving the Secretary's request for an extension under paragraph (c).

*§ 1000.1135 What happens if the Secretary takes no action within the 60-day period (or any extensions thereof)?*

The final offer is:



(a) Accepted automatically by operation of law for a compact or funding agreement provision except as to its application to a program described under 25 U.S.C. 5363(c); or

(b) Rejected automatically by operation of law with respect to any program described under 25 U.S.C. 5363(c).

*§ 1000.1140 Once the Tribe/Consortium's final offer has been accepted or accepted by operation of law, what is the next step?*

After the Tribe/Consortium's final offer is accepted or accepted by the operations of law, within 10 days the parties will amend the compact or funding agreement to incorporate the accepted terms of the final offer.

*§ 1000.1145 On what basis may the Secretary reject a final offer?*

The Secretary may reject a final offer for one of the following reasons:

(a) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Tribe/Consortium is entitled under the Act;

(b) The program that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to a Tribe/Consortium or is subject to discretion of the Secretary under the Act;

(c) The Tribe/Consortium cannot carry out the program in a manner that would not result in significant danger or risk to the public health or safety, to natural resources, or to trust resources;

(d) The Tribe/Consortium is not eligible to participate in self-governance under 25 U.S.C. 5362;

(e) The funding agreement would violate a Federal statute or regulation; or

(f) With respect to a program or portion of a program included in a final offer pursuant to 25 U.S.C. 5363(b)(2), the program or the portion of the program is not otherwise available under 25 U.S.C. 5321(a)(1)(E).

*§ 1000.1150 How does the Secretary reject a final offer?*

The Secretary rejects a final offer by providing written notice to the Tribe/Consortium based on the criteria in § 1000.1145 not more than 60 days after the receipt of a final offer, or a later date in accordance with § 1000.1130.

*§ 1000.1155 What is the “significant danger” or “risk” to the public health or safety, to natural resources, or to trust resources?*

A significant danger or risk is determined on a case-by-case basis in accordance with 25 U.S.C. 5366.

*§ 1000.1160 Is technical assistance available to a Tribe/Consortium to overcome the objections stated in the Secretary’s rejection of a final offer?*

Yes, the Secretary must provide technical assistance to overcome the objection stated in the notification of the rejection of the final offer.

*§ 1000.1165 If the Secretary rejects all or part of a final offer, is the Tribe/Consortium entitled to an appeal?*

Yes, the Tribe/Consortium is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart R of this part. Alternatively, at its option, the Tribe/Consortium has the right to initiate an action challenging the Secretary’s decision in U.S. District Court under 25 U.S.C. 5331(a).

*§ 1000.1170 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?*

Yes, subject to 25 U.S.C. 5366(c)(6)(A)(iv).

*§ 1000.1175 Does appealing the final offer decision prevent the Secretary and the Tribe/Consortium from entering into any accepted compact, funding agreement or amendment provisions that are not in dispute?*

No, appealing the decision does not prevent the Secretary and Tribe/Consortium from entering into any accepted, severable provisions of a compact, funding agreement, or amendment that are not in dispute.

*§ 1000.1180 What is the burden of proof in an appeal of a rejection of a final offer?*

With respect to any appeal, hearing, or civil action, brought under this subpart, the Secretary shall have the burden of clearly demonstrating the validity of the grounds for rejecting the final offer.

### **Subpart J – Waiver of Regulations**

*§ 1000.1201 What regulations apply to Tribes/Consortia?*

All regulations that govern the operation of programs included in a funding agreement apply unless waived under this subpart. To the maximum extent practical, the parties should identify these regulations in the funding agreement.

*§ 1000.1205 Can the Secretary grant a waiver of regulations to a Tribe/Consortium?*

Yes, a Tribe/Consortium may ask the Secretary to grant a waiver of some or all Department regulation(s) applicable to a program, in whole or in part, operated by a Tribe/Consortium under a compact or funding agreement.

*§ 1000.1210 When can a Tribe/Consortium request a waiver of a regulation?*

A Tribe/Consortium may request a waiver of a regulation:

- (a) As part of the negotiation process;
- (b) At any time after a funding agreement has been executed; or
- (c) Following a denial decision, provided that the Tribe/Consortium

acknowledges that the submission commences a new 120-day review period under §1000.1240.

*§ 1000.1215 How does a Tribe/Consortium obtain a waiver?*

(a) A Tribe/Consortium must submit its written waiver request for any DOI compact, funding agreement, or amendment thereof:

- (1) In electronic form (PDF), which is the preferred method, by email to

**GROUPADDRESS@ois.gov** [note: this is placeholder e-mail address]; or

- (2) If in paper form by United States Mail or express courier to Director, Office of Self-Governance at the headquarters address indicated on the official Department OSG website.

(b) The waiver request, including one made under § 1000.1210(a), must be a separate document from the compact, funding agreement, or amendment and clearly identified as a “Waiver Request.”

*§ 1000.1220 How does a Tribe/Consortium operating a Pub. L. 102-477 Plan obtain a waiver?*

(a) For a waiver request involving any program that has been integrated under an approved plan authorized by Pub. L. 102-477, as amended, or proposed to be integrated under a Pub. L. 102-477 plan, the Tribe must submit the request to the BIA – Division of Workforce Development.

(b) The provisions of 25 U.S.C. 3406 (b), *et seq.*, governing submission, review, decision, dispute resolution, and appeal apply to a waiver request submitted under subparagraph (a).

(c) If a waiver of regulations had been previously obtained for a program administered by the Department that is later integrated into a plan authorized by Pub. L. 102-477, such waiver of regulations will continue to be in effect.

*§ 1000.1225 May a Tribe/Consortium request an optional meeting or other informal discussion to discuss a waiver request?*

(a) Yes, a Tribe/Consortium may request an optional meeting or other informal discussion with the appropriate bureau official(s).

(b) To provide reasonable time for consideration, the Tribe/Consortium may request a meeting or other informal discussion to be held with the appropriate bureau official(s) no less than 30 days before the end of the 120-day period, unless the parties agree on another date.

(c) For all purposes relating to these meeting or informal discussion procedures, the parties are the designated representatives of the Tribe/Consortium and the appropriate bureau official(s) from whom the waiver is requested.

*§ 1000.1230 Is a bureau required to provide technical assistance to a Tribe/Consortium concerning waivers?*

Yes.

(a) *Prior to submission of a waiver request.* A Tribe/Consortium considering a waiver request under this part may request, and a bureau shall provide, technical assistance to assist the Tribe/Consortium to prepare and submit the waiver request.

(b) *After submission of a waiver request.* Not later than 60 days after receipt of a Tribe's/Consortium's waiver request, unless the parties agree on another date, a bureau shall, if applicable:

(1) Provide technical assistance to overcome any objection which the bureau might have to the request while a waiver request is under consideration; and/or

(2) Identify additional information that may assist the bureau in making a decision.

*§ 1000.1235 How does the Secretary respond to a waiver request?*

Within 10 business days of receipt, the officials designated by the Secretary in § 1000.1215 will email to the Tribe/Consortium a letter:

(a) Acknowledging receipt of the waiver request; and

(b) Identifying the date the waiver request was received and the last day of the applicable statutory review period.

*§ 1000.1240 When must the Secretary make a decision on a waiver request?*

(a) Not later than 120 days after receipt of a waiver request by the Secretary and the Secretary's designated officials in accordance with § 1000.1215.

(b) This 120-day period may be extended for any length of time, as agreed upon by both the Tribe/Consortium and the Secretary.

*§ 1000.1245 How does the Secretary make a decision on the waiver request?*

(a) The Secretary must issue a written decision explaining the rationale for denying or approving the requested waiver.

(b) If the Secretary issues a written decision denying the requested waiver, it must describe the basis for the specific finding that the identified text in the regulation may not be waived because such a waiver is prohibited by Federal law.

(c) The decision is final for the Department.

*§ 1000.1250 What happens if the Secretary neither approves nor denies a waiver request within the time specified in § 1000.1240?*

If the Secretary fails to make a determination with respect to a waiver request within the period specified in § 1000.1240 (including any extension agreed to under that section), the waiver request is automatically, by operation of law,

(a) Deemed approved except for programs eligible under section 403(b)(2) or section 403(c) (25 U.S.C. 5363(b)(2) or 5363(c)), as amended; or

(b) Deemed denied with respect to programs eligible under section 403(b)(2) or section 403(c) (25 U.S.C. 5363(b)(2) or 5363(c)), as amended. Such deemed denial is a final decision for the Department.

*§ 1000.1255 May a Tribe/Consortium appeal the Secretary's decision to deny its request for a waiver of a regulation?*

Yes, the Tribe/Consortium may appeal the Secretary's decision consistent with applicable law, including 25 U.S.C. 5331. The burden of proof shall be as set forth in §1000.2315.

*§ 1000.1260 What is the term of a waiver?*

Upon approval, a waiver is deemed approved until such time as rescinded by the Tribe/Consortium.

*§ 1000.1265 May a Tribe/Consortium withdraw a waiver request?*

Yes. If a Tribe/Consortium chooses to withdraw a waiver request before the Secretary makes a decision, it must do so in writing prior to the end of the 120-day time frame.

*§ 1000.1270 May a Tribe/Consortium have more than one waiver request pending before the Secretary at the same time?*

Yes. A Tribe/Consortium may have more than one waiver request pending before the Secretary at the same time, provided that each waiver request affects a different regulatory provision.

*§ 1000.1275 May a Tribe/Consortium continue to negotiate a funding agreement pending final decision on a waiver request?*

Yes, pending final decision on a waiver request, any Tribe/Consortium may continue to negotiate and implement a funding agreement. The regulation will apply until it is waived. The funding agreement will be subject to later adjustment based on an affirmative final decision on the Tribe's/Consortium's waiver request.

*§ 1000.1280 How is a waiver decision documented for the record?*

The waiver approval is made part of the funding agreement by attaching a copy of it to the funding agreement and by mutually executing any necessary conforming amendments to the funding agreement. The waiver requests and bureau's decision document(s), pursuant to § 1000.1245, will be posted and archived on the OSG website or successor technology within 30 days of the decision. Such posting/archiving shall include deemed approved and deemed denied decisions under § 1000.1250. All decisions shall be made available on request, and a summary of decisions will be included in the Self Governance Annual Report to Congress.



## **Subpart K – Construction**

### CONSTRUCTION DEFINITIONS

*§ 1000.1301 What key construction terms do I need to know?*

*Budget* means a statement of the funds required to complete the scope of work in a construction project. For cost reimbursement agreements, budgets may be stated using broad categories such as planning, design, construction, project administration, and contingency. For fixed price agreements, budgets may be stated as lump sums, unit cost pricing, or a combination thereof.

*Construction management services (CMS)* means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. CMS activities typically include:

- (a) Coordination and information exchange between the Tribe/Consortium and the Federal Government;
- (b) Preparation of a Tribe's/Consortium's project agreement; and
- (c) A Tribe's/Consortium's subcontract scope of work identification and subcontract preparation, and competitive selection of construction contract subcontractors.

*Construction phase* is the phase of a construction project during which the project is constructed, and includes labor, materials, equipment and services necessary to complete the work, in accordance with the construction project agreement.

*Construction program* or *construction project* means a Tribal undertaking relating to the administration, planning, environmental determination, design, construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems, or other

facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control, transportation, or port facilities, or for other Tribal purposes.

*Construction project agreement* means a negotiated agreement between the Secretary and a Tribe/Consortium, that at a minimum:

(a) Establishes project phase start and completion dates, which may extend over a period of one or more years;

(b) Provides a general description of the project, including the scope of work, references to design criteria and standards by which it will be accomplished, and other terms and conditions;

(c) Identifies the responsibilities of the Tribe/Consortium and the Secretary;

(d) Addresses how project-related environmental considerations will be addressed;

(e) Identifies the owner and operations and maintenance entity of the proposed work;

(f) Provides a budget;

(g) Provides a payment process;

(h) Establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be one or more years; and

(i) Identifies the agreement of the Secretary and Tribe/Consortium over which entity will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction.

*Design phase* is the phase of a construction project during which project plans, specifications, and other documents are prepared that are used to construct the project. Site investigation, final site selection and environmental review and determination activities are completed in this phase if not conducted as part of the planning phase.

*NEPA* means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

*NHPA* means the National Historic Preservation Act (16 U.S.C. 470 et seq.).

*Planning phase* is the phase of a construction project agreement during which planning services are provided.

*Planning services* may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed, conducting environmental review activities and justifying the need for the project.

*SHPO* means State Historic Preservation Officer.

*Scope of work* or *specific scope of work* means a brief written description of the work to be accomplished under the construction project, sufficient to confirm that the project is consistent with the purpose for which the Secretary has allocated funds.

*THPO* means Tribal Historic Preservation Officer.

## PURPOSE AND SCOPE

*§ 1000.1305 What construction projects and programs included in a funding agreement or construction project agreement are subject to this subpart?*

(a) All construction programs and construction projects included in a funding agreement under title IV are subject to this subpart.

(b) The following programs and activities are not construction programs and activities for the purposes of this subpart:

(1) Activities limited to providing planning services, administrative support services, coordination, responsibility for the construction project, site-management and administration of the project, which may include cost management, project budgeting, project scheduling and procurement.

(2) The BIA Housing Improvement Program;

(3) The BIA Road Maintenance Program and other road maintenance activities as maintenance is defined by 23 U.S.C. 101;

(4) Operation and maintenance programs;

(5) Child Care Development Fund projects using funds transferred under an approved Pub. L. 102-477 plan; and

(6) Non-403(c) Programs that are less than \$100,000, subject to 25 U.S.C. 5363(e)(2), other applicable Federal law, and § 1000.1515.

*§ 1000.1306 May a program or project-specific grant or contracting mechanism involving construction and related activities satisfy the requirements of this subpart?*

Yes, program or project-specific contracting mechanisms or agreements involving construction and related activities will satisfy the requirements of this subpart and may be incorporated into the Tribe/Consortium's funding agreement, provided that such program or project-specific contracting mechanism or agreement addresses all the requirements of 25 U.S.C. 5367 that are applicable to the construction program or project. Nothing herein shall require the Secretary to duplicate the Federal requirements of 25 U.S.C. 5367 that

are applicable to the project in the program or project-specific contracting mechanism or agreement.

*§ 1000.1307 May the Secretary accept funds from another Department for a program or project involving construction and related activities for transfer to the Tribe/Consortium under its funding agreement or construction project agreement?*

Yes, the Secretary may accept funds from another Department for a program or project involving construction and related activities for transfer to the Tribe/Consortium under its funding agreement or construction project agreement, subject to an interagency agreement between the Secretary and the Federal agency, with the concurrence of the Tribe/Consortium before such interagency agreement is finalized, that addresses the purpose, intent, Federal oversight and other responsibilities for the construction program or project, and related activities.

*§ 1000.1310 What alternatives are available for a Tribe/Consortium to perform a construction program or project?*

(a) As authorized by 25 U.S.C. 5367(g), and at the option of the Tribe/Consortium, construction project funding proposals shall be negotiated with the Secretary pursuant to the statutory process in 25 U.S.C. 5324, and any resulting agreement shall be incorporated into the funding agreement as an “addendum”; or

(b) A Tribe/Consortium may negotiate a construction project with the Secretary pursuant to the statutory process in 25 U.S.C. 5324, and incorporate any resulting construction project agreement into a separate title I construction contract and funding agreement subject to title I and the part 900 regulations, including subpart J (Construction) of part 900. Such construction project shall not be subject to this subpart.

*§ 1000.1315 Does this subpart create an agency relationship?*

No, a BIA or non-BIA construction program or project does not automatically create an agency relationship. However, Federal law, provisions of a funding agreement, or Federal actions may create an agency relationship.

#### NOTIFICATION AND PROJECT ASSUMPTION

*§ 1000.1320 Is the Secretary required to consult with affected Tribes/Consortia concerning construction projects and programs?*

Yes, before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes/Consortia as set forth in subpart I of this part.

*§ 1000.1325 When does the Secretary confer with a Tribe/Consortium concerning Tribal preferences as to size, location, type, and other characteristics of a project?*

Before spending any funds for planning, design, construction, or renovation projects, whether or not subject to a competitive application and ranking process, the Secretary must confer with any Indian Tribe/Consortium that would be significantly affected by the expenditure to determine and honor Tribal preferences whenever practicable concerning the size, location, type, and other characteristics of the project.

*§ 1000.1330 What does a Tribe/Consortium do if it wants to perform a construction project or program under 25 U.S.C. 5367?*

(a) A Tribe/Consortium may start the process of developing a construction project proposal to include in a funding agreement or construction project agreement by:

(1) Notifying the Secretary in writing that the Tribe/Consortium wishes to perform one or more construction projects under 25 U.S.C. 5367; or

(2) Submitting a proposed construction project agreement for consideration and negotiation, or

(3) A combination of the actions described in paragraphs (a)(1) and (2) of this section.

(b) Within 30 days after receiving a request from a Tribe/Consortium, the Secretary and the Tribe/Consortium shall exchange all applicable information available to each party about the project including, but not limited to, planning, construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archaeological reports.

*§ 1000.1335 What must a Tribal proposal for a construction program or project contain?*

A construction project proposal must contain all of the required elements of a construction project contained in § 1000.1355. In addition to these minimum requirements, a Tribe/Consortium may include additional items for negotiation.

*§ 1000.1340 May multiple projects be included in a single construction project agreement or funding agreement that includes a construction project?*

Yes, a Tribe/Consortium may include multiple projects in a single funding agreement or construction project agreement if funded by the same bureau, or may add additional projects by amendment(s) to an existing funding agreement or construction project agreement with the same bureau.

*§ 1000.1345 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?*

(a) No, the Tribe/Consortium and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects as long as they meet or exceed the requirements of 25 U.S.C. 5367(d).

(b) The Secretary may provide, or the Tribe/Consortium may request, Federal construction guidelines and manuals for consideration by the Tribe/Consortium in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards) that meet or exceed otherwise applicable standards, the Secretary must accept the Tribally proposed standards.

*§ 1000.1350 What provisions relating to a construction project or program may be included in a funding agreement or construction project agreement?*

Unless otherwise agreed to in writing by a Tribe/Consortium, no provision of title 41, United States Code, the Federal Acquisition Regulations, or any other law or regulation pertaining to Federal procurement, shall apply to any construction program or project carried out under title IV of the Act. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

*§ 1000.1355 What provisions must a Tribe/Consortium include in a construction project agreement or funding agreement that contains a construction project or program?*

(a) For each construction project or program carried out by the Tribe/Consortium under 25 U.S.C. 5367, the Tribe/Consortium and the Secretary shall negotiate a provision in the construction project agreement or funding agreement that identifies:



(1) The approximate start and completion dates for the project, which may extend over a period of one or more years;

(2) A general description of the project, including the scope of work, references to design criteria, and other terms and conditions;

(3) The responsibilities of the Tribe/Consortium for the project;

(4) How project-related environmental considerations will be addressed;

(5) The amount of Federal funds provided for the project;

(6) The terms and conditions by which funding for the project, including contingency funds, will be paid to the Tribe/Consortium by the Secretary;

(7) The obligations of the Tribe/Consortium to comply with the applicable codes and standards referenced in 25 U.S.C. 5367(d) and applicable Federal laws and regulations;

(8) The agreement of the parties over who will bear any additional costs necessary to meet changes in scope, or errors or omissions in design and construction;

(9) The entity responsible to issue any Certificate of Occupancy, if applicable;  
and

(10) Other terms and conditions the parties mutually agree upon.

(b) The Tribe/Consortium shall include in the construction project agreement or funding agreement that includes a construction project or program a provision for the submission to the Secretary of progress reports and financial status reports not less than semi-annually commencing after funding for the project is received by the Tribe/Consortium and continuing until the construction of the project is complete.

## REQUIREMENTS AND STANDARDS

*§ 1000.1360 What codes, standards and architects and engineers must a*

*Tribe/Consortium use when performing a construction project under this part?*

(a) In carrying out a construction project under this subpart, a Tribe/Consortium must:

(1) Adhere to applicable Federal, State, local, and Tribal building codes, architectural and engineering standards, and applicable Federal guidelines regarding design, space, and operational standards, appropriate for the particular project; and

(2) Use only architects and engineers who:

(i) Are licensed to practice in the State in which the facility will be built; and

(ii) Certify that:

(A) They are qualified to perform the work required by the specific construction involved; and

(B) Upon completion of design, the plans, and specifications meet or exceed the applicable construction and safety codes.

#### NEPA PROCESS

*§ 1000.1365 Are Tribes/Consortia required to carry out activities involving NEPA in order to enter into a construction project agreement?*

No, Tribes/Consortia are not required to carry out any activities involving NEPA in order to enter into a construction project agreement.

*§ 1000.1370 How may a Tribe/Consortium elect to assume some Federal responsibilities under NEPA?*

(a) A Tribe/Consortium may, subject to the agreement of the Secretary, elect to assume some Federal responsibilities under NEPA, NHPA, and related provisions of

other laws and regulations that would apply if the Secretary were to undertake a construction project by adopting a resolution:

(1) Designating a certifying Tribal officer to represent the Indian Tribe and to assume the status of a responsible Federal official under those Acts, laws, or regulations; and

(2) Accepting the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer assuming the status of a responsible Federal official under those Acts, laws, or regulations.

(b) Notwithstanding subsection (a), nothing in this section authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under NEPA, NHPA, and other related provisions of law that are inherent Federal functions.

*§ 1000.1375 How may a Tribe/Consortium carry out activities involving NEPA without assuming some Federal responsibilities?*

A Tribe/Consortium may elect to carry out some or all activities involving development and preparation of applicable documentation under NEPA, NHPA and related provisions of other laws and regulations for final review and approval by the Secretary.

*§ 1000.1379 Are Tribes/Consortia required to adopt a separate resolution or take equivalent Tribal action to assume some environmental responsibilities of the Secretary under NEPA, NHPA, and related laws and regulations for each construction project?*

No, the Tribe/Consortium may adopt a single resolution or take equivalent Tribal action to assume some environmental responsibilities of the Secretary for NEPA, NHPA,

and related laws and regulations for a single project, multiple projects, a class of projects, or all projects performed under 25 U.S.C. 5367.

§ 1000.1380 *What additional provisions of law are related to NEPA and NHPA?*

(a) Depending upon the nature and the location of the construction project, environmental laws related to NEPA and NHPA may include:

- (1) Archaeological and Historical Data Preservation Act (54 U.S.C. 3120501 through 3120508);
- (2) Archeological Resources Protection Act (16 U.S.C. 470aa *et seq.*);
- (3) Clean Air Act (42 U.S.C. 7401 *et seq.*);
- (4) Clean Water Act (33 U.S.C. 1251 *et seq.*);
- (5) Coastal Barrier Improvement Act (16 U.S.C. 3501 *et seq.*);
- (6) Coastal Barrier Resources Act (16 U.S.C. 3501 *et seq.*);
- (7) Coastal Zone Management Act (16 U.S.C. 1451 *et seq.*);
- (8) Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*);
- (9) Endangered Species Act (16 U.S.C. 1531 *et seq.*);
- (10) Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*);
- (11) Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1401 through 1445; 16 U.S.C. 1431 through 1447F; 33 U.S.C. 2801 through 2805);
- (12) National Trails System Act (16 U.S.C. 1241 *et seq.*);
- (13) Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*);
- (14) Noise Control Act (42 U.S.C. 4901 *et seq.*);

- (15) Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*);
- (16) Safe Drinking Water Act (42 U.S.C. 300f *et seq.*);
- (17) Toxic Substance Control Act (15 U.S.C. 2601 *et seq.*);
- (18) Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*); and
- (19) Wilderness Act (16 U.S.C. 1131 *et seq.*)

(b) This section provides a list of environmental laws for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

*§ 1000.1385 What is the typical environmental review process for construction projects?*

(a) During the environmental review process, the following activities may occur:

(1) Consult with appropriate Tribal, Federal, state, local officials, and interested parties on potential environmental effects;

(2) Document assessment of potential environmental effects;

(3) Perform necessary environmental surveys and inventories;

(4) Consult with the Advisory Council on Historic Preservation, acting through the SHPO or THPO, to ensure compliance with the NHPA;

(5) Assess whether extraordinary or exceptional circumstances exist that may prevent the project from meeting the criteria for categorical exclusion from further environmental review under NEPA, or if an environmental assessment is required;

(6) Identify methods to avoid or mitigate potential adverse effects; and

(7) Obtain environmental permits and approvals as required.

(b) This section is for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

*§ 1000.1390 Is the Secretary required to take into account the Indigenous Knowledge of Tribes/Consortia when preparing environmental studies under NEPA, NHPA, and related provisions of other law and regulations?*

Yes, Council on Environmental Quality (CEQ) regulations direct agencies to make use of any reliable data sources, in carrying out their responsibilities under NEPA. The Secretary recognizes that Tribes/Consortia hold relevant information and perspectives regarding the environment, and Indigenous Knowledge can inform the Secretary's environmental analysis. Similarly, section 106 of NHPA (54 U.S.C. 306108) establishes a process to ensure that the Secretary take into account the effects of a project the Department carries out, licenses, or assists on historic properties.

*§ 1000.1395 May a Tribe/Consortium act as a cooperating agency or joint lead agency for environmental review purposes regardless of whether it exercises its option under § 1000.1370(a)(1)?*

Yes, consistent with 40 CFR 1501.7(b) and 1501.8, a Tribe/Consortium may act as a cooperating agency or joint lead agency for environmental review purposes under this part. For informational purposes only, the term "cooperating agency" is defined at 40 CFR 1508.1(g) and the criteria for a Tribe/Consortium to act as a "cooperating agency" are set out in 40 CFR 1501.8 and Department regulations at 43 CFR 46.225, respectively.

*§ 1000.1400 How does a Tribe/Consortium comply with NEPA and NHPA?*

(a) A Tribe/Consortium complies with NEPA and NHPA by:

(1) Developing and adopting their own environmental review procedures that meet or exceed applicable Federal requirements;

- (2) Adopting the procedures of the Secretary; or
- (3) Adopting the procedures of another Federal agency.

(b) The Tribe/Consortium shall reference such procedures in the funding agreement or construction project agreement and use such procedures in undertaking the project.

*§ 1000.1405 If a Tribe/Consortium adopts the environmental review procedures of a Federal agency, is the Tribe/Consortium responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?*

No, the Federal agency is responsible for ensuring its own policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws, not the Tribe/Consortium.

*§ 1000.1410 Are Federal funds available to cover the cost of Tribes/Consortia carrying out environmental responsibilities?*

Yes, funds are available:

(a) For project-specific environmental costs through the construction project agreement or funding agreement that includes the construction project; and

(b) For environmental review program costs through a funding agreement and/or a construction project agreement.

*§ 1000.1415 How are project and program environmental review costs identified?*

(a) The Tribe/Consortium and the Secretary shall work together during the initial stages of project development to identify program and project related costs associated with carrying out environmental responsibilities for proposed projects. The goal in this

process is to identify the costs associated with all foreseeable environmental review activities.

(b) If unforeseen environmental review and compliance costs are identified during the performance of the construction project, the Tribe/Consortium or, at the request of the Tribe/Consortium, the Tribe/Consortium and Secretary may do one or more of the following:

- (1) Mitigate adverse environmental effects;
- (2) Alter the project scope of work; and/or
- (3) Add additional program and/or project funding, including seeking supplemental appropriations.

*§ 1000.1420 What costs may be included in the budget for a construction project or program?*

(a) A Tribe/Consortium may include costs allowed by applicable provisions of subpart E of 2 CFR part 200, and costs allowed under 25 U.S.C. 5367, 25 U.S.C. 5325 and 25 U.S.C. 5324(m). The cost incurred will vary depending on which phase of the construction process the Tribe/Consortium is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement or funding agreement that includes a construction project is fixed priced or cost-reimbursement, budgets may include costs or fees associated with the following:

- (1) Construction project proposal preparation;
- (2) Conducting community meetings to develop project documents;



(3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans and specifications, and to assist in oversight of the design during construction;

(4) Real property lease or acquisition;

(5) Development of project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance;

(6) Project management, superintendence, safety, and inspection;

(7) Travel, including local travel incurred as a direct result of conducting the construction project agreement and remote travel in conjunction with the project;

(8) Consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who provide services, to include construction management services;

(9) Project site development;

(10) Project construction cost;

(11) General, administrative overhead, and indirect costs;

(12) Securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(12) Other costs directly related to performing the construction project;

(13) Project Contingency;

(i) A cost-reimbursement project agreement budgets contingency as a broad category. Project contingency remaining at the end of the project is considered savings.

(ii) Fixed-price agreements budget project contingency in the lump sum price or unit price.

(c) In the case of a fixed-price project agreement, a reasonable profit determined by taking into consideration the relevant risks and local market conditions.

*§ 1000.1425 May the Secretary reject a Tribe's/Consortium's final offer of a construction project proposal submitted under subpart I – Final Offer based on a determination of Tribal capacity or capability?*

No, the Secretary may not reject a Tribe's/Consortium's final offer of a construction project based on a determination of Tribal capacity or capability.

*§ 1000.1430 On what basis may the Secretary reject a final offer of a construction project proposal made by a Tribe/Consortium?*

As described in subpart I – Final Offer of this part, rejection of a final offer by the Secretary for a construction project must be based on a specific finding by the Secretary that clearly demonstrates, or that is supported by a controlling legal authority, that one or more of the statutory criteria under 25 U.S.C. 5366(c)(6) exist to reject the final offer.

#### ROLE OF THE SECRETARY

*§ 1000.1435 What is the Secretary's role in a construction project performed under this subpart?*

The Secretary has the following role regarding a construction program or project contained in a funding agreement or construction project agreement:

(a) On a schedule negotiated by the Secretary and the Tribe/Consortium, to ensure health and safety standards and compliance with Federal law, the Secretary shall review and verify, to the satisfaction of the Secretary:

(1) That project planning and documents prepared by the Tribe/Consortium in advance of initial construction are in conformity with the obligations of the Tribe/Consortium under 25 U.S.C. 5367(d); and

(2) Before the project planning and design documents are implemented, that subsequent document amendments that result in a significant change in construction are in conformity with the obligations of the Tribe/Consortium under 25 U.S.C. 5367(d).

(b) Where no time is otherwise specified in a funding agreement or construction project agreement, the Secretary shall complete the review and verification of project documents required under 25 U.S.C. 5367(h) and provide a Tribe/Consortium a written response within 30 days of the Secretary's receipt from the Tribe/Consortium of project planning and design documents. Absent a written response by the Secretary within the 30-day period, the project planning and design documents, or amendments to such documents, shall be deemed to be conformity with the Tribe's obligations under 25 U.S.C. 5367(d).

(c) The Secretary must approve any proposed changes in the construction project that require;

(1) An increase in the negotiated funding amount; or

(2) An increase in the negotiated performance period; or

(3) A significant departure from the scope or objective of the construction program as agreed to in the funding agreement or construction project agreement.

(d) A Tribe/Consortium may make immaterial changes to the performance period and make budget adjustments within available Federal funding without an amendment to the funding agreement or construction project agreement.

(e) The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Tribe/Consortium. The Secretary must provide the Tribe/Consortium with reasonable advance written notice to assist the Tribe/Consortium in coordinating the visit. The purpose of the visit is to review the progress under the construction project agreement or funding agreement. At the request of the Tribe/Consortium, the Secretary must provide the Tribe/Consortium a written site visit report;

(f) Where the Secretary and the Tribe/Consortium share construction project or program activities, the Secretary and Tribe/Consortium shall provide for the exchange of information;

(g) The Secretary may reassume the construction portion of a funding agreement or construction project agreement if the Secretary, in accordance with subpart M of this part, makes a written finding of:

(1) A significant failure to substantially carry out the terms of the funding agreement or construction agreement without good cause; or

(2) Imminent jeopardy to a physical trust asset, to a natural resource, or that adversely affects public health and safety as provided in subpart M of this part.

*§ 1000.1440 What constitutes a “significant change” in the original scope of work?*

A significant change in the original scope of work is:

(a) A change that would result in a cost that exceeds the total of the Federal project funds available and the Tribe’s/Consortium’s contingency funds; or

(b) A material departure from the original scope of work, including substantial departure from timelines negotiated in the construction project agreement.

*§ 1000.1445 May the Secretary suspend construction activities under a funding agreement or construction project agreement?*

(a) The Secretary may, in lieu of reassumption under subpart M of this part, allow a Tribe/Consortium to suspend certain work under a construction portion of a funding agreement or construction project agreement for up to 30 days only if the Secretary notifies the Tribe/Consortium in writing that the Secretary has found that:

(1) Site conditions adversely affect health and safety; or

(2) Work in progress or completed for the construction project fails to substantially carry out the terms of the construction project agreement or funding agreement without good cause.

(b) The Secretary may suspend only work directly related to the criteria specified in paragraph (a) of this section unless other reasons for suspension are specifically negotiated in the funding agreement or construction project agreement.

(c) Unless the Secretary determines that a health and safety emergency requiring immediate reassumption under subpart M of this part exists, before requesting a suspension of work on the project by the Tribe/Consortium, the Secretary must provide:

(1) A 5-working days written notice to the Tribe/Consortium specifying the reasons the Secretary requests a suspension of certain project work; and

(2) A reasonable opportunity for the Tribe/Consortium to correct the problem.

(d) The Tribe/Consortium must be compensated for reasonable costs due to any suspension of work that occurred through no fault of the Tribe/Consortium. Project funds will not be used for this purpose. However, if suspension occurs due to the action or

inaction of the Tribe/Consortium, then project funds will be used to cover suspension related activities.

*§ 1000.1450 How are property and funding returned if there is a reassumption for substantial failure to carry out a construction project?*

If there is a reassumption by the Secretary of a project for substantial failure to carry out the funding agreement or construction project agreement, property and funding will be returned as provided in subparts M and N of this part.

*§ 1000.1455 What happens when a Tribe/Consortium, suspended under § 1000.1445 for substantial failure to carry out the terms of construction project agreement or funding agreement that includes a construction project or program without good cause, does not correct the failure during the suspension?*

Except when the Secretary makes a finding of imminent jeopardy to a physical trust asset, a natural resource, or public health and safety, requiring immediate reassumption as provided in subpart M of this part, a finding by the Secretary of substantial failure to carry out the terms of the construction project agreement or funding agreement that includes a construction project or program without good cause is not corrected or resolved by the Tribe/Consortium during the suspension of work, the Secretary may initiate a reassumption at the end of the 30-day suspension of work if an extension has not been negotiated. Any unresolved dispute will be processed in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 7101, *et seq.*

*§ 1000.1460 How does the Secretary make advance payments to a Tribe/Consortium under a funding agreement or construction project agreement?*

(a) For all construction projects performed under a funding agreement or construction project agreement, advance payments shall be made annually or semiannually, at the Tribe's/Consortium's option as provided in 25 U.S.C. 5367(f). The initial payment shall include all contingency funding for the project or phase of the project to the extent that there are funds appropriated for that purpose.

(b) The amount of subsequent advance payments is based on the mutually agreeable project schedule reflecting:

- (1) Work to be accomplished within the advance payment period;
- (2) Work already accomplished; and
- (3) Total prior payments for each annual or semiannual advance payment period.

(c) For lump sum, fixed price agreements, at the request of the Tribe/Consortium, payments shall be based on an advance payment period measured as follows:

(1) One year; or

(2) Project Phase (e.g., planning, design, construction). If project phase is chosen by the Tribe/Consortium as the payment period, the full amount of funds necessary to perform the work for that phase of the construction project agreement is payable in the initial advance payment. For multi-phase projects, the planning and design phases must be completed prior to the transfer of funds by the Secretary for the associated construction phase. The completion of the planning and design phases will include at least one opportunity for Secretarial approval in accordance with § 1000.1435.

(d) For construction project agreements, the amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year.

(e) Any agreement to advance funds under paragraphs (b), (c) or (d) of this section is subject to the availability of appropriations.

(f) Initial advance payments are due within 10 days of the effective date of the funding agreement or construction project agreement, and subsequent advance payments are due:

(1) Within 10 days of apportionment for annual payments, or

(2) Within 10 days of the start date of the project phase for phase payments.

*§ 1000.1465 Is a facility built under this subpart eligible for annual operation and maintenance funding?*

Yes, upon completion of a facility constructed under the Act, the Secretary shall include the facility among those eligible for annual operation and maintenance funding support comparable to that provided for similar facilities funded by the Department as annual appropriations are available and to the extent that the facility size and complexity and other factors do not exceed the funding formula criteria for comparable buildings.

#### ROLE OF THE TRIBE/CONSORTIUM

*§ 1000.1470 What is the Tribe's/Consortium's role in a construction project included in a funding agreement or construction project agreement under this subpart?*

(a) In carrying out a construction project under the Act, a Tribe/Consortium shall assume responsibility for the completion of the construction project and of a facility that is usable for the purpose for which the Tribe/Consortium received funding, including day-to-day on-site management and administration of the project, in accordance with the negotiated funding agreement or construction project agreement. However, Tribes/Consortia are not required to perform beyond the amount of funds provided. For



example, a Tribe/Consortium may encounter unforeseen circumstances during the term of a funding agreement or construction project agreement. If this occurs, options available to the Tribe/Consortium include, but are not limited to:

- (1) Reallocating existing funding;
- (2) Reducing/revising the scope of work that does not require an amendment

because it does not result in a significant change;

- (3) Utilizing savings;
- (4) Requesting additional funds or appropriations;
- (5) Utilizing interest earnings;
- (6) Seeking funds from other sources; and/or

(7) Redesigning or re-scoping that does not result in a significant change by amendment as provided in the funding agreement the construction project agreement.

(b) The Tribe/Consortium must give the Secretary timely notice of any proposed changes to the project that require an increase to the negotiated funding amount or an increase in the negotiated performance period or any other significant departure from the scope or objective of the project. The Tribe/Consortium and Secretary may negotiate to include timely notice requirements in the funding agreement or construction project agreement.

*§ 1000.1475 Is a Tribe/Consortium required to submit construction project progress and financial reports for construction projects?*

Yes, as required under § 1000.1355(b), construction project progress reports and financial reports are only required for active construction projects. The construction progress and financial reports shall provide the following information:

(a) Construction project progress reports contain information about accomplishments during the reporting period and issues and concerns of the Tribe/Consortium relating to the project, if any. Construction progress information will include the following, as applicable:

(1) Phase(s) of the project completed or in progress including but not limited to design complete, environmental review complete, and construction underway;

(2) Milestone project event(s) reached (e.g., 50% of the project is completed);

(3) Other information mutually agreeable to the Tribe/Consortium and the Secretary.

(4) Upon project completion, the final construction progress report will provide notification to the Secretary that the project has been completed in accordance with the approved project scope, including any changes in the project scope of work.

(b) Construction project financial reports contain information regarding the amount of funds expended during the reporting period and financial concerns of the Tribe/Consortium concerning the project, if any.

#### OTHER

*§ 1000.1480 May a Tribe/Consortium continue work with construction funds remaining in a funding agreement or construction project agreement at the end of the funding year?*

Yes, any funds remaining in a funding agreement or construction project agreement for a project at the end of the funding year may be spent for construction under the terms of the funding agreement or construction project agreement for which the funds were awarded.

*§ 1000.1485 Must a construction project agreement or funding agreement that contains a construction project or activity incorporate provisions of Federal construction standards?*

(a) No, the Secretary may, however, provide information about Federal standards as early as possible in the construction process.

(b) If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards), including health and safety, meet or exceed applicable Federal codes and standards, then the Secretary must accept the Tribe's/Consortium's proposed codes and standards.

(c) The Secretary may also accept commonly accepted industry construction codes and standards; provided that such codes and standards meet or exceed otherwise applicable Federal standards for the construction project.

*§ 1000.1490 May the Secretary require design provisions and other terms and conditions for construction projects or programs included in a funding agreement or construction project agreement under section 403(c) (25 U.S.C. 5363(c))?*

Yes, the relevant bureau may provide to the Tribe/Consortium project design criteria and other terms and conditions that are required for such a construction project or program. The construction project or program must be completed in accordance with the terms and conditions set forth in the funding agreement or construction project agreement.

*§ 1000.1495 Do all provisions of other subparts apply to construction portions of a funding agreement or construction project agreement?*

Yes, all provisions of other subparts apply to construction portions of a funding agreement or construction project agreement unless those provisions are inconsistent with this subpart.

*§ 1000.1500 When a Tribe withdraws from a Consortium, is the Secretary required to award to the withdrawing Tribe a portion of funds associated with a construction project if the withdrawing Tribe so requests?*

Under § 1000.235, a Tribe may withdraw from a Consortium and request its portion of a construction project's funds. The Secretary may decide not to award these funds if the award will affect the Consortium's ability to complete a non-severable phase of the project within available funding. A non-severable phase of a project would include but is not limited to the construction of a single building serving a Consortium. A severable phase of a project would include but is not limited to the funding for a road in one village where the Consortium would be able to complete the roads in the other villages that were part of the project approved initially in the funding agreement. The Secretary's decision under this section may be appealed under subpart R of this part.

*§ 1000.1505 May a Tribe/Consortium reallocate funds from a construction program to a non-construction program?*

No, a Tribe/Consortium may not reallocate funds from a construction program to a non-construction program unless otherwise provided under the relevant appropriation acts.

*§ 1000.1510 May a Tribe/Consortium reallocate funds among construction programs?*

Yes, a Tribe/Consortium may reallocate funds among construction programs if permitted by appropriations law or if approved in advance by the Secretary.

*§ 1000.1515 Must the Secretary retain project funds to ensure proper health and safety standards in construction projects?*

Yes, the Secretary must retain project funds to ensure proper health and safety standards in construction projects. Examples of purposes for which bureaus may retain funds include:

- (a) Determining or approving appropriate construction standards to be used in funding agreements;
- (b) Verifying that there is an adequate Tribal inspection system utilizing licensed professionals;
- (c) Providing for sufficient monitoring of design and construction by the Secretary; and
- (d) Requiring corrective action during performance when appropriate.

*§ 1000.1520 What funding must the Secretary provide in a construction project agreement or funding agreement that includes a construction project or program?*

The Secretary must provide funding for a construction project agreement or funding agreement that includes a construction project or program in accordance with 25 U.S.C. 5325 and 25 U.S.C. 5363(g)(3).

*§ 1000.1525 Must Federal funds from other DOI sources be incorporated into a construction project agreement or funding agreement that includes a construction project or program?*

Yes, at the request of the Tribe/Consortium, the Secretary must include Federal funds from other DOI sources as permitted by law, whether on an ongoing or a one-time basis.

*§ 1000.1530 May a Tribe/Consortium contribute funding to a project?*

Yes, at the discretion of a Tribe/Consortium, a Tribe/Consortium may contribute funds to a construction project.

### **Subpart L – Federal Tort Claims**

*§ 1000.1601 What is the purpose of this subpart?*

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

This section covers:

- (a) Coverage of claims arising out of the performance under compacts and funding agreements;
- (b) Procedures for filing claims under FTCA; and
- (c) Procedures for a Tribe/Consortium to cooperate with the Federal Government in connection with tort claims arising out of the Tribe's/Consortium's performance of a compact or funding agreement under this part.

*§ 1000.1605 What other statutes and regulations apply to FTCA coverage?*

A number of other statutes and regulations apply to FTCA coverage, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671 through 2680), 25 U.S.C. 5376, and related U.S. Department of Justice regulations in 28 CFR part 14.

*§ 1000.1610 Do Tribes/Consortia need to be aware of areas which FTCA does not cover?*

Yes, there are claims against Tribes/Consortia which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. The following general guidance is not intended as a definitive description of coverage,

which is subject to review by the U.S. Department of Justice and the courts on a case-by-case basis.

(a) *What claims are expressly barred by FTCA and therefore may not be made against the United States, a Tribe, or Consortium?* Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

(b) *What claims may not be pursued under FTCA?*

(1) Claims against subcontractors arising out of the performance of subcontracts with a Tribe/Consortium;

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

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

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

(c) *What remedies are expressly excluded by FTCA and therefore are barred?*

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

(2) Other remedies not permitted under applicable state law.

*§ 1000.1615 Is there a deadline for filing FTCA claims?*

Yes, claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

*§ 1000.1620 How long does the Federal Government have to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?*

The Federal Government has 6 months to process a FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed.

*§ 1000.1625 Is it necessary for a compact or funding agreement to include any clauses about FTCA coverage?*

No, clauses about FTCA coverage are optional. At the request of Tribes/Consortia, a compact or funding agreement shall include the following clause to clarify the scope of FTCA coverage:

*For purposes of FTCA coverage, the Tribe/Consortium and its employees (including individuals performing personal services contracts with the Tribe/Consortium) are deemed to be employees of the Federal Government while performing work under the compact or funding agreement. This status is not changed by the source of the funds used by the Tribe/Consortium to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the Tribe/Consortium.*

*§ 1000.1630 Does FTCA apply to a compact and funding agreement if FTCA is not referenced in the compact or funding agreement?*

Yes. In accordance with 25 U.S.C. 5376, FTCA applies to a compact or funding agreement even if the compact or funding agreement does not mention it.

*§ 1000.1635 To what extent shall the Tribe/Consortium cooperate with the Federal Government in connection with tort claims arising out of the Tribe's/Consortium's performance of a compact, funding agreement, or subcontract?*



(a) The Tribe/Consortium shall designate in writing to the Secretary an individual to serve as tort claims liaison with the Federal Government.

(b) As part of the notification required by 28 U.S.C. 2679(c), the Tribe/Consortium shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the Tribe/Consortium or any of its employees that relates to performance of a compact, funding agreement, or subcontract.

(c) The Tribe/Consortium, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include as appropriate:

- (1) The date, time and exact place of the accident or incident;
- (2) A concise and complete statement of the circumstances of the accident or incident;
- (3) The names and addresses of Tribal and/or Federal employees involved as participants or witnesses;
- (4) The names and addresses of all other eyewitnesses;
- (5) An accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;
- (6) A statement as to whether any person involved was cited for violating a Federal, State, or Tribal law, ordinance, or regulation;

(7) The Tribe's/Consortium's determination as to whether any of its employees (including Federal employees assigned to the Tribe/Consortium) involved in the incident giving rise to the tort claim were acting within the scope of their employment in the performance of the compact or funding agreement at the time the incident occurred;

(8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The Tribe/Consortium shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Secretary, the Tribe/Consortium shall make an assignment and subrogation of all the Tribe's/Consortium's rights and claims (except those against the Federal Government) arising out of a tort claim against the Tribe/Consortium.

(f) If requested by the Secretary, the Tribe/Consortium shall authorize representatives of the Secretary to settle or defend any claim and to represent the Tribe/Consortium in or take charge of any action.

(g) If the Federal Government undertakes the settlement or defense of any claim or action, the Tribe/Consortium shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

*§ 1000.1640 Does this coverage extend to subcontractors of compacts and funding agreements?*

No, subcontractors or subgrantees providing services to a Pub. L. 93–638 Tribe/Consortium are generally not covered.

*§ 1000.1645 Is FTCA the exclusive remedy for a tort claim, including a claim concerning personal injury or death, resulting from the performance of a compact or funding agreement?*

Yes, except as explained in § 1000.1610(b). No claim may be filed against a Tribe/Consortium or employee based upon performance of a compact or funding agreement. All claims shall be filed against the United States and are subject to the limitations and restrictions of FTCA.

*§ 1000.1650 What employees are covered by FTCA for claims arising out of a Tribe's/Consortia's performance of a compact or funding agreement?*

The following employees are covered by FTCA for claims:

- (a) Permanent employees;
- (b) Temporary employees;
- (c) Persons providing services without compensation in the performance of a compact or funding agreement; and;

(d) Federal employees assigned to a Tribe/Consortium under the compact or funding agreement including those under the Intergovernmental Personnel Act.

*§ 1000.1655 Does FTCA cover employees of the Tribe/Consortium who are paid by the Tribe/Consortium from funds other than those provided through the funding agreement?*

Yes, FTCA covers employees of the Tribe/Consortium who are not paid from funds transferred under a funding agreement as long as the services out of which the claim arose were performed under the compact or funding agreement.

*§ 1000.1660 May persons who are not Indians or Alaska Natives assert claims under FTCA arising out of the performance of a compact or funding agreement by a Tribe/Consortium?*

Yes, any person(s) may assert tort claims under FTCA arising out of the performance of a compact or funding agreement by Tribes/Consortia under this subpart.

*§ 1000.1665 If the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or a complaint alleging a tort covered by FTCA and arising out of the performance of a compact or funding agreement, what should the Tribe/Consortium do?*

As part of the notification required by 28 U.S.C. 2679(c), if the Tribe/Consortium or Tribe's/Consortium's employee receives a summons and/or complaint alleging a tort covered by FTCA and arising out the performance of a compact or funding agreement, the Tribe/Consortium should immediately:

(a) Inform the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240.

(b) Inform the Tribe's/Consortium's tort claims liaison, and

(c) Forward all of the materials identified in § 1000.1635(c) to the contacts given in § 1000.1665(a) and (b).

### **Subpart M – Reassumption**

*§ 1000.1701 What is the purpose of this subpart?*

This subpart explains when the Secretary can reassume a program without the consent of a Tribe/Consortium.

*§ 1000.1705 What does reassumption mean?*

Reassumption means the Secretary, without consent of the Tribe/Consortium, takes control or operation of the PSFAs and associated funding in a compact or funding agreement, in whole or in part, and assumes the responsibility to provide such PSFAs.

*§ 1000.1710 Under what circumstances may the Secretary reassume a program operated by a Tribe/Consortium under a funding agreement?*

The Secretary may reassume a program and the associated funding if the Secretary makes a specific finding relating to that program of:

(a) Imminent jeopardy to a trust asset, a natural resource, or public health and safety that:

- (1) Is caused by an act or omission of the Tribe/Consortium; and
- (2) Arises out of a failure to carry out the compact or funding agreement; or

(b) Gross mismanagement with respect to funds transferred to a Tribe/Consortium under a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.

*§ 1000.1715 What is “imminent jeopardy” to a trust asset?*

Imminent jeopardy means an immediate threat and likelihood of significant devaluation, degradation, damage, or loss of a trust asset, or the intended benefit from the asset caused by the actions or inactions of a Tribe/Consortium in performing trust functions. This includes disregarding Federal trust standards and/or Federal law while performing trust functions if the disregard creates such an immediate threat.

*§ 1000.1720 What is “imminent jeopardy” to natural resources?*

The standard for natural resources is the same as for a physical trust asset, except that a review for compliance with the specific mandatory statutory provisions related to the program as reflected in the funding agreement must also be considered.

*§ 1000.1725 What is “imminent jeopardy” to public health and safety?*

Imminent jeopardy to public health and safety means an immediate and significant threat of serious harm to human well-being, including conditions that may result in serious injury, or death, caused by Tribal/Consortium action or inaction or as otherwise provided in a funding agreement.

*§ 1000.1730 What steps must the Secretary take prior to reassumption becoming effective?*

Except as provided in § 1000.1750 for immediate reassumption, prior to a reassumption becoming effective, the Secretary must:

- (a) Notify the Tribe/Consortium in writing of the details of the findings required under § 1000.1710;
- (b) Request specific corrective action to remedy the mismanagement of the funds or programs within a reasonable period of time which in no case may be less than 45 days;
- (c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Tribe/Consortium overcome the conditions that led to the findings described under (a); and
- (d) Provide the Tribe/Consortium with a hearing on the record as provided under subpart R of this part.

*§ 1000.1735 Does the Tribe/Consortium have a right to a hearing prior to a non-immediate reassumption becoming effective?*

Yes, at the request of the Tribe/Consortium, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in § 1000.1730(b).

*§ 1000.1740 What happens if the Secretary determines that the Tribe/Consortium has not corrected the conditions that the Secretary identified in the written notice?*

(a) The Secretary shall provide a second written notice to the Tribe/Consortium served by the compact or funding agreement that the compact or funding agreement will be rescinded, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the Secretary's reassumption;

(2) The details and facts supporting the intended reassumption; and

(3) Instructions that explain the Tribe/Consortium's right to a formal hearing within 30 days of receipt of the notice.

*§ 1000.1745 What is the earliest date on which a reassumption by the Secretary can be effective?*

Except as provided in § 1000.1750, no program may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Tribe/Consortium with an opportunity to take corrective action in response to any adverse final ruling.

*§ 1000.1750 Does the Secretary have the authority to immediately reassume a program?*

Yes, the Secretary may immediately reassume operation of a program and associated funding upon providing to the Tribe/Consortium written notice in which the Secretary makes a finding of:

(a) Imminent and substantial jeopardy and irreparable harm to a trust asset, a natural resource, or public health and safety that:

(1) Is caused by an act or omission by the Tribe/Consortium; and

(2) Arises out of a failure to carry out the terms of an applicable compact or funding agreement.

(b) If the Secretary reassumes operation of a program under this provision, the Secretary must provide the Tribe/Consortium with a hearing on the record not later than 10 days after the date of reassumption.

*§ 1000.1755 What must a Tribe/Consortium do when a program is reassumed?*

On the effective date of reassumption, the Tribe/Consortium must, at the request of the Secretary, deliver all property and equipment, and title thereto:

(a) That the Tribe/Consortium received for the program under the funding agreement; and

(b) That has a per item value in excess of \$5,000, or as otherwise provided in the funding agreement.

*§ 1000.1760 When must the Tribe/Consortium return funds to the Department?*

The Tribe/Consortium must return unexpended funds, less “wind up costs,” that remain available to the Department as soon as practical after the effective date of the reassumption.



*§ 1000.1765 May the Tribe/Consortium be reimbursed for actual and reasonable “wind up costs” incurred after the effective date of retrocession?*

Yes, the Tribe/Consortium may be reimbursed for actual and reasonable “wind up costs” to the extent that funds are available.

*§ 1000.1770 Is a Tribe’s/Consortium’s general right to negotiate a funding agreement adversely affected by a reassumption action?*

A reassumption action taken by the Secretary does not affect the Tribe/Consortium’s ability to negotiate a funding agreement for programs not affected by the reassumption.

*§ 1000.1775 When will the Secretary return management of a reassumed program?*

A reassumed program may be included in future funding agreements, but the Secretary may include conditions in the terms of the funding agreement to ensure that the circumstances that caused jeopardy to attach do not reoccur.

### **Subpart N – Retrocession**

*§ 1000.1801 What is the purpose of this subpart?*

This subpart explains what happens when a Tribe/Consortium fully or partially and voluntarily returns a program to a bureau before the expiration of the term of the compact or funding agreement.

*§ 1000.1805 Is a decision by a Tribe/Consortium not to include a program in a successor agreement considered a retrocession?*

No, a decision by a Tribe/Consortium not to include a program in a successor agreement is not considered a retrocession.

*§ 1000.1810 Who may retrocede a program in a funding agreement?*

A Tribe/Consortium may retrocede a program. However, the right of a Consortium member to retrocede may be subject to the terms of the agreement among the members of the Consortium and §§ 1000.205 through 1000.235.

*§ 1000.1815 How does a Tribe/Consortium retrocede a program?*

The Tribe/Consortium must submit:

- (a) A written notice to:
  - (1) The Office of Self-Governance for BIA programs; or
  - (2) The appropriate bureau for non-BIA programs; and
- (b) A Tribal resolution or other official action of its governing body.

*§ 1000.1820 When will the retrocession become effective?*

The retrocession becomes effective on the date that is mutually agreed to by the parties in writing. In the absence of a mutually agreed upon effective date, the retrocession becomes effective on the earlier of:

- (a) One year after the date the Tribe/Consortium submits its notice of retrocession; or
- (b) The date the funding agreement expires.

*§ 1000.1825 How will retrocession affect the Tribe's/Consortium's existing and future funding agreements?*

Retrocession does not affect other parts of the funding agreement or funding agreements with other bureaus. A Tribe/Consortium may request to negotiate for and include retroceded programs in future funding agreements or through a self-determination contract.

*§ 1000.1830 Does the Tribe/Consortium have to return funds used in the operation of a retroceded program?*

The Tribe/Consortium and the Secretary must negotiate the amount of funds that have not been obligated by the Tribe/Consortium to be returned to the Secretary, less close out costs, for the Secretary's operation of the retroceded program. This amount must be based on such factors as the time remaining or functions remaining in the funding cycle or as provided in the funding agreement.

*§ 1000.1835 Does the Tribe/Consortium have to return property used in the operation of a retroceded program?*

On the effective date of any retrocession, the Tribe/Consortium must, at the option of the Secretary, return all property and equipment, and title thereto:

(a) That was acquired with funds under the funding agreement for the program being retroceded; and

(b) That has a per item current fair market value in excess of \$5,000 at the time of the retrocession, or as otherwise provided in the funding agreement.

*§ 1000.1840 What happens to a Tribe's/Consortium's mature contract status if it has retroceded a program that is also available for self-determination contracting?*

If a Tribe/Consortium retrocedes operation of a program carried out under a title IV funding agreement, at the option of the Tribe/Consortium, the resulting self-determination contract is considered mature if the Tribe/Consortium meets the requirements of 25 U.S.C. 5304(h).

*§ 1000.1845 How does retrocession affect a bureau's operation of the retroceded program?*

The level of operation of the program will depend upon the amount of funding that is returned with the retrocession.

### **Subpart O – Trust Evaluation**

*§ 1000.1901 What is the purpose of this subpart?*

This subpart describes how the trust responsibility of the United States is legally maintained through a system of trust evaluations when Tribes/Consortia perform trust PSFAs through funding agreements under the Act. It describes the principles and processes upon which trust evaluations by the Secretary will be based.

*§ 1000.1905 Does the Act alter the trust responsibility of the United States to Indian Tribes and individuals under self-governance?*

No, the Act does, however, permit a Tribe/Consortium to assume management responsibilities for trust assets and resources on its own behalf and on behalf of individual Indians. Under the Act, the Secretary has a trust responsibility to conduct annual trust evaluations of a Tribe's/Consortium's performance of trust PSFAs under a funding agreement to ensure that Tribal and individual trust assets and resources are managed in accordance with the legal principles and standards governing the performance of trust PSFAs set out in the funding agreement or as provided for by law.

*§ 1000.1910 What are "trust resources" for the purposes of the trust evaluation process?*

- (a) Trust resources include property and interests in property:
  - (1) That are held in trust by the United States for the benefit of a Tribe or individual Indians; or
  - (2) That are subject to restrictions upon alienation.

(b) Trust assets include:

(1) Other assets, trust revenue, royalties, or rental, including natural resources, land, water, minerals, funds, property, or claims, and any intangible right or interest in any of the foregoing;

(2) Any other property, asset, or interest therein, or treaty right for which the United States is charged with a trust responsibility. For example, water rights and off-reservation treaty rights.

(c) This definition defines trust resources and trust assets for purposes of the trust evaluation process only.

*§ 1000.1915 What are “trust PSFAs” for the purposes of the trust evaluation process?*

Trust PSFAs are those programs, services, functions and activities necessary to the management of assets and resources held in trust by the United States for an Indian Tribe or individual Indian.

*§ 1000.1920 Can a Tribe /Consortium request the Secretary to conduct an assessment of the status of the trust assets, resource, and PSFAs?*

If the parties agree in writing and it is practical, the Secretary may arrange for a written assessment by the Department of the status of the trust resource and asset at the time of the transfer of the PSFAs or at a later time. The parties shall agree upon an estimate of time required to complete a baseline assessment. Upon completion of the assessment report by the Department, the Secretary’s designated representative shall provide a copy of the assessment to the Tribe/Consortium within 30 days.

#### ANNUAL TRUST EVALUATION

*§ 1000.1925 What is a trust evaluation?*

A trust evaluation is an annual review and evaluation of trust functions performed by a Tribe/Consortium to ensure that the functions are performed in accordance with trust standards as defined by Federal law. Trust evaluations address trust functions performed by the Tribe/Consortium on its own behalf as well as trust functions performed by the Tribe/Consortium for the benefit of individual Indians or Alaska Natives.

*§ 1000.1930 How are trust evaluations conducted?*

(a) Each year the Secretary's designated representative(s) will conduct an evaluation of trust PSFAs for each funding agreement. The Secretary's designated representative(s) will coordinate in writing with the leadership of the Tribe/Consortium, with a copy to the designated Tribe's/Consortium's representative(s), to arrange the evaluation of trust PSFAs and throughout the trust evaluation, including the written report required by § 1000.1940.

(b) This section describes the general framework for trust evaluations. However, each Tribe/Consortium may develop, with the appropriate bureau, an individualized trust evaluation method to allow for the Tribe's/Consortium's unique history, circumstances, trust resources and assets, and the terms and conditions of its funding agreement. An individualized trust evaluation must, at a minimum, contain the measures in paragraph (d) of this section.

(c) To facilitate the trust evaluation so as to mitigate costs and maximize efficiency, each Tribe/Consortium must provide access to all records, plans, and other pertinent documents relevant to the trust PSFAs under review not otherwise available to the Department.

(d) The Secretary's designated representative(s) will:

- (1) Review trust transactions;
- (2) Conduct on-site inspections of trust resources and assets, as appropriate, at a time to be coordinated between the parties;
- (3) Review compliance with applicable statutory and regulatory requirements;
- (4) Review compliance with the trust provisions and standards as may be negotiated and included in the funding agreement;
- (5) Ensure that the same level of trust services is provided to individual Indians as would have been provided by the Secretary;
- (6) Document deficiencies in the performance of trust PSFAs discovered during the trust evaluation in the final report which the Department will submit to the Tribe/Consortium pursuant to § 1000.1940; and
- (7) Ensure the fulfillment of the Secretary's trust responsibility to Tribes and individual Indians by documenting the existence of:
  - (i) Systems of internal controls;
  - (ii) Trust standards; and
  - (iii) Safeguards against conflicts of interest in the performance of trust PSFAs.

*§ 1000.1935 May the trust evaluation process be used for additional reviews?*

Yes, if the parties agree in writing to such additional reviews.

*§ 1000.1936 May the parties negotiate review methods for purposes of the trust evaluation?*

Yes, unless review methods are otherwise provided by Federal law, the Secretary's designated representative will negotiate review methods at the request of the Tribe/Consortium for inclusion in a funding agreement as provided in § 1000.1930(b).

*§ 1000.1940 What are the responsibilities of the Secretary's designated representative(s) after the annual trust evaluation?*

The Secretary's representative(s) must prepare a written report documenting the results of the trust evaluation within 60 days of the Department's completion of an on-site and/or desk review.

(a) The Secretary's representative(s) will provide the Tribe/Consortium representative(s) with a copy of the report for review and comment before finalization.

(b) The Secretary's representative(s) will attach to the report any Tribal/Consortium comments that the representative receives.

(c) The Secretary's representative(s) must respond to the Tribe's/Consortium's comments as part of the final trust evaluation report.

*§ 1000.1945 Is the trust evaluation standard or process different when the trust resource or asset is held in trust for an individual Indian or Indian allottee?*

No, Tribes/Consortia are under the same obligation as the Secretary to perform trust PSFAs and related activities in accordance with trust protection standards and principles whether managing Tribally or individually owned trust resources and assets. The Department's process for conducting the annual evaluation of Tribal/Consortium performance of trust PSFAs on behalf of individual Indians is the same as that used in evaluating performance of Tribal trust PSFAs.

*§ 1000.1950 Does the annual trust review evaluation include a review of the Secretary's inherent Federal and retained operation trust PSFAs?*

When the annual trust evaluation by the Secretary reveals a deficient performance of trust PSFAs by a Tribe/Consortium due in part to the action or inaction of a bureau, it



will trigger an evaluation by the Department of the Secretary's inherent Federal functions and any retained trust PSFAs pertaining to the bureau's action or inaction.

The appropriate Department officials will be notified in writing by the Secretary's representative of the need for corrective action. A copy of such written notice shall be sent by the Secretary's representative to the Tribe/Consortium. The review of the Secretary's trust PSFAs shall be based on the standards in Federal law.

*§ 1000.1955 What are the consequences of a finding of imminent jeopardy in the Secretary's annual trust evaluation?*

(a) A finding of imminent jeopardy to a trust asset, natural resource, or public health and safety that is caused by an act or omission of the Tribe/Consortium and that arises out of a failure by the Tribe/Consortium to carry out the compact or funding agreement, triggers the Federal reassumption process (*see* subpart M of this part), unless the conditions in paragraph (b) of this section are met.

(b) The reassumption process will not be triggered if the Secretary's designated representative determines that the Tribe/Consortium:

- (1) Can cure the conditions causing jeopardy within 60 days; and
- (2) Will not cause significant loss, harm, or devaluation of a trust asset, natural resources, or the public health and safety.

*§ 1000.1960 What if the Secretary's trust evaluation reveals problems that do not rise to the level of imminent jeopardy?*

Where problems not rising to the level of imminent jeopardy are caused by Tribal/Consortium action or inaction, the conditions must be:

- (a) Documented in the Department's annual trust evaluation report;

- (b) Reported to the Secretary; and
- (c) Reported in writing to:
  - (1) The governing body of the Tribe; and
  - (2) In the case of a Consortium, to the governing body of each Tribe on whose behalf the Consortium is performing the trust PSFAs.

*§ 1000.1965 Who is responsible for taking corrective action?*

The Tribe/Consortium is primarily responsible for identifying and implementing corrective actions for matters contained in the funding agreement, but the Department may also suggest possible corrective measures for Tribal/Consortium consideration.

*§ 1000.1970 What are the requirements of the Department's review team report?*

A report summarizing the results of the trust evaluation will be prepared by the Secretary's designated representative(s) and copies provided to the Tribe/Consortium within the time frame specified in § 1000.1940. The annual trust evaluation report must:

- (a) Be written objectively, concisely, and clearly;
- (b) Present information accurately and fairly, including only relevant and adequately supported information, findings, and conclusions; and
- (c) Include a written response from the Tribe/Consortium to the draft report provided to the Tribe/Consortium by the Secretary's representative(s).

*§ 1000.1975 May the Department conduct more than one trust evaluation per Tribe per year?*

- (a) Yes, if the Department receives information that it concludes rises to the level of a threat of imminent jeopardy to a trust asset, natural resource, or the public health and safety, caused by an act or omission of a Tribe/Consortium and arises out of a failure to

carry out a compact or funding agreement, the Department, as trustee, may conduct a preliminary investigation. The Department:

- (1) Shall promptly contract the Tribe/Consortium to discuss the nature of the threat;
- (2) Will follow up with notification to the Tribe/Consortium in writing, and
- (3) May conduct an on-site inspection upon 2 days' advance written notice to the Tribe/Consortium.

(b) If the preliminary investigation shows that appropriate, sufficient data are present to indicate there may be imminent jeopardy, the Secretary's designated representative shall follow the reassumption procedures in accordance with subpart M of this part.

### **Subpart P – Reports**

*§ 1000.2001 What is the purpose of this subpart?*

This subpart describes what reports are developed under self-governance by the Secretary and the Tribes/Consortia.

*§ 1000.2005 Is the Secretary required to report on Self Governance?*

Yes, on January 1 of each year, the Secretary will submit a report on self-governance to the Congress. The report will be based on:

- (a) Information contained in funding agreements;
- (b) Annual audit reports, and
- (c) Data of the Secretary regarding the disposition of Federal funds.

*§ 1000.2010 What will the Secretary's annual report to Congress contain?*

The Secretary's report will:

(a) Identify:

(1) The relative costs and benefits of self-governance;

(2) With particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to self-governance Indian Tribes and members of Indian Tribes;

(3) The funds transferred to each Tribe/Consortium and the corresponding reduction in the Federal employees and workload; and

(4) The funding formula for individual Tribal shares of all Central Office funds, together with the comments of affected Indian Tribes, developed for the report to Congress as required by 25 USC 5372(d).

(b) Include the separate views and comments of each Indian Tribe or Tribal organization; and

(c) Include a list of:

(1) All such programs that the Secretary determines, in consultation with Indian Tribes participating in self-governance, are eligible for negotiation to be included in a funding agreement at the request of a participating Indian Tribe;

(2) All such programs which Indian Tribes have formally requested to include in a funding agreement under section 403(c) (25 U.S.C. 5363(c)) due to the special geographic, historical, or cultural significance of the program to the Indian Tribe, indicating whether each request was granted or denied, and stating the grounds for any denial; and

(d) Include in this report, in the aggregate, a description of the internal controls that were inadequate, the technical assistance provided, and a description of Secretarial

actions taken to address any remaining inadequate internal controls after the provision of technical assistance and implementation of the plan required by 25 USC 5324(q)(1).

(e) Programmatic targets established by the Secretary, after consulting with participating Tribes/Consortia, to encourage bureaus of the Department, other than the BIA, the BIE, the BTFA, or the Office of Assistant Secretary for Indian Affairs to ensure that an appropriate portion of those programs are available to be included in funding agreements.

*§ 1000.2011 Is the Secretary required to review programs of the Department other than BIA, the BIE, the BTFA, and the Office of the Assistant Secretary for Indian Affairs?*

Yes. In order to optimize opportunities for including non-BIA programs in agreements with Tribes/Consortia participating in self-governance under the Act, the Secretary shall review all non-BIA programs without regard to the agency or office concerned.

*§ 1000.2012 Is the Secretary required to annually publish information under this subpart in the Federal Register?*

Yes, the Secretary shall annually review and publish in the *Federal Register*, after consulting with Tribes/Consortia participating in self-governance, revised lists under § 1000.2010(c)(1) and (2) and programmatic targets under § 1000.2010(e), and make such information available to all participating Tribes/Consortia.

*§ 1000.2015 Must the Secretary seek comment on the report from Tribes/Consortia before submitting it to Congress?*

Yes, before the report of the Secretary is submitted to Congress, it must be distributed by the Secretary to Tribes/Consortia for comment. The comment period must not be less than 30 days.

*§ 1000.2020 What may the Tribe's/Consortium's annual report on self-governance address?*

(a) The Tribe's/Consortium's annual self-governance report may address:

(1) A list of unmet Tribal needs in order of priority;

(2) The approved, year-end Tribal/Consortium budget for the programs and services funded under self-governance, summarized, and annotated as the Tribe/Consortium may deem appropriate;

(3) Identification of any reallocation of trust programs;

(4) Program and service delivery highlights, which may include a narrative of specific program redesign or other accomplishments, or benefits attributed to self-governance; and

(5) At the Tribe's/Consortium's option, a summary of the highlights of the report referred to in paragraph (a)(2) of this section and other pertinent information the Tribe/Consortium may wish to report.

(b) The report submitted under this section is intended to provide the Department with information necessary to meet its Congressional reporting responsibilities and to fulfill its responsibility as an advocate for self-governance. The report is not intended to be burdensome, and Tribes/Consortia are encouraged to design and present the report in a brief and concise manner.

*§ 1000.2025 Are there other data submissions or reports that Tribes/Consortia may be requested to submit?*

Yes, Tribes/Consortia may be requested to submit data for the Secretary to determine allocation of funds to be awarded under a funding agreement.

*§ 1000.2030 Are Tribes/Consortia required to submit Single Audit Act reports?*

Yes. The Single Agency Audit Act, 31 U.S.C. 7501 *et seq.*, and subparts E and F of 2 CFR part 200 applies to a funding agreement under this part. The Tribe/Consortium must provide to the designated official an annual single audit report as prescribed by 31 U.S.C. 7501, *et seq.*

*§ 1000.2035 Is there an exemption available for the requirement to submit Single Audit Act reports?*

Yes. In accordance with 2 CFR 200.501(d), a non-Federal entity that expends less than the amount as published by OMB during the entity's fiscal year in Federal awards is exempt from submitting an annual single audit report for that year.

*§ 1000.2040 Are Tribes/Consortia required to maintain reports and records in accordance with 25 U.S.C. 5305?*

Yes, Tribes/Consortia are required to maintain reports and records in accordance with 25 U.S.C. 5305.

### **Subpart Q – Operational Provisions**

*§ 1000.2101 How can a Tribe/Consortium hire a Federal employee to help implement a funding agreement?*

If a Tribe/Consortium chooses to hire a Federal employee, it can use, in addition to any other available options, one of the arrangements listed in this section:

(a) The Tribe/Consortium can use its own personnel hiring procedures. Federal employees hired by the Tribe/Consortium are separated from Federal service.

(b) The Tribe/Consortium can “direct hire” a Federal employee as a Tribal/Consortium employee. The employee will be separated from Federal service and work for the Tribe/Consortium, but maintain a negotiated Federal benefit package that is paid for by the Tribe/Consortium out of funding agreement program funds; or

(c) The Tribe/Consortium can negotiate an agreement under the Intergovernmental Personnel Act, 5 U.S.C. 3371 through 3375, 25 U.S.C. 323, 25 U.S.C. 48, or other applicable Federal law. The employee will remain a Federal employee during the term of the agreement.

*§ 1000.2105 Can a Tribe/Consortium employee be detailed to a Federal service position?*

Yes, under the Intergovernmental Personnel Act, 5 U.S.C. 3371 through 3375, 25 U.S.C. 323, 25 U.S.C. 48, or other applicable law, when permitted by the Secretary.

*§ 1000.2110 How does the Freedom of Information Act apply?*

(a) Access to records maintained by the Secretary is governed by the Freedom of Information Act (5 U.S.C. 552) and other applicable Federal law.

(b) Unless the Tribe/Consortium specifies otherwise in a funding agreement, records of the Tribe/Consortium shall not be considered Federal records for the purpose of the Freedom of Information Act.

(c) The Freedom of Information Act does not apply to records maintained solely by Tribes/Consortia.

*§ 1000.2115 How does the Privacy Act apply?*



Unless the Tribe/Consortium specifies otherwise, records of the Tribe/Consortium shall not be considered Federal records for the purposes of the Privacy Act.

*§ 1000.2120 What audit requirements must a Tribe/Consortium follow?*

The Single Agency Audit Act, 31 U.S.C. 7501 *et seq.*, and subparts E and F of 2 CFR part 200 apply to a funding agreement under this part. The Tribe/Consortium must provide to the designated official an annual single audit as prescribed by 31 U.S.C. 7501, *et seq.*

*§ 1000.2125 How do OMB circulars and the Act apply to funding agreements?*

(a) A Tribe/Consortium shall apply cost principles under the applicable OMB circular, except as modified by:

- (1) Any provision of law, including 25 U.S.C. 5325; or
- (2) Any exemptions or exceptions granted by OMB.

(b) In any circumstances where the provisions of Federal statutes or this part differ from the provisions of 2 CFR part 200, the provisions of the Federal statutes or this part govern. This includes the provisions of Pub. L. 93-638, including 25 U.S.C. 5325 and 5365(c).

*§ 1000.2130 How much time does the Federal Government have to make a claim against a Tribe/Consortium relating to any disallowance of costs, based on an audit?*

Any claim by the Federal Government against a Tribe/Consortium relating to the disallowance of costs for funds received under a funding agreement based on any audit (other than those relating to a criminal offense) shall be subject to the 365-day period set forth in 25 U.S.C. 5325(f), as prescribed by 25 U.S.C. 5365(c)(3).

*§ 1000.2135 Does a Tribe/Consortium have additional ongoing requirements to maintain minimum standards for Tribe/Consortium management systems?*

(a) Yes, for a Tribe/Consortium required to perform an annual audit under the Single Audit Act and subparts E and F of 2 CFR part 200, the Tribe/Consortium must maintain management systems that are determined to be adequate by an independent audit.

(b) For a Tribe/Consortium that is not required to perform an annual audit under the Single Audit Act, the financial management systems, including records documenting compliance with Federal statutes, regulations, and the terms and conditions of the funding agreement, must be sufficient to permit the preparation of reports required by general and program-specific terms and conditions; and the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the requirements of the funding agreement.

(c) As prescribed by subparts E and F of 2 CFR part 200, every Tribe/Consortium must establish and maintain effective internal controls over funds included in a funding agreement that provide reasonable assurances that the Tribe/Consortium is managing the funds in compliance with Federal statutes, regulations, and the terms and conditions of the funding agreement.

*§ 1000.2140 Are there any restrictions on how funds awarded to a Tribe/Consortium under a funding agreement may be spent?*

Yes, funds awarded to a Tribe/Consortium under a funding agreement may be spent only for costs associated with PSFAs subject to the funding agreement.

*§ 1000.2145 What standard applies to a Tribe's/Consortium's management of funds awarded under a funding agreement?*

Funds awarded a Tribe/Consortium under a funding agreement, including advance payments, shall be managed by the Tribe/Consortium using the prudent investment standard, provided that the Secretary shall not be liable for any investment losses of funds managed by the Tribe/Consortium that are not otherwise guaranteed or insured by the Federal Government.

The prudent investment standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the investment portfolio and as part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the Tribe/Consortium. In making and implementing investment decisions, the Tribe/Consortium has a duty to diversify the investment, unless, under the circumstances, it is prudent not to do so. In addition, the Tribe/Consortium must:

- (a) Conform to fundamental fiduciary duties of loyalty and impartiality;
- (b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and
- (c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Tribe/Consortium.

*§ 1000.2150 How may interest or investment income that accrues on funds awarded under a funding agreement be used?*

- (a) Interest or income earned on investments or deposits of awards made under a funding agreement may be:

(1) Used for any governmental purpose approved by the Tribe/Consortium; or  
(2) Used to provide expanded services under the funding agreement and to support some or all of the costs of investment services.

(b) The retention of interest or investment income under paragraph (a) shall not diminish the amount of funds a Tribe/Consortium is entitled to receive under a funding agreement in the year the interest or income is earned or in a subsequent fiscal year.

*§ 1000.2155 Can a Tribe/Consortium retain savings from programs?*

Yes, notwithstanding any provision of an appropriations Act, the Tribe/Consortium may retain savings for each fiscal year during which a funding agreement is in effect. A Tribe/Consortium must use any savings that it realizes under a funding agreement, including a construction contract:

- (a) To provide additional services or benefits under the funding agreement; or
- (b) As carryover; and
- (c) For purposes of this subpart only, programs administered by BIA using appropriations made to other Federal agencies, such as the U.S. Department of Transportation, will be treated in accordance with paragraph (b).

*§ 1000.2160 Can a Tribe/Consortium carry over funds not spent during the term of the funding agreement?*

(a) Yes. Notwithstanding any provision of an appropriations Act, all funds paid to a Tribe/Consortium in accordance with a compact or funding agreement shall remain available until expended.

(b) If a Tribe/Consortium elects to carry over funding from one year to the next, the carryover shall not diminish the amount of funds the Tribe/Consortium is entitled to receive under a funding agreement in that fiscal year or any subsequent fiscal year.

(c) A Tribe/Consortium may elect to carry over funding from one year to the next without any additional justification or document necessary for expenditure.

*§ 1000.2165 After a non-BIA funding agreement has been executed and the funds transferred to a Tribe/Consortium, can a bureau request the return of unexpended funds?*

The non-BIA bureau may request the return of unexpended funds already transferred to a Tribe/Consortium only under the following circumstances:

- (a) Retrocession;
- (b) Reassumption;
- (c) Construction, when there are special legal requirements; or
- (d) As otherwise provided for in the funding agreement.

*§ 1000.2170 How can a person or group appeal a decision or contest an action related to a program operated by a Tribe/Consortium under a funding agreement?*

(a) *BIA Programs.* A person or group who is aggrieved by an action of a Tribe/Consortium with respect to programs that are provided by the Tribe/Consortium under a funding agreement must follow Tribal administrative procedures.

(b) *Non-BIA Programs.* Procedures will vary depending on the program. Aggrieved parties should initially contact the local program administrator (the Indian program contact). Thereafter, appeals will follow the relevant bureau's appeal procedures.

*§ 1000.2175 Must Tribes/Consortia comply with the Secretarial approval requirements of 25 U.S.C. 81; 82a; and 476 regarding professional and attorney contracts?*

No, for the period that an agreement entered into under this part is in effect, the provisions of 25 U.S.C. 81, 82a, and 476, do not apply to attorney and other professional contracts by participating Tribes/Consortia.

*§ 1000.2180 Are funds awarded under a funding agreement non-Federal funds for the purpose of meeting matching or cost participation requirements?*

(a) Yes, in accordance with 25 U.S.C. 5363(j), all funds provided under funding agreements shall be treated as non-Federal funds for purposes of meeting matching requirements under any other Federal law.

(b) Alternatively, a Tribe/Consortium may elect under 25 U.S.C. 5363(l) to incorporate 25 U.S.C. 5325(j) in their funding agreement for the purpose of meeting matching or cost participating requirements under other Federal and non-Federal programs.

*§ 1000.2185 Does Indian preference apply to services, activities, programs, and functions performed under a funding agreement?*

Yes, in accordance with section 25 U.S.C. 5307(b) and (c), as amended, Tribal law governs Indian preference in employment in contracting and subcontracting in performance of a funding agreement.

*§ 1000.2190 Do the wage and labor standards in the Davis-Bacon Act apply to Tribes and Tribal Consortia?*

No, wage and labor standards of the Davis-Bacon Act, 40 U.S.C. 3141 through 3144, 3146 and 3147, do not apply to employees of Tribes and Tribal Consortia. Davis-

Bacon wage and labor standards do apply to all other laborers and mechanics employed by contractors and subcontractors of a Tribe/Consortium in the construction, alteration, and repair (including painting or redecorating) of buildings or other facilities in connection with a funding agreement.

*§ 1000.2195 Can a Tribe/Consortium use Federal supply sources in the performance of a funding agreement?*

Yes. A Tribe/Consortium and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) or other Federal resources (including supplies, services and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), to the same extent as if the Tribe/Consortium were a Federal agency. While implementation of this provision is the responsibility of the General Services Administration, the Department shall assist the Tribes/Consortia to resolve any barriers to full implementation that may arise to the fullest extent possible.

*§ 1000.2200 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a BIA funding Agreement?*

Yes. The Prompt Payment Act (31 U.S.C. 3901) applies to a BIA funding agreement.

*§ 1000.2205 Does the Prompt Payment Act (31 U.S.C. 3901) apply to a non-BIA program funding agreement?*

Yes, unless restricted by a funding agreement, the Prompt Payment Act shall apply to a non-BIA funding agreement.

*§ 1000.2210 Is a Tribe/Consortium obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?*

A Tribe/Consortium shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Tribe/Consortium has reason to believe that the total amount provided for a specific activity under a compact or funding agreement is insufficient, the Tribe/Consortium shall provide reasonable notice of such insufficiency to the Secretary. If, after notice, the Secretary does not increase the amount of funds transferred under the funding agreement, the Tribe/Consortium may suspend performance of the activity until such time as additional funds are transferred. Nothing in 25 U.S.C. 5368(l) reduces any programs, services, or funds of, or provided to, another Tribe/Consortium.

### **Subpart R – Appeals**

*§ 1000.2301 What is the purpose of this subpart?*

This subpart prescribes the process Tribes/Consortia may use to resolve disputes with the Department arising before or after execution of a funding agreement or compact and certain other disputes related to self-governance.

*§ 1000.2302 What does “title-I eligible programs” mean in this subpart?*

Throughout this subpart, the phrase “title-I-eligible programs” is used to refer to all PSFAs that the Secretary provides for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department within which the PSFAs have been performed.

*§ 1000.2305 How must disputes be handled?*



(a) The Department encourages its bureaus to seek all means of dispute resolution before the Tribe/Consortium files a formal appeal(s).

(b) Disputes shall be addressed through government-to-government discourse. This discourse must be respectful of government-to-government relationships and relevant Federal–Tribal agreements, treaties, judicial decisions, and policies pertaining to Indian Tribes, including, but not limited to, such applicable principles described in subpart I.

(c) All disputes arising under this rule, including, but not limited to, disputes related to decisions described in § 1000.2345, may use non-binding informal alternative dispute resolution, such as an informal conference or assistance of the Department’s Office of Collaborative Action and Dispute Resolution (CADR), at the option of the Tribe/Consortium. The Tribe/Consortium may ask for this alternative dispute resolution any time before the issuance of an initial decision of a formal appeal. The appeals timetable will be suspended while alternative dispute resolution is pending.

*§ 1000.2310 Does a Tribe/Consortium have any options besides an appeal?*

Yes, the Tribe/Consortium may request a non-binding alternative dispute resolution process-without the need for a formal appeal. Or, the Tribe/Consortium may, in lieu of filing an administrative appeal under this subpart, file an action in an appropriate Federal court under 25 U.S.C. 5331, or any other applicable law.

*§ 1000.2315 What is the Secretary’s burden of proof for appeals in this subpart?*

As required by sections 25 U.S.C. 5366(d) and 5375, in any administrative action, appeal, or civil action for judicial review of any decision made by the Secretary under this title, the Secretary shall have the burden of proof:

- (a) To demonstrate by a preponderance of the evidence the validity of the grounds for a reassumption under 25 U.S.C. 5366(b);
- (b) To clearly demonstrate the validity of the grounds for rejecting a final offer made under 25 U.S.C. 5366(c); and
- (c) Except as provided in 25 U.S.C. 5366(d), to demonstrate by a preponderance of the evidence the validity of the grounds for a decision made and the consistency of the decision with the requirements and policies of the Act.

#### INFORMAL CONFERENCE

##### *§ 1000.2320 How does a Tribe/Consortium request an informal conference?*

The Tribe/Consortium shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision.

- (a) The Tribe/Consortium may either hand-deliver the request for an informal conference to that person's office, email the request, or mail it by certified mail, return receipt requested.
- (b) If the Tribe/Consortium mails the request, it will be considered filed on the date the Tribe/Consortium mailed it by certified mail. If the Tribe/Consortium emails the request, it will be presumed received on the next business day following transmission from the Tribe/Consortium.
- (c) The document should be clearly identified as "Request for Informal Conference".

##### *§ 1000.2325 How is an informal conference held?*

For all purposes relating to these informal conference procedures, the parties are the designated representatives of the Tribe/Consortium and the bureau.

(a) The informal conference shall be held within 30 days of the date the request was received, unless the parties agree on another date.

(b) If possible, at the option of the Tribe/Consortium, the informal conference will be held at the Tribe's/Consortium's office. If the meeting cannot be held at the Tribe's/Consortium's office, the parties must agree on an alternative meeting place or forum, including but not limited to telephonic or virtual meeting forums. If the alternative meeting place is more than fifty miles from the Tribe's/Consortium's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Tribe/Consortium.

(c) The informal conference shall be conducted by a designated representative of the Secretary.

(d) Only the parties may make presentations at the informal conference.

(e) The informal conference is not a hearing on the record. Nothing said during an informal conference may be used by either party in litigation.

*§ 1000.2330 What happens after the informal conference?*

(a) Within 10 business days of the informal conference, the person who conducted the informal conference shall prepare and mail to the Tribe/Consortium a brief summary of the informal conference. The summary must include any agreements reached or changes from the initial position of the bureau or the Tribe/Consortium.

(b) Every summary of an informal conference must contain the following language:

*Within 30 days of the receipt of the summary from the informal conference, you may file an appeal of the initial decision of the Department of the Interior agency*

*in accordance with subpart R of 25 CFR part 1000. Alternatively, you may file an action in Federal court pursuant to 25 U.S.C. 5331.*

(c) If in its judgment no agreement was reached, the Tribe/Consortium may choose to appeal the initial decision, as modified by any changes made as a result of the informal conference, under this subpart.

#### POST-AWARD DISPUTES

*§ 1000.2335 How may a Tribe/Consortium appeal a decision made after the funding agreement or compact or an amendment to a funding agreement or compact has been signed?*

With the exception of certain decisions concerning immediate reassumption (*see* §§ 1000.2405 through 1000.2430), the Tribe/Consortium may appeal post-award administrative decisions to the Civilian Board of Contract Appeals (CBCA).

*§ 1000.2340 What statutes and regulations govern resolution of disputes concerning signed funding agreements or compacts (and any signed amendments) that are appealed to the CBCA?*

25 U.S.C. 5331 and the regulations at 25 CFR 900.216 through 900.230 apply to disputes concerning signed funding agreements and compacts (and any signed amendments), that are appealed to the CBCA, except that any references to the U.S. Department of Health and Human Services are inapplicable. For purposes of such appeals:

- (a) The terms “contract” and “self-determination contract” mean compacts and funding agreements entered into under the Act; and
- (b) The term “Tribe” means “Tribe/Consortium”.

## PRE-AWARD DISPUTES

*§ 1000.2345 What decisions may a Tribe/Consortium appeal under §§ 1000.2345 through 1000.2395?*

Decisions that a Tribe/Consortium may appeal include, but are not limited to:

- (a) A decision to reject a final offer, or a portion thereof, under 25 U.S.C. 5366(c);
- (b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under 25 U.S.C. 5366(c);
- (c) A decision that provisions in a retained funding agreement and/or compact are directly contrary to any express provision of the Act;
- (d) A decision to reassume a compact or funding agreement, in whole or in part, under 25 U.S.C. 5366(b), except for immediate reassumptions under 25 U.S.C. 5366(b)(3);
- (e) A decision to reject a final construction project proposal, or a portion thereof, under 25 U.S.C. 5367(g) and subpart K of this part; and
- (f) For construction project agreements carried out under 25 U.S.C. 5367, a decision to reject project planning documents, design documents, or proposed amendments submitted by a Tribe/Consortium under 25 U.S.C. 5367(h)(1) and subpart K of this part.

*§ 1000.2350 What decisions may not be appealed under §§ 1000.2345 through 1000.2395?*

Decisions that may not be appealed under §§ 1000.2345 through 1000.2395 shall be limited to:

(a) Disputes arising under the terms of a compact, funding agreement, or construction project agreement that has been awarded;

(b) Disputes arising from immediate reassumptions under 25 U.S.C. 5366(b)(3) and § 1000.1750 which is covered under §§ 1000.2405 through 1000.2430;

(c) Decisions relating to planning and negotiation grants (subparts C and D of this part) and certain discretionary grants not awarded under title IV (25 CFR part 2);

(d) Decisions regarding requests for waivers of regulations (subpart J of this part);

(e) Decisions regarding construction (subpart K of this part) addressed in § 1000.1455; and

(f) Decisions under any other statute, such as the Freedom of Information Act and the Privacy Act (*see* 43 CFR part 2).

*§ 1000.2351 To Whom may a Tribe/Consortium appeal a decision made before the funding agreement, amendment to the funding agreement, or compact is signed?*

(a) *Title-I-eligible PSFA pre-award disputes.* For title I—eligible PSFA disputes, appeal may only be filed with Interior Board of Indian Appeals (IBIA) under the provisions set forth in 25 CFR 900.150(a) through (h), 900.152 through 900.169.

(b) *Other pre-award disputes.* For all other pre-award disputes, including those involving PSFAs that are not title I-eligible, appeals may be filed with the bureau head/Assistant Secretary or IBIA as noted below. However, the Tribe/Consortium may not avail itself of both paths for the same dispute.

(1) *Bureau head/Assistant Secretary appeal.* Unless the initial decision being appealed is one that was made by the bureau head (those appeals are forwarded to the appropriate Assistant Secretary—*see* § 1000.2360(c)), the bureau head will decide appeals relating to these pre-award matters, that include but are not limited to disputes regarding:

- (i) PSFAs that are not title 1-eligible;
- (ii) Inherently Federal functions;
- (iii) Decisions declining to provide requested information as addressed in § 1000.1035; and
- (iv) Allocations of program funds when a dispute arises between a Consortium and a withdrawing Tribe.

(2) *IBIA.* The Tribe/Consortium may choose to forego the administrative appeal through the bureau or the Assistant Secretary, as described in the paragraph (b)(1) of this section, and instead appeal directly to IBIA.

*§ 1000.2355 How does a Tribe/Consortium know where and when to file an appeal?*

Every decision in any of the areas listed in § 1000.2345 must contain information which shall tell the Tribe/Consortium where and when to file the Tribe's/Consortium's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request non-binding informal alternative dispute resolution, such as an informal conference under § 1000.2320, or file an appeal of the initial decision of the Department in accordance with subpart R of this part. Alternatively, you may file an action in Federal court pursuant to 25 U.S.C. 5331.

## APPEALS TO BUREAU HEAD/ASSISTANT SECRETARY

*§ 1000.2360 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the bureau head/Assistant Secretary?*

(a) If a Tribe/Consortium wishes to exercise its appeal rights to the bureau head/Assistant Secretary under § 1000.2351, it must make a written request for review to the appropriate bureau head within 30 days of receiving the initial adverse decision or the conclusion of any non-binding informal alternative dispute resolution process. In addition, the Tribe/Consortium may request the opportunity to have a meeting with appropriate bureau personnel in an effort to clarify the matter under dispute before a formal decision by the bureau head.

(b) The written request for review should include a statement describing its reasons for a review, with any supporting documentation, or indicate that such a statement or documentation will be submitted within 30 days. A copy of the request must also be sent to the Director of the OSG.

(c) If the initial decision was made by the bureau head, any appeal shall be directed to the appropriate Assistant Secretary. If a Tribe does not request a review within 30 days of receipt of the decision, the initial decision will be final for the Department.

*§ 1000.2365 When must the bureau head (or appropriate Assistant Secretary) issue a final decision in the pre-award appeal?*

Within 30 days of receiving the request for review and the statement of reasons described in § 1000.2360, the bureau head or, where applicable, the appropriate Assistant Secretary must:



- (a) Issue a written final decision stating the reasons for the decision; and
- (b) Send the decision to the Tribe/Consortium.

*§ 1000.2370 When and how will the Assistant Secretary respond to an appeal by a Tribe/Consortium?*

The appropriate Assistant Secretary will decide an appeal of any initial decision made by a bureau head (*see* § 1000.2360). If the Tribe/Consortium has appealed the bureau's initial adverse decision of the bureau to the bureau head and the bureau head's decision on initial appeal is contrary to the Tribe's/Consortium's request for relief, or the bureau head fails to make a decision within 30 days of receipt by the bureau of the Tribe's/Consortium's initial request for review and any accompanying statement and documentation, the Tribe's/Consortium's appeal will be sent automatically to the appropriate Assistant Secretary for decision. The Assistant Secretary must either concur with the bureau head's decision or issue a separate decision within 60 days of receipt by the bureau of the Tribe's/Consortium's initial request for review and any accompanying statement and documentation. The decision of the Assistant Secretary is final for the Department.

#### APPEALS TO IBIA

*§ 1000.2375 When and how must a Tribe/Consortium appeal an adverse pre-award decision to the IBIA?*

(a) If a Tribe/Consortium wishes to exercise its appeal rights to the IBIA under § 1000.2351, it must file a notice of appeal to the IBIA within 30 days of receiving the initial decision or the conclusion of any non-binding informal alternative dispute resolution process.

(b) The Tribe/Consortium may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Tribe/Consortium mails the Notice of Appeal it will be considered filed on the date the Tribe/Consortium mailed it by certified mail. The Tribe/Consortium should mail the notice of appeal to: Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, VA 22203.

(c) The Notice of Appeal must include:

(1) A statement describing the Tribe's/Consortium's reasons for a review (including why the Tribe/Consortium thinks the initial decision is wrong and briefly identify the issues involved in the appeal);

(2) Any supporting documentation;

(3) If the Tribe/Consortium's Notice of Appeal does not include the items in the above subsections (1) or (2), an indication that such a statement or documentation will be submitted within 30 days; and

(4) A statement whether the Tribe/Consortium wants a hearing on the record, or whether the Tribe/Consortium wants to waive its right to a hearing.

(d) The Tribe/Consortium must serve a copy of the notice of appeal upon the official whose decision it is appealing. A copy of the notice of appeal must also be sent to the Director of the OSG. The Tribe/Consortium must certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the IBIA under the Act.

*§ 1000.2380 What happens after a Tribe/Consortium files an appeal?*

(a) Within 5 days of receiving the Tribe's/Consortium's notice of appeal, the IBIA will decide whether the appeal falls under § 1000.2345. If so, the Tribe/Consortium is entitled to a hearing.

(b) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Tribe/Consortium, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the IBIA decides that the Tribe/Consortium is not entitled to a hearing or if the Tribe/Consortium has waived its right to a hearing on the record, the IBIA will dismiss the appeal and inform the Tribe/Consortium that it is not entitled to a hearing or has waived its right to a hearing.

*§ 1000.2385 What procedures apply to IBIA proceedings?*

The IBIA may use the procedures set forth in 43 CFR 4.22 through 4.27 as a guide.

*§ 1000.2386 What regulations govern resolution of disputes that are appealed to the IBIA?*

To the extent not inconsistent with this subpart, the regulations at 25 CFR 900.159 through 900.169 apply to disputes that are appealed to the IBIA, except that any references to the U.S. Department of Health and Human Services are inapplicable. For purposes of such appeals:

(a) The terms "contract" and "self-determination contract" mean compacts and funding agreements entered into under the Act; and

(b) The term "Tribe" means "Tribe/Consortium."

*§ 1000.2390 Will an appeal adversely affect the Tribe's/Consortium's rights in other compact, funding negotiations, or construction project agreement?*

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

*§ 1000.2395 Will the decision on appeal be available for the public to review?*

Yes, the Secretary shall publish all final decisions from the Administrative Law Judge (ALJs) and IBIA under this subpart. Decisions can be found on the Department's website.

#### APPEALS OF AN IMMEDIATE REASSUMPTION OF A SELF-GOVERNANCE PROGRAM

*§ 1000.2405 What happens in the case of an immediate reassumption under 25 U.S.C. 5366(b)?*

If the Secretary immediately reassumes a program under § 1000.1750, the Secretary must comply with §§ 1000.2410 through 1000.2430.

*§ 1000.2410 Will there be a hearing?*

Yes, unless the Tribe/Consortium waives its right to a hearing in writing. The Deputy Director of the Office of Hearings and Appeals must appoint an ALJ to hold a hearing.

(a) The hearing must be held within 10 days of the date of the notice referred to in § 1000.1750 unless the Tribe/Consortium agrees to a later date.

(b) If possible, the hearing will be held at the office of the Tribe/Consortium. The parties may agree to an alternative meeting place or forum, including but not limited to telephonic or virtual meeting forums. If the hearing is held more than 50 miles from

the office of the Tribe/Consortium, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Tribe/Consortium.

*§ 1000.2415 What happens after the hearing?*

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Tribe/Consortium has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement:

*Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the IBIA under 25 CFR 1000.2420. An appeal to the IBIA under shall be filed at the following address: Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.*

*§ 1000.2420 Is the recommended decision always final?*

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the

recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Tribe/Consortium receives the ALJ's recommended decision, unless a written statement of objection is filed with the IBIA during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

*§ 1000.2425 If a Tribe/Consortium objects to the recommended decision, what action will the IBIA take?*

(a) The IBIA has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the IBIA must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

*§ 1000.2430 Will an immediate reassumption appeal adversely affect the Tribe's/Consortium's rights in other self-governance negotiations?*

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

## EQUAL ACCESS TO JUSTICE ACT

*§ 1000.2435 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?*

Yes. EAJA claims against the Department will be heard under 48 CFR 6101.30, 6101.31 (CBCA) and 43 CFR 4.602, 4.604 through 4.628 (Department) and under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412.

### **Subparts S – Conflicts of Interest**

*§ 1000.2501 Is a Tribe/Consortium required to have policies in place to address conflicts of interest?*

Yes. A Tribe/Consortium participating in self-governance must ensure that internal measures are in place to address, pursuant to Tribal law and procedures, conflicts of interest in the administration of programs carried out under a compact and funding agreement.

The Tribe/Consortium and the Secretary may agree that using the Tribe's/Consortium's own written code of ethics satisfies the objectives of the personal conflicts and organizational conflicts provisions of this subpart, in whole or in part.

When the Secretary and the Tribe/Consortium agree to use the Tribe's/Consortium's written codes or measures, the funding agreement will reflect that and the agreed-upon provisions shall be followed, rather than the related provisions of this subpart.

*§ 1000.2505 What is an organizational conflict of interest?*

(a) An organizational conflict of interest arises when, in the administration of programs performed under a compact or funding agreement subject to this part, there is a direct conflict between the financial interests of the Tribe/Consortium and:

(1) The financial interests of beneficial owners of Indian trust resources;

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

(3) An express statutory obligation of the United States to third parties. This section only applies if the conflict was not addressed when the funding agreement was first negotiated.

(b) This section only applies where the financial interests of the Tribe/Consortium are significant enough to impair the Tribe's/Consortium's objectivity in carrying out the funding agreement, or a portion of the funding agreement.

*§ 1000.2510 What must a Tribe/Consortium do if an organizational conflict of interest arises under a funding agreement?*

This section only applies if the conflict was not addressed when the funding agreement was first negotiated. When a Tribe/Consortium becomes aware of an organizational conflict of interest, the Tribe/Consortium must immediately disclose the conflict to the Secretary.

*§ 1000.2515 When must a Tribe/Consortium regulate its employees or subcontractors to avoid a personal conflict of interest?*

A Tribe/Consortium must maintain written standards of conduct, pursuant to Tribal law and procedures, to govern officers, employees, and agents (including



subcontractors) engaged in functions related to the management of trust assets performed under a compact and funding agreement subject to this part.

*§ 1000.2520 What types of personal conflicts of interest involving Tribal officers, employees, or subcontractors would have to be regulated by a Tribe/Consortium?*

The Tribe/Consortium must ensure that internal measures are in place that specify that no officer, employee, or agent (including a subcontractor) of the Tribe/Consortium reviews a trust transaction in which that person has a financial or employment interest that conflicts with that of the trust beneficiary, whether the beneficiary is the Tribe/Consortium or an allottee. Interests arising from membership in, or employment by, a Tribe/Consortium or rights to share in a Tribal claim need not be regulated.

*§ 1000.2525 What personal conflicts of interest must the standards of conduct regulate?*

The personal conflicts of interest standards, established pursuant to Tribal law and procedures, must:

(a) Prohibit an officer, employee, or agent (including a subcontractor) from participating in the review, analysis, or inspection of trust transactions involving an entity in which such persons have a direct financial interest or an employment relationship;

(b) Prohibit such officers, employees, or agents from accepting any gratuity, favor, or anything of more than nominal value, from a party (other than the Tribe/Consortium) with an interest the trust transactions under review; and

(c) Provide for sanctions or remedies for violation of the standards.

#### **Subpart T – Tribal Consultation Process**

*§ 1000.2601 What is the purpose of this subpart?*

(a) This subpart describes the process for engaging in consultations related to self-governance with Tribes/Consortia.

(b) The Tribal Consultation Process for self-governance matters described in this subpart is intended to apply to consultations commencing after the effective date of this rule and supersedes previous self-governance consultation processes used by the Secretary.

*§ 1000.2605 When does the Secretary consult with Tribes and Consortia on matters related to self-governance?*

On matters related to self-governance, the Secretary shall consult:

(a) To determine which programs are eligible for negotiation to be included in a funding agreement at the request of a participating Tribe/Consortium;

(b) To establish programmatic targets to encourage the Department's bureaus to ensure that an appropriate portion of non-BIA programs are available to be included in funding agreements;

(c) On any Secretarial Action with Tribal Implications, provided that the Secretary incorporate input and requests from Tribes and Consortia on topics for consultation.

*§ 1000.2610 What principles should guide consultations with Tribes and Consortia?*

To the extent practical and not prohibited by law, consultations with self-governance Tribes/Consortia should satisfy the following principles:

(a) Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribes and Consortia and acknowledges that the United States holds treaty and trust responsibilities to Tribes and Consortia.

(b) Consultation is a two-way Nation-to-Nation exchange of information and dialogue between official representatives of the United States and Tribes and Consortia.

(c) Consultation session methods may include, but are not limited to, in-person meetings, video conferences, teleconferences, and correspondence to discuss a specific issue, and must identify the session as consultation in advance of the scheduled meeting.

(d) Consultation should include both the elected or appointed official of the Tribe, acting in the official capacity as the leader of the Tribe or Consortia, or designee of the elected or appointed representative, and the Departmental official with authority to decide on the proposed Departmental Action with Tribal Implications, or designee.

(e) The Secretary shall make good faith efforts to invite Tribes and Consortia to consult early in the planning process and throughout the decision-making process and engage in robust, interactive, pre-decisional, informative, and transparent consultation when planning actions with Tribal implications.

(f) The Secretary should give meaningful consideration to information obtained during consultation with Tribes and Consortia.

(g) The Secretary should strive for consensus with Tribes and Consortia through consultation or a mutually desired outcome. It is the policy of the Department to seek consensus with Tribes and Consortia.

(h) Consultation will ensure that applicable information is readily available to Tribes and Consortia.

(i) Consultation will ensure that officials from Tribes and Consortia and Federal officials have adequate time to communicate.

(j) Consultation will ensure that Tribes and Consortia are advised as to how their input influenced the Department's decision-making.

*§ 1000.2615 What notice must the Secretary provide to Tribes and Consortia of an upcoming consultation?*

(a) The Secretary shall issue a notice of consultation which includes:

(1) Sufficient information on the topic to be discussed, in an accessible language and format, and context for the consultation topic, to facilitate meaningful consultation;

(2) Identification of a timeline of the process and possible outcomes for Departmental action under consideration;

(3) The date, time, and location of the consultation;

(4) If consulting virtually or by telephone, links to join or register in advance;

(5) An explanation of any time constraints known to the Department at that time;

(6) Deadlines for Tribes and Consortia to submit written comments on the topic;

and

(7) The names and contact information for Departmental staff who can provide additional information on the consultation.

(b) The Secretary shall provide notice of at least 30 days to Tribes and Consortia of any planned consultation sessions.

(c) The Secretary shall distribute such notice under this section to each Tribe/Consortium through:

(1) Email to a point of contact for each Tribe and Consortium; and

(2) Posting the notice on the website for the Department and/or OSG.

(d) The Secretary should, to the greatest extent practical, provide appropriate, available information on the subject of consultation including, where consistent with applicable law, a proposed agenda, framing paper, and other relevant documents to assist in the consultation process.

*§ 1000.2620 Is the Secretary required to allow written comments by Tribes and Consortia following a consultation?*

Yes. The Secretary shall allow for a written comment period following the consultation of at least 30 days, unless otherwise directed by law.

*§ 1000.2625 What record must the Secretary maintain following a consultation with Tribes and Consortia?*

(a) The Secretary shall maintain a record of a consultation with Tribes or Consortia that includes:

- (1) A summary of Tribal or Consortia input received;
- (2) A general explanation of how Tribes or Consortia input influenced or was incorporated into the agency action; and
- (3) If relevant, the general reasoning for why suggestions from Tribes or Consortia were not incorporated into the agency action or why consensus could not be attained.

(b) The Secretary shall timely disclose the outcome of a consultation and decisions made as a result of the consultation.

(c) The record of consultation does not waive any privilege or other exception to disclosure pursuant to the Freedom of Information Act or its implementing regulations.

*§ 1000.2630 How must the Secretary handle confidential or sensitive information provided by Tribes and Consortia during a consultation?*

Prior to a consultation, the Secretary shall inform Tribes and Consortia of those Federal laws, including the Freedom of Information Act, that may require disclosure of information provided by the self-governance Tribe/Consortium during a consultation. To the extent permitted by applicable law, the Secretary shall ensure that such information designated as confidential or sensitive by a Tribe or Consortium is not publicly disclosed. The Department should obtain advance informed consent from Tribes/Consortia for the use of confidential or sensitive information provided, and should inform Tribal representatives that certain Federal laws, including the Freedom of Information Act, may require disclosure of such information.

**Bryan Newland,**

*Assistant Secretary – Indian Affairs.*