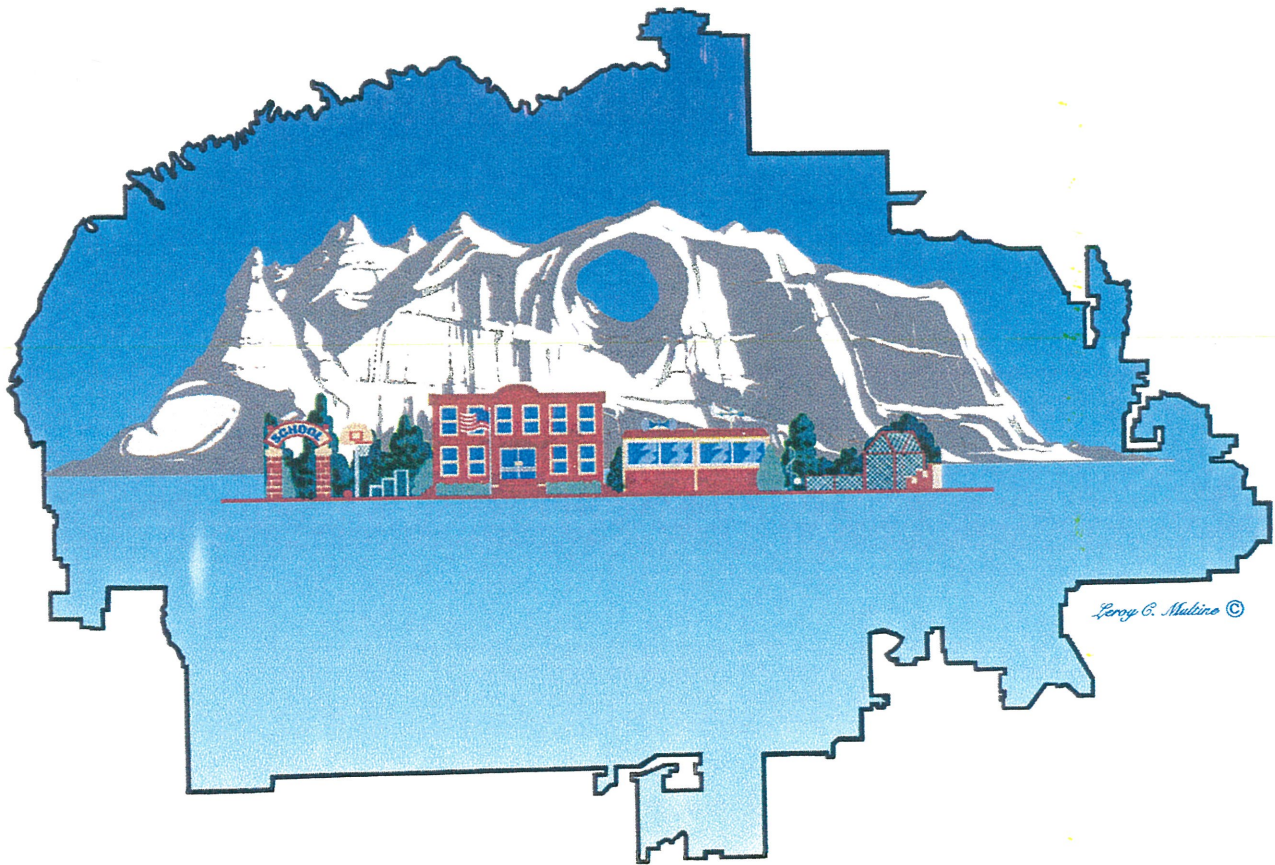


GRANT/CONTRACT CONVERSION/MAINTENANCE HANDBOOK



Leroy G. Malino ©

**DIVISION OF DINÉ EDUCATION
EDUCATION COMMITTEE OF THE NAVAJO NATION
SUBCOMMITTEE ON SCHOOL BOARD POLICIES
FALL 2000**

RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving the "Grant/Contract Conversion/Maintenance Handbook" to Supercede Education Committee Resolution ECA-064-88, entitled "Procedures for Public Law 100-297 Grant Authorization," and Advisory Committee Resolution ACS-188-88, for Use by School Boards wishing to Convert from B.I.A. Operated to Grant/Contract School Status

WHEREAS:

1. Pursuant to 2 N.N.C. §§481 and 482, the Education Committee is established and continued as a standing committee of the Navajo Nation Council for the purpose of overseeing the educational development of the Navajo Nation and to develop policies for a scholastically excellent, and culturally relevant education; and
2. The Education Committee of the Navajo Nation Council is empowered to review, sanction and authorize applications for Self-Determination Act contracts and grants for the operation of educational programs, subject to final approval, by the Intergovernmental Relations Committee of the Navajo Nation Council, 2 N.N.C. §484 (B)(3); and
3. The Education Committee of the Navajo Nation Council has legislative oversight responsibility, oversight of the Division of Diné Education, responsibility for the initiation of education legislation and its implementation; and
4. The Navajo Nation, since 1988, has required a review and a recommended approval from the Education Committee of the Navajo Nation Council of all Public Law 93-638 contract and Public Law 100-297 grant applications before any local school board can receive authorization for a contract/grant by the Navajo Nation; and
5. About twenty-eight (28) schools and five (5) residential dormitories have been previously authorized and are operating their educational programs by contract/grant authority and a majority of these schools sanctioned by the Navajo Nation have experienced success in being responsible for the education of Navajo children; and
6. As more Bureau of Indian Affairs operated schools consider the option of contracting/granting the operations of their school, the Education Committee of the Navajo Nation Council became aware that the Nation needed to update its procedures and practices in processing and approving contract/grant applications for school boards, as well as criteria to determine if approved contracts/grants are being satisfactorily administered; and

7. In April of 2000, the Education Committee of the Navajo Nation Council directed the Subcommittee on School Board Policies (Memorandum attached as **Exhibit "A"**) to develop a handbook, which would standardize procedures and requirements for Contract/Grant applications, as well as, Procedures and Requirements for Authorization to continue Contract/Grant school operations; and

8. Partnership efforts from the Division of Diné Education, Navajo Area School Board Association, Inc. (NASBA), Association of Navajo Community Controlled School Boards, Inc. (ANCCSB), Native American Grant School Association (NAGSA), and other interested individuals made contributions to the development of the "Grant/Contract Conversion/Maintenance Handbook" herein attached as **Exhibit "B."** All comments, both written and oral, were given due consideration and numerous revisions were made to earlier versions of the Handbook; and

9. The Education Committee of the Navajo Nation Council finds that it would be in the best interest of Navajo children and families, chapters, community schools boards, and educational entities for the adoption of the "Grant/Contract Conversion/Maintenance Handbook."

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Education Committee of the Navajo Nation Council hereby approves the "Grant/Contract Conversion/Maintenance Handbook" to supercede Education Committee Resolution ECA-064-88, entitled: "Procedures for Public Law 100-297 Grant Authorization" (attached as **Exhibit "C"**) and Advisory Committee Resolution ACS-188-88 (attached as **Exhibit "D"**) for use by School Boards wishing to convert from B.I.A. operated to grant/contract school status.

2. The Education Committee of the Navajo Nation Council hereby requires compliance from all school boards and communities that wish to exercise their option to convert to grant or contract school status with the provisions contained in the "Grant/Contract Conversion/Maintenance Handbook."

3. The Bureau of Indian Affairs funded schools whose school boards are currently operating under the authority of Public Law 100-297 or Public Law 93-638 will be required to comply with the provisions in the Handbook in order to maintain authorization from the Navajo Nation to operate their schools.

4. The Education Committee of the Navajo Nation Council recognizes that the Navajo Nation supports local control of education and the authority of local School Board within established laws identified in the Handbook.

5. The "Grant/Contract Conversion/Maintenance Handbook" may be amended by the Education Committee of the Navajo Nation Council as they deem appropriate, 2 N.N.C. §484 (B)(1).

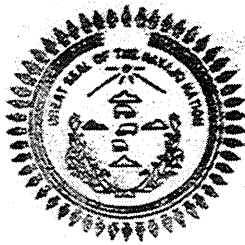
CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of (5) in favor, (0) opposed and (0) abstained, this 13th day of February, 2001.



Wallace Charley, Vice Chairperson
Education Committee
NAVAJO NATION COUNCIL

Motion: Frank C. Willetto, Sr.
Second: Dr. Samuel Billison



MEMORANDUM

TO : Genevieve Jackson, Director
Division of Diné Education

FROM : Andy R. Ayze
Andy R. Ayze, Chairman
Education Committee

DATE : May 8, 2000

SUBJECT : **Proposed Amendments to Resolution Nos. ECA-064-88 and ACS-188-88**

On April 28, 2000, the Education Committee of the Navajo Nation Council by a vote of 5 in favor, 0 opposed and 0 abstaining, designated the Subcommittee on Navajo School Board Policies to work with the Division of Diné Education to amend the policy on grant/contract conversion for Navajo BIA operated schools in the Resolution Nos. ECA-064-88 and ACS-188-88, respectively. The following Education Committee members are on the Subcommittee:

1. Wallace Charley, Chairman
2. Christine Apache, member
3. Calvin Kirk, member
4. Frank Chee Willetto, alternate

If there are questions, please call Ms. Peggy Nakai, Legislative Advisor and she will gladly assist you.

c: Education Committee members
Frank Seanez, Attorney IV, OLC

RESOLUTION
OF THE
EDUCATION COMMITTEE
OF THE
NAVAJO TRIBAL COUNCIL

EXHIBIT C

Recommending the Adoption of "Procedures for P.L. 100-297 Grant Authorization", and Taking Certain Other Actions

WHEREAS:

1. By Resolution Number ACMA-35-84 the Education Committee of the Navajo Tribal Council is authorized to develop policies and procedures to implement Tribal education laws; and
2. By Resolution Number ACF-32-88, the Education Committee of the Navajo Tribal Council has been directed to develop procedures for Tribal authorization of grants pursuant to the provisions of P.L. 100-297; and
3. The Alamo Navajo School Board, Inc., the Leupp Boarding School Board, Inc., the Rough Rock School Board, Inc., and the Tuba City High School Board, Inc. have elected to exercise their right under P.L. 100-297 to convert from P.L. 93-638 contract operation to grant operation at the start of Fiscal Year 1989, and have notified the United States Secretary of the Interior in accordance with the legal deadline for such notification; and
4. As, at the time of said deadline, there were no Tribal procedures in place for authorizing such conversions, the four School Boards named herein did not violate any Tribal or Federal legal requirements simply by notifying the Secretary of the Interior of their decisions; and
5. Each of these School Boards, as duly authorized by the Navajo Tribe, has responsibly operated its school under a P.L. 93-638 contract with the Bureau of Indian Affairs for at least three years; and
6. As with any such new law, decisions will be made and regulations and precedents will be created with respect to P.L. 100-297 during the first year of its implementation which will seriously and directly affect the future use of that law by the Navajo Tribe and local Navajo School Boards; and
7. It is therefore highly desirable that there be Navajo School Boards which will be directly and immediately affected by those regulations, precedents and decisions involved in making them; and
8. Those School Boards so affected should not be penalized or prevented from being involved due to a lack of duly adopted procedures; and
9. There remains short but sufficient time to adopt and implement Tribal authorization procedures as directed so as not to jeopardize Navajo interests and lose the significant benefits for Navajo students which can be realized under P.L. 100-297; and

10. Each of the four local Navajo School Boards recognizes the sovereign status of the Navajo Nation and the legal right of the governing body of the Navajo Nation with regard to retrocession of grants made under P.L. 100-297; and

11. This Committee, by Resolution Number ECA-063-88, dated August 25, 1988, has directed that grant authorization procedures be developed and presented to it for consideration in order to expedite their adoption prior to the beginning of Fiscal Year 1989; and

12. Given that the four School Boards affected are all experience and responsible contractors, the Education Committee of the Navajo Tribal Council is inconvenienced that a current Tribal reauthorization to contract under P.L. 93-638 combined with a written agreement from each of the respective School Boards to comply with the additional requirements contained herein as an amendment to existing P.L. 93-638 recontracting procedures will be sufficient to ensure appropriate accountability of the prospective grantee School Boards to the Navajo Tribe; and

13. The Education Committee of the Navajo Tribal Council recognizes that this procedure is sufficient to address the needs and concerns of the Navajo Tribe with regard only to those four School Boards named herein and that additional procedures are needed to address the authorization of other School Boards in the future.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Education Committee of the Navajo Tribal council hereby declares that it finds the attached amended "Procedures for Review of Recontracting applications" (Attachment "A") to be appropriate for authorizing the School Boards which are currently eligible to convert to grant operation under that law as of October 1, 1988; and

2. The Education Committee of the Navajo Tribal Council hereby declares that it finds that the existing provisions in the final form of P.L. 100-297 combined with the additional provisions contained in the attached amended "Procedures..." adequately address the need for accountability of grantees to the Navajo Tribe; and

3. The Education Committee of the Navajo Tribal Council hereby declares that each of the four Local Navajo School Boards named herein is required to comply with all provisions of their current respective individual P.L. 93-638 recontracting authorization, and shall be required to comply with all such duly adopted additional Tribal requirements and standards as are uniformly applicable to all grantees under P.L. 100-297; and

4. The Education Committee of the Navajo Tribal Council hereby directs that the submission of these recommendations to the Advisory Committee be expedited by the Navajo Nation Education System so that they may be included on the agenda for the next meeting of the Advisory Committee of the Navajo Tribal Council after August 31, 1988 for its approval; and

5. The Education Committee of the Navajo Tribal Council hereby strongly recommends and urges that the Advisory Committee of the Navajo Tribal Council approve these procedures as recommended at the earliest possible time so that the Navajo Tribe and the affected Navajo School Boards, schools and students will not be deprived for another year of the significant benefits which can be realized under this new law; and

6. The Education Committee of the Navajo Tribal Council hereby directs that procedures for authorizing Local Navajo School Boards to operate under the provisions of P.L. 100-297 which have not yet elected to do so be developed by the Navajo Nation Education System without delay and in cooperation and consultation with those affected; and

7. The Education Committee of the Navajo Tribal Council hereby respectfully requests that all appropriate offices and officials of the Navajo Nation Education System and the Navajo Tribe to all things within their power and authority to realize the intent of this Resolution.

CERTIFICATION

I hereby certify that the foregoing Resolution was duly considered by the Education Committee of the Navajo Tribal Council at a duly call meeting at Albuquerque, New Mexico at which a quorum was present, and that same was adopted by a vote of 04 in favor, 00 opposed and 01 abstaining this 31st day of August, 1988.



Daniel E. Tso, Chairman
EDUCATION COMMITTEE

MOTION: Billy Todachennie
SECOND: David J. Tsosie

PROCEDURES FOR REVIEW OF RECONTRACTING APPLICATIONS AND
ASSURANCE FOR ACCOUNTABILITY MEASURES UNDER P.L. 100-297

DEADLINE (ELAPSED DAYS)	WHO	WHAT (ACTION TO BE TAKEN)
DAY 0	Applicant	Submit application to Navajo Nation Education System (NNEs), Executive Director's Office. Application must be submitted by close-of-business in order to be dated on day submitted.
		Send copy of application to Agency Education Superintendent (AES), and Area Director (AD).
		Submit notice of date of receipt by NNEs to Area Director
	NNEs	Issue official signed, dated receipt for application to contractor, with copy to AD
		If application is hand-delivered, date of receipt is determined by date of presentation before close-of business at NNEs offices.
		If application is mail delivered, date of receipt is determined by actual date of postal delivery to NNEs offices, as documented by mail-receipt date stamp.
Upon receipt of copy of application	AD and AES	Issue official dated, signed receipt for copy of application to contractor, with copy of receipt to NNEs
	NNEs	Begin Tribal Review
Upon receipt of copy	AES	Begin review of availability of funds, change(s) in scope, or effect on personnel agreements involved in application.
Upon receipt copy	AD	Begin Area review of application. However, this review shall not be construed as submission of the application by the Tribe after review or as a waiver or termination of the Tribal review process.
10 days from receipt of application	AES	Report results of review to Area Director

Complete administrative review and report recommendations to Education Committee through Chairman of the Education Committee.

IF OBJECTION ISSUES EXIST:

- a. Arrange for formal hearing before Education Committee.
- b. Issue notice to contractor to include
 - . Clear statement of questions being raised
 - . Rationale for raising them
 - . Date, time and place of hearing
 - . Names of witnesses to be called, if any.

Within period of 10 days from issuance of objection issue notice

	Education Committee	Hold hearing on objection issues.
45	Education Committee	Submit Formal Resolution(s) (if any) objecting to recontracting, to Area Director, by end of the business day.
46	Area Director	Complete Area Review & Issue requisite notices.

ADDITIONAL REQUIREMENTS FOR CONTRACTORS SEEKING TO CONVERT TO P.L. 100-297 GRANT OPERATIONS

DEADLINE	WHO	WHAT (ACTION TO BE TAKEN)
Prior to August 1, 1988 *	Contractor	Submit notice of election to convert to grant operation to Secretary of Interior.
		* If notice of election is submitted after September 30, 1988, the Contractor must secure a waiver from the Secretary in accordance with Section 5209 (b) (3) of P.L. 100-297, and a formal waiver of this deadline from the Education Committee.

Prior to
October 1, 1988

Contractor

Submit notice of election to convert to grant operation to Education Committee.

Submit to Education Committee a written agreement to:

1. Comply with all provisions of the Contractor's existing P.L. 93-638 recontracting authorization unless clearly in conflict with relevant provisions of P.L. 100-297, and to comply with such Tribal Education Standards as have been or may be duly adopted by the Navajo Nation.
2. Comply with all provisions of Section 5207 of P.L. 100-297.
3. Permit monitoring visits to their respective schools by representatives of Navajo Nation Education System upon receipt of written notice from the Executive Director of the Navajo Nation Education System, or an authorized representative, at least forty-eight hours in advance of the intended visit. The monitoring performed during such visits shall be based on a mutually agreed-upon Tribal monitoring checklist to be included in the grant.
4. Provide to the Navajo Nation Education System, Office of the Executive Director, one copy of each of the School Board's personnel and property management manuals, and one copy of the School Board's Articles of Incorporation no later than 120 days after the commencement of the grant.
5. Recognize the right of the Navajo Nation to be represented at grant negotiations.
6. Comply with such school attendance boundaries as are or may be duly adopted by the Navajo Nation.
7. Comply with the following additional requirements:

ADDITIONAL REQUIREMENTS:

1. School Boards which are formally authorized to convert to P.L. 100-297 grant operations and do in fact so convert shall submit quarterly reports to the Education Committee, and a copy of same to the Navajo Nation Education System, which report shall, at minimum, consist of:
 - a. a brief description of any substantial administrative benefits and/or problems attributable to grant versus contract operations.
 - b. a brief description of any substantial financial benefits attributable to grant operations, including information regarding investments, if any, of grant funds.
 - c. a brief description of any substantial programmatic benefits or problems attributable to grant versus contract operations.
 - d. such additional information as may be requested in writing by the Committee at least two weeks prior to the due date of the next quarterly report.

ACS-188-88

Class "C" Resolution
No BIA Action Required.

RESOLUTION OF THE
ADVISORY COMMITTEE OF THE
NAVAJO TRIBAL COUNCIL

Adopting the "Procedures for P.L. 100-297 Grant
Authorization", and Taking Certain Other Actions

WHEREAS:

1. Pursuant to 2 N.T.C. Section 341 (b)(1), the Advisory Committee of the Navajo Tribal Council is authorized to act as the Executive Committee of the Navajo Tribal Council with general authority, to act for the Navajo Tribal Council at such times when the Navajo Tribal Council is not in session; and
2. Pursuant to the Plan of Operation of the Education Committee of the Navajo Tribal Council, the Education Committee shall, where appropriate, seek concurrence of the Advisory Committee of the Navajo Tribal Council or the Navajo Tribal Council in framing official responses from the Navajo Nation to proposals for major changes in educational programs, such as proposals regarding major school closures or transfers of jurisdictions; 2 NTC 484 (b)(12); and
3. Pursuant to Resolution ACP-32-88, the Advisory Committee of the Navajo Tribal Council has established its position that no contract or grant be authorized without a specific action of the Navajo Tribal Government to authorize such grant or contract. Furthermore, authorization of contracts or grants will be contingent upon procedures and assurances of accountability developed by the Education Committee of the Navajo Tribal Council in conjunction with the Navajo Nation Education System and approved by the Advisory Committee of the Navajo Tribal Council; and
4. The Advisory Committee of the Navajo Tribal Council further directed that the Tribal grant procedures and accountability mechanisms developed by the Education Committee of the Navajo Tribal Council be considerably more stringent than for P.L. 93-638 contracted schools currently and include performance based reporting and evaluation criteria; Resolution ACP-32-88; and
5. The Advisory Committee of the Navajo Tribal Council further stated that said procedures and authorization for P.L. 93-638 contracts remain in effect; Resolution ACP-32-88; and

6. The Alamo Navajo School Board, Inc., the Leupp Boarding School, Inc., the Rough Rock School Board, Inc., and the Tuba City High School Board, Inc., have elected to exercise their right under P.L. 100-297 to convert from P.L. 93-638 contract operation to grant operation at the start of Fiscal Year 1989, and have notified the United States Secretary of the Interior in accordance with the legal deadline for such notification; and

7. School Boards and school representatives in conjunction with the Navajo Nation Education System have developed procedures for P.L. 100-297 grant authorization, which were presented to and adopted by the Education Committee of the Navajo Tribal Council; Resolution ECA-064-88.

NOW THEREFORE BE IT RESOLVED THAT:

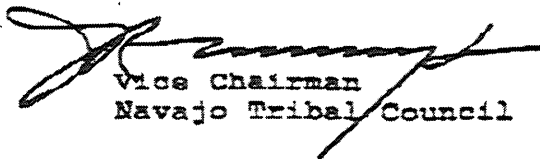
1. The Advisory Committee of the Navajo Tribal Council hereby adopts the "Procedures for P.L. 100-297 Grant Authorization" as presented by the Navajo Nation Education System and as approved by the Education Committee of the Navajo Tribal Council, attached hereto and incorporated herein as Attachment "A".

2. The Advisory Committee of the Navajo Tribal Council hereby declares that it finds that the existing provisions in the final form of P.L. 100-297 combined with the additional provisions contained in the attached amended "Procedures..." (Attachment A) address the need for accountability of grantees to the Navajo Nation.

3. The Advisory Committee of the Navajo Tribal Council hereby directs that the Navajo Nation Education System develop and implement additional standards and assurances of accountability needed to address the authorization of P.L. 100-297 grants to other school boards in the future.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Advisory Committee of the Navajo Tribal Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 16 in favor and 0 opposed, this 22nd day of September, 1988.


Vice Chairman
Navajo Tribal Council

GRANT/CONTRACT CONVERSION/MAINTENANCE HANDBOOK



DIVISION OF DINÉ EDUCATION
EDUCATION COMMITTEE OF THE NAVAJO NATION
SUBCOMMITTEE ON SCHOOL BOARD POLICIES
FALL 2000

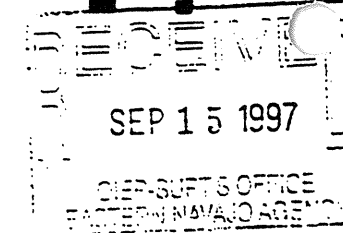
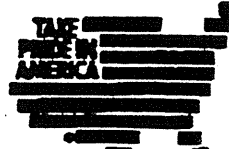
GRANT/CONTRACT CONVERSION/MAINTENANCE HANDBOOK

1. Overview
2. Application Process
3. Application Content
4. Checklist
5. Grant Administrative Requirements
6. Appendix
 - A. Public Law 100-297
 - B. Public Law 100-297 "Conditions and Provisions"
 - C. Public Law 103-382 "Tort Claims"
 - D. 25 USC 450d-Criminal Activities
 - E. 25 USC 450e-Wage /Labor Standards
 - F. 25 CFR Part 36 Subpart H – Residential Standards
 - G. 25 CFR Part 63 Indian Child Protection/Family Violence Prevention
 - H. Child Protection Handbook
 - I. OMB-Circulars:
 - 1) A-133 Illegal Acts
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 - J. 43 CFR Part 12-Administrative Requirements and Cost Principles for Assistance Programs
 - K. Public Law 101-301 Grant Amendments Authorized for Facilities Improvement Projects
 - L. Tribal Review Process (164 SAS)
 - M. Navajo Nation Corporation Code
 - N. BIA/OIEP Checklist
 - O. Navajo Nation Title 10: Education
 - P. Navajo Nation Title II: Standards of Conduct and Restricted Activities of Public Officials and Employees
 - Q. Navajo Nation Ethics in Government Law (1999 Edition)
 - R. School Board Code of Ethics
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 - V. Standing Committees' Resolutions
 - 1) Education/NNC Resolution (Authorization)
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 - 3) Education/NNC Resolution Authorizing Facilities Improvement Projects
 - 4) Intergovernmental Relations/NNC Resolution (Authorization)
 - 5) Intergovernmental Relations/NNC Resolution (Reauthorization)
 - 6) Intergovernmental Relations/NNC Resolution Authorizing Facilities Improvement Projects

TO: ELO 3	From: Bill Mehyk
Co: OIEP	Co: OIEP
Dept:	Phone #
Fax #	Fax #

Department of the Interior

INDIAN AFFAIRS
Washington, D.C. 20240



SEP 12 1997

IN REPLY REFER TO:
OIE-00

Memorandum

To: All Education Line Officers

From: Acting Director, Office of Indian Education Programs

William Mehyk, Jr.

Subject: Grant School Conversion

The purpose of this memorandum is to clarify the conversion process of Bureau of Indian Affairs operated schools to grant status.

According to 25 U.S.C. §2505(e), "a grant provided under this part, and any transfer of the operation of a Bureau school made under subsection (b), shall become effective beginning with the academic year succeeding the fiscal year in which the application for the grant or transfer is made, or at an earlier date determined by the Secretary." The Bureau of Indian Affairs interpretation and implementation of this language provides that the effective date of all grant conversions is the academic year beginning after the last day of the fiscal year in which application for grant conversion is completed. For example, applications submitted from October 1, 1997, to September 30, 1998, are eligible for grant conversion July 1, 1999. Applications submitted October 1, 1998, to September 30, 1999, are eligible for conversion July 1, 2000.

Additionally, House report language accompanying the FY 1998 Department of the Interior and Related Agencies Appropriations Bill states: "As a prerequisite to contracting for additional Federal programs, sufficient funds must be available to the BIA to pay severance and lump sum payments to those Federal employees displaced as a result of tribal contracting activity." Further, report language notes that "...some tribes may still experience delays in contracting for BIA programs and schools. The Bureau is encouraged to work with the tribes to phase in contracting for BIA programs and schools. The Bureau is encouraged to work with the tribes to phase in contracting activity over time when employee displacement funds are insufficient."

The clear intention of the Appropriations Committee is to allow the BIA to delay the contracting for programs and schools if there are not sufficient severance cost funds available. Therefore, while we continue to make every effort to facilitate tribal operation of schools, grant conversions must be limited to those schools for which there are sufficient funds appropriated for associated severance costs. The priority order for conversions will be based on the date on which applications are submitted in completed form.

Please distribute this to tribes and school boards in your jurisdiction. We hope this clarifies the conversion process and provides all interested parties with a method to effectively plan and implement the conversion of schools to tribal control.

1. Overview

The Navajo Nation, since 1988, has required a review and a recommended approval of the Education Committee of all Public Law 100-297 Grant and Public Law 93-638 Contract applications before any school board can receive final approval and sanction of their application by the Navajo Nation. The Division of Diné Education has the responsibility and authority for implementing and enforcing educational laws of the Navajo Nation (Pursuant to 10 N.N.C. Section 105).

About twenty-eight (28) schools and five (5) residential dormitories have been previously authorized and are operating their schools by this grant/contract authority. A majority of these schools sanctioned by the Nation have experienced success in being responsible for the education of Navajo children.

As more Bureau of Indian Affairs Operated Schools consider the option of contracting or granting the operations of their school, the Education Committee recognized the need for the Nation to update its procedures and practices in processing and approving grant or contract applications for school boards, as well as criteria to determine if approved programs are being satisfactorily administered.

In April of 2000, the Education Committee directed the Sub-committee on School Board Policies to develop a handbook, which would standardize procedures and requirements for grant/contract applications as well as procedures and requirements for authorization to continue their grants/contracts.

In developing the handbook, comments were requested and received from the various organizations and individuals representing the Bureau Funded Schools and their school boards. All comments, both written and oral, were given due consideration and led to Final version of the Handbook.

This Handbook is a tool to assist Bureau Operated Schools and their school boards in submitting grant/contract applications to operate their schools under the authorities of federal and Navajo Nation Law. This Handbook is also a tool to assist those Bureau Funded Schools whose school boards are currently operating their schools under the Authority of Public Law 100-297 or Public Law 93-638 and Navajo Nation law in meeting the minimum requirements to maintain authorization from the Navajo Nation to operate their schools.

School boards shall be familiar with the following federal laws, regulations and circulars applicable to the BIA-funded school system:

- A. Basic federal law applicable to BIA-funded school system: Public Law 95-561, 25 USC §2001, et seq.;
- B. Indian Self-Determination Act, Public Law 93-638, 25 USC §450, et seq. (applicable to “contract schools”; also contains provisions incorporated into the Tribally Controlled Schools Act);
- C. Tribally Controlled Schools Act, Public Law 100-297, 25 USC §2501 (applicable to “grant schools);
- D. Bureau of Indian Affairs education regulations at 25 CFR Parts 31, 32, 33, 36, 38, and 39.;
- E. The Single Agency Audit Act, as amended in 1996, 31 USC §7501, et seq.;
- F. OMB Circular A-133, *“Audits of States, Local Governments and non-Profit Organizations”*, revised June 24, 1997 (guidance on preparation of annual audit reports);
- G. OMB Circular A-87 – *“Cost Principles for State, Local, and Indian Tribal Governments”* (revised 5/4/95, as further amended 8/29/97);
- H. Indian Child Protection and Family Violence Prevention Act, 25 USC §3201, et seq.;
- I. BIA regulations – Indian Child Protection and Family Violence Prevention, 25 CFR Part 63; and
- J. 43 CFR – Part 12



2. Application Process

All applications should be submitted to the Navajo Nation Division of Diné Education no later than the first Monday, 5:00 p.m., of the 3rd week of March of the current Fiscal Year. No waivers will be authorized.

To ensure adequate review, it is required by the Navajo Nation Law that your application goes through the Tribal Review Process (164 SAS). These time lines are established for the Tribal Review Process (164 SAS):

2 weeks	Technical Assistance Services, DODE
1 week	Administration, DODE
1 week	Contracts/Grants Office
1 week	Division of Finance
1 week	Department of Justice
1 week	Office of the President/Vice President
1 week	Office of Legislative Council
2 weeks	Education Committee of the Navajo Nation Council
2 weeks	Inter-Government Relations Committee of the Navajo Council
1 week	Division of Diné Education to transmit application to the Bureau of Indian Affairs-Office of Indian Education Programs

Total: 13 weeks/3 months

The Federal Law, (25 USC 2505 (e)) requires that the Office of Indian Education (OIEP) is to receive approved applications in the Fiscal Year that comes before the school year the Grant is to start. Therefore, approved applications should be submitted to BIA/OIEP by July 1, but must be submitted no later than September 30th.



3. Application Content

- A. Name, address and phone number of the school board submitting the application.
- B. Resolutions from the local school board and the chapter(s) within the school's authorized boundaries supporting the school board application.
- C. Narrative explanation of the school board's prior experience and knowledge in operating the school.
- D. Information on the geographic and demographic factors in the affected areas.
- E. A narrative description identifying each of the programs to be offered by the school board and a description of an implementation plan for each program.
- F. If not adopted, an affirmative statement that the Navajo Nation North Central Association (NN/NCA) Academic Standards will be adopted, and that NN/NCA Certification will be acquired within one year.
- G. Statement certified by the school board if applicable, that the Residential Standards will be in conformance with 25 CFR Part 36 Subpart H. School boards shall report to OIEP with respect to instances of non-compliance with space and privacy requirements due to inadequate facilities.
- H. A specific point by point description of how the school board will handle the Requirements of:
 - 1) Accounting and Management of equipment of the school and future equipment acquisitions.
 - 2) A bookkeeping and accounting procedure system
 - 3) Recruitment and retention of adequately trained personnel
 - 4) Personnel policies and procedures
 - 5) Financial policies and procedures
 - 6) Risk management programs (Insurance, including but not limited to, general liabilities, property protection, fire, vehicles, etc.)

Application Content

Corrected Copy
Approved by Education Subcommittee on School Board Certification Procedures

- 7) Consolidated school reform plans
- 8) Reporting Requirements (Single Agency Audit Act of 1984 as amended.)
- 9) Implementation and enforcement of the Navajo Nation Ethics in Government Law (2 N.N.C. 6).
- I. Documentation of Incorporation with the Navajo Nation Corporation Commission.
- J. A Scope of Work that addresses program implementation and compliance to be utilized as a foundation by an independent auditing firm that will be retained to conduct an annual audit which meets the requirements of the Single Agency Audit Act of 1984 as amended in 1996.
- K. Assurances that all employees will receive a background investigation and that the employees will meet the minimum standards for character and suitability required in 25 CFR Part 63.11. School board members, in compliance with Navajo Law (including Navajo Election Law) and Federal laws, will also receive criminal background investigations. The criminal background check will include federal, state, and tribal convictions or *Nolo Contendere* pleas on child related convictions. No individuals convicted of any child related crimes may serve on the school board.
- L. A Certification from each school board member that they have read and understand 25 USC 450d-Criminal Activities Involving Grants, Contracts, etc.; Penalties.
- M. Certification from each school board member that they understand that all funds received must be deposited in accounts that are insured by an agency or instrumentality of the United States.
- N. Certification from each school board member, the school chief administrative officer, and the fiscal & personnel manager that they have read and understand the Provisions of OMB Circular, A-87 particularly those sections that pertain to allowable and unallowable cost.
- O. Certification from each school board member that they have read and understand the "Indian Child Protection and Family Violence Prevention Act of 1990" requiring child abuse reporting procedures plan and background investigation requirement procedures.

OK
X/13/3

Application Content

- P. A signed copy of a School Board Code of Ethics from each school board member.
- Q. Certification from each school board member that they have received training in the contents of these requirements.

CORRECTED COPY
APPROVED BY EDUCATION BOARD GOVERNMENT OF SICHUAN PROVINCE

RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving the "Grant/Contract Conversion/Maintenance Handbook" to Supersede Education Committee Resolution ECA-064-88, entitled "Procedures for Public Law 100-297 Grant Authorization," and Advisory Committee Resolution ACS-188-88, for Use by School Boards wishing to Convert from B.I.A. Operated to Grant/Contract School Status

WHEREAS:

1. Pursuant to 2 N.N.C. §§481 and 482, the Education Committee is established and continued as a standing committee of the Navajo Nation Council for the purpose of overseeing the educational development of the Navajo Nation and to develop policies for a scholastically excellent, and culturally relevant education; and
2. The Education Committee of the Navajo Nation Council is empowered to review, sanction and authorize applications for Self-Determination Act contracts and grants for the operation of educational programs, subject to final approval, by the Intergovernmental Relations Committee of the Navajo Nation Council, 2 N.N.C. §484 (B)(3); and
3. The Education Committee of the Navajo Nation Council has legislative oversight responsibility, oversight of the Division of Diné Education, responsibility for the initiation of education legislation and its implementation; and
4. The Navajo Nation, since 1988, has required a review and a recommended approval from the Education Committee of the Navajo Nation Council of all Public Law 93-638 contract and Public Law 100-297 grant applications before any local school board can receive authorization for a contract/grant by the Navajo Nation; and
5. About twenty-eight (28) schools and five (5) residential dormitories have been previously authorized and are operating their educational programs by contract/grant authority and a majority of these schools sanctioned by the Navajo Nation have experienced success in being responsible for the education of Navajo children; and
6. As more Bureau of Indian Affairs operated schools consider the option of contracting/granting the operations of their school, the Education Committee of the Navajo Nation Council became aware that the Nation needed to update its procedures and practices in processing and approving contract/grant applications for school boards, as well as criteria to determine if approved contracts/grants are being satisfactorily administered; and



Checklist

Corrected Copy
Approved by Education Area Committee on 01/11/11

4. Checklist for School Boards Converting to Grant/Contract Status

A. Legal Requirements

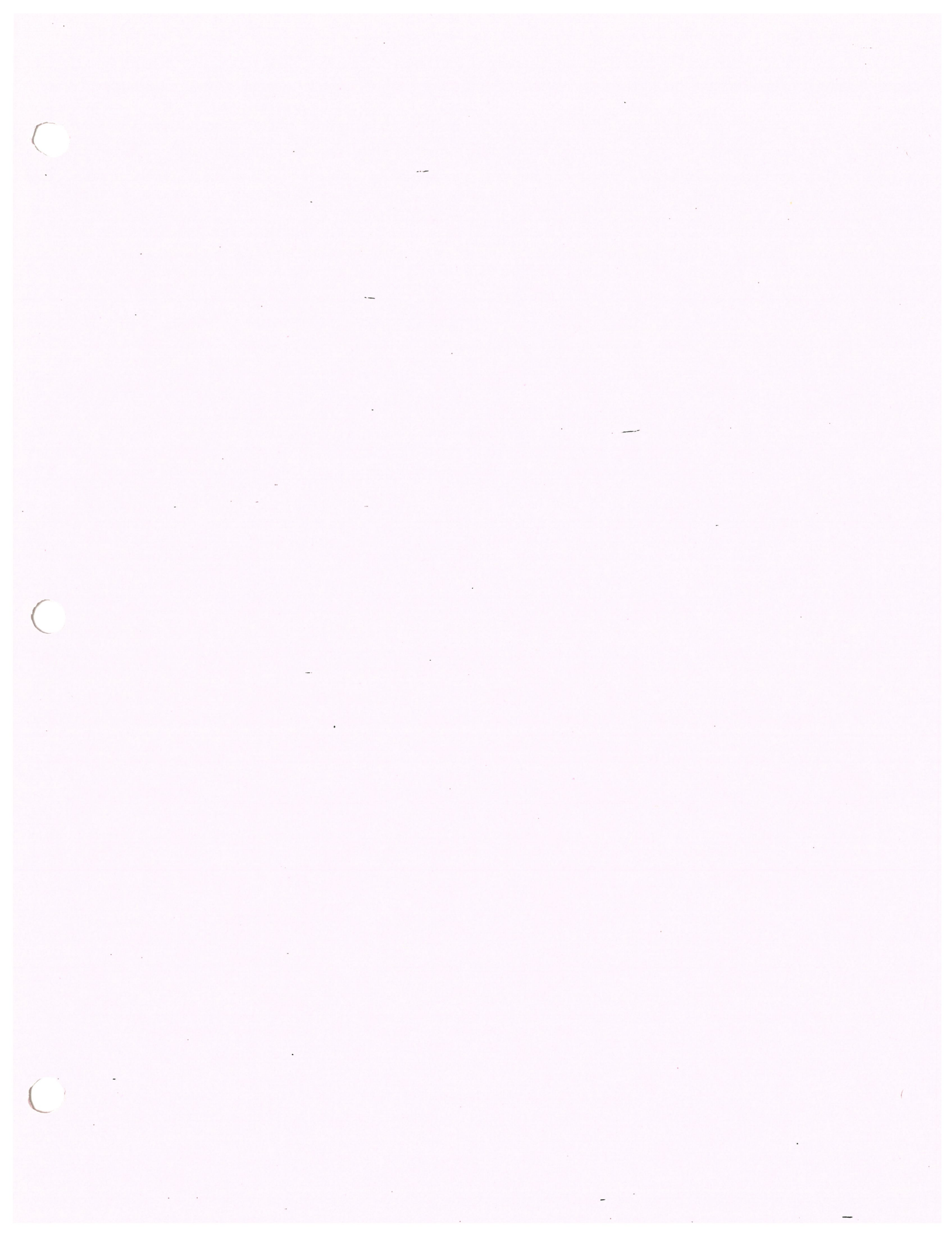
- Resolution from the local school board
- Resolution from the Chapters served by the school
- Articles of incorporation and by-laws
- Corporation status under the Navajo Nation
- Complete application (See Application Content, Section III of this manual)
- Application filed for 501 (C) (3) status with the IRS
- Resolution from the Education Committee of the Navajo Nation Council
- Resolution from the Intergovernmental Relations Committee of the Navajo Nation Council

B. Initial Minimum Operating Requirements

- Policy on status of retaining the benefits of current BIA staff under grant/contract
- Hiring a Director or naming an Interim Director
- Employee benefits Plan
- Banking relationship, designated signatories in accordance with financial manual
- Spending procedures and system, consistent with financial manual
- Expedited hiring policies, consistent with personnel manual
- A detailed an education plan
- Utility/phone/food/laundry contracts are in place for award

C. Minimum Grant/Contract Maintenance Requirements

- Submission of the completed annual program report 60 days after the end of the school year.



5. Grant/Contract Administrative Requirements

- A. An Annual Report is due 60 days after the end of the School Year to the Division of Diné Education and as a minimum shall include:**
- 1) Annual Financial Statement reporting revenue and expenditure.**
 - 2) Number of students served and a brief description of each program accomplishment.**
 - 3) An objective evaluation of the total school program conducted by an outside entity at the end of the each school year, including will be the Consolidated School Reform Plan Report Card.**
 - 4) Certification that Navajo Nation North Central Association Accreditation is current.**
 - 5) If providing residential program, certification by the school board that the program meets all requirements of 25 CFR Part 36 Subpart H. Statement certified by the school board if applicable, that the Residential Standards will be in conformance with 25 CFR Part 36 Subpart H. School boards shall report to OIEP with respect to instances of non-compliance with space and privacy requirements due to inadequate facilities.**
 - 6) Certification by each school board member and the chief school administrative officer that all employees and school board members have received a background investigation and that the board and its employees do meet the minimum standards for character and suitability required in 25 CFR Part 63. School board members, in compliance with Navajo Law (including Navajo Election Law) and Federal laws, will also receive criminal background investigations. The criminal background check will include federal, state, and tribal convictions or *Nolo Contendere* pleas on child abuse convictions. No individuals convicted of any child related crimes may serve on the school board.**
 - 7) Certification from each school board member, the chief school administrative officer, and the fiscal & personnel manager that they have read and understand the 25 USC 450d-Criminal Activities Involving Grants, Contracts, etc.; Penalties.**
 - 8) Certification by the school board that they are in compliance with the Navajo Nation Business Preference Law and the Navajo Preference in Employment Act.**

Grant Administrative Requirements

- 9) **Certifications by the school board that all funds received were deposited in accounts that are insured by an agency or instrumentality of the United States.**
- 10) **Certification that copies of any and all audit reports have been made available to the people who are recipients of the services that the grant/contract provides. Copies shall be posted at public view at the school and chapters within the school boundary.**
- 11) **Certification that each fiscal year's financial records will be kept for four years.**
- 12) **Certification from each school board member, chief school administrative officer, and the personnel manager that each employee received a copy of the Child Abuse Reporting Procedures that has been developed by the school.**

B. Annual Audit Report

1. **Annual Financial Audit that meets the requirements of the *Single Agency Audit Act of 1984 as amended* and a review by the auditor of Program Implementation and Compliance. For a first year grantee/contractor, the same certified auditing firm may be retained for up to 6 years. All other grantees/contractors will select a different certified auditing firm each time the grant/contract is re-authorized.**
2. **An Annual Financial Audit that meets the statute requirement, is due within 9 months after the end of the fiscal period, or within 30 days after the entity receives its auditor's report, whichever comes first. The reports will be submitted to: Auditor General, Navajo Nation, Window Rock, AZ., 86515 and Division of Diné Education, Navajo Nation, Window Rock, AZ., 86515.**



Appendix

PART B—TRIBALLY CONTROLLED SCHOOL GRANTS

Tribally
Controlled
Schools Act of
1988.
25 USC 2501
note.

SEC. 5201. SHORT TITLE.

This part may be cited as the "Tribally Controlled Schools Act of 1988".

SEC. 5202. FINDINGS.

25 USC 2501.

The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, Indians, finds that—

(1) the Indian Self-Determination and Education Assistance Act, which was a product of the legitimate aspirations and a recognition of the inherent authority of Indian nations, was and is a crucial positive step towards tribal and community control;

(2) the Bureau of Indian Affairs' administration and domination of the contracting process under such Act has not provided the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities;

(3) Indians will never surrender their desire to control their relationships both among themselves and with the non-Indian governments, organizations, and persons;

(4) true self-determination in any society of people is dependent upon an educational process which will ensure the development of qualified people to fulfill meaningful leadership roles;

(5) the Federal administration of education for Indian children has not effected the desired level of educational achievement nor created the diverse opportunities and personal satisfaction which education can and should provide;

(6) true local control requires the least possible Federal interference; and

(7) the time has come to enhance the concepts made manifest in the Indian Self-Determination and Education Assistance Act.

SEC. 5203. DECLARATION OF POLICY.

25 USC 2502.

(a) **RECOGNITION.**—The Congress recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational services so as to render such services more responsive to the needs and desires of those communities.

(b) **COMMITMENT.**—The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy for education which will deter further perpetuation of Federal bureaucratic domination of programs.

(c) **NATIONAL GOAL.**—The Congress declares that a major national goal of the United States is to provide the resources, processes, and structures which will enable tribes and local communities to effect the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(d) **EDUCATIONAL NEEDS.**—The Congress affirms the reality of the special and unique educational needs of Indian peoples, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities. These may best be met through a grant process.

(e) **FEDERAL RELATIONS.**—The Congress declares its commitment to these policies and its support, to the full extent of its responsibility, for Federal relations with the Indian Nations.

(f) **TERMINATION.**—The Congress hereby repudiates and rejects House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of Federal relations with any Indian Nation.

25 USC 2503.

SEC. 5204. GRANTS AUTHORIZED.**(a) IN GENERAL.—**

(1) The Secretary shall provide grants to Indian tribes, and tribal organizations, that—

(A) operate tribally controlled schools which are eligible for assistance under this part, and

(B) submit to the Secretary applications for such grants.

(2) Grants provided under this part shall be deposited into the general operating fund of the tribally controlled school with respect to which the grant is provided.

(3)(A) Except as otherwise provided in this paragraph, grants provided under this part shall be used to defray, at the discretion of the school board of the tribally controlled school with respect to which the grant is provided, any expenditures for education-related activities for which any funds that compose the grant may be used under the laws described in section 5205(a), including but not limited to, expenditures for—

(i) school operations, academic, educational, residential, guidance and counseling, and administrative purposes, and

(ii) support services for the school, including transportation.

(B) Grants provided under this part may, at the discretion of the school board of the tribally controlled school with respect to which such grant is provided, be used to defray operation and maintenance expenditures for the school if any funds for the operation and maintenance of the school are allocated to the school under the provisions of any of the laws described in section 5205(a).

(C) If funds allocated to a tribally controlled school under chapter 1 of title I of the Elementary and Secondary Education Act of 1965, the Education of the Handicapped Act, or any Federal education law other than title XI of the Education Amendments of 1978 are included in a grant provided under this part, a portion of the grant equal to the amount of the funds allocated under such law shall be expended only for those activities for which funds provided under such law may be expended under the terms of such law.

(b) LIMITATIONS.—

(1) No more than one grant may be provided under this part with respect to any Indian tribe or tribal organization for any fiscal year.

(2) Funds provided under any grant made under this part may not be used in connection with religious worship or sectarian instruction.

(3) Funds provided under any grant made under this part may not be expended for administrative costs (as defined under section 1128A(e)(1) of the Education Amendments of 1978) in excess of the amount generated for such costs under section 1128A of such Act.

(c) **LIMITATION ON TRANSFER OF FUNDS AMONG SCHOOLSITES.—**

(1) In the case of a grantee which operates schools at more than one schoolsite, the grantee may expend no more than the lesser of—

(A) 10 percent of the funds allocated for a schoolsite under section 1128 of the Education Amendments of 1978, or

(B) \$400,000 of such funds, at any other schoolsite.

(2) For purposes of this subsection, the term "schoolsite" means the physical location and the facilities of an elementary or secondary educational or residential program operated by, or under contract with, the Bureau for which a discreet student count is identified under the funding formula established under section 1128 of the Education Amendments of 1978.

(d) **NO REQUIREMENT TO ACCEPT GRANTS.—**Nothing in this part may be construed—

(1) to require a tribe or tribal organization to apply for or accept, or

(2) to allow any person to coerce any tribe or tribal organization into applying for, or accepting,

a grant under this part to plan, conduct, and administer all of, or any portion of, any Bureau program. Such applications, and the timing of such applications, shall be strictly voluntary. Nothing in this part may be construed as allowing or requiring any grant with any entity other than the entity to which the grant is provided.

Voluntarism.

(e) **NO EFFECT ON FEDERAL RESPONSIBILITY.—**Grants provided under this part shall not terminate, modify, suspend, or reduce the responsibility of the Federal Government to provide a program.

(f) **RETROCESSION.—**Whenever an Indian tribe requests retrocession of any program for which assistance is provided under this part, such retrocession shall become effective upon a date specified by the Secretary not more than 120 days after the date on which the tribe requests the retrocession, or such later date as may be mutually agreed upon by the Secretary and the tribe. If such a program is retroceded, the Secretary shall provide to any Indian tribe served by such program at least the same quantity and quality of services that would have been provided under such program at the level of funding provided under this part prior to the retrocession.

(g) **NO TERMINATION FOR ADMINISTRATIVE CONVENIENCE.—**Grants provided under this Act may not be terminated, modified, suspended, or reduced only for the convenience of the administering agency.

SEC. 5705. COMPOSITION OF GRANTS.

25 USC 2504.

(a) **IN GENERAL.—**The grant provided under this part to an Indian tribe or tribal organization for any fiscal year shall consist of—

(1) the total amount of funds allocated for such fiscal year under sections 1128 and 1128A of the Education Amendments of 1978 with respect to the tribally controlled schools eligible for assistance under this part that are operated by such Indian tribe or tribal organization, including, but not limited to, funds

provided under such sections, or under any other provision of law, for transportation costs,

(2) to the extent requested by such Indian tribe or tribal organization, the total amount of funds provided from operations and maintenance accounts and other facilities accounts for such schools for such fiscal year under section 1126(d) of the Education Amendments of 1978 or under any other law, and

(3) the total amount of funds provided under—

(A) chapter 1 of title I of the Elementary and Secondary Education Act of 1965,

(B) the Education of the Handicapped Act, and

(C) any other Federal education law,

that are allocated to such schools for such fiscal year.

(b) SPECIAL RULES.—

(1) In the allocation of funds under sections 1128, 1128A, and 1126(d) of the Education Amendments of 1978, tribally controlled schools for which grants are provided under this part shall be treated as contract schools.

(2) In the allocation of funds provided under—

(A) chapter 1 of title I of the Elementary and Secondary Education Act of 1965,

(B) the Education of the Handicapped Act, and

(C) any other Federal education law,

that are distributed through the Bureau, tribally controlled schools for which grants are provided under this part shall be treated as Bureau schools.

(3) Funds allocated to a tribally controlled school by reason of paragraph (1) or (2) shall be subject to the provisions of this part and shall not be subject to any additional restriction, priority, or limitation that is imposed by the Bureau with respect to funds provided under—

(i) title I of the Elementary and Secondary Education Act of 1965,

(ii) the Education of the Handicapped Act, or

(iii) any Federal education law other than title XI of the Education Amendments of 1978.

(B) Indian tribes and tribal organizations to which grants are provided under this part, and tribally controlled schools for which such grants are provided, shall not be subject to any requirements, obligations, restrictions, or limitations imposed by the Bureau that would otherwise apply solely by reason of the receipt of funds provided under any law referred to in clause (i), (ii), or (iii) of subparagraph (A).

25 USC 2505.

SEC. 5206. ELIGIBILITY FOR GRANTS.

(a) IN GENERAL.—

(1) A tribally controlled school is eligible for assistance under this part if the school—

(A) was, on the date of enactment of this Act, a school which received funds under the authority of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.),

(B) was a school operated (as either an elementary or secondary school or a combined program) by the Bureau and has met the requirements of subsection (b).

(C) is a school for which the Bureau has not provided funds, but which has met the requirements of subsection (c), or

(D) is a school with respect to which an election has been made under paragraph (2) and which has met the requirements of subsection (b).

(2) Any application which has been submitted under the Indian Self-Determination and Education Assistance Act by an Indian tribe for a school which is not in operation on the date of enactment of this Act shall be reviewed under the guidelines and regulations for applications submitted under the Indian Self-Determination and Education Assistance Act that were in effect at the time the application was submitted, unless the Indian tribe or tribal organization elects to have the application reviewed under the provisions of subsection (b).

(b) ADDITIONAL REQUIREMENTS FOR BUREAU SCHOOLS AND CERTAIN ELECTING SCHOOLS.—

(1) Any school that was operated as a Bureau school on the date of enactment of this Act, and any school with respect to which an election is made under subsection (a)(2), meets the requirements of this subsection if—

(A) the Indian tribe or tribal organization that operates, or desires to operate, the school submits to the Secretary an application requesting that the Secretary—

(i) transfer operation of the school to the Indian tribe or tribal organization, if the Indian tribe or tribal organization is not already operating the school, and

(ii) make a determination of whether the school is eligible for assistance under this part, and

(B) the Secretary makes a determination that the school is eligible for assistance under this part.

(2)(A) By no later than the date that is 120 days after the date on which an application is submitted to the Secretary under paragraph (1)(A), the Secretary shall determine—

(i) if the school is not being operated by the Indian tribe or tribal organization, whether to transfer operation of the school to the Indian tribe or tribal organization, and

(ii) whether the school is eligible for assistance under this part.

(B) In considering applications submitted under paragraph (1)(A), the Secretary—

(i) shall transfer operation of the school to the Indian tribe or tribal organization, if the Indian tribe or tribal organization is not already operating the school, and

(ii) shall determine that the school is eligible for assistance under this part.

unless the Secretary finds by clear and convincing evidence that the services to be provided by the Indian tribe or tribal organization will be deleterious to the welfare of the Indians served by the school.

(C) In considering applications submitted under paragraph (1)(A), the Secretary shall consider whether the Indian tribe or tribal organization would be deficient in operating the school with respect to—

(i) equipment,

(ii) bookkeeping and accounting procedures,

(iii) substantive knowledge of operating the school,

- (iv) adequately trained personnel, or
- (v) any other necessary components in the operation of the school.

(c) ADDITIONAL REQUIREMENTS FOR SCHOOLS THAT HAVE NOT RECEIVED BUREAU FUNDS.—

(1) A school for which the Bureau has not provided funds meets the requirements of this subsection if—

(A) the Indian tribe or tribal organization that operates, or desires to operate, the school submits to the Secretary an application requesting a determination by the Secretary of whether the school is eligible for assistance under this part, and

(B) the Secretary makes a determination that the school is eligible for assistance under this part.

(2)(A) By no later than the date that is 180 days after the date on which an application is submitted to the Secretary under paragraph (1)(A), the Secretary shall determine whether the school is eligible for assistance under this part.

(B) In making the determination under subparagraph (A), the Secretary shall give equal consideration to each of the following factors:

(i) with respect to the applicant's proposal—

(I) the adequacy of facilities or the potential to obtain or provide adequate facilities;

(II) geographic and demographic factors in the affected areas;

(III) adequacy of applicant's program plans;

(IV) geographic proximity of comparable public education; and

(V) the needs as expressed by all affected parties, including but not limited to students, families, tribal governments at both the central and local levels, and school organizations; and

(ii) with respect to all education services already available—

(I) geographic and demographic factors in the affected areas;

(II) adequacy and comparability of programs already available;

(III) consistency of available programs with tribal education codes or tribal legislation to education; and

(IV) the history and success of these services for the proposed population to be served, as determined from all factors and not just standardized examination performance.

(C) The Secretary may not make a determination under this paragraph that is primarily based upon the geographic proximity of comparable public education.

(D) Applications submitted under paragraph (1)(A) shall include information on the factors described in subparagraph (B)(i), but the applicant may also provide the Secretary such information relative to the factors described in subparagraph (B)(ii) as the applicant considers appropriate.

(E) If the Secretary fails to make a determination under subparagraph (A) with respect to an application within 180 days after the date on which the Secretary received the application, the Secretary shall be treated as having made a determination

that the tribally controlled school is eligible for assistance under the title and the grant shall become effective 18 months after the date on which the Secretary received the application, or an earlier date, at the Secretary's discretion.

(d) APPLICATIONS AND REPORTS.—

(1) All applications and reports submitted to the Secretary under this part, and any amendments to such applications or reports, shall be filed with the agency or area education officer designated by the Director of the Office of Indian Education of the Department of Education. The date on which such filing occurs shall, for purposes of this part, be treated as the date on which the application or amendment is submitted to the Secretary.

(2) Any application that is submitted under this part shall be accompanied by a document indicating the action taken by the tribal governing body in authorizing such application.

(e) EFFECTIVE DATE FOR APPROVED APPLICATIONS.—Except as provided in subsection (c)(2)(E), a grant provided under this part, and any transfer of the operation of a Bureau school made under subsection (b), shall become effective beginning with the academic year succeeding the fiscal year in which the application for the grant or transfer is made, or at an earlier date determined by the Secretary.

(f) DENIAL OF APPLICATIONS.—

(1) Whenever the Secretary declines to provide a grant under this part, to transfer operation of a Bureau school under subsection (b), or determines that a school is not eligible for assistance under this part, the Secretary shall—

(A) state the objections in writing to the tribe or tribal organization within the allotted time,

(B) provide assistance to the tribe or tribal organization to overcome all stated objections,

(C) provide the tribe or tribal organization a hearing, under the same rules and regulations that apply under the Indian Self-Determination and Education Assistance Act, and

(D) provide an opportunity to appeal the objection raised.

(2) The Secretary shall reconsider any amended application submitted under this part within 60 days after the amended application is submitted to the Secretary.

(g) REPORT.—The Bureau shall submit an annual report to the Congress on all applications received, and actions taken (including the costs associated with such actions), under this section at the same time that the President is required to submit to the Congress the budget under section 1105 of title 31, United States Code.

SEC. 5207. DURATION OF ELIGIBILITY DETERMINATION.

(a) IN GENERAL.—If the Secretary determines that a tribally controlled school is eligible for assistance under this part, the eligibility determination shall remain in effect until the determination is revoked by the Secretary, and the requirements of subsection (b) or (c) of section 5206, if applicable, shall be considered to have been met with respect to such school until the eligibility determination is revoked by the Secretary.

(b) ANNUAL REPORTS.—Each recipient of a grant provided under this part shall submit to the Secretary and to the tribal governing body (within the meaning of section 1121(j) of the Education Amend-

ments of 1978) of the tribally controlled school an annual report that shall be limited to—

(1) an annual financial statement reporting revenue and expenditures as defined by the cost accounting established by the grantee;

(2) a biannual financial audit conducted pursuant to the standards of the Single Audit Act of 1984;

(3) an annual submission to the Secretary of the number of students served and a brief description of programs offered under the grant; and

(4) a program evaluation conducted by an impartial entity, to be based on the standards established for purposes of subsection (c)(1)(A)(ii).

(c) REVOCATION OF ELIGIBILITY.—

(1)(A) The Secretary shall not revoke a determination that a school is eligible for assistance under this part if—

(i) the Indian tribe or tribal organization submits the reports required under subsection (b) with respect to the school, and

(ii) at least one of the following subclauses applies with respect to the school:

(I) The school is certified or accredited by a State or regional accrediting association as determined by the Secretary of Education, or is a candidate in good standing for such accreditation under the rules of the State or regional accrediting association, showing that credits achieved by students within the education programs are, or will be, accepted at grade level by a State certified or regionally accredited institution.

(II) A determination made by the Secretary that there is a reasonable expectation that the accreditation described in subclause (I), or the candidacy in good standing for such accreditation, will be reached by the school within 3 years and that the program offered by the school is beneficial to the Indian students.

(III) The school is accredited by a tribal department of education if such accreditation is accepted by a generally recognized regional or State accreditation agency.

(IV) The school accepts the standards promulgated under section 1121 of the Education Amendments of 1978 and an evaluation of performance is conducted under this section in conformance with the regulations pertaining to Bureau operated schools by an impartial evaluator chosen by the grantee, but no grantee shall be required to comply with these standards to a higher degree than a comparable Bureau operated school.

(V) A positive evaluation of the school is conducted once every 3 years under standards adopted by the contractor under a contract for a school entered into under the Indian Self-Determination and Education Assistance Act prior to the date of enactment of this Act, such evaluation to be conducted by an impartial evaluator agreed to by the Secretary and the grantee. Upon failure to agree on such an evaluator, the governing body of the tribe shall choose the evaluator or perform the evaluation.

(B) The choice of standards employed for purposes of subparagraph (A)(ii) shall be consistent with section 1121(e) of the Education Amendments of 1978.

(2) The Secretary shall not revoke a determination that a school is eligible for assistance under this part, or reassume control of a school that was a Bureau school prior to approval of an application submitted under section 5206(b)(1)(A), until the Secretary—

(A) provides notice to the tribally controlled school and the tribal governing body (within the meaning of section 1121(j) of the Education Amendments of 1978) of the tribally controlled school which states—

(i) the specific deficiencies that led to the revocation or resumption determination, and

(ii) the actions that are needed to remedy such deficiencies, and

(B) affords such authority an opportunity to effect any remedial actions.

The Secretary shall provide such technical assistance as is necessary to effect such remedial actions. Such notice and technical assistance shall be in addition to a hearing and appeal to be conducted pursuant to the regulations described in section 5206(d)(1)(C).

SEC. 5208. PAYMENT OF GRANTS; INVESTMENT OF FUNDS.

25 USC 2507.

(a) PAYMENTS.—

(1) Except as otherwise provided in this subsection, the Secretary shall make payments to grantees under this part in two payments:

(A) one payment to be made no later than October 1 of each fiscal year in an amount equal to one-half the amount paid during the preceding fiscal year to the grantee or a contractor that has elected to have the provisions of this part apply, and

(B) the second payment consisting of the remainder to which the grantee or contractor is entitled for the fiscal year to be made by no later than January 1 of the fiscal year.

(2) For any school for which no payment was made under this part in the preceding fiscal year, full payment of the amount computed for each fiscal year shall be made by January 1 of the fiscal year.

(b) INVESTMENT OF FUNDS.—

(1) Notwithstanding any other provision of law, any interest or investment income that accrues on any funds provided under this part after such funds are paid to the Indian tribe or tribal organization and before such funds are expended for the purpose for which such funds were provided under this part shall be the property of the Indian tribe or tribal organization and shall not be taken into account by any officer or employee of the Federal Government in determining whether to provide assistance, or the amount of assistance, under any provision of Federal law.

(2) Funds provided under this part may be—

(A) invested by the Indian tribe or tribal organization only in obligations of the United States or in obligations or securities that are guaranteed or insured by the United States, or

(B) deposited only into accounts that are insured by an agency or instrumentality of the United States.

(c) RECOVERIES.—For the purposes of underrecovery and overrecovery determinations by any Federal agency for any other funds, from whatever source derived, funds received under this part shall not be taken into consideration.



Public Law 93-638
The Indian Self-Determination and Education Assistance Act,
As Amended

In answering the following questions, where applicable, cite the specific provision of the Act and/or the regulations that supports your argument as justification for your answer.

1. What is the purpose of the Indian Self-Determination & Education Assistance Act?

“To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own education activities; and for other purposes”.

The Act is codified as, “The Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450, et seq; 88 Stat. 2203; effective January 4, 1975). The Act was signed by President Gerald R. Ford after the Indian Policy Statement was signed by President Richard M. Nixon in 1970. At the heart of the new policy was commitment by the Federal government to foster and encourage tribal self-government. Incidentally, President Ronald Reagan issued a second Indian Policy Statement in 1983, which reaffirmed the government-to-government relationship of Indian tribes with the United States. It was President Reagan’s policy to expand the 1970 Indian Policy Statement and to turn the ideas of the self-determination policy into reality.

2. How many titles are in the Act? What are they?

There are six (6) Titles in the Act, however, only five (5) are active:

Title I - Indian Self-Determination Act (provides statutory authority for the majority of the self-determination contracting provisions)

NOTE: In Pub. Law 93-638 in 1975.

Title II - Indian Education Assistance Act (contains provisions for education programs such as JOM; and provisions for school construction).

NOTE: In Pub. Law 93-638 in 1975.

Title III - Tribal Self-Governance Demonstration Project (provides authority for the self-governance program as a demonstration project under the Department of Health and Human Services).

NOTE: Title III created through Pub. Law 100-472 (Indian Self-Determination and Education Assistance Act Amendments of 1988). Has been repealed by Section 10 of Pub. Law 106-260 (Tribal Self-Governance Amendments of 2000).

Title IV - Tribal Self-Governance (provides for a permanent self-governance program for the Department of the Interior).

NOTE: Title IV created through Pub. Law 103-413 (Indian Self-Determination and Education Assistance Act Amendments of 1994).

Title V - Tribal Self-Governance (provides for a permanent self-governance program for the Department of Health and Human Services).

NOTE: Title V created through Section 4 of Pub. Law 106-260 (Tribal Self-Governance Amendments of 2000).

Title VI - Tribal Self-Governance - Health and Human Services (provides for a Self-Governance Demonstration Project Feasibility Study within the Department of Health and Human Services).

NOTE: Title VI created through Section 5 of Pub. Law 106-260 (Tribal Self-Governance Amendments of 2000).

3. What organizations are eligible to contract with the Secretary under the Act?

Federally-recognized Indian tribes; and other organizations duly authorized by a governing body of an Indian tribe. See the definition of an Indian tribe and tribal organization in Sec. 4(e) and 4(l) of the Act.

4. Define a "self-determination contract"?

Sec. 4(j) of the Act defines a self-determination contract as: "...a contract (or grant or cooperative agreement utilized under section 9 [25 USC 450e] of this act) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided [in] the last proviso in section 105(a) of this Act, no contract (or grant or cooperative agreement utilized under section 9 [25 USC 450e] of this act) entered into under title I of this Act shall be construed to be a procurement contract;"

Regulations: 25 CFR Part 900, Subpart B; 900.6 cross references the definition to the Act.

NOTE: This term was defined in Pub. Law 100-472 (The Indian Self-Determination and Education Assistance Act Amendments of 1988; 102 Stat. 2285; October 5, 1988) and also amended Section 105(a) of the Act to add the last proviso. Pub. Law 103-413 (The Indian Self-Determination Act Amendments of 1994; 108 Stat. 4250; October 25, 1994) rewrote Section 105 of the Act. The subject proviso is no longer in Section 105(a). The definition of a "self-determination contract" has not been amended to remove the reference to "the last proviso in Section 105(a) of the Act".

5. Contracting under the Act is discretionary for the Secretary. (True or False)

False.

Contracting under the Act is *not* discretionary for the Secretary. Sec. 102(a)(1) of the Act *directs* the Secretary to enter into a contract or contracts upon the request of any Indian tribe by tribal resolution. Tribes can request to enter into a self-determination contract or contracts to plan, conduct, and administer programs or portions thereof, including construction programs.

6. The Act limits contracting with Indian tribes to the BIA and IHS. (True or False)

False.

The Act in Sec. 102(a)(1)(D)&(E) allows Indian tribes and tribal organizations to contract for programs for which appropriations are made to agencies other than DHHS and DOI; and for the benefit of Indians because of their status as Indians without regard to the Agency or Office of the DHHS or DOI, within which it is performed.

Regulations: 25 CFR Part 900, Subpart A; 900.2(b).

7. Only programs at the local levels are contractible because these programs provide direct services to the tribes. (True or False)

False.

The Act in Sec. 102(a)(1), provides for Indian tribes to contract any program that meets the statutory criteria cited above. Further, the Act provides that "...programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the DOI and DHHS (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the department that carries out such functions."

Regulations: 25 CFR Part 900, Subpart A; 900.3(a)(4) & (5); 900.3(b)(8) through (11).

8. Tribes may contract for entire programs or portions of programs under the Act. (True or False)

True.

Sec. 102(a)(1) of the Act, provides that Indian tribes and tribal organizations may contract for programs or portions thereof.

Regulations: 25 CFR Part 900, Subpart A; 900.3(b)(1).

9. When tribes "compact" under the Act, they must "compact" entire BIA programs because the idea is to eliminate BIA involvement. (True or False)

False.

Self-governance compacting under Titles IV (for DOI) and V (for DHHS) is similar to self-determination contracting under Title I. Tribes may compact for entire programs or portions of programs. This decision rests solely with an Indian tribe or tribal organization. Further, Sec. 403(b)(1) of the Act provides that tribes may compact for entire programs, services, function, activities, or portions thereof administered by the Department of the Interior through the Bureau of Indian Affairs, without regard to the agency or office of the Bureau of Indian Affairs within which the program, service, function, and activity, or portion thereof, is performed, etc.

10. What constitutes a tribal request to enter into a self-determination contract?

A tribal resolution requesting to enter into a self-determination contract.

Refer to Sec. 102(a)(1) of the Act, wherein it states in part ... "The Secretary is directed, upon request of any Indian tribe by resolution ..."

Refer to 25 CFR Part 900, Subpart C; 900.8(d).

11. Tribes are subject to the CFR, BIAM and other BIA policies, when they contract programs, because they are contracting BIA programs and thus, must follow BIA's policies. In addition, tribes must comply with industry standards and criteria. (True or False)

False.

Refer to Sec. 108(c); Section 1(b)(11), wherein it states: "Federal program guidelines, manuals, or policy directives - Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et. seq.), the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law".

Regulations: 25 CFR Part 900, Subpart A; 900.3(b)(1), wherein it states in part, that the Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs"; and 25 CFR Part 900, Subpart A; 900.5 (and 25 CFR Part 900, Subpart J; 900.126).

NOTE: It may appear that this answer is incorrect when considering a self-determination construction contract given the flush language following Sec. 102(a)(2) of the Act. However, consider that Tribes and Tribal Organizations have the right to create their own standards, and the Federal government will accept the tribal standards if these standards are "consistent with or exceed" the Federal standards.

12. Because of the above, tribes cannot propose their own program standards. (True or False)

False.

The Act in Sec. 105(a)(2), provides that program standards applicable to non-construction programs shall be set forth in the contract proposal and the final contract of the tribe or tribal organization. In addition, Sec. 105(j) of the Act provides that tribes and tribal organizations may propose a redesign of a program, activity, function, or service carried out under the contract, including any *non-statutory program standard* in such a manner as to best meet the local geographic, demographic, economic, cultural, health, and institutional needs of the Indian people and tribe served under the contract.

Regulations: 25 CFR Part 900, Subpart A; 900.3(b)(3); and 25 CFR Part 900, Subpart C; 900.8(g)(4).

NOTE: See **NOTE** at question 11, above.

13. Tribes can only contract for non-trust programs because the Secretary must continue to operate these programs to carry out his trust responsibility to Indian tribes. (True or False)

False.

Tribes and tribal organizations may contract for *any* BIA program or portion thereof, including trust programs; however, the BIA cannot allow for contracting of its trust functions. The BIA must carefully analyze the program to be contracted and identify specific trust functions that must be retained by the BIA.

Regulations: 25 CFR Part 900, Subpart A; 900.3(b)(4), Policy Statements, wherein it states the Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians. Also, 25 CFR Part 900, Subpart A; 900.4(b) which states the regulations are not to be construed as: "terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding this trust responsibility".

14. Conversely, when tribes "compact" BIA programs, they can include the Secretary's trust responsibilities because the Act provides for assumption of all programs and functions. (True or False)

False.

Again, Titles III (for DHHS) and IV (for DOI) provisions are the same as the Title I provisions in that the Secretary's inherent trust functions are not "compactible"; and that the decision to "compact" all or portions of a BIA program rests with the Indian tribe.

15. Does a contractible program include administrative functions at higher levels of the Bureau or Department?

Yes.

Sec. 102(a)(1) of the Act provides that "...the programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the DOI and DHHS, (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs that are otherwise are contractible."

Regulations: 25 CFR Part 900, Subpart A; 900.3(a)(3).

16. What staffing options are available to tribes and tribal organizations under the Act?

Tribes can decide to:

- (1) "direct hire" Federal employees;
- (2) set their own qualifications standards and hire their own staff;
- (3) use the Intergovernmental Personnel Act (IPA) of 1970, as amended (P. L. 91-648; 5 U.S.C. Chapter 33, Subchapter VI; 5 CFR Part 334; FPM Chapter 334); or
- (4) use the 1834 Act to employ Federal employees.

NOTE: If a tribe or tribal organization decides to hire BIA program staff, they have the option of offering the employees different salary levels and fringe benefits; or to continue the Federal salary levels and fringe benefits and pay into an account to preserve the affected employees' Federal pay and retirement, etc. There are two

types of assignments under the IPA. A Federal employee may be placed in a "Leave Without Pay" status or be "Detailed" to a non-Federal entity. In either case, the Federal employee still remains an employee of the Federal government and retains the benefits attached to that status. At the end of the assignment, the agency must return the employee to the same position he/she occupied at the time the IPA assignment began or reassign the individual to another position of like pay and grade.

17. Only a BIA Warranted Officer can award contracts under the Act. (True or False)

False.

It is not required that a Warranted Contracting Officer award a self-determination contract.

Regulations: 25 CFR Part 900, Subpart B; 900.6 defines "Awarding Official" as any person who has been appointed through a delegation of authority in accordance with applicable regulations, has the authority to enter into and administer contracts on behalf of the United States of America, and make determinations and findings with respect thereto. Pursuant to the definition, this person can be any Federal official, including but not limited to, contracting officers.

NOTE: The Federal Register, Vol. 58, No. 161, Monday, August 23, 1993, provides a definition of "Awarding Official" which states in part, an "Awarding Official means contracting officer and shall be any person, other than an Approving Official who has the delegated authority to award, modify, and administer all non-procurement and non-construction contracts as defined in the 25 U.S.C. section 450(b)(j), as amended, and shall make decisions and issue findings and determinations with respect thereto. The Awarding Official may be other than a warranted contracting officer but also includes warranted contracting officers".

18. Only a "contract" can be used under the Act because a contract is a legal and binding instrument used to document an agreement between two parties. (True or False)

False.

The Act provides that an Indian tribe or tribal organization may request a contract, a grant in-lieu of a contract, or a cooperative agreement-in-lieu of a contract. Refer to the definition of a self-determination contract in Sec. 4(j). The type of agreement to be used should be determined by the nature of relationship that is contemplated between the tribe and the BIA.

19. How long does the Secretary have to approve a self-determination contract?

Ninety (90) days.

Sec. 102(a)(2) of the Act mandates that a decision to decline or approve a proposal and the award a contract must be done within 90 days of receipt of a contract proposal.

Regulations: 25 CFR Part 900, Subpart D; 900.16.

20. How long does the Secretary have to award a self-determination contract?

The same Ninety (90) days.

Refer to Sec. 102(a)(2) of the Act.

Regulations: 25 CFR Part 900, Subpart D; 900.16.

21. Can the approval and award time frames be extended? If yes, how?

Yes.

The time frames can only be extended by request of the Secretary and upon written approval of an Indian tribe or tribal organization. If the extension request is denied, then the Secretary must move to either approve the entire proposal, decide to approve a portion of the proposal and decline the remainder, or decline the entire proposal within the established ninety-day time frame.

Refer to Sec. 102(a)(2) of the Act.

Regulations: 25 CFR Part 900, Subpart 900.17; 900.18; and Subpart E.

22. Because a self-determination contract for a construction project is a "non-traditional procurement contract", it can only be awarded by a BIA Warranted Contracting Officer. (True or False)

False.

Sec. 105(a)(1) states: "(n)otwithstanding any other provision of law, subject to paragraph (3), the contracts and cooperative agreements entered into with tribal organizations pursuant to section 102 *shall not be subject to Federal contracting or cooperative agreement laws* (including any regulations), except to the extent that such laws expressly apply to Indian tribes".

Regulations: 25 CFR Part 900, Subpart J, 900.115(b) wherein it states that self-determination construction contracts are not traditional procurement contracts.

Sec. 105(a)(3)(A) further states: "(w)ith respect to a; construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et. seq.) and the regulations relating to acquisitions promulgated under such Act shall apply only to the extent that the application of such provision to the construction contract (or subcontract) is: (i) necessary to ensure that the contract may be carried out in a satisfactory manner; (ii) directly related to the construction activity; and (iii) not inconsistent with this Act." This is commonly referred to as the "test of three".

Regulations: 25 CFR Part 900, Subpart J, 900.115(b)(1).

NOTE: It is not required that a Warranted Contracting Officer award any self-determination contract. Refer to the definition of Awarding Official in 25 CFR Part 900, Subpart A; and the answer to Question No. 17. However, the Bureau of Indian Affairs has not delegated the authority to award self-determination construction contracts at this time. Therefore, until such delegation occurs, self-determination construction contracts can only be awarded by a Warranted Contracting Officer.

23. A self-determination construction contract may only be awarded as a fixed-price contract because of the nature of the project. (True or False)

False.

Sec. 4(m) defines a self-determination construction contract as “a fixed-price or cost-reimbursement self-determination contract...”

Regulations: 25 CFR Part 900, Subpart J; 900.113, defines a construction contract as a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract ...”

24. Is a self-determination contract for the Housing Improvement Program or Roads Maintenance considered a self-determination construction contract?

No.

Sec. 4(m)(2) of the Act, specifically excludes contracts for these programs as construction contracts.

Regulations: 25 CFR Part 900, Subpart J; 900.113(a)(2), wherein it states in part, a self-determination construction contract “does not include any contract ... for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior...”

25. Does a construction program include planning and design? Does it include contract management services?

Sec. 5(m) of the Act defines a construction contract to exclude planning services and construction management services (or a combination of such services) if such services are limited to planning and construction management services. But if such services are included as part of the whole, then these services may be included in a construction contract. It may also include contract management services, if the tribe or tribal organization requests.

Regulations: 25 CFR Part 900, Subpart J; 900.113(a)(1); and for the definition of Construction Management Services, refer to 25 CFR Part 900, Subpart J; 900.113(b).

26. What is a mature contract? What is a non-mature contract?

A mature contract, as defined in Sec. 4(h) of the Act, is a contract that: (1) has been continuously operated for 3 or more years; and (2) has no significant or material audit exceptions in the annual financial audit of the tribal organization.

A contract that does not meet the definition of a “mature” contract, this would be a “term” contract.

27. Tribes cannot combine contracts because the appropriations law prohibits this. (True or False)

False.

Sec. 102(a)(3) provides that, upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract. In addition, tribes and tribal organizations have the option of requesting a reprogramming of funds to meet their program

priorities.

28. Once a contract has been deemed a mature contract, it cannot be converted to a non-mature status. (True or False)

False.

Any contract that falls out of compliance with the statutory definition, may be converted to a non-mature or a "term" contract after the appropriate determination by the BIA and notice to the tribal organization. The notice must contain appropriate appeals rights and dispute procedures.

29. Does the Secretary have the discretionary authority to decline a contract proposal?

No.

The Secretary does not have discretionary authority to decline. Any decision to decline must be in conformance with Sec 102(a)(2) of the Act; and the Secretary has the "burden of proof" to demonstrate that his decision complies with the provisions in Sec. 102(a)(2)(A), (B), (C), (D), or (E); or any combination thereof.

Regulations: 25 CFR Part 900, Subpart E; 900.21; 900.22; 900.23.

30. What is declination under the Act?

Declination under the Act is a formal written decision by the Secretary to not enter into a self-determination contract.

Refer to Sec. 102(a)(2) of the Act.

Regulations: 25 CFR Part 900, Subpart E.

31. Because of the Departmental Manual (DM) 130, only the Regional Director can approve or decline a contract proposal. (True or False)

False.

The authority to approve and decline a self-determination contract proposal has been delegated from the Deputy Commissioner of Indian Affairs to each regional director.

NOTE: This was done initially through memorandum dated July 5, 1989 in response to the short time frame for approval or declination provided in Pub. Law 100-472, it has since been continued through 20 BIAM Supplement 2, Release 9442, as amended, and is now continued through the Indian Affairs Manual system. Each regional director has been delegated discretionary authority to further delegate this authority to select agency superintendents and line officials.

32. What are the statutory criteria for declining a contract proposal?

Sec. 102(a)(2) provides, in part, that ..."the Secretary shall, within 90 days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains specific finding that, or that is supported by a controlling legal authority that -

- (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
- (B) adequate protection of trust resources is not assured;
- (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
- (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a); or
- (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot be lawfully carried out by the contractor".

Regulations: 25 CFR Part 900, Subpart E; 900.22.

33. How long does the Secretary have to decline a contract?

Ninety (90) days.

Refer to Sec. 102(a)(2) of the Act.

Regulations: 25 CFR Part 900, Subpart E; 900.21 and 900.22.

34. Is a tribe or tribal organization required to enter into a contract at the request of the Secretary?

No.

One of the key principles of the Act is the recognition of an Indian tribe's inherent right to decide whether to enter into a self-determination contract, or to not enter into a contract.

35. Is there a time frame for review, approval or declination, and award of a proposal to amend or renew a self-determination contract?

Yes. Ninety (90) days.

Refer to Sec. 102(a)(2) of the Act, which states in part: "... a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within 90 days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains specific finding that, or that is supported by a controlling legal authority that..."

Refer to the declination criteria in Sec. 102(a)(2)(A) through (E).

Regulations: 25 CFR Part 900, Subpart C; 900.12; 25 CFR Part 900, Subpart D; 900.16; 900.18; and 25 CFR Part 900, Subpart E; 900.32 and 900.33.

36. Is there a time frame for review, approval or declination, and award of a proposal to redesign any program, activity, function, or services provided under a self-determination contract?

Yes. The time frames for review, approval, declination, or award, are the same ninety (90) days provided for in Sec. 102.

See Sec. 105(j) of the Act which refers back to Sec. 102 of the Act. Redesign proposals are processed in the same manner as new contract proposals.

Regulations: 25 CFR Part 900, Subparts C, D, & E for guidance.

37. The BIA may return a contract proposal or effectively stop the "clock" if a contract proposal is incomplete. (True or False)

False.

The Secretary is specifically mandated to approve the contract within ninety (90) days, unless he can demonstrate through written notification to the applicant tribe that a declination issue exists; and that the declination issue cannot be overcome by a contract or technical assistance; etc. If information critical to his decision is not available, he can request such information within the statutory 90 day time frame; or decline the contract proposal using one or more of the statutory declination criteria in Sec. 102(a)(2); or request an extension of time from the applicant tribe to attempt resolution of the issues. He may also approve a portion of the contract proposal that does not pose a declination issue and move toward a partial contract award then proceed with declination of the portion that poses a declination issue.

Regulations: 25 CFR Part 900, Subpart E - Declination Procedures.

38. Is there a time frame for review, approval or declination of a request to waive a provision of the regulations?

Yes. Ninety (90) days.

Refer to Sec. 107(e) of the Act, which refers to following the time line, findings, assistance, hearing, and appeal procedures set forth in Sec. 102 of the Act. The Secretary has 90 days to approve or deny a waiver request. If the request is denied, the Secretary must include a full explanation of the basis for the decision. Any denial is deemed a declination so the Secretary is required to comply with the declination criteria and procedures. If the request is not acted on for 90 days, the request is deemed approved.

Regulations: 25 CFR Part 900, Subpart K; 900.143; 900.144; and 900.145. Also refer to 25 CFR Part 900, Subpart L; 900.150.

39. Can the District Court reverse a declination finding?

Yes.

Sec. 110(a) provides that the United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency

thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract).

Regulations: 25 CFR Part 900, Subpart L; 900.150.

40. In a construction contract proposal, is the tribe or tribal organization required to include provisions regarding the use of licensed and qualified architects, health and safety standards, adherence to Federal, state, local, or tribal building codes and engineering standards?

Yes.

Sec. 102(a)(2) of the Act states in part that the contractor shall include in the proposal, standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards.

Regulations: 25 CFR Part 900, Subpart J; 900.125(1).

41. When funding is an issue, what must the BIA do?

Approve any severable portion of the contract proposal that does not support a declination finding. If the tribe proposes a level of funding in excess of the funding available, subject to any alteration in the scope of the proposal that is agreed to, approve the altered proposal and decline the balance. Refer to Sec. 106(a)(1) of the Act wherein it states in part, that the amount of funds provided under the terms of the contracts entered into shall not be less than the appropriate Secretary would have otherwise provided, without regard to any organizational level within the Department of the Interior at which the program is operated. Also refer to Sec. 106(b) of the Act which prohibits the reduction of funds for the contract except under certain circumstances. The Secretary is required under Sec. 106(c)(6) of the Act, to report any deficiency of funds to Congress.

Refer to Sec. 102(a)(4) of the Act.

Regulations: 25 CFR Part 900, Subpart E; 900.22(d).

42. When contractibility of a certain BIA program function is an issue, what must the BIA do?

Work with the tribe or tribal organization to define the scope of the program to be contracted; and carefully analyze the functions to determine which are trust functions and which are non-trust functions. Any trust functions then are identified and set aside as non-contractible; and the remainder of the functions can be contracted by the tribe or tribal organization. Failure to agree on these functions will require the Secretary to decline the contract proposal in accordance with Sec. 102(a)(2) of the Act.

Regulations: 25 CFR Part 900, Subpart E.

43. When the BIA issues a formal notice to decline a contract proposal, can a tribe or tribal organization go directly to the District Court rather than pursue the appeals process?

Yes.

An Indian tribe or tribal organization has the right to sue in Federal district court to challenge the Secretary's decision.

Refer to Sec. 102(b)(3); and Sec. 110(a) of the Act.

Regulations: 25 CFR Part 900, Subpart E; 900.31.

44. Construction contracts under the Act are subject to the Federal Acquisition Regulations (FAR). (True or False)

False.

Sec. 105(a)(3) states in part, that the Office of Federal Procurement Policy shall apply to self-determination construction contracts only to the extent that application of such provision is: (i) necessary to ensure that the contract may be carried out in a satisfactory manner; (ii) directly related to the construction activity; (iii) not inconsistent with the Act. This is commonly referred to as the "test of three". In addition, the Act in Sec. 4(j) defines a self-determination construction contract which states in part, that these contracts are not to be construed as procurement contracts.

Regulations: 25 CFR Part 900, Subpart J; 900.115. 25 CFR 900.115(b)(3) states in part, that no Federal law (including an Executive Order) relating to acquisition by the Federal government shall apply to a construction contract that an Indian tribe or tribal organization enters into under this Act, unless expressly provided in the law.

45. What criteria must be met before the provisions of the Federal Property and Procurement Policy Act and the regulations relating to acquisitions, may be considered to apply to construction contracts under the Act?

Sec. 105(a)(3)(A) states in part, the Federal Property and Procurement Policy Act (41 U.S.C. 401 et. seq.), and regulations relating to acquisitions promulgated under such act apply only to the extent application of such regulation is : (i) necessary to ensure that the contract may be carried out in a satisfactory manner; (ii) directly related to the construction activity; and (iii) not inconsistent with the Act.

Regulations: 25 CFR Part 900, Subpart J; 900.115(b)(1); and refer to the discussion in question No. 44.

46. Advance payments are allowed under a non-construction contract, but are not allowed under a construction contract under the Act. (True or False)

False.

Sec. 105(b) of the Act provides that payments for contracts pursuant to Sec. 102 of the Act may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary.

Regulations: 25 CFR Part 900, Subpart J; 900.132 provides that a schedule for advance payments be developed based on progress, need, and other considerations, for incorporation into the contract. If the contract does not provide for the length of each allocation period, the Secretary is required to make at least quarterly payments.

NOTE: This subject remains an issue between the BIA and the Department of Transportation (DOT), Federal Lands Highway Administration (FLHA). It has been agreed that advance payments can be made for a construction contract when the specific advance payment procedure to be used has been approved by the BIA Division of Transportation.

47. Tribes and tribal organizations, when contracting under the Act, are excluded from the Davis-Bacon Act. (True or False)

True.

A tribe or a tribal organization as a "contractor" or a "subcontractor" is excluded from the applicability of the Davis-Bacon Act, but when it subcontracts any portion of the program, project, function, or activity, the subcontractor is subject to the applicability of the Davis-Bacon Act.

Refer to Sec. 7(a) of the Act.

48. Once a tribe contracts a BIA program, it must wait a year before it can retrocede a program because of a contractual relationship between a tribe and the BIA. (True or False)

False. An Indian tribe or tribal organization may retrocede a program at any time for any reason(s).

Sec. 105(e) of the Act, and 25 CFR Part 900, Subpart P; 900.242, requires in part, that the retrocession shall be effective on:

- (1) the earlier date of
 - (A) the date that is one year after the date the Indian tribe or tribal organization submits such a request; or
 - (B) the date on which the contract expires; or
- (2) such date as may be mutually agreed by the Secretary and the Indian tribe.

Regulations: 25 CFR Part 900, Subpart P; 900.242

49. Conversely, a tribe that enters into a self-governance compact, cannot retrocede the programs to the Secretary. (True or False)

False. An Indian tribe or tribal organization has the same rights to retrocede a self-governance compact as provided for under Title I of the Act.

Sec. 303(a)(8) and 403(b)(7) of the Act provide for retrocession of self-governance compacts under the provisions in Sec. 105(e) of the Act.

Regulations: 25 CFR Part 900 does not cover self-governance compacts.

50. A tribal organization that is not a governing body, cannot retrocede a contracted program. (True or False)

False. A tribal organization that is not governing body, can retrocede a contracted program.

Refer to Sec. 105(e) of the Act.

Regulations: 25 CFR Part 900, Subpart P; 900.240 and 900.241.

NOTE: Public Law 103-413 provided for this change in authority which was designed primarily to address the unique circumstances in Alaska. Heretofore, only a governing body of an Indian tribe had the authority to decide to retrocede a program to the Secretary.

51. For what reason(s) may a tribe or tribal organization retrocede a program?

For any reason.

One of the principal tenets of the Act is the recognition of a tribe's inherent right to decide to contract or not contract; and 25 CFR Part 900, Subpart A; 900.3(b)(5) acknowledges this right. It states the Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

52. What requirements must a tribe or tribal organization meet before it can return a contract to the BIA?

Nothing.

There are no special requirements tribes and tribal organizations must meet, except to notify the BIA of their decision; and upon the effective date of the Bureau's reassumption of the program, return any property that has a value in excess of \$5,000 at the time of the retrocession or other equipment that the Bureau requests to continue the program.

Refer to Sec. 105(f)(2)(B).

Regulations: 25 CFR Part 900, Subpart P; 900.245; and 25 CFR Part 900, Subpart I; 900.89; 900.93; 900.100; and 900.106.

53. Once a tribe retrocedes a program, it loses its right to contract for the same program. (True or False)

False.

Regulations: 25 CFR Part 900, Subpart P; 900.243, wherein it states that contract retrocession shall not negatively affect any other contract to which it is a party; any other contract it may request; and any future request by the Indian tribe or tribal organization to contract for the same program.

NOTE: Again, this provision goes back to one of the primary tenets of the Act, and that is the recognition of an Indian tribe's inherent right to decide to contract.

54. The BIA can, for a specific reason(s), take over a contracted program from a tribe or tribal organization. (True or False)

True.

The Bureau can reassume a contracted program for a number of reasons. See the discussion below under question No. 55.

Regulations: 25 CFR Part 900, Subpart P; 900.247; 900.248; 900.252.

55. If the above is true, under what circumstance(s) can this happen?

The Bureau may reassume a contracted program under two major circumstances:

- (1) *Emergency Reassumption* when the contractor has failed to fulfill the requirements of a contract and this failure poses:
 - (A) an immediate threat of imminent harm to the safety of any person; or
 - (B) imminent substantial and irreparable harm to trust funds, trust lands, or interest in such lands; or
- (2) *Non-Emergency Reassumption* if there has been:
 - (A) a violation of the rights or endangerment of the health, safety, or welfare of any person; or
 - (B) gross negligence or mismanagement in the handling or use of contract funds, trust funds, trust lands, or interests in trust lands under the contract.

Sec. 109 of the Act provides that the Secretary may reassume, in whole or in part, a program in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves: (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons'; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, or in the management of trust fund, trust lands, or interest in such lands pursuant to such contracts or grant agreement".

Regulations: 25 CFR Part 900, Subpart P; 900.247, 900.248; 900.252.

56. The decision to reassume a contracted program rests solely with the Regional Director because of the delegated authority from the Deputy Commissioner of Indian Affairs. (True or False)

False.

Through the delegation of authority from the Deputy Commissioner of Indian Affairs to the regional directors and the subsequent delegation of authority to agency superintendents and line officials by the regional directors, this authority has been delegated to agency superintendents and line officials as Approving Officials. Where the delegation has not occurred from the regional office, the Regional Director retains this authority.

57. A tribe or tribal organization is entitled to use BIA property under the contract, but it must return this property upon retrocession. (True or False)

True.

Although the Bureau is obligated by Sec. 105(f)(1) of the Act to permit a tribe or tribal organization to utilize facilities and equipment and other personal property owned by the government to carry out the contracted programs, a tribe or tribal organization must return all government-furnished property, and pursuant to Sec. 105(f)(2) of the Act all donated property and/or property acquired with contract funds, having a fair market value of \$5,000 or more at the time of retrocession to the Bureau, if the property will be needed by the Bureau for the continued operation of the program. This does not apply to excess or surplus Government property of other Federal agencies acquired for donation to an Indian tribe or tribal organization.

Regulations: 25 CFR Part 900, Subpart I, 900.89, 900.93, and 900.100; Subpart P, 900.245; and the discussion on question No. 52.

58. When property is donated to a tribe or tribal organization, who has title to the donated property: the BIA or the tribe?

The tribe or tribal organization has title to any donated property.

Sec. 105(f)(2) of the Act states in part, that title to donated personal and real property found to be excess to the needs of the Bureau of Indian Affairs, Indian Health Service, or GSA, shall vest in the appropriate tribe or tribal organization. Sec. 105(f)(2)(C) further states this property is eligible for replacement on the same basis as if title to such property were vested in the United States.

Regulations: 25 CFR Part 900, Subpart I.

59. Can the BIA acquire excess or surplus property of other federal agencies for donation to a tribe or tribal organization for use under the contract?

Yes.

Sec. 105(f)(3) of the Act provides authority for the Secretary to donate to an Indian tribe or tribal organization, title to any personal or real property found to be excess to the needs of the Bureau, IHS, or the General Services Administration.

Regulations: 25 CFR Part 900, Subpart I; 900.95 and 900.102.

60. In the event of a contract retrocession or reassumption, can the BIA take back property donated to a tribe or tribal organization? If so, under what circumstance(s)?

Yes. Only if the property in question has a value of \$5,000 or more at the time of such retrocession or reassumption.

Sec. 105(f)(1) and (2).

Regulations: 25 CFR Part 900, Subpart I; 900.89, 900.93, and 900.100.

61. Can a tribe that is not party to a self-determination contract, but believes the contract will limit or reduce in any way the funding that is available to the tribe, go to Federal court and stop the contract?

Yes.

Sec. 105(i)(1) and (2) of the Act requires the Secretary to take action necessary to ensure services are provided to tribes not served by the proposed contract, including dividing the administration of the program. Sec. 105(i)(2) further provides that services to non-contracting tribes must not be limited or reduced; and provides any tribe that may be adversely impacted by a proposed contract may apply the provisions in Sec. 110 of the Act, which means filing a civil action or claim against the Secretary for money damages. In his review of the contract proposal, the Secretary must apply the statutory declination criteria in Sec. 102(a)(2) of the Act and 25 CFR Part 900, Subpart D; 900.22, to determine whether the proposed contract will have an adverse impact on the non-contracting tribes.

62. Is the BIA required to enter into a lease if a tribe or tribal organization, has a facility to use for the program and requests such a lease? If so, under what condition(s)?

Yes.

Sec. 105(l)(1) of the Act requires the Secretary, upon request by an Indian tribe, to enter into a lease with an Indian tribe that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe for the administration and delivery of services under the Act. Sec. 105(l)(2) further authorizes compensation either through rent, depreciation based on the useful life of the facility, principal or interest paid or accrued, operation and maintenance expenses, and other reasonable expenses that the Secretary determines by regulation, to be allowable.

Regulations: 25 Part 900, CFR Subpart H.

63. What costs may be included in a tribe's request to carry out the contract which normally are not carried out by the Secretary in his direct operation of the program, or are provided by the Secretary in support of the contracted program from resources other than those under the contract?

Contract Support Costs.

Sec. 106(a)(1) requires that the amount of funds provided under a contract shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs without regard to the organizational level within the Department of the Interior or the Department of Health & Human Services.

It further states in Sec. 106(a)(2), there shall be added to the amount of the contract, (1) *contract support costs* which shall consist of an amount for the reasonable costs for activities which must be carried on by the tribe as a contractor to ensure compliance with the terms of the contract and prudent management, but which (A) normally are not carried on by the respective Secretary in his direct operation of the program; (B) are provided by the Secretary in support of the contracted program from sources other than those under contract.

Contract support costs shall include costs of reimbursing each tribal contractor for reasonable and allowable costs of (i) direct program expenses for the operation of the contracted program; (ii) any additional administrative or other expenses related to the overhead incurred by the tribal contractor in connection with the operation of the program, function, service, or activity, *except* that such funding shall not duplicate any funding provided under Sec. 106(a)(1) of the Act.

64. Are pre-award and start-up costs allowable under a contract? Under what conditions?

Yes.

Refer to Sec. 106(a)(5) and (6) of the Act.

Regulations: 25 CFR Part 900, Subpart C; 900.7, where it states "(a)n Indian tribe or tribal organization may also request reimbursement for pre-award costs for obtaining technical assistance under sections 106(a)(2) and (5) of the Act. In addition 25 CFR Part 900, Subpart C; 900.8(h)(2) provides for tribes and tribal organizations to identify the amount of direct contract support costs, including one-time start-up or pre-award costs under section 106(a)(2) and related provisions of the Act. This section lists the type of costs that are allowable as pre-award and start-up costs.

65. What is an indirect cost?

The Act, in Sec. 4(f), defines "indirect costs" as costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved.

66. What is an indirect cost rate?

The Act, in Sec. 4(g), defines an "indirect cost rate" as the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency.

NOTE: An indirect cost rate is the ratio between an organization's indirect cost pool and direct cost base. It is expressed as a percentage.

67. An indirect cost pool cannot include costs associated with tribal council expenses, such as meeting stipends, salaries, etc., because these costs are not allocable to the BIA contracted programs. (True or False)

False.

An indirect cost pool can include tribal council expenses and any other overhead or administrative type costs that a contractor must incur to operate the contracted programs. The concept here is that the tribal council performs oversight functions for the programs administered by the tribe, and, therefore, may include the costs incurred in the performance of those functions in its indirect cost pool. A general rule of thumb by the Office of Inspector General (OIG), is to allow up to 50% of the tribal council expenses with no requirement for the tribal council to document its time spent in performance of these oversight functions.

68. Can the BIA suspend, withhold, or delay the payment of funds under a contract?

Yes.

Sec. 106(l)(1) of the Act provides the authority for the Secretary to suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause.

Regulations: 25 CFR Part 900, Subpart L; 900.150.

69. What is Section 108 of the Act?

The "Model Contract" for Sec. 102 programs.

Sec. 108 of the Act prescribes provisions for a model contract to be used in awarding contracts for Sec. 102 programs. Excluded are self-determination construction contracts, see Sec. 105(m)(1)(A) of the Act. Construction contracts are separately defined in the Act and are subject to a separate proposal and review process.

Regulations: 25 CFR Part 900, Subpart J; 900.114.

70. The Contract Disputes Act does not apply to self-determination contracts because self-determination contracts are not considered procurement contracts. (True or False)

False.

While contracts under the Act are not procurement contracts, Sec. 110(d) of the Act provides that the Contract Disputes Act of 1978, shall apply to contracts awarded under the Act, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals (IBCA), established pursuant to section 8 of such Act (41 U.S.C. 607).

Sec. 110(a) of the Act grants Federal District Court jurisdiction for any civil action or claim under the Act against the Secretary and grants the U.S. Court of Claims concurrent jurisdiction over such an action or claim for money damages. The District Court may order appropriate relief including money damages, injunctive relief against any action contrary to the Act or regulations, or mandamus to compel performance under the Act or regulations.

Regulations: 25 CFR Part 900, Subpart N; 900.215 - 900.230.

71. The Federal Tort Claims Act (FTCA) does not apply to self-determination contracts because tribes and tribal organizations are required by the Act to carry their own liability insurance coverage. (True or False)

False.

The Federal Tort Claims Act (FTCA) applies to contracted programs under the Act. For the purposes of a claim under the FTCA, the contractor is considered to be the BIA or the IHS; and the contractor's employees are considered to be BIA or IHS employees. Sec. 102(c) of the Act provides that the Secretary shall provide liability insurance or equivalent coverage for tribal organizations carrying out self-determination contracts. The Secretary must give preference to coverage underwritten by Indian-owned economic enterprises and consider the extent of liability covered by the Federal Tort Claims Act (FTCA).

Regulations: 25 CFR Part 900, Subpart M; 900.180 - 900.210.

72. The Equal Access to Justice Act (EAJA) does not apply to self-determination contracts because self-determination contracts are not procurement contracts. (True or False)

False.

Sec. 110(c) of the Act provides for Equal Access to Justice Act provisions to apply to self-determination contracts thereby entitling tribal organizations to reimbursement for their expenses in a successful administrative appeal against the Secretary. Cases filed under the EAJA are heard by the Interior Board of Indian Appeals (IBIA) under 43 CFR 4.601-4.619.

Regulations: 25 CFR Part 900, Subpart L; 900.177.

73. The Office of Management and Budget (OMB) circular, or the "common rule" does not apply to tribes and tribal organizations contracting under the Act because tribes are required to maintain their own management policies and procedures. (True or False)

True and False. The only provisions of OMB Circulars and the only provisions of the Common Rule that apply to contracts are found in 25 CFR Part 900, Subpart F, or those expressly agreed to in a contract under the Act. Indian tribes are required to maintain management systems as a prerequisite to contracting under the Act.

Refer to Sec. 107(a)(1) of the Act. [See also Sec. 5 (Reporting and Audit Requirements); Sec. 102(a)(2), flush language (Program Standards); Sec. 105(a)(1) (Administrative Provisions) applicability of laws; and Sec. 108]

Regulations: 25 CFR Part 900, Subpart F, 900.37

NOTE: The Common Rule is implemented by the Department of the Interior in 43 CFR Part 12. It provides minimum standards which management systems must meet. However, in crafting the regulations, Indian tribes were careful not to allow for a blanket applicability of the Common Rule or other OMB circulars to self-determination contracts.

74. The Single Audit Act requires tribes and tribal organizations to audit each contracted program at least once each year. (True or False)

False.

Audits conducted under the Single Audit Act (Pub. Law 98-502) do not include every contracted program. Audits under Single Audit Act are organization-wide audits; and programs audited are selected based on dollar thresholds and sampling techniques. The Single Audit Act Amendments of 1996 (Pub. Law 104-156) raises the dollar thresholds and creates another criteria, that instead of using the amount of funds an organization receives annually, it uses the amount of an organizations annual expenditures (\$300,000 in an organization's fiscal year).

Sec. 5(f)(1) of the Act requires that for each fiscal year which an Indian tribe and tribal organization receives or expends funds pursuant to the contract entered into, or grant made, under the Act, the tribal organization shall submit to the appropriate Secretary a single-agency audit report required under Chapter 75 of title 31, U.S.C. In addition, a tribe or tribal organization must provide additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.

Regulations: 25 CFR Part 900, Subpart F; 900.40(b).

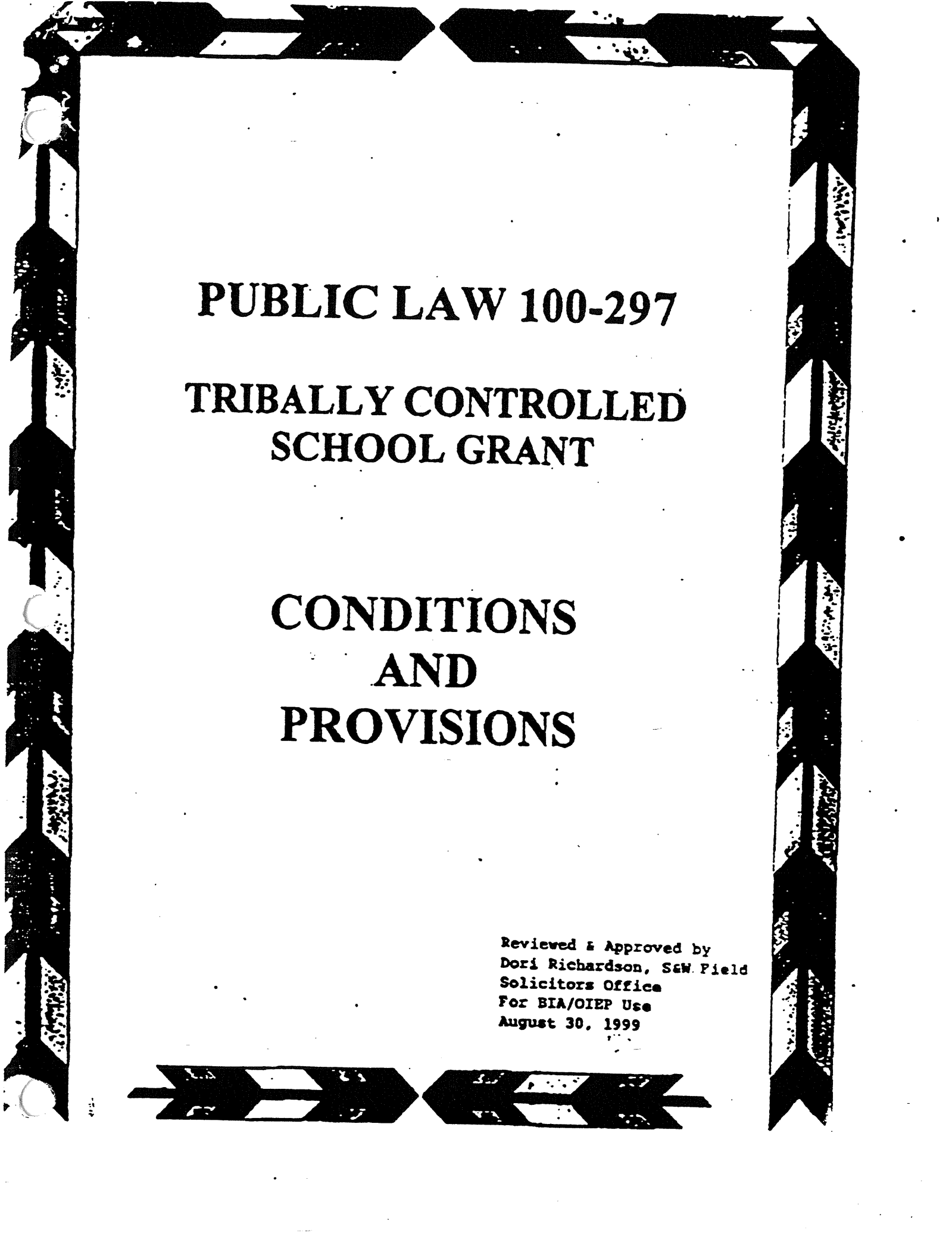
75. What programmatic reports are required under self-determination contracts?

Unless required by statute, there are no mandatory programmatic reporting requirements.

Each tribe or tribal organization shall negotiate with the Secretary, the type and frequency of program narrative and program data reports which respond to the needs of the contracting parties; and that are appropriate for the purposes of the contract. Any disagreements over reporting requirements are subject to the declination criteria and procedures in Sec. 102 of the Act. 25 CFR Part 900, Subpart C; 900.8(g)(5) requires the tribe to identify program reports, data, and financial reports it will provide, in its contract proposal.

Refer to Sec. 5(f) of the Act.

Regulations: 25 CFR Part 900, Subpart G; 900.65 - 900.68.



PUBLIC LAW 100-297
TRIBALLY CONTROLLED
SCHOOL GRANT

CONDITIONS
AND
PROVISIONS

Reviewed & Approved by
Dori Richardson, S&W Field
Solicitors Office
For BIA/OIEP Use
August 30, 1999

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**Title V - Part A
Trially Controlled School Grant**

SPECIAL CONDITIONS

- I. PURPOSE OF ADMINISTRATIVE COST GRANTS**
- II. PAYMENTS OF GRANTS**
- III. METHOD OF PAYMENT**
- IV. EXPENDITURE OF ADMINISTRATIVE COST GRANTS**
- V. ADMINISTRATIVE COST GRANTS COORDINATION**
- VI. FUND ADJUSTMENTS**

Public Law 100-297

**Title V - Part A
Administrative Cost Grants**

SPECIAL CONDITIONS

I. Purpose of Administrative Cost Grants

- A. Administrative cost grants are to meet costs of necessary administrative functions which:
1. The tribe or tribal organization incurs as a result of operating a tribal elementary or secondary education program.
 2. Are not customarily paid by comparable Bureau-operated programs out of direct program funds and either
 - a. Normally provided for comparable Bureau programs by federal officials using resources other than Bureau direct program funds, or
 - b. Are otherwise required of tribal self-determination program operators by law or prudent management practice.
- B. The Grantee shall provide all related administrative overhead services and operations necessary to meet the requirements of law and prudent management practice.
- C. The Grantee shall carry out other necessary support functions, which would otherwise be provided by the Secretary of the Interior or other federal officers and employees from funds provided for administrative cost purposes.

II. Payments of Grants

- A. One payment to be made no later than July 15 of each year in an amount equal to one-half of the amount which the Grantee was entitled to receive during the preceding academic year, and
- B. The second payment, consisting of the remainder to which the Grantee is entitled for the academic year, shall be made not later than December 1 of each year.

- C. For any school for which no payment was made from Bureau funds in the preceding academic year, full payment of the amount computed for the first academic year of eligibility under this part shall be made not later than December 1 of the academic year.
- D. With regard to funds for Grantees that become available for obligation on October 1 of the fiscal year for which such funds are appropriated, the Secretary shall make payments to grantees not later than December 1 of the fiscal year.
- E. Payments shall be subject to any restriction that may be imposed by a Continuing Resolution or other act appropriating the funds involved.

III. Method of Payments

Payments to Grantees shall be accomplished by "Electronic Transfer of Funds" through the Federal Reserve Communications System. The Grantee shall furnish the Bureau of Indian Affairs with the American Bank Association number and Bank Account number to which the funds are to be deposited.

IV. Expenditure of Administrative Cost Grants

- A. Costs of necessary administrative functions which the Tribe or Tribal Organization incurs as a result of operating a tribal elementary or secondary educational program required of tribal self-determination program operators by law or prudent management practice includes but are not necessarily limited to:
 - 1. Contract (or other agreement) administration;
 - 2. Executive, policy, and corporate leadership and decision making;
 - 3. Program planning, development, and management;
 - 4. Fiscal, personnel, property, and procurement management;
 - 5. Related office services and record-keeping;
 - 6. Costs of necessary insurance, auditing, legal, safety and security services.

V. Administrative Cost Grant Coordination

- A. Funds received as "administrative cost grants" may be combined into a single administrative cost account without the necessity of maintaining separate funding source accounting.

- B. Indirect cost funds for programs at the school which share common administrative services with tribal elementary or secondary educational programs may be included in the administrative cost account described in A above.
- C. Funds received as administrative cost grants with respect to elementary or secondary education programs shall remain available without fiscal year limitation and without diminishing the amount of any grants otherwise payable to the school as administrative cost for any fiscal year beginning after the fiscal year for which the grant is provided.
- D. Funds received as grants shall not be taken into consideration for purposes of indirect cost under-recovery and over-recovery determinations by any Federal Agency for any other funds, from whatever source derived.

VI. Fund Adjustments

Funds provided under this part are subject to adjustments based upon the availability of funds and/or changes in program needs or requirements.

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**Title V - Part B
Trially Controlled School Grant**

SPECIAL CONDITIONS

- I. PURPOSE OF TRIBALLY CONTROLLED SCHOOL GRANTS**
- II. PAYMENTS OF GRANTS**
- III. METHOD OF PAYMENT**
- IV. INVESTMENT OF FUNDS**
- V. RECOVERIES**
- VI. USE OF FUNDS**
- VII. GENERAL SERVICES ADMINISTRATION (GSA)**
- VIII. RETROCESSION**
- IX. HEARINGS AND APPEALS**
- X. ANNUAL REPORT OF SCHOOL OPERATIONS**
- XI. FUND ADJUSTMENTS**
- XII. EMPLOYEE BACKGROUND INVESTIGATIONS**
- XIII. REPORTING INCIDENCES OR SUSPECTED INCIDENCES OF CHILD ABUSE AND NEGLECT**
- XIV. CHILD PROTECTION CHECKLIST**

Public Law 100-297

**Title V - Part B
Tribally Controlled School Grants**

SPECIAL CONDITIONS

I. Purpose of Tribally Controlled School Grants

The purpose of this grant is to allow the Grantee and the Tribally Controlled School Boards to defray expenditures, for education related activities from funds composing the grant, in the operation of the Tribally Controlled School with the least possible Federal interference.

Grants provided under Public Law 100-297 may not be terminated, modified, suspended or reduced only for the convenience of the administering agency. 25 USC 2506 shall apply in determining the duration of eligibility as a Tribally Controlled School.

II. Payment of Grants

- A. One payment to be made no later than July 15 of each year in an amount equal to one-half of the amount which the Grantee was entitled to receive during the preceding academic year.
- B. The second payment, consisting of the remainder to which the Grantee is entitled for the academic year, shall be made no later than December 1 of each year.
- C. For any school for which no payment was made from Bureau funds in the preceding academic year, full payment of the amount computed for the first academic year of eligibility under this part shall be made no later than December 1 of the academic year.
- D. With regard to funds for Grantees that become available for obligation on October 1 of the fiscal year for which such funds are appropriated, the Secretary shall make payments to Grantees not later than December 1 of the fiscal year.
- E. Payments shall be subject to any restriction that may be imposed by a Continuing Resolution or other act appropriating the funds involved.

III. Method of Payment

Payments to Grantees shall be accomplished by "Electronic Transfer of Funds" through the Federal Reserve Communications System. The Grantee shall furnish the Bureau of Indian Affairs with the American Bank Association number and Bank Account number to which the funds are to be deposited.

IV. Investment of Funds

Funds provided may be invested by the Indian Tribe or Indian Organization in accordance to 25 USC 2507 (b)(2):

- A. Only in obligations of the United States or in obligations or securities that are guaranteed or insured by the United States; or mutual (or other) funds registered with the Securities and Exchange Commission and which only invest in obligations of the United States or securities that are guaranteed or insured by the United States; or,
- B. Deposited only into accounts that are insured by an Agency or Instrumentality of the United States, or fully collateralized to ensure protection of the fund, even in the event of a bank failure.

Any interest or investment income that accrues on any funds provided for a Tribally Controlled School after such funds are paid to the Tribe or Tribal Organization, and before such funds are expended for the purposes for which such funds were provided for such School, shall be the property of the Indian Tribe or Tribal Organization and shall not be taken into account by any Officer or Employee of the Federal Government in determining whether to provide assistance, or the amount of assistance, under any provision of Federal Law.

V. Recoveries

For the purposes of under-recovery and over-recovery determinations by any Federal Agency for any other funds from whatever source derived, funds received for Tribally Controlled School grants shall not be taken into consideration.

VI. Use of Funds

- A. Grants shall be deposited into the General Operating Fund for the school to be used to defray, at the discretion of the School Board, any expenditures for education related activities for which the funds that compose the grant may be used under the authority of 25 USC 2503 (B).

Such expenditures include, but are not limited to: School Operations, Academic, Educational, Residential, Guidance and Counseling, and Administrative purposes, and

- Support Services for the school, including Transportation. Refer to 25 USC 2503 (a)(3)(A).
- B. Tribally Controlled School grant funds will not be expended for Administrative Costs in excess of the amount generated for such costs.
 - C. Grant funds received will not be used in connection with religious worship or sectarian instruction.
 - D. Each school site for which a discreet Student Count is identified under the funding formula established under Section 1128 of the Education Amendments of 1978 shall expend no more than the lesser of:
 - 1. Ten percent (10%) of the funds allocated for a School under Section 1128 of the Education Amendments of 1978; or
 - 2. \$400,000 of such funds, at any other school site.
(These restrictions apply to payments for cooperative agreements.)
 - E. Grant provided under this chapter may, at the discretion of the Grantee of the Tribally Controlled School with respect to which such grant is provided, be used to defray operation and maintenance expenditures for the school if any funds for the operation and maintenance of the school are allocated to the school under the provisions of any of the laws described in Section 25 USC 2504 (a) of this title. Refer to 25 USC 2503 (B).
 - F. Funds allocated to the School under the Elementary and Secondary Education Act of 1965 as amended, the Education of the Handicapped Act, or any other federal education law other than Title XI of the Education Amendments of 1978, and included in this grant, a portion of the grant equal to the amount of the funds allocated under such Law shall be expended under the terms of such law.
 - G. Grantee shall not be subject to any requirements, obligations, restrictions, or limitations imposed by the Bureau of Indian Affairs that would otherwise apply solely by the reason of the receipt of funds provided under the Elementary and Secondary Education Act of 1965, as amended, the Education of the Handicapped Act, P.L. 94-142, or any federal education law other than Title XI of the Education Amendments of 1978. Refer to 25 USC 2503 (a)(3).

VII. General Services Administration (GSA)

Tribal Grantees are allowed, at their discretion, to use GSA sources of supplies and services.

VIII. Retrocession

Whenever a tribal governing body requests retrocession of any program for which assistance is provided under this chapter, such retrocession shall become effective upon a date specified by the Secretary not more than 120 days after the date on which the tribal governing body requests the retrocession, or such later date as may be mutually agreed upon by the Secretary and the tribal governing body. If such a program is retroceded, the Secretary shall provide to any Indian tribe served by such program at least the same quantity and quality of services that would have been provided under such program at the level of funding provided under this chapter prior to the retrocession. The tribe requesting retrocession shall specify whether the retrocession is to status as a Bureau school or as a contract school under Title XI of the Education Amendments of 1978 [25 U.S.C. 2001 et seq.]. Except as otherwise determined by the Secretary, the tribe or tribal organization operating the program to be retroceded must transfer to the Secretary (or to the tribe or tribal organization which will operate the program as a contract school) the existing equipment and materials which were acquired: (1) with assistance under this chapter, or (2) upon assumption of operation of the program under this chapter if it was a Bureau funded school under Title XI of the Education Amendments of 1978 before receiving assistance under this chapter. As referred in 25 USC 2503(f).

IX. Hearings and Appeals

The Tribe(s) or Tribal Organization(s) shall be provided a hearing on the record and an opportunity to appeal under the same rules that apply under the Indian Self-Determination and Education Assistance act. Refer to 25 USC 450m-1, or 25 USC 2508 (e).

X. Annual Report for School Operations

The Grantee shall submit to the Secretary and to the Tribal Governing body of the Tribally Controlled School an Annual Report that shall be limited to:

- A. An Annual Financial Statement reporting revenue and expenditures as defined by the cost accounting established by the Grantee.
- B. An annual submission of the number of students served and a brief description of programs offered under the grant.

C. A Bi-annual Financial Audit conducted to the standards of the Single Audit Act of 1984.

D. A Program Evaluation conducted by an impartial entity, based on at least one of the following criteria:

1. The School is Certified or Accredited by a State or Regional Accrediting Association as determined by the Secretary of Education, or is a candidate in good standing for such accreditation under the rules of the State or Regional Accrediting Association, showing that credits achieved by students within the education programs are, or will be, accepted at grade level by a State Certified or Regionally Accredited Institution.
2. A determination made by the Secretary that there is a reasonable expectation that the accreditation described in sub-clause (1), or the candidacy in good standing for such accreditation, will be reached by the School within 3 years and that the program offered by the school is beneficial to the Indian Students.
3. The school is accredited by a Tribal Department of Education if such accreditation is accepted by a generally recognized Regional or State Accreditation Agency.
4. The school accepts the standards promulgated under section 1121 of the Education Amendments of 1978 and an evaluation of performance is conducted under this section in conformance with the regulations pertaining to Bureau-operated schools by an impartial evaluator chosen by the grantee, but no grantee shall be required to comply with these standards to a higher degree than a comparable Bureau-operated school.
5. A positive evaluation of the school is conducted once every 3 years under standards adopted by the contractor under a contract for a school entered into under the Indian Self-Determination and Education Assistance Act prior to the date of enactment of this act, such evaluation to be conducted by an impartial evaluator agreed to by the Secretary and the Grantee. If the Secretary and a Grantee other than the Tribal Governing body fail to agree on such an Evaluator, the Tribal Governing body shall choose the Evaluator or perform the evaluation. If the Secretary and a Grantee which is the Tribal Governing body fail to agree on such an Evaluator, this subclause shall not apply.

XI. Fund Adjustments

Funds provided under this part are subject to adjustments based upon the availability of funds and/or changes in program needs or requirements.

XII. Employee Background Investigations

Compliance to the United States Department of the Interior, Bureau of Indian Affairs, Child Protection Handbook is mandatory for Bureau Operated Schools, Public Law 93-638 Contract Schools, and Public Law 100-297 Tribally Controlled Grant Schools. The Handbook provides the key administrative and program elements of Public Laws:

99-570 – "Indian Alcohol and Substance Abuse Prevention and Treatment Act" of 1986

101-630 – "Indian Child Protection and Family Violence Prevention Act" of 1990

101-647 – "Crime Control Act, Child Care Worker-Employee Background Checks" of 1990.

ACCOUNTABILITY. All BIA, tribal, grant, contract, and self-governance programs are required to comply with existing federal laws. This includes the following requirements: background investigations, mandatory reporting, failure to report penalties, cross reporting between law enforcement and child protection services, confidentiality, and child abuse investigation requirements or waivers.

Minimum investigation requirements:

- A. Conduct an investigation of the character of each individual who is employed or is being considered for employment, by such Tribe or Tribal Organization, in a position that involves regular contact with, or control over, Indian Children.
- B. Employ individuals in those positions only if the individuals meet standards of character, no less stringent than those prescribed under section 408(b) - A Minimum standards shall ensure that no individual has been found guilty of, or entered a plea of no contest or guilty to any offense under Federal, State or Tribal law involving crimes of violence, sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.
- C. Under the authority of 25 CFR Section 63.16(b) – A Indian Tribe(s) and Tribal Organization(s) may conduct their own background investigations, contract with private firms, or request the Office of Personnel Management (OPM) to conduct an investigation that covers the past five years of the individuals employment, education, etc.
- D. Under the authority of 25 CFR Section 63.22(b) – A Indian Tribe(s) and Tribal Organization(s) must identify those positions which permit contact with or control over Indian Children and establish standards to determine suitability for employment. Standards should then be used to determine whether an individual is suitable for employment in a position that permits contact with or control over Indian Children.

If not, the individual may only be placed in a position that does not permit contact with or control over Indian Children.

- E. These regulations are applicable to volunteers who have regular contact with or control over, Indian children in Bureau funded schools, residential facilities, and out-of-home educational care. Refer to 25 USC 3202 Section 403 (14).

XIII. Reporting Incidents or Suspected Incidents of Child Abuse and Neglect

The United States Department of the Interior, Bureau of Indian Affairs' Child Protection Handbook, requires that Tribes and Tribal Organizations (Grant Schools) report incidents or suspected incidences of child abuse and neglect which have occurred, which are occurring, or which may occur, to local law enforcement, the local child protection services agency or the Child Abuse Hotline 1-800-633-5155.

Specifically, each Indian Tribal or Tribal Organization (Grant School) that receives funds under the Indian Self-Determination and Education Assistance Act and/or the Tribally Controlled Schools Act of 1988 shall ensure that:

- A. Through training and informing, all school employees are aware that they are required to immediately report (no later than 24 hours from the time the incident is brought to their attention) incidents or suspected incidents of child abuse or child neglect occurring, which have occurred, or which may occur to their local law enforcement agency, to child protective services or to the BIA National Child Abuse Prevention Hotline;
- B. Through training and informing, all school employees are aware that failure to report suspected child abuse or neglect may subject the school employee to a fine or jail sentence and/or administrative penalties as prescribed by the law;
- C. The identity of any person making a report shall not be disclosed without the consent of the person making the report;
- D. Any person making a report based upon their reasonable belief, and made in good faith shall be immune from civil and criminal liability for making that report; and
- E. Retaliation against an employee for reporting suspected child abuse is prohibited.

Child Protection Checklist

In carrying out the requirements of the above cited laws, the Bureau of Indian Affairs, Office of Indian Education Programs requires that the Tribally Controlled Schools complete and sign a Child Protection Checklist which is to be submitted to their designated Bureau of Indian Affairs, Education Line Officer no later than October 1 of each year.

Specifically, based on a directive from the Director of the Office of Indian Education programs, titled a Child Protection Checklist dated November 15, 1995, each bureau funded school is to have on file a current and up-to-date Child Protection Checklist which ensures that:

- A. A staff member is identified who will coordinate child protection issues;
- B. Background checks for all employees and volunteers have been completed;
- C. Student and staff handbooks include a statement on the schools written policy for child protection and which explains the process for the mandated reporting of suspected child abuse;
- D. The school has on file at least the following information: Public Law 101-630; 25 CFR Part 63; current copies of the Child Protection Handbook; Reporting Guidelines for Suspected Child Abuse Memorandum of April 18, 1994; a current list of local Child Protection resources and service providers; and the current BIA National Child Abuse Prevention Hotline number; and
- E. Yearly, and as needed, child protection training sessions conducted for all school employees, volunteers, school board members, and students.

Public Law 100-297

Tribally Controlled School Grant

SCHOOL OPERATIONS

GENERAL PROVISIONS

- I. GENERAL**
- II. REPORTING AND AUDIT REQUIREMENTS**
- III. PENALTIES**
- IV. WAGE AND LABOR STANDARDS**
- V. PERSONNEL**
- VI. REASSUMPTION OF PROGRAMS**
- VII. EFFECT ON EXISTING RIGHTS**

Public Law 100-297

Tribally Controlled School Grant

SCHOOL OPERATIONS

GENERAL PROVISIONS

I. General

All provisions of sections 5, 6, 7, 104, 109, and 110 of the Indian Self-determination Act (25 USC, 450c, 450d, 450 e, 450i, 450j(f), 450j-1(e), 450m, and 450n), as amended, except those pertaining to indirect costs and length of contract, shall apply to Tribally Controlled School Grants.

II. Reporting and Audit Requirements

(a)(1) Each recipient of federal financial assistance under this act shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of Title 5, United States Code, including records which fully disclose -

(A) The amount and disposition by such recipient of the proceeds of such assistance,

(B) The cost of the project or undertaking in connection with which such assistance is given or used,

(C) The amount of that portion of the cost of the project or undertaking supplied by other sources, and

(D) Such other information as will facilitate an effective audit.

(2) For the purpose of this subsection, such records for a mature contract shall consist of Quarterly Financial Statements for the purpose of accounting for federal funds, the audit required by the Single Audit Act of 1984 (98 Statute 2327, 31 USC, 7501 et. Seq.), and a brief Annual Program Report.

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, under the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, sub-grants, or other arrangements referred to in the preceding subsection.

- (c) Any funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid, shall be repaid to the Treasury of the United States.
- (d) The Secretary shall report annually in writing to Tribes regarding projected and actual staffing levels, funding obligations, and expenditures for programs operated directly by the Secretary serving that Tribe.
- (e) For each fiscal year during which an Indian Tribal Organization receives or expends funds pursuant to a contract or grant under this title, the Indian Tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which federal funds were expended, information on the conduct of this program or service involved, and such other information as the appropriate Secretary may request through regulations promulgated under sections 552 and 553 of Title V, United States Code.
Refer to 25 USC 2508(a), including 25 USC 450e.

III. Penalties

Whoever, being an Officer, Director, Agent, or Employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or sub-grant pursuant to the Act or the Act of April 16, 1934 (48 Stat. 596), as amended, embezzles, willfully misapplies, steals or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, sub-grant, contract, or subcontract, shall be fined not more than \$10,000 or imprisoned for no more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed \$100, he shall be fined not more than \$1000, or imprisoned not more than one year, or both.

IV. Wage and Labor Standards

- (a) All laborers and mechanics employed by contractors or subcontractors in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Number 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. 276c).

- (b) Any contract, subcontract, grant, or sub-grant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing federal contracts with or grants to Indian Organizations or for the benefit of Indians, shall require that to the greatest extent feasible;
- (1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
 - (2) Preference in the award of subcontracts and sub-grants in connection with the administration of such contracts or grants shall be given to Indian Organizations and to Indian-owned economic enterprises as defined in Section 3 of the Indian Financing Act of 1974 (88 Stat. 77).

V. Personnel

Retention of Federal employee coverage, rights and benefits by employees of tribal organizations. Refer to 25 USC 450i.

(a) to (d) Omitted

(e) Eligible employees; Federal employee programs subject to retention

Notwithstanding the provisions of Sections 8347(o), 8713, and 8914 of Title 5, executive order, or administrative regulation, an employee serving under an appointment not limited to one year or less who leaves Federal employment to be employed by a tribal organization, the city of St. Paul, Alaska, the city of St. George, Alaska, upon incorporation, or the Village Corporations of St. Paul and St. George Islands established pursuant to Section 1607 of Title 43, in connection with governmental or other activities which are or have been performed by employees in or for Indian communities is entitled, if the employee and the tribal organization so elect, to the following:

- (1) To retain coverage, rights, and benefits under subchapter I of Chapter 81 ("Compensation for Work Injuries") of Title 5, and for this purpose his employment with the tribal organization shall be deemed employment by the United States. However, if an injured employee, or his dependents in case of his death, receives from the tribal organization any payment (including an allowance, gratuity, payment under an insurance policy for which the premium is wholly paid by the tribal organization, or other benefit of any kind) on account of the same injury or death, the amount of that payment shall be credited against any benefit payable under subchapter I of Chapter 81 of Title 5, as follows:

- (A) Payments on account of injury or disability shall be credited against disability compensation payable to the injured employee; and (B) payments on account of death shall be credited against death compensation payable to dependents of the deceased employee.
- (2) To retain coverage, rights, and benefits under Chapter 83 ("Retirement") or Chapter 84 ("Federal Employees Retirement System") of Title 5, if necessary employee deductions and agency contributions in payment for coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Civil Service Retirement and Disability Fund (Section 8348 of Title 5); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed creditable service under Section 8332 of Title 5. Days of unused sick leave to the credit of an employee under a formal leave system at the time the employee leaves Federal employment to be employed by a tribal organization remain to his credit for retirement purposes during covered service with the tribal organization.
- (3) To retain coverage, rights, and benefits under Chapter 89 ("Health Insurance") of Title 5, if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Employee's Health Benefit Fund (Section 8909 of Title 5); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under Chapter 89 of Title 5.
- (4) To retain coverage, rights, and benefits under Chapter 87 ("Life Insurance") of Title 5, if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organizations are currently deposited in the Employee's Life Insurance Fund (Section 8714 of Title 5); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under Chapter 87 of Title 5.
- (f) Deposit by tribal organization of employee deductions and agency contributions in appropriate funds.

During the period an employee is entitled to the coverage, rights, and benefits pursuant to the preceding subsection, the tribal organization employing such employee shall deposit currently in the appropriate funds the employee deductions and agency contributions required by paragraphs (2), (3), and (4) of such preceding subsection.

- (g) Election for retention by employee and tribal organization before date of employment by tribal organization; transfer of employee to another tribal organization

An employee who is employed by a tribal organization under subsection (e) of this section and such tribal organization shall make the election to retain the coverages, rights, and benefits in paragraphs (1), (2), (3), and (4) of such subsection (e) before the date of his employment by a tribal organization. An employee who is employed by a tribal organization under subsection (e) of this section shall continue to be entitled to the benefits of such subsection if he is employed by another tribal organization to perform service in activities of the type described in such subsection.

- (h) "Employee" defined

For the purposes of subsections (e), (f), and (g) of this section, the term "employee" means an employee as defined in Section 2105 of Title 5.

- (i) Promulgation of implementation regulations by President

The President may prescribe regulations necessary to carry out the provisions of subsections (e), (f), (g), and (h) of this section and to protect and assure the compensation, retirement, insurance, leave, reemployment rights, and such other similar civil service employment rights as he finds appropriate.

- (j) Additional employee employment rights

Anything in Sections 205 and 207 of Title 18 to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under Section 3372 of Title 5, or Section 48 of this Title and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection with any matter pending before any department, agency, court, or commission, including any matter in which the United States is a party or has a direct and substantial interest: Provided, That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.

- (k), (l) Omitted

- (m) Conversion to career appointment

The status of an Indian (as defined in Section 479 of this Title) appointed (except temporary appointments) to the Federal service under an excepted appointment under the authority of Section 472 of this Title, or any other provision of law granting a preference to Indians in personnel actions, shall be converted to a career appointment in the competitive service after three years of continuous service and satisfactory performance. The conversion shall not alter the Indian's eligibility for preference in personnel actions.

Prior Provisions

A prior section 104 of Pub. L. 93-638 was renumbered section 103 by Pub. L. 100-472 and is classified to section 450h of this title.

VI. Reassumption of Programs

The reassumption provisions of ISDEA is referenced in 25 USC 2508 which incorporates reassumption at 25 USC 450m, as follows:

Each contract or grant agreement entered into pursuant to Section 102, 103, and 104 of this Act shall provide that in any case where the appropriate Secretary determines that the Tribal Organizations performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any person; or (2) gross negligence or mismanagement in the handling or use of funds provided to the Tribal Organization pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by her/him after providing notice and hearing to such Tribal Organization, rescind such contract or grant agreement and assume or resume control or operation of the program, activity, or service involved if she/ he determines that the Tribal Organization has not taken corrective action as prescribed by her/him: Provided, that the appropriate Secretary may, upon notice to a Tribal Organization, immediately rescind a contract or grant and resume control or operation of a program, activity, or service if she/he finds that there is an immediate threat to safety and, in such cases, she/he shall hold a hearing on such action within ten days thereof. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as she/he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. Nothing in this section shall be construed as contravening the Occupational Safety and Health act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651).

VII. Effect on Existing Rights.

Nothing in this act shall be construed as-

- (1) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian Tribe; or
- (2) Authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

1997 MAR 12

To: All OIEP Line Officers
From: Director, Office of Indian Education Programs
Subject: Modification of P.L. 100-297 Grant Document

Don Sebastian Morris

It has become apparent that the Office of Indian Education Programs needs to revise the P.L. 100-297 Grant document to accurately reflect that the BIA is providing federal facilities, under a use permit, to Tribal Grantees and identify specific responsibilities that the Grantee is assuming under the grant.

The attached modified grant document has been developed and is hereby approved for replacement of the existing grant documents.

As designated P.L. 100-297 grants officers you are instructed to meet with the grantees under your supervision and to replace the current grant document with the newly revised document. At that time you should also obtain a current listing of buildings which are included under the grant. This grant revision should be completed no later than May 30, 1997.

Upon completion of up dating all P.L. 100-297 grants a copy of the final document shall be forwarded to Dr. Dennis Fox in central office and a copy to Dr. Kenneth G. Ross in the Albuquerque OIEP office.

Public Law 100-297

**Work Requirements for Facility Management Functions
And
Operations and Maintenance Activities**

SPECIAL CONDITIONS

- I. PURPOSE**
- II. BUREAU RESPONSIBILITIES TO P.L. 100-297 GRANT SCHOOLS**
- III. ANNUAL REPORT FOR FACILITIES MANAGEMENT - O & M**
- IV. FUND ADJUSTMENTS**

Public Law 100-297

**Facility Management Functions
And
Operations and Maintenance Activities**

SPECIAL CONDITIONS

I. Purpose

The Bureau of Indian Affairs is to ensure that there is a current Facilities Inventory and a Comprehensive Asbestos Management Plan (AHERA) for each building identified under this grant; further, that these facilities are potentially eligible for O&M, MI&R, FI&R or replacement funding to correct identified deficiencies, within established federal project and funding parameters.

In recognition thereof, the grantee hereby agrees to maintain and operate the facilities in accordance with Bureau of Indian Affairs (BIA) adopted facilities standards, including ensuring that facilities staff of the grantee are trained in accordance with federal training mandates applicable to employees vested with the responsibility of maintaining and operating the federal facilities. Such training includes, but may not be limited to, the following: Handicapped Access; Safety Awareness; Safe Water Act Requirements; Waste Water Disposal; Asbestos Requirements under O&M (16 hours); Collateral Safety Officer Responsibilities; Safety Training Courses - NFPA 101 Life Safety Code; Facilities Management for Facilities Personnel; Facilities Management Information System; and Preventive Maintenance.

The Grantee is prohibited from making major alteration(s) or expansion(s) of the Federally owned buildings without submitting the required written request for such alteration(s) or expansion(s) to the Director of the Office of Indian Education Programs.

All facilities space expansion(s) using non-federally appropriated funds shall conform to the standards and codes established by the Bureau's Division of Safety Management for receiving authorization for facilities operation and maintenance funding from the Bureau.

II. Bureau Responsibilities to P.L. 100-297 Grant Schools

Public Law 100-297 Grantees should be provided Technical Assistance (training) on the following areas by the Bureau of Indian Affairs Division having responsibility for facilities operations at the time of contracting or granting.

- A. Application/use of the Bureau's FACCOM - Facility Management System.
- B. Overview of regulations covering facility management, Minor Improvement and Repair (MI&R) Program, Facility Improvement and Repair (FI&R) Program, and Quarters Repair and Improvement Program (QI&R).
- C. Overview of regulations and safety requirements for boiler repair or replacement.
- D. Overview of use of work analysis reports, if needed.
- E. Overview of use of facility maintenance reports, if needed.
- F. Overview of the regulations and hands-on use of the Bureau's Facilities Backlog System.
- G. Provide copies of all related safety requirements affecting granted programs.
- H. Training on the development of Facility Abatement Plans, if required by the Bureau.
- I. Training on the development of a Preventive Maintenance Schedule and suggested monitoring program.

III. Annual Report for Facilities Management - O & M

The Grantee shall submit to the Secretary and to the tribal governing body of the tribally controlled school an annual report that shall be limited to:

- A. Annual financial statement reporting revenue and expenditures as defined by the cost accounting established by the grantee.
- B. Compliance to the Single Audit Act of 1984 as amended.

IV. Funds Adjustment

Funds provided under this part are subject to adjustments based upon availability of funds and/or changes in program needs or requirements.

Public Law 100-297

**Work Requirements for Facility Management Functions
And
Operations and Maintenance Activities**

GENERAL CONDITIONS

- I. OPERATIONS AND MAINTENANCE**
- II. PREVENTIVE SCHEDULED MAINTENANCE**
- III. UNSCHEDULED EMERGENCY MAINTENANCE**
- IV. FACILITIES IMPROVEMENT AND REPAIR - THE
BACKLOG SYSTEM**

Public Law 100-297

Work Requirements for Facility Management Functions
And
Operations and Maintenance Activities

GENERAL CONDITIONS

I. Operations and Maintenance

Operations and Maintenance - (O&M) is the accomplishment of day to day functions that keep the schools facilities operational and safe for the student, staff, and the Indian Community.

Safety is a primary consideration of all facilities management program activities. One of the most important objectives of the Operations and Maintenance Program is to keep facilities, including O&M equipment, in safe operating condition. BIA facility management staff are to support and cooperate with grant operations and maintenance staff to ensure safe facilities.

Grant O&M staff are responsible for completing the following technologies as they apply to heir respective facilities. The adjusting of the Bureau's Facilities Construction Operation and Maintenance System (FACCOM) inventory will cause the technologies to change based on work requirements placed in the system. One must be careful when making changes to the FACCOM inventory, as finding is directly affected. In addition, other O&M activities that must be conducted are: custodial, electric and/or mechanical inspecting, painting, site maintenance, and establishment of a preventive maintenance program.

The grantee should route all requests for assistance or technical assistance through their respective Grants Officer to the Area/Agency Facility Manager to the Facilities Management & Construction Center in Albuquerque, New Mexico. Compliance with this protocol is essential to ensure that the Office of Indian Programs (OIP) and Office of Indian Education Programs (OIEP) provide the best services possible.

II. Preventive Scheduled Maintenance

Preventive Scheduled Maintenance activities are routine activities that keep facilities safe and in good working condition. Inspection of critical facility components are to be conducted at predetermined times to verify proper operation and condition, and to service or identify more extensive replacement or repair needs. It is important to use and follow standard practices and manufacturer's recommended maintenance procedures for particular systems and equipment. The grantee will need to use the Bureau's FACCOM System and request that the system provides a summary preventive maintenance schedule report on facilities and equipment.

(Preventive Maintenance Schedule - Short Report). Once the information is obtained from the system, the grantee will develop, follow and maintain the preventive maintenance schedule on a monthly basis.

Reports that need to be reviewed and used by the grantee are the facilities maintenance report (FMR) and work analysis report (WAR). The Bureau's Area/Agency Facility Manager will be responsible for providing grantee with:

1. Access to the Bureau's FACCOM System;
2. Printouts of required reports - (FMR & WAR); and
3. Training the Grantee's Facility Manager on the use of the FACCOM System as it relates to: O&M, M&R, or FI&R (emergency funds, new school construction allocations, and preventive maintenance schedule used by the Bureau prior to granting).

III. Unscheduled Emergency Maintenance

Unscheduled Emergency Maintenance is the care of facilities that is not routine.

If any emergency should arise, such as a major electrical outage or major repairs that could potentially impact a required program or activity or other requirements beyond the capacity of the local facilities personnel, the grantee should follow these steps. If the estimated cost for repair(s) is over \$1,000.00 per emergency situation:

1. Call your Area Facility Manager for Education Agencies that do not administer facilities management operations. Call your education agency's facilities manager if the education agency administers facilities management operation as soon as you are aware that the situation is an emergency with a cost greater than \$1,000.00. The Area/ Agency Facility Manager will then approve the request. Emergency work under \$1,000.00 must be accomplished with existing O&M funds awarded to the school, as such situations are not considered an emergency funded project.

2. Complete the Bureau's checklist for requesting a reimbursement for actual costs on a situation by situation basis. Technical Assistance can be obtained in completing this document by contacting the Area/Agency Facility Manager. The grantee is to use local O&M funds to make the more immediate repairs.

IV. Facilities Improvement and Repair - The Backlog System

FI&R funds are requested on a project-by-project basis. They are designated for specific projects on the basis of priorities set by Agency, Area, and Facilities Management & Construction Center (FMCC), and approved by Congress. Project funds are not available for other uses except by official reprogramming.

- Step 1: Users are required to apply for an access code/password authorization from the FMCC office for person(s) who will be encoding the backlog items.
- Step 2: The grant school is responsible for keeping the backlog current and updated by inspecting the facilities and identifying needed repair items.
- Step 3: The grant school provides cost estimates and justification for repair or renovation items as part of continuous FACCOM backlog updating.
- Step 4: Area/Agency Facilities Management provides technical assistance to the grant school by providing advice and guidance concerning the backlog.
- Step 5: The grant school is responsible for their own encoding, either by hiring a consultant or paying Agency Facilities Management for encoding services.
- Step 6: If the grant school hires a consultant to update the backlog, ensure that the consultant has his/her own equipment to access the backlog system.



THE INDIAN SELF-DETERMINATION
AND
EDUCATION ASSISTANCE ACT (P.L. 93-639)

*AS AMENDED BY P.L. 103-413, P.L. 103-435, & P.L. 103-37
25 October 1994 and 2 November 1994*

(AS APPLIES TO P.L. 100-297)

**PUBLIC LAW 100-297, AS AMENDED BY P. L. 103-413,
P. L. 103-435 & P. L. 103-37
(October 25, 1994 and November 2, 1994)**

GENERAL PROVISIONS

PROVISIONS OF P. L. 93-638 THAT APPLY TO GRANTS (P. L. 100-297)

Sec. 2508. (a):

- 1. Sec. 5 Reporting and Audit Requirements**
- 2. Sec. 6 Penalties**
- 3. Sec. 7 Wage and Labor Standards**
- 4. Sec. 105 (f) Administrative Provisions**
- 5. Sec. 106 (f) Funding Provisions**
- 6. Sec. 109 Reassumption of Programs**
- 7. Sec. 111 Effect on Existing Rights**

memorandum

DATE: September 12, 1996

TO: Self Determination Office/Awarding Official

P.L. 93-638 Relevant Sections To P.L. 100-297 Grants

As requested, the attached PL 93-638, Indian Self Determination information of the relevant sections of the Law is provided. The regulation as provided to you prior, is in effect as of August 23, 1996 and supersedes the BIAM interim rules. Below are my summary statements of the sections applicable to school grants.

Section Five: Reporting and Audit Requirement (25 USC 450C) - All applicable

This sections provides that the Grantee must keep such records of funds awarded, received, funds expended, the total cost of the project, other funds received (non Federal), that will facilitate the audit. Requires that grantee submit program report(s), financial reports and have books, records and other papers available for examination. Such reports and information be available to the Indians being served. Provides for funds not expended (except as provided) or used for the purposes for which paid, be repaid to the Treasury.

Grantee is required to submit a single agency audit report required by Chapter 72 of Title 31 USC (A128 Audit).

Reports are negotiated with Grantee and any disagreement on reporting requirements is subject to declination criteria.

Section Six - Penalties - All applicable

Defines penalties for officers, agents, employees related to embezzlement, stealing, fraud, etc.

Section Seven - Wage and Labor Standards - All applicable

States that Davis Bacon Act applies to contractors or subcontractors (not School Grantees) that perform construction, alteration, or repair work at the School. This section provides preference in training and employment to Indians. Also, provides preference for subcontracts to Indians.

Section 105 - Administrative Provisions

This section will all be applicable should the Grantee performs construction services as well.

- Provides that 638 non construction contracts and grants are not subject to Federal Acquisition regulations (FAR).
- Schools or Tribe can set own program standards.
- List laws that do not apply to construction contracts.
- Payments under grants may be made in advance and Grantee may earn interest on the funds. (Interest earn be put back into the program)
- Grantee may use all facilities and equipment to support the program. Grantee may retain title to equipment.
- Grantee can keep equipment upon retrocession or reassumption except for equipment over \$5,000 value. Other equipment is subject to negotiation at time of retrocession or reassumption.
- Equipment shall be replaced as if it is owned by the Government.
- Access to acquire excess federal equipment
- Allows for redesign of a program not in conflict with law.
- Access to Federal Sources of supply, for supplies, travel, etc.
- Allows for tribe to enter into lease with Government for facilities used by the Tribe for delivery of services. Compensation to be included in the lease.
- Other sections related to construction services are not included at this time and can be summarize as a follow up.

Section 109 - Reassumption of Programs

Provides for the Secretary to reassume or retrocede a program based on grantee performance related to violations of rights, health, safety or welfare of any persons or gross negligence or mismanagement in use of funds. Due process including hearing for record.

Section 110 - Contract Appeals

Grantees may file action in the U.S. district court on any civil action or claim against the Secretary.

Secretary must have grantee's consent on all revisions or amendments of the Grant.

REPORTING AND AUDIT REQUIREMENTS

SEC. 5. (a) Maintenance of records.

(1) Each recipient of Federal financial assistance under this Act shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of title 5, United States Code, including records which fully disclose—

(A) the amount and disposition by such recipient of the proceeds of such assistance,

(B) the cost of the project or undertaking in connection with which such assistance is given or used,

(C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and

(D) such other information as will facilitate an effective audit.

(2) For the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for Federal funds, the annual single-agency audit required by chapter 75 of title 31, United States Code, and a brief annual program report.

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) Except as provided in section 13a or 450j-1 of this title, funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

(h) "mature contract" means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: Provided, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 102(a) [450f(a)] of this Act, a contract of the tribal organization which meets this definition shall be considered to be a mature contract;

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 9 [450e-1] of this act) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: Provided, That except as provided [in] the last proviso in section 105(a) of this Act, no contract (or grant or cooperative agreement utilized under section 9 [450e-1] of this act) entered into under title I of this Act shall be construed to be a procurement contract;

(k) "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law; and

(l) "tribal organization" means the recognized governing body of any Indian tribe; any established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) "construction contract" means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract-

(1) that is limited to providing planning services and construction management services (or a combination of such services);

(2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

purposes for which paid shall be repaid to the Treasury of the United States through the respective Secretary.

(e) The Secretary shall report annually in writing to each tribe regarding projected and actual staffing levels, funding obligations, and expenditures for programs operated directly by the Secretary serving that tribe.

(f)(1) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract entered into, or grant made, under this Act, the tribal organization that requested such contract or grant shall submit to the appropriate Secretary a single-agency audit report required by chapter 75 of title 31, United States Code.

(2) In addition to submitting a single-agency audit report pursuant to paragraph (1), a tribal organization referred to in such paragraph shall submit such additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.

(3) Any disagreement over reporting requirements shall be subject to the declination criteria and procedures set forth in section 102.

(As amended Oct. 5, 1988, P.L. 100-472; Title I § 104, Title II § 208, 102 Stat. 2287, 2296; Nov. 1, 1988, P.L. 100-581, Title II, § 209, 102 Stat. 2940; P.L. 101-301, §2(a)(4), May 24, 1990, 104 Stat. 206; P.L. 101-644, Title II, § 202(3), Nov. 29, 1990, 104 Stat. 4665; Oct. 25, 1994, P.L. 103-413, § 102(2).)

PENALTIES

SEC. 6. Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. §§ 452 et seq.], embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, shall be fined not more than \$10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

WAGE AND LABOR STANDARDS

SEC. 7.(a) All laborers and mechanics employed by contractors or subcontractors (excluding tribes and tribal organizations) in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act

of March 3, 1931 (46 Stat. 1494), as amended [40 U.S.C. §§ 276a et seq.]. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) [5 U.S.C. § 90 note] and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. 276c).

(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. §§ 452 et seq.] or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77). [25 U.S.C. § 1452].

(c) Notwithstanding subsections (a) and (b), with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

(As amended Oct. 29, 1994, P.L. 103-413, § 102(3).(4).)

ADMINISTRATIVE PROVISIONS

SEC. 105. (a)(1) Notwithstanding any other provision of law, subject to paragraph (3), the contracts and cooperative agreements entered into with tribal organizations pursuant to section 102 shall not be subject to Federal contracting or cooperative agreements laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.

(2) Program standards applicable to a nonconstruction self-determination contract shall be set forth in the contract proposal and the final contract of the tribe or tribal organization.

(3)(A) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and the regulations relating to acquisitions promulgated under such Act shall apply only to the extent that the application of such provision to the construction contract (or subcontract) is

(i) necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) directly related to the construction activity; and

(iii) not inconsistent with this Act.

(B) A list of the Federal requirements that meet the requirements of clauses (i) through (iii) of subparagraph (A) shall be included in an attachment to the contract pursuant to negotiations between the Secretary and the tribal organization.

(C)(i) Except as provided in subparagraph (B), no Federal law listed in clause (ii) or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal Government shall apply to a construction contract that a tribe or tribal organization enters into under this Act, unless expressly provided in such law.

(ii) The laws listed in this paragraph are as follows:

(1) The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.).

(II) Section 3709 of the Revised Statutes.

(III) Section 9(c) of the Act of Aug. 2, 1945 (60 Stat. 809, chapter 744).

(IV) Title III of the Federal Property and Administrative Services Act of 1949 (63 Stat. 395 et seq., chapter 283).

(V) Section 13 of the Act of Oct. 3, 1944 (68 Stat. 776; chapter 479).

(VI) Chapters 21, 25, 27, 29, and 31 of title 44, United States Code.

(VII) Section 2 of the Act of June 13, 1934 (48 Stat. 948, chapter 483).

(VIII) Sections 1 through 12 of the Act of June 30, 1936 (49 Stat. 2036 et seq. chapter 881).

(IX) The Service Control Act of 1965 (41 U.S.C. 351 et seq.).

(X) The Small Business Act (15 U.S.C. 631 et seq.).

(XI) Executive Order Nos. 12138, 11246, 11701 and 11758.

(b) Payments of any grants or under any contracts pursuant to sections 102 and 103 of this Act may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

(c)(1) A self-determination contract shall be—

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

(d)(1) Beginning in fiscal year 1990, upon the election of a tribal organization, the Secretary shall use the calendar year as the basis for contracts or agreements under this Act unless the Secretary and the Indian tribe or tribal organization agree on a different period.

(2) The Secretary shall, on or before April 1 of each year beginning in 1992, submit a report to the Congress on the amounts of any additional obligation authority needed to implement this subsection in the next fiscal year.

(e) If an Indian tribe, or a tribal organization authorized by a tribe, requests retrocession of the appropriate Secretary for any contract or portion of a contract entered into pursuant to this Act, unless the tribe or tribal organization rescinds the request for retrocession, such retrocession shall become effective on—

(1) the earlier of—

(A) the date that is 1 year after the date the Indian tribe or tribal organization submits such request; or

(B) the date on which the contract expires; or

(2) such date as may be mutually agreed by the Secretary and the Indian tribe.

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

(1) permit an Indian tribe or tribal organization in carrying out such contract or grant, to utilize existing school buildings, hospitals and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance;

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

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

(B) if property described in subparagraph (A) has a value in excess of \$5,000 at the time of the retrocession, rescission, or termination of the self-determination contract or grant agreement, at the option of the Secretary, upon the retrocession, rescission, or termination, title to such property and equipment shall revert to the Department of the Interior or the Department of Health and Human Services, as appropriate; and

(C) all property referred to in subparagraph (A) shall remain eligible for replacement on the same basis as if title to such property were vested in the United States; and

(3) acquire excess or surplus Government personal or real property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this Act.

(g) The contracts authorized under section 102 of this Act and grants pursuant to section 103 of this Act may include provisions for the performance of personal services which would otherwise be performed by Federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services, to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary: Provided, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

(h) Contracts and grants with tribal organizations pursuant to sections 102 and 103 of this Act and the rules and regulations adopted by the Secretaries of the Interior and Health and Human Services pursuant to Section 107 of this Act shall include provisions to assure the fair and uniform provisions by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

(i)(1) If a self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract, including program redesign in consultation with the tribal organization and all affected tribes.

(2) Nothing in this title shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable Federal law. Any tribe or tribal organization that alleges that a self-determination contract is in violation of this section may apply the provisions of section 110.

(j) Upon providing notice to the Secretary, a tribal organization that carries out a nonconstruction self-determination contract may propose a redesign of a program, activity, function, or service carried out by the tribal organization under the contract, including any

nonstatutory program standard, in such manner as to best meet the local geographic, demographic, economic, cultural, health, and institutional needs of the Indian people and tribes served under the contract. The Secretary shall evaluate any proposal to redesign any program, activity, function, or service provided under the contract. With respect to declining to approve a redesigned program, activity, function, or service under this subsection, the Secretary shall apply the criteria and procedures set forth in section 102.

(k) For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this Act shall be deemed an executive agency when carrying out such contract, grant, or agreement and the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access.

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

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

(m)(1) Each construction contract requested, approved, or awarded under this Act shall be subject to—

(A) except as otherwise provided in this Act, the provisions of this Act, other than sections 102(a)(2), 106(l), 108 and 109; and

(B) section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (104 Stat. 1959).

(2) In providing technical assistance to tribes and tribal organizations in the development of construction contract proposals, the Secretary shall provide, not later than 30 days after receiving a request from a tribe or tribal organization, all information available to the Secretary regarding the construction project, including construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments or environmental impact reports, and archaeological reports.

(3) Prior to finalizing a construction contract proposal pursuant to section 102(a), and upon request of the tribe or tribal organization that submits the proposal, the Secretary shall provide for a precontract negotiation phase in the development of a contract proposal. Such phase shall include, at a minimum, the following elements:

(A) The provision of technical assistance pursuant to section 103 and paragraph (2).

(B) A joint scoping session between the Secretary and the tribe or tribal organization to review all plans, specifications, engineering reports, cost estimates, and other information available to the parties, for the purpose of identifying all areas of agreement and disagreement.

(C) An opportunity for the Secretary to revise the plans, designs, or cost estimates of the Secretary in response to concerns raised, or information provided by, the tribe or tribal organization.

(D) A negotiation session during which the Secretary and the tribe or tribal organization shall seek to develop a mutually agreeable contract proposal.

(E) Upon the request of the tribe or tribal organization, the use of an alternative dispute resolution mechanism to seek resolution of all remaining areas of disagreement pursuant to the dispute resolution provisions under subchapter IV of chapter 5 of title 5, United States Code.

(F) The submission to the Secretary by the tribe or tribal organization of a final contract proposal pursuant to section 102(a).

(4)(A) Subject to subparagraph (B), in funding a fixed-price construction contract pursuant to section 106(a), the Secretary shall provide for the following:

(i) The reasonable costs to the tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract.

(ii) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract and other relevant considerations.

(B) In establishing a contract budget for a construction project, the Secretary shall not be required to separately identify the components described in clauses (i) and (ii) of subparagraph (A).

(C) The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties, including the following costs:

(i) The reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of this Act and any other applicable law.

(ii) The costs of preparing the contract proposal and supporting cost data.

(iii) The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract.

(iv) In the case of a fixed-price contract, a fair profit determined by taking into consideration the relevant risks and local market conditions.

(v) If the Secretary and the tribe or tribal organization are unable to develop a mutually agreeable construction contract proposal pursuant to the procedures set forth in this subsection, the tribe or tribal organization may submit a final contract proposal to the Secretary. Not later than 30 days after receiving such final contract proposal, the Secretary shall approve the contract proposal and award the contract, unless, during such period the Secretary declines the proposal pursuant to sections 102(a)(2) and 102(b) of section 102 (including providing opportunity for an appeal pursuant to section 102(b)).

(n) Notwithstanding any other provision of law, the rental rates for housing provided to an employee by the Federal Government in Alaska pursuant to a self-determination contract shall be determined on the basis of—

(1) the reasonable value of the quarters and facilities (as such terms are defined under section 5911 of title 5, United States Code) to such employees, and

(2) the circumstances under which such quarters and facilities are provided to such employee, as based on the cost of comparable private rental housing in the nearest established community with a year-round population of 1,500 or more individuals.

(As amended Oct. 5, 1988, P.L. 100-472, Title II, § 204, 102 Stat. 2291; P.L. 101-301, §2(a)(7), May 24, 1990, 104 Stat. 207; P.L. 101-644, Title II, § 203(a)-(e), Nov. 29, 1990, 104 Stat. 4666; Oct. 25, 1994, P.L. 103-413, § 102(10)-(13).)

(As added Oct. 25, 1994, P.L. 103-413, § 103.)

REASSUMPTION OF PROGRAMS

SEC. 109. Each contract or grant agreement entered into pursuant to sections 102, 103, and 104 of this Act [25 U.S.C. §§ 450f-450h] shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, or in the management of trust fund, trust lands or interests in such lands pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and a hearing on the record to such tribal organization, rescind such contract or grant agreement, in whole or in part, and assume or resume control of operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by the Secretary to remedy the contract deficiency, except that the appropriate Secretary may, upon written notice to a tribal organization, and the tribe served by the tribal organization, immediately rescind a contract or grant, in whole or in part, and resume control or operation of a program, activity, function, or service, if the Secretary finds that (i) there is an immediate threat of imminent harm to the safety of any person, or imminent substantial and irreparable harm to trust funds, trust lands, or interests in such lands, and (ii) such threat arises from the failure of the contractor to fulfill the requirements of the contract. In such cases, the Secretary shall provide the tribal organization with a hearing on the record within ten days or such later date as the tribal organization may approve. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. In any hearing or appeal provided for under this section, the Secretary shall have the burden of proof to establish, by clearly demonstrating the validity of the grounds for rescinding, assuming, or reassuming the contract that is the subject of the hearing. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651).

(As amended Nov. 1, 1988, P.L. 100-581, Title II § 211, 102 Stat. 2941; P.L. 101-310, § 2(a)(10), May 24, 1990, 104 Stat. 207; Oct. 25, 1994, P.L. 103-413, § 104(1).)

[APPEALS AND RIGHTS]

SEC. 110. (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an

officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract).

(b) The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

(c) The Equal Access to Justice Act (Public Law 96-481, Act of October 1, 1980, 92 Stat. 2325 as amended), section 504 of Title 5 United States Code, and section 2412 of Title 28 United States Code shall apply to administrative appeals pending on or filed after the date of enactment of the Indian Self-Determination and Education Assistance Act Amendments of 1988 by tribal organizations regarding self-determination contracts.

(d) The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, *except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).*

(e) Subsection (d) of this section shall apply to any case pending or commenced on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services except that in any such case finally disposed of before the date of enactment of these amendments [enacted Oct. 5, 1988], the 30 day period referred to in section 504(a)(2) of Title 5, United States Code shall be deemed to commence on the date of enactment of this subsection [enacted Oct. 5, 1988].

(As added Oct. 5, 1988, P.L. 100-472, § 206(a); Nov. 1, 1988, P.L. 100-581, § 212; May 24, 1990, P.L. 101-301, § 1(a)(2), 2(b); Oct. 25, 1994, P.L. 103-413, § 104(2), (3).)

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CHAPTER 171. TORT CLAIMS PROCEDURE

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HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

SENATE REVISION AMENDMENT

As printed in this report, this chapter should have read "173" and not "171". It was properly numbered "173" in the bill. However, the chapter was renumbered "171", without change in its section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

Amendments:

1959. Act Sept. 8, 1959, P. L. 86-238, § 1(2), 73 Stat. 472, amended the analysis of this chapter by substituting "\$2,500" for "\$1,000" in item 2672.

1966. Act July 18, 1966, P. L. 89-506, § 9(b), 80 Stat. 308, amended the analysis of this chapter by deleting "of \$2,500 or less" in item 2672.

CROSS REFERENCES

- Review of tort claims cases, 28 USCS § 1291.
- Jurisdiction of district courts in tort claims cases, 28 USCS § 1346.
- Venue in tort claims actions, 28 USCS § 1402.
- Time for commencing tort action against the United States, 28 USCS § 2401.
- Jury trial denied in action against the United States, 28 USCS § 2402.
- Computation of interest on judgments against the United States, computation, 28 USCS § 2411.
- Costs in tort claims cases, 28 USCS § 2412.

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Federal Procedure L Ed:

- 17 Fed Proc L Ed, Health, Education, and Welfare § 42:109.
- 26 Fed Proc L Ed, Parties § 59:58.
- 28 Fed Proc L Ed, Postal Service § 63:310.
- 33 Fed Proc L Ed, Trial § 77:125.

Am Jur:

15 Am Jur 2d, Civil Rights § 273.

Am Jur Proof of Facts:

20 Am Jur Proof of Facts, Federal Tort Claims Act, p. 375.

Law Review Articles:

Kennelly, United States in third-party actions in certification cases. 17 Forum 556-558, Winter, 1982.

VERALEX[®]: Cases and annotations referred to herein can be further researched through the VERALEX[®] electronic retrieval system's two services, Auto-Cite[®] and SHOWME[®]. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

§ 2671. Definitions

As used in this chapter [28 USCS §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

(June 25, 1948, ch 646, § 1, 62 Stat. 982; May 24, 1949, ch 139, § 124, 63 Stat. 106; July 18, 1966, P. L. 89-506, § 8, 80 Stat. 307; Dec. 29, 1981, P. L. 97-124, § 1, 95 Stat. 1666; Nov. 18, 1988, P. L. 100-694, § 3, 102 Stat. 4564.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES**Prior law and revision:**

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 941 (Aug. 2, 1946, ch. 753, § 402, 60 Stat. 342).

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in section 2671 of title 28, U.S.C.

Amendments:

1949. Act May 24, 1949 in the third para. substituted "office" for "offic".

1966. Act July 18, 1966 (applicable to claims accruing 6 months or more after the date of enactment as provided by § 10 of such Act, which appears as 28 USCS § 2672 note) substituted the first undesignated para for:

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States."

1981. Act Dec. 29, 1981 (applicable only with respect to claims arising on or after 12/29/81, as provided by § 4 of such Act, which appears as 10 USCS § 1089 note), in the second para., inserted "members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32."; and in the third para., inserted "or a member of the National Guard as defined in section 101(3) of title 32".

1988. Act Nov. 18, 1988 (effective upon enactment and applicable as provided by § 8 of such Act, which appears as 28 USCS § 2679 note), in the first undesignated para., inserted "the judicial and legislative branches."

Transfer of functions:

For transfer of certain functions relating to claims and litigation, insofar as they pertain to the Air Force, from the Secretary of the Army to the Secretary of the Air Force, see Secretary of Defense Transfer Order No. 34 [§ 1a(2)(4)], effective July 1, 1949.

Other provisions:

Congressional findings and purposes. Act Nov. 18, 1988, P. L. 100-694, § 2, 102 Stat. 4563, effective on enactment and applicable as provided by § 8 of such Act, which appears as 28 USCS § 2679 note, provided:

(a) Findings. The Congress finds and declares the following:

"(1) For more than 40 years the Federal Tort Claims Act [for full classification, consult USCS Tables volumes] has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

"(2) The United States, through the Federal Tort Claims Act [for full classification, consult USCS Tables volumes], is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

"(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act [for full classification, consult USCS Tables volumes] has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

"(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in *Westfall v. Erwin*, have seriously eroded the common law tort immunity previously available to Federal employees.

"(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

"(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act [for full classification, consult USCS Table volumes] as the proper remedy for Federal employee torts.

"(7) In its opinion in *Westfall v. Erwin* [98 L Ed 619], the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

"(b) Purpose. It is the purpose of this Act [amending generally 28 USCS §§ 2671 et seq.; for full classification, consult USCS Tables volumes] to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States."

Severability provisions. Act Nov. 18, 1988, P. L. 100-694, § 7, 102 Stat. 4565, effective upon enactment as provided by § 8 of such Act, which appears as 28 USCS § 2679 note, provided: "If any provision of this Act [amending generally 28 USCS §§ 2671 et seq.; for full classification, consult USCS Tables volumes] or the amendments made by this Act [amending generally 28 USCS §§ 2671 et seq.; for full classification, consult USCS Tables volumes] or the application of the provision to any person or circumstance is held invalid, the remainder of this Act [amending generally 28 USCS §§ 2671 et seq.; for full classification, consult USCS Tables volumes] and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation."

CODE OF FEDERAL REGULATIONS

Office of the Secretary of Agriculture, administrative regulations, 7 CFR Part 1.

National Aeronautics and Space Administration, administrative authority and policy, 14 CFR Part 1204.

Department of the Army, claims against the United States, 32 CFR Part 536.

Department of the Air Force, administrative claims, 32 CFR Part 842.

U.S. Postal Service, procedures to adjudicate claims for personal injury or property damage arising out of the operation of. 39 CFR Part 912.
Office of the Secretary of the Interior, administrative claims under Federal Tort Claims Act, 43 CFR Part 22.

CROSS REFERENCES

Peace Corps volunteers deemed employees of United States, 22 USCS § 2504.

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Federal Procedure L Ed:

- 9 Fed Proc L Ed, Criminal Procedure § 22:161.
- 10A Fed Proc L Ed, Economic Development and Stabilization § 27:64.
- 11 Fed Proc L Ed, Employees' Compensation Acts § 29:13.
- 12A Fed Proc L Ed, Farms, Ranches, and Agricultural Products § 34:945.
- 13 Fed Proc L Ed, Food, Drugs, and Cosmetics, § 35:175.
- 17 Fed Proc L Ed, Health, Education, and Welfare § 42:109.
- 18 Fed Proc L Ed, Housing and Urban Development § 44:67.
- 23 Fed Proc L Ed, Maritime Law and Procedure, § 53:171.
- 24 Fed Proc L Ed, Natural and Marine Resources § 56:906.
- 26 Fed Proc L Ed, Parties § 59:58.
- 28 Fed Proc L Ed, Postal Service § 63:310.
- 33 Fed Proc L Ed, Trial § 77:125.

Am Jur:

- 2 Am Jur 2d, Admiralty § 120.
- 3A Am Jur 2d, Aliens and Citizens § 19.
- 6 Am Jur 2d, Atomic Energy § 48.
- 15 Am Jur 2d, Civil Rights § 273.
- 22 Am Jur 2d, Damages § 1030.
- 35 Am Jur 2d, Federal Tort Claims Act §§ 57, 59.
- 60 Am Jur 2d, Penal and Correctional Institutions § 185.
- 70A Am Jur 2d, Space Law §§ 14, 17.
- 77 Am Jur 2d, United States § 114.

Am Jur Trials:

- 8 Am Jur Trials, Motor Vehicle Collisions—Agency Relationship, p. 1.
- 8 Am Jur Trials, Federal Tort Claims Act Proceedings, p. 635.

Am Jur Proof of Facts:

- 1 Am Jur Proof of Facts 3d, Physician's Negligence in Using Oxytocin to Stimulate Labor in Childbirth, p. 1.
- 13 Am Jur Proof of Facts 2d, Forensic Economics—General Overview: Death Of Person In Labor Force, p. 45.
- 29 Am Jur Proof of Facts 2d, Police Officer's Violent Conduct as Basis for Imposition of Governmental Liability, p. 1.
- 30 Am Jur Proof of Facts 2d, Governmental Entity's Liability for Failure to Prevent Crime, p. 429.
- 20 Am Jur Proof of Facts, Federal Tort Claims Act, p. 375.

50 Am Jur Proof of Facts 2d, Highway Defects—Liability for Failure to Install Median Barrier, p. 63.

50 Am Jur Proof of Facts 2d, Motorist's Negligence in Striking Person Lying in Road, p. 595.

50 Am Jur Proof of Facts 2d, Liability of Motor Vehicle Passenger for Accident, p. 677.

Forms:

13 Fed Procedural Forms L Ed, Navigable Waters § 51:15.

15A Fed Procedural Forms L Ed, Telecommunications § 62:306.

15A Fed Procedural Forms L Ed, Tort Claims Against United States § 63:2, 11, 61, 70, 74, 81, 83, 85, 86, 87, 88, 89, 101-103, 111, 121, 131, 132, 141-143, 145, 146, 152, 161, 162, 164, 166, 192, 201, 211.

2 Am Jur Pl & Pr Forms (Rev), Atomic Energy, Form 42.

3 Am Jur Pl & Pr Forms (Rev), Automobiles and Highway Traffic, Forms 147, 188, 227, 326, 508, 571, 602.

4 Am Jur Pl & Pr Forms (Rev), Aviation, Forms 218, 305, 306.

11 Am Jur Pl & Pr Forms (Rev), Federal Tort Claims, Forms 4-10, 19, 32.

19 Am Jur Pl & Pr Forms (Rev), Penal and Correctional Institutions, Form 8.

20 Am Jur Pl & Pr Forms (Rev), Prenatal Injuries, Form 12.

20 Am Jur Pl & Pr Forms (Rev), Postal Service, Form 6.

22 Am Jur Pl & Pr Forms (Rev), Space Law, Form 6.

Immigration Law Service:

1 Immigration Law Service, Immigration and Naturalization Service § 2:27.

2 Immigration Law Service, Actions By and Against Aliens § 27:23.

Annotations:

Restriction of use of public parks as violating freedom of speech or press under First Amendment of Federal Constitution. 82 L Ed 2d 958.

Right of members of Armed Forces to bring actions in civilian courts against their superior—Federal Cases. 76 L Ed 2d 891.

Implication of private right of action from provision of United States constitution-federal cases. 64 L Ed 2d 872.

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—federal cases 14 L Ed 2d 892.

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act. 14 L Ed 2d 892.

United States' liability, under Federal Tort Claims Act, for death or injury of federal prisoner 10 L Ed 2d 1361.

Extent to which state law is applicable in actions under Federal Tort Claims Act. 7 L Ed 2d 894. (partially superseded by Right of United States under Federal Tort Claims Act to recover contribution or

indemnity from joint tortfeasor, 15 ALR Fed 665, and § 12 superseded by Statute of limitations under Federal Tort Claims Act (28 USCS § 2401(b)). 29 ALR Fed 482).

Construction and application of 28 USC § 2680 excepting specified claims from scope of Federal Tort Claims Act. 6 L Ed 2d 1422.

Comment note-Extent to which state law is applicable in actions under Federal Tort Claims Act. 1 L Ed 2d 1647. (partially superseded by Right of United States under Federal Tort Claims Act to recover contribution or indemnity from joint tortfeasor, 15 ALR Fed 665, and supplemented by Extent to which state law is applicable in actions under Federal Tort Claims Act, 7 L Ed 2d 994 (partially superseded by 15 ALR Fed 665, supra. and § 12 superseded by Statute of limitations under Federal Tort Claims Act (28 USCS § 2401(b)). 29 ALR Fed 482)).

Federal Tort Claims Act: Liability of United States for injury or death resulting from condition of premises. 91 ALR Fed 16.

Modern status of Federal Civil Procedure Rule 54(b) governing entry of judgment of multiple claims. 89 ALR Fed 514.

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of assault and battery (28 USCS § 2680(h)). 88 ALR Fed 7.

Applicability and effect of 28 USCS § 2675(b) pertaining to increase in federal tort claim over amount presented to agency. 80 ALR Fed 737.

Tort liability of United States under Claims Act for acts committed by aliens. 78 ALR Fed 683.

When is interest of proposed intervenor inadequately represented by existing party so as to satisfy that requirement for intervention as of right under Rule 24(a)(2) of Federal Rules of Civil Procedure. 74 ALR Fed 327.

When is claim properly presented to federal agency, under 28 USCS § 2675(a), for purposes of satisfying prerequisite to subsequent suit under Federal Tort Claims Act. 73 ALR Fed 338.

Pendent jurisdiction of federal court over state claim against party not otherwise subject to federal jurisdiction where state claim is sought to be joined with claim arising under laws, treaties, or Constitution of United States ("pendent party" jurisdiction). 72 ALR Fed 191.

Right of member of family of serviceman to maintain action under Federal Tort Claims Act (28 USCS §§ 1346(b), 2671-2680) against United States based upon injuries sustained by serviceman while on active duty. 69 ALR Fed 949.

Liability of United States, under Federal Tort Claims Act (28 USCS §§ 1346, 2671 et seq.), for death or injury sustained by visitor to national park or national forest. 66 ALR Fed 305.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to Federal Tort Claims Act (28 USCS § 2680(a)). 65 ALR Fed 358.

Fetus as person on whose behalf action may be brought under 42 USCS § 1983. 64 ALR Fed 886.

What constitutes "claim arising in a foreign country" under 28 USCS § 2680(k), excluding such claims from Federal Tort Claims Act. 57 ALR Fed 275.

Admissibility of evidence of habit or routine practice under Rule 406, Federal Rules of Evidence. 53 ALR Fed 703.

Federal or state law as governing in matters of res judicata and collateral estoppel in Federal Tort Claims Act suit. 49 ALR Fed 326.

When may claims against United States under Federal Tort Claims Act (28 USCS §§ 2671-2680) be maintained as class action. 48 ALR Fed 860.

Liability of United States for negligence of person other than air traffic controller in connection with aviation control operations. 47 ALR Fed 85.

Propriety of awarding damages under Federal Tort Claims Act (28 USCS §§ 1346, 2671 et seq.) to individuals whose mail is illegally opened, copied, or read by Federal Official or Agency. 47 ALR Fed 285.

Propriety of considering future income taxes in awarding damages under Federal Tort Claims Act. 47 ALR Fed 735.

Liability of United States for negligence or air traffic controller. 46 ALR Fed 24.

Federal Employees' Compensation Act (5 USCS §§ 8101 et seq.) as affecting recovery under Federal Tort Claims Act. 43 ALR Fed 424.

Construction and application of Federal Tort Claims Act provision (28 USCS § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process. 43 ALR Fed 571.

Removal from, or remand to, state court in Federal Tort Claims Act proceeding involving motor vehicle driver, under 28 USCS § 2679(d). 41 ALR Fed 288.

Authority of United States officials to conduct inspection or search of American registered vessel located outside territorial waters of United States. 40 ALR Fed 402.

Propriety of considering effect of inflation in awarding damages under Federal Tort Claims Act (28 USCS §§ 1346, 2671 et seq.). 38 ALR Fed 201.

Claims based on construction and maintenance of public property as within provision of 28 USCS § 2680(a) excepting from Federal Tort Claims Act claims involving "discretionary function or duty". 37 ALR Fed 537.

Claims based on law enforcement and regulatory activities as within 28 USCS § 2680(a) excepting from Federal Tort Claims Act claims involving "discretionary function or duty". 36 ALR Fed 240.

Issuance of permits, licenses, and the like, as within 28 USCS § 2680(a) excepting from Federal Tort Claims Act claims involving "discretionary function or duty". 35 ALR Fed 481.

Validity, construction, and application of innocent spouse statute (26 USCS § 6013(e)), under which innocent spouse is relieved of federal income tax liability in certain cases. 31 ALR Fed 14.

- Serviceman's right to recover under Federal Tort Claims Act (28 USCS §§ 2671 et seq.). 31 ALR Fed 146.
- Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of misrepresentation and deceit (28 USCS § 2680(h)). 30 ALR Fed 421.
- Statute of limitations under Federal Tort Claims Act (28 USCS § 2401(b)). 29 ALR Fed 482.
- Relief under Federal Civil Rights Acts to state prisoners complaining of denial of medical care. 28 ALR Fed 279.
- Propriety, under Rule 23 of Federal Rules of Civil Procedure, of class action for injuries and deaths in airplane crash. 28 ALR Fed 719.
- Measure of damages for wrongful death of child under Federal Tort Claims Act (28 USCS §§ 1346(b), 2671-2680). 25 ALR Fed 179.
- Liability of United States, under Federal Tort Claims Act (28 USCS §§ 1346, 2671-2680), for damages caused by ingestion or administration of drugs, vaccines, and the like, approved as safe for use by government agency. 24 ALR Fed 467.
- Discovery for purposes of determining whether class action requirements under Rule 23(a) and (b) of Federal Rules of Civil Procedure are satisfied. 24 ALR Fed 872.
- Who must be joined in action as person "needed for just adjudication" under Rule 19(a) of Federal Rules of Civil Procedure. 22 ALR Fed 765.
- Liability of United States under Federal Tort Claims Act for injuries resulting from failure to provide police protection. 22 ALR Fed 903.
- Validity, construction, and application of rule 19(b) of Federal Rules of Civil Procedure, as amended in 1966, providing for determination to be made by court to proceed with or dismiss action when joinder of person needed for just adjudication is not feasible. 21 ALR Fed 12.
- Liability of United States for injuries or damage resulting from failure to establish, or properly maintain or operate, aids to maritime navigation. 19 ALR Fed 297.
- Construction and application of provisions of Federal Employees' Compensation Act (5 USCS § 8132) requiring compensation beneficiary who recovers from third person or receives money in settlement of claim, to refund to United States amount of compensation paid, after deducting cost of suit and reasonable attorney's fee. 17 ALR Fed 494.
- Right of United States under Federal Tort Claims Act to recover contribution or indemnity from joint tortfeasor. 15 ALR Fed 665.
- Validity, construction, and application of Admiralty Jurisdiction Extension Act (46 USCS § 740). 14 ALR Fed 664.
- Federal Tort Claims Act: Construction and application of 28 USCS § 2675(a), as amended in 1966, and implementing regulations, requiring presentation of claim to, and denial of claim by, federal agency before court action can be instituted against United States. 13 ALR Fed 762 (§ 7 superseded by When is claim properly presented to federal agency, under 28 USCS § 2675(a), for purposes of satisfying prerequisite to subsequent suit under Federal Tort Claims Act. 73 ALR Fed 338).
- Federal Tort Claims Act: Liability of United States for injury or death resulting from condition of premises. 12 ALR Fed 163.

Federal Tort Claims Act: Medical malpractice cases. 9 ALR Fed 16 (§ 12 superseded by Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of misrepresentation and deceit (28 USCS § 2680(h)). 30 ALR Fed 421).

Application, in federal civil action, of governmental privilege of nondisclosure of identity of informer. 8 ALR Fed 6.

Propriety, under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action seeking relief from racial discrimination. 8 ALR Fed 461 (§ 9 superseded by What constitutes "an opportunity for full and fair litigation" in state court precluding habeas corpus review under 28 USCS § 2254 in federal court of state prisoner's Fourth Amendment claims, 75 ALR Fed 9, and by Typicality requirement of Rule 23(a)(3) of Federal Rules of Civil Procedure as to class representative in class action based on unlawful discrimination. 74 ALR Fed 42).

Construction and application of change of venue or transfer provision of judicial code (28 USC § 1404(a)), apart from questions of convenience and justice of transfer. 7 ALR Fed 9.

Federal Tort Claims Act: When is government officer or employee "acting within the scope of his office or employment" for purpose of determining government liability under 28 USC § 1346(b). 6 ALR Fed 373.

Federal Tort Claims Act: Claims arising out of operation of aircraft, 5 ALR Fed 440 (§ 9 superseded by Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of misrepresentation and deceit (28 USCS § 2680(h)). 30 ALR Fed 421).

Federal Tort Claims Act: Automobile negligence cases. 4 ALR Fed 6.

Liability of United States under Federal Tort Claims Act for damage from flooding. 4 ALR Fed 723 (§ 11 superseded by Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of misrepresentation and deceit (28 USCS § 2680(h)). 30 ALR Fed 421).

Federal Tort Claims Act: When is a member of the armed forces acting "in line of duty" within meaning of 28 USC § 2671. 1 ALR Fed 563.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration. 66 ALR4th 83.

Workers' compensation act as precluding tort action for injury to or death of employee's unborn child. 55 ALR4th 792.

Medical malpractice: "loss of chance" causality. 54 ALR4th 10.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 ALR4th 853.

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Liability of hospital or sanitarium for negligence of physician or surgeon. 51 ALR4th 235.

Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury. 49 ALR4th 216.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor. 49 ALR4th 1076.

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Modern trends as to contributory negligence of children. 32 ALR4th 56.

Propriety and effect of "structured settlement" whereby damages are paid in installments over a period of time, and attorneys' fees arrangements in relation thereto. 31 ALR4th 95.

Negligence of one parent contributing to injury or death of child as barring or reducing damages recoverable by other parent for losses suffered by other parent as result of injury or death of child. 26 ALR4th 396.

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Effect of anticipated inflation on damages for future losses—modern cases. 21 ALR4th 21.

Medical malpractice: instrument breaking in course of surgery or treatment. 20 ALR4th 1179.

Municipal or state liability for injuries resulting from police roadblocks or commandeering of private vehicles. 19 ALR4th 937.

Liability of governmental officer or entity for failure to warn or notify release of potentially dangerous individual from custody. 12 ALR4th 722.

Governmental tort liability for injuries caused by negligently released individual. 6 ALR4th 1155.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damage to such vehicle, as result of police chase. 4 ALR4th 865.

Liability of governmental unit or its officers for injury to innocent pedestrian or occupant of parked vehicle, or for damage to such vehicle, as result of police chase. 100 ALR3d 815.

Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner. 79 ALR3d 1210.

Recovery for mental or emotional distress resulting from injury to, or death of, member of plaintiff's family arising from physician's or hospital's wrongful conduct. 77 ALR3d 447.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant. 75 ALR3d 825.

Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child. 53 ALR3d 566.

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Validity, construction, and effect of 28 USC § 2679(b), providing that remedy against the United States for negligent operation of motor vehicle is exclusive of remedy against driver-employee. 16 ALR3d 1394.

Application of collateral source rule in action under Federal Tort Claims Act. 12 ALR3d 1245.

Federal Tort Claims Act: Construction of provision excepting claims involving "discretionary function or duty." 99 ALR2d 1016.

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I. FEDERAL AGENCY

1. Generally

Although Congress could have left determination as to whose negligence Government should be liable for, under Federal Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.), to law of state involved, as it did with other aspects of liability under Act, Congress has chosen not to do this and instead has incorporated into definitions of Act exemption from liability for injury caused by employees of contractor: while this congressional choice leaves courts free to look to law of torts and agency to define "contractor," it does not leave them free to abrogate exemption that Act provides. *Logue v United States* (1973) 412 US 521, 37 L Ed 2d 121, 93 S Ct 2215, on remand (CA5 Tex) 488 F2d 1090.

Federal Tort Claims act deals with whether United States may be sued for certain torts: it does not define what are torts. *Aretz v United States* (1979, CA5 Ga) 604 F2d 417, reh gr (CA5 Ga) 616 F2d 254, later proceeding 248 Ga 19, 280 SE2d 345

Federal Tort Claims Act (28 USCS §§ 2671 et seq.) does not entirely waive sovereign immunity of United States, federal government may only be held liable for damages caused by negligent or wrongful act or omission of government employee. *Brandes v United States* (1986, CA9 Cal) 783 F2d 895.

2. Air Force base exchange

Air force base exchange is "federal agency," and by reason thereof United States was subject to suit for personal injuries. *Daniels v Chanute Air Force Base Exchange* (1955, DC Ill) 127 F Supp 920 (disagreed with by United States v Forfan (CA9 Cal) 268 F2d 29, cert den 361 US 902, 4 L Ed 2d 157, 80 S Ct 211).

3. Army hunting club

Civilian hired and paid by civilian manager of hunt club, which was private association of military personnel located on military reservation, was employee of government while driving military prisoners to and from "voluntary" prison work detail at club, and government thus was liable for accidental injury to prisoner while

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being transported, since even if club was not federal agency or instrumentality, nevertheless civilian driver was acting on behalf of, and was amenable to some degree of control by, United States Disciplinary Barracks while transporting prisoners, and thus was acting on behalf of federal agency in official capacity, temporarily in service of United States without compensation, within meaning of 28 USCS § 2671. *Witt v United States* (1972, CA2 NY) 462 F2d 1261.

For army nonappropriated fund activity to be federal agency within meaning of 28 USCS §§ 1346(b) and 2671 et seq., it must be integral part of army, charged with essential function in operation of army, and degree of control and supervision by army must be more than casual or perfunctory; hunt club formed by voluntary post members of United States army interested in equestrian art was nonappropriated fund activity, and not part of army that could be classified federal agency; therefore, there could be no liability on part of United States under 28 USCS §§ 1346(b) and 2761 et seq. for claimed negligent operation of club. *Scott v United States* (1963, MD Ga) 226 F Supp 864, affd (CA5 Ga) 337 F2d 471, cert den 380 US 933, 13 L Ed 2d 821, 85 S Ct 939.

4. Civil Air Patrol

Civil Air Patrol is not federal agency within meaning of 28 USCS § 2671. *Pearl v United States* (1956, CA10 Okla) 230 F2d 243.

Where plaintiff, professional golfer, was severely injured in crash of Air Force plane, furnished to Civil Air Patrol, which Air Force Lieutenant assigned to duty with Civil Air Patrol had been authorized, by official of their organization, to use in flying golfer from one city to another in promotional activities for Civil Air Patrol, and conclusion of District Judge was that aircraft was being operated at time on business of United States in charge of employee of United States acting in line of duty, on government's appeal there can be no recovery, because Civil Air Patrol is not federal agency under Federal Tort Claims Act, and Air Force Lieutenant acted contrary to governing regulations and beyond scope of his authority in using Air Force plane for such purpose. *United States v Alexander* (1956, CA4 NC) 234 F2d 861, cert den 352 US 892, 1 L Ed 2d 86, 77 S Ct 131.

Civil Air Patrol does not have requisite elements to constitute federal agency, and member of Patrol necessarily does not qualify as employee of government. *Kiker v Estep* (1978, ND Ga) 444 F Supp 563.

5. Coast Guard

Coast guard is "federal agency." *Marino v United States* (1948, DC NY) 82 F Supp 190.

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6. Community action agency

Community action agency, even though federally funded, is not "federal agency" for purposes of Federal Tort Claims Act. *United States v Orleans* (1976) 425 US 807, 48 L Ed 2d 390, 96 S Ct 1971.

Fact that community action agency is under Federal control by virtue of Office of Economic Opportunity Act does not cause it to be "agency" within meaning of Federal Tort Claims Act. *Vincent v United States* (1974, ED Ark) 383 F Supp 471, aff'd (CA8 Ark) 513 F2d 1296, cert den 426 US 919, 49 L Ed 2d 372, 96 S Ct 2623.

Federal funding of local community action agency does not cause agency to be primarily instrumentality of federal government within meaning of 28 USCS § 2671. *Hughes v United States* (1973, SD Iowa) 383 F Supp 1071.

7. —"Head Start" program

Preschool children who sustained severe bodily injuries in automobile accident while riding with driver who was transporting children from "Head Start" program to their homes could not recover under Federal Tort Claims Act where driver was employed by nonprofit corporation which had obtained federal grants for purpose of providing assistance to poor under provisions of Economic Opportunity Act (42 USCS §§ 2701 et seq.), such driver using her family automobile and receiving 10 cents per mile traveled, although funds used for this purpose were largely derived from grants of assistance from federal government paid to nonprofit corporation, such corporation was separate and distinct from United States and from Office of Economic Opportunity; federal control exercised over nonprofit corporation was hence insufficient to cause it to be considered agency or instrumentality of federal government within meaning of 28 USCS § 1346(b). *Vincent v United States* (1975, CA8 Ark) 513 F2d 1296, cert den 426 US 919, 49 L Ed 2d 372, 96 S Ct 2623.

8. County jail

Even if death of federal prisoner has resulted from negligence of employees of county jail in which prisoner was confined pending trial, such employees are employees of "contractor with United States," so as to fall within Federal Tort Claims Act's exclusionary provision (28 USCS § 2671) stating that term federal agency "does not include any contractor with United States"; such jail employees cannot be treated either as employees of "federal agency" or as "acting on behalf of federal agency in official capacity" within meaning of § 2671, and United States is therefore not liable for negligence of such jail employees under Act, where conclusion that

deputy United States marshal who arrested prisoner had no authority to control activities of jail employees is supported both by enabling statute (18 USCS § 4002) authorizing Government to contract with state and local authorities to provide safekeeping and care for federal prisoners, and by contract entered into between government and county. *Logue v United States* (1973) 412 US 521, 37 L Ed 2d 121, 93 S Ct 2215, on remand (CA5 Tex) 488 F2d 1090.

County jail under contract with Bureau of Prisons to provide safekeeping, care and subsistence for federal prisoners is "contractor with the United States" within exculpatory clause of 28 USCS § 2671; hence employees of jail are not employees of "federal agency" for purposes of limited waiver of sovereign immunity embodied in such Act. *Harper v United States* (1975, CA5 Ga) 515 F2d 576.

Actual relationship between federal government and reformatory jail was functional equivalent of contractor relationship that exists between federal government and state or county facility in which it lodges prisoners and Federal Tort Claims Act (28 USCS §§ 2671 et seq.) did not render United States liable for negligent actions of prison officials. *Cannon v United States* (1951) 207 App DC 203, 645 F2d 1128.

9. Federal Deposit Insurance Corporation

Federal deposit insurance corporation is clearly federal agency and therefore within scope of Federal Tort Claims Act. *Safeway Portland Employees' Federal Credit Union v Federal Deposit Ins. Corp.* (1974, CA9 Or) 506 F2d 1213, CCH Fed Secur L Rep ¶ 94899.

The FDIC is a federal agency, and despite fact that it is authorized to sue and be sued when the action brought against it sounds in tort the action must be brought against the United States under the Federal Tort Claims Procedure. *Maggelsen v Federal Deposit Ins. Corp.* (1972, DC Mont) 341 F Supp 1031.

Legislative purpose of Federal Deposit Insurance Corporation (FDIC) authority to conduct examinations is to protect Corporation and deposit insurance system against loss from undue risk. Corporation cannot be held to owe any duty, either expressly or by implication, to bank as corporate entity or to shareholders, to disclose evidence of misconduct of bank manager; absent such duty no recovery may be had under Federal Tort Claims Act. *First State Bank of Hudson County v United States* (1978, DC NJ) 471 F Supp 33.

Third-party action against Federal Deposit Insurance Corporation (FDIC) must proceed directly against United States in conformity with

requirements of Federal Tort Claims Act (28 USCS §§ 2671 et seq.) as FDIC is federal agency within meaning of Act; federal court lacked jurisdiction over claim against FDIC where claimant failed to plead jurisdiction under Act and did not allege facts constituting compliance with procedural requirements of Act. *Federal Deposit Ins. Corp. v TWT Exploration Co.* (1985, WD Okla) 626 F Supp 149.

10. Housing authority

Whether government contractor is federal agency is determined by power of Federal Government to control detailed physical performances of contractor, and issue is not whether alleged tortfeasor receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by Federal Government; United States could not therefore be liable for negligence of Puerto Rican public housing authority in erecting railing of balcony from which plaintiff fell. *Ramos Perez v United States* (1979, CA1 Puerto Rico) 594 F2d 280.

Federal district court had jurisdiction of suit by administrator of deceased against United States arising out of death of deceased, tenant in federal housing project leased by government to local housing authority, where government was entitled to profits and supervised operation of project, since housing authority was "federal agency." *Toth v United States* (1952, DC Ohio) 107 F Supp 37.

City housing authority was not employee of federal government within meaning of Federal Tort Claims Act, notwithstanding federal government provided funds to city authority, where federal government exercised no control of daily management and operation of city authority; thus, in action to recover for death of housing authority resident who was killed in fire, United States could not be held liable for any negligence or acts of omission of housing authority employees. *Allen v Kansas City* (1987, DC Kan) 660 F Supp 489.

11. Irrigation district

Although the government has certain control over an irrigation district, it is not a federal agency within the meaning of 28 USCS § 2671 where the actual operation of the canal as a commercial enterprise for the delivery and sale of irrigation water is carried out by defendant. *Furrer v Talent Irrig Dist* (1970) 258 Or 494, 466 P2d 605.

12. Naval base officers' mess

Officers' mess at naval base was "federal agency" within meaning of 28 USCS § 2671 and United States was liable for negligence of em-

ployee of mess. *United States v Holcombe* (1960, CA4 Va) 277 F2d 143.

13. Port authority

Although not federal agency, if Congress allows Delaware River Port Authority, which was created under congressionally-sanctioned interstate compact, to perform essentially federal functions, Authority's liability for negligent acts may be construed as liability of federal agency. *Yancoskie v Delaware River Port Authority* (1974, DC NJ) 385 F Supp 1170, rev'd on other grounds (CA3 NJ) 528 F2d 722.

14. Postal Service

Postal Service and Postal Inspection Service are "federal agencies" under 28 USCS § 2671. *Myers & Myers, Inc. v United States Postal Service* (1975, CA2 NY) 527 F2d 1252, 35 ALR Fed 466 (disagreed with by *Jayvee Brand, Inc. v United States*, 232 App DC 150, 721 F2d 385) and (disagreed with by *Art Metal-U.S.A., Inc. v United States*, 244 App DC 1, 753 F2d 1151, 32 CCF ¶ 73391).

Postal Service and Postal Inspection Service seem plainly to be "federal agencies" within broad definition of that term provided in 28 USCS § 2671. *Grasso v United States Postal Service* (1977, DC Conn) 438 F Supp 1231 (superseded by statute as stated in *Jackson v United States Postal Service* (CA5 Tex) 799 F2d 1018, reh den, en banc (CA5 Tex) 803 F2d 717).

15. Production credit association

Production credit associations (PCA's) are not federal instrumentalities within meaning of Federal Tort Claims Act (28 USCS §§ 2671 et seq.), as they are privately owned and are operated by independent boards of directors, and thus FTCA does not deprive Iowa state courts of jurisdiction over action against PCA; performance of important governmental function is but single factor not determinative of FTCA status. *South Cent. Iowa Production Credit Asso. v Scanlan* (1986, Iowa) 380 NW2d 699.

Production credit associations (PCA's) are not corporations primarily acting as instrumentalities or agencies of United States within meaning of Federal Tort Claims Act (28 USCS §§ 2671 et seq.), and Congress did not intend to insulate PCA's from state court jurisdiction; interpretation of pertinent federal statutes determinative of PCA's status under FTCA does not depend upon status of PCA as plaintiff or defendant. *Waldschmidt v Iowa Lakes Production Credit Asso.* (1986, Iowa) 380 NW2d 704.

16. Psychiatric institutions

Psychiatric institute was independent contractor where day-to-day operation of drug testing

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program was vested solely in institute; therefore, army chemical corps was not liable under FTCA for institute's negligence in administering drug in army's test of hallucinogenic compounds as potential warfare agents. *Barrett v United States* (1987, SD NY) 660 F Supp 1291, later proceeding (SD NY) 668 F Supp 339, affd, in part (CA2 NY) 853 F2d 124, cert den (US) 102 L Ed 2d 990, 109 S Ct 866.

17. Smithsonian Institution

Smithsonian Institution is federal agency within meaning of 28 USCS § 2671 for purposes of Federal Tort Claims Act and plaintiff's failure to file proper administrative claim deprives district court of jurisdiction to entertain claim against institution. *Genson v Ripley* (1982, CA9 Ariz) 681 F2d 1240, cert den, 459 US 937, 74 L Ed 2d 193, 103 S Ct 245.

18. State

In a negligence action against the U S alleging injuries as a result of a DDT program, which was funded by the federal government and subject to federal regulations, but operated by the state, it was determined that the state is not an agent of the U. S., but rather an independent organization, therefore notice of a claim against the U S must be filed with the appropriate federal agency and not with the state as a prerequisite to filing suit under the Federal Tort Claims Act. *Hejl v United States* (1971, CA5 Tex) 445 F2d 124

19. Miscellaneous

Local committee inspecting potato warehouse in contemplation of agricultural commodity loan was not an agency of federal government. *Lavitt v United States* (1949, CA2 Conn) 177 F2d 627.

Operator runs sports center as independent contractor where sports center is part of recreation area owned by United States and administered by Department of Interior, where operator's contract with National Park Service authorizes it to provide accommodations, facilities, and services for public, to maintain and operate accommodations, facilities, and services, and to provide plant, personnel, equipment, goods, and commodities necessary therefor, and where contract also requires that operator procure liability insurance facts that sports center must be operated to satisfaction of government and that National Park Service officials are empowered to make periodic inspections and spot checks of facility do not cause operator to be federal agency. *De Blasio v United States* (1985, ED NY) 617 F Supp 1004

II. EMPLOYEE OF GOVERNMENT

A. In General

20. Generally

Mere fact that government owned property which person was using negligently, so as to give rise to plaintiff's claim, does not make person employee of government. *Pattino v United States* (1962, CA10 Wyo) 311 F2d 604, cert den 373 US 911, 10 L Ed 2d 412, 83 S Ct 1300; *Blackwell v United States* (1963, CA5 La) 321 F2d 96.

Definition of "employee of the Government" made by 28 USCS § 2671 is not without boundaries, but it does have expansive reach and should be applied with eye to general agency law rather than to formalities of employment contracts. *Witt v United States* (1972, CA2 NY) 462 F2d 1261.

Although agency law is proper law to use when determining that one is either employee or independent contractor for Federal Tort Claims Act (28 USCS §§ 2671 et seq.) purposes, it cannot be used to make initial determination as to whether fiancée of government employee was also government employee for purposes of Act. *Brandes v United States* (1986, CA9 Cal) 783 F2d 895.

Where actions taken by employee of federal agency are within outer perimeter of his line of duty, he is immune from liability under Federal Tort Claims Act. *Genson v Ripley* (1981, DC Ariz) 544 F Supp 251, affd (CA9 Ariz) 681 F2d 1240, cert den 459 US 937, 74 L Ed 2d 193, 103 S Ct 245.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—federal cases. 14 L Ed 2d 892 (see especially § 3, Considerations affecting determination of whether person is employee of federal government, generally)

21. State or federal law as controlling

State law is controlling in determining whether person is "employee" of Federal Government under Federal Tort Claims Act. *Fries v United States* (1948, CA6 Ky) 170 F2d 726, cert den 336 US 954, 93 L Ed 1109, 69 S Ct 876; *Buchanan v United States* (1962, CA8 Minn) 305 F2d 738; *Hopson v United States* (1956, DC Ark) 136 F Supp 804; *Maloolf v United States* (1965, DC Md) 242 F Supp 175.

Federal law is controlling in determining whether person is "employee" of Federal Government under Federal Tort Claims Act. *Pattino v United States* (1962, CA10 Wyo) 311 F2d 604, cert den 373 US 911, 10 L Ed 2d 412, 83 S Ct 1300; *Blackwell v United States* (1963, CA5 La) 321 F2d 96; *Brucker v United States* (1964, CA9 Cal) 338 F2d 427, cert den 381 US 937, 14 L Ed

2d 701, 85 S Ct 1769; *Fisher v United States* (1966, CA6 Ohio) 356 F2d 706, cert den 385 US 819, 17 L Ed 2d 57, 87 S Ct 41; *United States v Becker* (1967, CA9 Ariz) 378 F2d 319 (disagreed with by *Felder v United States* (CA9 Ariz) 543 F2d 657) as stated in *Re Air Crash Disaster near Chicago* (CA7 Ill) 803 F2d 304, 21 Fed Rules Evid Serv 1092 and (disagreed with by *Letnes v United States* (CA9 Ariz) 820 F2d 1517); *United States v N. A. Degerstrom, Inc.* (1969, CA9 Wash) 408 F2d 1130; *Wood v Standard Products Co.* (1982, CA4 Va) 671 F2d 825; *Brandes v United States* (1986, CA9 Cal) 783 F2d 895; *Barker v Luna* (1977, DC Nev) 439 F Supp 810.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—federal cases. 14 L Ed 2d 892 (see especially § 4, state or federal law as controlling).

22. Control or right of control over person's work

Although various criteria should be used in determining whether or not particular person is employee of government under Tort Claims Act, factor of primary importance is who has control or right of control over person's work. *Lavitt v United States* (1949, CA2 Conn) 177 F2d 627; *Fries v United States* (1948, CA6 Ky) 170 F2d 726, cert den 336 US 954, 93 L Ed 1109, 69 S Ct 876; *Strangi v United States* (1954, CA5 Tex) 211 F2d 305; *Buchanan v United States* (1962, CA8 Minn) 305 F2d 738; *Dushon v United States* (1957, CA9 Alaska) 243 F2d 451, cert den 355 US 933, 2 L Ed 2d 416, 78 S Ct 415.

Under 28 USCS § 2671, term "employee of the government" includes "officers and employees of any federal agency"; in determining whether individual acted "on behalf of a federal agency" so as to qualify as "employee" of government under 28 USCS § 2671, court must consider all facts of relationship between individual and federal agency, and principal consideration is degree of control agency retains over individual, and whether or not agency ever actually exercises this control. *Rosano v American Export-Isbrandtsen Lines, Inc.* (1975, ED Pa) 395 F Supp 1192, rev'd on other grounds (CA3 Pa) 531 F2d 1227, 21 FR Serv 2d 1066, cert den 429 US 857, 50 L Ed 2d 135, 97 S Ct 156.

23. —Distinction between independent contractor and government employee

Even if person acting on behalf of federal agency in official capacity is not employee of federal agency, such person is "employee of government," as defined in Federal Tort Claims

Act (28 USCS § 2671); however, for purposes of Federal Tort Claims Act provision (28 USCS § 2671) making United States liable for negligent or wrongful conduct of person "acting on behalf of federal agency in official capacity," employees of contractor with Government, whose physical performance is not subject to governmental supervision, are not to be treated as "acting on behalf of" federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of Government. *Logue v United States* (1973) 412 US 521, 37 L Ed 2d 121, 93 S Ct 2215, on remand (CA5 Tex) 488 F2d 1090.

For purposes of Federal Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.), limiting tort liability of United States to liability for acts or omissions of federal government employees (§ 1346(b)), and defining government employees to include officers and employees of any federal agency, but excluding any contractor with United States (§ 2671), critical element in distinguishing agency employee from independent contractor is power of United States to control detailed physical performance of contractor. *United States v Orleans* (1976) 425 US 807, 48 L Ed 2d 390, 96 S Ct 1971.

Distinction between master servant and independent contractor relationship lies largely in degree of control or right of control retained by employer over details of work as it is being performed, although there is no definite and absolute rule. *Strangi v United States* (1954, CA5 Tex) 211 F2d 305.

Fact of broad, supervisory control, or even potential to exercise detailed control, cannot convert contractor into agent, nor can it be basis for imposing vicarious liability on United States. *Gibson v United States* (1977, CA3 NJ) 567 F2d 1237, cert den 436 US 925, 56 L Ed 2d 768, 98 S Ct 2819.

Only where government has power under contract to supervise contractor's day to day operations and to control detailed physical performance of contractor can it be said that contractor is employee or agent of United States within intendment of Federal Tort Claims Act. *Wood v Standard Products Co.* (1982, CA4 Va) 671 F2d 825.

United States is not liable under FTCA for negligence of its independent contractor; critical test for distinguishing agent from contractor is existence of federal authority to control and supervise detailed physical performance on day to day operations, and not whether person must comply with federal standards and regulations; park service concessionaire required to submit price list for federal approval and to maintain and operate facilities in particular manner is

independent contractor rather than agent of Federal Government. *Ducey v United States* (1983, CA9 Nev) 713 F2d 504, later app (CA9 Nev) 830 F2d 1071.

Although government retains right to inspect contractor's work, this authority is insufficient to shift contractor's status from independent contractor to servant or agent since safety of employees is under exclusive control and supervision of contractor pursuant to contract, and as result United States is not liable for any negligent acts by contractor which contribute to employee's fall. *Jennings v United States* (1981, DC Dist Col) 530 F Supp 40.

In determining whether party is independent contractor or government employee, self-serving characterizations are irrelevant and basic test to be applied is extent to which government controls or can control work of party in question. *Wright v United States* (1982, ND Ill) 537 F Supp 568.

Realty firm is independent contractor of United States rather than employee under 28 USCS § 2671, and thus United States is not liable for personal injury suffered at house owned by United States and maintained by firm under 28 USCS § 1346(b), because government does not control detailed physical performance of firm, notwithstanding that applicable government handbook and contract between firm and government contain detailed instructions. *Smith v United States* (1987, DC Minn) 674 F Supp 683.

Government is not liable for drowning death of child in lake created by Corps of Engineers hurricane protection project where project was constructed by contractor, because (1) even though Corps had inspector present, contractor exercised operational control of project area and supervised its employees, thus contractor was not de facto government employee. *Mocklin v Orleans Levee Dist.* (1988, ED La) 690 F Supp 527, aff'd (CA5 La) 877 F2d 427.

Annotations

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—federal cases: 14 L Ed 2d 892 (see especially § 5, distinction between independent contractor and government employee).

24. — Imposition of Federal safety standards

Although government may establish safety standards and reserve right to inspect for compliance with such standards, such provisions in contract do not make contractor government agency for purposes of determining liability of government under Federal Tort Claims Act (28 USCS §§ 2671, et seq.), contractor becomes government agency only when government assumes

contractor's contractual obligations or actually directs performance of contractor or his employees. *Harris v Pettibone Corp.* (1980, ED Tenn) 488 F Supp 1129.

Fact that government reserved right to stop work for safety violations is not enough to impose liability for independent contractor's actions since government must retain some control over manner in which contractor's work is performed in order to be liable for employee's injury. *Martinez v United States* (1987, WD Tex) 661 F Supp 762.

25. — Distinction between employment by federal government and employment by local government

Where municipality of St. Thomas and St. John in unincorporated territory of Virgin Islands is body politic which has attributes of sovereignty distinct from powers of United States Government, municipality's Superintendent of Public Works, whose duties were being performed under supervision and control of governor of territory, is official of municipality's government and is not employee of United States Government under Federal Tort Claims Act, although he has been appointed by United States Secretary of Interior and although his salary is paid from federal funds appropriated by Congress for government of Virgin Islands and its municipalities, and fact that federal funds are used for payment of salaries merely indicates that Congress is willing to subsidize local government, but not that officials of local government are employees of United States Government, and that, aside from letter appointing Superintendent to his position, record does not disclose order or directive issued by Secretary of Interior or other department or agency of United States with respect to Superintendent's duties. *Harris v Boreham* (1956, CA3 VI) 233 F2d 110.

Lieutenant Colonel in regular army of United States who was detailed to state National Guard as United States property and fiscal officer is employee of United States under Tort Claims Act. *United States v Wendi* (1957, CA9 Wash) 242 F2d 854 (disapproved on other grounds Maryland use of *Levin v United States*, 381 US 41, 14 L Ed 2d 205, 85 S Ct 1293, vacated on other grounds 382 US 159, 15 L Ed 2d 227, 86 S Ct 305).

Officers of police department of city located within Indian reservation, which officers were also deputized special officers of Department of Interior, Bureau of Indian Affairs, holding special commissions to arrest Indians on reservation, were employees of United States while arresting Indian on reservation, since officers, as employees of city police department, did not

have power to arrest Indians on reservation, and thus were acting on behalf of federal agency in an official capacity temporarily in the service of United States, albeit without compensation. *Provincial v United States* (1972, CA8 SD) 454 F2d 72, later app (CA8 SD) 463 F2d 760 and (disagreed with by *Dellums v Powell*, 184 App DC 324, 566 F2d 216, 23 FR Serv 2d 1368, cert den 438 US 916, 57 L Ed 2d 1161, 98 S Ct 3146, 98 S Ct 3147, reh den 439 US 886, 58 L Ed 2d 201, 99 S Ct 234 and (disapproved by *Monell v Department of Social Services*, 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018, 17 BNA FEP Cas 873, 16 CCH EPD ¶ 8345) as stated in *Tarpley v Greene*, 221 App DC 227, 684 F2d 1).

Individual was not employee of state of Nevada but of United States, though he was hired by state personnel department, was paid by state, and received all fringe benefits of employment through state agencies, where he was under supervision and control of federal agency. *Martarano v United States* (1964, DC Nev) 231 F Supp 805.

Instructor at Manpower Development and Training Act school was not employee of government, for purposes of Federal Tort Claims Act, where direction, control, and supervision of supervisory personnel at such school was entrusted to state and local agencies. *Prater v United States* (1973, ND Tex) 357 F Supp 1044.

State police officers possessing written arrest authority from assistant United States attorney are officers of United States for purposes of false imprisonment suit under 28 USCS § 2671. *Van Schaick v United States* (1983, DC SC) 586 F Supp 1023.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—federal cases. 14 L Ed 2d 892 (see especially § 6, distinction between employment by federal government and employment by local government).

26. Loaned servants

Where venereal disease survey was conducted by city and county board of health and United States Public Health Service participated in survey to extent of loaning equipment and contributing funds, but retained no control or direction over project, chauffeur, who was hired locally and was negligent in driving United States vehicle in course of his duties for project, is loaned servant of local board of health and is not employee of United States. *Fries v United States* (1948, CA6 Ky) 170 F2d 726, cert den 336 US 954, 93 L Ed 1109, 69 S Ct 876.

Finding that operator of loader leased by plaintiff to government at specified hourly rental

for both loader and operator, was "loaned servant" employee of government, rendering government liable for damage to loader caused by operator's negligence, was not clearly erroneous, where there was evidence that government actively participated in operation of loader and exerted detailed control over operations. *United States v N. A. Degerstrom, Inc.* (1969, CA9 Wash) 408 F2d 1130.

Regular Army personnel who were assigned to teach military science for junior unit of Reserve Officers' Training Corps at high school are employees of local school board, but not of United States Government, although personnel were receiving their salaries from Government, they received additional \$15 every four weeks from school board as compensation for their teaching and for taking care of weapons, they were members of faculty, and it was concluded that they were "loaned servants" who were under control of school board, where it was emphasized that school board assumed responsibility for government property which was used in connection with high school's junior ROTC program. *Cobb v United States* (1948, DC La) 81 F Supp 9.

Although mammal control agent was hired by state personnel department, was paid by state, and received all fringe benefits of employment through state agencies, he is employee of federal government under Federal Tort Claims Act, since he is officially loaned to federal agency and is working under direct supervision and control of federal agency; with respect to vicarious liability of master for tortious misconduct of his servant, controlling principle is that responsibility follows right of supervision and control and person in question is superseded by federal officials of Fish and Wildlife Service, job description, proficiency ratings, and actions pertaining to pay increases were supplied, reviewed, and approved by officials of Federal Bureau of Sport Fisheries and Wildlife, and no employee or officer of state directed or supervised person in performance of his work. *Martarano v United States* (1964, DC Nev) 231 F Supp 805.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 8, loaned servants).

27. Federal funding of agency

For purposes of Federal Tort Claims Act, limiting tort liability of United States to liability for the acts or omissions of federal government employees, and defining government employees to include officers and employees of any federal agency but not any contractor with the United

States. "community action agency" funded under Economic Opportunity Act of 1964 is not federal instrumentality or agency, and its employees are not employees of federal government, since (1) question is not whether community action agency receives federal money and must comply with federal standards and regulations, but rather whether its day-to-day operations are supervised by federal government, thus making it irrelevant whether federal program is funded by means of contract or grant, (2) community action agencies are local entities having complete control over operations of their own programs, while federal government supplies financial aid, advice, and oversight only to assure that federal funds will not be diverted to unauthorized purposes, thus making it irrelevant that community action agency neither obtains additional funds from other than federal sources or conducts any program without federal money, and (3) converting local executors of locally planned program which receives conditional federal funding into federal employees distorts well established principles of master and servant relationships, and extends meaning of Federal Tort Claims Act beyond that intended. *United States v. Orleans* (1976) 425 US 807, 48 L Ed 2d 390, 96 S Ct 1971.

Mere fact that person is paid from federal government funds does not make him employee of government within meaning of Tort Claims Act. *Harris v. Boreham* (1956, CA3 Va) 233 F2d 110, *Cromelin v. United States* (1949, CA5 Ga) 177 F2d 275, cert den 339 US 944, 94 L Ed 1359, 70 S Ct 790 and (disagreed with by *United States v. Le Patourel* (CA8 Neb) 593 F2d 827); *Patino v. United States* (1962, CA10 Wyo) 311 F2d 604, cert den 373 US 911, 10 L Ed 2d 412, 83 S Ct 1300; *Blackwell v. United States* (1963, CA5 La) 321 F2d 96.

Fact that person is paid by someone other than government does not preclude him from being employee of government. *United States v. Holcombe* (1960, CA4 Va) 277 F2d 143; *Martinez v. United States* (1964, DC Nev) 231 F Supp 805.

Prochuk children who sustained severe bodily injuries in automobile accident while riding with driver who was transporting children from "Head Start" program to their homes could not recover under Federal Tort Claims Act where driver was employed by nonprofit corporation which had obtained federal grants for purpose of providing assistance to poor under provisions of Economic Opportunity Act (42 USCS §§ 2701 et seq.), where driver used her family automobile and received 10 cents per mile traveled, although funds used for this purpose were largely derived from grants of assistance from federal government; paid to nonprofit corporation, such corpo-

ration was separate and distinct from United States and from Office of Economic Opportunity; federal control exercised over nonprofit corporation was insufficient to cause it to be considered agency or instrumentality of federal government within meaning of 28 USCS § 1346(b). *Vincent v. United States* (1975, CA8 Ark) 513 F2d 1296, cert den 426 US 919, 49 L Ed 2d 372, 96 S Ct 2623.

Federal funding of local community action agency does not cause agency to be primarily instrumentality of federal government within meaning of 28 USCS § 2671; employee of such agency was not "employee of the government." *Hughes v. United States* (1973, SD Iowa) 383 F Supp 1071.

Nonprofit recreation association obtaining money primarily from resources of Farmers Home Administration, whose day-to-day operations are not supervised by Federal Government, is not independent contractor within meaning of 28 USCS § 2671; *Wright v. United States* (1977, DC Mont) 428 F Supp 782, affd (CA9 Mont) 599 F2d 304.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 7.5, federal funding of agency).

B. Specific Persons as Employees

1. Persons Engaged in Military or Related Activities

28. Aero club members

Although considering aero club to be instrumentality of United States, negligent club member who was flying club plane is not employee of government, since club has no contractual arrangement with him, does not compensate him, and neither possesses nor exercises power to control his conduct of flight, moreover, listing of available check pilots and flying instructors can reasonably be viewed as service provided by club for convenience of members, rather than evidence of master-servant relationship between club and listed pilots, and club regulations relating to check pilot and flying instructors, as well as bylaw provision empowering president of club to approve or disapprove particular flight arrangements, can be regarded not as manifestations of control by club over check pilots and flying instructors as servants, but rather as reflecting club's control over its planes and activities of its members in interest of air safety. *Brucker v. United States* (1964, CA9 Cal) 338 F2d 427, cert den 381 US 957, 14 L Ed 2d 701, 85 S Ct 1769.

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Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 12, members of aero club).

29. Arsenal or ammunition depot personnel

Firm which operates United States government arsenal and manufactures ammunition is independent contractor and not employee of government, where although government maintains certain overriding general control over arsenal property, such control is no different than that interest and general control ordinarily exercised by owner over his property which, by lease or other contract, is in hands of another, and much of "control" is exercised in necessary direction of seeing that firm's obligations to government are fulfilled and not in direction of government taking over those obligations itself, although government retains title to property, total situation reveals absence of that kind of control on part of government which will make it liable under Federal Tort Claims Act for negligence, if any, of firm. *Buchanan v United States* (1962, CA8 Minn) 305 F2d 738.

Although contract for operation of government-owned ammunition depot contains provisions which are required in standard government contracts, and government reserved right to inspect plant and facilities, since only control or right to control retained or exercised by government over operation of depot was limited to control of result of work being performed, firm which operates depot is independent contractor, and its employees are not employees of government under Federal Tort Claims Act. *Hopson v United States* (1956, DC Ark) 136 F Supp 804.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 14, arsenal or ammunition depot personnel).

30. Civil Air Patrol personnel

Civil air patrol pilot while piloting plane on loan from air force and carrying passenger on official indoctrination flight of civil air patrol was not employee of United States, and United States was not liable for death of passenger when plane stalled in flight and crashed, there being no indication that pilot has been detailed by Air Force to assist in training program of Civil Air Patrol or that he is engaged in carrying out mission specifically assigned by Air Force. *Pearl v United States* (1956, CA10 Okla) 230 F2d 243.

Officer of United States Air Force who was assigned to Civil Air Patrol as liaison officer is employee of United States when flying plane which is owned, maintained, operated, and exclusively controlled by Air Force. *Alexander v Civil Air Patrol* (1955, DC NC) 134 F Supp 691, rev'd on other grounds *United States v Alexander* (CA4 NC) 234 F2d 861, cert den 352 US 892, 1 L Ed 2d 86, 77 S.Ct 131.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 13, Civil Air Patrol personnel).

31. National Guard personnel

1981 amendment to 28 USCS § 2671 making federal government liable for acts or omissions of National Guard personnel which occurred during federal training activity was not intended to eliminate any liability of states for acts or omissions of National Guard as language of preamble to amendment does not evidence congressional intent to make FTCA exclusive remedy in actions against National Guard, except perhaps medical malpractice actions. *United States v Hawaii* (1987, CA9 Hawaii) 832 F2d 1116.

Member of National Guard involved in automobile accident prior to effective date of amendment to Federal Tort Claims Act (28 USCS §§ 2671 et seq.) (FTCA) making members of National Guard employees of United States for purposes of FTCA, who was not in active service for Federal Government at time of accident, was not employee of Federal Government under FTCA. *Russell v United States* (1986, SD Ind) 626 F Supp 1217.

United States is entitled to contribution from state where state national guardsman, also federal employee under 28 USCS § 2671, negligently injured plaintiffs in car accident while performing recruiting duty for state national guard, because (1) fact that guardsman was federal employee acting in line of duty does not preclude determination he was acting in line of duty under state law, (2) fact that guardsman was acting in line of duty under state law gives United States right to contribution under state law, and (3) Federal Tort Claims Act (28 USCS §§ 2671 et seq.) is not exclusive remedy for injuries resulting from national guard activities. *Lee v Yee* (1986, DC Hawaii) 643 F Supp 593, aff'd (CA9 Hawaii) 832 F2d 1116.

Person who is merely supervised by National Guard technician is not himself employee of United States, and torts of such person will not give rise to liability under Federal Tort Claims Act. *Ferster v State* (1985) 129 Misc 2d 333, 493 NYS2d 259.

32. Post exchange personnel

Where plaintiff was allegedly injured through negligent driving of member of Air Force who was assigned to Air Force base exchange on permanent duty status, driver is employee of government under 28 USCS § 2671, since maintenance of post exchange is integral part of Armed Forces, and fact that military personnel were used in its operation seems to indicate that operation of post exchange is business of Air Force and it has right to supervise and control duties of servicemen assigned to exchange. *Roger v Elrod* (1954, DC Alaska) 125 F Supp 62

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 11, post exchange personnel)

33. Prison authorities

Definition of "employee of the Government" in 28 USCS § 2671 is not without boundaries, but it does have expansive reach and should be applied with eye to general agency law rather than to formalities of employment contracts; even though no written agreement exists, there is implied authority to person to transport military prisoners in his custody to work detail in order to supervise or help supervise that detail and return prisoners, and in such circumstances person is "acting on behalf of a federal agency in an official capacity, temporarily . . . in the service of the United States . . . without compensation," and is an employee of the United States for purposes of the right of prisoner to recover for injury sustained as a result of the person's negligence. *Witt v United States* (1972, CA2 NY) 462 F2d 1261

District Court has no jurisdiction under 28 USCS §§ 1346 and 2671 to entertain action filed by prisoner against guard at New York Metropolitan Correctional Center who struck him in face because those provisions relate to suits against United States, which was not named as party in action. *Moran v Hunter* (1978, SD NY) 462 F Supp 353

34 ROTC instructors

Junior Reserve Officer Training Corps instructors, who are civilians and whose daily supervision and control comes exclusively from school district, are not employees of federal government within meaning of Federal Tort Claims Act. *Cavazos v United States* (1985, CA5 Tex) 776 F2d 1263

Regular Army personnel who were assigned to teach military science for junior unit of Reserve Officers' Training Corps at high school are em-

ployees of local school board, but not of United States Government, although personnel were receiving their salaries from Government, they received additional \$15 every four weeks from school board as compensation for their teaching and for taking care of weapons, they were members of faculty, and it was concluded that they were loaned servants who were under control of school board, where it was emphasized that school board assumed responsibility for government property which was used in connection with high school's junior ROTC program. *Cobb v United States* (1948, DC La) 81 F Supp 9.

United States Air Force officer who was assigned to college as professor of air science and tactics for Air Force Reserve Officers' Training Corps program is employee of United States under Tort Claims Act, where officer is subject at any moment to be assigned by Air Force and his main source of livelihood comes from his salary as lieutenant colonel in Air Force. *Bellview v United States* (1954, DC Va) 122 F Supp 97; *La Bombard v United States* (1954, DC Va) 122 F Supp 294

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 10, ROTC instructors).

35. Truck drivers

Transport company and driver of its truck carrying explosives for Department of Defense were not 28 USCS § 2671 "employees" but rather company was independent contractor and driver was its employee, even though government heavily regulated explosives transportation operations, because nature of commodity transported justifiably mandates extensive regulation of contractor's work without resulting vicarious government liability or sharing of governmental immunity. *Creek Nation Indian Housing v United States* (1988, ED Okla) 677 F Supp 1120.

36. Miscellaneous

Aircraft engineering company testing Navy aircraft and equipment under government contracts was independent contractor rather than employee of government, and thus government was not liable for death of contractor's employee on test flight, where government's supervision of performance of contract was solely for government's benefit and government did not assume degree of control over performance of contract necessary to render it vicariously liable. *Stopp v Douglas Aircraft Co* (1971, ED Va) 329 F Supp 447

2. Persons Not Engaged in Military or Related Activities

37. Agricultural personnel

Field reporter working for agricultural stabilization and conservation service county committee is employee of United States under Tort Claims Act, where control which United States Department of Agriculture exercised over field reporter was emphasized, and he was among employees referred to in handbook, bulletins, rules, and regulations promulgated by Department of Agriculture and dealing with general standard of employment, standard of conduct, types of misconduct subjecting employees to disciplinary action, and various similar matters, moreover, field reporter is subject to spot checks which are subject to audit and review from Department of Agriculture, county committee is listed under Federal Department of Agriculture in various places and is treated by Department as one of its instrumentalities, county committee's funds come from United States Treasury, various written and other materials provided to county committee and its employees are from United States Department of Agriculture, and salary range and steps are controlled by Department's handbook. *Delgado v Akins* (1964, DC Ariz) 236 F Supp 202.

Aerial spraying company under crop-spraying contract with Department of Agriculture was employee of government, subjecting it to liability for property damage resulting from negligent spraying, where Department of Agriculture employees had exclusive control of company's activities in execution of contract, and pilot's only function was to fly as instructed and directed by Department Motors Ins. Corp v Aviation Specialties, Inc. (1969, WD Mich) 304 F Supp 973.

Inspector for Georgia Federal-State Inspection Service was not federal employee where (1) Service was not federal agency, (2) inspection fees, from which inspector's salary was paid, were not federal funds, and (3) Department of Agriculture did not exercise control over day-to-day operation of Service, notwithstanding that inspections were required by federal regulations, that inspectors were licensed and trained by Federal Government, or that federal agents could suspend inspectors' licenses. *Shippey v United States* (1970, SD Fla) 321 F Supp 350, affd (CA5 Fla) 451 F2d 184.

Fruit and vegetable inspector was not government employee even though Department of Agriculture trained and licensed such inspectors and notified them of availability of work in various states, where inspectors were hired and paid by state, and where Federal Government, though interested in uniform nationwide inspection service, did not issue travel orders or pay

expenses. *Haynes v United States* (1970, WD NY) 327 F Supp 264, affd (CA2 NY) 443 F2d 375.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 18, agricultural personnel).

38. Community action agency personnel

For purposes of Federal Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.), limiting tort liability of United States to liability for acts or omissions of federal government employees (§ 1346(b)), and defining government employees to include officers and employees of any federal agency but not any contractor with United States (§ 2671), "community action agency" funded under Economic Opportunity Act of 1964 (42 USCS §§ 2781 et seq.)—defined in such Act as state or political subdivision, or public or private nonprofit agency or organization designated by state or political subdivision, which is capable of planning, conducting, administering, and evaluating community action program (42 USCS § 2790(a))—is not federal instrumentality or agency, and its employees are not employees of federal government, since (1) question is not whether community action agency receives federal money and must comply with federal standards and regulations, but rather whether its day-to-day operations are supervised by federal government, thus making it irrelevant whether federal program is funded by means of contract or grant, (2) community action agencies are local entities having complete control over operations of their own programs, while federal government supplies financial aid, advice, and oversight only to assure that federal funds will not be diverted to unauthorized purposes, thus making it irrelevant that community action agency neither obtains additional funds from other than federal sources or conducts any program without federal money, and (3) converting local executors of locally planned program which receives conditional federal funding into federal employees distorts well established principles of master and servant relationships, and extends meaning of Federal Tort Claims Act beyond that intended. *United States v Orleans* (1976) 425 US 807, 48 L Ed 2d 390, 96 S Ct 1971.

Since government exercised no operational, day-to-day control over Job Corps Center operated by Federal Electric Company under contract with Office of Economic Opportunity, nor over employees of Federal Electric Company, United States may not be held liable on theory of respondeat superior for assault committed on

counselor for alleged failure of Federal Electric Company to supervise or control counselor's assailant. *Gibson v United States* (1977, CA3 NJ) 567 F2d 1237, cert den 436 US 925, 56 L Ed 2d 768, 98 S Ct 2819.

Federal funding of local community action agency does not cause agency to be primarily instrumentality of federal government within meaning of 28 USCS § 2671; employee of such agency was not "employee of the government." *Hughes v United States* (1973, SD Iowa) 383 F Supp 1071.

Community action agency which is recipient of assistance under Economic Opportunity Act (42 USCS §§ 2701 et seq.) is not federal agency, and part-time driver for "Head Start" program employed by such agency is not government employee, hence, negligence of driver does not give rise to liability of United States under 28 USCS § 1346(b). *Vincent v United States* (1974, ED Ark) 383 F Supp 471, affd (CA8 Ark) 513 F2d 1296, cert den 426 US 919, 49 L Ed 2d 372, 96 S Ct 2623.

39. Construction employees

United States was not liable under Federal Tort Claims Act for damages allegedly resulting from negligent conduct of United States and its employees in construction of pipeline across plaintiff's property, independent contractor and its employees were not employees of government as term "employee" is defined by 28 USCS §§ 1346(b) and 2671 et seq. *Nyquist v United States* (1964, DC Mont) 226 F Supp 884.

Where Federal Government had one of its project engineers working with dredging company on government construction contract, government possessed and exercised such control over dredging company that company, in negligently allowing fire to spread to plaintiff's property, is employee of government rather than independent contractor, where besides referring to engineer's control over company, it was emphasized that contract itself gave government extensive control over company's activities and even contained regulations dealing expressly with burning operations and fire prevention. *Maloolf v United States* (1965, DC Md) 242 F Supp 175.

Weider on government contract for construction of houses who had some tools of his own but furnished no material, which came from government, was employee of government, subjecting it to liability for his negligence, where complete supervision was impliedly reserved to government; or in any event exercised under contract fixing extent of work. *Clifford v United States* (1970, DC SD) 308 F Supp 957.

Government is not liable in action under Federal Tort Claims Act (28 USCS §§ 1346,

2671) where administratrix of deceased crane operator alleges that government was negligent in failing to inspect contractor's crane at government-owned construction site and monitor its operation because, among other things, contractor is not agency of government where agents' responsibilities of monitoring contract compliance and fire and safety hazards do not constitute supervision of day-to-day operations of contractor. *Schwab v United States* (1986, MD Fla) 649 F Supp 1319, affd without op (CA11 Fla) 825 F2d 556.

40. County jail employees

For Government to be liable for negligence of employee of county jail, he must be shown to be "employee of Government," as that term is used in Federal Tort Claims Act; county jail employee responsible for safekeeping of federal prisoner confined in county jail pending trial is employee of contractor with United States, and is not employee of government for whose negligence United States may be held liable under Federal Tort Claims Act. *Logue v United States* (1973) 412 US 521, 37 L Ed 2d 121, 93 S Ct 2215, on remand (CA5 Tex) 488 F2d 1090.

In action by federal prisoner injured when he fell while taking shower in county jail, there could be no recovery under Federal Tort Claims Act since employees of jail are not employees of government. *Harper v United States* (1975, CA5 Ga) 515 F2d 576.

41. Federal judges and judiciary officers and employees

As matter of common understanding, federal judges are considered employees of government for purposes of Federal Tort Claims Act. *United States v Le Patourel* (1978, CA8 Neb) 571 F2d 405, on remand (DC Neb) 463 F Supp 264 and on reh (CA8 Neb) 593 F2d 827.

Claim for damages against Clerk of U.S. Supreme Court in his official capacity is claim against United States, cognizable, if at all, only under Federal Tort Claims Act. *Borntrager v Stevas* (1985, CA8 Mo) 772 F2d 419, cert den 474 US 1008, 88 L Ed 2d 464, 106 S Ct 533 and (disagreed with by *Hironymous v Bowen* (CA9 Cal) 800 F2d 888, later proceeding 258 App DC 386 811 F2d 1575, later proceeding (DC Dist Col) 1988 US Dist LEXIS 16449).

42. Federal prisoners

Relationship of prisoner to guard is not such as will under common law impute negligence of former to latter, hence, suit cannot be maintained under Federal Tort Claims Act for negligence of prisoner in driving his own automobile while in custody of and accompanied by security officer of United States Immigration and Natu-

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ralization Service. *Sapp v United States* (1955, CA5 Fla) 227 F2d 280.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 20, federal prisoners).

43. Forest Service personnel

Finding that pilot who made his plane and his services available to Forest Service pursuant to contract, was government employee, rather than independent contractor, at time of crash while observing forest fire, was not clearly erroneous, rendering government liable for death of passenger, where pilot was paid at hourly rate, and was subject to government regulation and direction. *United States v Becker* (1967, CA9 Ariz) 378 F2d 319 (disagreed with by *Felder v United States* (CA9 Ariz) 543 F2d 657) as stated in *Re Air Crash Disaster near Chicago* (CA7 Ill) 803 F2d 304, 21 Fed Rules Evid Serv 1092 and (disagreed with by *Letnes v United States* (CA9 Ariz) 820 F2d 1517).

Copilot, employee of private aircraft company under contract with Forest Service, was not government employee for purposes of Federal Tort Claims Act (28 USCS §§ 2671 et seq.), but rather was employed by independent contractor, where government control over contractor was limited to provisions for safety, as government thus had no control over the detailed daily operation of contractor's employees. *Letnes v United States* (1987, CA9 Ariz) 820 F2d 1517.

Any claim under Federal Tort Claims Act against United States based upon negligence of independent contractors or their employees in building forest service roads in national forest was barred by 28 USCS § 2671 et seq. where such road was constructed by subcontractor under subcontract with general contractor, which had contract requiring it to construct such roads in accordance with plans and specifications drafted by Forest Service engineers, both subcontractor and general contractor were independent contractors and subcontractor employed its own workers and used its own tools to build such roads. *Fireman's Fund American Ins Cos. v United States* (1979, DC Or) 482 F Supp 893.

44. Hospital and public health personnel

Term "employee of government" is sufficiently broad to include regular personnel of Veterans' Administration Hospital. *Rufino v United States* (1954, DC NY) 126 F Supp 132.

Ambulance service attendants working under contract to Veterans Administration hospital are independent contractors where Veterans Admin-

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istration simply reserves right to furnish guidance and advice, to generally supervise work to be performed and to inspect and investigate operations. *Wright v United States* (1982, ND Ill) 537 F Supp 568.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 17, Veterans' Administration hospital personnel).

45. —Physicians

Physicians employed by independent contractors holding service contracts with government are not federal employees for purposes of medical malpractice action against United States under Federal Tort Claims Act (28 USCS §§ 2671 et seq.); determination whether particular persons are government employees includes consideration of extent of government supervision of day to day activities and source of compensation. *Bernie v United States* (1983, CA8 SD) 712 F2d 1271.

Strict control test for independent contractor exception to Federal Tort Claims Act (28 USCS § 2671) is not appropriate method to determine whether physicians rendering service to Veteran's administration are to be considered employees for purposes of immunity under 38 USCS § 4116. *Quilico v Kaplan* (1984, CA7 Ill) 749 F2d 480 (disagreed with by *Lilly v Fieldstone* (CA10) 1989 US App LEXIS 7759).

Where damages are recovered from United States for injuries resulting from negligence of medical doctor at United States Veterans' Administration Hospital, doctor is agent of United States and employee of government under 28 USCS § 2671. *Dishman v United States* (1950, DC Md) 93 F Supp 567.

Hospital emergency room physician who examined injured merchant seaman acted on behalf of United States Public Health Service where Public Health sent seaman to hospital because Public Health was closed and hospital had contract with Public Health to provide care to Public Health beneficiaries, under which contract Public Health had right to control treatment of its beneficiaries at hospital to extent even of removing its patients from hospital or having Public Health staff members enter hospital to administer treatment, and hence examining physician at hospital qualified as "employee" of federal government under §§ 1346(b) and 2671, and United States was liable under § 1346(b) for any negligence committed by physician at hospital in treatment of seaman. *Rosario v American Export-Isbrandtsen Lines, Inc.* (1975, ED Pa) 395 F Supp 1192, rev'd on other grounds (CA3

Pa) 531 F2d 1227, 21 FR Serv 2d 1066, cert den 429 US 857, 50 L Ed 2d 135, 97 S Ct 156.

Physician performing alleged negligent operation upon plaintiff is independent contractor and not employee of government hospital since there is no limitation on physician's authority to select and employ physician assistants, physician bills time to hospital on agreed basis and handles his own social security and income tax payments and where physician has exclusive control of pertinent work area at time of operation. *Walker v United States* (1982, W.D. Okla.) 549 F Supp 973.

United States is equitably estopped from asserting doctor is not government employee, where patient's estate brought malpractice action against government for alleged negligent treatment at VA hospital by doctor who, although under contract to VA, held himself out as Chief of Anesthesia with VA's consent and maintained office at hospital, because VA held itself out to patients as full-service hospital and created appearance, relied on by patients, that VA agents, not independent contractors, would provide medical care, and thus government cannot contractually insulate itself from liability under these facts. *Gamble v United States* (1986, ND Ohio) 648 F Supp 438.

46. Housing personnel

In action against United States under Federal Tort Claims Act for wrongful death allegedly resulting from negligence of manager of buildings leased to Federal Public Housing Authority in failing to take adequate measures to exterminate rats, since employee is defined as person acting on behalf of federal agency in official capacity, manager is subject to detailed supervision of public housing authority, and in his contract for management of property, he agrees to be bound by regulations issued by government in form of contract managers' manual, and by all amendments thereto, contention that manager, who was owner of real-estate firm, is independent contractor rather than employee of government would be rejected. *Maryland use of Pumpfrey v Manor Real Estate & Trust Co.* (1949, CA4 Md.) 176 F.2d 414.

For purposes of Tort Claims Act, caretakers for housing project owned by United States are employees of government. *United States v Doolley* (1955, CA9 Wash.) 231 F.2d 423.

Local housing authority was not independent contractor and government could be liable for negligence of authority's officials. *Toth v United States* (1952, DC Ohio) 107 F Supp 37.

City housing authority was not employee of federal government within meaning of Federal Tort Claims Act, notwithstanding federal gov-

ernment provided funds to city authority, where federal government exercised no control of daily management and operation of city authority. *Allen v Kansas City* (1987, DC Kan) 660 F Supp 489.

In personal injury action resulting from slip and fall in government-repossessed apartment building, federal agency officials had no liability under Federal Tort Claims Act, since building was managed by independent contractor rather than by federal employee; absence of authority on part of government to control detailed physical performance of contractor was evidence that employer-employee relationship did not exist, and fact that written contract with building manager was not signed until after occurrence of slip and fall was not controlling on issue, where agreement was actually entered into prior to occurrence. *Truesdale v CMC Realty Co.* (1987, ND Ill.) 671 F Supp 1173.

In action by real estate against United States to recover for injury she sustained when she fell on stairs of house owned by Department of Housing and Urban Development, government's motion for summary judgment would be granted where area management broker used by Department to supervise and maintain house was independent contractor, and not employee; thus broker's negligence did not subject United States to liability under Federal Torts Claim Act, despite fact broker was subject to detailed regulation under terms of handbook and contract. *Smith v United States* (1987, DC Minn) 674 F Supp 683.

Annotations:

Who is an "employee of the government" for whose conduct the United States may be held liable under the Federal Tort Claims Act—Federal cases. 14 L Ed 2d 892 (see especially § 16, housing personnel).

47. Informants

Government drug informant was not acting as independent contractor of government when informant shot another person at drug-related meeting where, under arrangement by which government recruited drug informant, informant was required to make offer to government before undertaking assignment, and where informant failed to inform government before attending drug-related meeting and thus government could not be held liable for victim's injuries under Federal Tort Claims Act under nondelegable duty doctrine applicable to dangerous activities. *Siagle v United States* (1980, CA9 Cal) 612 F.2d 1157.

Participant in federal witness protection program is not agent of government; and action brought against United States under Federal Tort Claims Act (28 USCS § 2671) in which it is

Soldier, repair parts specialist in motor pool who was given on-post housing in multi-unit complex, was acting within line and scope of employment when he injured child while operating ride-type power lawnmower outside his quarters where both manner and method by which portion of lawn assigned to soldier to maintain was specified in detail by government's regulations. *Craft v United States* (1976, CA5 Ala) 542 F2d 1250, reh den (CA5 Ala) 546 F2d 906 and reh den (CA5 Ala) 546 F2d 907.

Injury suffered on military base by serviceman on private business during normal duty hours but during period when serviceman had been given permission to take day off is incident to his military service, and no remedy is afforded by Federal Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.). *Warner v United States* (1983, CA5 Tex) 720 F2d 837.

Where plaintiff's decedent drowned in swimming pool provided and maintained at naval

station for benefit of servicemen, negligence in operation of drain whereby decedent was trapped at bottom of pool occurred while service members involved were acting within scope and authority of their employment in draining pool, and United States is liable to respond in damages under Federal Tort Claims Act. *Brown v United States* (1951, DC W Va) 99 F Supp 685.

In civil action arising out of murder of three teenagers and attempted murder of fourth teenager by military policeman who was later convicted of kidnap, rape, assault with intent to kill and murder, policeman's tortious conduct is not found to be within scope of his employment, as defined by Missouri law of respondeat superior, so as to invoke liability upon his employer, defendant United States, under Federal Tort Claims Act, since conduct was so outrageous and criminal and so excessively violent as to be totally without reason or responsibility. *Bates v United States* (1981, WD Mo) 517 F Supp 1350, affd (CA8 Mo) 701 F2d 737.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§ 2671 et seq.].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

(June 25, 1948, ch 646, § 1, 62 Stat. 983; Apr. 25, 1949, ch 92, § 2(b), 63 Stat. 62; May 24, 1949, ch 139, § 125, 63 Stat. 106; Sept. 23, 1950, ch 1010, § 9, 64 Stat. 987; Sept. 8, 1959, P. L. 86-238, § 1(1), 73 Stat. 471; July 18, 1966, P. L. 89-506, §§ 1, 9(a), 80 Stat. 306, 308.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

1948 Act

Based on title 28, U.S.C., 1940 ed., § 921 (Aug. 2, 1946, ch. 753, § 403, 60 Stat. 843).

The phrase "accruing on and after January 1, 1945" was omitted because executed as of the date of the enactment of this revised title.

Changes were made in phraseology.

1949 Act

This section corrects a typographical error in section 2672 of title 28, U.S.C.

Amendments:

1949. Act Apr. 25, 1949, in the first para. inserted "accruing on or after January 1, 1945."

Act May 24, 1949, in the third para., substituted "2677" for "2678".

1950. Act Sept. 23, 1950, in the third para. substituted "appropriations available to such agency" for "such agency's appropriations therefor, which appropriations are hereby authorized".

1959. Act Sept. 8, 1959, in the heading and in the first para., substituted "\$2,500" for "\$1,000".

1966. Act July 18, 1966 (effective 6 months or more after enactment as provided by § 10 of such Act, which appears as a note to this section), in the catchline, deleted "of \$2,500 or less", substituted the first para. for one which read: "The head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of \$2,500 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"; substituted the second para. for one which read: "Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the

28 USCS § 2672, n 7

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ciary of release anonymously as result of fraudulent concealment of Army's involvement in experiment leading to death of estate's decedent and such concealment materially affected estate's settlement decisions. *Barrett v United States* (1987, SD NY) 660 F Supp 1291, later proceeding (SD NY) 668 F Supp 339, affd, in part (CA2 NY) 853 F2d 124, cert den (US) 102 L Ed 2d 990, 109 S Ct 866.

While federal law governs question of what constitutes release under 28 USCS 2672, state law is to be applied in determining effect of such release. *Danzey v United States Fidelity & Guaranty Co.* (1980, La) 380 So 2d 1356.

8. Suit in excess of amount claimed

One injured in collision with government vehicle, whose claim for less than thousand dollars filed under 28 USCS § 2672 was rejected by government, could, in action brought pursuant to 28 USCS § 1346(b) recover greater sum than amount of his original claim, upon showing, that, after his original claim was filed, it was necessary to have surgery performed upon his shoulder, increasing his damages, and that necessity for surgery and resulting amount of damages

could not reasonably have been anticipated by claimant at time of filing original claim. *United States v Alexander* (1956, CA5 Ga) 238 F2d 314, 62 ALR2d 1329.

Claim presented to federal agency was not bar to institution of action for sum in excess of amount of claim presented. *Craun v United States* (1948, DC Pa) 78 F Supp 840.

Suit for more than demanded from agency will not be dismissed because demand exceeded amount of claim, but recovery is limited to amount of claim, filed with department, and plaintiff will be allowed to amend complaint to comply with claim. *Reardon v United States* (1949, DC Mass) 87 F Supp 35.

Suit cannot be filed for more than amount of claim filed with agency. *Henson v United States* (1949, DC Mo) 88 F Supp 148.

Where plaintiff had submitted to post office department for administrative settlement claim for \$1000, on post office form, in which he inserted "In the event claim is not settled, I reserve the right to commence suit for \$6000," action could not be maintained for increased amount. *Singer v United States* (1960, ED NY) 186 F Supp 131.

§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

(Act June 25, 1948, ch 646, § 1, 62 Stat. 983.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 922 (Aug. 2, 1946, ch. 753, § 404, 60 Stat. 843).

Changes were made in phraseology.

Other provisions:

Repeal of certain provisions. Act Nov. 8, 1965, P. L. 89-348, § 1(1), 79 Stat. 1310 repealed the provision for the annual report to Congress of the administrative adjustment of tort claims of \$2,500 or less, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

CROSS REFERENCES

This section is referred to in 5 USCS § 8477.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter [28 USCS §§ 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter [28 USCS §§ 2671 et seq.].

(June 25, 1948, ch 646, § 1, 62 Stat. 983; Nov. 18, 1988, P. L. 100-694, §§ 4, 9(c), 102 Stat. 4564, 4567.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Prior law and revision:**

Based on title 28, U.S.C., 1940 ed., § 931(a) (Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843).

Section constitutes the liability provisions in the second sentence of section 931(a) of title 28, U.S.C., 1940 ed.

Other provisions of section 931(a) of title 28, U.S.C., 1940 ed., are incorporated in sections 1346(b), 1402, 2402, 2411, and 2412 of this title, but the provision of such section 931(a) that the United States shall not be liable for interest prior to judgment was omitted as unnecessary in view of section 2411 of this title, which provides that interest on judgments against the United States shall be computed from the date of judgment. Such section 2411 is made applicable to tort-claim actions by section 932 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

- Merrill, Compensation for Prescription Drug Injuries. 59 Va L Rev 1.
 Peck, Laird v Nelms: A Call For Review and Revision of the Federal Tort Claims Act. 48 Wash L Rev 391.
 Lewin, The Tail Wags the Dog: Judicial Misinterpretation of the Punitive Damages Ban in the Federal Tort Claims Act. 27 Wm & Mary L Rev 245, Winter, 1986.
 Federal Compensation for Victims of the "Homeownership for the Poor" Program. 84 Yale LJ 294.

INTERPRETIVE NOTES AND DECISIONS

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| <p>I. IN GENERAL (notes 1-7)</p> <p>II. GOVERNMENT LIABLE UNDER SAME CONDITIONS AS PRIVATE INDIVIDUAL (notes 8-12)</p> <p>III. STATUS OF PLAINTIFF AS AFFECTING RIGHT OF RECOVERY (notes 13-31)</p> <p>IV. LIABILITY</p> <p style="padding-left: 20px;">A. In General (notes 32-41)</p> <p style="padding-left: 20px;">B. Damages (notes 42-63)</p> <p style="padding-left: 20px;">C. Negligence (notes 64-73)</p> <p style="padding-left: 20px;">D. Actions Involving Particular Matters (notes 74-122)</p> <p>V. PRACTICE AND PROCEDURE (notes 123-131)</p> <p style="padding-left: 40px;">I. IN GENERAL</p> <p style="padding-left: 60px;">1. Generally</p> <p style="padding-left: 60px;">2. Purpose</p> <p style="padding-left: 60px;">3. Construction</p> <p style="padding-left: 60px;">4. Relationship with other statutes</p> <p style="padding-left: 60px;">5. —Federal Employees' Compensation Act</p> <p style="padding-left: 60px;">6. —Flood control immunity provisions</p> <p style="padding-left: 60px;">7. —Longshoremen's and Harbor Workers' Compensation Act</p> <p>II GOVERNMENT LIABLE UNDER SAME CONDITIONS AS PRIVATE INDIVIDUAL</p> <p style="padding-left: 20px;">8. Generally</p> <p style="padding-left: 40px;">9. Absence of identical private activity</p> <p style="padding-left: 20px;">10. Governmental versus nongovernmental functions</p> <p style="padding-left: 20px;">11. Liability of government in absence of individual liability</p> <p style="padding-left: 20px;">12. Liability of other political subdivisions</p> <p style="padding-left: 40px;">III STATUS OF PLAINTIFF AS AFFECTING RIGHT OF RECOVERY</p> <p style="padding-left: 60px;">13. Generally</p> <p style="padding-left: 60px;">14. Employee of independent contractor</p> <p style="padding-left: 60px;">15. Employee of United States</p> <p style="padding-left: 60px;">16. Military personnel</p> <p style="padding-left: 60px;">17. —Automobile accidents</p> <p style="padding-left: 60px;">18. —Airplane crashes</p> | <p style="padding-left: 20px;">19. —Exposure to chemicals or radiation</p> <p style="padding-left: 20px;">20. —False imprisonment</p> <p style="padding-left: 20px;">21. —Medical malpractice</p> <p style="padding-left: 20px;">22. —Post-discharge treatment</p> <p style="padding-left: 20px;">23. —Injuries as military prisoner</p> <p style="padding-left: 20px;">24. —Swimming pool accidents</p> <p style="padding-left: 20px;">25. —Miscellaneous</p> <p style="padding-left: 20px;">26. Military personnel's family members</p> <p style="padding-left: 20px;">27. —Survivors</p> <p style="padding-left: 20px;">28. Prisoners</p> <p style="padding-left: 20px;">29. Reservists and cadets</p> <p style="padding-left: 20px;">30. Subrogees</p> <p style="padding-left: 20px;">31. Miscellaneous</p> <p style="padding-left: 40px;">IV. LIABILITY</p> <p style="padding-left: 60px;">A. In General</p> <p style="padding-left: 60px;">32. Generally</p> <p style="padding-left: 60px;">33. Law governing</p> <p style="padding-left: 60px;">34. —Conflict of laws</p> <p style="padding-left: 60px;">35. —Damages</p> <p style="padding-left: 60px;">36. —Negligence laws</p> <p style="padding-left: 60px;">37. Good Samaritan Doctrine</p> <p style="padding-left: 60px;">38. Assignment of claims</p> <p style="padding-left: 60px;">39. Indemnity or contribution</p> <p style="padding-left: 60px;">40. Settlement between tortfeasor and injured party</p> <p style="padding-left: 60px;">41. Interest prior to judgment</p> <p style="padding-left: 60px;">B. Damages</p> <p style="padding-left: 60px;">42. Generally</p> <p style="padding-left: 60px;">43. Collateral source payments</p> <p style="padding-left: 60px;">44. —CHAMPUS</p> <p style="padding-left: 60px;">45. —Federal Employees' Compensation Act</p> <p style="padding-left: 60px;">46. —Medicare</p> <p style="padding-left: 60px;">47. —Prison Industries Fund</p> <p style="padding-left: 60px;">48. —Social Security</p> <p style="padding-left: 60px;">49. —Veterans' benefits</p> <p style="padding-left: 60px;">50. —Others</p> <p style="padding-left: 60px;">51. Actual or compensatory damages</p> <p style="padding-left: 60px;">52. Punitive damages</p> <p style="padding-left: 60px;">53. —Failure to deduct collateral payments</p> <p style="padding-left: 60px;">54. —Wrongful death provisions</p> <p style="padding-left: 60px;">55. Nominal damages</p> <p style="padding-left: 60px;">56. Consequential damages</p> <p style="padding-left: 60px;">57. Funeral expenses</p> |
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128. Burden and standard of proof

Plaintiff's burden of proof in action under Federal Tort Claims Act is same as it is in any action for damages under state law, i.e., to prove his case by preponderance of evidence, which merely means that damage was more likely caused by defendant's fault than not. *Thompson v United States* (1973, WD La) 368 F Supp 466.

Although state law may be relied upon to substantively establish plaintiff's cause of action under Federal Tort Claims Act (28 USCS §§ 1346(b), 2671 et seq.), standard as to quantum of proof necessary to create question of fact by circumstantial evidence is governed by Federal law. *Denaux v United States* (1983, DC SC) 572 F Supp 659.

129. Proof of negligence

Parents of deceased soldier were not entitled to recover damages for death of son in plane crash where there was no evidence as to what happened during final minutes as plane approached port of destination. *Chapman v United States* (1952, CA5 Tex) 194 F2d 974, cert den 344 US 821, 97 L Ed 639, 73 S Ct 19.

Claim for damages under Federal Tort Claims Act would be denied, where plaintiff failed to show that silicosis condition was attributable to or resulted from alleged negligence in his injury and damage. *Buchanan v United States* (1964, WD NC) 236 F Supp 805.

Government was not liable for injuries sustained by plaintiff when she fell on stoop outside post office, since plaintiff was unable to show negligence on part of government employees who had cleaned off snow and sprinkled salt pellets on stoop. *Petersen v United States* (1965, SD Iowa) 245 F Supp 700.

130. Witnesses

Failure of trial court to award appellant the full present value of his future loss of earnings as

that value was calculated by his expert witness was not reversible error in that the trier of fact is not required to use any particular formula in computing the amount of the loss and may reject the un rebutted expert testimony proffered by appellant. *Bradshaw v United States* (1971) 143 App DC 344, 443 F2d 759.

131. Miscellaneous

In actions arising under Federal Tort Claims Act, district court should not make other than lump-sum money judgments unless and until Congress shall authorize a different type of award. *Frankel v Heym* (1972, CA3 Pa) 466 F2d 1226.

Federal Tort Claims Act does not contain express waiver of sovereign immunity necessary to permit court to award attorneys' fees against United States directly under that Act. *Joe v United States* (1985, CA11 Fla) 772 F2d 1535.

Complaint brought under Federal Tort Claims Act (28 USCS §§ 2671 et seq.) must allege facts enabling court to look beneath language in complaint to determine substance of claim, although pleading may otherwise be sufficient to prevent dismissal under Federal Rule of Civil Procedure 12(b)(6). *Johnson v United States* (1986, CA2 NY) 788 F2d 845, cert den 479 US 914, 93 L Ed 2d 288, 107 S Ct 315 and (disagreed with by *Kearney v United States* (CA9 Cal) 815 F2d 535 (disagreed with by *Guccione v United States* (CA2 NY) 847 F2d 1031, reh den (CA2 NY) 878 F2d 32)) and (disapproved on other grounds by *Sheridan v United States* (US) 101 L Ed 2d 352, 108 S Ct 2449).

Action of carpenter for injuries sustained on government job could not be sustained against government where government pleaded general release by plaintiff as to joint tortfeasors. *Rushford v United States* (1950, DC NY) 92 F Supp 874, affd (CA2 NY) 204 F2d 831.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the

28 USCS § 2675

PARTICULAR PROCEEDINGS

Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(June 25, 1948, ch 646, § 1, 62 Stat. 983; May 24, 1949, ch 139, § 126, 63 Stat. 107; July 18, 1966, P. L. 89-506, § 2, 80 Stat. 306.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 931(b) (Aug. 2, 1946, ch. 753, § 410(b), 60 Stat. 844).

Section constitutes all of section 931(b), except the first sentence, of title 28, U.S.C., 1940 ed. The remainder of such section 931(b) is incorporated in section 2677 of this title.

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in section 2675(b) of title 28, U.S.C.

Amendments:

1949. Act May 24, 1949, in subsec. (b), substituted "section" for "subsection".

1966. Act July 18, 1966 (effective 6 months or more after enactment as provided by § 10 of such Act, which appears as 28 USCS § 2672 note) substituted subsec. (a) for one which read:

"An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim."; and, in subsec. (b), deleted "The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon." preceding "Action under this section"

CODE OF FEDERAL REGULATIONS

Administrative regulations of the Secretary of Agriculture, 7 CFR Part 1.
Federal Aviation Administration, Department of Transportation, administrative claims under Federal Tort Claims Act, 14 CFR Part 15.

TORT CLAIMS

28 USCS § 2676

Woman injured by swine flu immunization is entitled to amend complaint to increase request for damages, where extent of injuries was not discoverable at time of administrative claim, court will award damages of \$645,786 where proof showed injuries to be permanently disabling *Harrison v United States* (1987, WD Tenn) 662 F Supp 1175.

Annotations:

Applicability and effect of 28 USCS 2675(b) pertaining to increase in federal tort claim over amount: presented to agency. 80 ALR Fed 737.

51. Clerical error

Where \$25 damages reported on administrative claim was clerical error, and no statement had been received from doctor as to his costs, 28 USCS § 2675(b) would not preclude recovery of \$2,500 as alleged in plaintiff's complaint. *Rabovsky v United States* (1967, DC Conn) 265 F Supp 587.

Where plaintiff through a clerical error presented a claim for damages for \$1391 instead of

\$11,000, and the government knew a mistake had been made and had precise prior notice of the true demand for plaintiff, the newly discovered clerical error brought into play the exceptions of 28 USCS § 2675(b), and plaintiff was not precluded from a recovery in excess of \$1391. *Little v United States* (1970, ED Pa) 317 F Supp 8.

52. Reservation of right to sue for increased amount

Plaintiff who reduced claim to \$1,000 in order to file claim with post office, on condition that it would not prejudice her right to suit, was limited to \$1,000 in federal court. *Clark v Continental Nat. Bank* (1949, DC Neb) 88 F Supp 324.

Where plaintiff had submitted to post office department for administrative settlement claim for \$1000, on post office form, in which he inserted "In the event claim is not settled, I reserve the right to commence suit for \$6000," action could not be maintained for increased amount *Singer v United States* (1960, ED NY) 186 F Supp 131.

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

(June 25, 1948, ch 646, § 1, 62 Stat. 984.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 931(b) (Aug. 2, 1946, ch. 753 § 410(b), 60 Stat. 844).

Section constitutes the first sentence of section 931(b) of title 28, U.S.C., 1940 ed. Other provisions of such section 931(b) are incorporated in section 2675 of this title.

Changes were made in phraseology.

Senate Revision Amendment

This section was eliminated by Senate amendment. See 80th Congress Senate Report No. 1559.

CODE OF FEDERAL REGULATIONS

Administrative regulations of the Secretary of Agriculture. 7 CFR Part 1.
National Aeronautics and Space Administration, administrative authority and policy. 14 CFR Part 1204.

Department of the Army, claims against the United States. 32 CFR Part 536

Department of the Air Force, administrative claims. 32 CFR Part 842.

death of her minor daughter caused by negligence of mail carrier, refusal to require mother to make election before trial whether to proceed against United States or mail carrier and refusal after trial to set aside verdict and judgment against mail carrier on ground that judgment against United States was complete bar to recovery against its employee did not constitute error. *Moon v Price* (1954, CA5 Ga) 213 F2d 794.

Plaintiff must elect recovery against United States for actual damages under Federal Tort Claims Act or against individual for actual and punitive damages under Bivens action where border patrol agent assaulted alien and court found United States liable under FTCA and agent liable under Bivens, because 28 USCS § 2676 states that recovery from United States under FTCA bars any additional judgment against employee on same facts. *Sanchez v Rowe* (1986, ND Tex) 651 F Supp 571, later proceeding (CA5 Tex) 870 F2d 291.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

(June 25, 1948, ch 646, § 1, 62 Stat. 984; July 18, 1966, P. L. 89-506, § 3, 80 Stat. 307.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 934 (Aug. 2, 1946, ch. 753, § 413, 60 Stat. 845).

Changes were made in phraseology.

Senate Revision Amendment

This section was renumbered "2676" by Senate amendment. See 80th Congress Senate Report No. 1559.

Amendments:

1966, Act July 18, 1966 (effective 6 months or more after enactment as provided by § 10 of such Act, which appears as 28 USCS § 2672 note) substituted this section for one which read: "The Attorney General, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."

CODE OF FEDERAL REGULATIONS

Administrative regulations of the Secretary of Agriculture, 7 CFR Part 1.
National Aeronautics and Space Administration, administrative authority and policy, 14 CFR Part 1204.
Department of the Army, claims against the United States, 32 CFR Part 536.

4. Settlement

Where plaintiff had made settlement with automobile insurer of government employee for damages growing out of automobile accident and had given it covenant not to sue, reserving right to sue United States, 28 USCS § 2676 did not bar his action against government for same damages growing out of same accident. *United States v First Sec. Bank* (1953, CA10 Utah) 208 F2d 424, 42 ALR2d 951.

5. Indemnity from employee

United States may not recover indemnity from one of its employees after it has been held liable under 28 USCS §§ 1346(b) and 2671 et seq. *United States v Gilman* (1954) 347 US 507, 98 L Ed 898, 74 S Ct 695.

by U.S. Attorney's superior, United States attorney, based on superior's very delayed response to letter informing him of settlement is ineffective since United States attorney had no authority to enter into agreement; only Deputy Attorney General is authorized to exercise settlement authority for settlements over \$750,000. *White v. United States*, Dept. of Interior (1986; MD Pa) 636 F Supp 82, later proceeding (MD Pa) 656 F Supp 25 and affd without op (CA3 Pa) 815 F2d 697.

3. Approval of court

Federal Tort Claims Act, which provides under 28 USCS § 2677 that Attorney General, with approval of court, may arbitrate, compromise, or settle any claim in suits under Act, after commencement of action thereon, imposes on District Courts of United States authority of, and responsibility for, passing on proposed compromises, notwithstanding judgment of Court of Appeals affirming judgment of District Court theretofore entered in such suits. *Hubsch v. United States* (1949) 338 US 440, 94 L Ed 244, 70 S Ct 225.

Although Attorney General has authority to purchase the release of private persons from potential tort liability where such purchase is deemed to be in the best interest of United

States, failure to obtain court approval of stipulation, as required by 28 USCS § 2677, renders it legal nullity. *United States v. Reilly* (1967, CA10 NM) 385 F2d 225.

28 USCS § 2677 contemplates duty for court to satisfy itself that settlement is reasonable and proper before approving it, and where there appeared no reason on basis of facts and circumstances why insurance company should not assume responsibility for any liability, United States might bear to plaintiff proposed settlement under which United States would accept partial responsibility for death of motorist in accident was disapproved. *Rowley v. United States* (1956, DC Utah) 140 F Supp 295.

Only method by which judicial determination of fairness of compromise under 28 USCS § 2677 can be had is by having trial of matter before court; court cannot therefore be party to rubber stamping of judgment of attorney general. *Automobile Ins. Co. v. United States* (1950, DC Or) 10 FRD 489.

4. Exclusiveness of remedy

Where Congress has set out statutory procedure for compromise of matters involving United States (28 USCS § 2677), it implicitly negatives use of any other procedure. *United States v. Reilly* (1967, CA10 NM) 385 F2d 225.

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch 646, § 1, 62 Stat. 984; July 18, 1966, P. L. 89-506, § 4, 80 Stat. 307.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 944 (Aug. 2, 1946, ch. 753, § 422, 60 Stat. 846).

Words "shall be guilty of a misdemeanor" and "shall, upon conviction thereof", in the second sentence, were omitted in conformity with revised title 18, U.S.C., Crimes and Criminal Procedure (H.R. 1600, 80th Cong.). See sections 1 and 2 of said revised title 18.

Changes were made in phraseology.

ond attorney spent substantially more than 40 hours on case, and third attorneys spent 42 hours on case, first attorneys were entitled to \$550 plus disbursements, \$650 went to second attorney and \$750 to third attorneys out of available \$1,950 for attorneys' fees. *Jaslow v United States* (1970, ED NY) 308 F Supp 1164.

6. Interest

Plaintiff's attorney was entitled to interest on

attorney fee from time judgment was entered until payment to him by plaintiff. *Schwartz v United States* (1967, CA3 Pa) 381 F2d 627, 11 FR Serv 2d 1004.

Plaintiff's attorney whose fee was contained in judgment order in federal tort claims case was entitled to such interest thereon as may be paid by defendants. *Price v United States* (1961, ED Va) 195 F Supp 203.

§ 2679. Exclusiveness of remedy

- (a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.
- (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
- (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
- (A) which is brought for a violation of the Constitution of the United States, or
 - (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.
- (c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.
- (d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or

proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, ch 646, § 1, 62 Stat. 984; Sept. 21, 1961, P. L. 87-258, § 1, 75 Stat. 539; July 18, 1966, P. L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, P. L. 100-694, §§ 5, 6, 102 Stat. 4564.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 945 (Aug. 2, 1946, ch. 753, § 423, 60 Stat. 846).

Changes were made in phraseology.

SENATE REVISION AMENDMENT

The catchline and text of this section were changed and the section was renumbered "2678" by Senate amendment. See 80th Congress Senate Report No. 1559.

Amendments:

1961. Act Sept. 21, 1961 (effective 6 months after enactment and applicable as provided by § 2 of such Act, which appears as a note to this section) designated the existing provisions as subsec. (a); and added subsecs. (b)-(e).

1966. Act July 18, 1966 (effective 6 months or more after enactment, as provided by § 10 of such Act, which appears as 28 USCS § 2672 note) substituted subsec. (b) for one which read:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

1988. Act Nov. 18, 1988 (effective upon enactment and applicable as provided by § 8 of such Act, which appears as a note to this section), substituted subsecs. (b) and (d) for ones which read:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place

§ 2680. Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to—

- (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
- (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
- (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
- (d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States.
- (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.
- (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
- (g) [Repealed]
- (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
- (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
- (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
- (k) Any claim arising in a foreign country.
- (l) Any claim arising from the activities of the Tennessee Valley Authority.
- (m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives. (June 25, 1948, ch 646, § 1, 62 Stat. 984; July 16, 1949, ch 340, 63 Stat. 444; Sept. 26, 1950, ch 1049, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, P. L. 86-168, Title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, P. L. 93-253, § 2, 88 Stat. 50.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., § 943 (Aug. 2, 1946, ch. 753, § 421, 60 Stat. 845).

Changes were made in phraseology.

Section 946 of title 28, U.S.C., 1940 ed., which was derived from section 424(b) of the Federal Tort Claims Act, was omitted from this revised title. It preserved the existing authority of federal agencies to settle tort claims not cognizable under section 2672 of this title. Certain enumerated laws granting such authority were specifically repealed by section 424(a) of the Federal Tort Claims Act, which section was also omitted from this revised title. These provisions were not included in this revised title as they are not properly a part of a code of general and permanent law.

SENATE REVISION AMENDMENT

Sections 2680 and 2681 were renumbered "2679" and "2680", respectively, by Senate amendment. See 80th Congress Senate Report No. 1559.

References in text:

"Sections 741-752, 781-790 of Title 46", referred to in this section, are popularly known as the Suits in Admiralty Act and the Public Vessels Act and appear as 46 USCS Appx. 741-746 and 781-790.

"Sections 1-31 of Title 50, Appendix", referred to in this section was in the original Act Aug. 2, 1946, § 943, a reference to the Trading with the Enemy Act, which now appears as 50 Appx. §§ 1-6, 7-39, and 41-44.

"The Panama Canal Company", referred to in this section, is deemed to be a reference to the Panama Canal Commission, as provided by 22 USCS § 3602(b)(5).

Amendments:

1949. July 16, 1949 added subsec. (m).

1950. Act Sept. 26, 1950 deleted subsec. (g) which read: "Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters."; and, in subsec. (m), substituted "Canal" for "Railroad".

1959. Act Aug. 18, 1959 (effective 1/1/60 as provided by § 203(c) of such Act) added subsec. (n).

1974. Act Mar. 16, 1974 substituted subsec. (h) for one which read: "Any claim arising out of assault, battery, false imprisonment, false

Cross References

Applicability of section to vocational rehabilitation services grants, see section 750 of Title 29, Labor.

Code of Federal Regulations

Applicability of this section to contract programs for Indian tribes, see 34 CFR 408.202.

§ 450d. Criminal activities involving grants, contracts, etc.; penalties

Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or sections 452 to 457 of this title, embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, shall be fined not more than \$10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(Pub.L. 93-638, § 6, Jan. 4, 1975, 88 Stat. 2205.)

Historical Note

References in Text. This Act, referred to in text, is the Indian Self-Determination and Education Assistance Act, which is Pub.L. 93-638, Jan. 4, 1975, 88 Stat. 2203. For complete classification of this Act to the Code, see Short Title note set out under section 450 of this title and Tables volume.

Codification. This section was not enacted as part of Title I of Pub.L. 93-638, which comprises this subchapter.

Legislative History. For legislative history and purpose of Pub.L. 93-638, see 1974 U.S. Code Cong. and Adm. News, p. 7775.

Cross References

Applicability of this section to vocational rehabilitation services grants, see section 750 of Title 29, Labor.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

Code of Federal Regulations

Applicability of this section to contract programs for Indian tribes, see 34 CFR 408.202.
Contracting with Indian organizations under Indian Self-Determination and Education Assistance Act, see 41 CFR 14H-70.000 et seq.

Library References

Indians §38(1).

C.J.S. Indians § 78 et seq.

Notes of Decisions

1. Persons entitled to maintain action
Congress intended to create criminal penalties, precluding private enforcement action, by this section relating to criminal activities involving grants and contracts under the Indi-

an Self-Determination and Education Assistance Act, Pub.L. 93-638, Jan. 4, 1975, 88 Stat. 2203. U. S. ex rel. Burnette v. Driving Hawk, C.A.S.D.1978, 587 F.2d 23.

§ 450e. Wage and labor standards and preference requirements for contracts or grants

(a) All laborers and mechanics employed by contractors of' subcontractors in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended [40 U.S.C.A. § 276a et seq.]. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, sections 452 to 457 of this title, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

(Pub.L. 93-638, § 7, Jan. 4, 1975, 88 Stat. 2205.)

¹ So in original. Probably should be "or".

Historical Note

References in Text. This Act, referred to in text, is the Indian Self-Determination and Education Assistance Act, which is Pub.L. 93-638, Jan. 4, 1975, 88 Stat. 2203. For complete classification of this Act to the Code, see Short Title note set out under section 450 of this title and Tables volume.

The Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended, referred to in subsec. (a), is Act Mar. 3, 1931, c. 411, 46 Stat. 1494, as amended, which is classified generally to sections 276a to 276a-5 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 276a of Title 40 and Tables volume.

The Act of March 3, 1921, referred to in subsec. (a), probably means the Act of March 3, 1931, c. 411, 46 Stat. 1494, as amended, known as the Davis-Bacon Act. See note above.

Reorganization Plan Numbered 14 of 1950, referred to in subsec. (a), is set out in the Appendix to Title 5, Government Organization and Employees.

Codification. This section was not enacted as part of Title I of Pub.L. 93-638, which comprises this subchapter.

Legislative History. For legislative history and purpose of Pub.L. 93-638, see 1974 U.S. Code Cong. and Adm. News, p. 7775.

Cross References

Applicability of this section to vocational rehabilitation services grants, see section 750 of Title 29, Labor.
Indian preference laws as not including provisions of this section, see section 2011 of this title.

Code of Federal Regulations

Applicability of this section to contract programs for Indian tribes, see 34 CFR 408.202.

Competitive awards, see 34 CFR 408.204.

Contracting with Indian organizations under Indian Self-Determination and Education Assistance Act, see 41 CFR 141-70.000 et seq.

Preference requirements for award of contracts and employment to Indians, see 34 CFR 250.5.

Library References

Labor Relations § 1132.

C.J.S. Labor Relations § 1042.

Notes of Decisions

Construction with other laws 1
 Factors determining grant of preference
 Generally 3
 Qualifications of non-Indians 4
 Subcontracts 2

the greatest extent feasible, preferences are to be given to Indians, a recipient of such a grant, in determining whether awarding of that preference is feasible, is permitted to take other conditions of the grant into consideration. *Johnson v. Central Valley School Dist. No. 356*, Wash.1982, 645 P.2d 1088.

1. Construction with other laws

Preference to Indian-owned firms in award of subcontracts, as required by subsec. (b)(2) of this section, is not satisfied by compliance with section 47 of this title. 1980, 59 Comp. Gen. 739.

4. — Qualifications of non-Indians

Preference provided for in this section, which stated that any grant for benefit of Indians required that, to greatest extent feasible, preferences were to be given to Indians, did not entitle teacher of Native American heritage to have school district give him preference over a better qualified non-Indian in filling tutor-counselor position which was funded under federal grant intended to improve learning abilities and opportunities of Indian children. *Johnson v. Central Valley School Dist. No. 356*, Wash.1982, 645 P.2d 1088.

2. Subcontracts

Subsec. (b)(2) of this section requires federal agency to include in prime contract, for benefit of Indians, a provision requiring contractor to afford preference to Indian-owned firms in award of subcontracts, to greatest extent feasible. 1980, 59 Comp. Gen. 739.

3. Factors determining grant of preference—Generally

Under this section, which states that any grant for benefit of Indians requires that, to

activities. Payment for the services of uniformed law enforcement in work zones may be included in the construction contract, or be provided by direct reimbursement from the highway agency to the law enforcement agency. When payment is included through the construction contract, the contractor will be responsible for reimbursing the law enforcement agency, and in turn will recover those costs through contract pay items. Direct interagency reimbursement may be made on a project-specific basis, or on a program-wide basis that considers the overall level of services to be provided by the law enforcement agency. Contract pay items for law enforcement service may be either unit price or lump sum items. Unit price items should be utilized when the highway agency can estimate and control the quantity of law enforcement services required on the project. The use of lump sum payment should be limited to situations where the quantity of services is directly affected by the contractor's choice of project scheduling and chosen manner of staging and performing the work. Innovative payment items may also be considered when they offer an advantage to both the highway agency and the contractor. When reimbursement to the law enforcement agency is made by interagency transfer of funds, the highway agency should establish a program-level or project-level budget that is adequate to meet anticipated program or project needs, and include provisions to address unplanned needs and other contingencies.

(e) *Work Vehicles and Equipment.* In addition to addressing risks to workers and road users from motorized traffic, the agency processes, procedures, and/or guidance established in accordance with 23 CFR 630.1006 should also address safe means for work vehicles and equipment to enter and exit traffic lanes and for delivery of construction materials to the work space, based on individual project characteristics and factors.

(f) *Payment for Traffic Control.* Consistent with the requirements of 23 CFR 630.1012, Project-level Procedures, project plans, specifications and estimates (PS&Es) shall include appropriate pay item provisions for implementing the project Transportation Management Plan (TMP), which includes a Temporary Traffic Control (TTC) plan, either through method or performance based specifications. Pay item provisions include, but are not limited to, the following:

(1) Payment for work zone traffic control features and operations shall not be incidental to the contract, or included in payment for other items of work not related to traffic control and safety;

(2) As a minimum, separate pay items shall be provided for major categories of traffic control devices, safety features, and work zone safety activities, including but not limited to positive protection devices, and uniformed law enforcement activities when funded through the project;

(3) For method based specifications, the specifications and other PS&E documents should provide sufficient details such that the quantity and types of devices and the overall effort required to implement and maintain the TMP can be determined;

(4) For method-based specifications, unit price pay items, lump sum pay items, or a combination thereof may be used;

(5) Lump sum payment should be limited to items for which an estimate of the actual quantity required is provided in the PS&E or for items where the actual quantity required is dependent upon the contractor's choice of work scheduling and methodology;

(6) For Lump Sum items, a contingency provision should be included such that additional payment is provided if the quantity or nature of the required work changes, either an increase or decrease, due to circumstances beyond the control of the contractor;

(7) Unit price payment should be provided for those items over which the contractor has little or no control over the quantity, and no firm estimate of quantities is provided in the PS&Es, but over which the highway agency has control of the actual quantity to be required during the project;

(8) Specifications should clearly indicate how placement, movement/relocation, and maintenance of traffic control devices and safety features will be compensated; and

(9) The specifications should include provisions to require and enforce contractor compliance with the contract provisions relative to implementation and maintenance of the project TMP and related traffic control items. Enforcement provisions may include remedies such as liquidated damages, work suspensions, or withholding payment for noncompliance.

§ 630.1110 Maintenance of Temporary Traffic Control Devices.

To provide for the continued effectiveness of temporary traffic control devices, each agency shall develop and

implement quality guidelines to help maintain the quality and adequacy of the temporary traffic control devices for the duration of the project. Agencies may choose to adopt existing quality guidelines such as those developed by the American Traffic Safety Services Association (ATSSA) or other state highway agencies.¹ A level of inspection necessary to provide ongoing compliance with the quality guidelines shall be provided.

[FR Doc. E7-23581 Filed 12-4-07; 8:45 am]
BILLING CODE 4910-22-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 36

RIN 1076-AE51

Homeliving Programs

AGENCY: Bureau of Indian Education, BIA, Interior.

ACTION: Final Rule.

SUMMARY: Under the No Child Left Behind Act of 2001, the Secretary of the Interior is publishing final regulations addressing homeliving programs administered under the Bureau of Indian Education-funded school system.

DATES: *Effective Date:* January 4, 2008.

FOR FURTHER INFORMATION CONTACT: Kevin Skenandore, Director, Bureau of Indian Education, 1849 C Street NW., MS-3609, Washington, DC 20240, phone (202) 208-6123.

SUPPLEMENTARY INFORMATION:

I. Background

A. What Information Does This Section Address?

This section addresses:
—Requirements of the No Child Left Behind Act of 2001 (Pub. L. 107-110; enacted January 8, 2002; "NCLBA" or "the Act"), section 1122.

¹ The American Traffic Safety Services Association's (ATSSA) Quality Guidelines for Work Zone Traffic Control Devices uses photos and written descriptions to help judge when a traffic control device has outlived its usefulness. These guidelines are available for purchase from ATSSA through the following URL: http://www.atssa.com/store/bc_item_detail.jsp?productId=1. Similar guidelines are available from various State highway agencies. The Illinois Department of Transportation "Quality Standards for Work Zone Traffic Control Devices" is available online at <http://dot.state.il.us/workzone/wztc2004r.pdf>. The Minnesota Department of Transportation "Quality Standards—Methods to determine whether the various traffic control devices are Acceptable, Marginal, or Unacceptable" is available online at <http://www.dot.state.mn.us/trafficeng/otepubl/fieldmanual2007/FM-2007-QualityStandards.pdf>.

- Overview of the negotiated rulemaking process.
- How public comments were handled.

B. What Are the Negotiated Rulemaking Requirements of the Act?

The Secretary of the Interior (“Secretary”) established a negotiated rulemaking committee (Committee) to develop proposed regulations to implement several sections of the Act related to the Bureau of Indian Education (Bureau)-funded school system. The Act required that the committee be comprised only of representatives of the Federal Government and representatives of tribes served by Bureau-funded schools. The Act also required that, to the maximum extent possible, the tribal representative membership reflect the proportionate share of students from tribes served by the Bureau-funded school system. The Secretary chartered the committee under the Federal Advisory Committee Act (5 U.S.C. Appendix (FACA)) on May 1, 2003. The committee was comprised of Federal representatives and representatives of tribes served by Bureau-funded schools who met in February 2006 to negotiate recommendations for proposed regulations under Section 1122 of the Act, 25 CFR part 36, Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations. As a basis for negotiations and for consensus, the committee used draft regulations proposed by the Bureau school and residential administrators.

C. What Was the Negotiated Rulemaking Process?

As required by the No Child Left Behind Act of 2001 (Pub. L. 107–110; enacted January 8, 2002, referred to in this preamble as “NCLB” or “the Act”), the Department of the Interior established a Negotiated Rulemaking Committee to develop proposed rules to implement several sections of the Act relating to the Bureau of Indian Education-funded school system. Negotiated Rulemaking is a process sanctioned by Subchapter III, or Chapter 5, Title 5, United States Code and the Federal Advisory Committee Act, 5 U.S.C. Appendix (FACA), that employs Federal representatives and members of the public who will be affected by rules to jointly develop proposed rules.

In this case, the Act required the Secretary of the Interior to select representatives of Indian tribes and Bureau-funded schools as well as Federal Government representatives to serve on the Committee. The

Committee’s task was to draft proposed rules to recommend to the Secretary. Upon the Secretary’s approval, draft rules are published in the **Federal Register** for written public comments within a 120-day public comment period. After the close of the public comment period, the Committee will reconvene to review these comments and to recommend promulgation of final rules to the Secretary.

The Secretary chartered the Committee under the FACA on May 1, 2003. It is comprised of 19 members nominated by Indian tribes and tribally operated schools. The law required that, to the maximum extent possible, the tribal representative membership should reflect the proportionate share of students from tribes served by the Bureau-funded school system. The Secretary also appointed to the Committee six members from within the Department of the Interior. The Committee selected three tribal representatives and two Federal representatives as co-chairs. Six individuals were hired to facilitate all Committee meetings.

The Committee initially met in the months of June through October 2003 to develop regulations in six areas. Subsequently, the Department reconvened the Committee in February 2004 to develop regulations in the areas of closure and consolidation of schools and criteria for homeliving situations. The Committee met on several occasions and developed the proposed rules that were published on July 12, 2004 (69 FR 41770).

D. How Were Public Comments Handled?

The Secretary published proposed regulations on July 12, 2004, for public comment. The public comment period ended on November 9, 2004. We received comments on this proposed rule from nine commenters, including tribal leaders, educators, and administrators. We reviewed all comments. Summaries of individual public comments and our responses are noted below. The final regulations are organized, as were the proposed regulations, under three broad categories: homeliving staffing; homeliving programs; and homeliving privacy. The final regulations, published as 25 CFR part 36—Homeliving Situations, reflect the public comments that were accepted. The Department still has under consideration the regulations for school closure and consolidation. At this time, the Department has made no final decision on issuing these rules.

II. Public Comments

In this section we discuss the main public comments received. General comments are discussed first, followed by comments on specific sections of the rule. Our responses follow each comment.

Section 36.70 What Terms do I Need to Know?

Comment: Several commenters suggested that we clarify or define the term “supplemental services” in § 36.70 and several others suggested that we clarify what “actually receiving supplemental services” means in § 36.70(2)(ii).

Response: We considered these comments and removed the obsolete reference to “supplemental services.”

Comment: Several commenters suggested we add definitions for the following terms: “behavioral health programs,” “behavioral health services,” and “behavioral health staff.”

Response: We accepted the comments and have added definitions for the terms.

Comment: A commenter recommended clarifying the definitions of “homeliving manager” and “homeliving supervisor” by switching the definitions to more accurately reflect what each position is responsible for. In the alternative, if the manager is to be responsible for physically supervising students, the commenter recommended changing the name of the “homeliving supervisor” to “homeliving administrator.”

Response: We considered this comment and made no change.

Section 36.71 What Is the Purpose of This Part?

Comment: A commenter recommended changing the definition for “homeliving situation” to: “Any program where education instruction and residential services are provided for students enrolled in Bureau-funded schools, who are housed at a Bureau-funded school facility, and who receive care, before and after school hours, in a manner in which they do not have to depend on family or guardianship.”

Response: We considered this comment, but, determined no change was necessary.

Comment: A commenter suggested replacing the term “homeliving situations” with “homeliving programs.”

Response: We considered the comment and revised § 36.71.

Section 36.75 What Qualifications Must Homeliving Staff Possess?

Comment: A commenter suggested that the competency or professional standards of homeliving personnel should not be compromised in § 36.75. The commenter stated that agreements to operate a quality program with quality staff is between BIE and the tribal governing body and should not be discretionary at the school staff level. The commenter stated that it may be appropriate to waive such qualifications only where the employee is a trainee under the supervision of a fully qualified supervisor, and it is a tribal decision, not a Federal one.

Response: We considered the comment, but determined that no change was necessary because a tribe can instruct the school supervisor if the school is a tribally operated school.

Comment: A commenter stated that requirements for improved criteria for homeliving staff in § 36.75 should not be unfunded mandates. The commenter supports a complete overhaul of the current funding formula in order to create a universal therapeutic model in all BIE-funded schools.

Response: While the Committee was aware of the funding needs for Indian education, the scope of the Committee was to draft regulations to implement the statute. Therefore, while the Committee notes the commenter's general comments about the need for additional funding and different funding priorities, these comments are outside of the scope of the rulemaking. Therefore, we made no change to the regulations.

Comment: A commenter suggested that substance abuse education and prevention training should be added to required training in § 36.75.

Response: This is already required in § 36.86(c)(2).

Comment: A commenter suggested: (1) that a determination of good cause in § 36.75(b)(2) should be made at the Education Line Officer level, (2) that guidelines or standards be provided for determining what good cause means, and (3) that a timeframe for waivers be added.

Response: We considered the comment and accepted it in part and rejected it in part. We rejected the part of the comment that raised issues the Committee considered in its deliberations. We accepted the part of the comment on adding a timeframe for waivers and revised § 36.75(b)(2).

Comment: A commenter recommended that in § 36.75 the delay of the effective date for higher standards for homeliving staff apply to current

staff as well as to new hires, and that the effective date depend on the Department's securing additional funding.

Response: The Committee considered the effective date of the higher standards for homeliving staff. The comment does not raise new issues that the Committee did not consider. Therefore, we considered the comment, but we made no change to the regulations.

Comment: A commenter suggested changing § 36.75 to allow the homeliving supervisor rather than the "school supervisor" to grant a waiver for a showing of good cause.

Response: We considered the comment, but we believed the proposed language provides for the entity with decision-making authority to decide whether to grant the waiver. Therefore, we made no change to the regulations.

Comment: Several commenters suggested that some homeliving program staff may not need the same level of educational standards as others because they work at night when students are sleeping and recommended changing the required standards in § 36.75(a).

Response: In adopting these regulations, the Committee considered that there are different levels of homeliving program staff. The Committee considered and did not adopt different standards for night-duty. Therefore, we considered the comment, but made no change to the regulations.

Comment: A commenter recommended that § 36.75 include a certificate program in lieu of the 32-hour post-secondary semester hour requirement since BIE-operated boarding schools are unique. Another commenter suggested that § 36.75 provide for development of a residential certificate of training including at least 80 hours in topics such as child development, behavior management, working with students at risk, special education students, social interaction skills, etc., as an option to requiring 32/48 hours of college credit. The certificate would be updated every 3 years with at least 10 hours of training.

A second commenter recommended that distance education and computer modules be available to staff.

A third commenter recommended that § 36.75 provide that each facility is responsible to set its own appropriate training requirements to fit its specific needs. This commenter further suggested that requiring 32 hours of post-secondary semester hours in a field related to child development and at least 1 year of relevant experience will cause a drop in the applicant pool and

that a degree does not necessarily make an applicant competent for a position.

Response: We considered these comments and made no changes to the rule.

Comment: A commenter suggested that if the definitions for "homeliving manager" and "homeliving supervisor" are switched, the qualifications for the two positions should also be switched in § 36.75.

Response: We considered this comment and made no changes because the definitions were not switched.

Comment: A commenter recommended deleting § 36.75(b) "when this part is published in final" because it is unnecessary considering the 2009–2010 timeframe and could be interpreted to apply only to those persons employed at the time the rule becomes final.

Response: We accepted this comment and changed the text to delete the reference to the rule's publication date.

Comment: A commenter recommended that we clarify § 36.75(b)(2) by stating whether the supervisor empowered to grant waivers from new qualifications has procedural guidance to follow.

Response: We considered this comment and revised the paragraph to clarify the process. The paragraph now states that a person not meeting the qualifications, "may, upon showing good cause, petition the school supervisor (or the homeliving supervisor for peripheral dorms) for a waiver from the new qualifications."

Comment: A commenter stated that: (1) 32 hours of post-secondary semester hours for basic homeliving staff would dramatically reduce the applicant supply pool for those positions at the local level; (2) We should clarify whether new hires before SY 2009–2010 must meet the new requirements; (3) Funding should be made available for dormitory programs, for training and post-secondary credit hours for meeting the recommended qualification requirements, and for meeting the needs of the students being served.

Response: We considered the comment, but did not change the section. While the training requirement may reduce the number of applicants for these positions, dormitory staff must have more training because of new needs children are exhibiting in behavior, new diagnostic findings affecting learning skills, and changes in life styles affecting family concepts and step-parenting, among other issues.

Comment: A commenter stated that if "recreation staff" is included in "homeliving staff" that fact should be

stated and clarified in the definition of "homeliving staff."

Response: The committee considered this in its original deliberation and no new issues have been raised by this comment that were not already considered by the committee.

Section 36.76 Who Is in Charge of all Homeliving Operations?

Comment: A commenter stated that the purpose of § 36.76 is unclear. If the section means there will be clear lines of authority, the question should be revised to read: "Must there exist clear lines of authority?" and the answer should read: "Yes, clear lines of authority must be established through the development of an organizational chart approved by the local board * * *". Or, if this section means to make a point other than establishing the requirement that an organizational chart be developed; the section needs to be rewritten for clarity.

Response: We accepted this comment and made corresponding changes to the rule.

Section 36.77 What Are the Homeliving Program Staffing Requirements?

Comment: Several commenters recommended that the delayed implementation of the homeliving staff-to-student ratios to school year 2009–10 in § 36.77 depend on the Department's securing the necessary funding to make the new ratios affordable.

Response: We considered this comment and revised the section title in response.

Comment: A commenter suggested that adult-to-child staffing ratios in dormitories for Native American children should be lower than 1:20–30 if other similar programs require lower adult-to-child staffing ratios.

Response: The Committee considered adult-to-child staffing ratios in drafting the regulations. The Committee discussed the pros and cons of changing staffing ratios and chose to adopt credentialing rather than changing staffing ratios. The comments raise no new issues to consider. Therefore, we made no change to the regulations.

Comment: A commenter recommended that § 36.77 should state what ratios will be effective until SY 2009–2010.

Response: We considered this comment, but made no changes to the regulation.

Comment: A commenter suggested that since § 36.75 requires higher quality staff, § 36.77 should provide that this staff be compensated appropriately, but

questioned how positions will be funded if IRG is cut.

Response: The Committee in its original deliberations considered the impact of these requirements and balanced them with the needs of the students. No new issues are raised by the commenter that were not considered in the original deliberations. Therefore, we made no change to the rule.

Comment: A commenter suggested that § 36.77 state that existing staff-to-student ratios remain in effect until the new requirements are effective.

Response: The Committee considered this issue at the time it negotiated the regulations and the comment raises no new issues. Therefore, we made no change to the regulations.

Comment: A commenter questioned whether it is necessary in § 36.77(b) to have three different staff-to-student ratios on weekends because weekend staff is presumably supervising rather than conducting structured programs.

Response: The Committee considered this issue at the time it negotiated the regulations and the comment raises no new issues. Therefore, we made no change to the regulations.

Comment: A commenter recommended revising § 36.77 by revising the question to: "What is the minimum acceptable staffing supervisory requirements necessary to adequately supervise students and provide a safe environment?" and eliminating the introductory sentence.

Response: We considered this comment and changed the section title to read, "What are the homeliving program staffing requirements?"

Section 36.79 What Are the Homeliving Behavioral Staff/Student Ratio Requirements?

Comment: A commenter suggested that the regulations define the term "behavioral staff." Another commenter suggested clarifying whether a behavioral health professional is the same as a certified counselor, either school or MSW, in § 36.79.

Response: We accepted these comments and defined "behavioral staff" at § 36.79.

Comment: A commenter stated that the regulations at § 36.79(b) change "should" to "must" for providing one full-time behavioral health professional for off-reservation boarding schools.

Response: We considered the comment, but we did not accept it. This issue was raised during the original Committee deliberations. In order to reach consensus the Committee adopted the provision that the homeliving program "should" consider providing these services. This comment does not

raise any new issues that were not considered by the committee when originally discussing this issue. Therefore, we made no change to the regulations.

Comment: A commenter recommended that § 36.79 be amended to delete a 20-hour minimum.

Response: We accepted this comment and added new paragraph (d) in response.

Comment: A commenter stated that funding increases are necessary to meet the criteria in § 36.79 for the number of and the educational level of behavioral health professionals who are necessary in homeliving programs to address issues such as abuse, neglect, trauma, cultural conflict, and lack of school success.

Response: Budget-related issues are fully addressed elsewhere in this preamble.

Comment: A commenter recommended revising § 36.79(b) to state "must," not "should" so that behavioral health may not be made optional and students who live off-reservation are not deprived of this requirement.

Response: This issue was raised during the original deliberations and, to reach consensus, the Committee adopted the provision that the homeliving program "should" consider providing these services. This comment does not raise any new issues that were not considered by the Committee when originally discussing this issue. Therefore, the comment is not accepted.

Section 36.80 If a School Has Separated Boys' and Girls' Homeliving Programs, May the Same Behavioral Staff Be Used for Each Program?

Comment: A commenter recommended clarifying the term "homeliving count period" in § 36.80.

Response: We considered the comment, but we are making no change to the regulations because the homeliving count period is defined in the funding formula regulations at 25 CFR 39.

Section 36.81 May a Homeliving Program Use Support Staff or Teachers to Meet Behavioral Health Staffing Requirements?

Comment: A commenter recommended revising the second sentence in § 36.81 to allow for flexibility in how a residential facility meets the behavioral health staffing requirements. The sentence is recommended to read: "The only exception is if the individual support staff employee or teacher has the appropriate behavioral health license or

certification or other appropriate training and supervision.”

Response: We accepted this comment in part and revised the second sentence to read as follows: “The only exception is if the individual support staff employee or teacher has the appropriate behavioral health license or certification.”

Comment: A commenter recommended eliminating the exception in § 36.81 or adding a requirement that the individual’s contract provide that the teaching and behavioral health services are not to be provided simultaneously.

Response: We considered this comment in conjunction with other comments on this issue. If teachers have the requisite training, then they may be able to provide the service as long as the provisions of § 36.82 have been met. Therefore, we made no change to the rule.

Section 36.82 May Behavioral Health Staff Provide Services During the Academic School Day?

Comment: A commenter recommended adding a provision for maximizing time the behavioral health staff is working with students during the time students are in the dorms, especially on weekends. Another commenter stated that we should amend § 36.82 to require that behavioral health staff provide services outside the academic school day except in emergencies and provide that schools have the necessary staff to handle emergency situations. The commenter suggested that behavioral health staff may observe students in their academic environment.

Response: In response to these comments, we revised § 36.82.

Section 36.83 How Many Hours Can a Student be Taken Out of the Academic Setting to Receive Behavioral Health Services?

Comment: A commenter suggested that § 36.83 be clarified so that schools may not use behavioral health staff outside their intended services.

Response: We considered the comment and addressed the suggested changes in § 32.82.

Comment: A commenter recommended that we amend § 36.83 to provide that students not be taken out of the academic setting to receive behavioral health services unless it is an emergency and to provide that schools have their own behavioral health professionals. The commenter recommended that Licensed Practicing Counselors not have a caseload of students. Another commenter

recommended revising § 36.83 to state: “should not spend more than” rather than “may spend no more than” in order to provide staff the needed flexibility to appropriately address each student’s individual needs and provide necessary services.

Response: We considered these comments and made changes consistent with the other comments on this section.

Section 36.84 Can a Program Hire or Contract or Acquire by Other Means Behavioral Health Professionals to Meet Staffing Requirements?

Comment: A commenter recommended that § 36.84 provide that instructional time be guarded. Each student should be able to go through an initial screening provided by the counselors.

Response: We considered this comment, but no change to the rule is necessary.

Comment: A commenter recommended delaying implementation of behavioral staff license requirement until additional appropriations are obtained and recommended revising § 36.84, paragraph (b) by changing “and” to “or.”

Response: We accepted this comment and changed the rule.

Comment: A commenter recommended that more instruction be provided so BIE-operated and grant/contract school programs can strategize with one another to maximize services to students and minimize the cost of services. In some locations distance is a factor and highly qualified people are in extreme demand and few agree to travel long distances and/or agree to provide services to a large number of identified students. Restrictions imposed by preferences of authority hinder meeting the needs of students. Schools must have strong working relationships.

Response: We revised this section to allow tribes and schools to work together to provide these services to students.

Section 36.85 Is a Nurse Required To Be Available in the Evenings?

Comment: A commenter recommended that we amend § 36.85 to require that nursing staff be on campus not only during the academic hours, but also outside of academic hours because more accidents are going to happen outside of academic hours. Another commenter recommended making the requirement in § 36.85 for having a RN or LPN available in the evenings when enrolment is over 300 mandatory.

Response: The committee considered the response but rejected it.

Section 36.86 Are There Staff Training Requirements?

Comment: A commenter agreed with the increase in educational requirements for new staff and homeliving managers and supervisors in § 36.86.

Response: We made no change to § 36.86 because the comment required no change.

Comment: A commenter stated that in § 36.86 (a)(4) confidentiality should follow the Family Education Right to Privacy Act, not just the Health Information Privacy Act.

Response: We considered the comment and revised § 36.86(a)(4).

Comment: A commenter recommended inserting “surrogate” before “parent training” in § 36.86(b)(4) because staff serves as surrogate parents in residential settings.

Response: We accepted the idea behind the comment and changed § 36.86(b)(4) to read:

(4) Parenting skills/child care.

Comment: A commenter recommended revising the question in § 36.86 as follows: “Are there homeliving staff training requirements?”

Response: We considered this comment and revised the section text, but not the title. To be more inclusive, the section states that all homeliving program staff and employees that supervise students participating in homeliving services and activities must have appropriate certification or requirements and receive annual training in specified topics.

Comment: A commenter suggested that the first paragraph in § 36.86, which applies to training that is “appropriate to the certification and licensing requirements,” is erroneous since none of the required training will result in licensing or certification, except in First Aid or CPR. Homeliving staff is not required to be licensed or certified (§ 36.75). The commenter recommended that this section be revised to provide flexibility so that residential programs may determine the frequency and timing of training as appropriate to their situations, including providing for refresher sessions for returning staff and training that may be completed over a 2- or 3-year period (lessening the financial impact) or more frequently as new developments occur (such as new or revised policy).

Another commenter suggested correcting the cite to “Health Information Patient Privacy Act” to “Health Insurance Portability and Accountability Act of 1996” in § 36.86(a)(4).

A commenter suggested changing the title in § 36.86(a)(7) to “Child Abuse

Reporting Requirements and Protection Procedures.”

Another commenter recommended that in § 36.86(b)(7) we clarify the term “child development” or make the terms applicable only to those residential programs with younger children in residence since some residential programs serve only high school age students. If paragraph (7) remains in this section, the commenter recommended adding “if appropriate to the student ages served.”

Response: We considered these comments and made some changes based upon them. We did not change the section title because changes that we made in response to other comments made this unnecessary. Similarly, other changes we made regarding licensure eliminated the need to consider that suggestion. On the issue of training being only a refresher for returning staff, the committee considered this issue in its original deliberations and this comment raised no new issues.

Comment: A commenter suggested that § 36.86 include a recommendation that courses be provided on dealing with the tween, pre-teen, and teenage adolescent years.

Response: We considered this comment, but these various developmental stages are covered under the broader title of child development. We revised this section to clarify this.

Section 36.90 What Recreation, Academic Tutoring, Student Safety and Health Care Services Must Homeliving Programs Provide?

Comment: A commenter suggested clarifying in § 36.90 what a “homeliving program board” is and whether it applies to schools with peripheral dorms.

Response: We accepted the comment and changed § 36.90 to read: “ * * * as deemed necessary by the local school board or homeliving program board.”

Comment: A commenter suggested that if staff are required to provide these services in § 36.90, it should be required that students be assigned to participate in the service schedule.

Response: We considered this comment, but it is not something that should be addressed in regulations.

Comment: A commenter recommended that in § 36.90 we require that library and computer program requirements must be met in the dormitory facility because of the staff-to-student ratio, individual student needs, and academic needs in all subject areas and age/grade levels.

Response: These issues are addressed in § 36.102.

Section 36.91 What Are the Program Requirements for Behavioral Health Services?

Comment: A commenter suggested that requirements that a reiteration of the Intensive Residential Guidance program elements in § 36.91 is unnecessary because the IRG program was eliminated. Also, costs associated with some of the required services are prohibitive and not all students will require each of the enumerated services. The commenter recommended that this section be revised as follows: “ * * * behavioral health program must include the following services as needed:”

Response: We considered this comment and clarified the rule to provide that the homeliving program should have the capacity to provide these services.

Section 36.92 Are There Any Activities That Must be Offered by a Homeliving Program?

Comment: A commenter recommended that we clarify § 36.92(a) by providing a requirement for one hour of scheduled, structured physical activity Monday through Thursday instead of through Friday since many residential programs dismiss students on Friday through Sunday. The commenter recommended requiring two hours total of physical or recreational activities for those present in the dorm on the weekend. Another commenter suggested revising § 36.92(b) to allow each tribe/school to decide whether to offer and to decide the content of any of these topics to ensure consistency with local community values.

Response: We accepted the comment regarding Monday through Thursday physical activity and changed the rule to reflect this. We partially accepted the suggestion regarding personal wellness, excluding the idea of consistency with tribal mores, since it is implicit in the ability to design a wellness program and some schools, such as off-reservation boarding schools, may not have local tribal mores.

Comment: A commenter recommended changing § 36.92(e) to refer to activities as “personal wellness,” since mandating “character” and “sex education” may not be congruent with the local values or belief systems of the community.

Response: We accepted the comment and modified § 36.92(e).

Comment: A commenter recommended deleting the term “structures” in § 36.92 since it is not clear whether a lesson plan is required or students may pick from a choice of activities.

Response: We considered this comment, but did not modify the rule. The goal of the committee was to have a structured organized physical activity without a program goal or plan. We believe that the term “structure” adequately connotes this.

Section 36.93 Is a Homeliving Handbook Required?

Comment: A commenter suggested that in § 36.93 we add the terms “school board approval.”

Response: We considered the comment and found the comment unpersuasive. Therefore, we made no change to the regulations.

Comment: A commenter recommended revising § 36.93 by requiring that the home living handbook be provided rather than referring to student rights and responsibilities and requiring that the handbook be provided during the first week the students are in residence rather than before the first day of school.

Response: We accepted this comment and revised the section accordingly.

Comment: A commenter recommended changing “school staff” to “homeliving staff” or “residential staff” in § 36.93(d).

Response: We considered limiting circulation of the handbook only to homeliving staff. However, we believe that all staff should receive a copy of the handbook.

Section 36.94 What Must a Homeliving Handbook Contain?

Comment: Commenters recommended the following changes to § 36.94: revise (i) to read “Personnel and position listing or a copy of the residential staff organizational chart”; revise

(l) to “Transportation Policy and Procedures”; revise (o) to read “Drug, Alcohol and Tobacco Products Policy” and revise (q) to read: “Medication Administration Policy.”

Response: We made several of the suggested changes, but did not require an organizational chart or transportation procedures. We do not see the need for requiring an organizational chart. The rule requires transportation policies, not procedures.

Comment: A commenter suggested that we add drug/alcohol policy and consequences and move up its priority in § 36.94.

Response: We accepted part of the comment and revised § 36.94(o) to read “drug/alcohol policy.” We rejected the rest of the comment because the list is a list of all items that must be included in the handbook and is not a priority list. Therefore, we did not make the change to the regulations.

Section 36.95 What Sanitary Standards Must Homeliving Programs Meet?

Comment: A commenter recommended changing the term "rooms" to "dorm rooms" for clarification in § 36.95, and adding "unless need arises sooner" at the end of paragraph (c). A commenter recommended that § 36.95(d) and (e) be revised to read that linens and toiletries "may be provided as needed."

Response: We considered this change, but did not revise the rule because the existing is adequate.

Comment: A commenter recommended that § 36.95 require that dorms pass inspection by some entity, and that each site be visited at least once in five years to verify that health, safety and standards are met.

Response: We considered this comment and made no change because health and safety inspection requirements vary by locality.

Section 36.96 May Students Be Required to Assist With Daily or Weekly Cleaning?

Comment: A commenter noted that in § 36.96 students should be required to assist in cleaning the dorm.

Response: We considered the comment, but made no change because that rule already provides for students to assist with cleaning.

Comment: A commenter suggested we add a provision to § 36.96 for cleaning and maintaining a healthy environment by dorm staff as role models for students.

Response: We considered the comment and rejected it including any additional provisions on cleaning in § 36.96.

Section 36.97 What Basic Requirements Must a Program's Health Services Meet?

Comment: A commenter recommended revising § 36.97(a) to also allow for agreements between a tribe or tribal school board and IHS.

Response: We accepted this comment and changed the rule accordingly.

Section 36.98 Must the Homeliving Program Have an Isolation Room for Ill Children?

Comment: A commenter recommended modifying § 36.98 to require that a sickroom be available, but space does not have to be dedicated to this use only. Another commenter recommended rewriting the question in § 36.98 to read: "Must the homeliving program provide special accommodations for ill children?" Using the singular reference to "an

isolation room," coupled with the first sentence and the second sentence could cause confusion as to whether one or two rooms are required.

Response: We considered these comments and made appropriate changes to the rule.

Section 36.100 Are There Minimum Requirements for Student Attendance Checks?

Comment: A commenter recommended revising § 36.100(d) to state that night time physical checks will be made once every hour, except high school student rooms which will be checked every two hours.

Response: We considered the comment, but did not change the rule. High school students are just as likely, or even more likely, to be out of their rooms at night.

Comment: A commenter recommended revising § 36.100(f) to make it applicable only when residential staff knows that a student will be absent from school.

Response: We accepted this comment and changed the rule accordingly.

Comment: A commenter suggested that § 36.100 provide that each child accepted into the dorm should agree to undergo drug and alcohol screening if needed.

Response: We considered the comment and made no change to the rule. Schools should develop their own drug and alcohol policies.

Section 36.102 What Student Resources Must be Provided by A Homeliving Program?

Comment: A commenter recommended that we clarify the terms "library resources" and "reasonable access" in § 36.102.

Response: We considered the comment, but found no change to the rule necessary.

Comment: A commenter recommended adding at the beginning of § 36.102(b): "To the extent the student does have their own * * *"

Response: We considered the comment, but made no change, as the committee believes it is in the best interest of students to have textbooks available after hours.

Section 36.110 Must Programs Provide Space for Storing Personal Effects?

Comment: A commenter recommended adding the following after the first sentence in § 36.110: "This requirement is met if a residential room door can be locked" because some residential facilities will have difficulty meeting the lockable storage space requirement due to space limitations and/or age of the facility.

Response: We considered this comment, but made no change. The committee wanted the students to have one lockable space, such as a drawer, closet, or storage bin.

Section 36.111 Can a Tribe, Tribal Governing Body, or Local School Board Waive the Homeliving Standards?

Comment: A commenter suggested that in § 36.111 we clarify how 60 days are calculated and recommended that a school board or tribal body submit a proposed waiver by January 1 of the year preceding implementation in order to provide time for revisions and for starting the year with alternative standards in place.

Response: We considered the comment and rejected it in part because the regulatory section is based on statutory language. We accepted some of the comment and made the following changes:

A tribal governing body or local school board may waive some or all of the standards established in this part by adopting a written resolution that determines that the standards are inappropriate for the needs of the tribe's students. The approved alternative standards are effective on the first day of the following school year.

Section 36.112 What Are the Consequences for Failing to Meet the Requirements of This Part?

Comment: A commenter suggested adding a new question after § 36.112: "What happens to a school that does not meet these standards?"

Response: We considered the comment, but made no changes because this question is limited to whether the school can be closed or consolidated for failing to meet these standards and not for other reasons that are addressed in other regulations.

Section 36.120 What Type of Reporting Is Required to Ensure Accountability?

Comment: A commenter recommended that we identify a specific time for reporting enrolment figures in § 36.120.

Response: We accepted the comment and revised § 36.120(c) and (d).

Comment: A commenter recommended adding a requirement in § 36.120 that the report be filed 45 days after the end of the school year and a statement that the accountability report is the only report a residential program is required to file.

Response: We accepted the suggestions to add a 45-day filing period.

Comment: A commenter recommended adding a provision in § 36.120 to require that the report also be submitted to the Division of Residential Life in BIE.

Response: We did not accept this comment. The BIE already receives the report, and there is no reason to require in the rule that the report go to a particular division within the office.

III. Procedural Matters

A. Regulatory Planning and Review (E.O. 12866)

This document is a significant rule and the Office of Management and Budget (OMB) has reviewed the rule under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The rule deals exclusively with homeliving programs and is not expected to have a significant effect on budgets.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule has been prepared in consultation with the U.S. Department of Education.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule spells out student rights, the procedures for their dissemination, and the procedures for implementing them. The rule is not expected to have a significant effect on budgets.

(4) Office of Management and Budget has determined that this rule raises novel legal or policy issues. For this reason review is required under E.O. 12866.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will 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.*).

C. Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. Nothing in the rule proposes rules of private property rights, constitutional or otherwise, or invokes the Federal condemnation power or alters any use of Federal land held in trust. The focus of this rule is homeliving programs. A takings implication assessment is not required.

D. Federalism (E.O. 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Nothing in this rule has substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not implicate State government. A Federalism Assessment is not required.

E. Consultation With Indian Tribes (E.O. 13175)

In accordance with Executive Order 13175, we have identified potential effects on federally recognized Indian tribes that will result from this rule. Accordingly: (1) We have consulted with the affected tribe(s) on a government-to-government basis. The consultations have been open and candid to allow the affected tribe(s) to fully evaluate the potential effect of the rule on trust resources. (2) We have fully considered tribal views in drafting this final rule. (3) We have consulted with the appropriate bureaus and offices of the Department about the political effects of this rule on Indian tribes. The BIE and the Office of the Assistant Secretary—Indian Affairs have been consulted.

F. Paperwork Reduction Act

This rulemaking requires information collection from 10 or more parties and a submission under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is required. Accordingly, the Department prepared submissions on these collections for review and approval by OMB. Having reviewed the Department's submissions, along with any comments that were submitted by the reviewing public, OMB has approved the information collection requirements in this rulemaking and has assigned the OMB control number 1076-0164. In addition to this number, the information collections in part 39 are also covered by OMB control numbers 1076-0134 and 1076-0122.

The information collected will be used to enable the Bureau to better administer Bureau-funded schools subject to this rulemaking. In all instances, the Department has striven to lessen the burden on the public and ask for only information essential to administering the responsibility to federally recognized tribes. The public may make additional comments on the accuracy of our burden estimates (which are explained in detail in the preamble

to the proposed rule published on February 25, 2004, at 69 FR 8752) and any suggestions for reducing this burden to the OMB Interior Desk Officer, Docket Number 1076-AE49, Office of Information and Regulatory Affairs, 202/395-6566 (facsimile); email: OIRA_DOCKET@omb.eop.gov.

G. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required.

H. Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Department has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

List of Subjects in 25 CFR Part 36

Indians—Education, Schools, Elementary and secondary education programs, grant programs—Indians, Government programs—education.

Dated: October 19, 2007.

Carl J. Artman,

Assistant Secretary—Indian Affairs.

■ For the reasons given in the preamble, part 36 of Title 25 of the Code of Federal Regulations is amended by revising subpart G to read as follows:

PART 36—MINIMUM ACADEMIC STANDARDS FOR THE BASIC EDUCATION OF INDIAN CHILDREN AND NATIONAL CRITERIA FOR DORMITORY SITUATIONS

Subpart G—Homeliving Programs

Sec.

§ 36.70 What terms do I need to know?

§ 36.71 What is the purpose of this part?

Staffing

§ 36.75 What qualifications must homeliving staff possess?

§ 36.76 Who is in charge of all homeliving operations?

§ 36.77 What are the homeliving staffing requirements?

§ 36.78 What are the staffing requirements for homeliving programs offering less than 5 nights service?

§ 36.79 What are the homeliving behavioral staff/student ratio requirements?

§ 36.80 If a school has separated boys' and girls' homeliving programs, may the same behavioral staff be used for each program?

§ 36.81 May a homeliving program use support staff or teachers to meet behavioral health staffing requirements?

§ 36.82 May behavioral health staff provide services during the academic school day?

- § 36.83 How many hours can a student be taken out of the academic setting to receive behavioral health services?
- § 36.84 Can a program hire or contract or acquire by other means behavioral health professionals to meet staffing requirements?
- § 36.85 Is a nurse required to be available in the evenings?
- § 36.86 Are there staff training requirements?

Program Requirements

- § 36.90 What recreation, academic tutoring, student safety and health care services must homeliving programs provide?
- § 36.91 What are the program requirements for behavioral health services?
- § 36.92 Are there any activities that must be offered by a homeliving program?
- § 36.93 Is a homeliving handbook required?
- § 36.94 What must a homeliving handbook contain?
- § 36.95 What sanitary standards must homeliving programs meet?
- § 36.96 May students be required to assist with daily or weekly cleaning?
- § 36.97 What basic requirements must a program's health services meet?
- § 36.98 Must the homeliving program have an isolation room for ill children?
- § 36.99 Are immunizations required for residential program students?
- § 36.100 Are there minimum requirements for student attendance checks?
- § 36.101 How often must students who have been separated for emergency health or behavioral reasons be supervised?
- § 36.102 What student resources must be provided by a homeliving program?
- § 36.103 Are there requirements for multipurpose spaces in homeliving programs?

Privacy

- § 36.110 Must programs provide space for storing personal effects?

Waivers and Accountability

- § 36.111 Can a tribe, tribal governing body or local school board waive the homeliving standards?

- § 36.112 Can a homeliving program be closed, transferred, consolidated, or substantially curtailed for failure to meet these standards?
- § 36.120 What type of reporting is required to ensure accountability?

Subpart G—Homeliving Programs

Authority: 25 U.S.C. 13; 25 U.S.C. 2008; Pub. L. 107–110 (115 Stat. 1425).

§ 36.70 What terms do I need to know?

The following definitions apply to this subpart:

Behavioral health professional means a State licensed or State certified Social Worker, School Counselor, Drug and Alcohol Counselor, School Psychologist, or School Psychometrist responsible for coordinating a broad range of needs including:

- (1) Support groups;
- (2) Individual counseling;
- (3) Crisis intervention;
- (4) Preventive activities; and
- (5) Coordination of referrals and outside services with appropriate providers.

Behavioral Health Program means a homeliving based service designed to decrease barriers to learning or increase positive, personal well-being by:

- (1) Providing early intervention services, coordinating crisis intervention and prevention services;
- (2) Promoting a positive social and emotional environment;
- (3) Reducing the incidence of problems; and
- (4) Referring students with behavioral needs that require professional medical care to an appropriate residential care facility.

Behavioral health services means the services provided by a school behavioral health program as defined in this section.

Homeliving Manager means the employee responsible for direct supervision of the homeliving program staff and students.

Homeliving Program means a program that provides room and board in a boarding school or dormitory to residents who are either:

- (1) Enrolled in and are current members of a public school in the community in which they reside; or
- (2) Members of the instructional program in the same boarding school in which they are counted as residents and:
 - (i) Are officially enrolled in the residential program of a Bureau-operated or funded school; and
 - (ii) Are actually receiving a homeliving program provided to all students who are provided room and board in a boarding school or dormitory.

Homeliving Program Staff means the employee(s) responsible for direct supervision of students in the homeliving area.

Homeliving Supervisor means the employee with overall administrative responsibility for supervising students, programs, and personnel in the homeliving area.

§ 36.71 What is the purpose of this part?

The purpose of this part is to establish standards for homeliving programs.

Staffing

§ 36.75 What qualifications must homeliving staff possess?

- (a) Homeliving staff must possess the qualifications shown in the following table:

Position	Required training
(1) Homeliving Supervisor	Must be qualified based on size and complexity of the school, but at minimum possess a bachelor's degree.
(2) Homeliving Manager	Must be qualified based on the size and complexity of the student body but must at a minimum have an associate's degree no later than 2008.
(3) Homeliving Program Staff	Must have at least 32 post-secondary semester hours (or 48 quarter hours) in an applicable academic discipline, including fields related to working with children, such as, child development, education, behavioral sciences and cultural studies.

(b) A person employed as a homeliving program staff:

- (1) Should meet the requirements of paragraph (a) of this section by the 2009–2010 school year; and
- (2) May, upon showing good cause, petition the school supervisor (or the homeliving supervisor for peripheral dorms) for a waiver from the new qualifications.

§ 36.76 Who is in charge of all homeliving operations?

One staff member who has the authority to ensure the successful functioning of all phases of the homeliving program should be designated as in charge of all homeliving operations. All staff should be advised of the lines of authority through an organizational chart approved by the local board responsible

for operations of the homeliving program.

§ 36.77 What are the homeliving staffing requirements?

Homeliving programs must meet the staffing requirements of this section.

- (a) Effective with the 2009–2010 school year, each homeliving program must maintain the following student minimum supervisory requirements on weekdays:

Grade level	Time of day	Ratio	Grade level	Time of day	Ratio	Grade level	Time of day	Ratio
Elementary (Grade 1–6).	Morning	1:20.	High School (Gr. 7–12).	Night	1:40.		Evening	1:30.
	During school	As school needs.		Morning	1:20.		Night	1:50.
	Evening	1:20.		During school	As school needs.		(b) The following staffing ratios apply on weekends:	
Grade level			Time of day			Ratio		
Elementary (Grade 1–6)			Morning/day			1:20.		
			Evening			1:20.		
			Night			1:40.		
High School (Gr. 7–12)			Morning/day			1:40.		
			Evening			1:40.		
			Night			1:50.		

§ 36.78 What are the staffing requirements for homeliving programs offering less than 5 nights service?

For homeliving programs providing less than 5 nights service, the staffing levels from § 36.77 apply. To fill this requirement, the program must use only employees who work a minimum of 20 hours per week.

§ 36.79 What are the homeliving behavioral professional staff/student ratio requirements?

Behavioral health professional(s) is necessary in homeliving programs to address issues, such as abuse, neglect, trauma, cultural conflict, and lack of school success. Each homeliving program must provide a minimum of one half-time behavioral health professional for every 50 students.

(a) The program may fill the staffing requirements of this section by using contract services, other agencies (including the Indian Health Service) or private/nonprofit volunteer service organizations.

(b) Off-reservation homeliving programs should consider providing one full-time behavioral health professional for every 50 students.

(c) For purposes of this section, a one half-time behavioral health professional is one that works for the homeliving program a minimum of 20 hours per week.

(d) For purposes of this section, in instances where the behavioral health services are obtained through other programs, the behavioral health professional must be available at the request of the homeliving program.

§ 36.80 If a school or dormitory has separated boys' and girls' homeliving programs, may the same behavioral professional be used for each program?

Yes, a program may use the same behavioral professional for both boys' and girls' programs. However, behavioral health staffing requirements

are based on the combined enrollment during the homeliving count period.

§ 36.81 May a homeliving program use support staff or teachers to meet behavioral health staffing requirements?

No, a homeliving program must not use support staff or teachers to meet behavioral health staffing requirements. The only exception is if the individual support staff employee or teacher has the appropriate behavioral health license or certification.

§ 36.82 May behavioral health professional(s) provide services during the academic school day?

Behavioral health professional(s) must average at least 75 percent of their work hours with students in their dormitories. These work hours must occur outside of the academic school day, except in emergency situations as deemed by the administrative head of the homeliving program or designee. The purpose of this requirement is to maximize contact time with students in their homeliving setting.

§ 36.83 How many hours can a student be taken out of the academic setting to receive behavioral health services?

A student may spend no more than 5 hours per week out of the academic setting to receive behavioral health services from the homeliving behavioral health professional(s), except for emergency situations.

§ 36.84 Can a program hire or contract or acquire by other means behavioral health professionals to meet staffing requirements?

A program may hire or contract behavioral health professionals to meet staffing requirements or acquire such services by other means such as through a Memorandum of Understanding with other programs.

(a) At least one individual must be a licensed or certified school counselor or

a social worker who is licensed/certified to practice at the location where the services are provided.

(b) For additional staffing, other individuals with appropriate certifications or licenses are acceptable to meet staffing requirements.

§ 36.85 Is a nurse required to be available in the evenings?

No, a program is not required to make a nurse (LPN or RN) available in the evenings. However, this is encouraged for homeliving programs with an enrollment greater than 300 or for programs that are more than 50 miles from available services.

§ 36.86 Are there staff training requirements?

(a) All homeliving program staff as well as all employees that supervise students participating in homeliving services and activities must have the appropriate certification or licensing requirements up to date and on file. Programs must provide annual and continuous professional training and development appropriate to the certification and licensing requirements.

(b) All homeliving program staff as well as all employees who supervise students participating in homeliving services and activities must receive annual training in the topics set out in this section before the first day of student occupancy for the year.

- (1) First Aid/Safety/Emergency & Crisis Preparedness;
- (2) CPR—Automated External Defibrillator;
- (3) Student Checkout Policy;
- (4) Confidentiality (Health Information Privacy Act and the Family Education Right to Privacy Act.);
- (5) Medication Administration;
- (6) Student Rights;
- (7) Child Abuse Reporting Requirements and Protection Procedures; and
- (8) Suicide Prevention.

(c) Homeliving staff as well as all employees that supervise students participating in homeliving services and activities must be given the following training annually:

- (1) De-escalation/Conflict Resolution;
- (2) Substance Abuse Issues;
- (3) Ethics;
- (4) Parenting skills/Child Care;
- (5) Special Education and Working with Students with Disabilities;
- (6) Student Supervision Skills;
- (7) Child Development (recognizes various stages of development in the student population);
- (8) Basic Counseling Skills; and
- (9) Continuity of Operations Plan (COOP).

Program Requirements

§ 36.90 What recreation, academic tutoring, student safety, and health care services must homeliving programs provide?

All homeliving programs must provide for appropriate student safety, academic tutoring, recreation, and health care services for their students, as deemed necessary by the local school board or homeliving board.

§ 36.91 What are the program requirements for behavioral health services?

(a) The homeliving behavioral health program must make available the following services:

- (1) Behavioral Health Screening/Assessment;
- (2) Diagnosis;
- (3) Treatment Plan;
- (4) Treatment and Placement;
- (5) Evaluation; and
- (6) Record of Services (if applicable, in coordination with the student's Individual Education Plan).

(b) Each homeliving behavioral health program must have written procedures for dealing with emergency behavioral health care issues.

(c) Parents or guardians may opt out of any non-emergency behavioral health services by submitting a written request.

(d) Parents or guardians must be consulted before a child is prescribed behavioral health.

(e) Medication in a non-emergency situation.

§ 36.92 Are there any activities that must be offered by a homeliving program?

Yes, a homeliving program must make available the following activities:

(a) One hour per day of scheduled, structured physical activity Monday through Thursday, and two hours of scheduled physical activities on the weekends for any students who are in residence on the weekends;

(b) One hour per day of scheduled, structured study at least four days per week for all students, and additional study time for students who are failing any classes;

- (c) Tutoring during study time;
- (d) Native language or cultural activities; and
- (e) Wellness program that may include character, health, wellness, and sex education.

§ 36.93 Is a homeliving handbook required?

Yes, each program must publish a homeliving handbook, which may be incorporated into a general student handbook. During the first week the students and staff are in the dormitory, the homeliving program must:

- (a) Provide each student with a copy of the handbook that contains all the provisions in § 36.94;
- (b) Provide all staff, students, and parents or guardians with a current and updated copy of student rights and responsibilities;
- (c) Conduct an orientation for all students on the handbook and student rights and responsibilities; and
- (d) Ensure that all students, school staff, and to the extent possible, parents and guardians confirm in writing that they have received a copy of and understand the homeliving handbook.

§ 36.94 What must a homeliving handbook contain?

A homeliving handbook must contain all of the following, and may include additional information:

- (a) Mission/Vision Statement;
- (b) Discipline Policy;
- (c) Parent/Student Rights and Responsibilities;
- (d) Confidentiality;
- (e) Sexual Harassment Policy;
- (f) Violence/Bullying Policy;
- (g) Homeliving Policies and Procedures;
- (h) Services Available;
- (i) Personnel and Position Listing;
- (j) Emergency Procedures and Contact Numbers;
- (k) Bank Procedures;
- (l) Transportation Policy;
- (m) Check-Out Procedures;
- (n) Dress Code;
- (o) Drug/Alcohol Policy;
- (p) Computer Usage Policy;
- (q) Medication Administration Policy and Procedure; and
- (r) Isolation/Separation Policy.

§ 36.95 What sanitary standards must homeliving programs meet?

Each homeliving program must meet all of the following standards:

- (a) Restrooms, showers, and common areas must be cleaned daily;

(b) Rooms must be cleaned daily;

(c) Linens must be changed and cleaned weekly;

(d) Linens are to be provided;

(e) Basic Toiletries must be provided; and

(f) Functional washing machines and dryers must be provided.

§ 36.96 May students be required to assist with daily or weekly cleaning?

Yes, students can be required to assist with daily or weekly cleaning. However, the ultimate responsibility of cleanliness rests with the homeliving supervisor and local law or rules regarding chemical use must be followed.

§ 36.97 What basic requirements must a program's health services meet?

(a) A homeliving program must make available basic medical, dental, vision, and other necessary health services for all students residing in the homeliving program, subject to agreements between the BIE and the Indian Health Service or between a tribally-operated homeliving program and the Indian Health Service or tribal health program.

(b) A homeliving program must have written procedures for dealing with emergency health care issues.

(c) Parents or guardians may opt out of any non-emergency services by submitting a written request.

(d) The homeliving supervisor or designee must act *in loco parentis* when the parent or guardian cannot be found.

§ 36.98 Must the homeliving program have an isolation room for ill children?

Yes, the homeliving program must have an isolation room(s) available for ill students. The isolation room (or rooms, if needed) must be made available for use by students with contagious conditions. Contagious boys and girls should have separate rooms. The isolation room(s) should have a separate access to shower and restroom facilities. Students isolated for contagious illness must be supervised as frequently and as closely as the circumstances and protocols require, but at least every 30 minutes.

§ 36.99 Are immunizations required for residential program students?

Each student must have all immunizations required by State, local, or tribal governments before being admitted to a homeliving program. Annual flu shots are not required, but are encouraged.

§ 36.100 Are there minimum requirements for student attendance checks?

Yes, there are minimum requirements for student attendance checks as follows:

(a) All students must be physically accounted for four times daily;

(b) Each count must be at least two hours apart;

(c) If students are on an off-campus activity, physical accounts of students must be made at least once every two hours or at other reasonable times depending on the activity;

(d) At night all student rooms should be physically checked at least once every hour;

(e) If a student is unaccounted for, the homeliving program must follow its established search procedures; and

(f) When homeliving staff is aware of a student who is going to be absent from school, the homeliving program is required to notify the school.

§ 36.101 How often must students who have been separated for emergency health or behavioral reasons be supervised?

Students who have been separated for emergency behavioral or health reasons must be supervised as frequently and as closely as the circumstances and protocols require. No student will be left unsupervised for any period until such factors as the student's health based on a medical assessment, the safety of the student, and any other applicable guidance for dealing with behavior or health emergencies are considered.

§ 36.102 What student resources must be provided by a homeliving program?

The following minimum resources must be available at all homeliving programs:

(a) Library resources such as access to books and resource materials, including school libraries and public libraries which are conveniently available;

(b) A copy of each textbook used by the academic program or the equivalent for peripheral dorms; and

(c) Reasonable access to a computer with Internet access to facilitate homework and study.

§ 36.103 What are the requirements for multi-purpose spaces in homeliving programs?

Homeliving programs must provide adequate areas for sleeping, study, recreation, and related activities.

Privacy

§ 36.110 Must programs provide space for storing personal effects?

Yes, students are entitled to private personal spaces for storing their own personal effects, including at least one lockable closet, dresser drawer, or storage space. However, all drawers, dressers, storage space, or lockable space are the property of the homeliving program and are subject to random search.

Waivers and Accountability

§ 36.111 Can a tribe, tribal governing body, or local school board waive the homeliving standards?

A tribal governing body or local school board may waive some or all of the standards established by this part if the body or board determines that the standards are inappropriate for the needs of the tribe's students.

(a) If a tribal governing body or school board waives standards under this section, it must, within 60 days, submit proposed alternative standards to the Director, BIE.

(b) Within 90 days of receiving a waiver and proposal under paragraph (a) of this section, the Director must either:

(1) Approve the submission; or

(2) Deliver to the governing body or school board a written explanation of the good cause for rejecting the submission.

(c) If the Director rejects a submission under paragraph (c) of this section, the governing body or school board may submit another waiver and proposal for approval. The standards in this part remain in effect until the Director approves alternative standards.

§ 36.112 Can a homeliving program be closed, transferred, consolidated, or substantially curtailed for failure to meet these standards?

No, a homeliving program cannot be closed, transferred to any other authority, consolidated, or its programs substantially curtailed for failure to meet these standards.

§ 36.120 What type of reporting is required to ensure accountability?

The homeliving program must provide to the appropriate local school board or alternative board such as a homeliving board, the tribal governing body, BIE, and the Secretary of the Interior, an annual accountability report within 45 days following the end of the school year consisting of:

(a) Enrollment figures identified by the homeliving count period;

(b) A brief description of programs offered;

(c) A statement of compliance with the requirements of this part and, if the program is not in compliance, recommendations for achieving compliance; and

(d) Recommendations to improve the homeliving program including identification of issues and needs.

[FR Doc. E7-23330 Filed 12-4-07; 8:45 am]

BILLING CODE 4310-6W-P

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Revisions of Regulations Concerning Procedures for Filing Appeals to Denial in Whole or Part of Initial FOIA Requests

AGENCY: National Labor Relations Board (NLRB).

ACTION: Final Rule.

SUMMARY: The National Labor Relations Board (NLRB) is amending regulations concerning the procedures for filing an appeal to adverse FOIA determinations. The revisions require that appeals be filed within 28 calendar days of the service of the notification of the adverse determination.

EFFECTIVE DATE: December 5, 2007.

FOR FURTHER INFORMATION CONTACT:

Lester A. Heltzer, Executive Secretary, National Labor Relations Board, Room 11600, 1099 14th Street NW., Washington, DC 20570-0001, Telephone (202) 273-1067, e-mail address Lester.Heltzer@nlrb.gov.

SUPPLEMENTARY INFORMATION:

I. Current regulation

Section 102.117(c)(2)(v) provides in part that "An appeal from an adverse determination made pursuant to paragraph (c)(2)(iii) of this section must be filed within 20 working days of the receipt by the person making the request of the notification of the adverse determination where the request is denied in its entirety; or, in the case of a partial denial, within 20 working days of the receipt of any records being made available pursuant to the request."

II. Proposed revision

Since the Agency does not send such determinations on initial requests by certified mail, it has no objective means of determining when a requestor receives an adverse determination. Therefore, it is impossible to know from which date to compute time periods from adverse FOIA determinations.

Other agencies' practices support using the date of service rather than date of receipt as the appropriate date for computing timeliness of FOIA appeals. Under 28 CFR Ch. 1, Sec. 16.9, appeals from adverse Department of Justice FOIA determinations must be filed "within 60 days of the date of the letter denying" the request. See also, *Center for Biological Diversity v. Gutierrez*, 451 F. Supp.2d 57 (D.D.C. 2006)(Department of Commerce regulations provide that appeals from adverse determinations must be received by 5 p.m. EST on the

PART 63—INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION

Subpart A—Purpose, Policy, and Definitions

Sec.

- 63.1 Purpose.
- 63.2 Policy.
- 63.3 Definitions.
- 63.4 Information collection.
- 63.5-63.9 [Reserved]

Subpart B—Minimum Standards of Character and Suitability for Employment

- 63.10 Purpose.
- 63.11 What is a determination of suitability for employment and efficiency of service?
- 63.12 What are minimum standards of character?
- 63.13 What does the Indian Child Protection and Family Violence Prevention Act require of the Bureau of Indian Affairs and Indian tribes or tribal organizations receiving funds under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act?
- 63.14 What positions require a background investigation and determination of suitability for employment or retention?
- 63.15 What questions should an employer ask?
- 63.16 Who conducts the background investigation and prepares the determination of suitability for employment?
- 63.17 How does an employer determine suitability for employment and efficiency of service?
- 63.18 Are the requirements for Bureau of Indian Affairs adjudication different from the requirements for Indian tribes and tribal organizations?
- 63.19 When should an employer deny employment or dismiss an employee?
- 63.20 What should an employer do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?
- 63.21 Are there other factors that may disqualify an applicant, volunteer or employee from placement in a position which involves regular contact with or control over Indian children?
- 63.22 Can an employer certify an individual with a prior conviction or substantiated misconduct as suitable for employment?
- 63.23 What rights does an applicant, volunteer or employee have during this process?
- 63.24 What protections must employers provide to applicants, volunteers and employees?
- 63.25-63.29 [Reserved]

Subpart C—Indian Child Protection and Family Violence Prevention Program

- 63.30 What is the purpose of the Indian child protection and family violence prevention program?
- 63.31 Can both the Bureau of Indian Affairs and tribes operate Indian child protection and family violence prevention programs?
- 63.32 Under what authority are Indian child protection and family violence prevention program funds awarded?
- 63.33 What must an application for Indian child protection and family violence prevention program funds include?
- 63.34 How are Indian child protection and family violence prevention program funds distributed?
- 63.35 How may Indian child protection and family violence prevention program funds be used?
- 63.36 What are the special requirements for Indian child protection and family violence prevention programs?
- 63.37–63.50 [Reserved]

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 13, 200, 3201 *et seq.*; 42 U.S.C. 13041.

SOURCE: 61 FR 32274, June 21, 1996, unless otherwise noted.

Subpart A—Purpose, Policy, and Definitions

§ 63.1 Purpose.

The purpose of these regulations is to prescribe minimum standards of character and suitability for employment for individuals whose duties and responsibilities allow them regular contact with or control over Indian children, and to establish the method for distribution of funds to support tribally operated programs to protect Indian children and reduce the incidents of family violence in Indian country as authorized by the Indian Child Protection and Family Violence Prevention Act of 1990, Pub. L. 101-630, 104 Stat. 4544, 25 U.S.C. 3201 3211.

§ 63.2 Policy.

In enacting the Indian Child Protection and Family Violence Prevention Act, the Congress recognized there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for

membership in, an Indian tribe. The minimum standards of character and suitability of employment for individuals ensure that Indian children are protected, and the Indian child protection and family violence prevention programs will emphasize the unique values of Indian culture and community involvement in the prevention and treatment of child abuse, child neglect and family violence.

§ 63.3 Definitions.

Bureau means the Bureau of Indian Affairs of the Department of the Interior;

Child means an individual who is not married, and has not attained 18 years of age.

Child abuse includes but is not limited to any case in which a child is dead, or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, or soft tissue swelling, and this condition is not justifiably explained or may not be the product of an accidental occurrence; and any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution.

Child neglect includes but is not limited to, negligent treatment or maltreatment of a child by a person, including a person responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened.

Crimes against persons are defined by local law. Adjudicating officers must contact local law enforcement agencies to determine if the crime for which an applicant or employee was found guilty (or entered a plea of *nolo contendere* or guilty) is defined as a crime against persons.

Family violence means any act, or threatened act, of violence, including any forceful detention of an individual, which results, or threatens to result, in physical or mental injury, and is committed by an individual against another individual to whom such person is, or was, related by blood or marriage or otherwise legally related, or with whom such person is, or was, residing, or with whom such person has, or had,

intimate or continuous social contact and household access.

Indian means any individual who is a member of an Indian tribe.

Indian child means any unmarried person who is under age eighteen and is either a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Indian country means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof; and,

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Unless otherwise indicated, the term "Indian country" is used instead of "Indian reservation" for consistency.

Indian reservation means any Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, or lands held by incorporated Native groups, regional corporations, or village corporations under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Inter-tribal consortium means a partnership between an Indian tribe or tribal organization of an Indian tribe, and one or more Indian tribes or tribal organizations of one or more Indian tribes.

Local child protective services agency is an agency of the Federal Government, state, or Indian tribe that has the primary responsibility for child protec-

tion on any Indian reservation, or within any community in Indian country.

Local law enforcement agency is that Federal, tribal, or state law enforcement agency that has primary responsibility for the investigation of an instance of alleged child abuse within the involved Indian jurisdiction.

Must is used in place of shall and indicates a mandatory or imperative act or requirement.

Person responsible for a child's welfare is any person who has legal or other recognized duty for the care and safety of a child, and may include any employee or volunteer of a children's residential facility, and any person providing out-of-home care, education, or services to children.

Related assistance means the counseling and self-help services for abusers, victims, and dependents in family violence situations; referrals for appropriate health-care services (including alcohol and drug abuse treatment); and may include food, clothing, child care, transportation, and emergency services for victims of family violence and their dependents.

Secretary means the Secretary of the Interior.

Service means the Indian Health Service of the Department of Health and Human Services.

Shelter means the temporary refuge and related assistance in compliance with applicable Federal and tribal laws and regulations governing the provision, on a regular basis, of shelter, safe homes, meals, and related assistance to victims of family violence or their dependents.

Tribal organization means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let, a grant is awarded, or funding agreement is made to an organization to perform services benefitting more than one Indian tribe, the approval of

each such Indian tribe must be a prerequisite to the letting or making of such contract, grant, or funding agreement.

§ 63.4 Information collection.

The information collection requirement contained in § 63.15, § 63.33 and § 63.34 will be approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), and assigned clearance number _____.

§§ 63.5–63.9 [Reserved]

Subpart B—Minimum Standards of Character and Suitability for Employment

§ 63.10 Purpose.

The purpose of this part is to establish:

(a) Procedures for determining suitability for employment and efficiency of service as mandated by the Indian Child Protection and Family Violence Prevention Act; and

(b) *Minimum standards of character* to ensure that individuals having regular contact with or control over Indian children have not been convicted of certain types of crimes or acted in a manner that placed others at risk or raised questions about their trustworthiness.

§ 63.11 What is a determination of suitability for employment and efficiency of service?

(a) *Determinations of suitability measure the fitness or eligibility* of an applicant, volunteer, or employee for a particular position. Suitability for employment does not evaluate an applicant's education, skills, knowledge, experience, etc. Rather, it requires that the employer investigate the background of each applicant, volunteer, and employee to:

(1) Determine the degree of risk the applicant, volunteer, or employee brings to the position; and

(2) Certify that the applicant's, volunteer's, or employee's past conduct would not interfere with his/her performance of duties, nor would it create an immediate or long-term risk for any Indian child.

(b) *Efficiency of service* is the employer's verification that the applicant or employee is able to perform the duties and responsibilities of the position, and his/her presence on the job will not inhibit other employees or the agency from performing their functions.

§ 63.12 What are minimum standards of character?

Minimum standards of character are established by an employer and refer to identifiable character traits and past conduct. An employer may use character traits and past conduct to determine whether an applicant, volunteer, or employee can effectively perform the duties of a particular position without risk of harm to others. Minimum standards of character ensure that no applicant, volunteer, or employee will be placed in a position with regular contact with or control over Indian children if he/she has been found guilty of or entered a plea of nolo contendere or guilty to any offense under Federal, state, or tribal law involving crimes of violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution, or crimes against persons.

§ 63.13 What does the Indian Child Protection and Family Violence Prevention Act require of the Bureau of Indian Affairs and Indian tribes or tribal organizations receiving funds under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act?

(a) The *Bureau of Indian Affairs* must compile a list of all authorized positions which involve regular contact with or control over Indian children; investigate the character of each individual who is employed, or is being considered for employment; and, prescribe minimum standards of character which each individual must meet to be appointed to such positions.

(b) All *Indian tribes or tribal organizations* receiving funds under the authority of the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act of 1988 must conduct a background investigation for individuals whose duties and

responsibilities would allow them regular contact with or control over Indian children, and employ only individuals who meet standards of character that are no less stringent than those prescribed for the Bureau of Indian Affairs.

§ 63.14 What positions require a background investigation and determination of suitability for employment or retention?

All positions that allow an applicant, employee, or volunteer regular contact with or control over Indian children are subject to a background investigation and determination of suitability for employment.

§ 63.15 What questions should an employer ask?

Employment applications must:

- (a) Ask whether the applicant, volunteer, or employee has been arrested or convicted of a crime involving a child, violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution, or crimes against persons;
- (b) Ask the disposition of the arrest or charge;
- (c) Require that an applicant, volunteer or employee sign, under penalty of perjury, a statement verifying the truth of all information provided in the employment application; and
- (d) Inform the applicant, volunteer or employee that a criminal history record check is a condition of employment and require the applicant, volunteer or employee to consent, in writing, to a record check.

§ 63.16 Who conducts the background investigation and prepares the determination of suitability for employment?

- (a) The *Bureau of Indian Affairs* must use the United States Office of Personnel Management (OPM) to conduct background investigations for Federal employees. The BIA must designate qualified security personnel to adjudicate the results of background investigations.
- (b) *Indian tribes and tribal organizations* may conduct their own background investigations, contract with private firms, or request the OPM to conduct an investigation. The inves-

tigation should cover the past five years of the individual's employment, education, etc.

§ 63.17 How does an employer determine suitability for employment and efficiency of service?

(a) *Adjudication* is the process employers use to determine suitability for employment and efficiency of service. The adjudication process protects the interests of the employer and the rights of applicants and employees. Adjudication requires uniform evaluation to ensure fair and consistent judgment.

(b) Each case is judged on its own merits. All available information, both favorable and unfavorable, must be considered and assessed in terms of accuracy, completeness, relevance, seriousness, overall significance, and how similar cases have been handled in the past.

(c) An *adjudicating official* conducts the adjudication. Each Federal agency, Indian tribe, or tribal organization must appoint an adjudicating official, who must first have been the subject of a favorable background investigation.

(1) Indian tribes and tribal organizations must ensure that persons charged with the responsibility for adjudicating employee background investigations are well-qualified and trained.

(2) Indian tribes and tribal organizations should also ensure that individuals who are not trained to adjudicate these types of investigations are supervised by someone who is experienced and receive the training necessary to perform the task.

(d) Each adjudicating official must be thoroughly familiar with all laws, regulations, and criteria involved in making a determination for suitability.

(e) The adjudicating official must review the background investigation to determine the character, reputation, and trustworthiness of the individual. At a minimum, the adjudicating official must:

- (1) Review each security investigation form and employment application and compare the information provided;
- (2) Review the results of written record searches requested from local law enforcement agencies, former employers, former supervisors, employment references, and schools; and

(3) Review the results of the fingerprint charts maintained by the Federal Bureau of Investigation or other law enforcement information maintained by other agencies.

(f) Relevancy is a key objective in evaluating investigative data. The adjudicating official must consider prior conduct in light of:

- (1) The nature and seriousness of the conduct in question;
- (2) The recency and circumstances surrounding the conduct in question;
- (3) The age of the individual at the time of the incident;
- (4) Societal conditions that may have contributed to the nature of the conduct;
- (5) The probability that the individual will continue the type of behavior in question; and,
- (6) The individual's commitment to rehabilitation and a change in the behavior in question.

§ 63.18 Are the requirements for Bureau of Indian Affairs adjudication different from the requirements for Indian tribes and tribal organizations?

Yes.

(a) In addition to the minimum requirements for background investigations found in § 63.12, *Bureau of Indian Affairs'* adjudicating officials must review the OPM National Agency Check and Inquiries which includes a search of the OPM Security/Suitability Investigations Index (SII) and the Defense Clearance and Investigations Index (DCII), and any additional standards which may be established by the BIA.

(b) All Bureau of Indian Affairs employees who have regular contact with or control over Indian children must be reinvestigated every five years during their employment in that or any other position which allows regular contact with or control over Indian children.

(c) *Indian tribes and tribal organizations* may adopt these additional requirements but are not mandated to do so by law.

§ 63.19 When should an employer deny employment or dismiss an employee?

(a) An employer may deny employment or dismiss an employee when an individual has been found guilty of or

entered a plea of guilty or nolo contendere to any Federal, state or tribal offense involving a crime of violence, sexual assault, sexual molestation, child exploitation, sexual contact, prostitution, or crimes against persons.

(b) An employer may deny employment or dismiss an employee when an individual has been convicted of an offense involving a child victim, a sex crime, or a drug felony.

§ 63.20 What should an employer do if an individual has been charged with an offense but the charge is pending or no disposition has been made by a court?

(a) The employer may deny the applicant employment until the charge has been resolved.

(b) The employer may deny the employee any on-the-job contact with children until the charge is resolved.

(c) The employer may detail or reassign the employee to other duties that do not involve contact with children.

(d) The employer may place the employee on administrative leave until the court has disposed of the charge.

§ 63.21 Are there other factors that may disqualify an applicant, volunteer or employee from placement in a position which involves regular contact with or control over Indian children?

Yes.

(a) An applicant, volunteer, or employee may be disqualified from consideration or continuing employment if it is found that:

(1) The individual's misconduct or negligence interfered with or affected a current or prior employer's performance of duties and responsibilities.

(2) The individual's criminal or dishonest conduct affected the individual's performance or the performance of others.

(3) The individual made an intentional false statement, deception or fraud on an examination or in obtaining employment.

(4) The individual has refused to furnish testimony or cooperate with an investigation.

(5) The individual's alcohol or substance abuse is of a nature and duration that suggests the individual could not perform the duties of the position

or would directly threaten the property or safety of others.

(6) The individual has illegally used narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation.

(7) The individual knowingly and willfully engaged in an act or activities designed to disrupt government programs.

(b) An individual must be disqualified for Federal employment if any statutory or regulatory provision would prevent his/her lawful employment.

§ 63.22 Can an employer certify an individual with a prior conviction or substantiated misconduct as suitable for employment?

(a) The *Bureau of Indian Affairs* must use Federal adjudicative standards which allow the BIA to certify that an individual is suitable for employment in a position that does not involve regular contact with or control over Indian children. The adjudicating officer must determine that the individual's prior conduct will not interfere with the performance of duties and will not create a potential for risk to the safety and well-being of Indian children.

(b) *Indian tribes and tribal organizations* must identify those positions which permit contact with or control over Indian children and establish standards to determine suitability for employment. Those standards should then be used to determine whether an individual is suitable for employment in a position that permits contact with or control over Indian children. If not, the individual may only be placed in a position that does not permit contact with or control over Indian children.

§ 63.23 What rights does an applicant, volunteer or employee have during this process?

(a) The applicant, volunteer, or employee must be provided an opportunity to explain, deny, or refute unfavorable and incorrect information gathered in an investigation, before the adjudication is final. The applicant, volunteer, or employee should receive a written summary of all derogatory information and be informed of the

process for explaining, denying, or refuting unfavorable information.

(b) Employers and adjudicating officials must not release the actual background investigative report to an applicant, volunteer, or employee. However, they may issue a written summary of the derogatory information.

(c) The applicant, volunteer, or employee who is the subject of a background investigation may obtain a copy of the reports from the originating (Federal, state, or other tribal) agency and challenge the accuracy and completeness of any information maintained by that agency.

(d) The results of an investigation cannot be used for any purpose other than to determine suitability for employment in a position that involves regular contact with or control over Indian children.

(e) Investigative reports contain information of a highly personal nature and should be maintained confidentially and secured in locked files. Investigative reports should be seen only by those officials who in performing their official duties need to know the information contained in the report.

§ 63.24 What protections must employers provide to applicants, volunteers and employees?

(a) Indian tribes and tribal organizations must comply with the privacy requirements of any Federal, state, or other tribal agency providing background investigations. Indian tribes and tribal organizations must establish and comply with personnel policies that safeguard information derived from background investigations.

(b) The Bureau of Indian Affairs must comply with all policies, procedures, criteria, and guidance contained in the Bureau of Indian Affairs Manual or other appropriate guidelines.

(c) Federal agencies exercising authority under this part by delegation from OPM must comply with OPM policies, procedures, criteria, and guidance.

§§ 63.25–63.29 [Reserved]

Subpart C—Indian Child Protection and Family Violence Prevention Program

§ 63.30 What is the purpose of the Indian child protection and family violence prevention program?

The purpose of this program is to develop tribally-operated programs to protect Indian children and reduce the incidence of family violence on Indian reservations.

§ 63.31 Can both the Bureau of Indian Affairs and tribes operate Indian child protection and family violence prevention programs?

Yes. However, tribes are encouraged to develop and operate programs to protect Indian children and reduce the incidence of family violence in Indian country.

§ 63.32 Under what authority are Indian child protection and family violence prevention program funds awarded?

The Secretary is authorized to enter into contracts with Indian tribes, tribal organizations, or tribal consortia pursuant to the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 *et seq.*, for the development and establishment of Indian child protection and family violence prevention programs. This includes compacting with tribes under the Self-Governance program procedures.

§ 63.33 What must an application for Indian child protection and family violence prevention program funds include?

In addition to the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 *et seq.*, contracting requirements, each application must provide the following information:

(a) The name and address of the agency or official to be responsible for the investigation of reported cases of child abuse and child neglect, the treatment and prevention of incidents of family violence, and the provision of immediate shelter and related assistance for

victims of family violence and their dependents;

(b) Projected service population of the program;

(c) Projected service area of the program; and

(d) Projected number of cases per month.

§ 63.34 How are Indian child protection and family violence prevention program funds distributed?

(a) Funds will be distributed, subject to the availability of appropriations, and:

(1) In any fiscal year that the appropriation exceeds 50 percent of the level of funding authorized for this purpose by the Act, 49 percent must be distributed equally to all tribes and tribal organizations and 49 percent must be distributed on a per capita basis according to the population of children residing in the service area. Two percent of the annual appropriation will be set aside for distribution to tribes demonstrating special circumstances.

(2) In any fiscal year that the appropriation does not exceed 50 percent of the level of funding authorized for this purpose by the Act, funding must be distributed in equal amounts to all tribes. Two percent of the annual appropriation will be set aside for distribution to tribes demonstrating special circumstances.

(3) Special circumstances include but are not limited to a high incidence of child sexual abuse, a high incidence of violent crimes, a high incidence of violent crimes against women, or the existence of a significant victim population within the community.

(i) This 2 percent will be subject to discretionary distribution by the Assistant Secretary—Indian Affairs, or his or her designee. Tribes may request these funds through their respective area offices. All requests must demonstrate a high incidence of child sexual abuse, a high incidence of violent crimes, a high incidence of violent crimes against women, or the existence of a significant victim population within the community.

(ii) Special circumstances funds will remain available through the third quarter of each fiscal year. In the

fourth quarter, unallocated special circumstances funds will be redistributed as set forth in paragraphs (a)(1) and (a)(2) of this section, except that there will be no additional set aside for special circumstances.

(b) Any tribe not wishing to receive Indian child protection and family violence prevention funds must inform its respective area office in writing within 90 days after receiving notice of the allocation from the area office. Each area office may reallocate unused Indian child protection and family violence prevention program funds as provided in this section.

(c) Funds may be used as matching shares for other federally funded programs which contribute to and promote prevention of child abuse, child neglect, and family violence on Indian reservations, but may not be used to supplant funds available for the same general purposes.

(d) Any income resulting from the operation of Indian child protection and family violence prevention programs may be retained and used to promote prevention of child abuse, child neglect, and family violence on Indian reservations.

§ 63.35 How may Indian child protection and family violence prevention program funds be used?

Indian child protection and family violence prevention program funds may be used to:

(a) Establish child protective services programs.

(b) Establish family violence prevention and treatment programs.

(c) Develop and implement multidisciplinary child abuse investigation and prosecution programs.

(d) Provide immediate shelter and related assistance to victims of family violence and their dependents, including construction or renovation of facilities to establish family violence shelters.

(e) Purchase equipment to assist in the investigation of cases of child abuse and child neglect.

(f) Develop protocols and intergovernmental or interagency agreements among tribal, Federal, state law enforcement, courts of competent jurisdiction, and related agencies to ensure

investigations of child abuse cases to minimize the trauma to the child victim, to define and specify each party's responsibilities, and to provide for the coordination of services to victims and their families.

(g) Develop child protection codes and regulations that provide for the care and protection of children and families on Indian reservations.

(h) Establish community education programs for tribal members and school children on issues of family violence, child abuse, and child neglect.

(i) Establish training programs for child protective services, law enforcement, judicial, medical, education, and related services personnel in the investigation, prevention, protection, and treatment of child abuse, child neglect, and family violence.

(j) Establish other innovative and culturally relevant programs and projects that show promise of successfully preventing and treating family violence, child abuse, and child neglect.

§ 63.36 What are the special requirements for Indian child protection and family violence prevention programs?

(a) Each tribe must develop appropriate standards of service, including caseload standards and staffing requirements. The following caseload standards and staffing requirements are comparable to those recommended by the Child Welfare League of America, and are included to assist tribes in developing standards for Indian child protection and family violence prevention programs:

(1) Caseworkers providing services to abused and neglected children and their families have a caseload of 20 active ongoing cases and five active investigations per caseworker.

(2) Caseworkers providing services to strengthen and preserve families with children have a caseload of 20 families. If intensive family-centered crisis services are provided, a caseload of 10 families per caseworker is recommended.

(3) It is recommended that there be one supervisor for every six caseworkers.

(b) The negotiation and award of contracts, grants, or funding agreements

Bureau of Indian Affairs, Interior

under these regulations must include the following requirements:

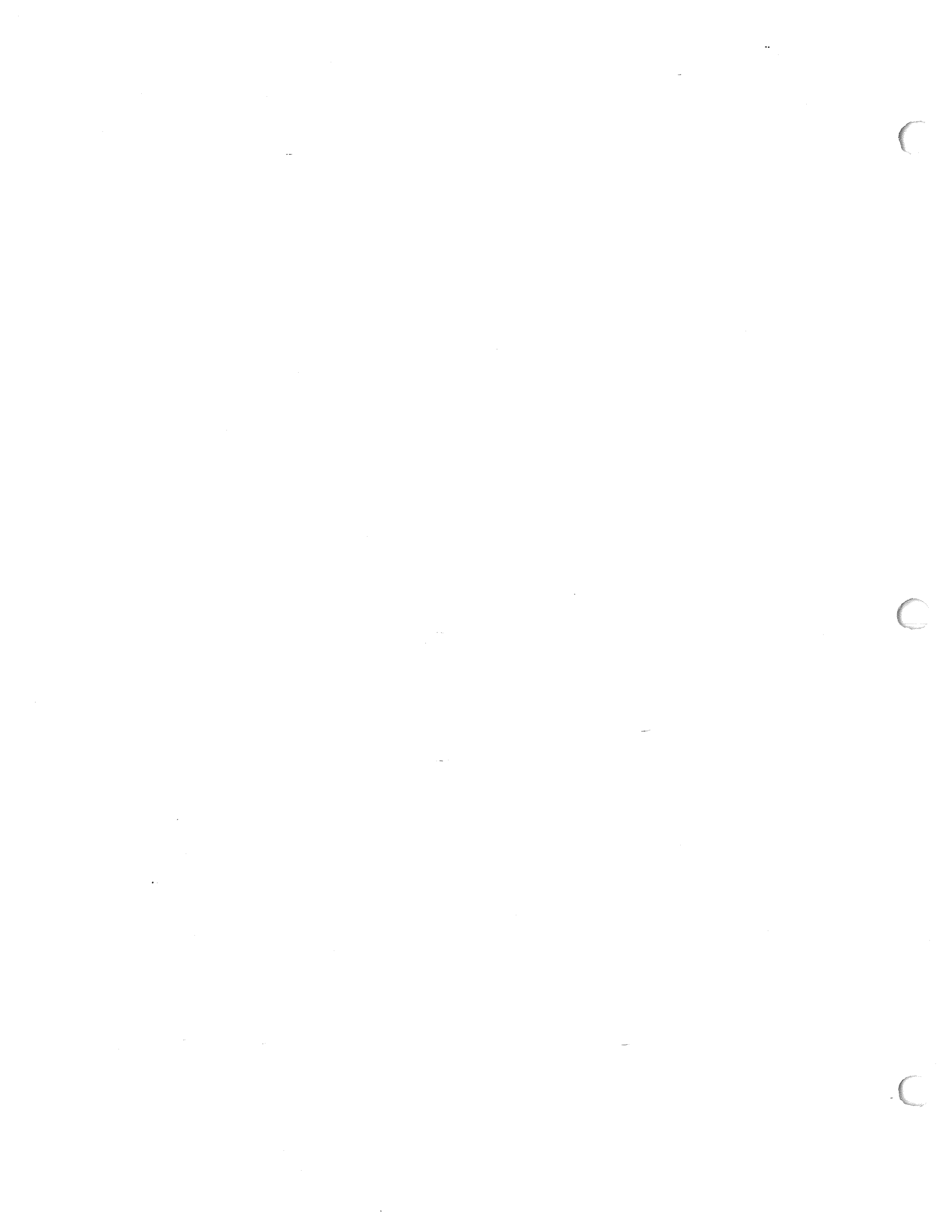
- (1) Performance of background investigations to ensure that only those individuals who meet the standards of character contained in §63.12 are employed in positions which involve regular contact with or control over Indian children.
- (2) Submission of an annual report to the contracting officer's representative which details program activities, number of children and families served, and the number of child abuse, child neglect, and family violence reports received.
- (3) Assurance that the identity of any person making a report of child abuse or child neglect will not be disclosed without the consent of the individual and that all reports and records collected under these regulations are confidential and to be disclosed only as provided by Federal or tribal law.
- (4) Assurance that persons who, in good faith, report child abuse or child neglect will not suffer retaliation from their employers.

CHILD PROTECTION HANDBOOK

PROTECTING AMERICAN INDIAN / ALASKA NATIVE CHILDREN



U.S. Department of the Interior * Bureau of Indian Affairs





TO: All Employees
FROM: Assistant Secretary - Indian Affairs
SUBJECT: Child Abuse in Indian Country

The Bureau of Indian Affairs has an ongoing, fundamental responsibility for protecting children from child abuse and neglect in Indian Country. The Indian Child Protection and Family Violence Prevention Act of 1990 details child protection requirements with which the Bureau must comply. Since its enactment, Congress has passed other legislation, including the Crime Control Act of 1990, which also affects child protection in Indian country.




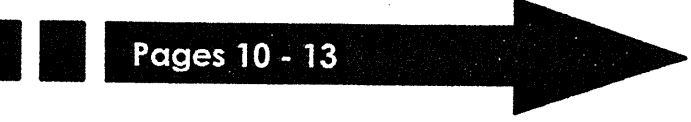
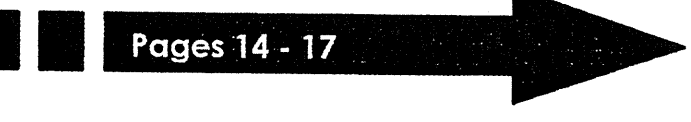

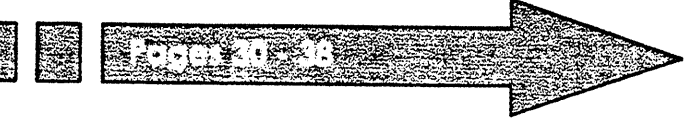
Reporting all alleged cases of child abuse and neglect involving Indian children is mandatory by law. Further, it is the policy of the Bureau that we will not tolerate child abuse or neglect. All employees of the BIA and all non-Federal employees of BIA-administered grant, contract or compact programs have a mandated responsibility for prompt reporting of alleged incidents of child abuse and neglect.

The Child Protection Handbook is designed as a reference tool for Bureau, tribal, and other non-Bureau employees who are in positions that have contact and/or control over Indian children. The Handbook provides employees with an overview of applicable laws, definitions, identification indicators, training, child protection teams, and reporting procedures associated with child protection. Additionally, the Handbook outlines established methods for conducting character/background checks on employees (and volunteers) who are working or applying for work in either a Federal or tribal programs.

Again, we expect all employees and volunteers, Federal and non-Federal, to comply with Federal laws that are meant to protect the safety of our Indian children.

Kevin Jones



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Public Law 101-647: "Crime Control Act, Child Care Worker - Employee Background Checks" of 1990. This law requires:

- ◆ Each Federal agency that hires, or contracts for, individuals involved with providing child care services to children under age 18, to assure that all existing and newly-hired employees undergo a criminal history background check.

Under the law,

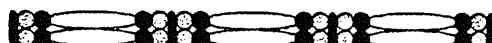
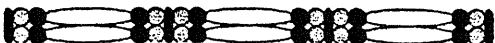
- ◆ "Child care services" means child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved with teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services.
- ◆ The criminal history background check must be based on a set of fingerprints and processed through the FBI Identification Division, and checks of State criminal history repositories of States where the individual has resided.
- ◆ New employees cannot be hired unless the required checks have been completed.
- ◆ Any conviction for a sex crime, an offense involving a child victim, or a drug felony may be grounds for denying employment, or for dismissal of an employee in a child care service position.

ACCOUNTABILITY. All BIA, tribal, grant, contract, and self-governance programs are required to comply with existing federal laws. This includes the following requirements: background investigations, mandatory reporting, failure to report penalties, cross reporting between law enforcement and child protection services, confidentiality, and child abuse investigation requirements or waivers.

DEFINITIONS. For the purposes of this Handbook, we are using the following definitions as provided in Public Law 101-630, Public Law 101-647, and 25 CFR Part 63.

Child. An individual who is not married, and who has not attained 18 years of age.

Child Abuse. Includes, but is not limited to, any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution; a child is dead or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, soft tissue swelling, and where such a condition is not justifiably explained or may not be the product of any accidental occurrence.



Child Care Services. Includes child protective services (for example, the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correction, or treatment services.

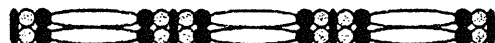
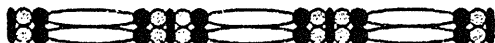
Child Neglect. Includes, but is not limited to, negligent treatment or maltreatment of a child by a person, including a person responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened. Some general circumstances of child neglect might include a person who exhibits a chronic pattern of not providing a child under 18 with adequate supervision, protection, food, clothing, medical care and/or emotional nurturance.

Juvenile Services. The BIA's Division of Law Enforcement provides juvenile services including juvenile delinquency prevention programs and services designed to reduce incidents of neglected/abandoned children, physically/sexually abused children, juvenile gang activity, and participation in area and local child protection teams.

Local Child Protection Services. Services provided by an agency of a Federal, state, or tribal government that has the primary responsibility for child protection on an Indian reservation or within a community in Indian country.

Local Law Enforcement Agency. A Federal, state, or tribal law enforcement agency that has the primary responsibility for the investigation of alleged child abuse within the portion of Indian country involved.

Person Responsible for a Child's Welfare. Any person who has legal or other recognized duty for the care and safety of a child, and may include any employee or volunteer of a children's residential facility, and any person providing out-of-home care, education, or services to children.



RECOGNIZING CHILD ABUSE AND NEGLECT: COMMON INDICATORS

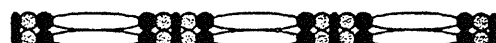
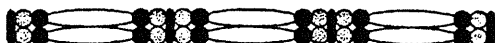
For each of the defined sub-categories under child abuse and neglect, a **PARTIAL** listing of visual or behavioral indicators are listed that will enable Federal and tribal employees to identify a possible occurrence of child abuse or neglect.

Sexual Abuse. Sexual abuse is when a child is being used for the sexual exploitation and/or gratification of the abuser. Categories of sexual abuse include: fondling, unwanted touching, sexually provocative language, exhibitionism, pornography, and oral/vaginal/anal penetration.

Physical Indicators:	Behavioral Indicators:
<ul style="list-style-type: none"> ◆ Difficulty in walking or sitting ◆ Torn, stained, or bloody underclothing ◆ Pain, bruising, or itching in the genital and/or anal area ◆ Sexually transmitted diseases ◆ Engages in delinquent acts ◆ Bruises or bleeding in the genital or anal area ◆ Loss of appetite ◆ Pregnancy ◆ Unexplained sore throats, urinary or yeast infections 	<ul style="list-style-type: none"> ◆ Appears withdrawn, engages in fantasy or unusual infantile behavior ◆ Poor peer relationships ◆ Displays bizarre, sophisticated, or unusual sexual knowledge or behavior ◆ Chronic running away ◆ School performance in steady decline ◆ Drug, inhalant, or alcohol abuse ◆ Sudden avoidance of certain familiar adults ◆ High levels of anxiety ◆ Regression; low self-esteem

Physical Abuse. Any non-accidental, intentional physical injury caused by an abuser.

Physical Indicators:	Behavioral Indicators:
<ul style="list-style-type: none"> ◆ Skin abrasions, fractures, etc. that show possible evidence of repeated injuries ◆ Sign of injury that is not consistent with the type of injury (visible burns on the arm, for example) ◆ Refuses to explain an injury ◆ Injuries appear clustered or are arranged symmetrically ◆ Complains of constant stomach pain or other possible internal injury ◆ Unexplained injuries ◆ Aggressive, self-destructive behavior 	<ul style="list-style-type: none"> ◆ Repeatedly absent or truant from school ◆ Exhibits extreme fright at being touched ◆ Displays loss in language and/or gross motor skills ◆ Extremely moody; susceptible to personality swings ◆ Afraid to take on new tasks ◆ Exceedingly careful not to antagonize adults ◆ Asks permission from a caretaker for virtually every physical action or need



Emotional Abuse. Recurring verbal and/or non-verbal behavior of a person characterized by intimidating, ignoring, belittling and/or otherwise damaging a child's sense of self-worth and emotional development.

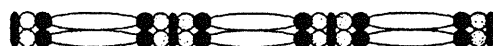
Physical Indicators:	Behavioral Indicators:
<ul style="list-style-type: none"> ◆ Eating disorders ◆ Excessive nightmares ◆ Bed-wetting problems ◆ Failure to thrive: a condition found in children, typically under two years old, who exhibit signs of mental/emotional and physical developmental retardation, as compared to the norm of same-age children. 	<ul style="list-style-type: none"> ◆ Chronic underachiever; poor self-concept; feels unworthy ◆ Exhibits self-destructive behavior, seemingly unaware of obvious hazards and risks ◆ Poor peer relationships ◆ Excessive rocking, biting, head-banging, and thumb sucking

Physical Neglect. The failure of the person(s) responsible for child's care to provide necessary food, shelter, medical care, supervision, or education to a child under age 18.

Physical Indicators:	Behavioral Indicators:
<ul style="list-style-type: none"> ◆ Clothing inappropriate for current weather conditions or insufficient for school/play ◆ Height and/or weight significantly below minimum standard established for age level ◆ Lack of needed medical and/or dental care ◆ Child left without adequate supervision for extended periods during the day or night ◆ Exhibits chronic fatigue ◆ Dirt and grime on clothes or skin; offensive body odor 	<ul style="list-style-type: none"> ◆ Chronic hunger; begs or steals food ◆ Runs away from home ◆ Refuses to eat ◆ Falls asleep in school ◆ Mentions no caretaker in the home ◆ Inability to concentrate ◆ Repeated acts of vandalism ◆ Depressed or apathetic ◆ Constant fatigue or listlessness

Emotional Neglect. The failure of a person to provide a child with a nurturing environment – an environment characterized by the qualities of appropriate attention, support, and affection, as provided by the caretaker to the child. Failure to provide a child with a nurturing environment may result in slowing the child's psychological growth and development.

<ul style="list-style-type: none"> ◆ Distrusts adults ◆ Reluctant to go home ◆ Consistently truant or tardy ◆ Possessive of toys and games ◆ May show "academic retardation" 	<ul style="list-style-type: none"> ◆ Difficulty in forming relationships ◆ Assumes adult or parent role ◆ Often seeks adults attention ◆ Feels abandoned, unwanted ◆ Engages in delinquent behaviors
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Family Violence. Family violence is any act, or threatened act, of violence, including any forceful detention of an individual, which results, or threatens to result, in physical or mental injury, and is committed by an individual against another individual to whom such person is, or was, related by blood or marriage or otherwise legally related, or with whom such person is, or was, residing, or with whom such person has, or had, intimate or continuous social contact and household access.

VIOLENCE AND THE INDIAN CHILD

The Bureau of Indian Affairs recognizes that violence directed toward children is a serious and growing problem. Social resource programs are examining ways to prevent and reduce the impact of family, school, and community violence on young children. Representatives from social services, education, and law enforcement are implementing better coordination methods designed to improve the access, delivery, and quality of educational, social, and family support services for young children at risk for violence.


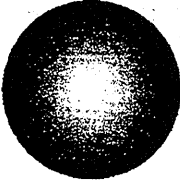
Increased awareness in Indian communities and professional services will help address the impact of violence on children and improve coordination of necessary services and support systems – thus improving the programmatic response to the problem. Education and training for parents, school personnel, childcare workers, child protective services providers, law enforcement, and tribal court officials can continue to assist tribes in reducing the risk and impact of this serious issue.

The Bureau will continue to develop violence prevention strategies such as proven mentoring and conflict resolution methods that have a record of improving the quality of life of American Indian and Alaska Native children and families. The Bureau and Indian communities will work together in cooperative partnership to reduce domestic violence in Indian country.

REPORTING

REPORTING SUSPECTED INCIDENTS OF CHILD ABUSE

Who must report? The Indian Child Protection and Family Violence Prevention Act, codified as Title 18, United States Code § 1167, requires the following people to immediately report incidents or suspected incidents of child abuse occurring or which may occur:

<u>Medical Field</u>	<u>Educational Field</u>	<u>Other Reporters</u>
<ul style="list-style-type: none"> • Physician • Surgeon • Dentist • Nurse • Dental Hygienist • Optometrist • Medical Examiner • Emergency Medical Technician • Paramedic • Health Care Provider 	<ul style="list-style-type: none"> • Teacher • School Counselor • Instructional Aide • Teacher's Aide • Teacher's Assistant  <ul style="list-style-type: none"> • Bus Driver • Administrative Officer • Supervisor of Child Welfare and Attendance • <u>Truancy Officer</u> <p>Above applies to anyone employed by any tribal, Federal, public or private school.</p>	<ul style="list-style-type: none"> • Child Day Care Worker • Head Start Teacher • Public Assist. Worker • Group home, Day Care, or Residential Facility Worker • Social Worker • Psychiatrist • Psychologist • Psychological Assistant • Marriage, Family or Child Counselor • Mental Health Professionals • Law Enforcement Officer • Probation Officer • Juvenile Rehab or Retention Workers • Public agency staff who are responsible for enforcing statutes and judicial orders

How is abuse reported? Any person aware of child abuse should make an oral report to their local law enforcement or child protective services agency. Calls can also be made to the BIA National Child Abuse Prevention Hotline at 1-800-633-5155.

CHILD ABUSE HOTLINE

1 - 800 - 633-5155



What information is needed for a report? Obviously, the more information provided by the caller the better. However, the information provided should include the name, address, directions to the child's home, sex of the child that is the victim of abuse, the grade and school name of the child (if known), the name and address of the child's parents or other person responsible for the child's care, the name and address of the alleged offender, name and address of the reporting party, a brief description as to the nature and extent of the abuse and injuries to the child. The caller should also provide, if known, any previously known or suspected abuse of the child or the child's siblings and the suspected date of the abuse.

Must the reporter of an incident maintain confidentiality? The law provides that the identity of any person making a report shall not be disclosed without the consent of the person making the report. However, the law does permit the sharing of the reporter's name with a court of competent jurisdiction, as well as a tribal, State, or Federal employee who needs to know the information in the performance of their duties. Additionally, tribal, State and Federal agencies which investigate incidents of child abuse may share information with like agencies on a "need to know" basis.

What are the civil and criminal liabilities the person making the report?

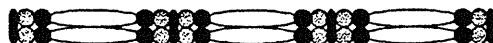
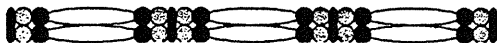
To protect the person making a report and to encourage the reporting of suspected child abuse, the law permits that any person making a child abuse report which is based upon their *reasonable belief* and which is *made in good faith* shall be immune from civil or criminal liability for making the report.

What are the consequences of failing to report an incident? Any of the above who fails to immediately report incidents of child abuse shall be fined \$5,000 and/or imprisoned not more than 6 months. The person reporting the abuse does not need to prove the abuse.

What is the responsibility of supervisors regarding reporting? The law further provides that any person who supervises or has authority over any of the above and inhibits or prevents that person from making the report shall be fined \$5,000 and/or imprisoned for 6 months.

What happens to the report? The law requires that when a local law enforcement or child protective services agency receives an initial report of child abuse, the receiving agency is required to immediately notify appropriate officials of the other agency and shall submit within 36 hours a written report to the other agency.

The law further requires that any local law enforcement or child protective services agency which receives a report of child abuse shall immediately initiate an investigation of the alleged abuse and take immediate and appropriate steps to secure the safety and well-being of the child or children involved.



If the local law enforcement agency determines the incident occurred in Indian country, the law enforcement agency shall, in addition to notifying the child protection agency, also notify the Federal Bureau of Investigation (FBI). The local law enforcement agency and the FBI shall determine which agency is to be the lead investigation agency. If the suspected abuse is substantiated, the case shall be submitted for prosecution in the appropriate court.

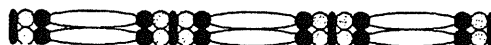
ASSESSMENT CONCERNING PROTECTION OF CHILD VICTIMS

The investigative agency or agencies working with the child protective services and or a Child Protection Team/Multi-Disciplinary Team (CPT/MDT) shall make an initial assessment to determine the following:

- ◆ The probable facts
- ◆ The need for protection of the child
- ◆ The need for removal or continued protective placement
- ◆ What other actions are required to ensure the protection and well-being of the victim

This information is to be conveyed to the responsible CPT/MDT members, the U.S. Attorney's Office, and/or the appropriate prosecutorial agency responsible for emergency removal.

Waiver of Parental Consent/Medical Examination. On a case-by-case basis, medical examinations and interviews with a child suspected of having been abused may be conducted without the consent of the parent, guardian, or legal custodian if it is in the best interests of the child. Immediate medical examinations will be arranged if there is an acute need, such as an injury to the child that requires medical attention; or if there is the need to preserve evidence, such as the preparation of a rape kit, or other existing conditions make it advisable. If no acute need for evidence preservation exists, a medical examination will be arranged in the normal course of business.



CHILD ABUSE AND NEGLECT

FACTS:

Reported cases of child abuse and neglect. Nationally, over 3 million children were reported victims of child abuse and neglect in 1995. For the same year in Indian country, tribes reported over 8,000 incidents of child abuse, 19,000 incidents of child neglect, and 4,000 incidents of sexual abuse.

Neglect is the most common form of child maltreatment. In 1995, 52 percent of the nation's children who were maltreated were victims of neglect. For the same year, 58 percent of the maltreated American Indian and Alaska Native children were determined to have been victims of neglect.

Other related national statistics.

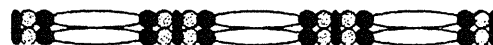
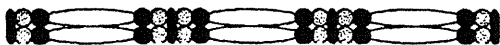
- **Gender.** In 1995, 53 percent of the child abuse/neglect victims were female and 47 percent were male.
- **Age.** About half of substantiated victims were of age 7 or younger, with 26 percent younger than 4 years old in 1995. About 26 percent of the victims were children between the ages of 8 and 12; another 21 percent were between the ages of 13 and 18. Victims of neglect tended to be younger than 8 years old, while the majority of child victims of physical, emotional, and sexual abuse were age 8 or older.
- **Death.** Nationally, child protection services (CPS) linked the deaths of 996 children to either abuse or neglect. Most of the children were 3 years old or younger. The 996 total, however, does not accurately reflect the total number of abuse/neglect-linked fatalities. Many such fatalities involving children are reported as homicides, and, therefore, are not reported to the local CPS.

FREQUENTLY ASKED QUESTIONS:

Where are children most frequently abused or neglected? In Indian country, nearly 80 percent of the reported child abuse/neglect incidents occur in the child's home. Only about 4 percent take place in or near a school environment. The remainder occurs elsewhere.

What can communities do to help prevent child abuse/neglect? Child abuse and neglect is a community problem. It is also a community challenge – a challenge to find solutions to reduce incidents of child maltreatment. Communities can implement programs designed to strengthen families, for example, by improving communication among families and sharing resources with less fortunate families. Prevention and intervention programs must be sensitive to the child's and the family's culture and values in the context of the larger community.

Sources: U.S. Department of Health and Human Services, Bureau of Indian Affairs, and National Clearinghouse on Child Abuse and Neglect



CHILD PROTECTION TEAMS (CPTs)

Child Protection Teams: A Mechanism for Cooperation. Child protection teams (CPTs) use a multi-disciplinary approach to coordinate interagency service delivery and maximize the existing services available to victims of child abuse. CPTs hold regular meetings and emphasize child abuse and neglect prevention.

CPT Composition. It is recommended that:

- ◆ membership is limited to eight or less and
- ◆ may be composed of representatives from tribal courts, education, local law enforcement, judicial services, mental health services, medical clinic (a physician), community health clinic (a nurse), and social services (tribal, BIA, IHS or state/county). Other agency representatives may serve as resources.
- ◆ All formal members of the CPT shall be required to have undergone or submit to a background investigation.

Confidentiality. Confidentiality shall be maintained. Each member shall be required to sign a confidentiality agreement. A violation of confidentiality will be subject to prosecution under federal law.

CPT Duties include:

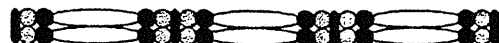
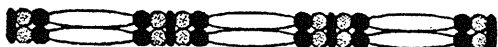
- ◆ providing oversight regarding reported child abuse/neglect incidents,
- ◆ facilitating the provision of service, and
- ◆ providing technical assistance.

CPTs will be trained to more effectively use community resources in the treatment and prevention of child abuse.

Types of Teams:

Core Team – Core teams are composed of members who have professional expertise necessary to identify and plan for treatment of child abuse and neglect cases.

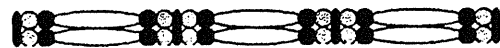
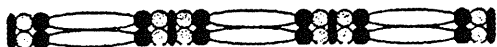
Program Development Team – Program development teams include community members with skills and knowledge to assess community problems, identify gaps in service, and develop tribal policies and programs that strengthen family life.



Interagency Agreements. The CPT should encourage interagency agreements or written agreements of cooperation between the agencies and organizations within the community's service delivery system. Inter-agency agreements should be reviewed annually and revised as necessary. These agreements may address:

- ◆ methods for communication among staff,
- ◆ referral procedures, criteria for cases to be reviewed,
- ◆ agency roles in identifying and reporting cases,
- ◆ providing treatment and case management,
- ◆ procedures for interagency information sharing, and
- ◆ a conflict resolution mechanism.

The team should ensure that the local child protection agencies' authority and responsibility are observed.



Confidentiality Agreement

All regular Child Protection Team (CPT) members should complete this agreement at least annually. Individuals who attend a CPT meeting on a one time only or infrequent basis should complete it each time they attend. This information should be maintained in the CPT file.

By signing this agreement, I agree to and understand that:

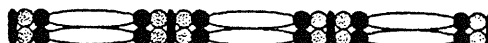
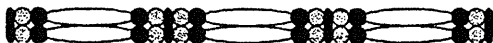
1. The Chairperson of the CPT has discussed with me the tribal and federal requirements for keeping information confidential.
2. Confidentiality means that I cannot discuss any matter pertaining to any child abuse/neglect case that I review as part of the Child Protection Team, except as allowed by law.
3. The legal requirements of confidentiality mean that I cannot discuss any matter pertaining to the CPT referrals with any member of my family, including parents, children, spouse, aunts, uncles, cousins, or with any other person unless they are allowed access to such information by law.
4. I understand that if I do not keep Child Protection Team referrals confidential, I am subject to termination of my job or other disciplinary action as allowed by tribal, federal or state law.

Signature of CPT Representative or Attendee

Date

Signature of Witness

Date



TRAINING

The following outline is a suggested format containing categories necessary for child protection training. This format can be utilized by all service providers who come into contact with or who are directly responsible for children, for example, the BIA Area/Agency Administrative Offices, all education offices, BIA schools (contract and grant schools), law enforcement, social services, and judicial services. Area, Agency and tribal staff may be identified as potential trainers. Training must be provided at a minimum of once a year, preferably near the beginning of the school year. It is the responsibility of the administrative leaders of each program area to implement training for all staff.

DEFINITIONS

- General Definition: overall description of abuse
 - Sexual Abuse
 - Physical Abuse
 - Emotional Abuse
 - Neglect
 - Physical neglect
 - Emotional neglect
 - Child Violence

SIGNS AND SYMPTOMS OF CHILD ABUSE & NEGLECT CHARACTERISTICS

Victims

- Behavioral signs
- Physical indicators
- Emotional/psychological indicators
- Violent crime impact

Caretaker's Behavior

- Characteristics of abusive caretakers

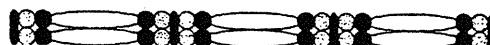
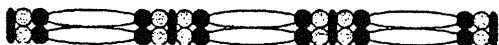
Risk Factors

- Families at risk
- The impact of family, school and community violence on children
- General at risk factors for children
- Increased risk for children with disabilities
- Specific American Indian risk factors (cultural, economic, social, etc.)

REPORTING ABUSE

Laws

- Reporting guidelines
- Responsibilities of all BIA employees/BIA policy



REPORTING ABUSE (continued)

- Good faith reporting
- Penalties for not reporting
- The role of the Child Protection Team

CONFIDENTIALITY

All cases of child abuse allegations shall be treated within the guidelines of Federal laws protecting children, employees and all parties involved. Confidentiality must be a priority throughout the process.

- Confidentiality of informant, alleged victim and information
- Disclosure protocol
- Maintenance of files
- Review of Federal laws pertaining to confidentiality of personnel information, for example:

- The Privacy Act
- The Family Education and Privacy Act
- The Crimes Control Act

ADMINISTRATIVE PROCEDURES FOR EMPLOYEES/VOLUNTEERS ACCUSED OF CHILD ABUSE

- General procedures
- Process for removing employee/volunteer from contact with or control over children

EMPLOYEE RIGHTS, ISSUES AND CONCERNS

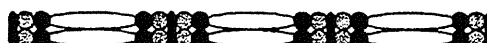
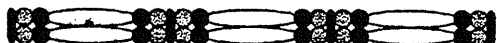
- Orientation of administrative procedures for new and current employees

THE IMPACT OF SERIOUS SEXUAL ABUSE

- Short-term impact
- Long-term impact
- Psychological impact
- Family dynamics in incestuous families
- Special considerations in multiple victim molestation

NORMAL SEXUAL DEVELOPMENT

- Age appropriate sexual behavior
- Disruptions in sexual development due to abuse



DISCUSSING ABUSE WITH THE CHILD

Communicating about abuse, referral, follow-up, and support
Identify professional resources

PERPETRATORS

Myths and facts
Characteristics of perpetrators
Profiles of a pedophile
Juvenile perpetrators
Offender treatment

SCHOOL-BASED INTERVENTIONS

Primary prevention programs
Post-abuse prevention
School personnel's attitudes/roles

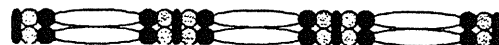
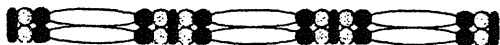
COMMUNITY RESOURCES

Professional Resources:

BIA
US Attorneys
IHS
Tribal Social Services
Tribal Law Enforcement
Schools
Tribal Initiatives

Other Community Resources:

Schools
Tribal Initiatives
Other Community Resources



INVESTIGATION (25 USC 3203)

When local law enforcement or child protective services staff receives a report of suspected child abuse or neglect, the receiving agency is required to:

- ◆ notify the other agency of such report and
- ◆ submit a written report to the other agency within 36 hours.

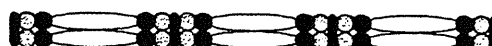
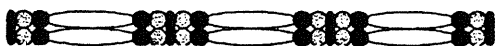
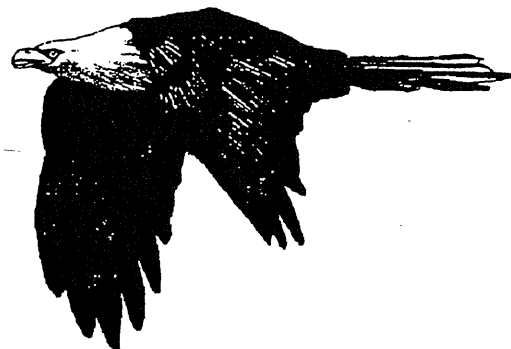
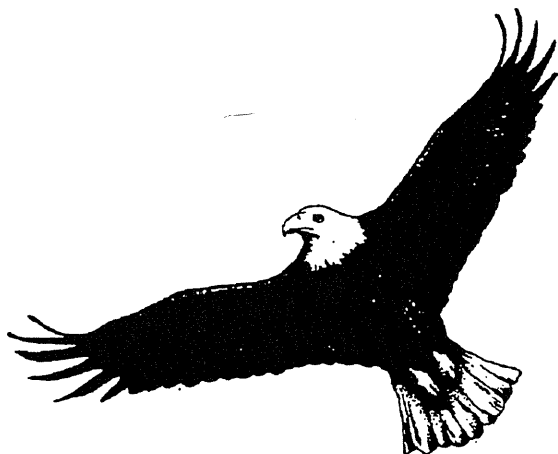
The local law enforcement or child protection service agency that receives a report shall immediately

- ◆ initiate an investigation of such an allegation and
- ◆ take immediate and appropriate steps to secure the safety and well being of the child(ren) involved.

The investigative agency or agencies working together with the child protection worker and/or the child protection team (CPT) shall make an initial evaluation to determine:

- ◆ the probable facts,
- ◆ the need for protection of the child, including the need for placement, and
- ◆ what other actions need to be taken for the safety of the child.

If emergency removal is necessary, the local child protection agency will follow the appropriate local procedures.





ADMINISTRATIVE PROCEDURE

REQUIRED CHARACTER AND BACKGROUND INVESTIGATION

This section establishes guidelines for conducting character/background investigations and processing criminal history checks (fingerprint checks) for employees and volunteers, whose responsibilities include the contact, care and control of Indian children.

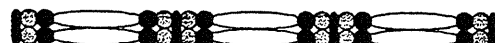
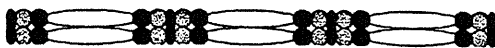
Federal Employees

Character Investigations for Bureau of Indian Affairs Employees

This section establishes guidelines for processing the required background investigations covered by Executive Order (E.O.) 10450, Security Requirements for Government Employment. E.O. 10450 requires that each civilian employed in any department or agency of the Government shall be made subject to investigation. The scope of the investigation will be consistent with the degree of risk the employee would have on the position occupied. However, in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation.

Procedures - requesting background investigations, determining suitability for employment and meeting minimum standards of character and efficiency of service, as mandated by E.O. 10450, and Public Laws 101-630 and 101-647:

- ◆ All vacancy announcements will clearly state the investigative requirements.
- ◆ Prospective employees will be informed that the appointment is subject to satisfactory completion of the pre-employment investigation inquiries as well as the post employment investigation.
- ◆ An unfavorable report as a result of the pre-employment inquiry shall be grounds for non-selection, and an unfavorable report as a result of the post employment investigations shall be grounds for separation from employment.
- ◆ Selecting officials shall conduct telephone reference inquiries (only on the applicant tentatively selected) prior to making a final commitment. The inquiries shall include three former employers and personal references or enough other alternative checks to cover the last seven years (e.g., high school/college teachers/counselors, etc.)



- ◆ Document the results and record the date of the telephone checks and the name and title of the person interviewed. The name and title of the person conducting the interview shall also be documented. If the applicant's references checks are found to be inconclusive, then the applicant is required to provide additional references.
- ◆ Certify that the individual's past conduct would not interfere with his /her performance of duties, nor would it create an immediate or long-term risk for any child.
- ◆ Applicants who have been tentatively selected for positions and employees must submit a security package consisting of the following: a Standard Form 85P, Questionnaire for Public Trust Positions, Standard Form 85P-S, Supplemental Questionnaire for Selected Positions, Standard Form 87, Fingerprint Chart, Optional Form 612, Optional Application for Federal Employment or resume along with the Optional Form 306, Declaration for Federal Employment.
- ◆ All positions with regular contact with or control over children have been designated as Public Trust (e.g., all positions in the Office of Indian Education Programs, social services, facilities management, etc.)
- ◆ All employees' occupying Public Trust positions with regular contact with or control over children shall be subject to periodic reinvestigation every five years. The reinvestigation will occur for each succeeding five-year period during the tenure of an employee who is in a position dealing with children. A criminal history check will meet the requirements for the reinvestigation.
- ◆ The designated employee who will request the background investigation from the Office of Personnel Management (OPM) must review the security package and code the case papers. The SF 85P must have "BIA EAGLE" on the top of the form.
- ◆ Those designated employees responsible for the scheduling of the required investigations have been/will be trained in the proper procedures for coding the case papers.
- ◆ The complete security forms must show no gaps in dates. Further, forms must cover the last seven years of the applicant's/employee's life in which the investigation will cover.
- ◆ The completed background investigations will be sent from OPM to the designated security officer as indicated on the security forms. The security officer will review the result of the background investigation, apply the suitability standard and make the suitability determination.
- ◆ Applicants and/or employees **MUST** be provided an opportunity to deny, explain, or refute derogatory information developed in the background investigation. This response may be accomplished either in person or in writing. If an unfavorable

determination is rendered, the servicing personnel office will notify the applicant or employee in compliance with due process procedures.

- ◆ The designated security officer shall issue a written notification to the designated personnel officer that the applicant/employee has met the investigative requirements for the position (either sensitive or nonsensitive).
- ◆ When determined suitable for a Public Trust position, the designated security officer or supervisor shall provide a briefing to the applicants and/or employees on the topic of “standards of conduct required for Federal employment and their responsibilities.”

Tribes and/or Tribal Organizations

Re: Public Law 101-630 “The Indian Child Protection and Family Violence Prevention Act” of 1990

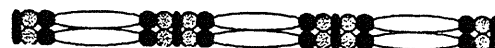
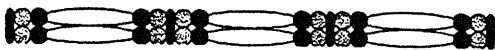
Sec. 408 – Character Investigations – investigations by Indian Tribes and Tribal organizations. – Each Indian tribe or tribal organizations that receive funds under the Indian Self-Determination and Education Assistance Act or Tribally Controlled Schools Act of 1988 shall –

Conduct an investigation of character of each individual who is employed or is being considered for employment, by such tribe or tribal organizations in a position that involves regular contact with, or control over, Indian children –

Employ individuals in those positions only if the individual meets minimum standard character requirements.

Re: Public Law 101-647 “Crime Control Act, Child Care worker – Employee Background Checks” of 1990

Sub chapter V – Each agency of the Federal Government and every facility operated by the Federal Government or operated under contract with the Federal Government, which hires (or contracts for hire) individuals involved with providing child care services to children under the age of 18 shall assure that all existing and newly hired employees undergo a criminal history background check.



EMPLOYEES AND VOLUNTEERS, FEDERAL AND TRIBAL

Provisional Clause:

Public Law 101-647 allows hiring employees or utilizing volunteers provisionally prior to the completion of a background check, if, at all times, the person is within the sight and under the supervision of a staff person who has had a background check and has been determined suitable.

The minimum investigative requirement for volunteers is a **CRIMINAL HISTORY BACKGROUND CHECK**. For all Office of Indian Education Programs (OIEP) volunteers, please refer to 62 BIAM regulations.

WHAT ARE MINIMUM STANDARDS OF CHARACTER and SUITABILITY?

- ◆ **Minimum Standards** of character are established by the employer and refer to identifiable character traits and past conduct.
- ◆ **Minimum Standards** of character SHALL ensure that NO applicant, volunteer or employee is placed in a position whose responsibilities and duties allow regular contact with or control over Indian children if he or she has been found:
 - ◆ guilty of or entered a plea of nolo contendere or guilty to any offense under Federal, State or Tribal law involving crimes of violence,
 - ◆ sexual assault,
 - ◆ sexual molestation,
 - ◆ sexual exploitation,
 - ◆ sexual contact or prostitution,
 - ◆ or crimes against persons.

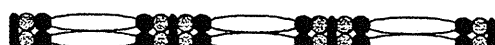
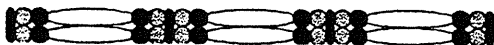
Determination of **suitability** measures the fitness or eligibility of the applicant, employee or volunteer for a particular position. It requires that:

- ◆ The employers investigate the background of each applicant, employee, or volunteer;
- ◆ Determine the degree of risk the individual brings to the position; and
- ◆ Certify the individual's past conduct would not interfere with his /her performance of duties, nor would it create an immediate or long-term risk for any Indian child.

Suitability for employment does not evaluate an applicant's education, skills, knowledge, or experience.

WHAT POSITIONS REQUIRE A BACKGROUND/CHARACTER INVESTIGATION?

All Federal employees, tribal contract and grant school employees, social and mental health workers, head start employees, child day care employees, juvenile detention, correctional or treatment centers employees, Tribal Courts employees, Law Enforcement personnel, health care service positions, and volunteers that have contact with or control over Indian children, as well as selected other positions, must have a background/character investigation.



WHAT IS REQUIRED IN DOING A BACKGROUND INVESTIGATION?

Federal

All Federal employees must be investigated by the Office of Personnel Management (OPM).

All applicants and/or employees must complete the SF 85P, Questionnaire for Public Trust Positions; SF 85P-S, Supplemental Questionnaire for Selected Positions; SF 87, Fingerprint Chart, OF 612, Optional Application For Federal Employment; and OF 306, Declaration for Federal Employment. [Some positions may require the SF 86, Questionnaire for Sensitive Positions (For National Security) {for law enforcement positions only} instead of the SF 85P.]

All investigations must be submitted to OPM within 14 days of placement in positions. Those positions designated Public Trust based on regular contact with or control over children must have "BIA EAGLE" on the top of the security form.

The minimum investigation is a **National Agency Check and Inquiries (NACI)**. The NACI consists of a search of the OPM Security/Suitability Investigations Index (SII), the Defense Clearance and Investigations Index (DCII), an FBI Identification Division, fingerprint name file and fingerprint chart, and FBI Records Management Division files, written inquiries, and records searches covering specific areas of a subject's background during the past five years.

All employees occupying positions designated Public Trust based on regular contact with, or control over children will be reinvestigated every five years. The minimum reinvestigation shall be a **CRIMINAL HISTORY CHECK**.

Tribal

All tribal employees who have contact with or care over Indian children must have a background investigation.

The employment application must ask whether the applicant, volunteer, or employee had been arrested or convicted of a crime involving a child, crimes of violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution or crimes against persons and the disposition of the arrest or charge.

Criminal History Checks (i.e., by conducting a FBI fingerprint search through the Office of Law Enforcement's Liaison Office, Albuquerque or by checking fingerprints through the states.)

Local Law Enforcement Checks (i.e., State, County and Tribal Court Systems)

Employment history verified for past five years

Employment References for past five years

Education/training verification

Residence history check

A subject interview, applicant or volunteer

Drivers license check/History, if applicable

Military verification, if applicable

ALERT – NOTICE TO ALL AREAS AND AGENCIES. A recent review of the Bureau's security program revealed the following critical deficiencies: background investigations were not completed prior to employees being assigned to sensitive and/or public trust positions, investigations were not consistently being requested for new employees, nor were the appropriate position sensitivity designations assigned. Area or Agency noncompliance with the investigative requirements of applicable Executive Orders and Public Laws **will not be tolerated.**

Character and Background Investigation Forms

Federal:

- ✓ Standard Form (SF) 85P, Questionnaire for Public Trust Positions
- ✓ SF 85P-S, Supplemental Questionnaire for Selected Positions
- ✓ SF 86, Questionnaire for Sensitive Positions (National Security)
- ✓ SF 87, Fingerprint Chart
- ✓ OF 612, Optional Application for Federal Employment
- ✓ OF 306, Declaration for Federal Employment
- ✓ Employer/Personal Reference Inquirer Form

Tribal:

- ✓ **Sample tribal forms are available from the BIA's Office of Law Enforcement, Services Liaison Office, Albuquerque, New Mexico.**

DEFINITIONS SPECIFIC TO THIS SECTION

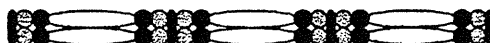
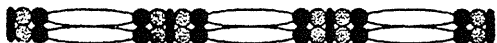
Confidentiality – the sensitivity of documents, criminal history checks, and inquiries received information must be shared with only those officials who have a need to know in the performance of their official duties.

Crimes against persons are defined by local law. Adjudicating officers must contact local law enforcement agencies to determine if the crime for which an applicant, employee or volunteer was found guilty (or entered a plea of nolo contendere or guilty) meets the requirements of Public Law 101-630.

Local law enforcement agency is that Federal, Tribal or state law enforcement agency that has primary responsibility for the investigation of an instance of alleged child abuse with the involved Indian jurisdiction.

National Criminal History Check is a FBI fingerprint search that includes a check of past state criminal history. The FBI search does not include local or tribal criminal histories.

Privacy Act contains provisions for criminal penalties for knowingly and willfully disclosing information from investigative files unless properly authorized.



Examples of positions that require investigation and determination of suitability:

All education positions (Status Quo and Pub. Laws 93-638, 95-561, 100-297)

Academic/support staff (teachers, school counselors, teachers' aide, etc.)

Professional and administrative staff (superintendents, principals)

Dormitory/domestic staff (home living specialists/assistant, night attendants)

Education support services staff (school bus drivers, cooks, school custodial workers, business managers/technicians, and registrars)

Social service and mental health workers

Foster care providers

Physician, dentists, dental assistants, nurses, etc.

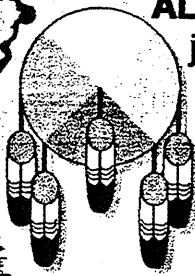
Head Start programs, child day care programs

Efficiency of Service is the employer's verification that the applicant, employee or volunteer is able to perform the duties and responsibilities of the position, and his/her presence on the job will not inhibit other employees or the agency from performing their functions.

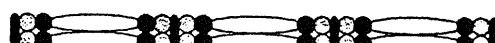
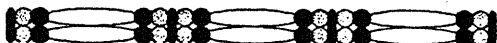
Adjudication is the process employer's use to determine suitability for employment and efficiency of service. The adjudication process protects the interests of the employer and the rights of applicants and employees. Adjudication requires uniform evaluation to ensure fair and consistent judgment. Each case is judged on its own merits based on all information gathered.

Due Process is advising the subject of any of derogatory information received and providing the subject the opportunity to comment, explain, deny or refute the information.

Character and background Investigations will be conducted for all Federal and tribal employees who have contact with control over Indian children.



ALL tribal contract and grant school; juvenile detention; correctional or treatment center; Tribal Court and Law Enforcement personnel; all health care service positions that have contact with or control over Indian children; and other positions involving such contact.



PROGRAM ADMINISTRATION

The Bureau of Indian Affairs recognizes that administrative action is essential to enforce compliance to Executive Order 10450, Public Laws 101-630 and 101-647, which safeguard Indian children. These actions, as stated in E.O. 10450 and the two Public Laws, apply to all employees, volunteers, their supervisors and various other BIA officials as well as tribal officials, tribal contractors, and tribal grantees who have a specific or general responsibility for child abuse prevention or treatment.

Five areas of concern have been identified as requiring immediate administrative intervention:

- ◆ Failure to report suspected cases of child abuse or neglect;
- ◆ Unsuitability determinations on applicants, volunteers, or current employees;
- ◆ Compliance with security background investigation procedures by responsible management officials;
- ◆ Child abuse allegations and supported incidents of child abuse among employees and volunteers; and
- ◆ Charges, indictments, and criminal records involving employees or volunteers.

Each of these five areas of concern is addressed in greater detail below. Topics covering access to information on cases of alleged child abuse are addressed at the end of this section, as is conflict of interest.

FAILURE TO REPORT SUSPECTED CASES OF CHILD ABUSE OR NEGLECT

BIA employees must report suspected cases of child abuse or neglect to the local social services, law enforcement or child protection hotline immediately, but no later than 24 hours from the time the incident is brought to their attention. Failure to report within this timeframe will result in corrective disciplinary or adverse action being taken against the employee. Failure to report suspected cases of child abuse or neglect may subject the employee to a fine not to exceed \$5,000 or six months in prison and/or administrative penalties up to and including removal from Federal service.

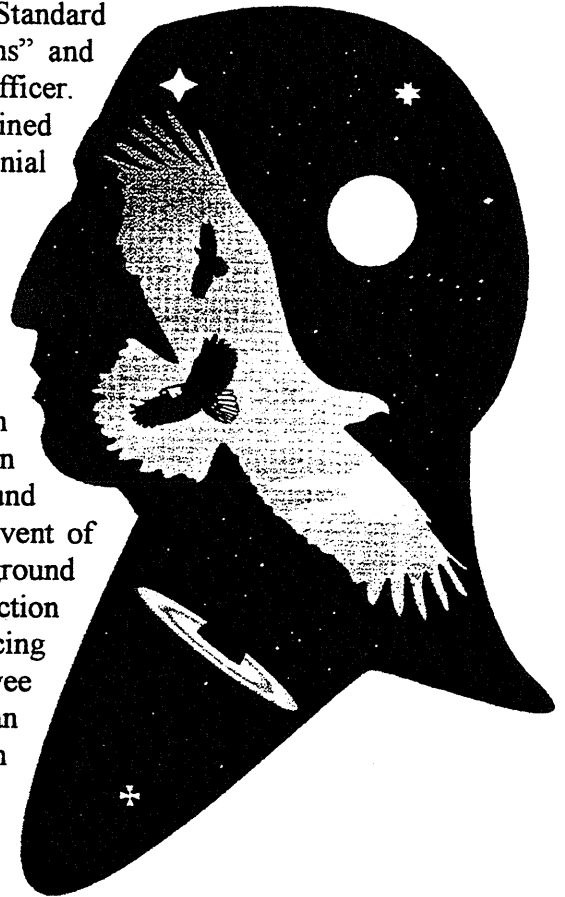
Any person making a report based upon their reasonable belief and made in good faith shall be immune from civil and criminal liability for making that report. Retaliation against an employee for reporting suspected incidents of child abuse is prohibited.

UNSUITABILITY DETERMINATIONS ON APPLICANTS, VOLUNTEERS, OR CURRENT EMPLOYEES

Applicants for BIA positions requiring regular contact with or control over children are required to complete as a minimum the Standard Form 85P, "Questionnaire for Public Trust Positions" and receive appropriate clearance by the BIA Security Officer. Applicants selected for a position and determined unsuitable for employment will be issued a written denial of employment.

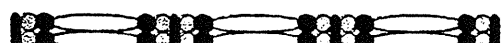
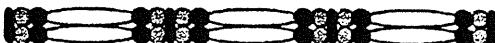
Volunteers are subject to the appropriate background investigation to meet the requirements of the law.

Current BIA employees occupying a position requiring regular contact with and control over children are required to have appropriate security background clearance through the BIA Security Office. In the event of negative results of a post-employment background investigation, or five-year follow-up investigation, action must be initiated in consultation with the servicing personnel office to propose removal of the employee from Federal service. A removal based on an unsuitability determination does not prohibit an employee from re-applying for a Federal position not requiring regular contact with or control over children within the Bureau of Indian Affairs or any other Federal agency.



COMPLIANCE WITH SECURITY BACKGROUND INVESTIGATION PROCEDURES, BY RESPONSIBLE MANAGEMENT OFFICIALS

It is the responsibility of management officials of the BIA to ensure all applicants and volunteers for sensitive positions and employees encumbering such positions requiring regular contact with and control over children have completed the appropriate security background investigation and obtained clearance for the position by the BIA Security Officer. Non-compliance with security background investigation procedures may endanger the safety or well being of Indian children and unnecessarily places them at risk. For this reason, failure to meet these requirements will result in corrective disciplinary or adverse action to be taken against the management official. Security Officers responsible for oversight and implementation of the program are responsible for notifying the second level management official in writing when faced with incidents of non-compliance.



CHILD ABUSE ALLEGATIONS AND SUPPORTED INCIDENTS OF CHILD ABUSE

This policy places safeguarding children from child abuse as the highest priority while an investigation of child abuse allegations is completed. This involves mandatory removal of the alleged perpetrator from contact with or control over children until a preliminary investigative report can be completed by law enforcement to determine whether prosecution is imminent.

Mandatory removal from contact with or control over children

It is the policy of the Bureau of Indian Affairs that any employees, against whom allegations of child abuse or neglect have been raised, will be immediately placed in a position requiring no contact with or control over children or automatically placed on administrative leave for a period of three (3) work days.

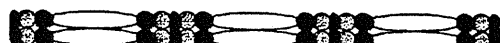
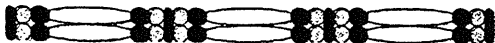
Removing an employee from contact with or control over children will be accomplished by placing the employee in a position that does not have contact with or control over children, if such a position exists and work is available. The employee will be informed in writing of the temporary assignment to this position and will be notified the reason for the action is an allegation of child abuse or neglect. Every effort will be made to place the employee in a position on site or in another office within the local commuting area.

If management determines it is in the best interest of the Federal service to place the employee on administrative leave, a letter stating such will be prepared in consultation with the servicing personnel office. The letter will inform the employee of the expected duration of the administrative leave and that action is being taken based on an allegation of child abuse or neglect.

THE PRELIMINARY INVESTIGATION

The employee will remain in the temporary assignment or on administrative leave pending receipt of a preliminary investigative report from law enforcement on the possibility of criminal prosecution. The preliminary investigation should be completed within three days of the receipt of the referral/allegations.

What happens next? Placing an employee in a temporary position or on administrative leave is required when law enforcement determines prosecution is likely or imminent or if the Agency has not received a preliminary report of investigation. In this case, the employee will be notified the temporary position or administrative leave will be extended for an indefinite amount of time. If law enforcement notifies management the allegations are unfounded, the employee may be immediately returned to duty.





When to initiate an administrative inquiry. In the absence of a preliminary report of investigation from Law Enforcement at the end of the three workdays, management will initiate an administrative inquiry into the merits of the allegation. Also, management will determine whether to continue the employee in a status with no contact or control over children or return the employee to their position. This does not prevent management from determining it is in the best interest of the student, school, or community to delay the employee's return to their position until a determination is made on whether or not administrative action is warranted. Further administrative review will be determined on a case by case basis.

When to inform employee of general allegations. The supervisor shall inform the employee of the general charge(s) or allegation(s) against the employee after receipt of the preliminary investigative report by law enforcement or during the conduct of an administrative investigation initiated by management unless Child Protective Services or Law Enforcement Services officials reasonably believe that notification of the employee shall result in the destruction of evidence, the intimidation of witnesses or victims, or shall otherwise impair the investigation. Management officials must receive concurrence from law enforcement and the servicing personnel office before any notification is given the employee. When the employee is notified of the allegations, the employee may submit a written response within 24-hours.

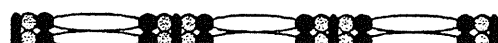
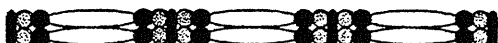
Consultation with servicing personnel office. After the 24-hour period has expired, or the employee has responded in writing, whichever comes first, the supervisor in consultation with the servicing personnel office shall make an initial determination on the merits of the allegations and explanations or responses. The supervisor will make a written determination, whether or not there is sufficient reason to believe the allegations have merit. The supervisor shall immediately submit the employee's written response and the supervisor's written findings and determinations to the servicing personnel office for advice and counsel on appropriate administrative action required. Refer to the directory in this Handbook's appendix for listing of servicing personnel offices and areas served.

CHARGES, INDICTMENTS, AND CRIMINAL RECORDS INVOLVING EMPLOYEES AND VOLUNTEERS

Management is responsible for ensuring none of the individuals appointed to positions having contact with or control over children have been found guilty of, or entered a plea of nolo contendere or guilty to any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.

Any employee occupying a position requiring regular contact with or control over children and convicted of crimes against persons or child abuse, neglect or abandonment shall immediately and permanently be removed from contact with or control over children. Charges or indictments of crimes against persons, child abuse, neglect or abandonment in a recognized court of law (tribal, State or Federal) will serve as basis for invoking the crime provision and an indefinite suspension shall be proposed.

The BIA need not await the outcome of the criminal proceedings to proceed with administrative action up to and including removal from Federal service. Management must immediately notify the servicing personnel office upon becoming aware of an employee being charged with or convicted of a crime, which may have a bearing upon continued employment.



Indefinite suspensions will be proposed when there is reasonable cause to believe the employee has committed a crime subject to the penalty of imprisonment. "Reasonable cause" may be established by an indictment alone or by circumstances attendant to an arrest or investigation conducted by the employing agency or criminal law enforcement authorities.

If the supervisor has information to substantiate the allegations brought against the employee, then the supervisor is responsible for taking administrative action against any BIA employee, regardless of pending criminal action against the employee. No administrative action should be taken without first consulting with the servicing personnel office.

ACCESS TO INFORMATION

Referral Source. The identity of any person making a report of child abuse or neglect shall not be disclosed to anyone other than those individuals directly involved in the child protection investigation or the court, without the consent of the individual.

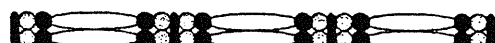
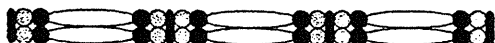
CONFIDENTIALITY. Employees with access to child abuse and neglect information shall keep this information strictly confidential. This information shall not be released to individuals who are not involved in the child protection investigation.

Requests for information. Any requests for information by parties not directly involved in the child protection activities shall be referred to the respective Privacy Act and Freedom of Information Act (FOIA) Coordinators. Requests for information/data received from union representatives shall be forwarded to the Privacy Act/Freedom of Information Act Coordinator and the servicing personnel office for response.

Restrictions on Release of Information. The local law enforcement office, which has received a report of child abuse against a BIA employee, shall advise the employee's immediate supervisor and the servicing personnel office of the allegations within 24 hours. If law enforcement personnel find sufficient reason to believe notification to the supervisor shall cause the destruction of evidence, intimidation of victims or witnesses, or shall otherwise impair the investigation, this information may be withheld. Law enforcement officials who make such a determination must submit their reasons in writing to their next line supervisor.

CONFLICT OF INTEREST

The BIA official, whether immediate, second, third or fourth-line supervisor, law enforcement official, child protection official, or other decision making official, who is presented with a potential conflict of interest or the appearance of a conflict of interest in a case of alleged child abuse, is responsible for excusing themselves from any further involvement in the case.



This document is provided as an example of a negotiated CPT agreement between a tribe and the Federal Government (the BIA and HIS). A tribe may want to refer to this example in drafting a similar CPT document. Each tribe, however, is encouraged to develop a CPT document that reflects the tribe's unique needs, resources, culture, and CPT objectives/goals.

MEMORANDUM OF UNDERSTANDING CROW CHILD PROTECTION TEAM

I. PURPOSE

The purpose of the Crow Child Protection Team (CPT) is to provide a multi-disciplinary team which coordinates child abuse prevention services through public awareness, staff training, and case management. The functions of the (CPT) are to staff cases and implement a coordinated plan for the prevention, intervention, and treatment of child abuse and neglect cases for Native American children residing on the Crow Reservation over whom the Crow Tribal Court has jurisdiction. However, the Crow Child Protection Team is primarily technical and advisory in nature and by definition, cannot assume or undermine the responsibility of individual agencies.

II. OBJECTIVE/GOALS

- A. To assess the needs and facilitate services in individual child abuse and neglect cases including investigation and treatment.
- B. To make team recommendations for short-term and long-term goals in individual child abuse and neglect cases.
- C. To promote awareness and prevention of child abuse and neglect on or near the Crow Reservation.
- D. To promote the concept that abuse and neglect is a shared community responsibility.
- E. To promote and identify appropriate care and preventive health services to children.

III. DEFINITION OF CHILD ABUSE AND NEGLECT

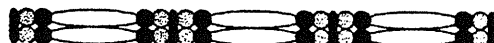
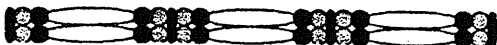
- A. General: **Child abuse and neglect** means the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened.
- B. Specific: **Child Abuse** is non-accidental physical injury, malnourishment, neglect, emotional, the sexual abuse or exploitation of children, or any other action that hinders the mental and physical growth and development of children.
- C. Categories of Abuse:

Physical Abuse -- non-accidental injury, examples may include: severe beatings, burns, strangulation, or human bites.

Neglect -- the failure to provide a child with the basic necessities of life: food, clothing, shelter, or medical care.

Sexual Abuse or Molestation -- the exploitation of a child for the sexual gratification of an adult, as in rape, incest, fondling of the genitals, or exhibitionism.

Emotional Abuse -- a pattern of behavior that attacks a child's emotional development and sense of self worth, examples include constant criticizing, belittling, insulting, rejecting, and providing no love, support, or guidance.



D. Criteria in Identifying Child Abuse and Neglect:

- (1) The child is under the age of eighteen.
- (2) The child is under the care of a caretaker.
- (3) The child is non-accidentally injured.

IV. CHILD PROTECTION TEAM COMPOSITION

A. Bureau of Indian Affairs:

Social Services
Criminal Investigators
Law Enforcement

B. Tribal Representatives:

Juvenile Court Counselor
Tribal Court Prosecutor
Tribal Social Services

C. Indian Health Service:

Physician
Medical Social Worker or/ Mental Health

D. Department of Public Health and Human Services – Family Services DPHHS:

Social Worker

E. School Representative:

School Social Worker

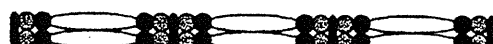
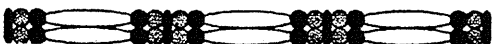
V. ANCILLARY CHILD PROTECTION TEAM

Additional persons and experts may be invited on an as needed basis. Approval is through the Team Coordinator and upon signing confidentially statements. Invited personnel may be excused after the discussion or presentation of the case they are involved with.

VI. ROLES AND FUNCTIONS OF TEAM MEMBERS

A. PHYSICIAN

1. The physician provides consultation within the team and to referring agencies.
2. He/she can provide medical diagnosis, treatment and follow-up of specific cases, either by self or referral of cases to another physician. Recommends referral of cases from the Child Protection Team to other appropriate health agencies and social services workers.
3. He/she will review medical records to determine past care or problems with the child.
4. He/she will request documentation from other medical staff members and agencies when required and request PHN involvement as needed.



B. INDIAN HEALTH SERVICE, MENTAL HEALTH AND MEDICAL SOCIAL WORK SERVICES

1. The Mental Health and Medical Social Service staff will report all suspected child abuse and neglect cases verbally and in writing to the BIA Social Services. Suspected child sexual abuse cases and severe physical abuse will be reported by IHS to BIA Social Services and BIA Law Enforcement.
2. The services available from the Mental Health program include psychological assessment, psychiatric evaluation, individual counseling and therapy, consultation, referral for inpatient treatment and follow-up. The Mental Health Representative will also provide input to CPT on patients received or placed by Mental Health personnel.
3. The services available from the IHS Medical Social Services program include crisis intervention, psychosocial assessment, coordination of discharge planning on inpatient admissions, and follow-up counseling and parenting skills.

C. BUREAU OF INDIAN AFFAIRS SOCIAL SERVICES

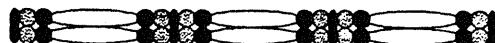
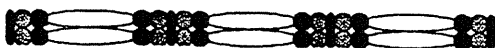
1. It is the responsibility of the BIA, Social Services to investigate or assist with the investigation of all child abuse/neglect complaints.
2. It will generally be the role of the BIA Social Worker to maintain primary, ongoing responsibility for case management and for implementation of a case plan based on input from BIA Criminal Investigators and Law Enforcement personnel, DPHHS, Social Workers, IHS, the Crow Tribal Court and Social Services, and CPT.

D. TRIBAL SOCIAL SERVICES

1. This is an appointed position. The role of this person will be to act as a liaison between the Chairman and the CPT on matters of policy and procedure.
2. Crow Tribal Social Services, when court ordered, will do case management and implementation of the caseplan.
3. Additional duties include but not limited to: The overseeing of the IV-E Program, Home Base, ICWA, Homeless Shelter, Senior Citizens, Day Care, Foster Parent training and licensing, and Crow Victims Assistance Program.

E. BIA LAW ENFORCEMENT

1. Upon receiving a referral, shall investigate to determine if a crime has actually occurred and determine if the crime is a misdemeanor or felony.
2. If the crime is a minor assault or neglect case, the Police Officer will notify Social Services and conduct a full investigation and may request technical assistance from the Criminal Investigators.
3. If the crime is a serious assault or a child sexual abuse case, the Criminal Investigators and the Federal Bureau of Investigation will be notified immediately. The Police Officer shall assist in the investigation, turning over any evidence/information to the Case Agent.
4. If the case is of a civil nature, the case will be referred to Social Services for a full investigation. The Police Officer will assist Social Services with any removal of children if required.
5. The Police Officer is responsible for presenting misdemeanor cases to the Prosecutor once it is complete.
6. The Police Representative will confer with other police officers if questions arise regarding issues of children and share documentation with CPT, if possible.



CRIMINAL INVESTIGATOR

1. Upon receiving a referral of suspected physical or sexual abuse or neglect, a Criminal Investigator will immediately conduct an investigation.
2. The Criminal Investigator will notify the Federal Bureau of Investigation and Social Services once the allegation is substantiated.
3. The Criminal Investigator will present cases of physical abuse, sexual abuse, and neglect to the United States Attorney of an opinion on prosecution in Federal Court.
4. In the event the U.S. Attorney declines Federal prosecution, the Criminal Investigator will present the case to the Tribal Prosecutor for an opinion on prosecution in Tribal Court.
5. Upon request from the Police Officer, the Criminal Investigators will provide technical advice and assistance with any misdemeanor investigation.

F. CROW TRIBAL COURT**ROLE OF THE COURT**

1. The role of the court is to review all facts derived from the investigation and to make an order on placement and/or treatment of the child.
2. The court may subpoena any additional records it feels it needs in order to render an opinion.
3. Child sexual abuse evaluations will be obtained through Indian Health Service or their represented agency if they are requested by BIA Law Enforcement or BIA Social Services in accordance to the Crow Tribal Code.

TRIBAL PROSECUTOR

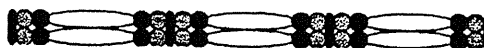
1. The Prosecutor will provide legal advice to the CPT.
2. The Prosecutor will file a petition upon receiving sufficient information of the investigation.
3. The Prosecutor or Clerk of Court will provide notice of hearings 2 days in advance unless the case is an emergency. Copies of court orders will be provided to all agencies involved in care or treatment.

JUVENILE COURT SERVICES:

1. This representative will be a juvenile court counselor. The role of the Juvenile Court Counselor will provide the perspective of the Court to the CPT.

G. DPHHS SOCIAL WORKERS

1. The DPHHS Social Worker's will perform the same functions as BIA Social Services for cases, which occur off the Crow Reservation.
2. Any DPHHS Social Workers may exchange information and records with Crow Tribal Court, IHS, BIA Law Enforcement and BIA Social Services, if the case is transferred or shared with above agencies on the Crow Reservation.



H. TEAM COORDINATOR

1. The Team Coordinator shall be appointed by the CPT team from its membership and may be rotated annually.
2. The Team Coordinator shall take minutes, or appoint someone to take minutes at each meeting.
3. The Team Coordinator will be responsible for planning each CPT meeting, sending out notices and communicating with team members.
4. Records and minutes shall be kept in confidential manner.
5. All other agencies, entities, or individuals, will direct referrals, communication, or requests for attending CPT meetings to the CPT Team Coordinator.
6. The Team Coordinator will ensure that new members and visitors sign confidentiality statements.
7. The Area CPT will communicate with Crow CPT through the Team Coordinator.

I. SCHOOL REPRESENTATIVE

1. Make referrals of child abuse and neglect to CPT.
2. Monitor behavior and emotional status of children and coordinate school related services within the represented school district.
3. Communicate with other county school districts as requested by CPT and present questions or concerns from school personnel to CPT.
4. Provide education and training related to child abuse as necessary.

VII. POLICIES AND PROCEDURES

A. GENERAL

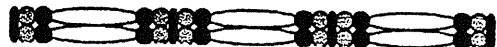
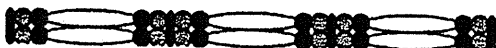
1. Investigations of child abuse/neglect cases on the Crow Reservation will comply with all applicable provisions of Federal, State, and Tribal Laws, statutes and regulations.
2. Communication is a shared responsibility between CPT members and their colleagues within their respective agencies.

B. IDENTIFICATION AND REPORTING CASES OF CHILD ABUSE

1. Any person who suspects or has knowledge of child abuse/neglect is obligated by tribal ordinance and Federal Law Pub. L. 101-630, to make a report directly to BIA Social Services. In the event that they are not available, the report shall be made to BIA Law Enforcement within 24 hours.
2. Failure to report suspected child abuse/neglect by any individual may result in disciplinary action or prosecution in accordance with Pub. L. 101- 630.

C. INPATIENT ADMISSION POLICY

1. An assessment of the child by BIA Social Services, DPHHS, Crow Tribal Court, or Crow Social Services will determine the placement needs and resources available for the child.
2. If an emergency hospital admission is necessary for protection of the child, the admission must be approved by a physician.
3. Emergency hospital admissions for the protection of the child must be approved in by a Tribal Court order within 48 hours.
4. The Social Worker will submit a report to the on-call physician that a child is in protective custody and identify individuals allowed to visit.



D. MEDICAL ASSESSMENT

1. Diagnostic procedures will be conducted in accordance with IHS Manual Chapter 13, Maternal and Child Health Policies. Specifically, a physical examination will be provided which documents any evidence of injury or neglect. These entries will be noted in the child's records and referred to the CPT.
2. A medical report of findings will be provided to Law Enforcement and BIA Social Services.

E. HOME ASSESSMENT

1. Home assessments will be conducted by BIA Social Services and/or Tribal Social Services.

F. FORENSIC INVESTIGATION

1. Law Enforcement will collect evidence, including photographs, and investigate the criminal portion of the case.
2. Indian Health Service may provide for expert witness interviews in cases of child sexual, physical, or emotional abuse as needed.

G. CASE MANAGEMENT

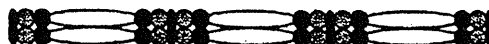
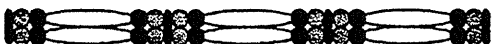
1. A primary case manager will be appointed for each case. It will be the responsibility of the case manager to monitor the progress of the case and report to the CPT.
2. BIA Social Services, Crow Social Services, or DPHHS will be the case manager for children under their care and supervision in which there is an on going investigation.
3. CPT reviews the results of investigations and makes recommendations for the case plan.
4. Progress on cases will be reviewed at the regularly scheduled meetings.
5. Cases will be closed by mutual consensus among CPT members.

H. LEGAL PROCEEDING FOR REMOVAL OF A CHILD

1. BIA Social Services, Tribal Social Services, Tribal Court, Law Enforcement, or IHS medical staff can make the decision to place a child in protective custody for 48 hours.
2. DPHHS staff will request assistance from BIA Social Services, Tribal Social Services, Tribal Court, or from Law Enforcement personnel prior to removal of a child from the Crow Reservation with whom the state has jurisdiction.
3. The CPT may make recommendation to BIA Social Services, Tribal Social Services, Tribal Court, or DPHHS whether to seek temporary custody, long term or temporary placement, or termination of parental rights.
4. It is the responsibility of the placing agency to bring the allegation of abuse or neglect to the Tribal Prosecutor or Court Counselor and provide necessary documentation to substantiate the allegation of child abuse.
5. BIA Criminal Investigators, BIA Law Enforcement, BIA Social Services, or Tribal Social Services, may file Child In Need of Care Petitions regarding abuse or neglect of children with the Tribal Prosecutor or Court Counselor.

I. ATTENDANCE AND PARTICIPATION

1. CPT composition is determined by Crow Tribal Court and reviewed annually.
2. Any member who cannot attend the regularly scheduled CPT meeting will send an alternate or provide written notification to the CPT Secretary, Family Services, Indian Health Service. The member is responsible for briefing the alternate regarding their cases prior to the meeting.



J. DECISION-MAKING OR RECOMMENDATIONS

1. The CPT has the power to make recommendations in an advisory capacity to other CPT members and to the Tribal Court.
2. BIA Law Enforcement, BIA Social Services, and Tribal Social Services staff who have the responsibility for presenting recommendations to the Crow Tribal Court will consider and take under advisement all CPT recommendations.

K. CONFIDENTIALITY

1. All CPT members are required to follow the provisions of the Privacy Act. In addition, all members will be required to sign a confidentiality statement at the beginning of their appointment to the CPT, which will be reviewed annually by the Crow Tribal Court.
2. Visiting members will be required to sign a confidentiality statement prior to the meeting.
3. Minutes and working notes of the CPT will be kept in a locked file.

L. OVERSIGHT FUNCTIONS

1. The CPT will notify the Tribal Chairperson, Bureau of Indian Affairs Superintendent, Service Unit Director of Indian Health Service, or DPHHS Regional Administrator within 30 days, if no action or progress is being made on a case being considered by the CPT.
2. In case of an emergency, the Tribal Chairperson, Agency Superintendent, Service Unit Director of Indian Health service, and/or DPHHS Regional Administrator will be notified immediately.

M. CENTRAL REGISTRY

1. The CPT will comply with the requirements for establishing a Central Registry for tracking purposes in accordance with federal law.

N. TRAINING

1. CPT members will have sufficient training to carry out their functions related to child abuse and neglect.

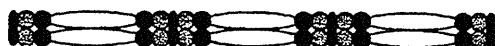
O. CONFLICT OF INTEREST

1. Discretion will be used by each CPT member concerning cases where they may have a conflict of interest. The decision to withdraw from discussion of a case where conflict of interest is a concern will be made by the individual. Conflict of interest issues may also be brought up by the group for discussion.

IX. PERIOD OF MEMORANDUM OF UNDERSTANDING

The Memorandum of Understanding between the Crow Tribe, Bureau of Indian Affairs, Indian Health Service, and DPHHS will be in effect for one (1) year. At the end of six (6) months, this agreement will be reviewed and necessary modifications will be made.

[Signatures of the BIA Crow Agency Superintendent, HIS Crow Service Unit Director, and Crow Tribe Chairperson followed on a signature page – a page not included here.]



BIA CENTRAL OFFICE TELEPHONE DIRECTORY (Selected Staff)

OFFICE OF TRIBAL SERVICES		OFFICE OF INDIAN EDUC. PROGRAMS	
Title/Name	Telephone #	Title/Name	Telephone #
Director, Deborah Maddox	(202) 208-3463	Dir., Joann Sebastian-Morris	(202) 208-6123
Security Officer, Janice Ruffin	(202) 208-3599	Deputy Dir., Bill Mehojah	(202) 208-6175
Statistician, Bob Stearns	(202) 208-2484	OIEP Personnel Officer	(505) 766-8126
Chief, Human Serv., Larry Blair	(202) 208-2479	Assistant Dir., Dr. Dennis Fox	(202) 208-6175
Alcohol/Substance Abuse	(202) 208-6179	Planning, Dr. Jim Martin	(202) 208-5810
Child Welfare-GA, Edie Adams	(202) 208-2536	Child Protect., Christine Brown	(202) 208-3559
Child Protection Coordinator	(202) 208-6858	Youth Risk Behavior Survey	(202) 208-3601

BIA SECURITY OFFICES

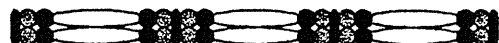
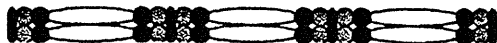
OFFICE	JURISDICTION	OFFICE	JURISDICTION
Aberdeen Area, BIA Connie Rauer 115 4 th Ave., S.E. Aberdeen, SD 57401 (605) 226-7360	Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin	Navajo Area, BIA Tim Clani P.O. Box 1060 Gallup, NM 87305 (505) 863-8320	Navajo Indian programs only
Albuquerque Area, BIA Sharon Garcia 615 First St. NW ms-230 Albuquerque, NM 87102 (505) 766-3479	Alaska, Colorado, Kansas, New Mexico, and Oklahoma	Phoenix Area, BIA Colleen Florence P.O. Box 10, ms-301 Phoenix, AZ 85001 (602) 379-4010	California
Billings Area, BIA Walter Wetzel 316 N 26 th St. Billings, MT 59101 (406) 247-7913	Montana, Oregon, and Wyoming	Office of Tribal Services Janice Ruffin 1849 C St., NW Washington, DC 30340 (202) 208-3599	Mich., Minn., Navajo (educ. only), S.Dak., (Flandreau Indian Sch. only), Wisc, and oversight of key cases
Div. of Law Enforcement Kay Hayes 123 4 th St., SW Albuquerque, NM 87103 (505) 248-7937	Tribal programs throughout the U.S.	Div. of Law Enforcement Ronda Klinekole 123 4 th St., SW Albuquerque, NM 87103 (505) 248-7937	Tribal programs throughout the U.S.

BIA PERSONNEL OFFICES

OFFICE	JURISDICTION	OFFICE	JURISDICTION
Aberdeen Area Pers. Management 115 4 th Ave., S.E. Aberdeen, SD 57401 (605) 226-7401	Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin	Portland Area The Federal Bldg. 911 NE 11 th Ave. Portland, OR 97232 (503) 231-6708	Idaho, Oregon, Washington, Flathead Agency (Montana), and the Metlakata, AK Field Office
Albuquerque Area Pers. Management P.O. Box 26567 Albuquerque, NM 87125 (505) 766-3130	Colorado (southern) and New Mexico	Human Resources Bureau of Reclamation 2800 Cottage Way Sacramento, CA 95825 (916)978-5477	Serves BIA offices in California, as per memorandum of agreement
Anadarko Area Pers. Management W.C.D. Office Complex P.O. Box 368 Anadarko, OK 73005 (405) 247-7956	Florida, Kansas, New York, North Carolina, Oklahoma, Texas, and Washington, D.C.	BIA Personnel Offices: Education	
		OFFICE	JURISDICTION
Billings Area Pers. Management 316 N. 26 th St. Billings, MT 59101 (406) 247-7956	Montana and Wyoming	OIEP Gallup Personnel Office P.O. Box 1060 Gallup, NM 87305 (505) 863-8462	Serves all of Navajo
Juneau Area Pers. Management P.O. Box 25520 Juneau, Ak 99802 (907) 586-7174	Alaska	OIEP Personnel Office 201 3 rd St. N.W. Suite 310 Albuquerque, NM 87102 (505) 766-3564	Serves all of the U.S., except for the Navajo
Phoenix Area Office Pers. Management P.O. Box 10 Phoenix, AZ 85001 (602) 379-6739	Arizona, Nevada, and Utah	OIEP Personnel Training Officer Haskell Indian Nations U. 155 Indian Ave. Lawrence, KS 66046 (913) 749-8434	Serves all of the U.S.

BIA ALCOHOL & SUBSTANCE ABUSE COORDINATORS

OFFICE	OFFICE	OFFICE	OFFICE
Aberdeen Area – BIA Gerald Gallegos 115 4 th Ave., S.E. Aberdeen, SD 57401 (605) 226-7347	Billings Area – BIA JoAnn Birdshead 316 N. 26 th St. Billings, MT 59101 (406) 247-7988	Muskogee Area – BIA LaFonda Mathews 101 N. 5 th St. Muskogee, OK 74401 (918) 687-2507	Portland Area – BIA Robert Carr 911 NE 11 th Ave. Portland, OR 97232 (503) 231-6785
Albuquerque Area – BIA Cecelia Clark P.O. Box 26567 Albuquerque, NM 87125 (505) 766-3164	Juneau Area – BIA Jimmie Clemmons P.O. Box 25520 Juneau, AK 99802 (907) 586-7611	Navajo Area – BIA Vivian Hailstorm P.O. Box 1060 Gallup, NM 87305 (505) 863-8215	Sacramento Area-BIA Lenora Guerrero-Campbell 4330 Watt Ave. 4 th Floor N. Highlands, CA 95660
Anadarko Area – BIA Retha Murdock P.O. Box 368 Anadarko, OK 73005 (405) 247-2242	Minneapolis Area – BIA Claricy Smith 331 2 nd Ave. S. Minneapolis, MN 55401 (612)373-1000,ex.1121	Phoenix Area – BIA Evelyn Roanhorse P.O. Box 10 Phoenix, AZ 85001 (602) 379-6785	CENTRAL OFFICE – BIA Gloria Mora 1849 C St.NW, ms-4603 Washington, DC 20040 (202) 208-6179



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1101 Office of Management and Budget Circular A-133 (6/30/97)

OFFICE OF MANAGEMENT AND BUDGET (OMB)

Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations"

June 30, 1997

To the Heads of Executive Departments and Establishments

Subject: Audits of States, Local Governments, and Non-Profit Organizations.

1. Purpose. This Circular is issued pursuant to the Single Audit Act of 1984, P.L. 98-502, and the Single Audit Act Amendments of 1996, P.L. 104-156. It sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of States, local governments, and non-profit organizations expending Federal awards.

2. Authority. Circular A-133 is issued under the authority of sections 503, 1111, and 7501 et seq. of title 31, United States Code, and Executive Orders 8248 and 11541.

3. Rescission and Supersession. This Circular rescinds Circular A-128, "Audits of State and Local Governments," issued April 12, 1985, and supersedes the prior Circular A-133, "Audits of Institutions of Higher Education and Other Non-Profit Institutions," issued April 22, 1996. For effective dates, see paragraph 10.

4. Policy. Except as provided herein, the standards set forth in this Circular shall be applied by all Federal agencies. If any statute specifically prescribes policies or specific requirements that differ from the standards provided herein, the provisions of the subsequent statute shall govern.

Federal agencies shall apply the provisions of the sections of this Circular to non-Federal entities, whether they are recipients expending Federal awards received directly from Federal awarding agencies, or are subrecipients expending Federal awards received from a pass-through entity (a recipient or another subrecipient).

This Circular does not apply to non-U.S. based entities expending Federal awards received either directly as a recipient or indirectly as a subrecipient.

5. Definitions. The definitions of key terms used in this Circular are contained in §.105 in the Attachment to this Circular.

6. Required Action. The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in the Attachment to this Circular. Federal agencies making awards to non-Federal en-

ties, either directly or indirectly, shall adopt the language in the Circular in codified regulations as provided in Section 10 (below), unless different provisions are required by Federal statute or are approved by the Office of Management and Budget (OMB).

7. OMB Responsibilities. OMB will review Federal agency regulations and implementation of this Circular, and will provide interpretations of policy requirements and assistance to ensure uniform, effective and efficient implementation.

8. Information Contact. Further information concerning Circular A-133 may be obtained by contacting the Financial Standards and Reporting Branch, Office of Federal Financial Management, Office of Management and Budget, Washington, DC 20503, telephone (202) 395-3993.

9. Review Date. This Circular will have a policy review three years from the date of issuance.

10. Effective Dates. The standards set forth in §.400 of the Attachment to this Circular, which apply directly to Federal agencies, shall be effective July 1, 1996, and shall apply to audits of fiscal years beginning after June 30, 1996, except as otherwise specified in §.400(a).

The standards set forth in this Circular that Federal agencies shall apply to non-Federal entities shall be adopted by Federal agencies in codified regulations not later than 60 days after publication of this final revision in the Federal Register, so that they will apply to audits of fiscal years beginning after June 30, 1996, with the exception that §.305(b) of the Attachment applies to audits of fiscal years beginning after June 30, 1998. The requirements of Circular A-128, although the Circular is rescinded, and the 1990 version of Circular A-133 remain in effect for audits of fiscal years beginning on or before June 30, 1996.

Franklin D. Raines, Director.

Attachment

PART — AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-PROFIT ORGANIZATIONS

Subpart A — General

Sec.

- ____.100 Purpose.
- ____.105 Definitions.

Subpart B — Audits

- ____.200 Audit requirements.

- ____.205 Basis for determining Federal awards expended.
- ____.210 Subrecipient and vendor determinations.
- ____.215 Relation to other audit requirements.
- ____.220 Frequency of audits.
- ____.225 Sanctions.
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Subpart C — Auditees

- ____.300 Auditee responsibilities.
- ____.305 Auditor selection.
- ____.310 Financial statements.
- ____.315 Audit findings follow-up.
- ____.320 Report submission.

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- ____.400 Responsibilities.
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- ____.500 Scope of audit.
- ____.505 Audit reporting.
- ____.510 Audit findings.
- ____.515 Audit working papers.
- ____.520 Major program determination.
- ____.525 Criteria for Federal program risk.
- ____.530 Criteria for a low-risk auditee.

Appendix A to Part — Data Collection Form (Form SF-SAC)

Appendix B to Part — Circular A-133 Compliance Supplement

Subpart A — General §.100 Purpose.

This part sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards.

§.105 Definitions.

Auditee means any non-Federal entity that expends Federal awards which must be audited under this part.

Auditor means an auditor, that is a public accountant or a Federal, State or local government audit organization, which meets the general standards specified in generally accepted government auditing standards (GAGAS). The term auditor does not include internal auditors of non-profit organizations.

Audit finding means deficiencies which the auditor is required by §.510(a) to report in the schedule of findings and questioned costs.

CFDA number means the number assigned to a Federal program in the *Catalog of Federal Domestic Assistance (CFDA)*.

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. "Other clusters" are as defined by the Office of Management and Budget (OMB) in the compliance supplement or as designated by a State for Federal awards the State provides to its subrecipients that meet the definition of a cluster of programs. When designating an "other cluster," a State shall identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with § 400(d)(1) and § 400(d)(2), respectively. A cluster of programs shall be considered as one program for determining major programs, as described in § 520, and, with the exception of R&D as described in § 200(c), whether a program-specific audit may be elected.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § 400(a).

Compliance supplement refers to the *Circular A-133 Compliance Supplement*, included as Appendix B to Circular A-133, or such documents as OMB or its designee may issue to replace it.

This document is available from the Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325.

Corrective action means action taken by the auditee that:

- (1) Corrects identified deficiencies;
- (2) Produces recommended improvements; or
- (3) Demonstrates that audit findings are either invalid or do not warrant auditee action.

Federal agency has the same meaning as the term agency in Section 551(1) of title 5, United States Code.

Federal award means Federal financial assistance and Federal cost-reimbursement contracts that non-Federal entities receive directly from Federal awarding agencies or indirectly from pass-through entities. It does not include procurement contracts, under grants or contracts, used to buy goods or services from vendors. Any audits of such vendors shall be covered by the terms and conditions of the contract. Contracts to operate Federal Government owned, contractor operated facilities (GOCOs) are excluded from the requirements of this part.

Federal awarding agency means the Federal agency that provides an award directly to the recipient.

Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, loans, loan guarantees, property (including donated surplus property), cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, and other assistance, but does not include amounts received as reimbursement for services rendered to individuals as described in § 205(h) and § 205(i).

Federal program means:

(1) All Federal awards to a non-Federal entity assigned a single number in the CFDA.

(2) When no CFDA number is assigned, all Federal awards from the same agency made for the same purpose should be combined and considered one program.

(3) Notwithstanding paragraphs (1) and (2) of this definition, a cluster of programs. The types of clusters of programs are:

- (i) Research and development (R&D);
- (ii) Student financial aid (SFA); and
- (iii) "Other clusters," as described in the definition of cluster of programs in this section.

GAGAS means generally accepted government auditing standards issued by the Comptroller General of the United States, which are applicable to financial audits.

Generally accepted accounting principles has the meaning specified in generally accepted auditing standards issued by the American Institute of Certified Public Accountants (AICPA).

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporation (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Internal control means a process, effected by an entity's management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

- (1) Effectiveness and efficiency of operations;
- (2) Reliability of financial reporting; and
- (3) Compliance with applicable laws and regulations.

Internal control pertaining to the compliance requirements for Federal programs (Internal control over Federal programs) means a process — effected by an entity's management and other personnel — designed to provide reasonable assurance regarding the achievement of the following objectives for Federal programs:

(1) Transactions are properly recorded and accounted for to:

- (i) Permit the preparation of reliable financial statements and Federal reports;
- (ii) Maintain accountability over assets; and
- (iii) Demonstrate compliance with laws, regulations, and other compliance requirements;

(2) Transactions are executed in compliance with:

- (i) Laws, regulations, and the provisions of contracts or grant agreements that could have a direct and material effect on a Federal program; and
- (ii) Any other laws and regulations that are identified in the compliance supplement; and

(3) Funds, property, and other assets are safeguarded against loss from unauthorized use or disposition.

Loan means a Federal loan or loan guarantee received or administered by a non-Federal entity.

Local government means any unit of local government within a State, including a county, borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

Major program means a Federal program determined by the auditor to be a major program in accordance with § 520 or a program identified as a major program by a Federal agency or pass-through entity in accordance with § 215(c).

Management decision means the evaluation by the Federal awarding agency or pass-through entity of the audit findings and corrective action plan and the issuance of a written decision as to what corrective action is necessary.

Non-Federal entity means a State, local government, or non-profit organization.

Non-profit organization means:

- (1) any corporation, trust, association, cooperative, or other organization that:
 - (i) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
 - (ii) Is not organized primarily for profit; and

(iii) Uses its net proceeds to maintain, improve, or expand its operations; and

(2) The term non-profit organization includes non-profit institutions of higher education and hospitals.

OMB means the Executive Office of the President, Office of Management and Budget.

Oversight agency for audit means the Federal awarding agency that provides the predominant amount of direct funding to a recipient not assigned a cognizant agency for audit. When there is no direct funding, the Federal agency with the predominant indirect funding shall assume the oversight responsibilities. The duties of the oversight agency for audit are described in §____.400(b).

Pass-through entity means a non-Federal entity that provides a Federal award to a subrecipient to carry out a Federal program.

Program-specific audit means an audit of one Federal program as provided for in §____.200(c) and §____.235.

Questioned cost means a cost that is questioned by the auditor because of an audit finding:

(1) Which resulted from a violation or possible violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the use of Federal funds, including funds used to match Federal funds;

(2) Where the costs, at the time of the audit, are not supported by adequate documentation; or

(3) Where the costs incurred appear unreasonable and do not reflect the actions a prudent person would take in the circumstances.

Recipient means a non-Federal entity that expends Federal awards received directly from a Federal awarding agency to carry out a Federal program.

Research and development (R&D) means all research activities, both basic and applied, and all development activities that are performed by a non-Federal entity. Research is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. Development is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Single audit means an audit which includes both the entity's financial statements and the Federal awards as described in §____.500.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, any multi-State, regional, or interstate entity which has governmental functions, and any Indian tribe as defined in this section.

Student Financial Aid (SFA) includes those programs of general student assistance, such as those authorized by Title IV of the Higher Education Act of 1965, as amended, (20 U.S.C. 1070 et seq.) which is administered by the U.S. Department of Education, and similar programs provided by other Federal agencies. It does not include programs which provide fellowships or similar Federal awards to students on a competitive basis, or for specified studies or research.

Subrecipient means a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency. Guidance on distinguishing between a subrecipient and a vendor is provided in §____.210.

Types of compliance requirements refers to the types of compliance requirements listed in the compliance supplement. Examples include: activities allowed or unallowed; allowable costs/cost principles; cash management; eligibility; matching, level of effort, earmarking; and, reporting.

Vendor means a dealer, distributor, merchant, or other seller providing goods or services that are required for the conduct of a Federal program. These goods or services may be for an organization's own use or for the use of beneficiaries of the Federal program. Additional guidance on distinguishing between a subrecipient and a vendor is provided in §____.210.

Subpart B — Audits
§____.200 Audit requirements.

(a) *Audit required.* Non-Federal entities that expend \$300,000 or more in a year in Federal awards shall have a single or program-specific audit conducted for that year in accordance with the provisions of this

part. Guidance on determining Federal awards expended is provided in §____.205.

(b) *Single audit.* Non-Federal entities that expend \$300,000 or more in a year in Federal awards shall have a single audit conducted in accordance with §____.500 except when they elect to have a program-specific audit conducted in accordance with paragraph (c) of this section.

(c) *Program-specific audit election.* When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's laws, regulations, or grant agreements do not require a financial statement audit of the auditee, the auditee may elect to have a program-specific audit conducted in accordance with §____.235. A program-specific audit may not be elected for R&D unless all of the Federal awards expended were received from the same Federal agency, or the same Federal agency and the same pass-through entity, and that Federal agency, or pass-through entity in the case of a subrecipient, approves in advance a program-specific audit.

(d) *Exemption when Federal awards expended are less than \$300,000.* Non-Federal entities that expend less than \$300,000 a year in Federal awards are exempt from Federal audit requirements for that year, except as noted in §____.215(a), but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and General Accounting Office (GAO).

(e) *Federally Funded Research and Development Centers (FFRDC).* Management of an auditee that owns or operates a FFRDC may elect to treat the FFRDC as a separate entity for purposes of this part.

§____.205 Basis for determining Federal awards expended.

(a) *Determining Federal awards expended.* The determination of when an award is expended should be based on when the activity related to the award occurs. Generally, the activity pertains to events that require the non-Federal entity to comply with laws, regulations, and the provisions of contracts or grant agreements, such as: expenditure/expense transactions associated with grants, cost-reimbursement contracts, cooperative agreements, and direct appropriations; the disbursement of funds passed through to subrecipients; the use of loan proceeds under loan and loan guarantee programs; the receipt of property; the receipt of surplus property; the receipt or use

of program income; the distribution or consumption of food commodities; the disbursement of amounts entitling the non-Federal entity to an interest subsidy; and, the period when insurance is in force.

(b) *Loan and loan guarantees (loans).* Since the Federal Government is at risk for loans until the debt is repaid, the following guidelines shall be used to calculate the value of Federal awards expended under loan programs, except as noted in paragraphs (c) and (d) of this section:

(1) Value of new loans made or received during the fiscal year; plus

(2) Balance of loans from previous years for which the Federal Government imposes continuing compliance requirements; plus

(3) Any interest subsidy, cash, or administrative cost allowance received.

(c) *Loan and loan guarantees (loans) at institutions of higher education.* When loans are made to students of an institution does not make the loans, then only the value of loans made during the year shall be considered Federal awards expended in that year. The balance of loans for previous years is not included as Federal awards expended because the lender accounts for the prior balances.

(d) *Prior loan and loan guarantees (loans).* Loans, the proceeds of which were received and expended in prior-years, are not considered Federal awards expended under this part when the laws, regulations, and the provisions of contracts or grant agreements pertaining to such loans impose no continuing compliance requirements other than to repay the loans.

(e) *Endowment funds.* The cumulative balance of Federal awards for endowment funds which are federally restricted are considered awards expended in each year in which the funds are still restricted.

(f) *Free rent.* Free rent received by itself is not considered a Federal award expended under this part. However, free rent received as part of an award to carry out a Federal program shall be included in determining Federal awards expended and subject to audit under this part.

(g) *Valuing non-cash assistance.* Federal non-cash assistance, such as free rent, food stamps, food commodities, donated property, or donated surplus property, shall be valued at fair market value at the time of receipt or the assessed value provided by the Federal agency.

(h) *Medicare.* Medicare payments to a non-Federal entity for providing patient care

services to Medicare eligible individuals are not considered Federal awards expended under this part.

(i) *Medicaid.* Medicaid payments to a subrecipient for providing patient care services to Medicaid eligible individuals are not considered Federal awards expended under this part unless a State requires the funds to be treated as Federal awards expended because reimbursement is on a cost-reimbursement basis.

(j) *Certain loans provided by the National Credit Union Administration.* For purposes of this part, loans made from the National Credit Union Share Insurance Fund and the Central Liquidity Facility that are funded by contributions from insured institutions are not considered Federal awards expended.

§ ____ .210 Subrecipient and vendor determinations.

(a) *General.* An auditee may be a recipient, a subrecipient, and a vendor. Federal awards expended as a recipient or a subrecipient would be subject to audit under this part. The payments received for goods or services provided as a vendor would not be considered Federal awards. The guidance in paragraphs (b) and (c) of this section should be considered in determining whether payments constitute a Federal award or a payment for goods and services.

(b) *Federal award.* Characteristics indicative of a Federal award received by a subrecipient are when the organization:

(1) Determines who is eligible to receive what Federal financial assistance;

(2) Has its performance measured against whether the objectives of the Federal program are met;

(3) Has responsibility for programmatic decision making;

(4) Has responsibility for adherence to applicable Federal program compliance requirements; and

(5) Uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity.

(c) *Payment for goods and services.* Characteristics indicative of a payment for goods and services received by a vendor are when the organization:

(1) Provides the goods and services within normal business operations;

(2) Provides similar goods or services to many different purchasers;

(3) Operates in a competitive environment;

(4) Provides goods or services that are ancillary to the operation of the Federal program; and

(5) Is not subject to compliance requirements of the Federal program.

(d) *Use of judgment in making determination.* There may be unusual circumstances or exceptions to the listed characteristics. In making the determination of whether a subrecipient or vendor relationship exists, the substance of the relationship is more important than the form of the agreement. It is not expected that all of the characteristics will be present and judgment should be used in determining whether an entity is a subrecipient or vendor.

(e) *For-profit subrecipient.* Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The contract with the for-profit subrecipient should describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the contract, and post-award audits.

(f) *Compliance responsibility for vendors.* In most cases, the auditee's compliance responsibility for vendors is only to ensure that the procurement, receipt, and payment for goods and services comply with laws, regulations, and the provisions of contracts or grant agreements. Program compliance requirements normally do not pass through to vendors. However, the auditee is responsible for ensuring compliance for vendor transactions which are structured such that the vendor is responsible for program compliance or the vendor's records must be reviewed to determine program compliance. Also, when these vendor transactions relate to a major program, the scope of the audit shall include determining whether these transactions are in compliance with laws, regulations, and the provisions of contracts or grant agreements.

§ ____ .215 Relation to other audit requirements.

(a) *Audit under this part in lieu of other audits.* An audit made in accordance with this part shall be in lieu of any financial audit required under individual Federal awards. To the extent this audit meets a Federal agency's needs, it shall rely upon and use such audits. The provisions of this part neither limit the authority of Federal

agencies, including their Inspectors General, or GAO to conduct or arrange for additional audits (e.g., financial audits, performance audits, evaluations, inspections, or reviews) nor authorize any auditee to constrain Federal agencies from carrying out additional audits. Any additional audits shall be planned and performed in such a way as to build upon work performed by other auditors.

(b) *Federal agency to pay for additional audits.* A Federal agency that conducts or contracts for additional audits shall, consistent with other applicable laws and regulations, arrange for funding the full cost of such additional audits.

(c) *Request for a program to be audited as a major program.* A Federal agency may request an auditee to have a particular Federal program audited as a major program in lieu of the Federal agency conducting or arranging for the additional audits. To allow for planning, such requests should be made at least 180 days prior to the end of the fiscal year to be audited. The auditee, after consultation with its auditor, should promptly respond to such request by informing the Federal agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in § 220.520 and, if not, the estimated incremental cost. The Federal agency shall then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal agency request, and the Federal agency agrees to pay the full incremental costs, then the auditee shall have the program audited as a major program. A pass-through entity may use the provisions of this paragraph for a subrecipient.

§ 220.220 Frequency of audits.

Except for the provisions for biennial audits provided in paragraphs (a) and (b) of this section, audits required by this part shall be performed annually. Any biennial audit shall cover both years within the biennial period.

(a) A State or local government that is required by constitution or statute, in effect on January 1, 1987, to undergo its audits less frequently than annually, is permitted to undergo its audits pursuant to this part biennially. This requirement must still be in effect for the biennial period under audit.

(b) Any non-profit organization that had biennial audits for all biennial periods ending between July 1, 1992, and January 1, 1995, is permitted to undergo its audits pursuant to this part biennially.

§ 225.225 Sanctions.

No audit costs may be charged to Federal awards when audits required by this part have not been made or have been made but not in accordance with this part. In cases of continued inability or unwillingness to have an audit conducted in accordance with this part, Federal agencies and pass-through entities shall take appropriate action using sanctions such as:

- (a) Withholding a percentage of Federal awards until the audit is completed satisfactorily;
- (b) Withholding or disallowing overhead costs;
- (c) Suspending Federal awards until the audit is conducted; or
- (d) Terminating the Federal award.

§ 230.230 Audit costs.

(a) *Allowable costs.* Unless prohibited by law, the cost of audits made in accordance with the provisions of this part are allowable charges to Federal awards. The charges may be considered a direct cost or an allocated indirect cost, as determined in accordance with the provisions of applicable OMB cost principles circulars, the Federal Acquisition Regulation (FAR) (48 CFR parts 30 and 31), or other applicable cost principles or regulations.

(b) *Unallowable costs.* A non-Federal entity shall not charge the following to a Federal award:

- (1) The cost of any audit under the Single Audit Act Amendments of 1996 (31 U.S.C. 7501 *et seq.*) not conducted in accordance with this part.
- (2) The cost of auditing a non-Federal entity which has Federal awards expended of less than \$300,000 per year and is thereby exempted under § 200(d) from having an audit conducted under this part. However, this does not prohibit a pass-through entity from charging Federal awards for the cost of limited scope audits to monitor its subrecipients in accordance with § 400(d)(3), provided the subrecipient does not have a single audit. For purposes of this part, limited scope audits only include agreed-upon procedures engagements conducted in accordance with either the AICPA's generally accepted auditing standards or attestation standards, that are paid for and arranged by a pass-through entity and address only one or more of the following types of compliance requirements: activities allowed or unallowed; allowable costs/cost principles; eligibility; matching; level of effort, earmarking; and, reporting.

§ 235.235 Program-specific audits.

(a) *Program-specific audit guide available.* In many cases, a program-specific audit guide will be available to provide specific guidance to the auditor with respect to internal control, compliance requirements, suggested audit procedures, and audit reporting requirements. The auditor should contact the Office of Inspector General of the Federal agency to determine whether such a guide is available. When a current program-specific audit guide is available, the auditor shall follow GAGAS and the guide when performing a program-specific audit.

(b) *Program-specific audit guide not available.* (1) When a program-specific audit guide is not available, the auditee and auditor shall have basically the same responsibilities for the Federal program as they would have for an audit of a major program in a single audit.

(2) The auditee shall prepare the financial statement(s) for the Federal program that includes, at a minimum, a schedule of expenditures of Federal awards for the program and notes that describe the significant accounting policies used in preparing the schedule, a summary schedule of prior audit findings consistent with the requirements of § 315(b), and a corrective action plan consistent with the requirements of § 315(c).

(3) The auditor shall:

- (i) Perform an audit of the financial statement(s) for the Federal program in accordance with GAGAS;
- (ii) Obtain an understanding of internal control and perform tests of internal control over the Federal program consistent with the requirements of § 500(c) for a major program;
- (iii) Perform procedures to determine whether the auditee has complied with laws, regulations, and the provisions of contracts or grant agreements that could have a direct and material effect on the Federal program consistent with the requirements of § 500(d) for a major program; and
- (iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding in accordance with the requirements of § 500(e).

(4) The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the

manner presented in this section. The auditor's report(s) shall state that the audit was conducted in accordance with this part and include the following:

(i) An opinion (or disclaimer of opinion) as to whether the financial statement(s) of the Federal program is presented fairly in all material respects in conformity with the stated accounting policies;

(ii) A report on internal control related to the Federal program, which shall describe the scope of testing of internal control and the results of the tests;

(iii) A report on compliance which includes an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the provisions of contracts or grant agreements which could have a direct and material effect on the Federal program; and

(iv) A schedule of findings and questioned costs for the Federal program that includes a summary of the auditor's results relative to the Federal program in a format consistent with § 305(d)(1) and findings and questioned costs consistent with the requirements of § 305(d)(3).

(c) *Report submission for program-specific audits.* (1) The audit shall be completed and the reporting required by paragraph (c)(2) or (c)(3) of this section submitted within the earlier of 30 days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance by the Federal agency that provided the funding or a different period is specified in a program-specific audit guide. (However, for fiscal years beginning on or before June 30, 1998, the audit shall be completed and the required reporting shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or 13 months after the end of the audit period, unless a different period is specified in a program-specific audit guide.) Unless restricted by law or regulation, the auditee shall make report copies available for public inspection.

(2) When a program-specific audit guide is available, the auditee shall submit to the Federal clearinghouse designated by OMB the data collection form prepared in accordance with § 320(b), as applicable to a program-specific audit, and the reporting required by the program-specific audit guide to be retained as an archival copy. Also, the auditee shall submit to the Federal awarding agency or pass-through entity the reporting required by the program-specific audit guide.

(3) When a program-specific audit guide is not available, the reporting package for a program-specific audit shall consist of the financial statement(s) of the Federal program, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph (b)(2) of this section, and the auditor's report(s) described in paragraph (b)(4) of this section. The data collection form prepared in accordance with § 320(b), as applicable to a program-specific audit, and one copy of this reporting package shall be submitted to the Federal clearinghouse designated by OMB to be retained as an archival copy. Also, when the schedule of findings and questioned costs disclosed audit findings or the summary schedule of prior audit findings reported the status of any audit findings, the auditee shall submit one copy of the reporting package to the Federal clearinghouse on behalf of the Federal awarding agency, or directly to the pass-through entity in the case of a subrecipient. Instead of submitting the reporting package to the pass-through entity, when a subrecipient is not required to submit a reporting package to the pass-through entity, the subrecipient shall provide written notification to the pass-through entity, consistent with the requirements of § 320(e)(2). A subrecipient may submit a copy of the reporting package to the pass-through entity to comply with this notification requirement.

(d) Other sections of this part may apply. Program-specific audits are subject to § 100 through § 215(b), § 220 through § 230, § 300 through § 305, § 315, § 320(f) through § 320(j), § 400 through § 405, § 510 through § 515, and other referenced provisions of this part unless contrary to the provisions of this section, a program-specific audit guide, or program laws and regulations.

Subpart C — Auditees

§ 300 Auditee responsibilities.

The auditee shall:

(a) Identify, in its accounts, all Federal awards received and expended and the Federal programs under which they were received. Federal program and award identification shall include, as applicable, the CFDA title and number, award number and year, name of the Federal agency, and name of the pass-through entity.

(b) Maintain internal control over Federal programs that provides reasonable assurance

that the auditee is managing Federal awards in compliance with laws, regulations, and the provisions of contracts or grant agreements that could have a material effect on each of its Federal programs.

(c) Comply with laws, regulations, and the provisions of contracts or grant agreements related to each of its Federal programs.

(d) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards in accordance with § 310.

(e) Ensure that the audits required by this part are properly performed and submitted when due. When extensions to the report submission due date required by § 320(a) are granted by the cognizant or oversight agency for audit, promptly notify the Federal clearinghouse designated by OMB and each pass-through entity providing Federal awards of the extension.

(f) Follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan in accordance with § 315(b) and § 315(c), respectively.

§ 305 Auditor selection.

(a) *Auditor procurement.* In procuring audit services, auditees shall follow the procurement standards prescribed by the Grants Management Common Rule (hereinafter referred to as the "A-102 Common Rule") published March 11, 1988 and amended April 19, 1995 [insert appropriate CFR citation], Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations," or the FAR (48 CFR part 42), as applicable (OMB Circulars are available from the Office of Administration, Publications Office, room 2200, New Executive Office Building, Washington, DC 20503). Whenever possible, auditees shall make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services as stated in the A-102 Common Rule, OMB Circular A-110, or the FAR (48 CFR part 42), as applicable. In requesting proposals for audit services, the objectives and scope of the audit should be made clear. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of external quality control reviews, and price.

(b) *Restriction on auditor preparing indirect cost proposals.* An auditor who prepares the indirect cost proposal or cost allocation plan may not also be selected to perform the audit required by this part when the indirect costs recovered by the auditee during the prior year exceeded \$1 million. This restriction applies to the base year used in the preparation of the indirect cost proposal or cost allocation plan and any subsequent years in which the resulting indirect cost agreement or cost allocation plan is used to recover costs. To minimize any disruption in existing contracts for audit services, this paragraph applies to audits of fiscal years beginning after June 30, 1998.

(c) *Use of Federal auditors.* Federal auditors may perform all or part of the work required under this part if they comply fully with the requirements of this part.

§ ____-310 **Financial statements.**

(a) *Financial statements.* The auditee shall prepare financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements shall be for the same organizational unit and fiscal year that is chosen to meet the requirements of this part. However, organization-wide financial statements may also include departments, agencies, and other organizational units that have separate audits in accordance with § ____-500(a) and prepare separate financial statements.

(b) *Schedule of expenditures of Federal awards.* The auditee shall also prepare a schedule of expenditures of Federal awards for the period covered by the auditee's financial statements. While not required, the auditee may choose to provide information requested by Federal awarding agencies and pass-through entities to make the schedule easier to use. For example, when a Federal program has multiple award years, the auditee may list the amount of Federal awards expended for each award year separately. At a minimum, the schedule shall:

(1) List individual Federal programs by Federal agency. For Federal programs included in a cluster of programs, list individual Federal programs within a cluster of programs. For R&D, total Federal awards expended shall be shown either by individual award or by Federal agency and major subdivision within the Federal agency. For example, the National Institutes of Health is a major subdivision in the Department of Health and Human Services.

(2) For Federal awards received as a subrecipient, the name of the pass-through entity and identifying number assigned by the pass-through entity shall be included.

(3) Provide total Federal awards expended for each individual Federal program and the CFDA number or other identifying number when the CFDA information is not available.

(4) Include notes that describe the significant accounting policies used in preparing the schedule.

(5) To the extent practical, pass-through entities should identify in the schedule the total amount provided to subrecipients from each Federal program.

(6) Include, in either the schedule or a note to the schedule, the value of the Federal awards expended in the form of non-cash assistance, the amount of insurance in effect during the year, and loans or loan guarantees outstanding at year end. While not required, it is preferable to present this information in the schedule.

§ ____-315 **Audit findings follow-up.**

(a) *General.* The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee shall prepare a summary schedule of prior audit findings. The auditee shall also prepare a corrective action plan for current year audit findings. The summary schedule of prior audit findings and the corrective action plan shall include the reference numbers the auditor assigns to audit findings under § ____-510(c). Since the summary schedule may include audit findings from multiple years, it shall include the fiscal year in which the finding initially occurred.

(b) *Summary schedule of prior audit findings.* The summary schedule of prior audit findings shall report the status of all audit findings included in the prior audit's schedule of findings and questioned costs relative to Federal awards. The summary schedule shall also include audit findings reported in the prior audit's summary schedule of prior audit findings except audit findings listed as corrected in accordance with paragraph (b)(1) of this section, or no longer valid or not warranting further action in accordance with paragraph (b)(4) of this section.

(1) When audit findings were fully corrected, the summary schedule need only list the audit findings and state that corrective action was taken.

(2) When audit findings were not corrected or were only partially corrected, the

summary schedule shall describe the planned corrective action as well as any partial corrective action taken.

(3) When corrective action taken is significantly different from corrective action previously reported in a corrective action plan or in the Federal agency's or pass-through entity's management decision, the summary schedule shall provide an explanation.

(4) When the auditee believes the audit findings are no longer valid or do not warrant further action, the reasons for this position shall be described in the summary schedule. A valid reason for considering an audit finding as not warranting further action is that all of the following have occurred:

(i) Two years have passed since the audit report in which the finding occurred was submitted to the Federal clearinghouse;

(ii) The Federal agency or pass-through entity is not currently following up with the auditee on the audit finding; and

(iii) A management decision was not issued.

(c) *Corrective action plan.* At the completion of the audit, the auditee shall prepare a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan shall provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan shall include an explanation and specific reasons.

§ ____-320 **Report submission.**

(a) *General.* The audit shall be completed and the data collection form described in paragraph (b) of this section and reporting package described in paragraph (c) of this section shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance by the cognizant or oversight agency for audit. (However, for fiscal years beginning on or before June 30, 1998, the audit shall be completed and the data collection form and reporting package shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or 13 months after the end of the audit period.) Unless restricted by law or regulation, the auditee shall make copies available for public inspection.

(b) *Data Collection.* (1) The auditee shall submit a data collection form which states

whether the audit was completed in accordance with this part and provides information about the auditee, its Federal programs, and the results of the audit. The form shall be approved by OMB, available from the Federal clearinghouse designated by OMB, and include data elements similar to those presented in this paragraph. A senior level representative of the auditee (e.g., State controller, director of finance, chief executive officer, or chief financial officer) shall sign a statement to be included as part of the form certifying that: the auditee complied with the requirements of this part, the form was prepared in accordance with this part (and the instructions accompanying the form), and the information included in the form, in its entirety, are accurate and complete.

(2) The data collection form shall include the following data elements:

(i) The type of report the auditor issued on the financial statements of the auditee (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion).

(ii) Where applicable, a statement that reportable conditions in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses.

(iii) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee.

(iv) Where applicable, a statement that reportable conditions in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses.

(v) The type of report the auditor issued on compliance for major programs (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion).

(vi) A list of the Federal awarding agencies which will receive a copy of the reporting package pursuant to §____.320(d)(2).

(vii) A yes or no statement as to whether the auditee qualified as a low-risk auditee under §____.530.

(viii) The dollar threshold used to distinguish between Type A and Type B programs as defined in §____.520(b).

(ix) The *Catalog of Federal Domestic Assistance* (CFDA) number for each Federal program, as applicable.

(x) The name of each Federal program and identification of each major program. Individual programs within a cluster of programs should be listed in the same level of detail as they are listed in the schedule of expenditures of Federal awards.

(xi) The amount of expenditures in the schedule of expenditures of Federal awards associated with each Federal program.

(xii) For each Federal program, a yes or no statement as to whether there are audit findings in each of the following types of compliance requirements and the total amount of any questioned costs:

- (A) Activities allowed or unallowed.
- (B) Allowable costs/cost principles.
- (C) Cash management.
- (D) Davis-Bacon Act.
- (E) Eligibility.
- (F) Equipment and real property management.
- (G) Matching, level of effort, earmarking.
- (H) Period of availability of Federal funds.
- (I) Procurement and suspension and debarment.
- (J) Program income.
- (K) Real property acquisition and relocation assistance.

(L) Reporting.

(M) Subrecipient monitoring.

(N) Special tests and provisions.

(xiii) Auditee Name, Employer Identification Number(s), Name and Title of Certifying Official, Telephone Number, Signature, and Date.

(xiv) Auditor Name, Name and Title of Contact Person, Auditor Address, Auditor Telephone Number, Signature, and Date.

(xv) Whether the auditee has either a cognizant or oversight agency for audit.

(xvi) The name of the cognizant or oversight agency for audit determined in accordance with §____.400(a) and §____.400(b), respectively.

(3) Using the information included in the reporting package described in paragraph (c) of this section, the auditor shall complete the applicable sections of the form. The auditor shall sign a statement to be included as part of the data collection form that indicates, at a minimum, the source of the information included in the form, the auditor's responsibility for the information, that the form is not a substitute for the reporting package described in paragraph (c) of this section, and that the content of the form is limited to the data elements prescribed by OMB.

(c) *Reporting package.* The reporting package shall include the:

(1) Financial statements and schedule of expenditures of Federal awards discussed in §____.310(a) and §____.310(b), respectively;

(2) Summary schedule of prior audit findings discussed in §____.315(b);

(3) Auditor's report(s) discussed in §____.505; and

(4) Corrective action plan discussed in §____.315(c).

(d) *Submission to clearinghouse.* All auditees shall submit to the Federal clearinghouse designated by OMB the data collection form described in paragraph (b) of this section and one copy of the reporting package described in paragraph (c) of this section for:

(1) The Federal clearinghouse to retain as an archival copy; and

(2) Each Federal awarding agency when the schedule of findings and questioned costs disclosed audit findings relating to Federal awards that the Federal awarding agency provided directly or the summary schedule of prior audit findings reported the status of any audit findings relating to Federal awards that the Federal awarding agency provided directly.

(e) *Additional submission by subrecipients.* (1) In addition to the requirements discussed in paragraph (d) of this section, auditees that are also subrecipients shall submit to each pass-through entity one copy of the reporting package described in paragraph (c) of this section for each pass-through entity when the schedule of findings and questioned costs disclosed audit findings relating to Federal awards that the pass-through entity provided or the summary schedule of prior audit findings reported the status of any audit findings relating to Federal awards that the pass-through entity provided.

(2) Instead of submitting the reporting package to a pass-through entity, when a subrecipient is not required to submit a reporting package to a pass-through entity pursuant to paragraph (e)(1) of this section, the subrecipient shall provide written notification to the pass-through entity that: an audit of the subrecipient was conducted in accordance with this part (including the period covered by the audit and the name, amount, and CFDA number of the Federal award(s) provided by the pass-through entity); the schedule of findings and questioned costs disclosed no audit findings relating to the Federal award(s) that the pass-through entity provided; and, the summary schedule of prior audit findings did not report on the status of any audit findings relating to the Federal award(s) that the pass-through entity provided. A subrecipient may submit a copy of the reporting package described in paragraph (c) of this section to a pass-through entity to comply with this notification requirement.

(f) *Requests for report copies.* In response to requests by a Federal agency or pass-through entity, auditees shall submit the appropriate copies of the reporting package described in paragraph (c) of this section and, if requested, a copy of any management letters issued by the auditor.

(g) *Report retention requirements.* Auditees shall keep one copy of the data collection form described in paragraph (b) of this section and one copy of the reporting package described in paragraph (c) of this section on file for three years from the date of submission to the Federal clearinghouse designated by OMB. Pass-through entities shall keep subrecipients' submissions on file for three years from date of receipt.

(h) *Clearinghouse responsibilities.* The Federal clearinghouse designated by OMB shall distribute the reporting packages received in accordance with paragraph (d)(2) of this section and §____.235(c)(3) to applicable Federal awarding agencies, maintain a data base of completed audits, provide appropriate information to Federal agencies, and follow up with known auditees which have not submitted the required data collection forms and reporting packages.

(i) *Clearinghouse address.* The address of the Federal clearinghouse currently designated by OMB is Federal Audit Clearinghouse, Bureau of the Census, 1201 E. 10th Street, Jeffersonville, IN 47132.

(j) *Electronic filing.* Nothing in this part shall preclude electronic submissions to the Federal clearinghouse in such manner as may be approved by OMB. With OMB approval, the Federal clearinghouse may pilot test methods of electronic submissions.

Subpart D — Federal Agencies and Pass-Through Entities

§____.400 Responsibilities.

(a) *Cognizant agency for audit responsibilities.* Recipients expending more than \$25 million a year in Federal awards shall have a cognizant agency for audit. The designated cognizant agency for audit shall be the Federal awarding agency that provides the predominant amount of direct funding to a recipient unless OMB makes a specific cognizant agency for audit assignment. To provide for continuity of cognizance, the determination of the predominant amount of direct funding shall be based upon direct Federal awards expended in the recipient's fiscal years ending in 1995, 2000, 2005, and every fifth year thereafter. For example, audit cognizance for periods ending in 1997 through 2000 will be determined based on

Federal awards expended in 1995. (However, for States and local governments that expend more than \$25 million a year in Federal awards and have previously assigned cognizant agencies for audit, the requirements of this paragraph are not effective until fiscal years beginning after June 30, 2000.) Notwithstanding the manner in which audit cognizance is determined, a Federal awarding agency with cognizance for an auditee may reassign cognizance to another Federal awarding agency which provides substantial direct funding and agrees to be the cognizant agency for audit. Within 30 days after any reassignment, both the old and the new cognizant agency for audit shall notify the auditee, and, if known, the auditor of the reassignment. The cognizant agency for audit shall:

(1) Provide technical audit advice and liaison to auditees and auditors.

(2) Consider auditee requests for extensions to the report submission due date required by §____.320(a). The cognizant agency for audit may grant extensions for good cause.

(3) Obtain or conduct quality control reviews of selected audits made by non-Federal auditors, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any direct reporting by the auditee or its auditor of irregularities or illegal acts, as required by GAGAS or laws and regulations.

(5) Advise the auditor and, where appropriate, the auditee of any deficiencies found in the audits when the deficiencies require corrective action by the auditor. When advised of deficiencies, the auditee shall work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency for audit shall notify the auditor, the auditee, and applicable Federal awarding agencies and pass-through entities of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance by auditors shall be referred to appropriate State licensing agencies and professional bodies for disciplinary action.

(6) Coordinate, to the extent practical, audits or reviews made by or for Federal agencies that are in addition to the audits made pursuant to this part, so that the additional audits or reviews build upon audits performed in accordance with this part.

(7) Coordinate a management decision for audit findings that affect the Federal programs of more than one agency.

(8) Coordinate the audit work and reporting responsibilities among auditors to achieve the most cost-effective audit.

(9) For biennial audits permitted under §____.220, consider auditee requests to qualify as a low-risk auditee under §____.530(a).

(b) *Oversight agency for audit responsibilities.* An auditee which does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with §____.105. The oversight agency for audit:

(1) Shall provide technical advice to auditees and auditors as requested.

(2) May assume all or some of the responsibilities normally performed by a cognizant agency for audit.

(c) *Federal awarding agency responsibilities.* The Federal awarding agency shall perform the following for the Federal awards it makes:

(1) Identify Federal awards made by informing each recipient of the CFDA title and number, award name and number, award year, and if the award is for R&D. When some of this information is not available, the Federal agency shall provide information necessary to clearly describe the Federal award.

(2) Advise recipients of requirements imposed on them by Federal laws, regulations, and the provisions of contracts or grant agreements.

(3) Ensure that audits are completed and reports are received in a timely manner and in accordance with the requirements of this part.

(4) Provide technical advice and counsel to auditees and auditors as requested.

(5) Issue a management decision on audit findings within six months after receipt of the audit report and ensure that the recipient takes appropriate and timely corrective action.

(6) Assign a person responsible for providing annual updates of the compliance supplement to OMB.

(d) *Pass-through entity responsibilities.* A pass-through entity shall perform the following for the Federal awards it makes:

(1) Identify Federal awards made by informing each subrecipient of CFDA title and number, award name and number, award year, if the award is R&D, and name of Federal agency. When some of this information is not available, the pass-through entity shall provide the best information available to describe the Federal award.

(2) Advise subrecipients of requirements imposed on them by Federal laws,

regulations, and the provisions of contracts or grant agreements as well as any supplemental requirements imposed by the pass-through entity.

(3) Monitor the activities of subrecipients as necessary to ensure that Federal awards are used for authorized purposes in compliance with laws, regulations, and the provisions of contracts or grant agreements and that performance goals are achieved.

(4) Ensure that subrecipients expending \$300,000 or more in Federal awards during the subrecipient's fiscal year have met the audit requirements of this part for that fiscal year.

(5) Issue a management decision on audit findings within six months after receipt of the subrecipient's audit report and ensure that the subrecipient takes appropriate and timely corrective action.

(6) Consider whether subrecipient audits necessitate adjustment of the pass-through entity's own records.

(7) Require each subrecipient to permit the pass-through entity and auditors to have access to the records and financial statements as necessary for the pass-through entity to comply with this part.

§ ____ .405 Management decision.

(a) *General.* The management decision shall clearly state whether or not the audit finding is sustained, the reasons for the decision, and the expected auditee action to repay disallowed costs, make financial adjustments, or take other action. If the auditee has not completed corrective action, a timetable for follow-up should be given. Prior to issuing the management decision, the Federal agency or pass-through entity may request additional information or documentation from the auditee, including a request for auditor assurance related to the documentation, as a way of mitigating disallowed costs. The management decision should describe any appeal process available to the auditee.

(b) *Federal agency.* As provided in § ____ .400(a)(7), the cognizant agency for audit shall be responsible for coordinating a management decision for audit findings that affect the programs of more than one Federal agency. As provided in § ____ .400(c)(5), a Federal awarding agency is responsible for issuing a management decision for findings that relate to Federal awards it makes to recipients. Alternate arrangements may be made on a case-by-case basis by agreement among the Federal agencies concerned.

(c) *Pass-through entity.* As provided in § ____ .400(d)(5), the pass-through entity shall be responsible for making the management decision for audit findings that relate to Federal awards it makes to subrecipients.

(d) *Time requirements.* The entity responsible for making the management decision shall do so within six months of receipt of the audit report. Corrective action should be initiated within six months after receipt of the audit report and proceed as rapidly as possible.

(e) *Reference numbers.* Management decisions shall include the reference numbers the auditor assigned to each audit finding in accordance with § ____ .510(c).

Subpart E — Auditors

§ ____ .500 Scope of audit.

(a) *General.* The audit shall be conducted in accordance with GAGAS. The audit shall cover the entire operations of the auditee; or, at the option of the auditee, such audit shall include a series of audits that cover departments, agencies, and other organizational units which expended or otherwise administered Federal awards during such fiscal year, provided that each such audit shall encompass the financial statements and schedule of expenditures of Federal awards for each such department, agency, and other organizational unit, which shall be considered to be a non-Federal entity. The financial statements and schedule of expenditures of Federal awards shall be for the same fiscal year.

(b) *Financial statements.* The auditor shall determine whether the financial statements of the auditee are presented fairly in all material respects in conformity with generally accepted accounting principles. The auditor shall also determine whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the auditee's financial statements taken as a whole.

(c) *Internal control.* (1) In addition to the requirements of GAGAS, the auditor shall perform procedures to obtain an understanding of internal control over Federal programs sufficient to plan the audit to support a low assessed level of control risk for major programs.

(2) Except as provided in paragraph (c)(3) of this section, the auditor shall:

(i) Plan the testing of internal control over major programs to support a low assessed level of control risk for the assertions relevant to the compliance requirements for each major program; and

(ii) Perform testing of internal control as planned in paragraph (c)(2)(i) of this section.

(3) When internal control over some or all of the compliance requirements for a major program are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(2) of this section are not required for those compliance requirements. However, the auditor shall report a reportable condition (including whether any such condition is a material weakness) in accordance with § ____ .510, assess the related control risk at the maximum, and consider whether additional compliance tests are required because of ineffective internal control.

(d) *Compliance.* (1) In addition to the requirements of GAGAS, the auditor shall determine whether the auditee has complied with laws, regulations, and the provisions of contracts or grant agreements that may have a direct and material effect on each of its major programs.

(2) The principal compliance requirements applicable to most Federal programs and the compliance requirements of the largest Federal programs are included in the compliance supplement.

(3) For the compliance requirements related to Federal programs contained in the compliance supplement, an audit of these compliance requirements will meet the requirements of this part. Where there have been changes to the compliance requirements and the changes are not reflected in the compliance supplement, the auditor shall determine the current compliance requirements and modify the audit procedures accordingly. For those Federal programs not covered in the compliance supplement, the auditor should use the types of compliance requirements contained in the compliance supplement as guidance for identifying the types of compliance requirements to test, and determine the requirements governing the Federal program by reviewing the provisions of contracts and grant agreements and the laws and regulations referred to in such contracts and grant agreements.

(4) The compliance testing shall include tests of transactions and such other auditing procedures necessary to provide the auditor sufficient evidence to support an opinion on compliance.

(e) *Audit follow-up.* The auditor shall follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with

§ ____ .315(b), and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor shall perform audit follow-up procedures regardless of whether a prior audit finding relates to a major program in the current year.

(f) *Data Collection Form.* As required in § ____ .320(b)(3), the auditor shall complete and sign specified sections of the data collection form.

§ ____ .505 Audit reporting.

The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) shall state that the audit was conducted in accordance with this part and include the following:

(a) An opinion (or disclaimer of opinion) as to whether the financial statements are presented fairly in all material respects in conformity with generally accepted accounting principles and an opinion (or disclaimer of opinion) as to whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the financial statements taken as a whole.

(b) A report on internal control related to the financial statements and major programs. This report shall describe the scope of testing of internal control and the results of the tests, and, where applicable, refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(c) A report on compliance with laws, regulations, and the provisions of contracts or grant agreements, noncompliance with which could have a material effect on the financial statements. This report shall also include an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the provisions of contracts or grant agreements which could have a direct and material effect on each major program, and, where applicable, refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(d) A schedule of findings and questioned costs which shall include the following three components:

(1) A summary of the auditor's results which shall include:

(i) The type of report the auditor issued on the financial statements of the auditee

(i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(ii) Where applicable, a statement that reportable conditions in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses;

(iii) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee;

(iv) Where applicable, a statement that reportable conditions in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses;

(v) The type of report the auditor issued on compliance for major programs (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(vi) A statement as to whether the audit disclosed any audit findings which the auditor is required to report under § ____ .510(a);

(vii) An identification of major programs;

(viii) The dollar threshold used to distinguish between Type A and Type B programs, as described in § ____ .520(b); and

(ix) A statement as to whether the auditee qualified as a low-risk auditee under § ____ .530.

(2) Findings relating to the financial statements which are required to be reported in accordance with GAGAS.

(3) Findings and questioned costs for Federal awards which shall include audit findings as defined in § ____ .510(a).

(i) Audit findings (e.g., internal control findings, compliance findings, questioned costs, or fraud) which relate to the same issue should be presented as a single audit finding. Where practical, audit findings should be organized by Federal agency or pass-through entity.

(ii) Audit findings which relate to both the financial statements and Federal awards, as reported under paragraphs (d)(2) and (d)(3) of this section, respectively, should be reported in both sections of the schedule. However, the reporting in one section of the schedule may be in summary form with a reference to a detailed reporting in the other section of the schedule.

§ ____ .510 Audit findings.

(a) *Audit findings reported.* The auditor shall report the following as audit findings in a schedule of findings and questioned costs:

(1) Reportable conditions in internal control over major programs. The auditor's

determination of whether a deficiency in internal control is a reportable condition for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program or an audit objective identified in the compliance supplement. The auditor shall identify reportable conditions which are individually or cumulatively material weaknesses.

(2) Material noncompliance with the provisions of laws, regulations, contracts, or grant agreements related to a major program. The auditor's determination of whether a noncompliance with the provisions of laws, regulations, contracts, or grant agreements is material for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program or an audit objective identified in the compliance supplement.

(3) Known questioned costs which are greater than \$10,000 for a type of compliance requirement for a major program. Known questioned costs are those specifically identified by the auditor. In evaluating the effect of questioned costs on the opinion on compliance, the auditor considers the best estimate of total costs questioned (likely questioned costs), not just the questioned costs specifically identified (known questioned costs). The auditor shall also report known questioned costs when likely questioned costs are greater than \$10,000 for a type of compliance requirement for a major program. In reporting questioned costs, the auditor shall include information to provide proper perspective for judging the prevalence and consequences of the questioned costs.

(4) Known questioned costs which are greater than \$10,000 for a Federal program which is not audited as a major program. Except for audit follow-up, the auditor is not required under this part to perform audit procedures for such a Federal program; therefore, the auditor will normally not find questioned costs for a program which is not audited as a major program. However, if the auditor does become aware of questioned costs for a Federal program which is not audited as a major program (e.g., as part of audit follow-up or other audit procedures) and the known questioned costs are greater than \$10,000, then the auditor shall report this as an audit finding.

(5) The circumstances concerning why the auditor's report on compliance for major programs is other than an unqualified opinion, unless such circumstances are otherwise reported as audit findings in the

schedule of findings and questioned costs for Federal awards.

(6) Known fraud affecting a Federal award, unless such fraud is otherwise reported as an audit finding in the schedule of findings and questioned costs for Federal awards. This paragraph does not require the auditor to make an additional reporting when the auditor confirms that the fraud was reported outside of the auditor's reports under the direct reporting requirements of GAGAS.

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with § ____ .315(b) materially misrepresents the status of any prior audit finding.

(b) *Audit finding detail.* Audit findings shall be presented in sufficient detail for the auditee to prepare a corrective action plan and take corrective action and for Federal agencies and pass-through entities to arrive at a management decision. The following specific information shall be included, as applicable, in audit findings:

(1) Federal program and specific Federal award identification including the CFDA title and number, Federal award number and year, name of Federal agency, and name of the applicable pass-through entity. When information, such as the CFDA title and number or Federal award number, is not available, the auditor shall provide the best information available to describe the Federal award.

(2) The criteria or specific requirement upon which the audit finding is based, including statutory, regulatory, or other citation.

(3) The condition found, including facts that support the deficiency identified in the audit finding.

(4) Identification of questioned costs and how they were computed.

(5) Information to provide proper perspective for judging the prevalence and consequences of the audit findings, such as whether the audit findings represent an isolated instance or a systemic problem. Where appropriate, instances identified shall be related to the universe and the number of cases examined and be quantified in terms of dollar value.

(6) The possible asserted effect to provide sufficient information to the auditee and Federal agency, or pass-through entity in the case of a subrecipient, to permit them to determine the cause and effect to facilitate prompt and proper corrective action.

(7) Recommendations to prevent future occurrences of the deficiency identified in the audit finding.

(8) Views of responsible officials of the auditee when there is disagreement with the audit findings, to the extent practical.

(c) *Reference numbers.* Each audit finding in the schedule of findings and questioned costs shall include a reference number to allow for easy referencing of the audit findings during follow-up.

§ ____ .515 Audit working papers.

(a) *Retention of working papers.* The auditor shall retain working papers and reports for a minimum of three years after the date of issuance of the auditor's report(s) to the auditee, unless the auditor is notified in writing by the cognizant agency for audit, oversight agency for audit, or pass-through entity to extend the retention period. When the auditor is aware that the Federal awarding agency, pass-through entity, or auditee is contesting an audit finding, the auditor shall contact the parties contesting the audit finding for guidance prior to destruction of the working papers and reports.

(b) *Access to working papers.* Audit working papers shall be made available upon request to the cognizant or oversight agency for audit or its designee, a Federal agency providing direct or indirect funding, or GAO at the completion of the audit, as part of a quality review, to resolve audit findings, or to carry out oversight responsibilities consistent with the purposes of this part. Access to working papers includes the right of Federal agencies to obtain copies of working papers, as is reasonable and necessary.

§ ____ .520 Major program determination.

(a) *General.* The auditor shall use a risk-based approach to determine which Federal programs are major programs. This risk-based approach shall include consideration of: Current and prior audit experience, oversight by Federal agencies and pass-through entities, and the inherent risk of the Federal program. The process in paragraphs (b) through (i) of this section shall be followed.

(b) *Step 1.* (1) The auditor shall identify the larger Federal programs, which shall be labeled Type A programs. Type A programs are defined as Federal programs with Federal awards expended during the audit period exceeding the larger of:

(i) \$300,000 or three percent (.03) of total Federal awards expended in the case of an auditee for which total Federal awards

expended equal or exceed \$300,000 but are less than or equal to \$100 million.

(ii) \$3 million or three-tenths of one percent (.003) of total Federal awards expended in the case of an auditee for which total Federal awards expended exceed \$100 million but are less than or equal to \$10 billion.

(iii) \$30 million or 15 hundredths of one percent (.0015) of total Federal awards expended in the case of an auditee for which total Federal awards expended exceed \$10 billion.

(2) Federal programs not labeled Type A under paragraph (b)(1) of this section shall be labeled Type B programs.

(3) The inclusion of large loan and loan guarantees (loans) should not result in the exclusion of other programs as Type A programs. When a Federal program providing loans significantly affects the number or size of Type A programs, the auditor shall consider this Federal program as a Type A program and exclude its values in determining other Type A programs.

(4) For biennial audits permitted under § ____ .220, the determination of Type A and Type B programs shall be based upon the Federal awards expended during the two-year period.

(c) *Step 2.* (1) The auditor shall identify Type A programs which are low-risk. For a Type A program to be considered low-risk, it shall have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, it shall have had no audit findings under § ____ .510(a). However, the auditor may use judgment and consider that audit findings from questioned costs under § ____ .510(a)(3) and § ____ .510(a)(4), fraud under § ____ .510(a)(6), and audit follow-up for the summary schedule of prior audit findings under § ____ .510(a)(7) do not preclude the Type A program from being low-risk. The auditor shall consider: the criteria in § ____ .525(c), § ____ .525(d)(1), § ____ .525(d)(2), and § ____ .525(d)(3); the results of audit follow-up; whether any changes in personnel or systems affecting a Type A program have significantly increased risk; and apply professional judgment in determining whether a Type A program is low-risk.

(2) Notwithstanding paragraph (c)(1) of this section, OMB may approve a Federal awarding agency's request that a Type A program at certain recipients may not be

considered low-risk. For example, it may be necessary for a large Type A program to be audited as major each year at particular recipients to allow the Federal agency to comply with the Government Management Reform Act of 1994 (31 U.S.C. 3515). The Federal agency shall notify the recipient and, if known, the auditor at least 180 days prior to the end of the fiscal year to be audited of OMB's approval.

(d) *Step 3.* (1) The auditor shall identify Type B programs which are high-risk using professional judgment and the criteria in § 525. However, should the auditor select Option 2 under Step 4 (paragraph (e)(2)(i)(B) of this section), the auditor is not required to identify more high-risk Type B programs than the number of low-risk Type A programs. Except for known reportable conditions in internal control or compliance problems as discussed in § 525(b)(1), § 525(b)(2), and § 525(c)(1), a single criteria in § 525 would seldom cause a Type B program to be considered high-risk.

(2) The auditor is not expected to perform risk assessments on relatively small Federal programs. Therefore, the auditor is only required to perform risk assessments on Type B programs that exceed the larger of:

(i) \$100,000 or three-tenths of one percent (.003) of total Federal awards expended when the auditee has less than or equal to \$100 million in total Federal awards expended.

(ii) \$300,000 or three-hundredths of one percent (.003) of total Federal awards expended when the auditee has more than \$100 million in total Federal awards expended.

(e) *Step 4.* At a minimum, the auditor shall audit all of the following as major programs:

(1) All Type A programs, except the auditor may exclude any Type A programs identified as low-risk under Step 2 (paragraph (c)(1) of this section).

(2) (i) High-risk Type B programs as identified under either of the following two options:

(A) *Option 1.* At least one half of the Type B programs identified as high-risk under Step 3 (paragraph (d) of this section), except this paragraph (e)(2)(i)(A) does not require the auditor to audit more high-risk Type B programs than the number of low-risk Type A programs identified as low-risk under Step 2.

(B) *Option 2.* One high-risk Type B program for each Type A program identified as low-risk under Step 2.

(ii) When identifying which high-risk Type B programs to audit as major under either Option 1 or 2 in paragraph (e)(2)(i)(A) or (B) of this section, the auditor is encouraged to use an approach which provides an opportunity for different high-risk Type B programs to be audited as major over a period of time.

(3) Such additional programs as may be necessary to comply with the percentage of coverage rule discussed in paragraph (f) of this section. This paragraph (e)(3) may require the auditor to audit more programs as major than the number of Type A programs.

(f) *Percentage of coverage rule.* The auditor shall audit as major programs Federal programs with Federal awards expended that, in the aggregate, encompass at least 50 percent of total Federal awards expended. If the auditee meets the criteria in § 530 for a low-risk auditee, the auditor need only audit as major programs Federal programs with Federal awards expended that, in the aggregate, encompass at least 25 percent of total Federal awards expended.

(g) *Documentation of risk.* The auditor shall document in the working papers the risk analysis process used in determining major programs.

(h) *Auditor's judgment.* When the major program determination was performed and documented in accordance with this part, the auditor's judgment in applying the risk-based approach to determine major programs shall be presumed correct. Challenges by Federal agencies and pass-through entities shall only be for clearly improper use of the guidance in this part. However, Federal agencies and pass-through entities may provide auditors guidance about the risk of a particular Federal program and the auditor shall consider this guidance in determining major programs in audits not yet completed.

(i) *Deviation from use of risk criteria.* For first-year audits, the auditor may elect to determine major programs as all Type A programs plus any Type B programs as necessary to meet the percentage of coverage rule discussed in paragraph (f) of this section. Under this option, the auditor would not be required to perform the procedures discussed in paragraphs (c), (d), and (e) of this section.

(1) A first-year audit is the first year the entity is audited under this part or the first year of a change of auditors.

(2) To ensure that a frequent change of auditors would not preclude audit of high-risk Type B programs, this election for

first-year audits may not be used by an auditee more than once in every three years.

§ 525 Criteria for Federal program risk.

(a) *General.* The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring which could be material to the Federal program. The auditor shall use auditor judgment and consider criteria, such as described in paragraphs (b), (c), and (d) of this section, to identify risk in Federal programs. Also, as part of the risk analysis, the auditor may wish to discuss a particular Federal program with auditee management and the Federal agency or pass-through entity.

(b) *Current and prior audit experience.*

(1) Weaknesses in internal control over Federal programs would indicate higher risk.

Consideration should be given to the control environment over Federal programs and such factors as the expectation of management's adherence to applicable laws and regulations and the provisions of contracts and grant agreements and the competence and experience of personnel who administer the Federal programs.

(i) A Federal program administered under multiple internal control structures may have higher risk. When assessing risk in a large single audit, the auditor shall consider whether weaknesses are isolated in a single operating unit (e.g., one college campus) or pervasive throughout the entity.

(ii) When significant parts of a Federal program are passed through to subrecipients, a weak system for monitoring subrecipients would indicate higher risk.

(iii) The extent to which computer processing is used to administer Federal programs, as well as the complexity of that processing, should be considered by the auditor in assessing risk. New and recently modified computer systems may also indicate risk.

(2) Prior audit findings would indicate higher risk, particularly when the situations identified in the audit findings could have a significant impact on a Federal program or have not been corrected.

(3) Federal programs not recently audited as major programs may be of higher risk than Federal programs recently audited as major programs without audit findings.

(c) *Oversight exercised by Federal agencies and pass-through entities.* (1) Oversight exercised by Federal agencies or pass-through entities could indicate risk. For example, recent monitoring or other reviews performed by an

oversight entity which disclosed no significant problems would indicate lower risk. However, monitoring which disclosed significant problems would indicate higher risk.

(2) Federal agencies, with the concurrence of OMB, may identify Federal programs which are higher risk. OMB plans to provide this identification in the compliance supplement.

(d) *Inherent risk of the Federal program.*

(1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have a high-risk for time and effort reporting, but otherwise be at low-risk.

(2) The phase of a Federal program in its life cycle at the Federal agency may indicate risk. For example, a new Federal program with new or interim regulations may have higher risk than an established program with time-tested regulations. Also, significant changes in Federal programs, laws, regulations, or the provisions of contracts or grant agreements may increase risk.

(3) The phase of a Federal program in its life cycle at the auditee may indicate risk.

For example, during the first and last years that an auditee participates in a Federal program, the risk may be higher due to start-up or closeout of program activities and staff.

(4) Type B programs with larger Federal awards expended would be of higher risk than programs with substantially smaller Federal awards expended.

§ ____ .530 **Criteria for a low-risk auditee.**

An auditee which meets all of the following conditions for each of the preceding two years (or, in the case of biennial audits, preceding two audit periods) shall qualify as a low-risk auditee and be eligible for reduced audit coverage in accordance with § ____ .520:

(a) Single audits were performed on an annual basis in accordance with the provisions of this part. A non-Federal entity that has biennial audits does not qualify as a low-risk auditee, unless agreed to in advance by the cognizant or oversight agency for audit.

(b) The auditor's opinions on the financial statements and the schedule of expenditures of Federal awards were unqualified. However, the cognizant or oversight agency for audit may judge that an opinion qualification does not affect the management of Federal awards and provide a waiver.

(c) There were no deficiencies in internal control which were identified as material weaknesses under the requirements of

GAGAS. However, the cognizant or oversight agency for audit may judge that any identified material weaknesses do not affect the management of Federal awards and provide a waiver.

(d) None of the Federal programs had audit findings from any of the following in either of the preceding two years (or, in the case of biennial audits, preceding two audit periods) in which they were classified as Type A programs:

(1) Internal control deficiencies which were identified as material weaknesses;

(2) Noncompliance with the provisions of laws, regulations, contracts, or grant agreements which have a material effect on the Type A program; or

(3) Known or likely questioned costs that exceed five percent of the total Federal awards expended for a Type A program during the year.

Appendix A to Part ____ — Data Collection Form (Form SF-SAC)

[insert SF-SAC after finalized]

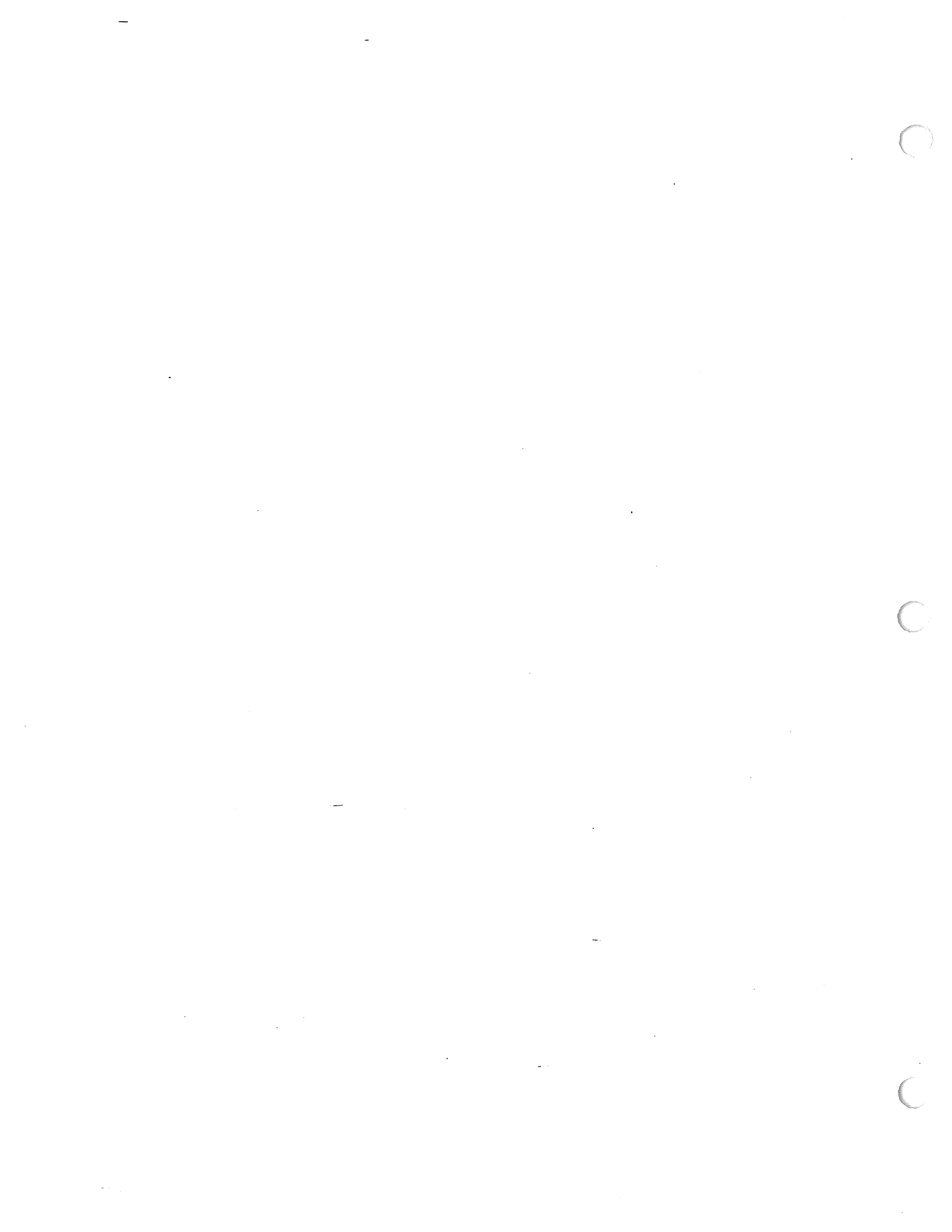
Appendix B to Part ____ — Circular A-133 Compliance Supplement

Note: Provisional OMB Circular A-133 Compliance Supplement is available from the Office of Administration, Publications Office, room 2200, New Executive Office Building, Washington, DC 20503.

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OFFICE OF MANAGEMENT AND BUDGET (OMB)

Cost Principles for State, Local and Indian Tribal Governments

May 4, 1995.

Circular No. A-87 Revised

To the Heads of Executive Departments and Establishments

From: Alice M. Rivlin, Director

Subject: Cost Principles for State, Local, and Indian Tribal Governments

1. *Purpose.* This Circular establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and federally-recognized Indian tribal governments (governmental units).

2. *Authority.* This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; the Chief Financial Officers Act of 1990; Reorganization Plan No. 2 of 1970; and Executive Order No. 11541 ("Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President").

3. *Background.* An interagency task force was established in 1987 to review existing cost principles for Federal awards to State, local, and Indian tribal governments. The task force studied Inspector General reports and recommendations, solicited suggestions for changes to the Circular from governmental units, and compared for consistency the provisions of other OMB cost principles circulars covering non-profit organizations and universities. A proposed revised Circular reflecting the results of those efforts was issued on October 12, 1988, and August 19, 1993. Extensive comments on the proposed revisions, discussions with interest groups, and related developments were considered in developing this revision.

4. *Rescissions.* This Circular rescinds and supersedes Circular A-87, issued January 15, 1981.

5. *Policy.* This Circular establishes principles and standards to provide a uniform approach for determining costs and to promote effective program delivery, efficiency, and better relationships between governmental units and the Federal Government. The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of

Federal and governmental unit participation in the financing of a particular Federal award. Provision for profit or other increment above cost is outside the scope of this Circular.

6. *Definitions.* Definitions of key terms used in this Circular are contained in Attachment A, Section B.

7. *Required Action.* Agencies responsible for administering programs that involve cost reimbursement contracts, grants, and other agreements with governmental units shall issue codified regulations to implement the provisions of this Circular and its Attachments by September 1, 1995.

8. *OMB Responsibilities.* The Office of Management and Budget (OMB) will review agency regulations and implementation of this Circular, and will provide policy interpretations and assistance to insure effective and efficient implementation. Any exceptions will be subject to approval by OMB. Exceptions will only be made in particular cases where adequate justification is presented.

9. *Information Contact.* Further information concerning this Circular may be obtained by contacting the Office of Federal Financial Management, Financial Standards and Reporting Branch, Office of Management and Budget, Washington, DC 20503, telephone 202-395-3993.

10. *Policy Review Date.* OMB Circular A-87 will have a policy review three years from the date of issuance.

11. *Effective Date.* This Circular is effective as follows:

— For costs charged indirectly or otherwise covered by the cost allocation plans described in Attachments C, D and E, this revision shall be applied to cost allocation plans and indirect cost proposals submitted or prepared for a governmental unit's fiscal year that begins on or after September 1, 1995.

— For other costs, this revision shall be applied to all awards or amendments, including continuation or renewal awards, made on or after September 1, 1995.

OMB Circular No. A-87 — Cost Principles for State, Local and Indian Tribal Governments

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- Attachment B — Selected Items of Cost
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Attachment A — General Principles for Determining Allowable Costs

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- A. Purpose and Scope
 - 1. *Objectives.* This Attachment establishes principles for determining the allowable costs incurred by State, local, and federally-recognized Indian tribal

governments (governmental units) under grants, cost reimbursement contracts, and other agreements with the Federal Government (collectively referred to in this Circular as "Federal awards"). The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal or governmental unit participation in the financing of a particular program or project. The principles are designed to provide that Federal awards bear their fair share of cost recognized under these principles except where restricted or prohibited by law. Provision for profit or other increment above cost is outside the scope of this Circular.

2. Policy guides.

a. The application of these principles is based on the fundamental premises that:

(1) Governmental units are responsible for the efficient and effective administration of Federal awards through the application of sound management practices.

(2) Governmental units assume responsibility for administering Federal funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the Federal award.

(3) Each governmental unit, in recognition of its own unique combination of staff, facilities, and experience, will have the primary responsibility for employing whatever form of organization and management techniques may be necessary to assure proper and efficient administration of Federal awards.

b. Federal agencies should work with States or localities which wish to test alternative mechanisms for paying costs for administering Federal programs. The Office of Management and Budget (OMB) encourages Federal agencies to test fee-for-service alternatives as a replacement for current cost-reimbursement payment methods in response to the National Performance Review's (NPR) recommendation. The NPR recommended the fee-for-service approach to reduce the burden associated with maintaining systems for charging administrative costs to Federal programs and preparing and approving cost allocation plans. This approach should also increase incentives for administrative efficiencies and improve outcomes.

3. Application.

a. These principles will be applied by all Federal agencies in determining costs incurred by governmental units under Federal awards (including subawards) except those with (1) publicly-financed educational institutions subject to OMB Circular A-21, "Cost Principles for Educational Institutions," and

(2) programs administered by publicly-owned hospitals and other providers of medical care that are subject to requirements promulgated by the sponsoring Federal agencies. However, this Circular does apply to all central service and department/agency costs that are allocated or billed to those educational institutions, hospitals, and other providers of medical care or services by other State and local government departments and agencies.

b. All subawards are subject to those Federal cost principles applicable to the particular organization concerned. Thus, if a subaward is to a governmental unit (other than a college, university or hospital), this Circular shall apply; if a subaward is to a commercial organization, the cost principles applicable to commercial organizations shall apply; if a subaward is to a college or university, Circular A-21 shall apply; if a subaward is to a hospital, the cost principles used by the Federal awarding agency for awards to hospitals shall apply, subject to the provisions of subsection A.3.a. of this Attachment; if a subaward is to some other non-profit organization, Circular A-122, "Cost Principles for Non-Profit Organizations," shall apply.

c. These principles shall be used as a guide in the pricing of fixed price arrangements where costs are used in determining the appropriate price.

d. Where a Federal contract awarded to a governmental unit incorporates a Cost Accounting Standards (CAS) clause, the requirements of that clause shall apply. In such cases, the governmental unit and the cognizant Federal agency shall establish an appropriate advance agreement on how the governmental unit will comply with applicable CAS requirements when estimating, accumulating and reporting costs under CAS-covered contracts. The agreement shall indicate that OMB Circular A-87 requirements will be applied to other Federal awards. In all cases, only one set of records needs to be maintained by the governmental unit.

*e. Conditional exemptions.

(1) OMB authorizes conditional exemption from OMB administrative requirements and cost principles circulars for certain Federal programs with statutorily-authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment. A Federal agency shall consult with OMB during its consideration of whether to grant such an exemption.

(2) To promote efficiency in State and local program administration, when Federal non-entitlement programs with common purposes have specific statutorily-authorized consolidated planning and consolidated administrative funding and where most of the State agency's resources come from non-Federal sources, Federal agencies may exempt these covered State-administered, non-entitlement grant programs from certain OMB grants management requirements. The exemptions would be from all but the allocability of costs provisions of OMB Circulars A-87 (Attachment A, subsection C.3), "Cost Principles for State, Local, and Indian Tribal Governments," A-21 (Section C, subpart 4), "Cost Principles for Educational Institutions," and A-122 (Attachment A, subsection A.4), "Cost Principles for Non-Profit Organizations," and from all of the administrative requirements provisions of OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and the agencies' grants management common rule.

(3) When a Federal agency provides this flexibility, as a prerequisite to a State's exercising this option, a State must adopt its own written fiscal and administrative requirements for expending and accounting for all funds, which are consistent with the provisions of OMB Circular A-87, and extend such policies to all subrecipients. These fiscal and administrative requirements must be sufficiently specific to ensure that: funds are used in compliance with all applicable federal statutory and regulatory provisions, costs are reasonable and necessary for operating these programs, and funds are not to be used for general expenses required to carry out other responsibilities of a State or its subrecipients.

B. Definitions

1. *Approval or authorization of the awarding or cognizant Federal agency* means documentation evidencing consent prior to incurring a specific cost. If such costs are specifically identified in a Federal award document, approval of the document constitutes approval of the costs. If the costs are covered by a State/local-wide cost allocation plan or an indirect cost proposal, approval of the plan constitutes the approval.

2. *Award* means grants, cost reimbursement contracts and other agreements between a State, local and Indian tribal government and the Federal Government.

*Editor's note: Paragraph incorporates a conditional program exemption OMB has authorized. See Aug. 29, 1997, *Federal Register* pages 45934-45936.

3. *Awarding agency* means (a) with respect to a grant, cooperative agreement, or cost reimbursement contract, the Federal agency, and (b) with respect to a subaward, the party that awarded the subaward.

4. *Central service cost allocation plan* means the documentation identifying, accumulating, and allocating or developing billing rates based on the allowable costs of services provided by a governmental unit on a centralized basis to its departments and agencies. The costs of these services may be allocated or billed to users.

5. *Claim* means a written demand or written assertion by the governmental unit or grantor seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of award terms, or other relief arising under or relating to the award. A voucher, invoice or other routine request for payment that is not a dispute when submitted is not a claim. Appeals, such as those filed by a governmental unit in response to questioned audit costs, are not considered claims until a final management decision is made by the Federal awarding agency.

6. *Cognizant agency* means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this Circular on behalf of all Federal agencies. OMB publishes a listing of cognizant agencies.

7. *Common Rule* means the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments; Final Rule" originally issued at 53 FR 8034-8103 (March 11, 1988). Other common rules will be referred to by their specific titles.

8. *Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to): awards and notices of awards; job orders or task orders issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and, bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301 *et seq.*

9. *Cost* means an amount as determined on a cash, accrual, or other basis acceptable

to the Federal awarding or cognizant agency. It does not include transfers to a general or similar fund.

10. *Cost allocation plan* means central service cost allocation plan, public assistance cost allocation plan, and indirect cost rate proposal. Each of these terms are further defined in this section.

11. *Cost objective* means a function, organizational subdivision, contract, grant, or other activity for which cost data are needed and for which costs are incurred.

12. *Federally-recognized Indian tribal government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any native village as defined in Section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided through the Bureau of Indian Affairs.

13. *Governmental unit* means the entire State, local, or federally-recognized Indian tribal government, including any component thereof. Components of governmental units may function independently of the governmental unit in accordance with the term of the award.

14. *Grantee department or agency* means the component of a State, local, or federally-recognized Indian tribal government which is responsible for the performance or administration of all or some part of a Federal award.

15. *Indirect cost rate proposal* means the documentation prepared by a governmental unit or component thereof to substantiate its request for the establishment of an indirect cost rate as described in Attachment E of this Circular.

16. *Local government* means a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (whether or not incorporated as a non-profit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

17. *Public assistance cost allocation plan* means a narrative description of the procedures that will be used in identifying, measuring and allocating all administrative costs to all of the programs administered or supervised by State public assistance agencies as described in Attachment D of this Circular.

18. *State* means any of the several States of the United States, the District of Colum-

bia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments.

C. Basic Guidelines

1. *Factors affecting allowability of costs.* To be allowable under Federal awards, costs must meet the following general criteria:

a. Be necessary and reasonable for proper and efficient performance and administration of Federal awards.

b. Be allocable to Federal awards under the provisions of this Circular.

c. Be authorized or not prohibited under State or local laws or regulations.

d. Conform to any limitations or exclusions set forth in these principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amounts of cost items.

e. Be consistent with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit.

f. Be accorded consistent treatment. A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.

g. Except as otherwise provided for in this Circular, be determined in accordance with generally accepted accounting principles.

h. Not be included as a cost or used to meet cost-sharing or matching requirements of any other Federal award in either the current or a prior period, except as specifically provided by Federal law or regulation.

i. Be the net of all applicable credits.

j. Be adequately documented.

2. *Reasonable costs.* A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally-funded. In determining reasonableness of a given cost, consideration shall be given to:

a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.

b. The restraints or requirements imposed by such factors as: sound business practices; arms length bargaining; Federal, State and

other laws and regulations; and, terms and conditions of the Federal award.

c. Market prices for comparable goods or services.

d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.

e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

3. Allocable costs.

a. A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received.

b. All activities which benefit from the governmental unit's indirect cost, including unallowable activities and services donated to the governmental unit by third parties, will receive an appropriate allocation of indirect costs.

c. Any cost allocable to a particular Federal award or cost objective under the principles provided for in this Circular may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by law or terms of the Federal awards, or for other reasons. However, this prohibition would not preclude governmental units from shifting costs that are allowable under two or more awards in accordance with existing program agreements.

d. Where an accumulation of indirect costs will ultimately result in charges to a Federal award, a cost allocation plan will be required as described in Attachments C, D, and E.

4. Applicable credits.

a. Applicable credits refer to those receipts or reduction of expenditure-type transactions that offset or reduce expense items allocable to Federal awards as direct or indirect costs. Examples of such transactions are: purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds or rebates, and adjustments of overpayments or erroneous charges. To the extent that such credits accruing to or received by the governmental unit relate to allowable costs, they shall be credited to the Federal award either as a cost reduction or cash refund, as appropriate.

b. In some instances, the amounts received from the Federal Government to finance activities or service operations of the

governmental unit should be treated as applicable credits. Specifically, the concept of netting such credit items (including any amounts used to meet cost sharing or matching requirements) should be recognized in determining the rates or amounts to be charged to Federal awards. (See Attachment B, item 15, "Depreciation and use allowances," for areas of potential application in the matter of Federal financing of activities.)

D. Composition of Cost

1. *Total cost.* The total cost of Federal awards is comprised of the allowable direct cost of the program, plus its allocable portion of allowable indirect costs, less applicable credits.

2. *Classification of costs.* There is no universal rule for classifying certain costs as either direct or indirect under every accounting system. A cost may be direct with respect to some specific service or function, but indirect with respect to the Federal award or other final cost objective. Therefore, it is essential that each item of cost be treated consistently in like circumstances either as a direct or an indirect cost. Guidelines for determining direct and indirect costs charged to Federal awards are provided in the sections that follow.

E. Direct Costs

1. *General.* Direct costs are those that can be identified specifically with a particular final cost objective.

2. *Application.* Typical direct costs chargeable to Federal awards are:

a. Compensation of employees for the time devoted and identified specifically to the performance of those awards.

b. Cost of materials acquired, consumed, or expended specifically for the purpose of those awards.

c. Equipment and other approved capital expenditures.

d. Travel expenses incurred specifically to carry out the award.

3. *Minor items.* Any direct cost of a minor amount may be treated as an indirect cost for reasons of practicality where such accounting treatment for that item of cost is consistently applied to all cost objectives.

F. Indirect Costs

1. *General.* Indirect costs are those: (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. The

term "indirect costs," as used herein, applies to costs of this type originating in the grantee department, as well as those incurred by other departments in supplying goods, services, and facilities. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect costs within a governmental unit department or in other agencies providing services to a governmental unit department. Indirect cost pools should be distributed to benefitted cost objectives on bases that will produce an equitable result in consideration of relative benefits derived.

2. *Cost allocation plans and indirect cost proposals.* Requirements for development and submission of cost allocation plans and indirect cost rate proposals are contained in Attachments C, D, and E.

3. *Limitation on indirect or administrative costs.*

a. In addition to restrictions contained in this Circular, there may be laws that further limit the amount of administrative or indirect cost allowed.

b. Amounts not recoverable as indirect costs or administrative costs under one Federal award may not be shifted to another Federal award, unless specifically authorized by Federal legislation or regulation.

G. Interagency Services

The cost of services provided by one agency to another within the governmental unit may include allowable direct costs of the service plus a pro rate share of indirect costs. A standard indirect cost allowance equal to ten percent of the direct salary and wage cost of providing the service (excluding overtime, shift premiums, and fringe benefits) may be used in lieu of determining the actual indirect costs of the service. These services do not include centralized services included in central service cost allocation plans as described in Attachment C.

H. Required Certifications

Each cost allocation plan or indirect cost rate proposal required by Attachments C and E must comply with the following:

1. No proposal to establish a cost allocation plan or an indirect cost rate, whether submitted to a Federal cognizant agency or maintained on file by the governmental unit, shall be acceptable unless such costs have been certified by the governmental unit using the Certificate of Cost Allocation Plan or Certificate of Indirect Costs as set forth in Attachments C and E. The certificate

must be signed on behalf of the governmental unit by an individual at a level no lower than chief financial officer of the governmental unit that submits the proposal or component covered by the proposal.

2. No cost allocation plan or indirect cost rate shall be approved by the Federal Government unless the plan or rate proposal has been certified. Where it is necessary to establish a cost allocation plan or an indirect cost rate and the governmental unit has not submitted a certified proposal for establishing such a plan or rate in accordance with the requirements, the Federal Government may either disallow all indirect costs or unilaterally establish such a plan or rate. Such a plan or rate may be based upon audited historical data or such other data that have been furnished to the cognizant Federal agency and for which it can be demonstrated that all unallowable costs have been excluded. When a cost allocation plan or indirect cost rate is unilaterally established by the Federal Government because of failure of the governmental unit to submit a certified proposal, the plan or rate established will be set to ensure that potentially unallowable costs will not be reimbursed.

Attachment B — Selected Items of Cost

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10. Communications
11. Compensation for personnel services
 - a. General
 - b. Reasonableness
 - c. Unallowable costs
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 - e. Pension plan costs
 - f. Post-retirement health benefits
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 - h. Support of salaries and wages
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12. Contingencies
13. Contributions and donations
14. Defense and prosecution of criminal and civil proceedings, and claims
15. Depreciation and use allowances
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17. Employee morale, health, and welfare costs
18. Entertainment

19. Equipment and other capital expenditures
20. Fines and penalties
21. Fund raising and investment management costs
22. Gains and losses on disposition of depreciable property and other capital assets and substantial relocation of Federal programs
23. General government expenses
24. Idle facilities and idle capacity
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26. Interest
27. Lobbying
28. Maintenance, operations, and repairs
29. Materials and supplies
30. Memberships, subscriptions, and professional activities
31. Motor pools
32. Pre-award costs
33. Professional service costs
34. Proposal costs
35. Publication and printing costs
36. Rearrangements and alterations
37. Reconversion costs
38. Rental costs
39. Taxes
40. Training
41. Travel costs
42. Underrecovery of costs under Federal agreements

Sections 1 through 42 provide principles to be applied in establishing the allowability or unallowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. A cost is allowable for Federal reimbursement only to the extent of benefits received by Federal awards and its conformance with the general policies and principles stated in Attachment A to this Circular. Failure to mention a particular item of cost in these sections is not intended to imply that it is either allowable or unallowable; rather, determination of allowability in each case should be based on the treatment or standards provided for similar or related items of cost.

1. *Accounting.* The cost of establishing and maintaining accounting and other information systems is allowable.

2. *Advertising and public relations costs.*

a. The term "advertising costs" means the costs of advertising media and corollary administrative costs. Advertising media include magazines, newspapers, radio and television programs, direct mail, exhibits, and the like.

b. The term "public relations" includes community relations and means those

activities dedicated to maintaining the image of the governmental unit or maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public.

c. Advertising costs are allowable only when incurred for the recruitment of personnel, the procurement of goods and services, the disposal of surplus materials, and any other specific purposes necessary to meet the requirements of the Federal award. Advertising costs associated with the disposal of surplus materials are not allowable where all disposal costs are reimbursed based on a standard rate as specified in the grants management common rule.

d. Public relations costs are allowable when:

(1) Specifically required by the Federal award and then only as a direct cost;

(2) Incurred to communicate with the public and press pertaining to specific activities or accomplishments that result from performance of the Federal award and then only as a direct cost; or

(3) Necessary to conduct general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed on matters of public concern, such as notices of Federal contract/grant awards, financial matters, etc.

e. Unallowable advertising and public relations costs include the following:

(1) All advertising and public relations costs other than as specified in subsections c. and d.;

(2) Except as otherwise permitted by these cost principles, costs of conventions, meetings, or other events related to other activities of the governmental unit including:

(a) Costs of displays, demonstrations, and exhibits;

(b) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and

(c) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings;

(3) Costs of promotional items and memorabilia, including models, gifts, and souvenirs; and

(4) Costs of advertising and public relations designed solely to promote the governmental unit.

3. *Advisory councils.* Costs incurred by advisory councils or committees are allowable

as a direct cost where authorized by the Federal awarding agency or as an indirect cost where allocable to Federal awards.

4. *Alcoholic beverages.* Costs of alcoholic beverages are unallowable.

5. *Audit services.* The costs of audits are allowable provided that the audits were performed in accordance with the Single Audit Act, as implemented by Circular A-128, "Audits of State and Local Governments." Generally, the percentage of costs charged to Federal awards for a single audit shall not exceed the percentage derived by dividing Federal funds expended by total funds expended by the recipient or subrecipient (including program matching funds) during the fiscal year. The percentage may be exceeded only if appropriate documentation demonstrates higher actual costs.

Other audit costs are allowable if specifically approved by the awarding or cognizant agency as a direct cost to an award or included as an indirect cost in a cost allocation plan or rate.

6. *Automatic electronic data processing.* The cost of data processing services is allowable (but see section 19, Equipment and other capital expenditures).

7. *Bad debts.* Any losses arising from uncollectible accounts and other claims, and related costs, are unallowable unless provided for in Federal program award regulations.

8. *Bonding costs.* Costs of bonding employees and officials are allowable to the extent that such bonding is in accordance with sound business practice.

9. *Budgeting.* Costs incurred for the development, preparation, presentation, and execution of budgets are allowable.

10. *Communications.* Costs of telephone, mail, messenger, and similar communication services are allowable.

11. *Compensation for personnel services.*

a. *General.* Compensation for personnel services includes all remuneration, paid currently or accrued, for services rendered during the period of performance under Federal awards, including but not necessarily limited to wages, salaries, and fringe benefits. The costs of such compensation are allowable to the extent that they satisfy the specific requirements of this Circular, and that the total compensation for individual employees:

(1) Is reasonable for the services rendered and conforms to the established policy of the governmental unit consistently applied to both Federal and non-Federal activities;

(2) Follows an appointment made in accordance with a governmental unit's laws

and rules and meets merit system or other requirements required by Federal law, where applicable; and

(3) Is determined and supported as provided in subsection h.

b. *Reasonableness.* Compensation for employees engaged in work on Federal awards will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the governmental unit. In cases where the kinds of employees required for Federal awards are not found in the other activities of the governmental unit, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the employing government competes for the kind of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness.

c. *Unallowable costs.* Costs which are unallowable under other sections of these principles shall not be allowable under this section solely on the basis that they constitute personnel compensation.

d. *Fringe benefits.*

(1) Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave, employee insurance, pensions, and unemployment benefit plans. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable to the extent that the benefits are reasonable and are required by law, governmental unit-employee agreement, or an established policy of the governmental unit.

(2) The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, holidays, court leave, military leave, and other similar benefits, are allowable if: (a) they are provided under established written leave policies; (b) the costs are equitably allocated to all related activities, including Federal awards; and, (c) the accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the governmental unit.

(3) When a governmental unit uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates

employment are allowable in the year of payment provided they are allocated as a general administrative expense to all activities of the governmental unit or component.

(4) The accrual basis may be only used for those types of leave for which a liability as defined by Generally Accepted Accounting Principles (GAAP) exists when the leave is earned. When a governmental unit uses the accrual basis of accounting, in accordance with GAAP, allowable leave costs are the lesser of the amount accrued or funded.

(5) The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in section 25, Insurance and indemnification); pension plan costs (see subsection e.); and other similar benefits are allowable, provided such benefits are granted under established written policies. Such benefits, whether treated as indirect costs or as direct costs, shall be allocated to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities.

e. *Pension plan costs.* Pension plan costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the governmental unit.

(1) For pension plans financed on a pay-as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) Pension costs calculated using an actuarial cost-based method recognized by GAAP are allowable for a given fiscal year if they are funded for that year within six months after the end of that year. Costs funded after the six month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The cognizant agency may agree to an extension of the six month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursement and the governmental unit's contribution to the pension fund. Adjustments may be made by cash refund or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the pension fund.

(3) Amounts funded by the governmental unit in excess of the actuarially determined

amount for a fiscal year may be used as the governmental unit's contribution in future periods.

(4) When a governmental unit converts to an acceptable actuarial cost method, as defined by GAAP, and funds pension costs in accordance with this method, the unfunded liability at the time of conversion shall be allowable if amortized over a period of years in accordance with GAAP.

(5) The Federal Government shall receive an equitable share of any previously allowed pension costs (including earnings thereon) which revert or inure to the governmental unit in the form of a refund, withdrawal, or other credit.

f. Post-retirement health benefits. Post-retirement health benefits (PRHB) refers to costs of health insurance or health services not included in a pension plan covered by subsection e. for retirees and their spouses, dependents, and survivors. PRHB costs may be computed using a pay-as-you-go method or an acceptable actuarial cost method in accordance with established written policies of the governmental unit.

(1) For PRHB financed on a pay as-you-go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) PRHB costs calculated using an actuarial cost method recognized by GAAP are allowable if they are funded for that year within six months after the end of that year. Costs funded after the six month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The cognizant agency may agree to an extension of the six month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursements and the governmental unit's contributions to the PRHB fund. Adjustments may be made by cash refund, reduction in current year's PRHB costs, or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the PRHB fund.

(3) Amounts funded in excess of the actuarially determined amount for a fiscal year may be used as the government's contribution in a future period.

(4) When a governmental unit converts to an acceptable actuarial cost method and funds PRHB costs in accordance with this method, the initial unfunded liability attributable to prior years shall be allowable if amortized over a period of years in accordance with

GAAP, or, if no such GAAP period exists, over a period negotiated with the cognizant agency.

(5) To be allowable in the current year, the PRHB costs must be paid either to:

(a) An insurer or other benefit provider as current year costs or premiums, or

(b) An insurer or trustee to maintain a trust fund or reserve for the sole purpose of providing post-retirement benefits to retirees and other beneficiaries.

(6) The Federal Government shall receive an equitable share of any amounts of previously allowed post-retirement benefit costs (including earnings thereon) which revert or inure to the governmental unit in the form of a refund, withdrawal, or other credit.

g. Severance pay.

(1) Payments in addition to regular salaries and wages made to workers whose employment is being terminated are allowable to the extent that, in each case, they are required by (a) law, (b) employer-employee agreement, or (c) established written policy.

(2) Severance payments (but not accruals) associated with normal turnover are allowable. Such payments shall be allocated to all activities of the governmental unit as an indirect cost.

(3) Abnormal or mass severance pay will be considered on a case-by-case basis and is allowable only if approved by the cognizant Federal agency.

h. Support of salaries and wages. These standards regarding time distribution are in addition to the standards for payroll documentation.

(1) Charges to Federal awards for salaries and wages, whether treated as direct or indirect costs, will be based on payrolls documented in accordance with generally accepted practice of the governmental unit and approved by a responsible official(s) of the governmental unit.

(2) No further documentation is required for the salaries and wages of employees who work in a single indirect cost activity.

(3) Where employees are expected to work solely on a single Federal award or cost objective, charges for their salaries and wages will be supported by periodic certifications that the employees worked solely on that program for the period covered by the certification. These certifications will be prepared at least semi-annually and will be signed by the employee or supervisory official having first hand knowledge of the work performed by the employee.

(4) Where employees work on multiple activities or cost objectives, a distribution

of their salaries or wages will be supported by personnel activity reports or equivalent documentation which meets the standards in subsection (5) unless a statistical sampling system (see subsection (6)) or other substitute system has been approved by the cognizant Federal agency. Such documentary support will be required where employees work on:

(a) More than one Federal award,

(b) A Federal award and a non-Federal award,

(c) An indirect cost activity and a direct cost activity,

(d) Two or more indirect activities which are allocated using different allocation bases, or

(e) An unallowable activity and a direct or indirect cost activity.

(5) Personnel activity reports or equivalent documentation must meet the following standards:

(a) They must reflect an after-the-fact distribution of the actual activity of each employee,

(b) They must account for the total activity for which each employee is compensated,

(c) They must be prepared at least monthly and must coincide with one or more pay periods, and

(d) They must be signed by the employee.

(e) Budget estimates or other distribution percentages determined before the services are performed do not qualify as support for charges to Federal awards but may be used for interim accounting purposes, provided that:

(i) The governmental unit's system for establishing the estimates produces reasonable approximations of the activity actually performed;

(ii) At least quarterly, comparisons of actual costs to budgeted distributions based on the monthly activity reports are made. Costs charged to Federal awards to reflect adjustments made as a result of the activity actually performed may be recorded annually if the quarterly comparisons show the differences between budgeted and actual costs are less than ten percent; and

(iii) The budget estimates or other distribution percentages are revised at least quarterly, if necessary, to reflect changed circumstances.

(6) Substitute systems for allocating salaries and wages to Federal awards may be used in place of activity reports. These systems are subject to approval if required by the cognizant agency. Such systems may include, but are not limited to, random moment sampling, case counts, or

other quantifiable measures of employee effort.

(a) Substitute systems which use sampling methods (primarily for Aid to Families with Dependent Children (AFDC), Medicaid, and other public assistance programs) must meet acceptable statistical sampling standards including:

(i) The sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided in subsection (c);

(ii) The entire time period involved must be covered by the sample; and

(iii) The results must be statistically valid and applied to the period being sampled.

(b) Allocating charges for the sampled employees' supervisors, clerical and support staffs, based on the results of the sampled employees, will be acceptable.

(c) Less than full compliance with the statistical sampling standards noted in subsection (a) may be accepted by the cognizant agency if it concludes that the amounts to be allocated to Federal awards will be minimal, or if it concludes that the system proposed by the governmental unit will result in lower costs to Federal awards than a system which complies with the standards.

(7) Salaries and wages of employees used in meeting cost sharing or matching requirements of Federal awards must be supported in the same manner as those claimed as allowable costs under Federal awards.

i. Donated services.

(1) Donated or volunteer services may be furnished to a governmental unit by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services is not reimbursable either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the provisions of the Common Rule.

(2) The value of donated services utilized in the performance of a direct cost activity shall, when material in amount, be considered in the determination of the governmental unit's indirect costs or rate(s) and, accordingly, shall be allocated a proportionate share of applicable indirect costs.

(3) To the extent feasible, donated services will be supported by the same methods used by the governmental unit to support the allocability of regular personnel services.

12. *Contingencies.* Contributions to a contingency reserve or any similar provision made for events the occurrence of which cannot be foretold with certainty as

to time, or intensity, or with an assurance of their happening, are unallowable. The term "contingency reserve" excludes self-insurance reserves (see subsection 25.c.), pension plan reserves (see subsection 11.e.), and post-retirement health and other benefit reserves (see subsection 11.f.) computed using acceptable actuarial cost methods.

13. *Contributions and donations.* Contributions and donations, including cash, property, and services, by governmental units to others, regardless of the recipient, are unallowable.

14. *Defense and prosecution of criminal and civil proceedings, and claims.*

a. The following costs are unallowable for contracts covered by 10 U.S.C. 2324(k), "Allowable costs under defense contracts."

(1) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of false certification brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(2) Costs incurred by a contractor in connection with any criminal, civil or administrative proceedings commenced by the United States or a State to the extent provided in 10 U.S.C. 2324(k).

b. Legal expenses required in the administration of Federal programs are allowable. Legal expenses for prosecution of claims against the Federal Government are unallowable.

15. *Depreciation and use allowances.*

a. Depreciation and use allowances are means of allocating the cost of fixed assets to periods benefitting from asset use. Compensation for the use of fixed assets on hand may be made through depreciation or use allowances. A combination of the two methods may not be used in connection with a single class of fixed assets (e.g., buildings, office equipment, computer equipment, etc.) except as provided in subsection g. Except for enterprise funds and internal service funds that are included as part of a State/local cost allocation plan, classes of assets shall be determined on the same basis used for the government-wide financial statements.

b. The computation of depreciation or use allowances shall be based on the acquisition cost of the assets involved. Where actual cost records have not been maintained, a reasonable estimate of the original acquisition cost may be used. The value of an asset donated to the governmental unit by an unrelated third party shall be its fair market

value at the time of donation. Governmental or quasi-governmental organizations located within the same State shall not be considered unrelated third parties for this purpose.

c. The computation of depreciation or use allowances will exclude:

(1) The cost of land;

(2) Any portion of the cost of buildings and equipment borne by or donated by the Federal Government irrespective of where title was originally vested or where it presently resides; and

(3) Any portion of the cost of buildings and equipment contributed by or for the governmental unit, or a related donor organization, in satisfaction of a matching requirement.

d. Where the use allowance method is followed, the use allowance for buildings and improvements (including land improvements, such as paved parking areas, fences, and sidewalks) will be computed at an annual rate not exceeding two percent of acquisition costs. The use allowance for equipment will be computed at an annual rate not exceeding 6 2/3 percent of acquisition cost. When the use allowance method is used for buildings, the entire building must be treated as a single asset; the building's components (e.g., plumbing system, heating and air condition, etc.) cannot be segregated from the building's shell. The two percent limitation, however, need not be applied to equipment which is merely attached or fastened to the building but not permanently fixed to it and which is used as furnishings or decorations or for specialized purposes (e.g., dentist chairs and dental treatment units, counters, laboratory benches bolted to the floor, dishwashers, modular furniture, carpeting, etc.). Such equipment will be considered as not being permanently fixed to the building if it can be removed without the destruction of, or need for costly or extensive alterations or repairs, to the building or the equipment. Equipment that meets these criteria will be subject to the 6 2/3 percent equipment use allowance limitation.

e. Where the depreciation method is followed, the period of useful service (useful life) established in each case for usable capital assets must take into consideration such factors as type of construction, nature of the equipment used, historical usage patterns, technological developments, and the renewal and replacement policies of the governmental unit followed for the individual items or classes of assets involved. In the absence of clear evidence indicating that the expected consumption of the asset will

be significantly greater in the early portions than in the later portions of its useful life, the straight line method of depreciation shall be used. Depreciation methods once used shall not be changed unless approved by the Federal cognizant or awarding agency. When the depreciation method is introduced for application to an asset previously subject to a use allowance, the annual depreciation charge thereon may not exceed the amount that would have resulted had the depreciation method been in effect from the date of acquisition of the asset. The combination of use allowances and depreciation applicable to the asset shall not exceed the total acquisition cost of the asset or fair market value at time of donation.

f. When the depreciation method is used for buildings, a building's shell may be segregated from the major component of the building (e.g., plumbing system, heating, and air conditioning system, etc.) and each major component depreciated over its estimated useful life, or the entire building (i.e., the shell and all components) may be treated as a single asset and depreciated over a single useful life.

g. A reasonable use allowance may be negotiated for any assets that are considered to be fully depreciated, after taking into consideration the amount of depreciation previously charged to the government, the estimated useful life remaining at the time of negotiation, the effect of any increased maintenance charges, decreased efficiency due to age, and any other factors pertinent to the utilization of the asset for the purpose contemplated.

h. Charges for use allowances or depreciation must be supported by adequate property records. Physical inventories must be taken at least once every two years (a statistical sampling approach is acceptable) to ensure that assets exist, and are in use. Governmental units will manage equipment in accordance with State laws and procedures. When the depreciation method is followed, depreciation records indicating the amount of depreciation taken each period must also be maintained.

16. *Disbursing service.* The cost of disbursing funds by the Treasurer or other designated officer is allowable.

17. *Employee morale, health, and welfare costs.* The costs of health or first-aid clinics and/or infirmaries, recreational facilities, employee counseling services, employee information publications, and any related expenses incurred in accordance with a governmental unit's policy are allowable.

Income generated from any of these activities will be offset against expenses.

18. *Entertainment.* Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities) are unallowable.

19. *Equipment and other capital expenditures.*

a. As used in this section the following terms have the meanings as set forth below:

(1) "Capital expenditure" means the cost of the asset including the cost to put it in place. Capital expenditure for equipment means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in, or excluded from, capital expenditure cost in accordance with the governmental unit's regular accounting practices.

(2) "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals the lesser of (a) the capitalization level established by the governmental unit for financial statement purposes, or (b) \$5000.

(3) "Other capital assets" mean buildings, land, and improvements to buildings or land that materially increase their value or useful life.

b. Capital expenditures which are not charged directly to a Federal award may be recovered through use allowances or depreciation on buildings, capital improvements, and equipment (see section 15). See also section 38 for allowability of rental costs for buildings and equipment.

c. Capital expenditures for equipment, including replacement equipment, other capital assets, and improvements which materially increase the value or useful life of equipment or other capital assets are allowable as a direct cost when approved by the awarding agency. Federal awarding agencies are authorized at their option to waive or delegate this approval requirement.

d. Items of equipment with an acquisition cost of less than \$5000 are considered to be supplies and are allowable as direct costs of Federal awards without specific awarding agency approval.

e. The unamortized portion of any equipment written off as a result of a change in

capitalization levels may be recovered by (1) continuing to claim the otherwise allowable use allowances or depreciation charges on the equipment or by (2) amortizing the amount to be written off over a period of years negotiated with the cognizant agency.

f. When replacing equipment purchased in whole or in part with Federal funds, the governmental unit may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

20. *Fines and penalties.* Fines, penalties, damages, and other settlements resulting from violations (or alleged violations) of, or failure of the governmental unit to comply with, Federal, State, local, or Indian tribal laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the Federal award or written instructions by the awarding agency authorizing in advance such payments.

21. *Fund raising and investment management costs.*

a. Costs of organized fund raising, including financial campaigns, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions are unallowable, regardless of the purpose for which the funds will be used.

b. Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable. However, such costs associated with investments covering pension, self-insurance, or other funds which include Federal participation allowed by this Circular are allowable.

c. Fund raising and investment activities shall be allocated an appropriate share of indirect costs under the conditions described in subsection C.3.b. of Attachment A.

22. *Gains and losses on disposition of depreciable property and other capital assets and substantial relocation of Federal programs.*

a. (1) Gains and losses on the sale, retirement, or other disposition of depreciable property shall be included in the year in which they occur as credits or charges to the asset cost grouping(s) in which the property was included. The amount of the gain or loss to be included as a credit or charge to the appropriate asset cost grouping(s) shall be the difference between the amount realized on the property and the undepreciated basis of the property.

(2) Gains and losses on the disposition of depreciable property shall not be recognized

as a separate credit or charge under the following conditions:

(a) The gain or loss is processed through a depreciation account and is reflected in the depreciation allowable under sections 15 and 19.

(b) The property is given in exchange as part of the purchase price of a similar item and the gain or loss is taken into account in determining the depreciation cost basis of the new item.

(c) A loss results from the failure to maintain permissible insurance, except as otherwise provided in subsection 25.d.

(d) Compensation for the use of the property was provided through use allowances in lieu of depreciation.

b. Substantial relocation of Federal awards from a facility where the Federal Government participated in the financing to another facility prior to the expiration of the useful life of the financed facility requires Federal agency approval. The extent of the relocation, the amount of the Federal participation in the financing, and the depreciation charged to date may require negotiation of space charges for Federal awards.

c. Gains or losses of any nature arising from the sale or exchange of property other than the property covered in subsection a., e.g., land or included in the fair market value used in any adjustment resulting from a relocation of Federal awards covered in subsection b. shall be excluded in computing Federal award costs.

23. General government expenses.

a. The general costs of government are unallowable (except as provided in section 41). These include:

(1) Salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision or the chief executives of federally-recognized Indian tribal governments;

(2) Salaries and other expenses of State legislatures, tribal councils, or similar local governmental bodies, such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction;

(3) Cost of the judiciary branch of a government;

(4) Cost of prosecutorial activities unless treated as a direct cost to a specific program when authorized by program regulations (however, this does not preclude the allowability of other legal activities of the Attorney General); and

(5) Other general types of government services normally provided to the general

public, such as fire and police, unless provided for as a direct cost in program regulations.

b. For federally-recognized Indian tribal governments and Councils of Governments (COGs), the portion of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his staff is allowable.

24. Idle facilities and idle capacity.

a. As used in this section the following terms have the meanings set forth below:

(1) "Facilities" means land and buildings or any portion thereof, equipment individually or collectively, or any other tangible capital asset, wherever located, and whether owned or leased by the governmental unit.

(2) "Idle facilities" means completely unused facilities that are excess to the governmental unit's current needs.

(3) "Idle capacity" means the unused capacity of partially used facilities. It is the difference between (a) that which a facility could achieve under 100 percent operating time on a one-shift basis less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays and (b) the extent to which the facility was actually used to meet demands during the accounting period. A multi-shift basis should be used if it can be shown that this amount of usage would normally be expected for the type of facility involved.

(4) "Cost of idle facilities or idle capacity" means costs such as maintenance, repair, housing, rent, and other related costs, e.g., insurance, interest, and depreciation or use allowances.

b. The costs of idle facilities are unallowable except to the extent that:

(1) They are necessary to meet fluctuations in workload; or

(2) Although not necessary to meet fluctuations in workload, they were necessary when acquired and are now idle because of changes in program requirements, efforts to achieve more economical operations, reorganization, termination, or other causes which could not have been reasonably foreseen. Under the exception stated in this subsection, costs of idle facilities are allowable for a reasonable period of time, ordinarily not to exceed one year, depending on the initiative taken to use, lease, or dispose of such facilities.

c. The costs of idle capacity are normal costs of doing business and are a factor in the normal fluctuations of usage or indirect cost rates from period to period. Such costs are allowable, provided that the capacity is

reasonably anticipated to be necessary or was originally reasonable and is not subject to reduction or elimination by use on other Federal awards, subletting, renting, or sale, in accordance with sound business, economic, or security practices. Widespread idle capacity throughout an entire facility or among a group of assets having substantially the same function may be considered idle facilities.

25. Insurance and indemnification.

a. Costs of insurance required or improved and maintained, pursuant to the Federal award, are allowable.

b. Costs of other insurance in connection with the general conduct of activities are allowable subject to the following limitations:

(1) Types and extent and cost of coverage are in accordance with the governmental unit's policy and sound business practice.

(2) Costs of insurance or of contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that the awarding agency has specifically required or approved such costs.

c. Actual losses which could have been covered by permissible insurance (through a self-insurance program or otherwise) are unallowable, unless expressly provided for in the Federal award or as described below. However, the Federal Government will participate in actual losses of a self insurance fund that are in excess of reserves. Costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools, which occur in the ordinary course of operations, are allowable.

d. Contributions to a reserve for certain self-insurance programs including workers compensation, unemployment compensation, and severance pay are allowable subject to the following provisions:

(1) The type of coverage and the extent of coverage and the rates and premiums would have been allowed had insurance (including reinsurance) been purchased to cover the risks. However, provision for known or reasonably estimated self-insured liabilities, which do not become payable for more than one year after the provision is made, shall not exceed the discounted present value of the liability. The rate used for discounting the liability must be determined by giving consideration to such factors as the governmental unit's settlement rate for those liabilities and its investment rate of return.

(2) Earnings or investment income on reserves must be credited to those reserves.

(3) Contributions to reserves must be based on sound actuarial principles using historical experience and reasonable assumptions. Reserve levels must be analyzed and updated at least biennially for each major risk being insured and take into account any reinsurance, coinsurance, etc. Reserve levels related to employee-related coverages will normally be limited to the value of claims (a) submitted and adjudicated but not paid, (b) submitted but not adjudicated, and (c) incurred but not submitted. Reserve levels in excess of the amounts based on the above must be identified and justified in the cost allocation plan or indirect cost rate proposal.

(4) Accounting records, actuarial studies, and cost allocations (or billings) must recognize any significant differences due to types of insured risk and losses generated by the various insured activities or agencies of the governmental unit. If individual departments or agencies of the governmental unit experience significantly different levels of claims for a particular risk, those differences are to be recognized by the use of separate allocations or other techniques resulting in an equitable allocation.

(5) Whenever funds are transferred from a self-insurance reserve to other accounts (e.g., general fund), refunds shall be made to the Federal Government for its share of funds transferred, including earned or imputed interest from the date of transfer.

e. Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (e.g., subsection 11.f. for post retirement health benefits), are allowable in the year of payment provided (1) the governmental unit follows a consistent costing policy and (2) they are allocated as a general administrative expense to all activities of the governmental unit.

f. Insurance refunds shall be credited against insurance costs in the year the refund is received.

g. Indemnification includes securing the governmental unit against liabilities to third persons and other losses not compensated by insurance or otherwise. The Federal Government is obligated to indemnify the governmental unit only to the extent expressly provided for in the Federal award, except as provided in subsection d.

h. Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own

defects in materials or workmanship are unallowable.

26. Interest.

a. Costs incurred for interest on borrowed capital or the use of a governmental unit's own funds, however represented, are unallowable except as specifically provided in subsection b. or authorized by Federal legislation.

b. Financing costs (including interest) paid or incurred on or after the effective date of this Circular associated with the otherwise allowable costs of building acquisition, construction, or fabrication, reconstruction or remodeling completed on or after October 1, 1980, is allowable, subject to the conditions in (1)-(4). Financing costs (including interest) paid or incurred on or after the effective date of this Circular associated with otherwise allowable costs of equipment is allowable, subject to the conditions in (1)-(4).

(1) The financing is provided (from other than tax or user fee sources) by a bona fide third party external to the governmental unit;

(2) The assets are used in support of Federal awards;

(3) Earnings on debt service reserve funds or interest earned on borrowed funds pending payment of the construction or acquisition costs are used to offset the current period's cost or the capitalized interest, as appropriate. Earnings subject to being reported to the Federal Internal Revenue Service under arbitrage requirements are excludable.

(4) Governmental units will negotiate the amount of allowable interest whenever cash payments (interest, depreciation, use allowances, and contributions) exceed the governmental unit's cash payments and other contributions attributable to that portion of real property used for Federal awards.

27. *Lobbying.* The cost of certain influencing activities associated with obtaining grants, contracts, cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants, contracts, cooperative agreements, and loans shall be governed by the common rule, "New Restrictions on Lobbying" published at 55 FR 6736 (February 26, 1990), including definitions, and the Office of Management and Budget "Government-wide Guidance for New Restrictions on Lobbying" and notices published at 54 FR 52306 (December 20, 1989), 55 FR 24540 (June 15, 1990), and 57 FR 1772 (January 15, 1992), respectively.

28. *Maintenance, operations, and repairs.* Unless prohibited by law, the cost of utilities, insurance, security, janitorial

services, elevator service, upkeep of grounds, necessary maintenance, normal repairs and alterations, and the like are allowable to the extent that they: (1) keep property (including Federal property, unless otherwise provided for) in an efficient operating condition, (2) do not add to the permanent value of property or appreciably prolong its intended life, and (3) are not otherwise included in rental or other charges for space. Costs which add to the permanent value of property or appreciably prolong its intended life shall be treated as capital expenditures (see sections 15 and 19).

29. *Materials and supplies.* The cost of materials and supplies is allowable. Purchases should be charged at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received. Withdrawals from general stores or stockrooms should be charged at cost under any recognized method of pricing, consistently applied. Incoming transportation charges are a proper part of materials and supply costs.

30. *Memberships, subscriptions, and professional activities.*

a. Costs of the governmental unit's memberships in business, technical, and professional organizations are allowable.

b. Costs of the governmental unit's subscriptions to business, professional, and technical periodicals are allowable.

c. Costs of meetings and conferences where the primary purpose is the dissemination of technical information, including meals, transportation, rental of meeting facilities, and other incidental costs are allowable.

d. Costs of membership in civic and community, social organizations are allowable as a direct cost with the approval of the Federal awarding agency.

e. Costs of membership in organizations substantially engaged in lobbying are unallowable.

31. *Motor pools.* The costs of a service organization which provides automobiles to user governmental units at a mileage or fixed rate and/or provides vehicle maintenance, inspection, and repair services are allowable.

32. *Pre-award costs.* Pre-award costs are those incurred prior to the effective date of the award directly pursuant to the negotiation and in anticipation of the award where such costs are necessary to comply with the proposed delivery schedule or period of performance. Such costs are allowable only to the extent that they would have been allowable if

incurred after the date of the award and only with the written approval of the awarding agency.

33. Professional service costs.

a. Cost of professional and consultant services rendered by persons or organizations that are members of a particular profession or possess a special skill, whether or not officers or employees of the governmental unit, are allowable, subject to section 14 when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government.

b. Retainer fees supported by evidence of bona fide services available or rendered are allowable.

34. Proposal costs. Costs of preparing proposals for potential Federal awards are allowable. Proposal costs should normally be treated as indirect costs and should be allocated to all activities of the governmental unit utilizing the cost allocation plan and indirect cost rate proposal. However, proposal costs may be charged directly to Federal awards with the prior approval of the Federal awarding agency.

35. Publication and printing costs. Publication costs, including the costs of printing (including the processes of composition, plate-making, press work, and binding, and the end products produced by such processes), distribution, promotion, mailing, and general handling are allowable.

36. Rearrangements and alterations. Costs incurred for ordinary and normal rearrangement and alteration of facilities are allowable. Special arrangements and alterations costs incurred specifically for a Federal award are allowable with the prior approval of the Federal awarding agency.

37. Reconversion costs. Costs incurred in the restoration or rehabilitation of the governmental unit's facilities to approximately the same condition existing immediately prior to commencement of Federal awards, less costs related to normal wear and tear, are allowable.

38. Rental costs.

a. Subject to the limitations described in subsections b. through d. of this section, rental costs are allowable to the extent that the rates are reasonable in light of such factors as: rental costs of comparable property, if any; market conditions in the area; alternatives available; and, the type, life expectancy, condition, and value of the property leased.

b. Rental costs under sale and leaseback arrangements are allowable only up to the amount that would be allowed had the governmental unit continued to own the property.

c. Rental costs under less-than-arms-length leases are allowable only up to the amount that would be allowed had title to the property vested in the governmental unit. For this purpose, less-than-arms-length leases include, but are not limited to, those where:

(1) One party to the lease is able to control or substantially influence the actions of the other;

(2) Both parties are parts of the same governmental unit; or

(3) The governmental unit creates an authority or similar entity to acquire and lease the facilities to the governmental unit and other parties.

d. Rental costs under leases which are required to be treated as capital leases under GAAP are allowable only up to the amount that would be allowed had the governmental unit purchased the property on the date the lease agreement was executed. This amount would include expenses such as depreciation or use allowance, maintenance, and insurance. The provisions of Financial Accounting Standards Board Statement 13 shall be used to determine whether a lease is a capital lease. Interest costs related to capital leases are allowable to the extent they meet the criteria in section 26.

39. Taxes.

a. Taxes that a governmental unit is legally required to pay are allowable, except for self-assessed taxes that disproportionately affect Federal programs or changes in tax policies that disproportionately affect Federal programs. This provision becomes effective for taxes paid during the governmental unit's first fiscal year that begins on or after January 1, 1998, and applies thereafter.

b. Gasoline taxes, motor vehicle fees, and other taxes that are in effect user fees for benefits provided to the Federal Government are allowable.

c. This provision does not restrict the authority of Federal agencies to identify taxes where Federal participation is inappropriate. Where the identification of the amount of unallowable taxes would require an inordinate amount of effort, the cognizant agency may accept a reasonable approximation thereof.

40. Training. The cost of training provided for employee development is allowable.

41. Travel costs.

a. *General.* Travel costs are allowable for expenses for transportation, lodging, subsistence, and related items incurred by employees traveling on official business. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of

actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip, and results in charges consistent with those normally allowed in like circumstances in non-federally-sponsored activities. Notwithstanding the provisions of section 23, travel costs of officials covered by that section, when specifically related to Federal awards, are allowable with the prior approval of a grantor agency.

b. *Lodging and subsistence.* Costs incurred by employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent such costs do not exceed charges normally allowed by the governmental unit in its regular operations as a result of the governmental unit's policy. In the absence of a written governmental unit policy regarding travel costs, the rates and amounts established under subchapter I of Chapter 57 of Title 5, United States Code "Travel and Subsistence Expenses; Mileage Allowances," or by the Administrator of General Services, or the President (or his designee) pursuant to any provisions of such subchapter shall be used as guidance for travel under Federal awards (41 U.S.C. 420, "Travel Expenses of Government Contractors").

c. *Commercial air travel.* Airfare costs in excess of the customary standard (coach or equivalent) airfare, are unallowable except when such accommodations would: require circuitous routing, require travel during unreasonable hours, excessively prolong travel, greatly increase the duration of the flight, result in increased cost that would offset transportation savings, or offer accommodations not reasonably adequate for the medical needs of the traveler. Where a governmental unit can reasonably demonstrate to the awarding agency either the nonavailability of customary standard airfare or Federal Government contract airfare for individual trips or, on an overall basis, that it is the governmental unit's practice to make routine use of such airfare, specific determinations of nonavailability will generally not be questioned by the Federal Government, unless a pattern of avoidance is detected. However, in order for airfare costs in excess of the customary standard commercial airfare to be allowable, e.g., use of first-class airfare, the governmental unit must justify and document on a case-by-case basis the applicable condition(s) set forth above.

d. *Air travel by other than commercial carrier.* Cost of travel by governmental unit-owned, -leased, or -chartered aircraft,

as used in this section, includes the cost of lease, charter, operation (including personnel costs), maintenance, depreciation, interest, insurance, and other related costs. Costs of travel via governmental unit-owned, -leased, or -chartered aircraft are unallowable to the extent they exceed the cost of allowable commercial air travel, as provided for in subsection c.

42. *Underrecovery of costs under Federal agreements.* Any excess costs over the Federal contribution under one award agreement are unallowable under other award agreements.

Attachment C — State/Local-Wide Central Service Cost Allocation Plans

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A. General

1. Most governmental units provide certain services, such as motor pools, computer centers, purchasing, accounting, etc., to operating agencies on a centralized basis. Since federally-supported awards are performed within the individual operating agencies, there needs to be a process whereby these central service costs can be identified and assigned to benefitted activities on a reasonable and consistent basis.

The central service cost allocation plan provides that process. All costs and other data used to distribute the costs included in the plan should be supported by formal accounting and other records that will support the propriety of the costs assigned to Federal awards.

2. Guidelines and illustrations of central service cost allocation plans are provided in a brochure published by the Department of Health and Human Services entitled "A Guide for State and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government." A copy of this brochure may be obtained from the Superintendent of Documents, U.S. Government Printing Office.

B. Definitions

1. *Billed central services* means central services that are billed to benefitted agencies and/or programs on an individual fee-for-service or similar basis. Typical examples of billed central services include computer services, transportation services, insurance, and fringe benefits.

2. *Allocated central services* means central services that benefit operating agencies but are not billed to the agencies on a fee-for-service or similar basis. These costs are allocated to benefitted agencies on some reasonable basis. Examples of such services might include general accounting, personnel administration, purchasing, etc.

3. *Agency or operating agency* means an organizational unit or sub-division within a governmental unit that is responsible for the performance or administration of awards or activities of the governmental unit.

C. Scope of the Central Service Cost Allocation Plans

The central service cost allocation plan will include all central service costs that will be claimed (either as a billed or an allocated cost) under Federal awards and will be documented as described in section E. Costs of central services omitted from the plan will not be reimbursed.

D. Submission Requirements

1. Each State will submit a plan to the Department of Health and Human Services for each year in which it claims central service costs under Federal awards. The plan should include (a) a projection of the next year's allocated central service cost (based either on actual costs for the most recently

completed year or the budget projection for the coming year), and (b) a reconciliation of actual allocated central service costs to the estimated costs used for either the most recently completed year or the year immediately preceding the most recently completed year.

2. Each local government that has been designated as a "major local government" by the Office of Management and Budget (OMB) is also required to submit a plan to its cognizant agency annually. OMB periodically lists major local governments in the *Federal Register*.

3. All other local governments claiming central service costs must develop a plan in accordance with the requirements described in this Circular and maintain the plan and related supporting documentation for audit. These local governments are not required to submit their plans for Federal approval unless they are specifically requested to do so by the cognizant agency. Where a local government only receives funds as a sub-recipient, the primary recipient will be responsible for negotiating indirect cost rates and/or monitoring the sub-recipient's plan.

4. All central service cost allocation plans will be prepared and, when required, submitted within six months prior to the beginning of each of the governmental unit's fiscal years in which it proposes to claim central service costs. Extensions may be granted by the cognizant agency on a case-by-case basis.

E. Documentation Requirements for Submitted Plans

The documentation requirements described in this section may be modified, expanded, or reduced by the cognizant agency on a case-by-case basis. For example, the requirements may be reduced for those central services which have little or no impact on Federal awards. Conversely, if a review of a plan indicates that certain additional information is needed, and will likely be needed in future years, it may be routinely requested in future plan submissions. Items marked with an asterisk (*) should be submitted only once; subsequent plans should merely indicate any changes since the last plan.

1. *General.* All proposed plans must be accompanied by the following: an organization chart sufficiently detailed to show operations including the central service activities of the State/local government whether or not they are shown as benefiting from central service functions; a copy of the

Comprehensive Annual Financial Report (or a copy of the Executive Budget if budgeted costs are being proposed) to support the allowable costs of each central service activity included in the plan; and, a certification (see subsection 4.) that the plan was prepared in accordance with this Circular, contains only allowable costs, and was prepared in a manner that treated similar costs consistently among the various Federal awards and between Federal and non-Federal awards/activities.

2. *Allocated central services.* For each allocated central service, the plan must also include the following: a brief description of the service*, an identification of the unit rendering the service and the operating agencies receiving the service, the items of expense included in the cost of the service, the method used to distribute the cost of the service to benefitted agencies, and a summary schedule showing the allocation of each service to the specific benefitted agencies. If any self-insurance funds or fringe benefits costs are treated as allocated (rather than billed) central services, documentation discussed in subsections 3.b. and c. shall also be included.

3. *Billed services.*

a. *General.* The information described below shall be provided for all billed central services, including internal service funds, self-insurance funds, and fringe benefit funds.

b. *Internal service funds.*

(1) For each internal service fund or similar activity with an operating budget of \$5 million or more, the plan shall include: a brief description of each service; a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source, e.g., regular billings, interest earned, etc.; a listing of all non-operating transfers (as defined by Generally Accepted Accounting Principles (GAAP)) into and out of the fund; a description of the procedures (methodology) used to charge the costs of each service to users, including how billing rates are determined; a schedule of current rates; and, a schedule comparing total revenues (including imputed revenues) generated by the service to the allowable costs of the service, as determined under this Circular, with an explanation of how variances will be handled.

(2) Revenues shall consist of all revenues generated by the service, including unbilled and uncollected revenues. If some users were not billed for the services (or were not

billed at the full rate for that class of users), a schedule showing the full imputed revenues associated with these users shall be provided. Expenses shall be broken out by object cost categories (e.g., salaries, supplies, etc.).

c. *Self-insurance funds.* For each self-insurance fund, the plan shall include: the fund balance sheet; a statement of revenue and expenses including a summary of billings and claims paid by agency; a listing of all non-operating transfers into and out of the fund; the type(s) of risk(s) covered by the fund (e.g., automobile liability, workers' compensation, etc.); an explanation of how the level of fund contributions are determined, including a copy of the current actuarial report (with the actuarial assumptions used) if the contributions are determined on an actuarial basis; and, a description of the procedures used to charge or allocate fund contributions to benefitted activities. Reserve levels in excess of claims (1) submitted and adjudicated but not paid, (2) submitted but not adjudicated, and (3) incurred but not submitted must be identified and explained.

d. *Fringe benefits.* For fringe benefit costs, the plan shall include: a listing of fringe benefits provided to covered employees, and the overall annual cost of each type of benefit; current fringe benefit policies*; and procedures used to charge or allocate the costs of the benefits to benefitted activities. In addition, for pension and post-retirement health insurance plans, the following information shall be provided: the governmental unit's funding policies, e.g., legislative bills, trust agreements, or State-mandated contribution rules, if different from actuarially determined rates; the pension plan's costs accrued for the year; the amount funded, and date(s) of funding; a copy of the current actuarial report (including the actuarial assumptions); the plan trustee's report; and, a schedule from the activity showing the value of the interest cost associated with late funding.

4. *Required certification.* Each central service cost allocation plan will be accompanied by a certification in the following form:

Certificate of Cost Allocation Plan

This is to certify that I have reviewed the cost allocation plan submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish cost allocations or billings for [identify period covered by plan] are allowable in accordance with the

requirements of OMB Circular A-87, "Cost Principles for State and Local Governments," and the Federal award(s) to which they apply. Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the awards to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently.

I declare that the foregoing is true and correct.

Governmental Unit _____

Signature _____

Name of Official _____

Title _____

Date of Execution _____

F. Negotiation and Approval of Central Service Plans

1. All proposed central service cost allocation plans that are required to be submitted will be reviewed, negotiated, and approved by the Federal cognizant agency on a timely basis. The cognizant agency will review the proposal within six months of receipt of the proposal and either negotiate/approve the proposal or advise the governmental unit of the additional documentation needed to support/evaluate the proposed plan or the changes required to make the proposal acceptable. Once an agreement with the governmental unit has been reached, the agreement will be accepted and used by all Federal agencies, unless prohibited or limited by statute. Where a Federal funding agency has reason to believe that special operating factors affecting its awards necessitate special consideration, the funding agency will, prior to the time the plans are negotiated, notify the cognizant agency.

2. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. The results of the negotiation shall be made available to all Federal agencies for their use.

3. Negotiated cost allocation plans based on a proposal later found to have included costs that: (a) are unallowable (i) as specified by law or regulation, (ii) as identified in Attachment B of this Circular, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards, shall be adjusted, or a refund shall be made at the option of the Federal cognizant agency. These adjustments or refunds are designed to correct the plans and do not constitute a reopening of the negotiation.

G. Other Policies

1. *Billed central service activities.* Each billed central service activity must separately account for all revenues (including imputed revenues) generated by the service, expenses incurred to furnish the service, and profit/loss.

2. *Working capital reserves.* Internal service funds are dependent upon a reasonable level of working capital reserve to operate from one billing cycle to the next. Charges by an internal service activity to provide for the establishment and maintenance of a reasonable level of working capital reserve, in addition to the full recovery of costs, are allowable. A working capital reserve as part of retained earnings of up to 60 days cash expenses for normal operating purposes is considered reasonable. A working capital reserve exceeding 60 days may be approved by the cognizant Federal agency in exceptional cases.

3. *Carry-forward adjustments of allocated central service costs.* Allocated central service costs are usually negotiated and approved for a future fiscal year on a "fixed with carry-forward" basis. Under this procedure, the fixed amounts for the future year covered by agreement are not subject to adjustment for that year. However, when the actual costs of the year involved become known, the differences between the fixed amounts previously approved and the actual costs will be carried forward and used as an adjustment to the fixed amounts established for a later year. This "carry-forward" procedure applies to all central services whose costs were fixed in the approved plan. However, a carry-forward adjustment is not permitted, for a central service activity that was not included in the approved plan, or for unallowable costs that must be reimbursed immediately.

4. *Adjustments of billed central services.* Billing rates used to charge Federal awards shall be based on the estimated costs of providing the services, including an estimate of

the allocable central service costs. A comparison of the revenue generated by each billed service (including total revenues whether or not billed or collected) to the actual allowable costs of the service will be made at least annually, and an adjustment will be made for the difference between the revenue and the allowable costs. These adjustments will be made through one of the following adjustment methods: (a) a cash refund to the Federal Government for the Federal share of the adjustment, (b) credits to the amounts charged to the individual programs, (c) adjustments to future billing rates, or (d) adjustments to allocated central service costs. Adjustments to allocated central services will not be permitted where the total amount of the adjustment for a particular service (Federal share and non-Federal) share exceeds \$500,000.

5. *Records retention.* All central service cost allocation plans and related documentation used as a basis for claiming costs under Federal awards must be retained for audit in accordance with the records retention requirements contained in the Common Rule.

6. *Appeals.* If a dispute arises in the negotiation of a plan between the cognizant agency and the governmental unit, the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.

7. *OMB assistance.* To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

Attachment D — Public Assistance Cost Allocation Plans

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A. General

Federally-financed programs administered by State public assistance agencies are funded predominately by the Department of Health and Human Services (HHS). In support of its

stewardship requirements, HHS has published requirements for the development, documentation, submission, negotiation, and approval of public assistance cost allocation plans in Subpart E of 45 CFR Part 95. All administrative costs (direct and indirect) are normally charged to Federal awards by implementing the public assistance cost allocation plan. This Attachment extends these requirements to all Federal agencies whose programs are administered by a State public assistance agency. Major federally-financed programs typically administered by State public assistance agencies include: Aid to Families with Dependent Children, Medicaid, Food Stamps, Child Support Enforcement, Adoption Assistance and Foster Care, and Social Services Block Grant.

B. Definitions

1. *State public assistance agency* means a State agency administering or supervising the administration of one or more public assistance programs operated by the State as identified in Subpart E of 45 CFR Part 95. For the purpose of this Attachment, these programs include all programs administered by the State public assistance agency.

2. *State public assistance agency costs* means all costs incurred by, or allocable to, the State public assistance agency, except expenditures for financial assistance, medical vendor payments, food stamps, and payments for services and goods provided directly to program recipients.

C. Policy

State public assistance agencies will develop, document and implement, and the Federal Government will review, negotiate, and approve, public assistance cost allocation plans in accordance with Subpart E of 45 CFR Part 95. The plan will include all programs administered by the State public assistance agency. Where a letter of approval or disapproval is transmitted to a State public assistance agency in accordance with Subpart E, the letter will apply to all Federal agencies and programs. The remaining sections of this Attachment (except for the requirement for certification) summarize the provisions of Subpart E of 45 CFR Part 95.

D. Submission, Documentation, and Approval of Public Assistance Cost Allocation Plans

1. State public assistance agencies are required to promptly submit amendments to

the cost allocation plan to HHS for review and approval.

2. Under the coordination process outlined in subsection E, affected Federal agencies will review all new plans and plan amendments and provide comments, as appropriate, to HHS. The effective date of the plan or plan amendment will be the first day of the quarter following the submission of the plan or amendment, unless another date is specifically approved by HHS. HHS, as the cognizant agency acting on behalf of all affected Federal agencies, will, as necessary, conduct negotiations with the State public assistance agency and will inform the State agency of the action taken on the plan or plan amendment.

E. Review of Implementation of Approved Plans

1. Since public assistance cost allocation plans are of a narrative nature, the review during the plan approval process consists of evaluating the appropriateness of the proposed groupings of costs (cost centers) and the related allocation bases. As such, the Federal Government needs some assurance that the cost allocation plan has been implemented as approved. This is accomplished by reviews by the funding agencies, single audits, or audits conducted by the cognizant audit agency.

2. Where inappropriate charges affecting more than one funding agency are identified, the cognizant HHS cost negotiation office will be advised and will take the lead in resolving the issue(s) as provided for in Subpart E of 45 CFR Part 95.

3. If a dispute arises in the negotiation of a plan or from a disallowance involving two or more funding agencies, the dispute shall be resolved in accordance with the appeals procedures set out in 45 CFR Part 75. Disputes involving only one funding agency will be resolved in accordance with the funding agency's appeal process.

4. To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, the Office of Management and Budget will lend assistance, as required, to resolve such problems in a timely manner.

F. Unallowable Costs

Claims developed under approved cost allocation plans will be based on allowable costs as identified in this Circular. Where unallowable costs have been claimed and reimbursed, they will be refunded to the program that reimbursed the unallowable

cost using one of the following methods: (a) a cash refund, (b) offset to a subsequent claim, or (c) credits to the amounts charged to individual awards.

Attachment E — State and Local Indirect Cost Rate Proposals

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A. General

1. Indirect costs are those that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned directly to Federal awards and other activities as appropriate, indirect costs are those remaining to be allocated to benefitted cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. Indirect costs include (a) the indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and (b) the costs of central governmental services distributed through the central service cost allocation plan (as described in Attachment C) and not otherwise treated as direct costs.

3. Indirect costs are normally charged to Federal awards by the use of an indirect cost rate. A separate indirect cost rate(s) is usually necessary for each department or agency of the governmental unit claiming indirect costs under Federal awards. Guidelines and illustrations of indirect cost proposals are provided in a brochure published by the Department of Health and Human Services entitled "A Guide for State and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government." A copy of this brochure may be obtained from the Superintendent of Documents, U.S. Government Printing Office.

4. Because of the diverse characteristics and accounting practices of governmental units, the types of costs which may be classified as indirect costs cannot be specified in all situations. However, typical examples of indirect costs may include certain State/local-wide central service costs, general administration of the grantee department or agency, accounting and personnel services performed within the grantee department or agency, depreciation or use allowances on buildings and equipment, the costs of operating and maintaining facilities, etc.

5. This Attachment does not apply to State public assistance agencies. These agencies should refer instead to Attachment D.

B. Definitions

1. *Indirect cost rate proposal* means the documentation prepared by a governmental unit or subdivision thereof to substantiate its request for the establishment of an indirect cost rate.

2. *Indirect cost rate* is a device for determining in a reasonable manner the proportion of indirect costs each program should bear. It is the ratio (expressed as a percentage) of the indirect costs to a direct cost base.

3. *Indirect cost pool* is the accumulated costs that jointly benefit two or more programs or other cost objectives.

4. *Base* means the accumulated direct costs (normally either total direct salaries

and wages or total direct costs exclusive of any extraordinary or distorting expenditures used to distribute indirect costs to individual Federal awards. The direct cost base selected should result in each award bearing a fair share of the indirect costs in reasonable relation to the benefits received from the costs.

5. *Predetermined rate* means an indirect cost rate, applicable to a specified current or future period, usually the governmental unit's fiscal year. This rate is based on an estimate of the costs to be incurred during the period. Except under very unusual circumstances, a predetermined rate is not subject to adjustment. (Because of legal constraints, predetermined rates are not permitted for Federal contracts; they may, however, be used for grants or cooperative agreements.) Predetermined rates may not be used by governmental units that have not submitted and negotiated the rate with the cognizant agency. In view of the potential advantages offered by this procedure, negotiation of predetermined rates for indirect costs for a period of two to four years should be the norm in those situations where the cost experience and other pertinent facts available are deemed sufficient to enable the parties involved to reach an informed judgment as to the probable level of indirect costs during the ensuing accounting periods.

6. *Fixed rate* means an indirect cost rate which has the same characteristics as a predetermined rate, except that the difference between the estimated costs and the actual, allowable costs of the period covered by the rate is carried forward as an adjustment to the rate computation of a subsequent period.

7. *Provisional rate* means a temporary indirect cost rate applicable to a specified period which is used for funding, interim reimbursement, and reporting indirect costs on Federal awards pending the establishment of a "final" rate for that period.

8. *Final rate* means an indirect cost rate applicable to a specified past period which is based on the actual allowable costs of the period. A final audited rate is not subject to adjustment.

9. *Base period* for the allocation of indirect costs is the period in which such costs are incurred and accumulated for allocation to activities performed in that period. The base period normally should coincide with the governmental unit's fiscal year, but in any event, shall be so selected as to avoid inequities in the allocation of costs.

C. Allocation of Indirect Costs and Determination of Indirect Cost Rates

1. General.

a. Where a governmental unit's department or agency has only one major function, or where all its major functions benefit from the indirect costs to approximately the same degree, the allocation of indirect costs and the computation of an indirect cost rate may be accomplished through simplified allocation procedures as described in subsection 2.

b. Where a governmental unit's department or agency has several major functions which benefit from its indirect costs in varying degrees, the allocation of indirect costs may require the accumulation of such costs into separate cost groupings which then are allocated individually to benefitted functions by means of a base which best measures the relative degree of benefit. The indirect costs allocated to each function are then distributed to individual awards and other activities included in that function by means of an indirect cost rate(s).

c. Specific methods for allocating indirect costs and computing indirect cost rates along with the conditions under which each method should be used are described in subsections 2, 3 and 4.

2. Simplified method.

a. Where a grantee agency's major functions benefit from its indirect costs to approximately the same degree, the allocation of indirect costs may be accomplished by

(1) classifying the grantee agency's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to individual Federal awards. The rate should be expressed as the percentage which the total amount of allowable indirect costs bears to the base selected. This method should also be used where a governmental unit's department or agency has only one major function encompassing a number of individual projects or activities, and may be used where the level of Federal awards to that department or agency is relatively small.

b. Both the direct costs and the indirect costs shall exclude capital expenditures and unallowable costs. However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

c. The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

3. Multiple allocation base method.

a. Where a grantee agency's indirect costs benefit its major functions in varying degrees, such costs shall be accumulated into separate cost groupings. Each grouping shall then be allocated individually to benefitted functions by means of a base which best measures the relative benefits.

b. The cost groupings should be established so as to permit the allocation of each grouping on the basis of benefits provided to the major functions. Each grouping should constitute a pool of expenses that are of like character in terms of the functions they benefit and in terms of the allocation base which best measures the relative benefits provided to each function. The number of separate groupings should be held within practical limits, taking into consideration the materiality of the amounts involved and the degree of precision needed.

c. Actual conditions must be taken into account in selecting the base to be used in allocating the expenses in each grouping to benefitted functions. When an allocation can be made by assignment of a cost grouping directly to the function benefitted, the allocation shall be made in that manner. When the expenses in a grouping are more general in nature, the allocation should be made through the use of a selected base which produces results that are equitable to both the Federal Government and the governmental unit. In general, any cost element or related factor associated with the governmental unit's activities is potentially adaptable for use as an allocation base provided that: (1) it can readily be expressed in terms of dollars or other quantitative measures (total direct costs, direct salaries and wages, staff hours applied, square feet used, hours of usage, number of documents processed, population served, and the like), and (2) it is common to the benefitted functions during the base period.

d. Except where a special indirect cost rate(s) is required in accordance with subsection 4, the separate groupings of indirect costs allocated to each major function shall be aggregated and treated as a common pool for that function. The costs in the common pool shall then be distributed to individual Federal

awards included in that function by use of a single indirect cost rate.

e. The distribution base used in computing the indirect cost rate for each function may be (1) total direct costs (excluding capital expenditures and other distorting items such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution. An indirect cost rate should be developed for each separate indirect cost pool developed. The rate in each case should be stated as the percentage relationship between the particular indirect cost pool and the distribution base identified with that pool.

4. *Special indirect cost rates.*

a. In some instances, a single indirect cost rate for all activities of a grantee department or agency or for each major function of the agency may not be appropriate. It may not take into account those different factors which may substantially affect the indirect costs applicable to a particular program or group of programs. The factors may include the physical location of the work, the level of administrative support required, the nature of the facilities or other resources employed, the organizational arrangements used, or any combination thereof. When a particular award is carried out in an environment which appears to generate a significantly different level of indirect costs, provisions should be made for a separate indirect cost pool applicable to that award. The separate indirect cost pool should be developed during the course of the regular allocation process, and the separate indirect cost rate resulting therefrom should be used, provided that: (1) the rate differs significantly from the rate which would have been developed under subsections 2. and 3., and (2) the award to which the rate would apply is material in amount.

b. Although this Circular adopts the concept of the full allocation of indirect costs, there are some Federal statutes which restrict the reimbursement of certain indirect costs. Where such restrictions exist, it may be necessary to develop a special rate for the affected award. Where a "restricted rate" is required, the procedure for developing a non-restricted rate will be used except for the additional step of the elimination from the indirect cost pool those costs for which the law prohibits reimbursement.

D. *Submission and Documentation of Proposals*

1. *Submission of indirect cost rate proposals.*

a. All departments or agencies of the governmental unit desiring to claim indirect costs under Federal awards must prepare an indirect cost rate proposal and related documentation to support those costs. The proposal and related documentation must be retained for audit in accordance with the records retention requirements contained in the Common Rule.

b. A governmental unit for which a cognizant agency assignment has been specifically designated must submit its indirect cost rate proposal to its cognizant agency. The Office of Management and Budget (OMB) will periodically publish lists of governmental units identifying the appropriate Federal cognizant agencies. The cognizant agency for all governmental units or agencies not identified by OMB will be determined based on the Federal agency providing the largest amount of Federal funds. In these cases, a governmental unit must develop an indirect cost proposal in accordance with the requirements of this Circular and maintain the proposal and related supporting documentation for audit. These governmental units are not required to submit their proposals unless they are specifically requested to do so by the cognizant agency. Where a local government only receives funds as a sub-recipient, the primary recipient will be responsible for negotiating and/or monitoring the sub-recipient's plan.

c. Each Indian tribal government desiring reimbursement of indirect costs must submit its indirect cost proposal to the Department of the Interior (its cognizant Federal agency).

d. Indirect cost proposals must be developed (and, when required, submitted) within six months after the close of the governmental unit's fiscal year, unless an exception is approved by the cognizant Federal agency. If the proposed central service cost allocation plan for the same period has not been approved by that time, the indirect cost proposal may be prepared including an amount for central services that is based on the latest federally-approved central service cost allocation plan. The difference between these central service amounts and the amounts ultimately approved will be compensated for by an adjustment in a subsequent period.

2. *Documentation of proposals.* The following shall be included with each indirect cost proposal:

a. The rates proposed, including subsidiary work sheets and other relevant data, cross referenced and reconciled to the financial data noted in subsection b. Allocated

central service costs will be supported by the summary table included in the approved central service cost allocation plan. This summary table is not required to be submitted with the indirect cost proposal if the central service cost allocation plan for the same fiscal year has been approved by the cognizant agency and is available to the funding agency.

b. A copy of the financial data (financial statements, comprehensive annual financial report, executive budgets, accounting reports, etc.) upon which the rate is based. Adjustments resulting from the use of unaudited data will be recognized, where appropriate, by the Federal cognizant agency in a subsequent proposal.

c. The approximate amount of direct base costs incurred under Federal awards. These costs should be broken out between salaries and wages and other direct costs.

d. A chart showing the organizational structure of the agency during the period for which the proposal applies, along with a functional statement(s) noting the duties and/or responsibilities of all units that comprise the agency. (Once this is submitted, only revisions need be submitted with subsequent proposals.)

3. *Required certification.* Each indirect cost rate proposal shall be accompanied by a certification in the following form:

Certificate of Indirect Costs

This is to certify that I have reviewed the indirect cost rate proposal submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish billing or final indirect costs rates for [identify period covered by rate] are allowable in accordance with the requirements of the Federal award(s) to which they apply and OMB Circular A-87, "Cost Principles for State and Local Governments." Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently and the Federal Government will be notified

of any accounting changes that would affect the predetermined rate.

I declare that the foregoing is true and correct.

Governmental Unit _____

Signature _____

Name of Official _____

Title _____

Date of Execution _____

E. Negotiation and Approval of Rates

1. Indirect cost rates will be reviewed, negotiated, and approved by the cognizant Federal agency on a timely basis. Once a rate has been agreed upon, it will be accepted and used by all Federal agencies unless prohibited or limited by statute. Where a Federal funding agency has reason to believe that special operating factors affecting its awards necessitate special indirect cost rates, the funding agency will, prior to the time the rates are negotiated, notify the cognizant Federal agency.

2. The use of predetermined rates, if allowed, is encouraged where the cognizant agency has reasonable assurance based on past experience and reliable projection of the grantee agency's costs, that the rate is not likely to exceed a rate based on actual costs. Long-term agreements utilizing predetermined rates extending over two or more years are encouraged, where appropriate.

3. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. This agreement will be subject to re-opening if the agreement is subsequently found to violate a statute, or the information upon which the plan was negotiated is later

found to be materially incomplete or inaccurate. The agreed upon rates shall be made available to all Federal agencies for their use.

4. Refunds shall be made if proposals are later found to have included costs that (a) are unallowable (i) as specified by law or regulation, (ii) as identified in Attachment B of this Circular, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards. These adjustments or refunds will be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

F. Other Policies

1. *Fringe benefit rates.* If overall fringe benefit rates are not approved for the governmental unit as part of the central service cost allocation plan, these rates will be reviewed, negotiated and approved for individual grantee agencies during the indirect cost negotiation process. In these cases, a proposed fringe benefit rate computation should accompany the indirect cost proposal. If fringe benefit rates are not used at the grantee agency level (i.e., the agency specifically identifies fringe benefit costs to individual employees), the governmental unit should so advise the cognizant agency.

2. *Billed services provided by the grantee agency.* In some cases, governmental units provide and bill for services similar to those covered by central service cost allocation plans (e.g., computer centers). Where this occurs, the governmental unit should be guided by the requirements in Attachment C relating to the development of billing rates and documentation requirements, and

should advise the cognizant agency of any billed services. Reviews of these types of services (including reviews of costing/billing methodology, profits or losses, etc.) will be made on a case-by-case basis as warranted by the circumstances involved.

3. *Indirect cost allocations not using rates.* In certain situations, a governmental unit, because of the nature of its awards, may be required to develop a cost allocation plan that distributes indirect (and, in some cases, direct) costs to the specific funding sources. In these cases, a narrative cost allocation methodology should be developed, documented, maintained for audit, or submitted, as appropriate, to the cognizant agency for review, negotiation, and approval.

4. *Appeals.* If a dispute arises in a negotiation of an indirect cost rate (or other rate) between the cognizant agency and the governmental unit, the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.

5. *Collection of unallowable costs and erroneous payments.* Costs specifically identified as unallowable and charged to Federal awards either directly or indirectly will be refunded (including interest chargeable in accordance with applicable Federal agency regulations).

6. *OMB assistance.* To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

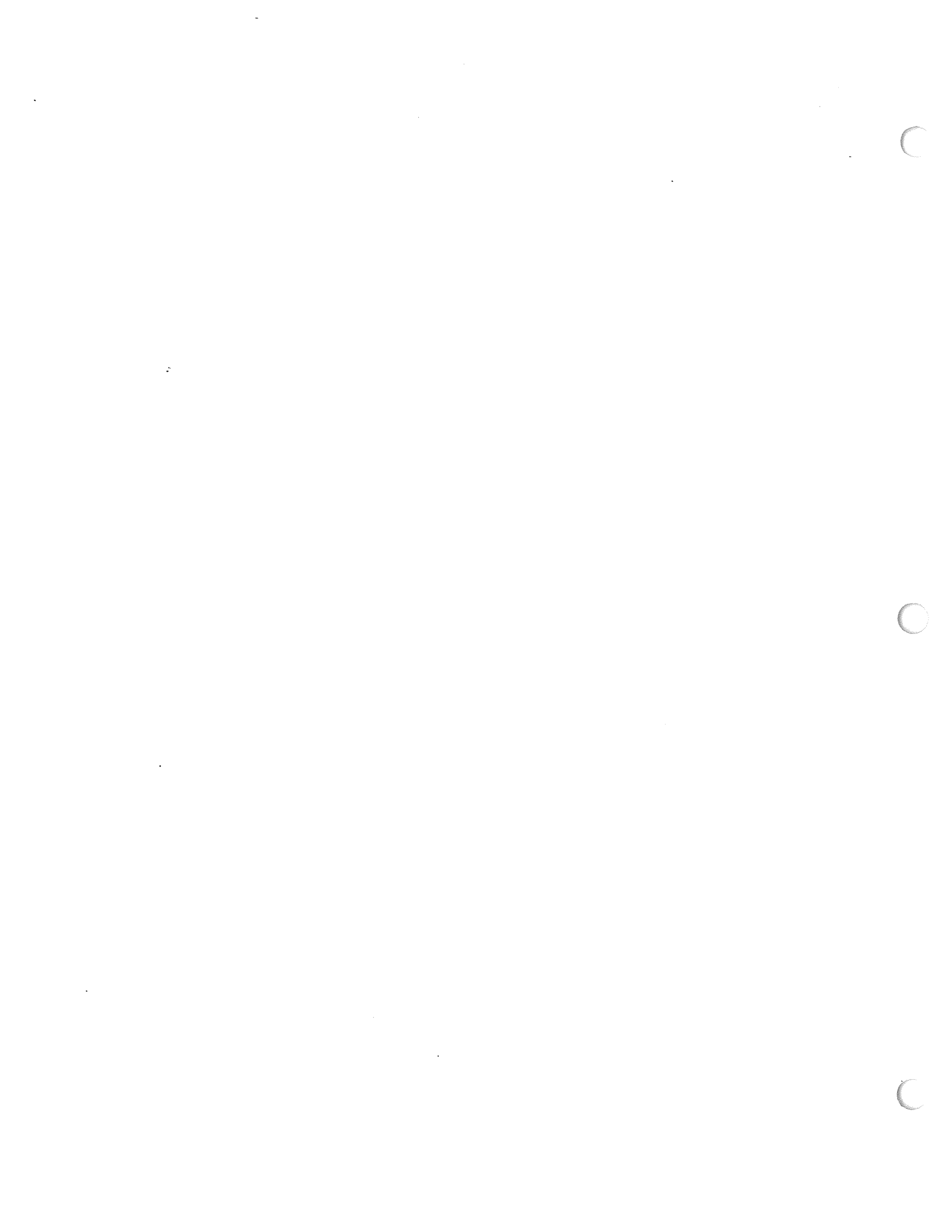
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OFFICE OF MANAGEMENT AND BUDGET

Grants and Cooperative Agreements With State and Local Governments

AGENCY: Office of Management and Budget

ACTION: Final revisions to OMB Circular A-102.

SUMMARY: The Office of Management and Budget is revising Circular A-102 to include references to the requirements in three executive orders and four statutory provisions issued or enacted since the last issuance of the Circular in March 1988. The revisions relate to: use of the metric system of measurement, cash management, infrastructure investment, purchase of recycled products, and disclosure of the federal contribution in procurement of goods and services.

DATES: The revisions to the Circular are effective October 14, 1994.

FOR FURTHER INFORMATION CONTACT: Thomas Coccozza, Financial Standards and Reporting Branch, Office of Federal Financial Management, Office of Management and Budget, (202) 395-3993.

SUPPLEMENTARY INFORMATION:

A. Background

On August 5, 1992, the Office of Management and Budget (OMB) published a notice in the *Federal Register* (57 FR 34599) requesting comments on proposed revisions to OMB Circular A-102, "Grants and Cooperative Agreements with State and Local Governments." The proposed revisions referenced three statutory provisions and an executive order. These relate to: (a) A requirement that encourages recipients of federally-funded grants and cooperative agreements to use the metric system of measurement in their assistance programs; (b) a reference to the Department of the Treasury's regulations to implement the Cash Management Improvement Act of 1990; (c) a requirement that State and local governments comply with section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended; and (d) a requirement that federal agencies comply with Executive Order 12803, "Infrastructure Privatization."

Interested parties were invited to submit comments on the revisions by October 5, 1992. Federal agencies submitted two comments.

B. Comments and Responses

Comment: One commenter said, in accordance with Section 6002(a) of RCRA, procurement items under \$10,000 are not covered. The commenter recommended that the \$10,000 ceiling be noted in the Circular. The same commenter said that RCRA provides that "each procuring agency shall procure items * * * consistent with maintaining a satisfactory level of competition."

Response: The substance of these provisions in Section 6002 are included in the Environmental Protection Agency's (EPA's) guidelines found at 40 CFR 247-253. Since EPA's guidelines are referenced in paragraph 2.h. of the Circular, it is not necessary to make a specific reference in the Circular to the particular provisions within Section 6002.

Comment: One commenter recommended that OMB add language to the Circular which states that the Metric Conversion Act requires each federal agency to establish a date(s) when the metric system of measurement will be used in that agency's procurement, grants and other business-related activities.

Response: OMB has added language which cites to the requirement for each agency to establish dates showing when the metric system of measurement will be used. This paragraph was also expanded to explain procedures for obtaining exceptions from metric usage.

C. Additional Changes

In addition to revising the Circular to add references to the statutory provisions and executive orders described in the August 1992 Notice, OMB is also revising the Circular to add references to another statutory provision and to two other executive orders. OMB is not requesting additional comment on these changes before finalization because they merely reference new requirements without elaboration.

In Section 623 of the Treasury, Postal Service, and General Government Appropriations Act for fiscal year 1993, Congress provided that grantees must specify, in any announcement of the awarding of contracts with an aggregate value of \$500,000 or more, the amount of Federal funds that will be used to finance the acquisitions. In the following year, Congress reenacted this provision (see Section 621 of the fiscal year 1994 Appropriations Act). Congress is likely to reenact this provision for fiscal year 1995 and for subsequent fiscal years. Accordingly, a

paragraph has been added to this Circular that references this requirement.

In January 1994, the President issued Executive Order No. 12893 ("Principles for Federal Infrastructure Investment"). A reference to this Executive Order, and to OMB's guidance for implementing it, has been included in the paragraph that references Executive Order No. 12803 ("Infrastructure Privatization").

Finally, in the proposed paragraph that would reference the Metric Conversion Act of 1975, a reference should have also been made to Executive Order No. 12770 ("Metric Usage in Federal Government Programs"). A reference to the Executive Order has been included in this paragraph.

Locations of the added (or amended) paragraphs and the citations for the four statutory provisions and three executive orders are as follows:

(1) Paragraph 1.j.—Metric Conversion Act of 1975, as amended (codified as amended at 15 U.S.C. 205a-205k), and Executive Order No. 12770 ("Metric Usage in Federal Government Programs"), 56 FR 35,801 (1991).

(2) Paragraph 2.a.—Cash Management Improvement Act of 1990, as amended (codified as amended in scattered sections of Title 31 U.S. Code).

(3) Paragraph 2.g.—Executive Order No. 12803 ("Infrastructure Privatization"), 57 FR 19,036 (1992), and Executive Order No. 12893 ("Principles for Federal Infrastructure Investment"), 59 FR 4233 (1994).

(4) Paragraph 2.h.—Resource Conservation and Recovery Act of 1976, section 6002, as amended (codified as amended at 42 U.S.C. 6962).

(5) Paragraph 2.i.—Treasury, Postal Service, and General Government Appropriations Act, 1994, Public Law 103-123, section 621, 107 Stat. 1226, 1265 (1993).

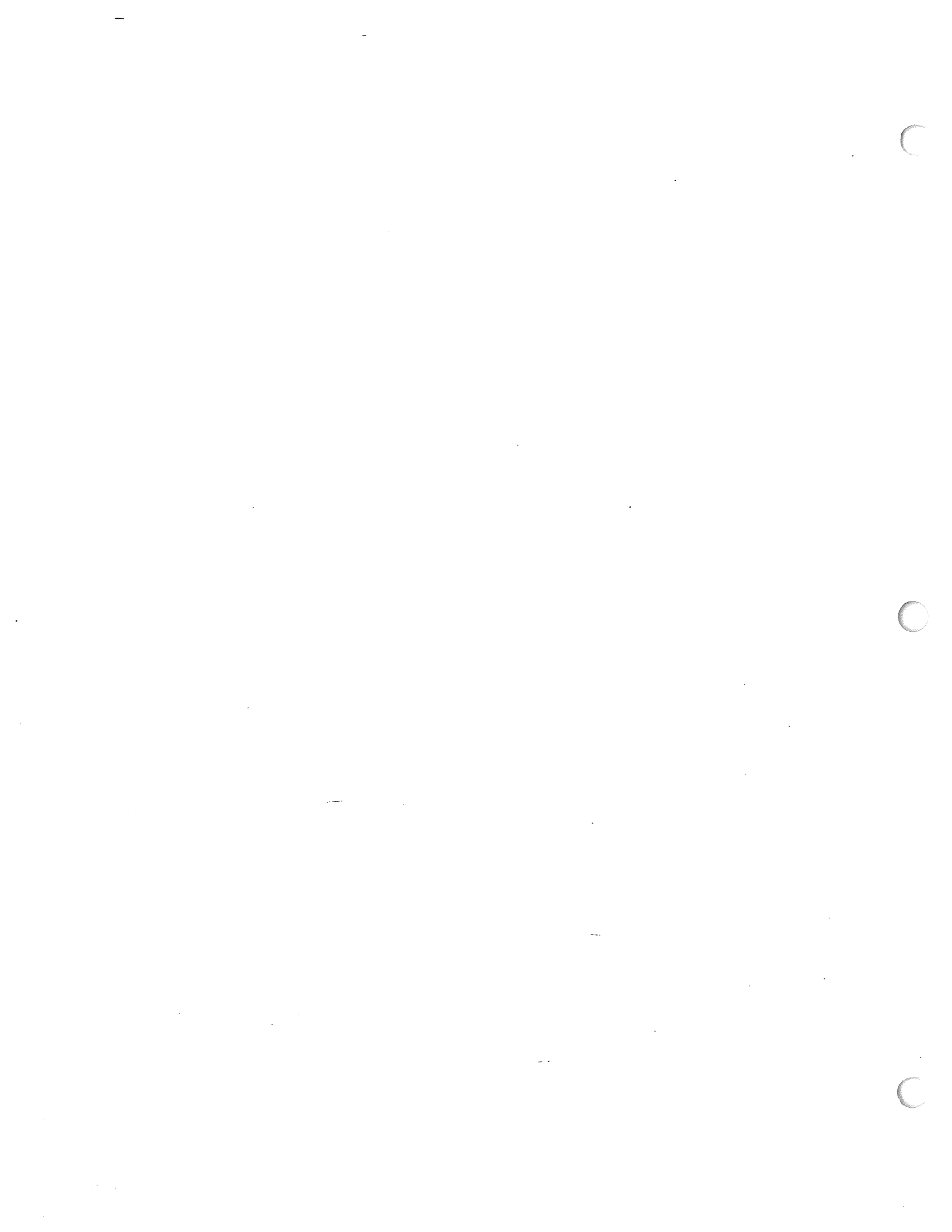
No other changes have been made to the Circular, which is being reissued in its entirety, as revised.

Darrell A. Johnson,
Deputy Assistant Director for Administration.

To the Heads of Executive Departments and Establishments

Subject: Grants and Cooperative Agreements with State and Local Governments

1. *Purpose.* This Circular establishes consistency and uniformity among federal agencies in the management of grants and cooperative agreements with State, local, and federally recognized Indian tribal



governments. This revision supersedes Office of Management and Budget (OMB) Circular No. A-102, dated March 3, 1988.

2. *Authority.* This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; Reorganization Plan No. 2 of 1970; Executive Order 11541 and the Chief Financial Officers Act, 31 U.S.C. 503. Also included in the Circular are standards to ensure consistent implementation of sections 202, 203, and 204 of the Intergovernmental Cooperation Act of 1968, the Office of Federal Procurement Policy Act Amendments of 1983, and sections 6301-08, title 31, United States Code.

3. *Background.* On March 12, 1987, the President directed all affected agencies to issue a grants management common rule to adopt government-wide terms and conditions for grants to state and local governments, and they did so. In 1988, OMB revised the Circular to provide guidance to Federal agencies on other matters not covered in the common rule.

4. *Required Action.* Consistent with their legal obligations, all Federal agencies administering programs that involve grants and cooperative agreements with State, local and Indian tribal governments (grantees) shall follow the policies in this Circular. If the enabling legislation for a specific grant program prescribes policies or requirements that differ from those in this Circular, the provisions of the enabling legislation shall govern.

5. *OMB Responsibilities.* OMB may grant deviations from the requirements of this Circular when permissible under existing law. However, in the interest of uniformity and consistency, deviations will be permitted only in exceptional circumstances.

6. *Information Contact.* Further information concerning this Circular may be obtained from: Office of Federal Financial Management, Office of Management and Budget, Room 6025, New Executive Office Building, Washington, DC 20503, (202) 395-3993.

7. *Termination Review Date.* The Circular will have a policy review three years from the date of issuance.

8. *Effective Date.* The Circular is effective on publication.

Alice M. Rivlin,
Acting Director.
Attachment:

Grants and Cooperative Agreements With State and Local Governments

1. Pre-Award Policies

a. *Use of grants and cooperative agreements.* Sections 6301-08, title 31, United States Code govern the use of grants, contracts and cooperative agreements. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement."

b. *Advance Public Notice and Priority Setting.*—(1) Federal agencies shall provide the public with an advance notice in the *Federal Register*, or by other appropriate means, of intended funding priorities for discretionary assistance programs, unless funding priorities are established by federal statute. These priorities shall be approved by a policy level official.

(2) Whenever time permits, agencies shall provide the public an opportunity to comment on intended funding priorities.

(3) All discretionary grant awards in excess of \$25,000 shall be reviewed for consistency with agency priorities by a policy level official.

c. Standard Forms for Applying for Grants and Cooperative Agreements.

(1) Agencies shall use the following standard application forms unless they obtain Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 35) and the 5 CFR Part 1320, "Controlling Paperwork Burdens on the Public":

- SF-424 Facesheet
- SF-424a Budget Information (Non-Construction)
- SF-424b Standard Assurances (Non-Construction)
- SF-424c Budget Information (Construction)
- SF-424d Standard Assurances (Construction)

When different or additional information is needed to comply with legislative requirements or to meet specific program needs,

agencies shall also obtain prior OMB approval.

(2) A preapplication shall be used for all construction, land acquisition and land development projects or programs when the need for Federal funding exceeds \$100,000, unless the Federal agency determines that a preapplication is not needed. A preapplication is used to:

(a) Establish communication between the agency and the applicant,

(b) Determine the applicant's eligibility,

(c) Determine how well the project can compete with similar projects from others, and

(d) Discourage any proposals that have little or no chance for Federal funding before applicants incur significant costs in preparing detailed applications.

(3) Agencies shall use the Budget Information (Construction) and Standard Assurances (Construction) when the major purpose of the project or program is construction, land acquisition or land development.

(4) Agencies may specify how and whether budgets shall be shown by functions or activities within the program or project.

(5) Agencies should generally include a request for a program narrative statement which is based on the following instructions:

(a) Objectives and need for assistance. Pinpoint any relevant physical, economic, social, financial, institutional, or other problems requiring a solution. Demonstrate the need for the assistance and state the principal and subordinate objectives of the project. Supporting documentation or other testimonies from concerned interests other than the applicant may be used. Any relevant data based on planning studies should be included or footnoted.

(b) Results or Benefits Expected. Identify costs and benefits to be derived. For example, show how the facility will be used. For land acquisition or development projects, explain how the project will benefit the public.

(c) Approach. Outline a plan of action pertaining to the scope and detail how the proposed work will be accomplished for each assistance program. Cite factors which might accelerate or decelerate the work and reasons for taking this approach as opposed to others. Describe any unusual features of the project, such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvements. Provide for each assistance



program quantitative projections of the accomplishments to be achieved, if possible. When accomplishments cannot be quantified, list the activities in chronological order to show the schedule of accomplishments and target expected completion dates. Identify the kinds of data to be collected and maintained, and discuss the criteria to be used to evaluate the results and success of the project. Explain the methodology that will be used to determine if the needs identified and discussed are being met and if the results and benefits identified are being achieved. List each organization, cooperator, consultant, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

(d) **Geographic location.** Give a precise location of the project and area to be served by the proposed project. Maps or other graphic aids may be attached.

(e) If applicable, provide the following information: for research and demonstration assistance requests, present a biographical sketch of the program director with the following information: name, address, telephone number, background, and other qualifying experience for the project. Also, list the name, training and background for other key personnel engaged in the project. Describe the relationship between this project and other work planned, anticipated, or underway under federal assistance. Explain the reason for all requests for supplemental assistance and justify the need for additional funding. Discuss accomplishments to date and list in chronological order a schedule of accomplishments, progress or milestones anticipated with the new funding request. If there have been significant changes in the project objectives, location, approach or time delays, explain and justify. For other requests for changes, or amendments, explain the reason for the change(s). If the scope or objectives have changed or an extension of time is necessary, explain the circumstances and justify. If the total budget has been exceeded or if the individual budget items have changes more than the prescribed limits, explain and justify the change and its effect on the project.

(6) Additional assurances shall not be added to those contained on the standard forms, unless specifically required by statute.

d. **Debarment and Suspension.** Federal agencies shall not award assistance to applicants that are debarred or suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs

under Executive Order 12549. Agencies shall establish procedures for the effective use of the List of Parties Excluded from Federal Procurement or Nonprocurement programs to assure that they do not award assistance to listed parties in violation of the Executive Order. Agencies shall also establish procedures to provide for effective use and/or dissemination of the list to assure that their grantees and subgrantees (including contractors) at any tier do not make awards in violation of the nonprocurement debarment and suspension common rule.

e. **Awards and Adjustments.**—(1) Ordinarily awards shall be made at least ten days prior to the beginning of the grant period.

(2) Agencies shall notify grantees immediately of any anticipated adjustments in the amount of an award. This notice shall be provided as early as possible in the funding period. Reductions in funding shall apply only to periods after notice is provided. Whenever an agency adjusts the amount of an award, it shall also make an appropriate adjustment to the amount of any required matching or cost sharing.

f. **Carryover Balances.** Agencies shall be prepared to identify to OMB the amounts of carryover balances (e.g., the amounts of estimated grantee unobligated balances available for carryover into subsequent grant periods). This presentation shall detail the fiscal and programmatic (level of effort) impact in the following period.

g. **Special Conditions or Restrictions.** Agencies may impose special conditions or restrictions on awards to "high risk" applicants/grantees in accordance with section ___12 of the grants management common rule. Agencies shall document use of the "Exception" provisions of section ___6 and "High-risk" provisions of section ___12 of the grants management common rule.

h. **Waiver of Single State Agency Requirements.**—(1) Requests to agencies from the Governors, or other duly constituted State authorities, for waiver of "single" State agency requirements in accordance with section 31 U.S.C. 6504, "Use of existing state or multi-member agency to administer grant programs," shall be given expeditious handling and, whenever possible, an affirmative response.

(2) When it is necessary to refuse a request for waiver of "single" state agency requirements under section 204 of the Intergovernmental Corporation Act, the Federal grantor agency shall advise OMB prior to informing the State that the request cannot be granted. The agency shall indicate

to OMB the reasons for the denial of the request.

(3) **Legislative proposals embracing grant-in-aid programs shall avoid inclusion of proposals for "single" State agencies in the absence of compelling reasons to do otherwise.** In addition, existing requirements in present grant-in-aid programs shall be reviewed and legislative proposals developed for the removal of these restrictive provisions.

i. **Patent Rights.** Agencies shall use the standard patent rights clause specified in "Rights to Inventions made by Non-profit Organizations and Small Business Firms" (37 CFR Part 401), when providing support for research and development.

j. **Metric System of Measurement.** The Metric Conversion Act of 1975, as amended, declares that the metric system is the preferred measurement system for U.S. trade and commerce. The act requires each Federal agency to establish a date(s), in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's

procurement, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. Heads of departments and agencies shall establish a process for a policy level and program level review of proposed exceptions to metric usage in grants programs. Executive Order 12770 ("Metric Usage in Federal Government Programs") elaborates on implementation of the act.

2. Post-Award Policies

a. **Cash Management.** Agency methods and procedures for transferring funds shall minimize the time elapsing between the transfer to recipients of grants and cooperative agreements and the recipient's need for the funds.

(1) Such transfers shall be made consistent with program purposes, applicable law and Treasury regulations contained in 31 CFR Part 205, Federal Funds Transfer Procedures.

(2) Where letters-of-credit are used to provide funds, they shall be in the same amount as the award.

b. **Grantee Financial Management Systems.** In assessing the adequacy of an applicant's financial management system, the awarding agency shall rely on readily available sources of information, such as

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audit reports, to the maximum extent possible. If additional information is necessary to assure prudent management of agency funds, it shall be obtained from the applicant or from an on-site review.

c. *Financial Status Reports.*—(1) Federal agencies shall require grantees to use the SF-269, Financial Status Report-Long Form, or SF-269a, Financial Status Report-Short Form, to report the status of funds for all non-construction projects or programs. Federal agencies need not require the Financial Status Report when the SF-270, Request for Advance or Reimbursement, or SF-272, Report of Federal Cash Transactions, is determined to provide adequate information.

(2) Federal agencies shall not require grantees to report on the status of funds by object class category of expenditure (e.g., personnel, travel, equipment).

(3) If reporting on the status of funds by programs, functions or activities within the project or program is required by statute or regulation, Federal agencies shall instruct grantees to use block 12, Remarks, on the SF-269, or a supplementary form approved by the OMB under the Paperwork Reduction Act of 1980.

(4) Federal agencies shall prescribe whether the reporting shall be on a cash or an accrual basis. If the Federal agency requires accrual information and the grantees's accounting records are not normally kept on an accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through an analysis of the documentation on hand.

d. *Contracting With Small and Minority Firms, Women's Business Enterprises and Labor Surplus Area Firms.* It is national policy to award a fair share of contracts to small and minority business firms. Grantees shall take similar appropriate affirmative action to support of women's enterprises and are encouraged to procure goods and services from labor surplus areas.

e. *Program Income.*—(1) Agencies shall encourage grantees to generate program income to help defray program costs. However, federal agencies shall not permit grantees to use grant-acquired assets to compete unfairly with the private sector.

(2) Federal agencies shall instruct grantees to deduct program income from total program costs as specified in the

grants management common rule at paragraph ____25 (g)(1), unless agency regulations or the terms of the grant award state otherwise. Authorization for recipients to follow the other alternatives in paragraph ____25 (g)(2) and (3) shall be granted sparingly.

f. *Site Visits and Technical Assistance.* Agencies shall conduct site visits only as warranted by program or project needs. Technical assistance site visits shall be provided only (1) In response to requests from grantees, (2) based on demonstrated program need, or (3) when recipients are designated "high risk" under section ____12 of the grants management common rule.

g. *Infrastructure Investment.* Agencies shall encourage grantees to consider the provisions of the common rule at Section ____31 and Executive Order 12803 ("Infrastructure Privatization"). This includes reviewing and modifying procedures affecting the management and disposition of federally-financed infrastructure owned by State and local governments, with their requests to sell or lease infrastructure assets, consistent with the criteria in Section 4 of the Order. Related guidance contained in Executive Order 12893 ("Principles for Federal Infrastructure Investments") requiring economic analysis and the development of investment options, including public-private partnership, shall also be applied. On March 7, 1994, OMB issued guidance on Executive Order 12893 in OMB Bulletin No. 94-16.

h. *Resource Conservation and Recovery Act.* Agencies shall implement the Resource Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C. 6962). Any State agency or agency of a political subdivision of a State which is using appropriated federal funds must comply with Section 6002 of RCRA. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA). Current guidelines are contained in 40 CFR Parts 247-253. State and local recipients of grants, loans, cooperative agreements or other instruments funded by appropriated Federal funds shall give preference in procurement programs to the purchase of recycled products pursuant to the EPA guidelines.

i. *Procurement of Goods and Services.* Agencies should be aware of and comply with the requirement enacted in Section 623 of the Treasury, Postal Service and General

Government Appropriations Act, 1993, and reenacted in Section 621 of the fiscal year 1994 Appropriations Act. This Section requires grantees to specify in any announcement of the awarding of contracts with an aggregate value of \$500,000 or more, the amount of Federal funds that will be used to finance the acquisitions.

*j. *Conditional exemptions.*—(1) OMB authorizes conditional exemption from OMB administrative requirements and cost principles circulars for certain Federal programs with statutorily-authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment. A Federal agency shall consult with OMB during its consideration of whether to grant such an exemption.

(2) To promote efficiency in State and local program administration, when Federal non-entitlement programs with common purposes have specific statutorily-authorized consolidated planning and consolidated administrative funding and where most of the State agency's resources come from non-Federal sources, Federal agencies may exempt these covered State-administered, non-entitlement grant programs from certain OMB grants management requirements. The exemptions would be from all but the allocability of costs provisions of OMB Circulars A-87 (Attachment A, subsection C.3), "Cost Principles for State, Local, and Indian Tribal Governments," A-21 (Section C, subpart 4), "Cost Principles for Educational Institutions," and A-122 (Attachment A, subsection A.4), "Cost Principles for Non-Profit Organizations," and from all of the administrative requirements provisions of OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and the agencies' grants management common rule.

(3) When a Federal agency provides this flexibility, as a prerequisite to a State's exercising this option, a State must adopt its own written fiscal and administrative requirements for expending and accounting for all funds, which are consistent with the provisions of OMB Circular A-87, and extend such policies to all subrecipients. These fiscal and administrative requirements must be sufficiently specific to ensure that: funds are used in compliance with all applicable federal statutory and regulatory

* Editor's note: Paragraph incorporates a conditional program exemption OMB has authorized. See Aug. 29, 1997, *Federal Register*, pages 45934-45936.



provisions, costs are reasonable and necessary for operating these programs, and funds are not to be used for general expenses required to carry out other responsibilities of a State or its subrecipients.

3. After-the-grant Policies

a. *Closeout.* Federal agencies shall notify grantees in writing before the end of the grant period of final reports that shall be due, the dates by which they must be received, and where they must be submitted. Copies of any required forms and instructions for their completion shall be included with this notification. The

Federal actions that must precede closeout are:

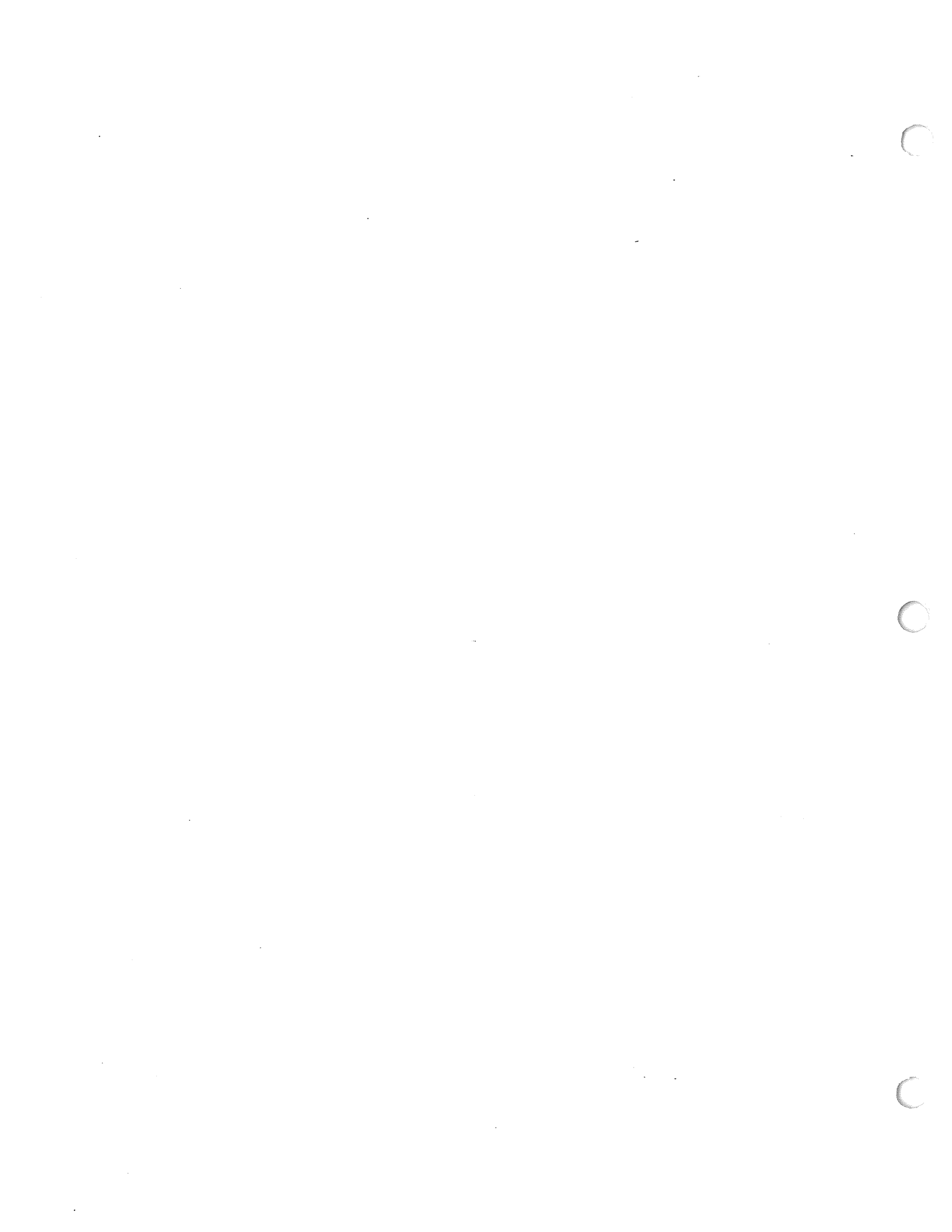
- (1) Receipt of all required reports,
- (2) Disposition or recovery of federally-owned assets (as distinct from property acquired under the grant), and
- (3) Adjustment of the award amount and the amount of Federal cash paid the recipient.

b. *Annual Reconciliation of Continuing Assistance Awards.* Federal agencies shall reconcile continuing awards at least annually and evaluate program performance and financial reports.

Items to be reviewed include:

- (1) A comparison of the recipient's work plan to its progress reports and project outputs,
- (2) the Financial Status Report (SF-269),
- (3) Request(s) for payment,
- (4) Compliance with any matching, level of effort or maintenance of effort requirement, and
- (5) A review of federally-owned property (as distinct from property acquired under the grant).

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43 CFR PART 12
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Authority: E.O. 12549; Sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 et seq.); 5 U.S.C. 301; Pub. L. 98-502; OMB Circulars A-102 and A-110; and OMB Circular A-128.

Cross Reference: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

Editorial Note: For additional information, see related documents published at 49 FR 24958, June 18, 1984; 52 FR 20178 and 20360, May 29, 1987; 53 FR 8028, March 11, 1988; 53 FR 19160, May 26, 1988; and 53 FR 34474, Sept. 6, 1988.

TITLE 43 SUBTITLE A PART 12 SUBPART A

PART 12 - ADMINISTRATIVE REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

SUBPART A - ADMINISTRATIVE REQUIREMENTS AND COST PRINCIPLES

Sec. 12.1 Scope of part.

This part prescribes administrative requirements and cost principles for grants and cooperative agreements entered into by the Department.

Sec. 12.2 Policy.

(a) All financial assistance awards and subawards, in the form of grants and cooperative agreements, in accordance with paragraph (b) of this section, are subject to OMB Circulars A-102, 'Uniform Administrative Requirements for Grants-in-Aid to State and Local Government,' A-110, 'Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations,' A-87, 'Cost Principles for State and Local Governments,' A-21, 'Cost Principles for Educational Institutions, and A-122, 'Cost Principles for Nonprofit Organizations,' as revised. The Bureau of Indian Affairs (BIA) is exempt from the requirements of paragraph B 21 on lobbying in OMB Circular A-122, until May 1, 1985. The Office of Territorial and International Affairs (TIA) is exempt from the requirements of this regulation until June 1, 1985.

(b)(1) Governmental recipients and subrecipients are subject to Circulars A-102 and A-87. Departmental regulations implementing Circular A-102 are contained in Subpart C, 43 CFR Part 12.

(2) Institutions of higher education which are recipients or subrecipients are subject to Circulars A-110 and A-21.

(3) Nonprofit organizations which are recipients or subrecipients are subject to Circulars A-110 and A-122.

(c) The circulars prescribed by this part published in the Federal Register are made a part of this regulation and include changes published in the Federal Register by OMB. (50 FR 6176, Feb. 14, 1985, as amended at 53 FR 8077, Mar. 11, 1988)

Sec. 12.3 Effect on prior issuances.

(a) All provisions of Department of the Interior nonregulatory program manuals, handbooks and other materials which are inconsistent with the above OMB Circulars are superseded, except to the extent that they are (1) required by statute, or (2) authorized in accordance with the exceptions provisions of each circular.

(b) Except to the extent inconsistent with the regulations in 43 CFR Part 12, Subpart C, all existing Department of the Interior regulations in 25 CFR Parts 23, 27, 39, 40, 41, 256, 272, 278, and 276; 30 CFR Parts 725, 735, 884, 886, and 890; 36 CFR Parts 60, 61, 63, 65, 67, 72, and 800; 43 CFR Parts 26 and 32; and 50 CFR Parts 80, 81, 82, 83, and 401 are not superseded by these regulations nor are any paperwork approvals under the Paperwork Reduction Act. (50 FR 6176, Feb. 14, 1985, as amended at 53 FR 8077, Mar. 11, 1988)

Sec. 12.4 Information collection requirements.

Information collections in addition to those required by applicable OMB Circulars will be cleared by responsible bureaus and offices on an individual basis.

Sec. 12.5 Waiver.

Only OMB can grant exceptions from the requirements of these Circulars when exceptions are not prohibited under existing laws.

SUBPART B - AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS

Sec. 12.11 Purpose.

This circular is issued pursuant to section 7505 of the Single Audit Act of 1984, (Pub. L. 98-502), and OMB Circular A-128. It establishes audit requirements for State and local governments that receive Federal aid, through the U.S. Department of the Interior and defines the Department's responsibilities for implementing and monitoring those requirements.

Sec. 12.12 Supersession.

The rule supersedes the requirements of Attachment P, 'Audit Requirements,' dated October 22, 1979, to OMB Circular A-102, 'Uniform requirements for grants to State and local governments,' among recipients of assistance for which the Department of the Interior is the cognizant audit agency.

Sec. 12.13 Background.

The Single Audit Act builds upon earlier efforts to improve audits of Federal aid programs. The Act requires State or local governments that receive \$100,000 or more a year in Federal funds to have an audit made for that year. Section 7505 of the Act requires the Director of the Office of Management and Budget to prescribe policies, procedures and guidelines to implement the Act. It specifies that the Director shall designate cognizant Federal agencies, determine criteria for making appropriate charges to Federal programs for the cost of audits, and provide procedures to assure that small firms or firms owned and controlled by disadvantaged individuals have the opportunity to participate in contracts for single audits.

Sec. 12.14 Policy.

The Single Audit Act requires the following:

(a) State or local governments that receive \$100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this Circular.

(b) State or local governments that receive between \$25,000 and \$100,000 a year have an audit made in accordance with this Circular, or in accordance with Federal laws and regulations governing the programs they participate in.

(c) State or local governments that receive less than \$25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or

regulation.

(d) Nothing in this paragraph exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law or in Circular A-102, 'Uniform requirements for grants to State or local governments.'

Sec. 12.15 Definitions.

For the purposes of this rule the following definitions from the Single Audit Act apply:

(a) Cognizant agency means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in Sec. 12.21 of this rule.

(b) Federal financial assistance means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State or local governments.

(c) Federal agency has the same meaning as the term 'agency' in section 551 (1) of title 5, U.S. Code.

(d) Generally accepted accounting principles has the meaning specified in the generally accepted government auditing standards.

(e) Generally accepted government auditing standards means the Standards for Audit of Government Organizations, Programs, Activities, and Functions, developed by the Comptroller General, dated February 27, 1981.

(f) Independent auditor means:

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

(g) Internal controls means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resource use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, and fairly disclosed in reports.

(h) Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(i) Local government means any unit of local government within a

State, including a county, a borough, municipality, a city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

(j) Major Federal assistance program, as defined by Pub. L. 98-502, is described in the appendix to this rule.

(k) Public accountants means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

(l) State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State regional, or interstate entity that has governmental functions and any Indian tribe.

(m) Subrecipient means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

Sec. 12.16 Scope of audit.

The Single Audit Act provides that:

(a) The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) The audit shall cover the entire operations of a State or local government or, at the option of that government, it may exclude departments, agencies or establishment that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives \$25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

(c) Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this rule. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements for grants to universities, hospitals, and other nonprofit organizations.

(d) The auditor shall determine whether:

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have a material effect on its financial statements and on each major Federal assistance program.

Sec. 12.17 Frequency of audit.

Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall honor requests for biennial audits by governments that have administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

Sec. 12.18 Internal control and compliance reviews.

The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

(a) Internal control review. In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

(b) Compliance review. The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(i) In making the test of transactions, the auditor shall determine whether:

The amounts reported as expenditures were for allowable services, and the records show that those who

received services or benefits were eligible to receive them.

(ii) In addition to transaction testing, the auditor shall determine whether:

Matching requirements, levels of effort and earmarking limitations were met; Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and amounts claimed or used for matching were determined in accordance with OMB Circular A-87, 'Cost principles for State and local governments,' and Attachment F of Circular A-102, 'Uniform requirements for grants to State and local governments.'

(iii) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to Compliance Supplement for Single Audits of State and Local Governments, issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statutes, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

Sec. 12.19 Subrecipients.

State or local governments that receive Federal financial assistance and provide \$25,000 or more of it in a fiscal year to a subrecipient shall:

(a) Determine whether State or local subrecipients have met the audit requirements of this rule and whether subrecipients covered by Circular A-110, 'Uniform requirements for grants to universities, hospitals, and other nonprofit organizations,' have met that requirement.

(b) Determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this rule, OMB Circular A-110, or through other means (e.g. program reviews) if the subrecipient has not yet had such an audit.

(c) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations.

(d) Consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

(e) Require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with this rule.

Sec. 12.20 Relation to other audit requirements.

The Single Audit Act provides that an audit made in accordance

with this rule shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

(a) The provisions of this rule do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

(b) The provisions of this rule do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

(c) A Federal agency that makes or contracts for audits made by recipients pursuant to this rule shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

Sec. 12.21 Department of the Interior responsibilities.

The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of OMB Circular A-128 and this rule.

(a) The Office of Management and Budget will assign cognizant agencies for States and their subdivisions. Other Federal agencies may cooperate with an assigned cognizant agency, in order to fulfill the cognizance responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

(b) A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this rule.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this rule. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for followup

action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this rule, so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

Sec. 12.22 Illegal acts or irregularities.

If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also Sec. 12.23(a)(3) of this part for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

Sec. 12.23 Audit reports.

Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

(a) The audit report shall state that the audit was made in accordance with the provisions of OMB Circular A-128. The report shall be made up of at least:

(1) The auditor's report on financial statements and or schedule of Federal assistance; the financial statements; and schedule of Federal assistance, showing the total expenditures each Federal assistance program as identified in the Catalog of Federal Domestic Assistance. Federal programs or grants that have not been assigned a catalog number shall be identified under the caption 'other Federal assistance.'

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the internal weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements. Negative assurance on those items not tested; Summary of all instances of noncompliance; and an identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

(b) The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

(c) All fraud, abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts of

which the auditors become aware, should normally be covered in a separate written report submitted in accordance with paragraph (f) of this section.

(d) In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

(e) The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

(f) In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to the recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

(g) Recipients of more than \$100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

(h) Recipients shall keep audit reports on file for three years from their issuance.

Sec. 12.24 Audit resolution.

As provided in Sec. 12.21, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned. Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

Sec. 12.25 Audit workpapers and reports.

Workpapers and reports shall be retained for minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

Sec. 12.26 Audit costs.

The cost of audits made in accordance with the provisions of this Circular are allowable charges to Federal assistance programs.

(a) The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provision of Circular A-87, 'Cost principles for State and local governments.'

(b) Generally, costs charged to Federal assistance programs for a single audit shall be consistent with the proportion of Federal funds to total funds expended by the recipient. These costs may be exceeded, however, if appropriate documentation demonstrates higher actual costs.

(c) The cost charged to any one program shall be reasonably proportionate to the cost of the audit effort devoted to that program.

Sec. 12.27 Sanctions.

The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with OMB Circular A-128. In cases of continued inability or unwillingness to have a proper audit, the Department of the Interior will consider other appropriate sanctions including:

Withholding a percentage of assistance payments until the audit is satisfactorily completed.

Withholding or disallowing overhead costs, and

Suspending the Federal assistance agreement until the audit is made.

Sec. 12.28 Auditor selection.

In arranging for audit services, State and local governments shall follow the procurement standards prescribed by Attachment O of Circular A-102, 'Uniform requirements for grants to State and local governments.' The standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

Sec. 12.29 Small and minority audit firms.

Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this rule. Recipients of Federal assistance provided by this Department shall take the following steps to further this goal:

(a) Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

(b) Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms owned and controlled by socially and economically disadvantaged individuals.

(c) Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

(d) Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs

and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

(e) Encourage contracting with consortiums of small audit firms as described in paragraph (a) of this section when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

(f) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

Sec. 12.30 Reporting.

The Department of the Interior will report to the Director of OMB on or before March 1, 1987, and annually thereafter on the effectiveness of State and local governments in carrying out the provisions of Circular A-128. The report must identify each State or local government or Indian tribe that, in the opinion of the agency, is failing to comply with the circular.

Sec. 12.31 Supplemental program guidance.

Each bureau and office of this Department may issue appropriate supplemental guidance to implement the requirements of this rule within its federally-assisted programs, subsequent to the concurrence and approval of the text by the Assistant Secretary-Policy, Budget and Administration.

APPENDIX TO SUBPART B - DEFINITION OF MAJOR PROGRAM AS PROVIDED IN PUB. L. 98-502

'Major Federal Assistance Program' for State and local governments having Federal assistance expenditures between \$100,000 and \$100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of \$300,000, or 3 percent of such total expenditures. Where total expenditures of Federal assistance exceed \$100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs

More than	But less than	Major Federal assistance program means any program that exceeds
\$100 million	1 billion	\$3 million
1 billion	2 billion	4 million
2 billion	3 billion	7 million
3 billion	4 billion	10 million
4 billion	5 billion	13 million
5 billion	6 billion	16 million
6 billion	7 billion	19 million
Over 7 billion		20 million

SUBPART C - UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

GENERAL

Sec. 12.41 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

Sec. 12.42 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

Sec. 12.43 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from 'programmatic' requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for 'grant' and 'subgrant' in this section and except where qualified by 'Federal') a procurement contract under a grant or subgrant, and means a

procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of 5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF-269 'Financial Status Report' (or other equivalent report); (2) for construction grants, the SF-271 'Outlay Report and Request for Reimbursement' (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the U.S. Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash

disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted - not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of 'grant' in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than 'equipment' as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority

would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. Termination does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation.

renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Sec. 12.44 Applicability.

(a) General. Subparts A-D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of Sec. 12.46, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583 - the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)(9)(G); HHS grants for WIN are subject to this part;

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administration expenses under The Food Stamp Act of 1977 (section 16 of Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section.

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits.

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) Entitlement programs. Entitlement programs enumerated above in Sec. 12.44(a) (3) through (8) are subject to Subpart E.

Sec. 12.45 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded.

except to the extent they are required by statute, or authorized in accordance with the exception provision in Sec. 12.46.

Sec. 12.46 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the Federal Register.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

PRE-AWARD REQUIREMENTS

Sec. 12.50 Forms for applying for grants.

(a) Scope. (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) Authorized forms and instructions for governmental organizations. (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

Sec. 12.51 State plans.

(a) Scope. The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, 'Intergovernmental Review of Federal Programs,' States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for

plans that are subject to regulations implementing the Executive order.

(b) Requirements. A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) Assurances. In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions.

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) Amendments. A State will amend a plan whenever necessary to reflect:

New or revised Federal statutes or regulations or a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

Sec. 12.52 Special grant or subgrant conditions for 'high-risk' grantees.

(a) A grantee or subgrantee may be considered 'high risk' if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

POST-AWARD REQUIREMENTS

FINANCIAL ADMINISTRATION

Sec. 12.60 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to -

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) Financial reporting. Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) Accounting records. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) Internal control. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) Budget control. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost

information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) Allowable cost. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) Cash management. Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

Sec. 12.61 Payment.

(a) Scope. This section prescribes the basic standard and methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) Basic standard. Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205.

(c) Advances. Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) Reimbursement. Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) Working capital advances. If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not

feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) Effect of program income, refunds, and audit recoveries on payment. (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) Withholding payments. (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless -

(i) The grantee or subgrantee has failed to comply with grant award conditions, or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with Sec. 43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) Cash depositories. (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) Interest earned on advances. Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

Sec. 12.62 Allowable costs.

(a) Limitation on use of funds. Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) Applicable cost principles. For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a -	Use the principles in -
State, local or Indian tribal government	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular	OMB Circular A-122.
Educational institutions	OMB Circular A-21.
For-profit organization Other than a hospital and an organization named in OMB Circular A-122 as not subject to that Circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards

that comply with cost principles acceptable to the Federal agency.

Sec. 12.63 Period of availability of funds.

(a) General. Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) Liquidation of obligations. A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

Sec. 12.64 Matching or cost sharing.

(a) Basic rule: Costs and contributions acceptable. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements apply.

(b) Qualifications and exceptions - (1) Costs borne by other Federal grant agreements. Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) General revenue sharing. For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) Cost or contributions counted towards other Federal cost-sharing requirements. Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) Costs financed by program income. Costs financed by program income, as defined in Sec. 12.65, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in Sec. 12.65(g).)

(5) Services or property financed by income earned by

contractors. Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) Records. Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) Special standards for third party in-kind contributions.

(i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect cost. Cost sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) Valuation of donated services - (1) Volunteer services. Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) Employees of other organizations. When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the

employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) Valuation of third party donated supplies and loaned equipment or space. (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) Valuation of third party donated equipment, buildings, and land. If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) Awards for capital expenditures. If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) Other awards. If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in Sec. 12.62, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) Valuation of grantee or subgrantee donated real property for construction/acquisition. If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) Appraisal of real property. In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

Sec. 12.65 Program income.

(a) General. Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) Definition of program income. Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. 'During the grant period' is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) Cost of generating program income. If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) Governmental revenues. Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) Royalties. Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See Sec. 12.74.)

(f) Property. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of Sec. 12.71 and Sec. 12.72.

(g) Use of program income. Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) Deduction. Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) Addition. When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) Cost sharing or matching. When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) Income after the award period. There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

Sec. 12.66 Non-Federal audit.

(a) Basic rule. Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) Subgrantees. State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide \$25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, 'Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations' have met the audit requirement. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds:

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) Auditor selection. In arranging for audit services, Sec. 12.36 shall be followed.

CHANGES, PROPERTY, AND SUBAWARDS

Sec. 12.70 Changes.

(a) General. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) Relation to cost principles. The applicable cost principles (see Sec. 12.62) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) Budget changes - (1) Nonconstruction projects. Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories)

(2) Construction projects. Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) Combined construction and nonconstruction projects. When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) Programmatic changes. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subcontracting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in

addition to the approval requirements of Sec. 12.76 but does not apply to the procurement of equipment, supplies, and general support services.

(e) Additional prior approval requirements. The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) Requesting prior approval. (1) A request for prior approval of any budget revision will be in the same budget format the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see Sec. 12.62) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

Sec. 12.71 Real property.

(a) Title. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) Use. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) Disposition. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) Retention of title. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sale of property. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer of title. Transfer title to the awarding agency or to a third-party designated/approved by the awarding

agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

Sec. 12.72 Equipment.

(a) Title. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) States. A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) Use. (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in Sec. 12.65(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) Management requirements. Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) Disposition. When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) Federal equipment. In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) Right to transfer title. The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third party named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 12.72(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

Sec. 12.73 Supplies.

(a) Title. Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) Disposition. If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

Sec. 12.74 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

Sec. 12.75 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, 'Debarment and Suspension.'

Sec. 12.76 Procurement.

(a) States. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and implementing regulations. Other grantees and subgrantees follow paragraphs (b) through (i) in this section.

(b) Procurement standards. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or

subgrantees officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only -

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and

sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest.

Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) Competition. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of Sec. 12.76. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business.

(ii) Requiring unnecessary experience and excessive bonding.

(iii) Noncompetitive pricing practices between firms or between affiliated companies.

(iv) Noncompetitive awards to consultants that are on retainer contracts.

(v) Organizational conflicts of interest.

(vi) Specifying only a 'brand name' product instead of allowing 'an equal' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project.

to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a 'brand name or equal' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) Methods of procurement to be followed. (1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than \$25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in Sec. 12.76(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements

apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number known suppliers, providing them sufficient time prior the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. response to publicized requests for proposals shall be honor, the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is

Determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) Contracting with small and minority firms, women's business enterprise and labor surplus area firms. (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) Contract cost and price. (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the

particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see Sec. 12.62). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) Awarding agency review. (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review (delete " ") procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed \$25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed \$25,000, specifies a 'brand name' product; or

(iv) The proposed award over \$25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than \$25,000.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis:

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) **Bonding requirements.** For construction or facility improvement contracts or subcontracts exceeding \$100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The 'bid guarantee' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A 'performance bond' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A 'payment bond' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) **Contract provisions.** A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) **Administrative, contractual, or legal remedies** in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts other than small purchases)

(2) **Termination for cause and for convenience** by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)

(3) **Compliance with Executive Order 11246** of September 24, 1965 entitled 'Equal Employment Opportunity,' as amended by executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)

(4) **Compliance with the Copeland 'Anti-Kickback' Act** (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

(5) **Compliance with the Davis-Bacon Act** (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5) (Construction contracts in excess of \$2,000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) **Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act** (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers)

(7) **Notice of awarding agency requirements and regulations** pertaining to reporting.

(8) **Notice of awarding agency requirements and regulations** pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or such contract.

(9) **Awarding agency requirements and regulations** pertaining to copyrights and rights in data.

(10) **Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives** to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) **Retention of all required records for three years** after grantees or subgrantees make final payments and all other pending matters are closed.

(12) **Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(b)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15).** (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)

(13) **Mandatory standards and policies** relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

Sec. 12.77 Subgrantees.

(a) States. States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with Sec. 12.82 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) All other grantees. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) Exceptions. By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 12.50;

(2) Section 12.51;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in Sec. 12.61; and

(4) Section 12.90.

REPORTS, RECORDS RETENTION, AND ENFORCEMENT

Sec. 12.80 Monitoring and reporting program performance.

(a) Monitoring by grantees. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) Nonconstruction performance reports. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support.

Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) Construction performance reports. For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) Significant developments. Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) Waivers, extensions. (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report

from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

Sec. 12.81 Financial reporting.

(a) General. (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) Financial Status Report - (1) Form. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with Sec. 12.81(e)(2)(iii).

(2) Accounting basis. Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) Frequency. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon

expiration or termination of grant support.

(4) Due date. When reports are required on a quarterly or semiannual basis, they will be due 30 days after the report period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) Federal Cash Transactions Report - (1) Form. (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) Forecasts of Federal cash requirements. Forecasts of Federal cash requirements may be required in the 'Remarks' section of the report.

(3) Cash in hands of subgrantees. When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) Frequency and due date. Grantees must submit report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) Request for advance or reimbursement - (1) Advance payments. Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) Reimbursements. Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in Sec. 12.81(b)(3).

(e) Outlay report and request for reimbursement for construction programs - (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for

Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in Sec. 12.81(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in Sec. 12.81(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by Sec. 12.81(b)(3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in Sec. 12.81(d).

(iii) The Federal agency may substitute the Financial Status Report specified in Sec. 12.81(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

Accounting basis. The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by Sec. 12.81(b)(2).

Sec. 12.82 Retention and access requirements for records.

(a) Applicability. (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see Sec. 12.76(i)(10).

(b) Length of retention period. (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed

for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) Starting date of retention period - (1) General. When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) Real property and equipment records. The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) Records for income transactions after grant or subgrant support. In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) Indirect cost rate proposals, cost allocations plans, etc. This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) If submitted for negotiation. If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) If not submitted for negotiation. If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) Substitution of microfilm. Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) Access to records - (1) Records of grantees and subgrantees. The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) Expiration of right of access. The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) Restrictions on public access. The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records unless required by Federal, State, or local law. grantees and subgrantees are not required to permit public access to their records.

Sec. 12.83 Enforcement.

(a) Remedies for noncompliance. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency.

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program.

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) Hearings, appeals. In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) Effects of suspension and termination. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) Relationship to Debarment and Suspension. The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to 'Debarment and Suspension' under E.O. 12549 (see Sec. 12.75).

Sec. 12.84 Termination for convenience.

Except as provided in Sec. 12.83 awards may be terminated in

whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either Sec. 12.83 or paragraph (a) of this section.

AFTER-THE-GRANT REQUIREMENTS

Sec. 12.90 Closeout.

(a) General. The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) Reports. Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.

(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs 271) (as applicable.)

(3) Final request for payment (SF-270) (if applicable).

(4) Invention disclosure (if applicable).

(5) Federally-owned property report:

In accordance with Sec. 12.72(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) Cost adjustment. The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) Cash adjustments. (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be returned for use on other grants.

Sec. 12.91 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds

on the basis of a later audit or other review:

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in Sec. 12.82.

(d) Property management requirements in Sec. 12.71 and 12.72, and

(e) Audit requirements in Sec. 12.66.

Sec. 12.92 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

ENTITLEMENTS - (RESERVED)

Sec. 12.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of 'ineligible' in Sec. 12.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment.

suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

Sec. 12.105 Definitions.

(a) Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) Agency. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

(e) Conviction. A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is 'debarred.'

(g) Debarring official. An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The debarring official for the Department of the Interior is the Director, Office of Acquisition and Property Management.

(h) Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency

implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) Nonprocurement List. The portion of the List of Parties Excluded from Federal Procurement or Nonprocurement Programs compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

(o) Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(2) (Reserved)

(q) Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) Respondent. A person against whom a debarment or suspension action has been initiated.

(s) State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) Suspending official. An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The suspending official for the Department of the Interior is the Director, Office of Acquisition and Property Management.

(u) Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is 'suspended.'

(v) Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(w) Exception official. The official authorized to grant exceptions under Sec. 12.215 for the Department of the Interior is the Director, Office of Acquisition and Property Management.

(x) Findings of fact official. The official authorized to conduct prepare findings of fact, if required under Sec. 12.314(b)(2) or Sec. 12.413(b)(2), is the Director, Office of Hearings and Appeals, or designee.

(53 FR 19199, May 26, 1988, and 19204, May 26, 1988)

Sec. 12.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as 'covered transactions.'

(1) Covered transaction. For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) Primary covered transaction. Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the

U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) Lower tier covered transaction. A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently \$25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(1) Principal investigators.

(2) Providers of federally-required audit services.

(3) Exceptions. The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subter awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government.

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities.

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(viii) Transactions entered into pursuant to Pub. L. 93-638.

(3) Department of the Interior covered transaction. These Department of the Interior regulations apply to the Department's domestic assistance covered transactions (whether by

a Federal agency, recipient, subrecipient, or intermediary) including, except as noted in paragraph (a)(2) of this section: Grants, cooperative agreements, scholarships, fellowships, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreement subawards, subcontracts and transactions at any tier that are charged as direct or indirect costs, regardless of type or (including subter awards under awards which are statutory entitlement or mandatory awards).

(b) Relationship to other sections. This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, 'Effect of Action,' Sec. 12.200, 'Debarment or suspension,' sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in Sec. 12.110(a). Sections 12.325, 'Scope of debarment,' and 12.420, 'Scope of suspension,' govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) Relationship to Federal procurement activities. Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

(53 FR 19199, and 19204, May 26, 1988)

Sec. 12.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

EFFECT OF ACTION

Sec. 12.200 Debarment or suspension.

(a) Primary covered transactions. Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, no agency shall enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to Sec. 12.215.

(b) Loser tier covered transactions. Except to the extent prohibited by law, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see Sec. 12.110(a)(1)(ii)) for the period of their debarment or suspension.

(c) Exceptions. Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

(8) Transactions entered into pursuant to Pub. L. 93-638.

(53 FR 19199, and 19204, May 26, 1988)

Sec. 12.205 Ineligible persons.

Persons who are ineligible, as defined in Sec. 12.105(i), are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

Sec. 12.210 Voluntary exclusion.

Persons who accept voluntary exclusions under Sec. 12.315 are excluded in accordance with the terms of their settlements. The Department of the Interior shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

Sec. 12.215 Exception provision.

The Department of the Interior may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and Sec. 12.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with Sec. 12.505(a).

Sec. 12.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency and participants may continue covered transaction, existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in Sec. 12.215.

Sec. 12.225 Failure to adhere to restrictions.

Except as permitted under Sec. 12.215 or Sec. 12.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see Appendix B of this subpart), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

DEBARMENT

Sec. 12.300 General

The debarring official may debar a person for any of the causes in Sec. 12.305, using procedures established in Sec. 12.310 through 12.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

Sec. 12.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of Sec. 12.300 through 12.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack

of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in Sec. 12.215 or Sec. 12.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under Sec. 12.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of the drug-free workplace requirements for grants, relating to providing a drug-free workplace, as set forth in Sec. 12.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

(53 FR 19199, 19204, May 26, 1988, as amended at 54 FR 4950, 4963, Jan. 31, 1989; 55 FR 21701, May 25, 1990)

Sec. 12.310 Procedures.

The Department of the Interior shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in Sec. 2.311 through 12.314.

Sec. 12.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

Sec. 12.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under Sec. 12.305 for proposing debarment;

(d) Of the provisions of Sec. 12.311 through Sec. 12.314, and any other Department of the Interior procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

Sec. 12.313 Opportunity to contest proposed debarment.

(a) Submission in opposition. Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) Additional proceedings as to disputed material facts. (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

Sec. 12.314 Debarring official's decision.

(a) No additional proceedings necessary. In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) Additional proceedings necessary. (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c)(1) Standard of proof. In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) Burden of proof. The burden of proof is on the agency proposing debarment.

(d) Notice of debarment official's decision. (1) If the debarment official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in Sec. 12.215.

(2) If the debarment official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

Sec. 12.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, the Department of the Interior may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see Subpart E).

Sec. 12.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the causes. If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of the drug-free workplace requirements for grants of this subpart generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of the drug-free workplace requirements for grants of this subpart (see 12.305(c)(5)), the period of debarment shall not exceed five years.

(53 FR 19199, 19204, May 26, 1988, as amended at 54 FR 4950, 4963, Jan. 31, 1989; 55 FR 21701, May 25, 1990)

Sec. 12.325 Scope of debarment.

(a) Scope in general. (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other

organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate or the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see Sec. 2.311 through 12.314).

(b) Imputing conduct. For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) Conduct imputed to participant. The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) Conduct imputed to individuals associated with participant. The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) Conduct of one participant imputed to other participants in a joint venture. The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

SUSPENSION

Sec. 12.400 General.

(a) The suspending official may suspend a person for any of the causes in Sec. 12.405 using procedures established in Sec. 2.410 through 12.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in Sec. 12.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic

documents such as grants, cooperative agreements, loan authorizations, and contracts.

Sec. 12.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of Sec. 12.400 through 12.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in Sec. 12.305(a); or

(2) That a cause for debarment under Sec. 12.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

Sec. 12.410 Procedures.

(a) Investigation and referral. Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) Decisionmaking process. The Department of the Interior shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in Sec. 12.411 through Sec. 12.413.

Sec. 12.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under Sec. 12.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of Sec. 12.411 through Sec. 12.413 and any other Department of the Interior procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

Sec. 12.412 Opportunity to contest suspension.

(a) Submission in opposition. Within 30 days after receipt of the

notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) Additional proceedings as to disputed material facts. (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment; or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

Sec. 12.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see Sec. 12.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) No additional proceedings necessary. In actions: Based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) Additional proceedings necessary. (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) Notice of suspending official's decision. Prompt written notice of the suspending official's decision shall be sent to the respondent.

Sec. 12.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

Sec. 12.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see Sec. 12.325), except that the procedures of Sec. 12.410 through 12.413 shall be used in imposing a suspension.

RESPONSIBILITIES OF GSA, DEPARTMENT OF THE INTERIOR AND PARTICIPANTS

Sec. 12.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

Sec. 12.505 Department of the Interior responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which the Department of the Interior has granted exceptions under Sec. 12.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in Sec. 12.500(b) and of the exceptions granted under Sec. 12.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel.).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

Sec. 12.510 Participants' responsibilities.

(a) Certification by participants in primary covered transactions. Each participant shall submit the certification in Appendix A to this subpart for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel.). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) Certification by participants in lower tier covered transactions. (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this subpart for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel.).

(c) Changed circumstances regarding certification. A participant shall provide immediate written notice to the Department of the Interior if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

DRUG-FREE WORKPLACE REQUIREMENTS (GRANTS)

Source: 55 FR 21688, 21701, May 25, 1990, unless otherwise

noted.

Editorial Note: Nomenclature changes for Sec. 12.600 through Sec. 12.635 appear at 55 FR 21702, May 25, 1990

Sec. 12.600 Purpose.

(a) The purpose of the drug-free workplace requirements for grants is to carry out the Drug-Free Workplace Act of 1988 by requiring that -

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

Sec. 12.605 Definitions.

(a) Except as amended in this section, the definitions of Sec. 12.105 apply to the drug-free workplace requirements for grants.

(b) For purposes of this subpart -

(1) Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) Drug-free workplace means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) Employee means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All direct charge employees;

(ii) All indirect charge employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent

contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) Grant means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) Grantee means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) Individual means a natural person;

(10) State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

Sec. 12.610 Coverage.

(a) The drug-free workplace requirements for grants applies to any grantee of the agency.

(b) The drug-free workplace requirements for grants applies to any grant, except where application of the drug-free workplace requirements for grants would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subpart D apply to matters covered by the drug-free workplace requirements for grants, except where specifically modified by the drug-free workplace requirements for grants. In the event of any conflict between provisions of the drug-free workplace requirements for grants and other provisions of the drug-free workplace requirements for grants, the provisions of the drug-free workplace requirements for grants are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

(55 FR 21688, 21701, May 25, 1990)

Sec. 12.615 Grounds for suspension of payments, suspension or

termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of the drug-free workplace requirements for grants if the agency head or his or her official designee determines, in writing, that -

(a) The grantee has made a false certification under Sec. 12.630.

(b) With respect to a grantee other than an individual -

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual -

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

Sec. 12.620 Effect of violation.

(a) In the event of a violation of the drug-free workplace requirements for grants as provided in Sec. 12.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of subpart D.

(b) Upon issuance of any final decision under subpart D requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (see Sec. 12.320(a)(2) of subpart D).

Sec. 12.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Sec. 12.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to subpart D.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant.

However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(1) The Department of the Interior is not designating a central location for the receipt of the statewide certifications from States. Therefore, each State shall ensure that a copy of their certification is submitted individually with respect to each grant application sent to the Bureau/Office within the Department.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submit State agency certification are not required to make a certifi for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(i) The Department of the Interior is not designating a central location for the receipt of State agency-wide certifications from State agencies. Therefore, each State agency shall ensure that a copy is submitted individually with respect to each grant application sent to the Bureau/Office within the Department.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on

which the policy statement and program shall be in place.

(55 FR 21688, 21701, May 25, 1990)

Sec. 12.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(i) The Department of the Interior is not designating a central location for the receipt of these notices from grantees. Therefore, the grantee shall provide this written notice to every grant officer, or other designee within a Bureau/Office of the Department on whose grant activity the convicted employee was working.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(1) The Department of the Interior is not designating a central location for the receipt of the notice from a grantee who is an individual. Therefore, the grantee who is an individual shall provide this written notice to the grant officer or other designee within the Bureau/Office within the Department.

(Approved by the Office of Management and Budget under control number 0991-0002)

(55 FR 21688 and 21702, May 25, 1990)

APPENDIX A TO SUBPART D - CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER

RESPONSIBILITY MATTERS - PRIMARY COVERED TRANSACTIONS

INSTRUCTIONS FOR CERTIFICATION

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms 'covered transaction,' 'debarred,' 'suspended,' 'ineligible,' 'lower tier covered transaction,' 'participant,' 'person,' 'primary covered transaction,' 'principal,' 'proposal,' and 'voluntarily excluded,' as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled 'Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transaction,' provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the

method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel.).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS - PRIMARY COVERED TRANSACTIONS

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX B TO SUBPART D - CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION - LOWER TIER COVERED TRANSACTIONS

INSTRUCTIONS FOR CERTIFICATION

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in

addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms 'covered transaction,' 'debarred,' 'suspended,' 'ineligible,' 'lower tier covered transaction,' 'participant,' 'person,' 'primary covered transaction,' 'principal,' 'proposal,' and 'voluntarily excluded,' as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled 'Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transaction,' without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely up certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel.).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION - LOWER TIER COVERED TRANSACTIONS

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX C TO SUBPART D - CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

INSTRUCTIONS FOR CERTIFICATION

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial

body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All direct charge employees; (ii) All indirect charge employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

ALTERNATE I (GRANTEES OTHER THAN INDIVIDUALS)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about -

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will -

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of

convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant:

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted -

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

.
. .
. . .

(Check) if there are workplaces on file that are not identified here.

ALTERNATE II. (GRANTEES WHO ARE INDIVIDUALS)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant:

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

(55 FR 21690, 21701, May 25, 1990)

PUBLIC LAW 101-301
IMPLEMENTATION PROCEDURES
INFORMATIONAL BROCHURE



Public Law 100-297 Amendments
Implementing Procedures Development Team

Bureau Of Indian Affairs
Department Of The Interior

September 1993

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EASTERN NAVAJO AGENCY

Public Law 101-301 Implementation Procedures

Informational Brochure

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**Compiled By The Office of Indian Education Programs
Albuquerque Field Office**

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CONSULTATION ITEM #5



CONSULTATION ITEM/TOPIC:

Public Law 101-301 "Miscellaneous Im Law Amendments"

POTENTIAL ISSUE OR CHANGE:

P.L. 101-301 permits Tribes and author Tribal Grant Schools to request Congressionally appropriated funds Facilities Operation and Maintenance Minor Improvement and Repair (Hes Safety Abatement); Major Facili Improvement and Repair and Facili Construction funds for elementary secondary education be included in gra as authorized by P.L. 100-297.

REASON FOR PROPOSING ISSUE OR CHANGE:

To clarify the process the BIA will use implement the inclusion of educat facilities programs and school construct projects in P.L. 101-297 grants. The process will not change the way Facili Operation and Maintenance funds administered.

CURRENT OPTION(S) BEING CONSIDERED BY THE BUREAU:

To use the P.L. 100-297 grant document the vehicle to transfer funds under amendment. Only minimal changes will made to existing instructions and forms include construction accounts.

To incorporate into the P.L. 100- process, 43 CFR Part 12 - Single Audit and Administrative and Au Requirements and Cost Principals Assistance Programs, as the procedures applying for construction and FI&R gra

The procedures under 43 CFR Part provide for the use of Standard Form as the application form.

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BACKGROUND

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The Bureau of Indian Affairs established a team composed of representatives of Tribal P.L. 100-297 grant schools; the Office of Construction Management; Office of Indian Education Programs; the Bureau's Facilities Management Construction Center; Bureau of Indian Affairs Contracts Officer, and the Department of Interior's Office of the Solicitor, to develop recommended implementation procedures relative to the authorities contained in P.L. 100-297, as amended by P.L. 101-301.

As a result of the Team's work, the Bureau of Indian Affairs is proposing to incorporate into the P.L. 100-297 grant process 43 CFR Part 12, A-D, as the application process which outlines the facilities construction grants requirements.

Rationale:

- a. These requirements were promulgated prior to the enactment of P. L. 100-297 and have been incorporated into the OMB Audit and Reporting Requirements.
- b. These requirements apply to all Department of the Interior grants and treat applicants equally.
- c. The Department of the Interior and other Federal agencies have awarded grants to Federally recognized tribes using this established application process. Thus, Tribes are familiar with the requirements.

The Bureau of Indian Affairs is not proposing to change how appropriated facilities funding or construction projects are identified and prioritized as a result of the P.L. 101-301 amendments to P.L. 100-297. The amendments did not create a separate priority ranking process for P.L. 100-297 grant schools to obtain appropriated facilities funding. However, once facilities funds or a construction project is identified for a grant school and funds are appropriated by Congress for the project, the Tribe or its authorized representatives may request the funds be included in their school grant.

For several of the facilities construction accounts, prioritization of projects is based on deficiencies identified in the BIA facilities inventory, the FACCOM system. For new school construction, P.L. 100-297 grant schools will still be required to submit applications and compete under the priority ranking procedures for new school construction with other BIA-funded schools. The Bureau of Indian Affairs is not proposing to change or supersede these established prioritization processes.

MISCELLANEOUS INDIAN LAW AMENDMENTS

The following is the amending language from P.L. 101-301 to P.L. 100-297 with regard to facilities accounts:

- (g) (1) Paragraph (2) of subsection 5205(a) of the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2504 (a)) is amended to read as follows: (2) to the extent requested by such

Indian tribe or tribal organization, the total amount of funds provided from operations and maintenance accounts and, notwithstanding section 105 of the Indian Self-determination Act (25 U.S.C. 490f), or any other provision of law, other facilities accounts for such schools for such fiscal year including but not limited to all those referenced under section 1126(d) of the Education Amendments of 1978, or any other law), and, (2) Subsection (b) of section 5205 of the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2504(b) is amended by adding the following new paragraph:

"(4) Notwithstanding the provision of paragraph 5204(a)(2) of the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2503(a)(2), with respect to funds from facilities improvement and repair, alteration and renovation (major or minor), health and safety, or new construction accounts included in the grant under such paragraph (a)(2), the grantee shall maintain a separate account for such funds and shall, at the end of the period designated for the work covered by the funds received, render a separate accounting of the work done and the funds used to the Secretary. Funds received from these accounts may only be used for the purposes for which they were appropriated and for the work encompassed by the application or submission under which they were received.....

THE IMPLEMENTATION PROCESS

The following is an outline of the proposed implementation process for Tribal Governments or their officially sanctioned representatives regarding applications and grants under P.L. 100-297, as amended by P.L. 101-301:

1. Congress passes Department of Interior, Bureau of Indian Affairs Construction Appropriations.
2. Facilities Management and Construction Center (FMCC) notifies affected Tribes of projects and the amount of funding which may be granted.
3. The Tribal government or officially sanctioned representative of the Tribe identified in the tribal resolution requests that facilities construction project funds be included in the P.L. 100-297 Grant by submission of Standard Form 424 and all other information required under 43 CFR Part 12, A-D, to the Office of Indian Education Programs line officer.
4. The Office of Indian Education Programs line officer convenes a meeting of the Agency/Area/and FMCC technical facilities construction experts to review the facilities construction grant application and make a determination on the capabilities of the applicant to perform the identified project following the provisions outlined in 43 CFR Part 12, A-D. Once a determination is made, the applicant will be notified in writing of the determination and a negotiation meeting will be arranged to determine the specific requirements of the project.
5. Once the negotiations are finalized, a construction award will be implemented for a specific designated phase (planning, design or construction) of the total project and authorization for transfer of the negotiated amount for that phase of the project to the P.L.100-297 grant will be made.

6. Upon completion of one phase of the project, the same procedures will be employed to negotiate the next phase of the project and so on until the project is complete.

43 CFR PART 12 AND STANDARD FORM 424 AND INSTRUCTIONS

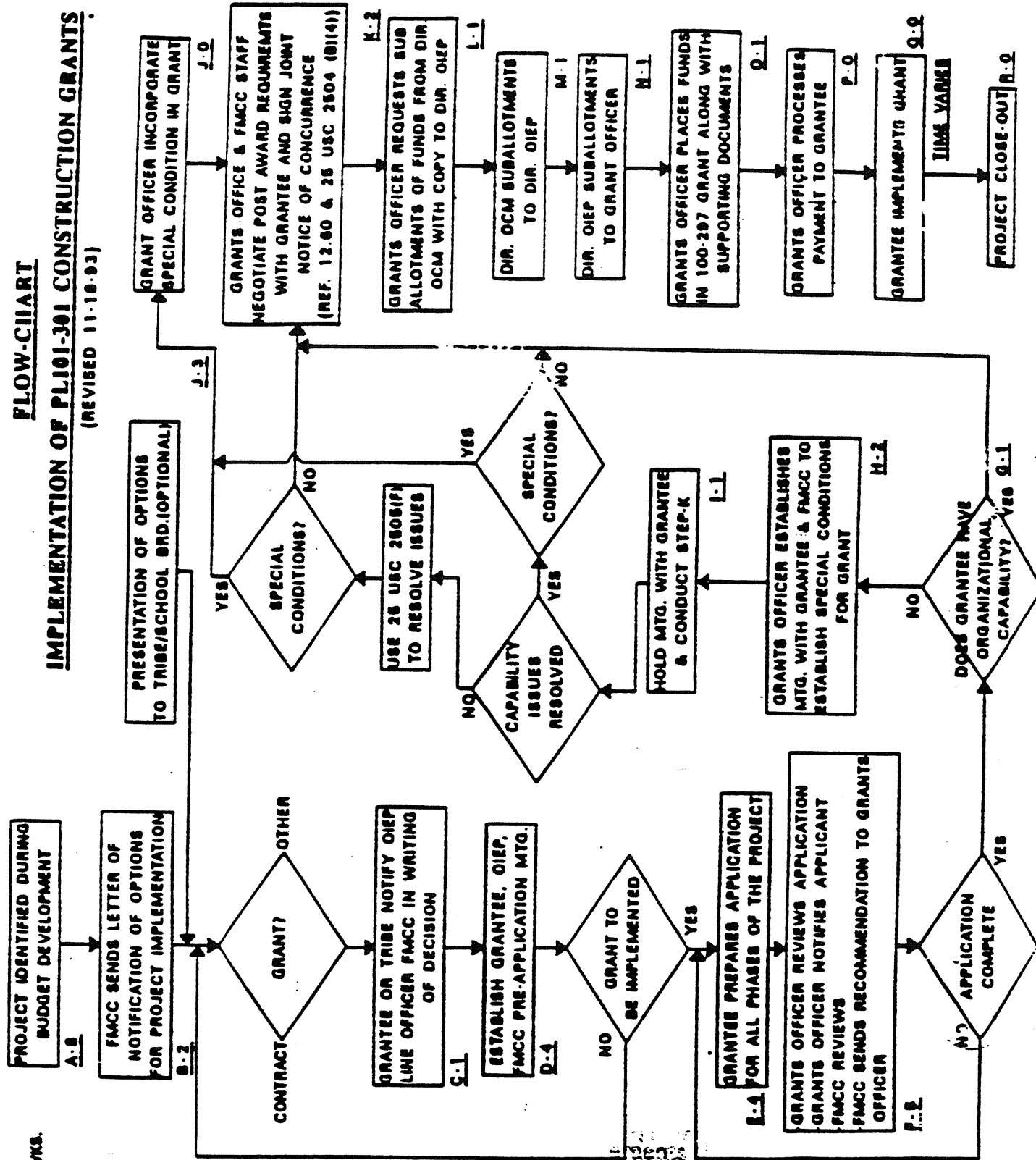
Due to printing limitations, a complete copy of 43 CFR Part 12 and Standard Form 424 and Instructions is not being included in this consultation booklet. However, under separate cover, copies will be mailed to all parties to whom the consultation booklet is distributed.

P.L. 101-301

FACILITIES CONSTRUCTION GRANTS

[Faint, illegible text]

FLOW-CHART IMPLEMENTATION OF PL101-301 CONSTRUCTION GRANTS (REVISED 11-18-93)



NOTES:

TRIP [A] [B] WKS.

STEPS FOR IMPLEMENTING PL 100-297 CONSTRUCTION GRANTS Exceeding \$100,000

STEP A - PROJECTS IDENTIFIED DURING BUDGET PROCESS

1. New School Construction projects will be identified during the budget process based on the Education Facilities Construction Priority List as published in the Federal Register.
2. Facilities Improvement and Repair projects will be identified during the budget process based on FACCOM automated priority ranking process.

Step B - NOTIFICATION OF IDENTIFIED CONSTRUCTION PROJECTS

1. Director, FMCC will send written notification to the tribe, grantee and grants officer that a construction project has been identified for funding consideration. The options for construction project implementation will be identified in the notification. These options include:
 - a. Tribal implementation using a P.L. 93-638 contract;
 - b. Grantee implementation using an amendment to the existing P.L. 100-297 Grant; or
 - c. BIA implementation.
2. The notification will indicate that the tribe or grantee may request a presentation of the options prior to making a decision.
3. The notification will include a requirement for a written decision to be reached within 30 calendar days.

Step C - GRANTEE NOTIFIES, IN WRITING, GRANTS OFFICER AND FMCC OF DECISION

Step D - PRE-APPLICATION MEETING

1. Grants Officer establishes pre-application meeting with Grantee; FMCC personnel; and, if applicable, the Area Facilities Manager.
2. Grants Officer notifies Grantee, in writing, of the date, time, location, and purpose of pre-application meeting. The following will be included in the notification:
 - a. Preliminary Program of Requirements (POR)
 - b. SF-424 Application Forms

- c. 43 CFR Part 12
- d. Applicable Standards, Codes and Project Requirements
- e. Flow Chart and Steps for Implementing PL 100-297
Construction Grants exceeding \$100,000
- f. Questions and Answers

3. At pre-application meeting, Grantee will be furnished a full description of application requirements including:

- a. OMB Circular A-128, Audit Requirements for State and Local Governments.
- b. OMB Circular A-102, Grants and Cooperative Agreements with State and Local Governments.
- c. OMB Circular A-87, Cost Principals for State and Local Governments.
- d. Budget information

Step E - GRANTEE PREPARES APPLICATION

- 1. Grantee may apply for any or all phases, that is, Planning, Design, and Construction, of the project.
- 2. The following are prepared as part of the application package:
 - a. SF 424 - Face Sheet
 - b. SF 424c - Budget Information (Construction)
 - c. Program Narrative which describes:
 - i Objectives
 - ii Approach (Plan of Action)
 - iii Organizational Capability
 - d. SF 424 d. Standard Assurances (Construction) with additional applicable assurances.

Step F - GRANTEE SUBMITS ORIGINAL AND ONE COPY OF APPLICATION TO GRANTS OFFICER FOR REVIEW

- 1. The Grants Officer reviews application. If application is incomplete, the Grants Officer shall:
 - a. -- Notify the applicant in writing of the deficiencies; and
 - b. Offer technical assistance to the applicant.
- 2. The Grants Officer notifies applicant in writing of receipt of the application and furnishes the application to the Director, FMCC, for technical review.

3. FMCC will review and comment on:
 - a. Technical capabilities of Grantee when information is available based on previous project performance
 - b. Project budget submitted
 - c. Program Narrative
4. FMCC will submit written recommendation to Grants Officer.

Step G - GRANTS OFFICER DETERMINES ORGANIZATIONAL CAPABILITY

1. Grants Officer determines if Grantee is capable in accordance with 25 U.S.C. 2505(b)(2)(C) and with 43 CFR 12.52 (a) through review of:
 - a. Application for administrative management systems, i.e., financial reporting documents, audits, if any, property management, personnel systems, etc.
 - b. Written recommendations from Director, FMCC.
2. If Grants Officer determines that Grantee is capable, go to Step K.
3. If Grants Officer determines Grantee lacks capabilities, go to Step H.

Step H - THE GRANTS OFFICER ESTABLISHES A MEETING TO NEGOTIATE SPECIAL CONDITIONS

1. Grant Officer proposes special conditions for grant in accordance with in 43 CFR 12.52(b).
2. Grant Officer establishes meeting with Grantee, FMCC personnel, and, if applicable, Area Facilities Manager for review of the proposed special conditions.
3. Grants Officer notifies Grantee in writing of the proposed special conditions and of the date, time, and location of the meeting.

Step I - MEETING ON NEGOTIATIONS OF SPECIAL CONDITIONS

1. Grants Officer meets with Grantee; FMCC personnel; and, if applicable, the Area Facilities Manager.
2. If Grantee agrees to special conditions, go to Step J.
3. If organization capability issues are resolved and Grants Officer determines special conditions are not necessary, go to Step K.

4. If issues are not resolved, Grants Officer and Grantee resolve in accordance with 25 USC 2505(f).

a. Grants Officer provides grantee with a written notice of unresolved issues regarding determination of organizational capability in accordance with 25 CFR 271.81 and 271.82. Written notice should be reviewed by appropriate Solicitor's Office staff prior to providing written notice to grantee.

b. Grants Officer notifies Directors, OIEP, FMCC, and OCM.

Step J - GRANTS OFFICER INCORPORATES SPECIAL CONDITIONS INTO THE GRANT

Step K - NEGOTIATION OF GRANT REQUIREMENTS

1. Grants Officer notifies Grantee in writing of the date, time, location, and purpose of meeting.

2. In accordance with 25 USC 2504(B)(4) and 43 CFR 12.60, to negotiate Grant Requirements, Grants Officer meets with Grantee; FMCC personnel; and, if applicable, the Area Facilities Manager.

3. Items to be negotiated may include the following depending on the appropriateness to the scope of the grant:

- a. Budget
- b. Design
- c. Inspection- responsible entity and frequency
- d. Space Guidelines - BIA, State/Regional or Tribal
- e. Enrollment Projections and Demographics
- f. Accreditation Standard
- g. Method of Payments
- h. Indirect/Contract Support Costs
- i. Equipment for educational facilities
- j. Property
- k. Financial Status Reports and Frequency
- l. Design Codes/Standards to be used
- m. Bonding for Subcontractors
- n. Selection of A/E Firm
- o. Value Engineering
- p. Records Management
- q. Site Selection
- r. Education Specifications
- s. Program Requirements
- t. Procurement

**GRANT AGREEMENT/AMENDMENT
BUREAU OF INDIAN AFFAIRS**

1. Effective Date: 10-26-94	2. (check one) Initial Grant <input checked="" type="checkbox"/> Amendment # <u>7</u>	3. Initial/Current Total: \$ <u>6,539,285.00</u> This Amendment (+ or -): \$ <u>4,136,506.00</u> New Grant Total: \$ <u>10,675,791.00</u>	4. Grant GTS78
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5. GRANT PURPOSE AND DESCRIPTION: (check one)
 Part A, Administrative Cost Grant, or Part B, Tribally Controlled School

6. Issued by
BUREAU ORGANIZATION AND ADDRESS

7. Issued to (Grantee)
ORGANIZATION AND ADDRESS

Choctaw Agency
421 Powell Street
Philadelphia, MS 39350

Mississippi Band of Choctaw Indians
Choctaw Department of Education
P. O. Box 6085 Choctaw Branch
Philadelphia, MS 39350

8. BUREAU ADMINISTRATOR
a. Name: Peter H. Camp
b. Title: Agency Superintendent for Education
c. Phone No. 703/235-3233
d. Post Office Address:

N/A

9. GRANTEE ADMINISTRATOR
a. Name: Phillip Martin
b. Title: Tribal Chief
c. Phone No. 601/656-5251
d. Post Office Address:
Mississippi Band of Choctaw Indians
Choctaw Department of Education
P. O. Box 6085 Choctaw Branch
Philadelphia, MS 39350

10. CONDITIONS: This agreement/amendment is subject to the conditions of the applicable following documents, which are attached:
A. Special Conditions
B. General Provisions
C. Grantee's Application
In the event there is a conflict of consistency in any attachments, the order of precedence will be as follows: Special Conditions, General Provisions & Grantee's Application.

11. ACCOUNTING, APPROPRIATION DATA AND AMOUNT

001	S78E01-9495-30000	4130
002	S78E01-9495-30200	4130
003	S78E01-9495-30600	4130
004	S78E01-9495-30500	4130
005	S78E01-9495-30700	4130
006	S78E01-94-97100-GY940001	4130
007	S78E01-94-97300	4130
008	S50E01-94-97410-S78E01-GY930003	4130

12. OFFER
This grant agreement/amendment is offered under authority of Title V of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Public Law 100-297).

13. ACCEPTANCE (Continuation Sheet Attached)
The grantee accepts this grant agreement/amendment. The undersigned represents that he is duly authorized to act on behalf of the grantee.

UNITED STATES OF AMERICA

BY: *Peter H. Camp*
(Signature)
Peter H. Camp
Agency Superintendent for Education
TYPED OR PRINTED NAME & TITLE

10/27/94
DATE SIGNED

NAME OF GRANTEE:
Mississippi Band of Choctaw Indians

BY: *Phillip Martin*
(Signature)
Phillip Martin
Tribal Chief
TYPED OR PRINTED NAME & TITLE

10/26/94
DATE SIGNED

BUREAU USE ONLY: Payment Instructions To Finance

See attached.

or Area Facilities Manager on an as needed basis.

Step R - PROJECT CLOSEOUT. In accordance with 43 CFR 12.90, Grantee provides Grants Officer with:

1. Final performance of Project report
2. SF 271 - Outlay report
3. Final request for payment, if applicable.
4. Federally owned property report

subject to any requirements, obligations, restrictions, or limitations imposed by the Bureau that would otherwise apply solely by reason of the receipt of funds provided under any law referred to in clause (i), (ii), or (iii) of subparagraph (A).

(4) Notwithstanding the provision of paragraph ¹ 2503(a)(2) of this title, with respect to funds from facilities improvement and repair, alteration and renovation (major or minor), health and safety, or new construction accounts included in the grant under such paragraph (a)(2), the grantee shall maintain a separate account for such funds and shall, at the end of the period designated for the work covered by the funds received, render a separate accounting of the work done and the funds used to the Secretary. Funds received from these accounts may only be used for the purposes for which they were appropriated and for the work encompassed by the application or submission under which they were received, except that a school receiving a grant under this chapter for facilities improvement and repair may use such grant funds for new construction if the tribal government or other organization provides funding for the new construction equal to at least one-fourth of the total cost of such new construction. Where the appropriations measure or the application submission does not stipulate a period for the work covered by the funds so designated, the Secretary and the grantee shall consult and determine such a period prior to the transfer of funds: Provided, That such period may be extended upon mutual agreement.

(5) If the Secretary fails to make a determination within 180 days of a request filed by an Indian tribe or tribal organization to include in such tribe or organization's grant the funds described in subsection (a)(2) of this section, the Secretary shall be deemed to have approved such request and the Secretary shall immediately amend the grant accordingly. Such tribe or organization may enforce its rights under subsection (a)(2) of this section and this paragraph, including any denial of or failure to act on such tribe or organization's request, pursuant to the disputes authority described in section 2508(e) of this title.

(Pub.L. 100-297, Title V, § 5205, Apr. 28, 1988, 102 Stat. 387; Pub.L. 100-427, § 10(c), Sept. 9, 1988, 102 Stat. 1608; Pub.L. 101-301, § 5(g), May 24, 1990, 104 Stat. 209; Pub.L. 102-119, § 26(f), Oct. 7, 1991, 105 Stat. 607; Pub.L. 103-382, Title III, §§ 382(a), (b), 394(m)(2), Oct. 20, 1994, 108 Stat. 4017, 4029.)

¹ So in original. Probably should read "section".

HISTORICAL AND STATUTORY NOTES

References in Text

The Elementary and Secondary Education Act of 1965, referred to in subssecs. (a)(3)(A) and (b)(2)(A), (3)(A)(i), is Pub.L. 89-10, Apr. 11, 1965, 79 Stat. 27, as amended generally by Pub.L. 103-382, Title I, § 101, Oct. 20, 1994, 108 Stat. 3519. Title I of the Act is classified generally to subchapter I [section 6301 et seq.] of chapter 70 of Title 20, Education. For complete classification of this Act to the Code, see Tables.

The Individuals with Disabilities Education Act, referred to in subssecs. (a)(3)(B) and (b)(2)(B), (3)(A)(ii), is Title VI of Pub.L. 91-230, Apr. 13, 1970, 84 Stat. 175, as amended, which is classified generally to chapter 33 (section 1400 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see section 1400 of Title 20 and Tables.

The Education Amendments of 1978, referred to in subsec. (b)(3)(A)(iii), is Pub.L. 95-561, Nov. 1, 1978, 92 Stat. 2143, as amended. Title XI of the Act is classified principally to chapter 22 [section 2001 et seq.] of this title. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 2701 of Title 20, Education, and Tables.

1994 Amendments

Subsecs. (a)(3)(A), (b)(2)(A), (3)(A). Pub.L. 103-382, § 394(m)(2), struck out "chapter 1 of" before "title I of the Elementary and Secondary Education Act of 1965".

Subsec. (b)(4). Pub.L. 103-382, § 382(a), provided exception whereby a school receiving a grant under this chapter for facilities improvement and repair may use such grant funds for new construction if tribal government or other organization provides funding for new construction equal to at least one-fourth of the total cost.

Subsec. (b)(5). Pub.L. 103-382, § 382(b), added par. (5).

1991 Amendment

Subsecs. (a)(3)(B), (b)(2)(B), (3)(A)(ii). Pub.L. 102-119 substituted "Individuals with Disabilities Education Act" for "Education of the Handicapped Act".

1990 Amendment

Subsec. (a)(2). Pub.L. 101-301, § 5(g)(1), substituted "maintenance accounts and, notwithstanding section 450j of this title, or any other provision of law, other facilities accounts for such schools for such fiscal year (including but not limited to all those referenced under section 1126(d) of the Education Amendments of 1978 [25 U.S.C.A. § 2006(d)], or any other law," for "maintenance accounts and other facilities accounts for such schools for such fiscal year under section 1126(d) of the Education Amendments of 1978 [25 U.S.C.A. § 2006(d)] or under any other law".

**Amendment to PL 100-297 Grant
for
Portable Classrooms**

Content

Special Provisions

Project Budget

Minimum Specification Requirements

Required Codes and Standards

Two Pages

Attachment A, One Page

Attachment B, Two Pages

Attachment C, Two Pages

SPECIAL PROVISIONS

A. Scope: This project provides for the purchase, delivery, installation, furnishings and equipment for portable classroom(s). Included are architect-engineering services, Grantee's administrative costs, utilities and sitework. The number of classrooms to be provided is indicated on the budget sheet, Attachment A.

B. Budget The budget for the scope of work under this amendment is indicated in Attachment A.

C. Technical Requirements:

1. Minimum Specifications The Grantee agrees to provide classrooms that meet the minimum specifications identified in Attachment B. The Grantee agrees to provide these minimum specifications to the building manufacturer or contractor before placing the order or entering into a subcontract for the building and/or utilities.

2. Codes and Standards Compliance Pursuant to 25 USC 2005(a), the Grantee agrees to comply with applicable Federal, State and local health and safety building codes and standards. The applicable Federal health and safety codes and standards are identified on Attachment C. The Grantee shall provide these health and safety codes and standards to the building manufacturer or contractor before placing the order or entering into a subcontract for the building and/or utilities.

3. Drawings and Specifications Approval

a. Buildings. The BIA will be responsible for providing the long term building operations and maintenance funds for the portable classrooms. Consequently, the Grantee shall provide the drawings and specifications to the BIA Grant Officer and the Grant Officer's Technical Representative before placing the order for the manufacture of the classrooms or before entering into a subcontract with the building contractor. The order shall not be placed or construction started until the Grant Officer has approved the drawings and specifications in writing.

b. Site Utilities. Designs for water, sewer, gas and electrical systems shall be prepared by licensed professions. The drawings shall be provided to the Grant Officer and Grant Officer's Technical Representative before installation of any utilities. No utilities work shall be started until the Grant Officer has approved the designs in writing.

4. Quality Control The Grantee shall provide an individual or firm to inspect the portable classrooms while they are being manufactured or constructed and during the installation of the building(s). The Grantee will use only licensed individuals to install any water, sewer, gas, electrical, or phone services.

D. Completion of Work/BIA Inspection/Notification to BIA. The Grantee shall notify the Grant Officer and Grant Officer's Technical Representative at least fourteen (14) calendar days before the building is complete and ready for inspection. All building systems and utilities shall be operational before BIA will inspect the building(s). The Grantee shall correct all codes and standards deficiencies prior to receiving operations and maintenance funds from the BIA.

E. Ownership of Buildings. The Bureau of Indian Affairs shall own the portable buildings provided under this grant. As owner, the BIA has a vested interest in assuring that the

building(s) comply with applicable codes and standards.

F. Progress and Financial Reporting The Grantee shall provide quarterly financial reports to the Grants Officer and Grant Officer's Technical Representative.

1. Progress Reports. The Grantee shall report accomplishments during the reporting period and shall indicate plans for the next quarter. Any problems hindering progress shall be reported.
2. Financial Reports. The Grantee shall report total funds received for this project, amounts obligated, amounts expended and balances remaining as of the end of the reporting period.

G. Grant Amendment Closeout. The Grantee shall cooperate with the Grant Officer to provide project information and data required for the closeout of work under this project.

H. Use of Excess Funds

In accordance with 25 USCA 450e-2, where the actual costs of construction projects under grants pursuant to Public Law 100-297, are less than the estimated costs thereof, use of the resulting excess funds shall be determined by the Secretary after consultation with the tribe (Grantee).

I. Use of Funds

In accordance with 25 USCA 2504(b)(4) the funds provided under this grant may only be used for the purposes for which they were appropriated and for the work encompassed by the application or submission under which they were received.

J. Requirement for Separate Account

In accordance with 25 USCA 2504(b)(4), the Grantee shall maintain a separate account for the funds received under this construction grant and shall, at the end of the period designated for the work covered by the funds received, render a separate accounting of the work done and the funds used. The Grantee shall provide a final financial report to the Grant Officer not later than 90 days after completion of work under the scope of the project.

ATTACHMENT C

**APPLICABLE HEALTH AND SAFETY CODES AND STANDARDS
PORTABLE CLASSROOMS PROGRAM**

The Contractor or Grantee agrees to comply with the following health and safety standards.

A. Occupation Safety and Health Administration (OSHA) Compliance. Buildings and sitework shall comply with all occupational safety and health standards issued under Section 6 of the Occupational Safety and Health Act of 1970, as amended.

B. Fire and Fire Safety. Buildings shall be classified according to occupancy and/or use and shall conform to the National Fire Codes. Any new building greater than 2000 square feet shall be provided with a fire sprinkler system meeting NFPA Ordinary Hazard Classification requirements.

C. Accommodations for the Disabled. New buildings shall comply with the Americans with Disabilities Act (ADA) Accessibility Guidelines and the Uniform Federal Accessibility Standards. When the standards conflict the most stringent shall be used.

D. Building Safety Code. All buildings shall be designed and constructed in accordance with the provisions of the current edition of the Uniform Building Code except, where the Uniform Building Code conflicts with the National Fire Protection Association (NFPA) Fire Codes, the provisions of the NFPA fire code shall apply.

E. Boiler/Pressure Vessel. The fabrication and installation of all new boiler and un-fired pressure vessels shall conform to the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code and shall be marked with appropriate ASME Code symbols.

F. Elevators. Not Applicable

G. Mechanical System.

(1) Liquified Petroleum Gas. Liquified petroleum gas heating systems and distribution facilities shall conform to NFPA No. 58, 85 and 86.

(2) Natural Gas. Natural gas systems shall comply with NFPA No. 54, 85 and 86.

(3) Oil. Oil burning system installations shall conform to NFPA No. 31, 85 and 86

(4) Electrical. Electrical heating and cooling systems shall be installed in accordance with the National Electrical Code. Specific equipment shall be Underwriter's Laboratory (UL) listed or labeled.

(5) Solar. If used, solar installations shall be installed in accordance with the Uniform Solar Code and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standards.

(6) Cooling and Ventilation. Cooling and ventilation systems shall conform to the Uniform Mechanical Code.

H. Electrical. Electrical power transmission, distribution and installation shall comply with the National Electrical Code (NFPA No. 70) and the National Electrical Safety Code.

I. Environmental Quality.

(1) Food Service. Not Applicable

(2) Sanitation Facilities. All new construction of sanitation facilities shall conform to the following guidelines:

(a) Liquid Waste: Applicable parts of 40 CFR, Protection of Environment, and 29 CFR, 1910.

(b) Solid Waste: Applicable parts of 40 CFR, Protection of the Environment.

(3) Water Facilities. All new construction of domestic water facilities shall conform to 40 CFR, Protection of the Environment and 29 CFR, 1910 OSHA.

(4) Illumination. All new construction shall provide facilities which conform to Illuminating Engineering Society Standards and Regulations on Illumination which include, 29 CFR, 1910.

(5) Heating, Ventilation and Air Conditioning (HVAC). All new construction shall conform to minimum requirements of the Uniform Mechanical Code and ASHRAE Standards.

(6) Pest, Vector and Vermin Control. All new construction shall conform to regulations on pest vector and vermin control included in 29 CFR, Protection of Environment, Parts 162, 163, 165, 170

J. Plumbing. All plumbing installations, equipment and fixtures shall comply to the Uniform Plumbing Code.

NO APPLIES TO ALL CONSTRUCTION PROJECTS

Number of weekend days of closure stated by calendar month;
 Number of weekday days of closure stated by calendar month; and
 Area closed stated in square kilometers.
For beaches:
 Whether the beach was Federal or State (including municipal or county);
 Number of days of closure stated by calendar month; and
 Length of shoreline closed stated in meters.
For fisheries:
 Whether area closed was an offshore, near-shore, or wetland fishery;
 Number of days of closure; and
 Area closed stated in square kilometers.
 For furbearer hunting or trapping areas and waterfowl hunting areas:
 Number of days of closure; and
 Area closed stated in square kilometers.

Implicit Price Deflator
 Quarterly implicit price deflator for the Gross National Product (base year 1992) for the quarter in which the identified substance entered a Great Lakes environment. [See the Survey of Current Business, published by the U.S. Department of Commerce/Bureau of Economic Analysis, 1441 L Street, NW, Washington, D.C., 20230, (202) 606-9800.]

MODIFICATIONS TO THE NRDAM/GLE DATABASES (IF ANY)

Documentation of the source of the modifications; and
 For air temperature:
 Air temperature, stated in degrees Celsius, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Table III.6.1, Volume III of the NRDAM/GLE technical document); and
 Substitute air temperature stated in degrees Celsius.
 For water temperature at the surface:
 Water temperature at the surface, stated in degrees Celsius, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Table III.6.2, Volume III of the NRDAM/GLE technical document); and
 Substitute water temperature stated in degrees Celsius.
 For total suspended sediment concentration:
 Total suspended sediment concentration, stated in milligrams per liter, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Section 3, Volume I of the NRDAM/GLE technical document); and
 Substitute suspended sediment concentration stated in milligrams per liter.
 For mean settling velocity of suspended solids:
 Total suspended sediment concentration, stated in milligrams per liter, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Section 3, Volume I of the NRDAM/GLE technical document); and
 Substitute suspended sediment concentration stated in milligrams per liter.

Mean settling velocity of suspended sediments, stated in meters per day, assigned by the NRDAM/GLE at the point that the identified substance entered a Great Lakes environment (see Section 3, Volume I of the NRDAM/GLE technical document); and
 Substitute suspended sediment concentration stated in milligrams per liter.
 For habitat type:
 Latitude and longitude bounds of area for which the habitat type is being modified;
 Habitat type assigned by the NRDAM/GLE (see Section 6.2, Volume III of the NRDAM/GLE technical document); and
 Substitute habitat type;
 If the authorized official turns off the ice modeling function, then he or she must provide documentation that ice was absent from the site of the release.

Definitions

Nearshore fishery—fishery in an open water area that is less than 90 feet in depth or is in a connecting channel.
Offshore fishery—fishery in an open water area that is 90 feet or more in depth.
Wetland fishery—fishery that is not in an open water area.

PART 12—ADMINISTRATIVE AND AUDIT REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

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 12.2 Policy.
 12.3 Effect on prior issuances.
 12.4 Information collection requirements.
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Subpart B [Reserved]

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 12.710 Policy.
 12.715 Evaluating offers.
 12.720 Excepted articles, materials, and supplies.
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- 12.780 Buy American Act—Supplies.
- BUY AMERICAN ACT—CONSTRUCTION MATERIALS**
- 12.800 Scope.
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- 12.810 Policy.
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- 12.855 Supplies and other expendable property.
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- Procurement Standards**
- 12.940 Purpose of procurement standards.
- 12.941 Recipient responsibilities.
- 12.942 Codes of conduct.
- 12.943 Competition.
- 12.944 Procurement procedures.
- 12.945 Cost and price analysis.
- 12.946 Procurement records.
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Employees," by prohibiting employees from endorsing in an official capacity the proprietary products or processes of manufacturers or the services of commercial firms for advertising, publicity, or sales purposes. The Department's use of materials, products, or services does not constitute official endorsement.

(2) The policy in paragraph (d)(1) of this section applies to a grant/cooperative agreement whose principal purpose is a partnership where the recipient/partner contributes resources to promote agency programs, publicize agency activities, assists in fundraising, or provides assistance to the agency. In the event that such a grant/cooperative agreement is awarded to a recipient, other than a State government, a local government, or a federally-recognized Indian tribal government, and authorizes joint dissemination of information and promotion of activities being supported, the following provision shall be made a term and condition of the award:

- Subpart F—Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations**
- GENERAL**
- 12.901 Purpose.
- 12.902 Definitions.
- 12.903 Effect on other issuances.
- 12.904 Deviations.
- 12.905 Subawards.

- 12.950 Purpose of reports and records.
- 12.951 Monitoring and reporting program performance.
- 12.952 Financial reporting.
- 12.953 Retention and access requirements for records.
- Termination and Enforcement**
- 12.960 Purpose of termination and enforcement.
- 12.961 Termination.
- 12.962 Enforcement.

(e) All financial assistance awards and subawards, in the form of grants and cooperative agreements, in accordance with paragraph (b) of this section, are subject to subparts C, D, E, and F of this part, OMB Circulars A-102, "Grants and Cooperative Agreements with State and Local Governments," A-110, "Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," A-97, "Cost Principles for State and Local Governments," A-21, "Cost Principles for Educational Institutions," A-122, "Cost Principles for Non-Profit Organizations," and A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

(b)(1) Governmental recipients and subrecipients are subject to subparts C, D, and E of this part, Circulars A-87 and A-133.

- PRE-AWARD REQUIREMENTS**
- 12.910 Purpose.
- 12.911 Pre-award policies.
- 12.912 Forms for applying for Federal assistance.
- 12.915 Debarment and suspension.
- 12.914 Special award conditions.
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- 12.916 Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580 codified at 42 U.S.C. 6932).
- 12.917 Certifications and representations.

- APPENDIX A TO SUBPART F—CONTRACT PROVISIONS**
- 12.970 Purpose.
- 12.971 Closeout procedures.
- 12.972 Subsequent adjustments and continuing responsibilities.
- 12.973 Collection of amounts due.

GRANT/COOPERATIVE AGREEMENT PROVISION

Recipient shall not publicize or otherwise circulate, promotional material (such as advertisements, sales brochures, press releases, speeches, still and motion pictures, articles, manuscripts or other publications) which states or implies government, Departmental, bureau, or government employee endorsement of a product, service, or position which the recipient represents. No release of information relating to this award may state or imply that the Government approves of the recipient's work products, or considers the recipient's work product to be superior to other products or services.

All information submitted for publication or other public releases of information regarding this project shall carry the following disclaimer:

The views and conclusions contained in this document are those of the authors and should not be interpreted as representing the opinions or policies of the U.S. Government. Mention of trade names or commercial products does not constitute their endorsement by the U.S. Government.

Recipient must obtain prior Government approval for any public information releases concerning this award which refer to the Department of the Interior or any bureau or employee (by name or title). The specific text, layout photographs, etc. of the proposed release must be submitted with the request for approval.

- POST-AWARD REQUIREMENTS**
- Financial and Program Management**
- 12.920 Purpose of financial and program management.
- 12.921 Standards for financial management systems.
- 12.922 Payment.
- 12.923 Cost sharing or matching.
- 12.924 Program income.
- 12.925 Revision of budget and program plans.
- 12.926 Non-Federal audits.
- 12.927 Allowable costs.
- 12.928 Period of availability of funds.

- PROPERTY STANDARDS**
- 12.930 Purpose of property standards.
- 12.931 Insurance coverage.
- 12.932 Real property.
- 12.933 Federally owned and exempt property.
- 12.934 Equipment.

Authority: 5 U.S.C. 301; 31 U.S.C. 6101 note, 7501; 41 U.S.C. 252a, 701 et seq; sec. 501, Pub. L. 104-206, 110 Stat. 2864; sec. 307, Pub. L. 104-208, 110 Stat. 3009; E.O. 12549, 3 CFR, 1986 Comp., p. 185; E.O. 12874, 3 CFR, 1989 Comp., 215; E.O. 12689, 3 CFR, 1989 Comp., p. 235; E.O. 12731, 3 CFR, 1990 Comp., p. 306; OMB Circular A-102; OMB Circular A-110; and OMB Circular A-133.

CROSS REFERENCE: See also Office of Management and Budget notice published at 56 FR 21679, May 25, 1990, and 60 FR 33036, June 26, 1995.

EDITORIAL NOTE: For additional information, see related documents published at 49 FR 24658, June 18, 1984; 52 FR 20178 and 20360, May 29, 1987; 53 FR 8028, Mar. 11, 1988; 53 FR 19160, May 26, 1988; and 53 FR 9474, Sept. 6, 1988.

- PROPERTY STANDARDS**
- 12.930 Purpose of property standards.
- 12.931 Insurance coverage.
- 12.932 Real property.
- 12.933 Federally owned and exempt property.
- 12.934 Equipment.

- PROPERTY STANDARDS**
- 12.930 Purpose of property standards.
- 12.931 Insurance coverage.
- 12.932 Real property.
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- 12.934 Equipment.

(d)(1) Federal ethics and conduct regulations contained in 5 CFR part 2635 Implement Executive Order 12874, 3 CFR, 1989 Comp., p. 215 (as modified by Executive Order 12731, 3 CFR, 1990 Comp., p. 306), "Principles of Ethical Conduct for Government Officers and

A recipient further agrees to include this provision in a subaward to any subrecipient, except for a subaward to a State government, a local government, or to a federally-recognized Indian tribal government.

[End of Provision]

(3) Recipient requests for clearance of public releases will be reviewed using existing public information mechanisms through the appropriate Public Affairs Office and with consultation with the cognizant Ethics Officer.

(28 FR 6176, Feb. 14, 1965, as amended at 63 FR 8077, Mar. 11, 1998; 66 FR 46986, Sept. 9, 1997; 69 FR 17712, Apr. 14, 1994; 63 FR 45944, Aug. 29, 1997)

§ 12.3 Effect on prior issuances.

(a) All provisions of Department of the Interior nonregulatory program manuals, handbooks and other materials which are inconsistent with the above OMB Circulars are superseded, except to the extent that they are (1) required by statute, or (2) authorized in accordance with the exceptions provisions of each circular.

(b) Except to the extent inconsistent with the regulations in 43 CFR part 12, subpart C, all existing Department of the Interior regulations in 25 CFR parts 23, 27, 39, 40, 41, 256, 272, 278, and 276; 30 CFR parts 726, 736, 884, 886, and 890; 36 CFR parts 60, 61, 63, 65, 67, 72, and 800; 43 CFR parts 26 and 32; and 50 CFR parts 80, 81, 82, 83, and 401 are not superseded by these regulations nor are any paperwork approvals under the Paperwork Reduction Act.

(28 FR 6176, Feb. 14, 1965, as amended at 63 FR 8077, Mar. 11, 1998)

§ 12.4 Information collection requirements.

Information collections in addition to those required by applicable OMB Circulars will be cleared by responsible bureaus and offices on an individual basis.

§ 12.5 Waiver.

Only OMB can grant exceptions from the requirements of these Circulars when exceptions are not prohibited under existing laws.

43 CFR Subtitle A (10-1-98 Edition)

Subpart B [Reserved]

Subpart C—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

Source: 53 FR 8077 and 8087, Mar. 11, 1988, unless otherwise noted.

GENERAL

§ 12.41 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 12.42 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 12.43 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded

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from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from "programmatic" requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assisted agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for "grant" and "subgrant" in this section and except where qualified by "Federal") a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For non-construction grants, the SF-289 "Financial Status Report" (or other equivalent report); (2) for construction

grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government. **Obligations** means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the U.S. Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not

include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of "grant" in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than "equipment" as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. "Termination" does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant,

whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 12.44 Applicability.

(a) *General.* Subparts A-D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 12.46, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental

Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)(18)(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section.

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1622(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1960 (Pub. L.

§ 12.45 96-021, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to recipients and entrants and the administrative costs of providing the assistance and benefits.

(f) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 236(d)(2)(C) and 240(f) (Entitlement Increase for Handicapped Children); and (10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 12.44(a) through (8) are subject to subpart E.

§ 12.45 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 12.46.

§ 12.46 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

PRE-AWARD REQUIREMENTS

§ 12.50 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants,

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions.

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 12.52 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

- (1) Has a history of unsatisfactory performance, or
- (2) Is not financially stable, or
- (3) Has a management system which does not meet the management standards set forth in this part, or
- (4) Has not conformed to terms and conditions of previous awards, or
- (5) Is otherwise not responsible; and

an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

- (1) Payment on a reimbursement basis;
- (2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;
- (3) Requiring additional, more detailed financial reports;
- (4) Additional project monitoring;

(6) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(7) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

- (1) The nature of the special conditions/restrictions;
- (2) The reason(s) for imposing them;
- (3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and
- (4) The method of requesting reconsideration of the conditions/restrictions imposed.

POST-AWARD REQUIREMENTS

Financial Administration

§ 12.60 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

- (1) Permit preparation of reports required by this part and the statutes authorizing the grant, and
- (2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

- (1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.
- (2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards

(c) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 12.52 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

- (1) Has a history of unsatisfactory performance, or
- (2) Is not financially stable, or
- (3) Has a management system which does not meet the management standards set forth in this part, or
- (4) Has not conformed to terms and conditions of previous awards, or
- (5) Is otherwise not responsible; and

an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

- (1) Payment on a reimbursement basis;
- (2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;
- (3) Requiring additional, more detailed financial reports;
- (4) Additional project monitoring;

and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allocability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agencies. When advances are made by letter-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grant-grantees must monitor cash drawdowns by their subgrantees to assure that they occur substantially to the same schedule of timing and amount as apply to advances to the grantees.

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(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 12.61 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 206.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period

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generally geared to the grantee's disbursement cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions, or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 12.89(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a

bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

§ 12.62 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-97.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institutions.	OMB Circular A-21.

<p>For the items of a—</p> <p>For-profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular.</p>	<p>Use the principles in—</p> <p>48 CFR Part 31, Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.</p>
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§ 12.63 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-289). The Federal agency may extend this deadline at the request of the grantee.

§ 12.64 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions—(1) Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 12.65, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 12.65(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (1) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay

for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect cost. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services—(1) Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be evaluated at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services

are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property

are not treated as third party in-kind

are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-Federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property

contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 12.62, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 12.65 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of

the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 12.74.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 12.71 and 12.72.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal

and grantee contributions rather than to increase the funds committed to the project.

(3) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(4) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(5) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 12.66 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7601-7607) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which exceeds \$500,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing

goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 12.36 shall be followed. (58 FR 8077 and 8087, Mar. 11, 1993, as amended at 62 FR 46839, 46846, Aug. 29, 1997)

CHANGES, PROPERTY, AND SUBAWARDS

§ 12.70 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 12.62) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrantees even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes—(1) Nonconstruction projects.* Except as stated in other regulations or an award document,

grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a non-construction award:

(1) Any revision which would result in the need for additional funding.

(11) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

(111) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and non-construction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from non-construction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subcontracting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval re-

quirement is in addition to the approval requirements of § 12.76 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget form and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 12.63) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 12.71 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purpose, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 12.72 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the

program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 12.65(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results recorded with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(6) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right

to transfer title to the Federal Government or a third party named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 12.72(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 12.73 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 12.74 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

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§ 12.75 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§ 12.76 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The

grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantee may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantees and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and

onditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contractor type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will set time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will use protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal Agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at \$100,000 (U.S.C. 403(11)) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) *Procurement by sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 12.76(d)(2)(1) apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(4) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) *Procurement by competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by *noncompetitive proposals* may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for

pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into small-tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders.

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unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §12.62). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for propos-

als or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the

simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Contract provisions. A grantee's and subgrantee's contracts must contain provisions in paragraph (1) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(5) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(6) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)

(7) Compliance with Executive Order 11946 of September 24, 1965, entitled

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"Equal Employment Opportunity," as amended by Executive Order 11376 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 5). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276e-7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of \$2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2000, and in excess of \$2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

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(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR, part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

(15) FR 8077 and 8087, Mar. 11, 1988, as amended at 60 FR 19339, 19644, Apr. 19, 1995

§ 12.77 Subgrants.

(a) States. States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for cost reimbursement is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) All other grantees. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) Exceptions. By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 12.50;

(2) Section 12.51;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 206, cited in § 12.51; and

(4) Section 12.90.

REPORTS, RECORDS RETENTION, AND ENFORCEMENT

§ 12.80 Monitoring and reporting program performance.

(a) Monitoring by grantees. Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) Nonconstruction performance reports. The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for

unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 12.81 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (6) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(6) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report.*—(1) *Form.* Grantees will use Standard Form 289 or 269A, Financial Status Report, to report the status of funds for all non-construction grants and for construction grants when required in accordance with § 12.81(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report.*—(1) *Form.* (i) For grants paid by letter of credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format

of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(5) *Request for advance or reimbursement.*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 12.81(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.*—(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies

may, however, prescribe the Request for Advance or Reimbursement form, specified in § 12.81(d), instead of this form.

(1) The frequency for submitting reimbursement requests is treated in § 12.81(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance. (1) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advance, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 12.81(b)(3) and (4).

(1) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 12.81(d).

(1) The Federal agency may substitute the Financial Status Report specified in § 12.81(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) Accounting basis. The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 12.81(b)(4).

§ 12.83 Retention and access requirements for records.

(a) Applicability. (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(1) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(1) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 12.76(k)(10).

(b) Length of retention period. (1) Except as otherwise provided, records

must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) Starting date of retention period.—(1) General. When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) Real property and equipment records. The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) Records for income transactions after grant or subgrant support. In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income

starts from the end of the grantee's fiscal year in which the income is earned.

(4) Indirect cost rate proposals, cost allocations plans, etc. This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(1) If not submitted for negotiation. If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(4) Substitution of microfilm. Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) Access to records.—(1) Records of grantees and subgrantees. The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) Expiration of right of access. The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) Restrictions on public access. The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records unless required by Federal, State, or local law. Grantees and subgrantees are not required to permit public access to their records.

§ 12.83 Enforcement.

(a) Remedies for noncompliance. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency.

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program.

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) Hearings, appeals. In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) Effects of suspension and termination. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancelable, and,

(3) The costs would be allowable if the award were not suspended or extended normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to Debarment and Suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 12.76).

§ 12.64 Termination for convenience.

Except as provided in § 12.83 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 12.83 or paragraph (a) of this section.

AFTER-THE-GRANT REQUIREMENTS

§ 12.90 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) Final performance or progress report.

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(2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable.)

(3) Final request for payment (SF-270) (if applicable).

(4) Invention disclosure (if applicable).

(5) *Federally-owned property report:*

In accordance with § 12.72(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately re-fund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 12.91 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later re-funds, corrections, or other transactions;

(c) Records retention as required in § 12.92;

(d) Property management requirements in §§ 12.71 and 12.72; and

(e) Audit requirements in § 12.68.

§ 12.92 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

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(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

ENTITLEMENTS [RESERVED]

Subpart D—Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)

SOURCE: 53 FR 19199, and 19204, May 26, 1988, unless otherwise noted.

GENERAL

§ 12.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see

definition of "ineligible" in § 12.106), and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103-355, sec. 2455, 108 Stat. 3327) by—

(1) Providing for the inclusion in the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

(50 FR 33040, 33061, June 26, 1985)

§ 12.105 Definitions.

The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the

same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

Debarring official. An official authorized to impose debarment. The debarring official is either:

- (1) The agency head, or
- (2) An official designated by the agency head.

(3) The debarring official for the Department of the Interior is the Director, Office of Acquisition and Property Management.

Exception official. The official authorized to grant exceptions under § 12.215 for the Department of the Interior is the Director, Office of Acquisition and Property Management.

Findings of fact official. The official authorized to conduct and prepare findings of fact, if required under § 12.314(b)(2) or § 12.413(b)(2), is the Director, Office of Hearings and Appeals, or designee.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive

order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9, subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or

foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

- (1) Principal investigators.
- (2) [Reserved]

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:

- (1) The agency head, or
- (2) An official designated by the agency head.
- (3) The suspending official for the Department of the Interior is the Director, Office of Acquisition and Property Management.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(53 FR 19199 and 19204, May 26, 1988, as amended at 60 FR 83040, 83061, June 26, 1995)

§ 12.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transactions.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(1) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(1) *Lower tier covered transaction.* A lower tier covered transaction is:

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(A) Any transaction between a participant and a person other than a provider, rights-of-way, and easements, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 263(g) (currently \$25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

- (1) Principal investigators.
(2) Providers of federally-required audit services.

(2) Exceptions. The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtler awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;
(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and
(vii) Other transactions where the application of these regulations would be prohibited by law.

(viii) Transactions entered into pursuant to Public Law 93-638.
(ix) Under natural resources management programs, permits, licenses, ex-

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changes and other acquisitions of real property, rights-of-way, and easements.
(x) Transactions concerning mineral patent claims entered into pursuant to 30 U.S.C. 21 et seq.

(xi) Water service contracts and repayment contracts entered into pursuant to 43 U.S.C. 485.

(3) Department of the Interior covered transactions. These Department of the Interior regulations apply to the Department's domestic assistance covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) including, except as noted in paragraph (a)(2) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements, Federal acquisition of a leasehold interest or any other interest in real property, concession contracts, dispositions of Federal real and personal property and natural resources, subawards, subcontracts and transactions at any tier that are charged as direct or indirect costs, regardless of type (including subtler awards under awards which are statutory entitlement or mandatory awards), and any other nonprocurement transactions between the Department and a person.

(b) Relationship to other sections. This section describes the types of transaction under which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 12.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 12.110(a). Sections 12.325, "Scope of debarment," and 12.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) Relationship to Federal procurement activities. In accordance with E.O. 12689

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and section 2455 of Public Law 103-355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

18 FR 19199 and 19204, May 26, 1988, as amended at 60 FR 33041, 33061, June 26, 1995

§ 12.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

EFFECT OF ACTION

§ 12.300 Debarment or suspension.

(a) Primary covered transactions. Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed

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for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to § 12.215.

(b) Lower tier covered transactions. Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 12.110(a)(1)(ii)) for the period of their exclusion.

(c) Exceptions. Debarment or suspension does not affect a person's eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtler awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;
(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and
(7) Other transactions where the application of these regulations would be prohibited by law.

(8) Transactions entered into pursuant to Public Law 93-638, 88 Stat. 2203.
(9) Under natural resources management programs, permits, licenses, exchanges and other acquisitions of real property, rights-of-way, and easements.

(10) Mineral patent claims entered into pursuant to Public Law 93-638.

§ 12.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of § 12.300 through 12.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement or applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 12.216 or § 12.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the In-

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(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntarily excluded, except as provided in § 12.216.

[60 FR 33041, 33061, June 26, 1995]

§ 12.225 Failure to adhere to restrictions.

(a) Except as permitted under § 12.216 or § 12.220, a participant shall not knowingly do business under a covered transaction with a person who is—

(1) Debarred or suspended;

(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (See Appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

[60 FR 33041, 33061, June 26, 1995]

DEBARMENT**§ 12.300 General.**

The debarring official may debar a person for any of the causes in § 12.305, using procedures established in § 12.310 through 12.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 12.205

(1) Water service contracts and repayment contracts entered into pursuant to 43 U.S.C. 485.

[60 FR 33041, 33061, June 26, 1995]

§ 12.205 Ineligible persons.

Persons who are ineligible, as defined in § 12.106(1), are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

§ 12.310 Voluntary exclusion.

Persons who accept voluntary exclusions under § 12.315 are excluded in accordance with the terms of their settlements. The Department of the Interior shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 12.315 Exception provision.

The Department of the Interior may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12649 and § 12.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 12.505(a).

[60 FR 33041, 33061, June 26, 1995]

§ 12.230 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

ternal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 12.315 or of any settlement of a debarment or suspension action; or

(b) Violation of any requirement of the drug-free workplace requirements for grants, relating to providing a drug-free workplace, as set forth in § 12.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[63 FR 19199, 19204, May 26, 1998, as amended at 54 FR 4850, 4983, Jan. 31, 1989; 55 FR 21701, May 26, 1990]

§ 12.310 Procedures.

The Department of the Interior shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in § 12.311 through 12.314.

§ 12.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§ 12.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered; (b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 12.305 for proposing debarment;

(d) Of the provisions of § 12.311 through § 12.314, and any other Department of the Interior procedures, if applicable, governing debarment decisionmaking; and

§ 12.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of § 12.400 through 12.413 upon adequate evidence: (1) To suspect the commission of an offense listed in § 12.306(a); or (2) That a cause for debarment under § 12.306 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 12.410 Procedures.

(a) Investigation and referral. Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) Decisionmaking process. The Department of the Interior shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 12.411 through § 12.413.

§ 12.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

- (a) That suspension has been imposed;
(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;
(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;
(d) Of the cause(s) relied upon under § 12.405 for imposing suspension;
(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;
(f) Of the provisions of § 12.411 through § 12.413 and any other Department of the Interior procedures, if applicable, governing suspension decisionmaking; and
(g) Of the effect of the suspension.

§ 12.412 Opportunity to contest suspension.

(a) Submission in opposition. Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) Additional proceedings as to disputed material facts. (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

- (1) The action is based on an indictment, conviction or civil judgment, or
(1) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§ 12.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 12.329(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment rendered in accordance with the following provisions:

(a) No additional proceedings necessary. In actions: Based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information

in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) Additional proceedings necessary. (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record. (2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) Notice of suspending official's decision. Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 12.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months, in no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 12.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 12.325), except that the procedures of § 12.410 through 12.413 shall be used in imposing a suspension.

RESPONSIBILITIES OF GSA, DEPARTMENT OF THE INTERIOR AND PARTICIPANTS

§ 12.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall include: (1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

- (2) The type of action;
(3) The cause for the action;
(4) The scope of the action;
(5) Any termination date for each listing; and
(6) The agency and name and telephone number of the agency point of contact for the action.

§ 12.505 Department of the Interior responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which the Department of the Interior has granted exceptions under § 12.216 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 12.500(b) and of the exceptions granted under § 12.216 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

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(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§ 12.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in appendix A to this subpart for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in appendix B to this subpart for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the

method and frequency by which they determine the eligibility of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to the Department of the Interior if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

DRUG-FREE WORKPLACE REQUIREMENTS (GRANTS)

SOURCE: 55 FR 21688, 21701, May 25, 1990, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes for §§ 12.600 through 12.636 appear at 55 FR 21702, May 25, 1990.

§ 12.600 Purpose.

(a) The purpose of the drug-free workplace requirements for grants is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 12.605 Definitions.

(a) Except as amended in this section, the definitions of § 12.105 apply to the drug-free workplace requirements for grants.

(b) For purposes of the drug-free workplace requirements for grants—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances

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(Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All direct charge employees;

(ii) All indirect charge employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subcontractors or subcontractors in covered workplaces);

(6) *Federal agency or agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term

grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 12.610 Coverage.

(a) The drug-free workplace requirements for grants applies to any grantee of the agency.

(b) The drug-free workplace requirements for grants applies to any grant, except where application of the drug-free workplace requirements for grants would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subpart D apply to matters covered by the drug-free workplace requirements for grants, except where specifically modified by the drug-free workplace requirements for

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grants. In the event of any conflict between provisions of the drug-free workplace requirements for grants and other provisions of subpart D, the provisions of the drug-free workplace requirements for grants are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

[56 FR 21688, 21701, May 25, 1990]

§ 12.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of the drug-free workplace requirements for grants if the agency head or his or her official designee determines, in writing, that—
(a) The grantee has made a false certification under § 12.630;
(b) With respect to a grantee other than an individual—

- (1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to appendix C) or
- (2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

- (1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to appendix C); or
- (2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 12.620 Effect of violation.

(a) In the event of a violation of the drug-free workplace requirements for grants as provided in § 12.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

- (1) Suspension of payments under the grant;
- (2) Suspension or termination of the grant; and

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(3) Suspension or debarment of the grantee under the provisions of subpart D.

(b) Upon issuance of any final decision under subpart D requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (see § 12.320(a)(2) of subpart D).

§ 12.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 12.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in appendix C to subpart D.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all

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State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(1) The Department of the Interior is not designating a central location for the receipt of the statewide certifications from States. Therefore, each State shall ensure that a copy of their certification is submitted individually with respect to each grant application sent to the Bureau/Office within the Department.

(2) [Reserved]

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(1) The Department of the Interior is not designating a central location for the receipt of State agency-wide certifications from State agencies. Therefore, each State agency shall ensure that a copy is submitted individually with respect to each grant application sent to the Bureau/Office within the Department.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

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(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

[56 FR 21688, 21701, May 25, 1990]

§ 12.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(1) The Department of the Interior is not designating a central location for the receipt of these notices from grantees. Therefore, the grantee shall provide this written notice to every grant officer, or other designee within a Bureau/Office of the Department on whose grant activity the convicted employee was working.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted:

- (1) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(1) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(1) The Department of the Interior is not designating a central location for the receipt of the notice from a grantee who is an individual. Therefore, the grantee who is an individual shall provide this written notice to the grant officer or other designee within the Bureau/Office within the Department.

(2) (Reserved)

(Approved by the Office of Management and Budget under control number 0691-0002)

[56 FR 21688 and 21702, May 25, 1990]

APPENDIX A TO SUBPART D—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this trans-

action. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms covered transaction, *suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded*, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good

with the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[50 FR 33042, 83061, June 26, 1985]

APPENDIX B TO SUBPART D—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms covered transaction, *debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded*, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

(50 FR 33042, 33061, June 26, 1995)

APPENDIX C TO SUBPART D—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the

grantee knowingly rendered a false certification, or otherwise violates a requirement of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1306.11 through 1306.16);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (1) All direct charge employees; (2) All indirect charge employees unless their impact or involvement is insignificant to the performance of the grant;

(11) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subcontractors or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (GRANTEES OTHER THAN INDIVIDUALS)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs;

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(5) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(6) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(3) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (2)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include

the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 90 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

Check if there are workplaces on file that are not identified here.

Alternate II. (GRANTEES WHO ARE INDIVIDUALS)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[56 FR 21690, 21701, May 26, 1991]

Subpart E—Buy American Requirements for Assistance Programs

SOURCE: 50 FR 36716, July 19, 1994, unless otherwise noted.

BUY AMERICAN ACT—SUPPLIES

§ 12.700 Scope.

This subpart implements section 307 of the Omnibus Consolidated Appropriations Act of 1997 (Public Law 104-206, 110 Stat. 3009) and section 501 of the Energy and Water Development Appropriations Act, 1997 (Public Law 104-206, 110 Stat. 2984). For awards made under the authority of section 307(a) of Public Law 104-206, this subpart requires that no funds made available in the Act may be expended by an entity unless the entity agrees that in expending the funds the entity will comply with sections 2 through 4 of the Act of March 3, 1923 (41 U.S.C. 104-10c; popularly known as the "Buy American Act"). It applies to procurement contracts under grants and cooperative agreements which provide for the purchase of equipment and products. Section 501 of Public Law 104-206, 110 Stat. 2984, only applies to awards made by the Bureau of Reclamation. In addition, for these awards, there is only a requirement that in providing financial assistance to, or entering into any contract with, any entity using funds made available in this Act, the Secretary, to the greatest extent practicable, will provide to the entity a notice describing a statement within the Act made by Congress. This statement concerns the sense of the Congress that to the greatest extent practicable, all equipment and products purchased with funds made available in the Act, should be American-made. Therefore, for Fiscal Year 1997 awards, only the requirements in Section 12.700 and 12.710 will apply to awards made by the Bureau of Reclamation.

(61 FR 6667, Dec. 30, 1996)

§ 12.705 Definitions.

Components, as used in this subpart, means those articles, materials, and supplies incorporated directly into the end products.

Concern, as used in this subpart, means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, to an individual,

partnership, corporation, joint venture, association, or cooperative.

Domestic end product, as used in this subpart, means (a) an unmanufactured end product mined or produced in the United States; or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with Section 12.710(d) (3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic. On acquisitions above \$25,000 in value, components of Canadian origin are treated as domestic.

Domestic offer, as used in this subpart, means an offered price for a domestic end product, including transportation to destination.

End product, as used in this subpart, means those articles, materials, and supplies to be acquired for public use under the grant, cooperative agreement, or procurement contract awarded under the grant or cooperative agreement.

Foreign end product, as used in this subpart, means an end product other than a domestic end product.

Foreign offer, as used in this subpart, means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

Instrumentality, as used in this subpart, does not include an agency or division of the government of a country.

Labor surplus area, as used in this subpart, means a geographical area identified by the Department of Labor in accordance with 20 CFR part 654, subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

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Labor surplus area concern, as used in this subpart, means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

United States, as used in this subpart, means the states thereof, the District of Columbia, and the territories and possessions of the United States.

(59 FR 36715, July 19, 1994, as amended at 61 FR 6668, Dec. 30, 1996)

§ 12.710 Policy.

(a) In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available under Public Law 104-206, it is the sense of Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(b) In awarding financial assistance under Public Law 104-206, 110 Stat. 3009, bureaus and offices excluding the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

NOTICE: Pursuant to sec. 307 of the Omnibus Consolidated Appropriations Act of 1997, Public Law 104-206, 110 Stat. 3009, please be advised of the following:

In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available in this act, it is the sense of the Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(c) In awarding financial assistance using funds made available under Public Law 104-206, to the greatest extent practicable, the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

NOTICE: Pursuant to sec. 501 of the Energy and Water Development Appropriations Act, 1997, Public Law 104-206, 110 Stat. 2984, please be advised of the following:

It is the sense of the Congress, that to the greatest extent practicable, all equipment and products purchased with funds made

available in this act should be American-made.

(d) The Buy American Act requires that only domestic end products be acquired for public use, except articles, materials, and supplies—

(1) For use outside the United States; reasonable, as determined in accordance with § 12.716;

(2) For which the agency head determines that domestic preference would be inconsistent with the public interest; or

(3) That are not mined, produced, or manufactured in the United States in sufficient and reasonable available commercial quantities, of a satisfactory quality (see § 12.720).

(e) The grantee's contracting officer may make a nonavailability determination under § 12.710(d)(4) for a procurement contract awarded under the grant or cooperative agreement if—

(1) The procurement action was conducted by full and open competition;

(2) The procurement action was publicly advertised; and

(3) No offer for a domestic end product was received; or

(4) The head of the grantee's contracting activity or designee may make a nonavailability determination under § 12.710(d)(4) for any circumstance other than specified in paragraph (e) of this section.

(59 FR 36715, July 19, 1994, as amended at 61 FR 66500, Dec. 20, 1996; 61 FR 38064, July 26, 1996; 61 FR 69688, Dec. 30, 1996)

§ 12.715 Evaluating offers.

(a) Unless the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines otherwise, the offered price of a domestic end product is unreasonable when the lowest acceptable domestic offer exceeds § 12.705), inclusive of duty, by—

(1) More than 6 percent, if the domestic offer is from a large business that is not a labor surplus area concern; or

(2) More than 12 percent, if the domestic offer is from a small business concern or any labor surplus area concern.

(b) The evaluation in paragraph (a) of this section shall be applied on an

§ 12.720

item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation.

(c) If an award of more than \$250,000 would be made to a domestic concern if the 12-percent factor were applied, but if the 6-percent factor were applied, the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official shall decide whether award to the domestic concern would involve unreasonable cost.

§ 12.720 Excepted articles, materials, and supplies.

(a) As indicated in the Federal Acquisition Regulation (FAR), one or more agencies have determined that the articles, materials, and supplies on the list referred to in paragraph (b) of this section are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. This referenced list in paragraph (b) of this section is furnished for information only; an article, material or supply listed therein may be treated as domestic only when the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official has made a determination that it is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality.

(b) Refer to the current list of excepted articles, materials, and supplies in FAR 25.108 (48 CFR 25.108).

§ 12.725 Solicitation provisions and contract clause.

(a) When quotations are obtained orally, vendors shall be informed that only domestic end products, other than end products excepted on a blanket or individual basis (see § 12.720), shall be acceptable, unless the price for an offered domestic end product is unreasonable (see § 12.715).

(b) The grantee awarding officer shall insert the clause at § 12.730, Buy American Act—Supplies, in solicitations for procurement contracts awarded under the grant or cooperative agreement for the purchase of supplies, or for services

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Involving the furnishing of supplies, for use within the United States.

§ 12.730 Buy American Act—Supplies.

As prescribed in § 12.725, insert the following clause:

BUY AMERICAN ACT—SUPPLIES

(a) The Buy American Act (41 U.S.C. 101) provides that the Government give preference to domestic end products.

Components, as used in this clause, means those articles, materials, and supplies incorporated directly into the end products.

Domestic end product, as used in this clause, means an unmanufactured end product mined or produced in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the products referred to in paragraphs (b)(2) or (3) of this clause shall be treated as domestic.

End products, as used in this clause, means those articles, materials, and supplies to be acquired for public use under this contract.

(b) The contractor shall deliver only domestic end products, except those—

(1) For use outside the United States;

(2) That the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;

(3) For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that domestic preference would be inconsistent with the public interest; or

(4) For which the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines the cost to be unreasonable (see § 12.715).

(End of clause)

BUY AMERICAN ACT—CONSTRUCTION MATERIALS

§ 12.800 Scope.

This subpart implements the Buy American Act (41 U.S.C. 101). It applies to procurement contracts awarded under a grant or cooperative agreement for the construction, alteration, or repair of any public building or public work in the United States.

§ 12.805 Definitions.

Components, as used in this subpart, means those articles, materials, and

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supplies incorporated directly into construction materials.

Construction, as used in this subpart, means construction, alteration, or repair of any public building or public work in the United States.

Construction materials, as used in this subpart, means an article, material, and supply brought to the construction site for incorporation into the building or work.

Construction material also includes an item brought to the site pre-assembled from articles, materials, and supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

Domestic construction material, as used in this section, means: (a) An unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether a construction material is domestic, only the construction material and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the construction material and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with § 12.810(a)(3) are treated as domestic.

Foreign construction material, as used in this section, means as construction material other than a domestic construction material.

United States (see § 12.705).

§ 12.810 Policy.

(a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when—

§ 12.820

(1) The cost would be unreasonable as determined in accordance with § 12.815;

(2) The head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that use of a particular domestic construction material would be impracticable; or

(3) The head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality (see § 12.720).

(b) When it is determined for any reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the agreement. Findings justifying the exception shall be available for public inspection.

§ 12.815 Evaluating offers.

(a) The restrictions of the Buy American Act do not apply when the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official determines that using a particular domestic construction material would unreasonably increase the cost or would be impracticable.

(b) When proposed awards are submitted to the head of the grantee organization or a designee at a level no lower than the grantee's designated awarding official for approval, each submission shall include a description of the materials, including unit and quantity, estimated costs, location of the construction project, name and address of the proposed contractor, and a detailed justification of the impracticability of using domestic materials.

§ 12.820 Violations.

Violation of the Buy American Act in the performance of a procurement construction contract under a grant or cooperative agreement is a cause for default. Information concerning a failure to comply with the clause at § 12.830, Buy American Act—Construction Materials, shall be promptly reported, investigated, and referred, when appropriate to the appropriate

U.S. Department of the Interior employee responsible for administering the grant or cooperative agreement. (For department procedures, see subpart D of this part).

§ 12.826 Solicitation provision and contract clause.

The grantee awarding official shall insert the clause at § 12.830, Buy American Act—Construction Materials, in solicitations for procurement contracts awarded under a grant or cooperative agreement for construction inside the United States.

§ 12.830 Buy American Act—Construction materials.

As prescribed in § 12.825, insert the following clause in solicitations for procurement contracts awarded under a grant or cooperative agreement for construction inside the United States:

BUY AMERICAN ACT—CONSTRUCTION MATERIALS

(a) The Buy American Act (41 U.S.C. 101) provides that the Government give preference to domestic construction material.

Components, used in this clause, means those articles, materials, and supplies incorporated directly into construction materials. Construction material, as used in this clause, means an article, material, or supply brought to the construction site for incorporation into the building or work. Construction material also includes an item brought to the site pre-assembled from articles, materials or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

Domestic construction material, as used in this clause, means (a) an unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the construction materials determined to be unavailable pursuant to § 12.810(a)(3) of 41 CFR part 12, subpart E shall be treated as domestic.

(b) The contractor agrees that only domestic construction material will be used by the

contractor, subcontractors, materialmen, and suppliers in the performance of this agreement, except for foreign construction materials, if any, listed in this agreement. (End of clause)

Subpart F—Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

SOURCE: 60 FR 17238, Apr. 5, 1995, unless otherwise noted.

GENERAL

§ 12.901 Purpose.

This subpart establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations.

§ 12.902 Definitions.

Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for:

- (1) Goods and other tangible property received;
- (2) Services performed by employees, contractors, subcontractors, and other payees; and,
- (3) Other amounts becoming owed under programs for which no current services or performance is required.

Accrued income means the sum of:

- (1) Earnings during a given period from:
- (1) Services performed by the recipient, and

- (1) Goods and other tangible property delivered to purchasers, and
- (2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation,

taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

Cash contributions means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout means the process by which a Federal agency determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Federal awarding agency.

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.

Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

Disallowed costs means those charges to an award that the Federal awarding agency determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

Equipment means tangible nonexpendable personal property including ex-

empt property charged directly to the award having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

Excess property means property under the control of any Federal awarding agency that, as determined by the Secretary, is no longer required for its needs or the discharge of its responsibilities.

Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

Federal share of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

Funding period means the period of time when Federal funding is available for obligation by the recipient.

Intangible property and debt instruments means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

Obligations means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that

require payment by the recipient during the same or a future period.

Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of: cash disbursements for direct charges for goods and services; the amount of indirect expense incurred; the value of in-kind contributions applied; and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

Prior approval means written approval by an authorized official evidencing prior consent.

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in § 12.924 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Project costs means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period means the period established in the award document during which Federal sponsorship begins and ends.

Property means, unless otherwise stated, real property, equipment, supplies, intangible property and debt instruments.

Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient means an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include, at the discretion of the Federal awarding agency, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

Research and development means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions.

(1) *Research* is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied.

(2) *Development* is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices,

systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

Small awards means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 408(11) (currently \$100,000).

Subaward means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of "award" in this section.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Federal awarding agency.

Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

Suspension means an action by a Federal awarding agency that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under the Department of the Interior Regulations implementing E.O.'s

12549 and 12689, "Debarment and Suspension." See subpart D of 43 CFR part 12.

Termination means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by Federal awarding agency that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Unrecovered indirect cost means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

Working capital advance means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 12.903 Effect on other issuances.

For awards subject to this subpart, all administrative requirements of codified program regulations, program manuals, handbooks and other non-regulatory materials which are inconsistent with the requirements of this subpart shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in Section 12.904.

§ 12.904

§ 12.904 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this subpart when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this subpart shall be permitted only in unusual circumstances. Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB. All requests for class deviations shall be processed through the Assistant Secretary-Policy, Management, and Budget. Federal awarding agencies may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by Federal awarding agencies. Bureau/office application of less restrictive requirements when awarding small awards, except for those requirements which are statutory, as well as exceptions on a case-by-case basis, will be handled by designated officials identified in bureau/office procedures.

§ 12.906 Subawards.

Unless sections of this subpart specifically exclude subrecipients from coverage, the provisions of this subpart shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals, or other non-profit organizations. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule. "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 43 CFR part 12.

PRE-AWARD REQUIREMENTS

§ 12.910 Purpose.

Sections 12.011 through 12.917 prescribe forms and instructions and other pre-award matters to be used in applying for Federal awards.

§ 12.911 Pre-award policies.

(a) *Use of Grants and Cooperative Agreements, and Contracts.* In each in-

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stance, the Federal awarding agency shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-6308) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public Notice and Priority Setting.* Federal awarding agencies shall notify the public of their funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 12.913 Forms for applying for Federal assistance.

(a) Federal awarding agencies shall comply with the applicable report clearance requirements of 5 CFR part 1320, "Controlling Paperwork Burdens on the Public," with regard to all forms used by the Federal awarding agency in place of or as a supplement to the Standard Form 424 (SF-424) series.

(b) Applicants shall use the SF-424 series or those forms and instructions prescribed by the Federal awarding agency.

(c) For Federal programs covered by E.O. 12372, "Intergovernmental Review of Federal Programs," the applicant shall complete the appropriate sections of the SF-424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Federal awarding agency or the *Catalog of Federal Domestic Assistance*. The SPOC shall advise the applicant

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whether the program for which application is made has been selected by that State for review. (See also 43 CFR part 9).

(d) Federal awarding agencies that do not use the SF-424 form will indicate whether the application is subject to review by the State under E.O. 12372.

§ 12.913 Debarment and suspension.

Federal awarding agencies and recipients shall comply with the non-procurement debarment and suspension common rule implementing E.O.s 12549 and 12889, "Debarment and Suspension," subpart D of 43 CFR part 12. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 12.914 Special award conditions.

(a) Federal awarding agencies may impose additional requirements as needed, if an applicant or recipient:

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this part;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) Additional requirements may only be imposed provided that the applicant or recipient is notified in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

§ 12.915 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and

§ 12.916

Competitiveness Act (16 U.S.C. 206) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. Federal awarding agencies will follow the provisions of E.O. 12770, "Metric Usage in Federal Government Programs." When applicable, the awarding agency shall request that measurement-sensitive information to be included as part of the application, be expressed in metric units. When required by the awarding agency, for grants to recipients, the following term and condition will be incorporated into the grant:

Provision

All progress and final reports, other reports, or

All progress and final reports, other reports, or publications produced under this award shall employ the metric system of measurements to the maximum extent practicable. Both metric and inch-pound units (dual units) may be used if necessary during any transition period(s). However, the recipient may use non-metric measurements to the extent that the recipient has supporting documentation that the use of metric measurements is impracticable or is likely to cause significant inefficiencies or loss of markets to the recipient, such as when foreign competitors are producing competing products in non-metric units.

End of Provision

§ 12.916 Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580 codified at 42 U.S.C. 6962).

Under the Act, any State agency or agency of a political subdivision of a State that is using appropriated Federal funds must comply with section 6002 of RCRA. Section 6002 of RCRA requires that preference be given in procurement programs to the purchase of specific products containing recycled

materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247-264). Accordingly, State and local institutions of higher education and hospitals that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 12.917 Certifications and representations.

Unless prohibited by statute or codified regulation, each Federal awarding agency is authorized and encouraged to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

POST-AWARD REQUIREMENTS

Financial and Program Management

§ 12.920 Purpose of financial and program management.

Sections 12.921 through 12.928 prescribe standards for financial management systems, methods for making payments and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 12.921 Standards for financial management systems.

(a) Federal awarding agencies shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following:

- (1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 12.952. If a Federal awarding agency requires reporting on an accrual basis from a re-

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ipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (31 U.S.C. 6601 note) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 206. "Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records, including cost accounting records, that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency, at its discretion, may require adequate bonding

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and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Federal awarding agency may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above in § 12.921 (c) and (d), the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, "Surety Companies Doing Business with the United States."

§ 12.922 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payments by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 206.

(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain or demonstrate written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and financial management systems that meet the standards for fund control and accountability as established in § 12.921. Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purposes of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances will be consolidated to cover anticipated cash needs for all awards made by the Federal awarding agency to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 206.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payments shall be submitted on SF-270, "Request for Advance or Reimbursement," or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special Federal awarding agency instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. Federal awarding agencies may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the Federal awarding agency shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients shall be authorized to submit a request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the Federal awarding agency has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Federal awarding agency may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursement cycle. Thereafter, the Federal awarding agency shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used

for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, Federal awarding agencies shall not withhold payments for proper charges made by recipients at any time during the project period unless paragraph (h)(1) or (h)(2) of this section apply:

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements; or

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A-129, "Managing Federal Credit Programs." Under such conditions, the Federal awarding agency may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(1) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (1)(2) of this section, Federal awarding agencies shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(1) Consistent with the national goal of expanding opportunities for women-owned and minority-owned business enterprises, recipients are encouraged to use women-owned and minority-owned banks (a bank which is owned at least

50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (k)(1), (2) or (3) apply:

(1) The recipient receives less than \$120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(1) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to \$250 per year may be retained by the recipient for administrative expense. In keeping with Electronic Funds Transfer rules, (31 CFR part 206), interest should be re-mitted to the HHS Payment Management System through an electronic medium such as the FEDWIRE Deposit system. Recipients which do not have this capability should use a check. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this subpart, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. Federal agencies shall not require more than an original and two copies of these forms.

(1) SF-270, Request for Advance or Reimbursement. Each Federal awarding agency shall adopt the SF-270 as a standard form for all nonconstruction programs where electronic funds transfer or predetermined advance methods are not used. Federal awarding agencies, however, have the option of using

this form for construction programs in lieu of the SF-271, "Outlay Report and Request for Reimbursement for Construction Programs."

(2) SF-271, Outlay Report and Request for Reimbursement for Construction Programs. Each Federal awarding agency shall adopt the SF-271 as the standard form to be used for requesting reimbursement for construction programs. However, a Federal awarding agency may substitute the SF-270 when the Federal awarding agency determines that it provides adequate information to meet Federal needs.

§ 12.923 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the Federal awarding agency.

(7) Conform to other provisions of this subpart, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a Federal awarding agency authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of paragraph (c) (1) or (2) of this section:

(1) The certified value of the remaining life of the property recorded in the

recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if paragraph (g) (1) or (2) of this section apply:

(1) If the purpose of the award is to assist the recipient to acquire equipment, buildings, or land, the total

value of the donated property may be claimed as cost sharing or matching.

(3) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed their fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(1) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(2) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§ 12.924 Program income.

(a) Federal awarding agencies shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with Federal awarding agency regulations or the terms and conditions of the award, shall be used in one or more of the following ways:

(1) Added to funds committed to the project or program by the Federal awarding agency and recipient and used to further eligible project or program objectives;

(2) Used to finance the non-Federal share of the project or program; or

(3) Deducted from the total project or program allowable costs in determining the net allowable costs upon which the Federal share of costs is based.

(c) When an agency authorizes the disposition of program income as described in paragraph (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) If the Federal awarding agency does not specify in its regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the awarding agency indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in §12.914.

(e) Unless Federal awarding agency regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by Federal awarding agency regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §§12.930 through 12.937).

(h) Unless Federal awarding agency regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 12.925 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon Federal awarding agency requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A-21, "Cost Principles for Institutions of Higher

Education," OMB Circular A-122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74, appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved award, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraph (c)(1) and (c)(4) of this section, Federal awarding agencies are authorized, at their option, to waive cost-related and administrative prior written approvals required by this subpart and OMB Circulars A-21 and A-122. Such waivers may include authorizing recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Federal awarding agency. All pre-award costs are incurred at the recipient's risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing, with the supporting reasons and revised expiration date, at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances. The conditions that prevent issuance of a one-time extension are:

(1) The terms and conditions of award prohibit the extension;

(ii) The extension requires additional Federal funds; or

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Federal awarding agency provides otherwise in the award or in the agency's regulations, the prior approval requirements described in paragraph (e)(1) through (3) of this section are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of the transfer exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. No Federal awarding agency shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) No other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from Federal awarding agencies for budget revisions whenever paragraph (h) (1), (2) or (3) of this section apply:

(1) the revision results from changes in the scope or the objective of the project or program;

(2) additional Federal funds are needed to complete the project; or

(3) the recipient requests a revision that involves specific costs for which prior written approval requirements may be imposed under § 12.927.

(i) No other prior approval requirements for specific items will be imposed unless OMB approves a deviation.

(j) When a Federal awarding agency makes an award that provides support

for both construction and nonconstruction work, the Federal awarding agency may require the recipient to request prior approval before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, Federal awarding agencies shall require recipients to notify the Federal awarding agency in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than \$5,000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Federal awarding agency indicates that a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the Federal awarding agencies shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 12.926 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

(b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A-133 shall be subject to the

audit requirements of the Federal awarding agencies.

(90 FR 17288, Apr. 6, 1995, as amended at 62 FR 46089, 46046, Aug. 29, 1997)

§ 12.927 Allowable costs.

Federal awarding agencies shall determine allowable costs in accordance with the type of entity incurring the costs, using the appropriate directive from the table below.

Entity incurring costs	Applicable directive
State, local, or Federally recognized Indian Tribe	OMB Circular A-87, Cost Principles for State and Local Governments.
Non-profit organization	OMB Circular A-122, Cost Principles for Non-profit Organizations and 43 CFR 12.927(b).
Institution of Higher Education	OMB Circular A-81, Cost Principles for Educational Institutions.
Hospital	45 CFR part 74, appendix E, Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.
Commercial organization or non-profit organization listed in Attachment C of OMB Circular A-122.	49 CFR part 31, Contract Principles and Procedures or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 12.928 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Federal awarding agency.

Property Standards

§ 12.930 Purpose of property standards.

Sections 12.931 through 12.937 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. Federal awarding agencies shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 12.931 through 12.937.

§ 12.931 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 12.932 Real property.

Each Federal awarding agency shall prescribe requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following:

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the awarding agency.

(b) The recipient shall obtain written approval by the Federal awarding agency for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by the Department of the Interior.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the Federal awarding agency or its successor. The Federal awarding agency will give one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation

to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Federal awarding agency and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 12.933 Federally owned and exempt property.

(a) *Federally-owned property.* (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually to the Federal awarding agency an inventory listing of federally-owned property in their custody. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Federal awarding agency for further utilization.

(2) If the Federal awarding agency has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710(i)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12921, "Improving Mathematics and Science Education In Support of the National Education Goals.") Appro-

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propriate instructions shall be issued to the recipient by the Federal awarding agency.

(b) *Exempt property.* Exempt property. When statutory authority exists, the Federal awarding agency has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Federal awarding agency considers appropriate. Such property is "exempt property." Should a Federal awarding agency not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 12.934 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds, and shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) Activities sponsored by the Federal awarding agency, then

(2) Activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be

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given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. User charges shall be treated as program income.

(6) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Federal awarding agency.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following:

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal awarding agency for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results re-

corded with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Federal awarding agency.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of \$5,000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Federal awarding agency. The Federal awarding agency shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within that agency, the availability of the equipment shall be reported to the General Services Administration by the Federal awarding agency to determine whether a requirement for the equipment exists in other Federal agencies. The Federal awarding agency shall issue instructions to

the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern:

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the Federal awarding agency an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share \$600 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient will be reimbursed by the Federal awarding agency for such costs incurred in its disposition.

(h) The Federal awarding agency may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when the third party is otherwise eligible under existing statutes. The transfer shall be subject to the following standards.

(1) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(2) The Federal awarding agency shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with Federal funds and federally-owned equipment. If the Federal awarding agency falls to issue disposition instructions within the 120-calendar-day period, the recipient shall apply the standards of this section, as appropriate.

(3) When the Federal awarding agency exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 12.935 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 12.936 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Federal awarding agency(ies) reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, "Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."

(c) Unless waived by the Federal awarding agency, the Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

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(2) Authorize others to receive, reproduce, publish, or otherwise use the data for Federal purposes.

(d) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 12.934(g).

§ 12.937 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

Procurement Standards

§ 12.940 Purpose of procurement standards.

Sections 12.941 through 12.948 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by the Federal awarding agencies upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 12.941 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising

under its contract(s). The recipient is the responsible authority, without recourse to the Federal awarding agency, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 12.942 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unselected item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 12.943 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to

ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bids or offer is responsive to the solicitation and is most advantageous to the recipient. Price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 12.944 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide, at a minimum, that:

- (1) Recipients avoid purchasing unnecessary items.
- (2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government; and
- (3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible,

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of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for natural and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to use small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess

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the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.s 12549 and 12689, "Debarment and Suspension." See 43 CFR part 12.

(e) Recipients shall, on request, make available for the Federal awarding agency, pre-award review of procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedure or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently \$100,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 12.945 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 12.946 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

- (a) Basis for contractor selection;
- (b) Justification for lack of competition when competitive bids or offers are not obtained; and
- (c) Basis for award cost or price.

§ 12.947 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and documents, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 12.948 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the provisions below in all contracts and subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction

contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, the Federal awarding agency may accept the bonding policy and requirements of the recipient, provided the Federal awarding agency has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, the Federal awarding agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of appendix A to this subpart, as applicable.

Reports and Records

§ 12.960 Purpose of reports and records.

Sections 12.951 through 12.963 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 12.951 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements as delineated in § 12.926.

(b) The Federal awarding agency shall prescribe the frequency of submission for performance reports. Except as provided in § 12.961(f), performance reports will not be required more frequently than quarterly or less frequently than annually. Annual reports shall be due 90 calendar days after the grant year; quarterly or semi-annual reports shall be due 30 days after the reporting period. The Federal awarding agency may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) A final technical or performance report shall be required after completion of the project only if the awarding agency determines this to be appropriate.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily

quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Federal awarding agency of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) Federal awarding agencies may make site visits, as needed.

(h) Federal awarding agencies shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

§ 12.962 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) SF-269 or SF-269A, *Financial Status Report*. (i) Each Federal awarding agency will require recipients to use either the SF-269 or SF-269A to report the status of funds for all nonconstruction projects or programs. A Federal awarding agency may, however, have the option of not requiring the SF-269 or SF-269A when the SF-270, Request for Advance or Reimbursement, or SF-272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF-269 or SF-269A shall be required at the completion of the project when the SF-270 is used only for advances.

(ii) The Federal awarding agency shall prescribe whether the report shall be on a cash or accrual basis. If the Federal awarding agency requires accrual information and the recipient's accounting records are not normally

kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop accrual information through best estimates based upon an analysis of the documentation on hand.

(iii) The Federal awarding agency shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) The Federal awarding agency shall require recipients to submit the SF-269 or SF-269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the Federal awarding agency upon request by the recipient.

(2) SF-272, *Report of Federal Cash Transactions*. (i) When funds are advanced to recipients, the Federal awarding agency shall require each recipient to submit the SF-272 and, when necessary, its continuation sheet, SF-272a. The Federal awarding agency shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) Federal awarding agencies may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, Federal awarding agencies may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF-272 15 calendar days following the end of each quarter. The Federal awarding agencies may require a monthly report from those recipients receiving advances totaling \$1 million or more per year.

(v) Federal awarding agencies may waive the requirement for submission of the SF-272 for any one of the following reasons:

(A) When monthly advances do not exceed \$25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the Federal awarding agency's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Federal awarding agency needs additional information or more frequent reports, the following shall be observed:

(1) When additional information is needed to comply with legislative requirements, Federal awarding agencies shall issue instructions to require recipients to submit such information under the "Remarks" section of the reports.

(2) When a Federal awarding agency determines that a recipient's accounting system does not meet the standards in § 12.921, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. The Federal awarding agency, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) Federal awarding agencies are encouraged to shade out any line item on any report if not necessary.

(4) Federal awarding agencies may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) Federal awarding agencies may provide computer or electronic outputs to recipients when such action expedites or contributes to the accuracy or reporting.

§ 12.953 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. Federal awarding agencies shall not

impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the Federal awarding agency, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocation plans, etc., as specified in § 12.963(g).

(c) Copies of original records may be substituted for the original records if authorized by the Federal awarding agency.

(d) The Federal awarding agency will request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a Federal awarding agency may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Federal awarding agency, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the

purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no Federal awarding agency shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Federal awarding agency can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the Federal awarding agency.

(g) Indirect cost rate proposals, cost allocation plans, etc. Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to the Federal awarding agency or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of the submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the Federal awarding agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

Termination and Enforcement

§ 12.960 Purpose of termination and enforcement.

Sections 12.961 and 12.962 set forth uniform suspension, termination and enforcement procedures.

§ 12.961 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (a)(2) or (a)(3) of this section applies.

(1) By the Federal awarding agency, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the Federal awarding agency with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the Federal awarding agency written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraph (a) (1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 12.971(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 12.963 Enforcement.

(a) Remedies for noncompliance. If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Federal awarding

§ 12.970

agency may, in addition to imposing any of the special conditions outlined in § 12.914, take one or more of the following actions, as appropriate in the circumstances.

- (1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the Federal awarding agency.
- (2) Disallow (that is, deny both use of credit for) all or part of the cost of the activity or action not in compliance.
- (3) Wholly or partly suspend or terminate the current award.
- (4) Withhold further awards for the project or program.
- (6) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the awarding agency shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the Federal awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraphs (c) (1) and (2) of this section apply:

- (1) The costs result from obligations which are properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancelable.
- (2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under E.O.s 12549 and 12889 and the Federal

43 CFR Subtitle A (10-1-96 Edition)

awarding agency implementing regulations (see 43 CFR part 12).

AFTER-THE-AWARD REQUIREMENTS

§ 12.970 Purpose.

Sections 12.971 through 12.973 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 12.971 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Federal awarding agency may approve extensions when requested by the recipient.

(b) Unless the Federal awarding agency authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) The Federal awarding agency shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the Federal awarding agency has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A-129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Federal awarding agency shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§ 12.931 through 12.937.

(g) If a final audit has not been performed prior to the closeout of an award, the Federal awarding agency shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

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§ 12.973 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Federal awarding agency to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 12.926.

(4) Property management requirements in §§ 12.931 through 12.937.

(6) Records retention as required in § 12.963.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Federal awarding agency and the recipient, provided the responsibilities of the recipient referred to in § 12.973(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 12.973 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Federal awarding agency may reduce the debt by paragraph (a) (1), (2) or (3) of this section:

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR chapter II, "Federal Claims Collection Standards."

APPENDIX A TO SUBPART F—CONTRACT PROVISIONS

All contracts awarded by a recipient, including small purchases, shall contain the following provisions as applicable:

Pt. 12, Subpt. F, App. A

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. *Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of \$100,000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3). "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States". The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than \$2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333)*—Where applicable, all contracts awarded by recipients in excess of \$100,000 for construction contracts and for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR part 6). Under section 102 of the Act, each contractor shall be required to compute

the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1 1/4 times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchase of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401. "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

6. *Clean Air Act* (42 U.S.C. 7401 et seq.) and the *Federal Water Pollution Control Act* (33 U.S.C. 1251 et seq.), as amended—Contracts and subgrants of amounts in excess of \$100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment* (31 U.S.C. 1352)—Contractors who apply or bid for an award of more than \$100,000 shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension* (E.O.s 12549 and 12689)—No contracts shall be made to parties listed on the General Services Administration's "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs" in accordance with E.O.s

12549 and 12689. "Debarment and Suspension." This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding their exclusion status and that of their principals.

PART 13—VENDING FACILITIES OPERATED BY BLIND PERSONS

- 13.1 Authority and purpose.
- 13.2 Application for permit.
- 13.3 Cooperation in selection of facilities.
- 13.4 Terms of permit.
- 13.5 Protection from competition.
- 13.6 Appeals.

AUTHORITY: Sec. 4, 68 Stat. 683; 20 U.S.C. 107.

SOURCE: 22 FR 9476, Nov. 27, 1957, unless otherwise noted.

§ 13.1 Authority and purpose.

The Randolph-Sheppard Vending Stand Act of June 20, 1936, as amended by section 4 of the Act of August 3, 1964 (68 Stat. 683; 20 U.S.C. 107), directs that, insofar as practicable, preference shall be given to blind persons in the operation of vending stands and machines on any Federal property. The regulations in this part prescribe the policies and procedures to achieve and protect that preference on property, including land, owned or leased by the United States and controlled by the Department of the Interior.

§ 13.2 Application for permit.

(a) State licensing agencies designated by the Department of Health, Education, and Welfare under the Randolph-Sheppard Vending Stand Act may apply for permits to establish and maintain vending facilities, including both vending stands and machines, to be operated by blind persons licensed by the State agencies. Application for a permit shall be made, in writing, by the State licensing agency to the head of the Interior bureau or office having control of the property in question. In the regulations in this part the term "head of the Interior bureau or office" includes the authorized representatives of that bureau or office.

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(b) The head of the Interior bureau or office may deny an application if the denial would unduly inconvenience the bureau or office or adversely affect the interests of the United States. Such determination shall be in writing and shall state the reasons on which it is based. The fact that a permit will be without charge for rent shall not constitute a basis for denying an application.

(c) In considering applications for permits, due regard shall be given to the terms of any existing contractual arrangements.

§ 13.3 Cooperation in selection of facilities.

Upon request from a State licensing agency, the Interior bureau or office shall cooperate in selecting locations and arranging accommodations for vending facilities to be operated by blind persons. In making such selection, due consideration shall be given to the requirements of occupant agencies, availability of suitable space, and requirements for preparation and maintenance of the space.

§ 13.4 Terms of permit.

Every permit shall describe the location of the vending facilities and shall be subject to the following provisions:

(a) The permit shall be issued in the name of the applicant State licensing agency.

(b) The permit shall be for a definite term, not to exceed five years, and shall be without charge for rent.

(c) The permit may be revoked at any time upon not less than 30 days written notice to the permittee from the head of the Interior bureau or office having control of the property where the vending facilities are located. Such notice shall state the reasons on which it is based.

(d) Items sold at the vending facilities shall be limited to newspapers, periodicals, pre-packaged confections, tobacco products, articles dispensed automatically or in containers or wrappings in which they are placed before receipt by the vendor, and such other articles as may be approved by the head of the Interior bureau or office for each location. The head of the Interior bureau or office may require

discontinuance of sale of any type of article, upon not less than 15 days' notice in writing.

(e) Vending facilities shall be operated in compliance with such standards of appearance, safety, health, sanitation, and efficiency as may be prescribed by the head of the Interior bureau or office. Such standards shall conform, so far as practicable with the provisions of State laws and regulations, whether or not the property is under the exclusive jurisdiction of the United States.

(f) The permittee shall arrange for the modification or relocation of the vending facilities when in the opinion of the head of the Interior bureau or office such action is essential to the satisfactory maintenance, operation, or use of the property concerned and shall not modify or relocate such facilities without such approval. Installation, modification, relocation, or removal of vending facilities shall be made only under the supervision of the head of the Interior bureau or office and without cost to the Department of the Interior. The permittee may be required to remove any vending device deemed undesirable by the head of the Interior bureau or office. Ownership of vending devices installed by the permittee or operator shall remain vested with the installer. All extra identifiable costs incurred by the Department of the Interior in restoring to its original condition any space vacated by removal or relocation of vending facilities shall be reimbursed by the permittee or the operator.

(g) In the event a vending facility is being operated in a manner unsatisfactory to the Interior bureau or office, the permittee will be notified in writing and required to take appropriate action to rectify the situation.

(h) The operator of the vending facility shall carry such insurance against losses by fire, public liability, employer's liability, or other hazards as is customary among prudent operators of similar businesses under comparable circumstances.

§ 13.5 Protection from competition.

(a) The head of the Interior bureau or office shall protect the blind operator of the vending facility against direct

§ 163. Agenda

A. The Navajo Nation Council shall adopt an agenda in accordance with written rules and procedures established by the Navajo Nation Council.

B. Once an agenda is adopted, it shall be amended only by two-thirds ($\frac{2}{3}$) vote of the Council.

HISTORY

CAP-83-93, April 22, 1993. "Rules of Order" were amended for budget deliberations.

CAP-24-90, April 30, 1990. "Rules of Order" for the Navajo Nation Council were adopted.

CD-68-89, December 15, 1989.

CF-29-72, February 3, 1972.

CMA-51-66, §2, March 9, 1966.

1922-1951 Res. p. 592, May 7, 1951.

§ 164. Navajo Nation Council and Committee resolutions procedure

Except as otherwise provided herein, no proposed resolution shall be considered by the Navajo Nation Council or its Committees unless the following procedures are complied with:

A. The proposed resolution shall be reviewed and signed by the following:

1. The appropriate Division Director for departments and activities under his or her supervision;
2. The President or Vice-President of the Navajo Nation for resolutions initiated by the Office of the President or by an office within the Executive Branch;
3. The Attorney General of the Navajo Nation;
4. The Controller for all requests affecting financial matters;
5. The Legislative Counsel to the Navajo Nation Council;
6. The Speaker of the Navajo Nation Council for Navajo Nation Council resolutions; and
7. Chairpersons of Standing Committees for Committee resolutions.

B. The sponsor of the resolution shall submit to the Office of Legislative Services a sufficient number of copies of the proposed resolutions.

C. The purpose of review shall be to:

1. Determine whether each proposed resolution is properly prepared;
2. Where necessary, refer the proposed resolution to appropriate divisions, departments, committees or other entities for comments and recommendations;

3. Require necessary clearances, investigation or other appropriate action as may be deemed necessary and proper; and

4. In no event shall processing of a proposed resolution be withheld or unduly delayed without review and written comment. The proposed resolution shall be reviewed within ten (10) working days after submission to the reviewing office.

D. The Director, Office of Legislative Services, shall prepare and submit a proposed agenda for the Navajo Nation Council to the Ethics and Rules Committee for recommendation to the Navajo Nation Council and the Director shall prepare and submit proposed Committee agendas to appropriate Committees. The agendas shall be subject to an item by item review to obtain final acceptance or referred to Committees for further review and recommendation.

E. Any proposed resolution which has not been made a part of the adopted agenda may be added to the agenda by two-thirds vote of the quorum of the Navajo Nation Council or Committee provided that the resolution is reviewed pursuant to 2 NNC §164(A). [See also 2 NNC §163(B)].

HISTORY

CD-68-89, December 15, 1989. Amended generally. Subsections (A)(2), (5), (6), (7), (C)(4), (D) and (E) were added.

CJA-14-72, January 26, 1972.

The review requirements were previously at §165.

§ 165. Legislation

All resolutions proposing new laws or amendments of laws shall clearly indicate new language by underscoring the new language and deletion by overstrike and shall refer to appropriate Navajo Nation Code titles and sections.

HISTORY

CD-68-89, December 15, 1989.

§ 166. Record of proceedings; interpreters; access to records

A. Proper records of the proceedings of the Navajo Nation Council and all standing Committees, Boards and Commissions shall be kept and the necessary interpreting services shall be provided by the Office of Legislative Services.

B. Access to records of the proceedings of the Navajo Nation Council, standing Committees, Boards and Commissions shall be provided to the public through the Office of Legislative Services and the Central Records Department.

CAP-24-97

RESOLUTION OF THE
NAVAJO NATION COUNCIL

Approving the Amendments to 2 N.N.C. Section 164

WHEREAS:

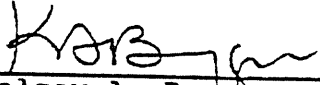
1. The Navajo Nation Council is the governing body of the Navajo Nation, pursuant to 2 N.N.C. §102 (A); and
2. The Navajo Nation Council has sole authority to consider and make amendments to the provisions of Title 2, Navajo Nation Code, (see Resolution CD-68-89); and
3. Section 164 of Title Two establishes the procedures for review of Council and standing committee resolutions which must be completed before any resolution may be considered and acted upon by the Council or its committees; and
4. The procedure established in Section 164 is cumbersome and frequently leads to unnecessary delay in the enactment of legislation to the detriment of the Navajo Nation and its people; and
5. It is in the best interest of the Navajo Nation and its people to reform the Section 164 review procedures by amending that law to reduce the number of days allowed for review, clarify the persons or entities who are mandatory reviewers, clarify the purpose of review, and create a remedy for the failure to complete review within the limits established by Section 164, as set forth in Exhibit One.

NOW THEREFORE BE IT RESOLVED THAT:

The Navajo Nation Council hereby adopts the amendments to 2 N.N.C. §164 set forth in Exhibit One.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 59 in favor, 0 opposed and 0 abstained, this 22nd day of April 1997.



Kelsey A. Begaye, Speaker
Navajo Nation Council

4-28-97

Date Signed

Motion: Young Jeff Tom
Second: Lawrence Morgan

EXHIBIT ONE

§164. Navajo Nation Council and Committee resolutions procedure

Except as otherwise provided herein, no proposed resolution shall be considered by the Navajo Nation Council or its Committees unless the following procedures are complied with:

- A. The proposed resolution shall be reviewed and signed by the following:
1. The appropriate Division Director for departments and activities under his or her supervision;
 2. The President or Vice President of the Navajo Nation for resolutions initiated by the Office of the President or by an office within the Executive Branch;
 3. The Attorney General of the Navajo Nation; the Attorney General and the Department of Justice shall not be required to approve any resolutions expressing congratulatory messages, condolences without appropriations, appointments, confirmations and internal budget transfers;
 4. The Controller for all requests affecting financial matters;
 5. The Legislative Counsel to the Navajo Nation Council; the Legislative Counsel to the Navajo Nation Council shall review all resolutions excluded from review by the Attorney General and Department of Justice pursuant to §164 (A)(3);
 6. The Speaker of the Navajo Nation Council for Navajo Nation Council resolutions; and
 7. Chairpersons of Standing Committees for committee resolutions.

No other review by any person or entity shall be deemed mandatory pursuant to this section. No discretionary review pursuant to §164 (B) shall be deemed to extend the time allowed for mandatory review pursuant to §164 (C).

B. Where deemed necessary by the Council or its Committees and in their sole discretion, a proposed resolution may be referred to any person or entity for comments and recommendations. Such referral shall not extend the time provided for review in §164 (C) by any mandatory reviewer listed in §164 (A).

C. All proposed resolutions shall be reviewed within five working days after submission to the reviewer. Within this five working day period, in no event shall processing of a proposed resolution be withheld or unduly delayed without review or signature. Any resolution held by a reviewer for more than five days without review or signature shall, on the sixth day, be deemed to have been fully reviewed, approved, and signed by the reviewer, and shall be immediately released, upon demand, to the sponsor.

D. The purpose of review shall be to:

1. Determine whether each proposed resolution is legally sufficient;
2. Determine whether required clearances, investigation or other appropriate action mandated by law have been obtained.

E. The sponsor of the resolution shall submit to the Office of Legislative Services sufficient copies of the proposed resolution to allow delivery of at least one copy to each member of the Council, or Committee and legislative staff.

F. The Director, Office of Legislative Services, shall prepare and submit a proposed agenda for the Navajo Nation Council to the Ethics and Rules Committee for recommendation to the Navajo Nation Council and the Director shall prepare and submit proposed Committee agendas to appropriate committees. The agendas shall be subject to an item by item review to obtain final acceptance or referred to committees for further review and recommendation.

G. Any proposed resolution which has not been made a part of the adopted agenda may be added to the agenda by two-thirds vote of the Navajo Nation Council or Committee provided that the resolution is first reviewed pursuant to 2 N.N.C. §164 (A). [See also 2 N.N.C. §163 (B)].

CJA-2-86

EXHIBIT "A"

NAVAJO NATION CORPORATION CODE

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NAVAJO NATION CORPORATION CODE

I. POLICY AND PURPOSE

The Navajo Nation Corporation Code is hereby enacted:

(a) The purpose of this code is to permit the formation of various corporate entities and require registration of foreign corporations; and to regulate such entities so as to promote economic growth and further the exercise of tribal sovereignty in the governance of its territory and citizens.

(b) This code is based upon the American Bar Association's Model Business Corporation Act, the Model Close Corporation Act and the Model Nonprofit Corporation Act as revised through the date of the enactment of this code, and the various agricultural cooperative acts of several states. The interpretation of this code shall be based on Navajo Tribal Court interpretation and such interpretation shall give the utmost respect in deciding the meaning and purpose of this code to the unique traditions and customs of the Navajo People. General decisional law interpreting similar provisions of the above Model Acts and state agricultural cooperative acts may be used as guidance.

(c) Unless otherwise expressly provided by law, the sovereign immunity of the Navajo Nation shall not extend to corporate entities organized under this code, nor shall such entities be considered a subdivision, entity or enterprise of the Navajo Nation, nor shall the Navajo Nation be liable for the debts or obligations of any kind of such entities.

(d) The provisions of this code shall be fully implemented within 180 days of the date of its adoption by the Navajo Tribal Council; provided however, the issuance of certificates of incorporation shall be issued on the date of adoption. The Division of Economic Development through its Department of Commerce shall administer the provisions of this code. The Division of Economic Development is directed to prepare an appropriate supplemental budget for carrying out its responsibilities under this code.

Chapter 1

ARTICLE I.

TITLE; DEFINITIONS; PURPOSES

101. SHORT TITLE

This chapter shall be known and may be cited as the "Navajo Nation Corporation Act."

102. DEFINITIONS

(a) "Articles of incorporation" include the original articles of incorporation, articles of merger or consolidation and all amendments thereto.

(b) "Attorney General" means the Attorney General of the Navajo Nation.

(c) "Authorized shares" means the aggregate number of shares, whether with or without par value, which the corporation is authorized to issue.

(d) "Capital surplus" means the entire surplus of a corporation other than its earned surplus.

(e) "Corporation" or "domestic corporation" means a for profit or nonprofit corporation subject to the provisions of this chapter, except a foreign corporation;

(f) "Court," except where otherwise specified, means the Navajo Tribal District Court having jurisdiction over civil actions.

(g) "Department" means the Department of Commerce within the Division of Economic Development or its designated successor.

(h) "Earned surplus" means the portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses from the date of incorporation, or from the latest date when a deficit was eliminated by an application of its capital surplus or stated capital or otherwise, after deducting subsequent distributions to shareholders and transfers to stated capital, and capital surplus to the extent such distributions and transfers are made out of earned surplus. Earned surplus shall also include any portion of surplus allocated to earned surplus in mergers, consolidations or acquisitions of all or substantially all of the outstanding shares or of the property and assets of another corporation, domestic or foreign.

(i) "Foreign corporation" means a corporation for profit or not for profit organized under laws other than the laws of the Navajo Nation.

(j) "Incorporator" means a signer of the original articles of incorporation.

(k) "Insolvent" means that the total liabilities of the corporation exceed a fair valuation of its total assets.

(l) "Navajo Indian Country" has the same meaning as in Title 7, Navajo Tribal Code Section 254.

(m) "Nonprofit corporation" means a corporation, no part of the income or profit of which is distributable to its members, directors or officers, except this Chapter shall not be construed as prohibiting the payment of reasonable compensation for services rendered or a distribution upon dissolution or liquidation as permitted by chapter 2.

(n) "Person" means both natural persons, either Navajo or non-Navajo, and foreign and domestic corporations and tribal governments and their political subdivisions.

(o) "Registered office" means that office maintained by the corporation within Navajo Indian Country, the address of which is on file with the Department.

(p) "Shareholder" means one who is a holder of record of shares in a corporation.

(q) "Shares" are the units into which the shareholders' right to participate in the control of the corporation, in its surplus or profits, or in the distribution of its assets, are divided.

(r) "Stated capital" means, at any particular time, the sum of:

(1) The par value of all shares of the corporation having a par value that have been issued;

(2) The amount of the consideration received by the corporation for all shares of the corporation without par value that have been issued, except such part of the consideration therefor as may have been allocated to capital surplus in a manner permitted by law; and

(3) Such amounts not included in subdivisions 1 and 2 of this paragraph as have been transferred to stated capital of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus all reductions from such sum as has been effected in a manner permitted by law.

Irrespective of the manner of designation thereof by the laws under which a foreign corporation is organized, the stated capital of a for profit foreign corporation shall be determined on the same basis and in the same manner as stated capital of a domestic corporation, for the purpose of computing fees and other charges imposed by this chapter.

(s) "Subscriber" means one who subscribes for shares in a corporation, whether before or after incorporation.

(t) "Treasury shares" means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been cancelled or restored to the status of authorized but unissued shares. Treasury shares shall be deemed to be "issued" shares but not "outstanding" shares.

103. AUTHORIZED PURPOSES FOR ORGANIZATION OF CORPORATION

Corporations for profit may be organized under this chapter for any lawful purpose or purposes.

104. GENERAL POWERS

(a) Each corporation shall have the power:

(1) To have perpetual succession of its corporate name unless a limited period of duration is stated in its articles of incorporation;

(2) To sue and be sued, complain and defend, in its corporate name;

(3) To have a corporate seal, which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced, provided however corporate seals shall not duplicate or closely resemble the seals of the Navajo Nation or its entities;

(4) To purchase, take, receive, lease, take by gift, devise, or bequest, or otherwise acquire, and to own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, including shares or other interests in, or obligations of, other domestic or foreign corporations, nonprofit corporations, associations, partnerships, limited partnerships, or individuals or governmental units or bodies, wherever situated;

(5) To redeem, acquire, cancel reacquired shares, reacquire and restore to the status of authorized but unissued, shares of stock issued by the corporation, but subsequently acquired by the corporation;

(6) To sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets;

(7) To lend money to, and otherwise assist, its employees;

(8) To make contracts including contracts of guaranty, suretyship and indemnification and incur liabilities; to borrow money; to issue its notes, bonds, and other obligations; and to secure any of its obligations by mortgage or pledge of all or any of its property or income, except for property or income held in trust subject to legal restrictions on hypothecation;

(9) To invest its surplus funds from time to time and to lend money for its corporate purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned;

(10) To conduct its business, carry on its operations, and have offices and exercise the powers granted by this chapter outside of Navajo Indian Country and to exercise in any reservation, state, territory, district, or possession of the United States, or in any foreign country the powers granted by this chapter subject to the laws of such jurisdictions;

(11) To elect or appoint officers and agents of the corporation, and to define their duties and fix their compensation;

(12) To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of the Nation, for the administration and regulation of the affairs of the corporation;

(13) To make contributions to charitable organizations;

(14) To cease its corporate activities and surrender its corporate franchise; and

(15) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed.

(b) Corporations organized under this chapter shall not have the power to engage in banking business.

105. CORPORATE NAME

The corporate name of a domestic corporation:

(1) Shall contain the word "corporation," "company," "incorporated," or "limited," or shall contain an abbreviation of one of such words;

(2) Shall not include the words "trust" or "trust company," separately or in combination to indicate or convey the idea that the corporation is engaged in trust business unless such corporation is to be and becomes actively and substantially engaged in trust business or such corporation is a holding company holding substantial interest in companies actively and substantially engaged in trust business;

(3) Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation;

(4) Shall not be the same as, or deceptively similar to, the name of any other entity organized or registered under this code; and

(5) Shall not contain the words "Navajo Nation" or "Navajo Tribe," nor in anyway imply that it is associated with the Navajo tribal government or a Navajo tribal entity, unless the Navajo Nation is a majority stockholder.

ARTICLE II. ORGANIC DOCUMENTS

106. INCORPORATORS

One or more persons may act as incorporators of a corporation by signing and filing in duplicate with the Department articles of incorporation. Upon filing of the articles of incorporation and compliance with applicable regulations, the Department shall issue a certificate of incorporation.

107. CONTENTS OF ARTICLES OF INCORPORATION

(a) The articles of incorporation shall set forth:

(1) The name of the corporation;

(2) The period of duration, which may be perpetual;

(3) The purpose or purposes for which the corporation is organized;

(4) A brief statement of the character of the business which the corporation initially intends to conduct;

(5) The class and aggregate number of shares which the corporation shall have the authority to issue and the par value of each of said shares, or a statement that all of said shares are without par value;

(6) Any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation;

(7) The address, including street and number, if any, of its principal office, and the name of its initial registered agent at such address;

(8) The number of directors constituting the initial board of directors and the names and addresses, including street and number, if any, of the persons who are to serve as directors until the first annual meeting of shareholders; or until their successors are elected and qualified. The minimum number of directors constituting the initial board shall be one (1);

(9) The name and address, including street and number, if any, of each incorporator; and

(10) A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation.

(b) It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this chapter. Whenever a provision of the articles of incorporation is inconsistent with a bylaw, the provision of the articles of incorporation shall be controlling.

(c) The articles of incorporation may provide for arbitration of any deadlock or dispute involving the internal affairs of the corporation.

108. EFFECT OF ISSUANCE OF CERTIFICATE OF INCORPORATION

Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter, except as against the Navajo Nation in a proceeding to cancel or revoke the certificate of incorporation.

109. BYLAWS

The power to make, alter, amend, or repeal the bylaws of the corporation shall be vested in the board of directors unless reserved to the shareholders by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law, or the articles of incorporation.

ARTICLE III.
STOCK AND STOCKHOLDERS

110. POWER TO ISSUE SHARES

Each corporation shall have the power to create and issue the number of shares stated in its articles of incorporation.

111. SUBSCRIPTIONS, CONSIDERATIONS, PAYMENT FOR SHARES, AND DETERMINATION OF AMOUNT OF STATED CAPITAL

Subscriptions, consideration, payment for shares and determination of amount of stated capital, shall be governed consistent with the provisions of the Model Business Corporation Act (as revised and approved as of January 1, 1986, by the American Bar Association Committee on Corporate Laws).

112. TRANSFER OF STOCK

Stock shall be freely alienable except to the extent restricted by the articles of incorporation or bylaws, and except that this section shall not be construed to restrict the operations of applicable blue sky or securities laws. No public offering of a security may be made without proof to the Department of compliance with such applicable blue sky or securities laws.

113. DENIAL OR RESTRICTION OF VOTING RIGHTS

A corporation may deny or restrict the voting rights of any of its stock, in its articles of incorporation, so long as it does not restrict or deny voting class shareholders' right to cumulative voting and preemptive right to acquire additional shares of the corporation.

114. EXPENSES OF ORGANIZATION, REORGANIZATION, AND FINANCING

The reasonable charges and expenses of organization or reorganization of a corporation may be paid out of the consideration received by the corporation in payment for its shares without thereby rendering such shares not fully paid.

115. STOCK CERTIFICATES; REPRESENTATION OF SHARES; SIGNERS; RESTRICTIONS OR LIMITATIONS ON TRANSFERABILITY; CONTENTS

(a) The shares of a corporation shall be represented by certificates signed by the president. In case any officer who has signed such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if such officer had not ceased to hold such office at the date of its issue.

(b) Every certificate representing shares, the transferability of which is restricted or limited, shall set forth a summary statement of any such restriction or limitation upon the transferability of such shares, on its face, and shall set forth on the back thereof a full statement of any such restriction or limitation upon the transferability of such shares, or shall state that the corporation will furnish to any shareholder upon request and without charge such statement.

(c) Each certificate representing shares shall also state:

- (1) That the corporation is organized under the laws of the Navajo Nation;
- (2) The name of the person to whom issued;
- (3) The number and class of shares which such certificate represents; and

(4) The par value of each share represented by such certificate, or a statement that the shares are without par value.

(d) No certificate shall be issued for any share until such share is fully paid.

116. LIABILITY OF SUBSCRIBERS AND SHAREHOLDERS

(a) A holder or a subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares

other than the obligation to pay to the corporation the full consideration for which said shares were issued or to be issued, which, as to shares having a par value, shall be not less than the par value thereof, except as set forth in subsection (c) below. Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid, shall not be personally liable to the corporation or its creditors for any unpaid portion of such consideration.

(b) No person holding shares as executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall be personally liable as a shareholder, but the shareholder estate and funds in the hands of said executor, administrator, conservator, guardian, trustee, assignee, or receiver shall be so liable. No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

(c) A holder or subscriber to shares of a corporation is presumed not to be personally liable for the debts of the corporation, but may be personally liable to the corporation in proportion to their ownership interest, after all assets of the corporation have been applied to claims of creditors, and the debts, obligations and liabilities of the corporation are not thereafter paid and discharged, to the extent determined by the court based upon the application of general decisional law relating to the piercing of the corporate veil, pursuant to, 7 Navajo Tribal Code Section 204. The court may consider in making shareholders liable hereunder, whether under the circumstances giving rise to claims of creditors, the acts or omissions by the corporation involved:

- (1) fraud;
- (2) misrepresentation;
- (3) thin-capitalization;
- (4) ultra-hazardous activities;
- (5) violation of applicable consumer protection laws;
- (6) criminal wrong-doing;
- (7) failure to maintain a reasonable amount of liability insurance coverage for the acts or omissions of its directors, officers, employees or agents; or
- (8) failure to comply with any provision of this code.

(d) No right to contribution shall exist between the shareholders and no liability under this section shall be asserted more than one year from the later

of the time a creditor's claim in tort or contract accrued or the date such claim should have been discovered.

117. VOTING OF SHARES; EXCLUSION OF SHARES OR CORPORATION'S OWN STOCK; DETERMINATION OF NUMBER OF OUTSTANDING SHARES

(a) Unless otherwise provided in the articles of incorporation, each outstanding share shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders.

(b) Shares of treasury stock belonging to a corporation shall not be voted, directly or indirectly, at any meeting and shall not be counted in determining the total number of outstanding shares at any given time, but shares of its own stock held by it in a fiduciary capacity may be voted and shall be counted in determining the total number of outstanding shares at any given time.

(c) A shareholder may vote either in person or by proxy executed in writing by the shareholder or by his/her duly authorized attorney in fact. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy. Every proxy shall be revocable at the pleasure of the person executing it or his/her personal representatives or assigns; but the parties to a valid pledge or to an executory contract of sale may agree in writing as to which of them shall vote the stock pledged or sold, until the contract of pledge or sale is fully executed.

(d) In all elections for directors every shareholder entitled to vote shall have the right to vote, in person or by proxy, the number of shares owned by him/her, for as many persons as there are directors to be elected, or to cumulate said shares, and give one candidate as many votes as the number of such directors multiplied by the number of his/her shares shall equal, or to distribute such votes on the same principle among any number of such candidates.

118. CERTAIN HOLDERS; PROXY PRESUMED VALID

(a) Shares outstanding in the name of another corporation may be voted by such officer, agent, or proxy as the bylaws of such corporation may prescribe, or, in the absence of such provision, as the board of directors of

such corporation may determine. A proxy purporting to be executed by a corporation shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger.

(b) Shares outstanding in the name of a deceased person may be voted by his/her administrator or executor, either in person or by proxy. Shares outstanding in the name of a guardian, conservator, or trustee may be voted by such fiduciary, either in person or by proxy, but no guardian, conservator, or trustee shall be entitled, as such fiduciary, to vote shares held by him/her without evidence of the guardian, conservator, or trust relationship with the shareholder.

(c) Shares outstanding in the name of a receiver or a trustee in bankruptcy may be voted by such a receiver or trustee, and shares held by or under the control of a receiver or a trustee in bankruptcy may be voted by such receiver or trustee without the transfer thereof into his/her name, if authority to do so be contained in an appropriate order of the court, by which such receiver or trustee in bankruptcy was appointed.

(d) Shares outstanding in the name of a partnership may be voted by any partner. A proxy purporting to be executed by a partnership shall be presumed to be valid and the burden of proving invalidity shall rest on any challenger.

(e) Shares outstanding in the name of two or more persons as joint tenants, or tenants in common, or tenants by the entirety, may be voted in person or by proxy by any one or more of such persons. If more than one of such tenants shall vote such shares, the vote shall be divided among them in proportion to the number of such tenants voting in person or proxy unless a different apportionment by such tenants is requested in writing prior to the vote.

119. STOCKHOLDERS' MEETINGS

(a) The bylaws of a corporation shall provide for an annual meeting of stockholders.

(b) Meetings of shareholders may be held at such place within or without the boundaries of Navajo Indian Country as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held at the principal office of the corporation.

(c) Special meetings of the shareholders may be called by the president, the secretary, the board of directors, the holders of not less than one-fifth of all the outstanding shares entitled to vote, or by such other officers or persons as may be provided in the articles of incorporation, or the bylaws.

120. NOTICE

(a) Except as provided herein, written or printed notice stating the place, day, and hour of the meeting, and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall, in the absence of a provision in the bylaws specifying a different period of notice, be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or person calling the meeting, to each shareholder of record entitled to vote at such meeting.

(b) If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his/her address as it appears on the records of the corporation, with postage thereon prepaid.

(c) Notice may be waived in writing by any shareholder, and will be deemed to be waived by any shareholder attending the meeting in person.

121. QUORUM OF SHAREHOLDERS REQUIRED

(a) Unless otherwise provided in the articles of incorporation, or bylaws, a majority of the outstanding shares having voting power, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders; provided, that in no event shall a quorum consist of less than one-third of the outstanding shares having voting power.

(b) The shareholders present at a duly organized meeting may continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum.

(c) If a meeting cannot be organized because a quorum has not attended, those present may adjourn the meeting from time to time until a quorum is present, at which time any business may be transacted that may have been transacted at the meeting as originally called.

(d) If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number is required by this chapter, or the articles of incorporation; provided however, that in elections of directors, those receiving the greatest number of votes shall be deemed elected even though not receiving a majority.

122. DIVIDENDS DECLARATION AND PAYMENT ON OUTSTANDING SHARES;
RESTRICTIONS ON PAYMENT OF DIVIDENDS

The board of directors of a corporation may declare and the corporation may pay dividends on its outstanding shares in cash, property, or its own shares, subject to the following provisions:

(1) No dividend shall be declared or paid at a time when the corporation is insolvent or its net assets are less than its stated capital, or when payments thereof would render the corporation insolvent or reduce its net assets below its stated capital;

(2) Dividends may be paid out of earned surplus or surplus arising from the surrender to the corporation of any of its shares, provided that the source of such dividends shall be disclosed to the shareholders receiving such dividends, concurrently with payment thereof. The limitations of this paragraph shall not limit nor be deemed to conflict with the provisions of this chapter in respect of the distribution of assets as a liquidating dividend;

(3) If a dividend is declared payable in its own shares having a par value, such shares shall be issued at the par value thereof and there shall be transferred from earned surplus to stated capital at the time such dividend is paid, an amount of surplus equal to the aggregated par value of the shares to be issued as a dividend;

(4) If a dividend is declared payable in its own shares without par value, such shares shall be issued at such value as shall be fixed by the board of directors by resolution adopted at the time such dividend is declared, and there shall be transferred from earned surplus to stated capital at the time such dividend is paid, an amount of surplus equal to the aggregated value so fixed in respect of such shares. The amount per share transferred to stated capital shall be disclosed to the shareholders receiving such dividends, concurrently with payment thereof;

(5) A split up or division of issued shares into a greater number of shares of the same class shall not be construed to be a share dividend within the meaning of this section;

(6) No dividend shall be declared or paid contrary to any restrictions contained in the articles of incorporation; and

(7) Subject to any restrictions contained in its articles of incorporation, the directors of any corporation engaged in the exploitation of wasting assets (oil, gas or other minerals) may determine the net profits derived from the exploitation of such wasting assets without taking into consideration the depletion of such wasting assets resulting from lapse of time or from necessary consumption of such assets incidental to their exploitation, and may pay dividends from the net profits so determined by the directors.

123. STOCKHOLDERS' RIGHT OF INSPECTION

A stockholder of a corporation or his/her agent may inspect and copy during usual business hours any records or documents of the corporation relevant to its business and affairs, including any:

- (1) Bylaws;
- (2) Minutes of the proceedings of the stockholders and directors;
- (3) Annual statement of affairs;
- (4) Stock ledger; and
- (5) Books of account.

124. STATEMENT OF AFFAIRS

(a) Once during each calendar year, one or more stockholders of a corporation may present to any officer of the corporation a written request for a statement of its affairs.

(b) Within 20 days after a request is made for a statement of corporation's affairs, the corporation shall prepare and have available on file at its principle office a statement, verified under oath by its president or treasurer or one of its vice-president or assistant treasurer, which sets forth fairly and accurately, in reasonable detail, the corporation's assets and liabilities as of a reasonably current date. This statement once prepared, shall fulfill the request for such a statement made by any shareholder for the following 12 months.

ARTICLE IV.
BOARD OF DIRECTORS

125. ORGANIZATION MEETING OF DIRECTORS

Unless otherwise provided in the articles of incorporation, after the issuance of the certificate of incorporation, an organizational meeting of the board of directors named in the articles of incorporation shall be held within the United States, at the call of a majority of the directors so named, for the purpose of adopting bylaws, electing officers, and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least five days notice thereof by mail to each director so elected, which notice shall state the time and place of the meeting; provided however, that if all the directors shall waive notice in writing and fix a time and place for said organization meeting, no notice shall be required of such meeting.

126. BOARD OF DIRECTORS; POWERS AUTHORIZED; QUALIFICATIONS

(a) The business and affairs of a corporation shall be managed by a board of directors. Directors need not be shareholders in the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors.

(b) Unless otherwise provided in the articles of incorporation or bylaws, the board of directors, by the affirmative vote of a majority of the directors then in office, and irrespective of any personal interest of any director, shall have authority to establish reasonable compensation of all directors for services to the corporation as directors, officers, or otherwise.

127. NUMBER; ELECTION

The number of directors shall be fixed by the bylaws, except as to the number constituting the first board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the bylaws. In the absence of a bylaw fixing the number of directors, the number shall be the same as that stated in the articles of incorporation. Such persons shall hold office until the

first annual meeting of shareholders or until their successors shall have been elected and qualified. Each director shall hold office for the term for which he/she is elected or until his/her successor shall have been elected and qualified.

128. CLASSIFICATION

The bylaws may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. Absent any such classifications the term of a director shall be for one year. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes. No classification of directors shall be effective prior to the first annual meeting of shareholders.

129. VACANCIES

Any directorship to be filled by reason of an increase in the number of directors may be filled by election at an annual meeting or at a special meeting of shareholders entitled to vote called for that purpose. Any vacancy occurring in the board of directors for any cause other than by reason of an increase in the number of directors may be filled by an affirmative vote of a majority of the remaining directors, unless the articles of incorporation otherwise provide. A director elected to fill a vacancy shall be elected for the unexpired term of his/her predecessor in office.

130. QUORUM

A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated

in the articles of incorporation, shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

131. EXECUTIVE COMMITTEE; POWERS

If the bylaws so provide, the board of directors, by resolution adopted by a majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors then of the number stated in the articles of incorporation, may designate two or more directors to constitute an executive committee, which committee, to the extent provided in such resolution or in the bylaws of the corporation shall have and may exercise all of the authority of the board of directors in the management of the business and affairs of the corporation but, the designation of such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any member thereof, of any responsibility imposed by law.

132. PLACE OF MEETINGS; SPECIAL MEETINGS

Meetings of the board of directors, regular or special, may be held at such place within or without the boundaries of Navajo Indian Country as may be provided in the bylaws or by resolution adopted by a majority of the board of directors.

133. NOTICE OF MEETINGS; WAIVER OF NOTICE

Meetings of the board of directors shall be held upon such notice as is prescribed in the bylaws. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting.

134. OFFICERS; POWERS AUTHORIZED

(a) The officers of a corporation shall consist of at least a president and secretary, and may additionally consist of one or more vice-presidents and a treasurer, as may be prescribed by the bylaws. Each officer shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws. If the bylaws so provide, any two or more offices may be held by the same person.

(b) All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the property and affairs of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws.

135. REMOVAL

Any officer or agent elected or appointed by the board of directors may be removed by a majority vote of the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed.

136. EXECUTION OF DOCUMENTS

Notwithstanding any contrary provision of law, an individual who holds more than one office in a corporation may act in more than one capacity to execute, acknowledge, or verify any instrument required to be executed, acknowledge, or verified by more than one officer.

137. BOOKS AND RECORDS; REQUIREMENTS FOR RIGHT TO EXAMINE AND MAKE EXTRACTS THEREFROM

(a) Each corporation shall keep correct and complete books and records of account, and shall also keep minutes of the proceedings of its shareholders and board of directors, and shall keep at its principal place of business or at the office, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each. Books, records and minutes shall be in written form, or in any other form capable of being converted into written form within a reasonable time.

(b) Nothing herein contained shall impair the power of the court upon proof by a shareholder of proper purpose, irrespective of the period of time during which such shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him/her, to compel by mandamus or otherwise the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders.

138. LIABILITY OF DIRECTORS IN CERTAIN CASES

(a) In addition to any other liabilities imposed by law upon directors of a corporation:

(1) Directors of a corporation who vote for or assent to the declaration of any dividend or other distribution of the assets of a corporation to its shareholders contrary to the provisions of this chapter or contrary to any restrictions contained in the articles of incorporation, shall be jointly and severally liable to the corporation for the amount of such dividend which is paid or the value of such assets which are distributed in excess of the amount of such dividend or distribution which could have been paid or distributed without a violation of the provisions of this chapter or the restrictions in the articles of incorporation;

(2) Directors of a corporation who vote for or assent to the purchase of its own shares contrary to the provisions of this chapter or contrary to any restrictions contained in the articles of incorporation shall be jointly and severally liable to the corporation for the amount of consideration paid for such shares which is in excess of the maximum amount which could have been paid therefor without a violation of the provisions of this chapter; and

(3) The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

(b) A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter under subsection (a) is taken shall be presumed to have assented to the action taken unless his/her dissent shall be entered in the minutes of the meeting or unless he/she shall file his/her written dissent to such action with the secretary of the meeting before the adjournment thereof, or shall forward such dissent by registered or certified mail to the secretary of the corporation before five o'clock in the afternoon of the next day which is not a holiday or a Saturday after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

(c) A director shall not be liable under subsection (a) if he/she relied and acted in good faith upon financial statements of the corporation represented to him/her to be correct by the president or the officer of such corporation having charge of its books of account, or stated in a written report by an independent public or certified public accountant or firm of such accountants fairly to reflect the financial condition of such corporation, nor shall he/she be so liable if in good faith in determining the amount available for any such dividend or distribution he/she considered the assets to be fairly valued at their book value.

(d) Any director against whom a claim shall be asserted under or pursuant to this section for the payment of a dividend or other distribution of assets of a corporation and who shall be held liable thereon, shall be entitled to contribution from the shareholders who accepted or received any such dividend or assets, knowing or who should have reasonably known that such dividend or distribution to have been made in violation of this chapter, in proportion to the amounts received by them.

(e) Any director against whom a claim shall be asserted under or pursuant to this section shall be entitled to contribution from the other directors who voted for or assented to the action upon which the claim is asserted.

(f) No liability under this section shall be asserted more than one year from the later of the time the claim accrued or the date such claim should have been discovered.

ARTICLE V.
MERGER AND DISSOLUTION

139. VOLUNTARY DISSOLUTION, CONSOLIDATION, MERGER, OR TRANSFER OF ASSETS

A voluntary dissolution, consolidation, merger or transfer of assets of a corporation shall be made in a manner consistent with the provisions applicable to domestic corporations under the corporation laws in the Model Business Corporation Act and Model Nonprofit Corporation Act (as revised and approved as of January 1, 1986, by the American Bar Association Committee on Corporate Laws). However, approval of any proposed voluntary dissolution, consolidation, merger or transfer of assets under this chapter requires the affirmative vote of at least a majority of stockholders of the corporation.

140. INVOLUNTARY DISSOLUTION BY SHAREHOLDERS

Any stockholder of a corporation may petition the court for dissolution of the corporation on the ground that there is such internal dissention among the stockholders of the corporation that the business and affairs of the corporation can no longer be conducted to the advantage of the stockholders generally.

141. INVOLUNTARY DISSOLUTION BY ATTORNEY GENERAL OF THE NAVAJO NATION

A corporation may be dissolved involuntarily by a judgment of the court in an action filed against it by the Attorney General when any one of the following is established:

(1) The corporation has failed to comply with the provisions of this code or regulations promulgated thereunder;

(2) The corporation procured its formation through fraudulent misrepresentation or concealment of material fact;

- (3) The corporation has violated the laws of the Navajo Nation;
- (4) The corporation has failed to file the statement of change of registered agent required by this chapter within thirty days after such change is duly authorized by the corporation; or
- (5) The corporation has continued or persisted over a period of time to conduct its business in a fraudulent or otherwise illegal manner.

142. REVOCATION BY DEPARTMENT

- (a) The articles of incorporation of a corporation may be revoked by the Department if the corporation has failed to comply with the provisions of this code or regulations promulgated thereunder.
- (b) The articles of incorporation of a corporation shall not be revoked by the Department unless:
 - (1) It shall have given the corporation not less than sixty days notice thereof by mail addressed to the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business; and
 - (2) Specifies the violation and gives the corporation a reasonable opportunity to comply or cure said violation.
- (c) Upon such revocation, the Department shall:
 - (1) Issue a certificate of revocation in duplicate;
 - (2) File one such certificate in its office; and
 - (3) Mail to such corporation at the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business a certificate of revocation.
- (d) Upon the issuance of such certificate of revocation, the existence of such corporation shall terminate, subject to the provisions of subsection (e) of this section. If the corporation has not applied for reinstatement within the six month period following the issuance of a certificate of revocation, the Department shall release the corporate name for use by any proposed domestic corporation, any foreign corporation applying for authority to do business within Navajo Indian Country or for use by a person intending to register the name as a trade name.
- (e) A corporation may apply for reinstatement within six months from the date a certificate of revocation is issued by the Department. If none of the

conditions set forth in subsection (a) of this section exists at the time of such application for reinstatement and, if such corporation has paid all fees, penalties, and costs incurred by the Department, the Department shall issue a certificate of reinstatement.

(f) The Department shall make available to the public a list, compiled annually, of the corporations whose articles of incorporation were revoked during the preceding year.

143. VENUE AND PROCESS

Actions by the Attorney General for the involuntary dissolution of a corporation shall be commenced either in the court in which the known place of business or registered agent of the corporation is situated, or if the corporation has failed to maintain a registered agent or known place of business, then in the court of Window Rock. Process shall issue and be served as in other civil actions.

144. JURISDICTION OF COURT TO LIQUIDATE ASSETS AND BUSINESS OF CORPORATION

The court shall have full power to liquidate the assets and business of a corporation. It shall not be necessary to make shareholders parties to any such action or proceeding unless relief is sought against them personally.

145. PROCEDURE IN LIQUIDATION OF CORPORATION BY COURT

(a) In proceedings to liquidate the assets and business of a corporation the court shall have power to issue injunctions, to appoint a receiver or receivers pendente lite, with such powers and duties as the court from time to time may direct, and to take such other proceedings as may be requisite to preserve the corporate assets wherever situated, and carry on the business of the corporation until a full hearing can be had.

(b) After a hearing had upon such notice as the court may direct to be given to all parties to the proceedings, and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers with authority to collect the assets of the corporation, including all

amounts owing to the corporation by subscribers on account of any unpaid portion of the consideration for the issuance of shares. Such liquidating receiver or receivers shall have authority, subject to the order of the court, to sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale. The assets of the corporation or the proceeds resulting from a sale, conveyance or other disposition thereof shall be applied to the expenses of such liquidation and to the payment of the liabilities and obligations of the corporation, and any remaining assets or proceeds shall be distributed among its shareholders according to their respective rights and interests. The order appointing such liquidating receiver or receivers shall state their powers and duties. Such powers and duties may be increased or diminished at any time during the proceedings.

(c) The court shall have power to allow from time to time as expenses of the liquidation compensation to the receiver or receivers and to attorneys in the proceeding, and to direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of such assets.

(d) A receiver of a corporation appointed under the provisions of this section shall have authority to sue and defend in all courts in his/her own name as receiver of such corporation. The court appointing such receiver shall have exclusive jurisdiction over the corporation and its property, wherever situated.

146. FILING OF CLAIMS IN LIQUIDATION PROCEEDINGS

In proceedings to liquidate the assets and business of a corporation the court may require all creditors of the corporation to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims it shall fix a date, which shall be not less than four months from the date of the order, as the last day for the filing of claims, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed. Prior to the date so fixed, the court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the corporation.

147. DISCONTINUANCE OF LIQUIDATION PROCEEDINGS

The liquidation of the assets and business of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the court shall dismiss the proceedings and direct the receiver to redeliver to the corporation all its remaining property and assets.

148. JUDGMENT OF INVOLUNTARY DISSOLUTION

In proceedings to liquidate the assets and business of a corporation, when the costs and expenses of such proceedings and all debts, obligations and liabilities of the corporation shall have been paid and discharged and all of its remaining property and assets distributed to its shareholders, or in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts and obligations, and all the property and assets have been applied to their payment, the court shall enter a judgment dissolving the corporation, whereupon the existence of the corporation shall cease.

149. FILING OF JUDGMENT OF DISSOLUTION

When the court enters a judgment dissolving a corporation, the clerk of such court shall cause a certified copy of the judgment to be filed with the Department. No filing fee shall be charged by the Department.

150. DEPOSIT WITH DIVISION OF ADMINISTRATION AND FINANCE OF AMOUNT DUE CERTAIN SHAREHOLDERS

Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found, or who is under disability and there is no person legally competent to receive such distributive portion, shall be reduced to cash and deposited with the Division of Administration and Finance and shall be paid over to such creditor or shareholder or to his/her legal representative upon proof satisfactory to the Division of Administration and Finance of his/her right thereto, and shall escheat to the Navajo Nation if unclaimed for a period of not less than five years.

151. SURVIVAL OF REMEDY AFTER DISSOLUTION

The dissolution of a corporation either by the issuance of a certificate of dissolution or revocation by the Department, or dissolution by a judgment of the court, or by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time within five years of the expiration of its period of duration.

ARTICLE VI.
REGISTERED AGENT

152. REGISTERED AGENT REQUIRED

Each corporation shall have and continuously maintain within Navajo Indian Country a registered agent, which agent may be either an individual resident within Navajo Indian Country or a corporation authorized by its own articles of incorporation to act as such agent and authorized to transact business within Navajo Indian Country.

153. CHANGE OF REGISTERED AGENT

(a) A corporation may change its registered agent by filing with the Department a statement setting forth:

- (1) The name of the corporation;
- (2) The name and address of its then-registered agent;
- (3) The name and address of its successor registered agent;
- (4) The date upon which such change shall take effect; and
- (5) That such change was authorized by resolution duly adopted by its board of directors or was authorized by an officer of the corporation duly empowered to make such change.

(b) Such statement shall be executed in duplicate by the corporation and delivered to the Department. If the Department finds that such statement conforms to the provisions of this chapter, it shall:

- (1) Endorse on each of such duplicate originals the word "Filed," and the month, day and year of the filing thereof;
- (2) File one of such duplicate originals in its office; and
- (3) Return the other duplicate original to the corporation or its representative.

(c) The change of registered agent shall become effective upon the filing of such statement by the Department.

(d) Any registered agent of a corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the Department, which shall forthwith mail one copy thereof to the corporation at its principal office as shown on the records of the Department. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Department or upon the appointment of a successor agent becoming effective, whichever occurs first. No fee or charge of any kind shall be imposed with respect to a filing under this subsection.

(e) A registered agent may change his/her address by filing with the Department a statement setting forth:

- (1) The name of the registered agent;
- (2) The present address, including street and number, if any, of such registered agent;
- (3) The names of the corporation or corporations represented by such registered agent at such address;
- (4) The address, including street and number, if any, to which the office of such registered agent is to be changed; and
- (5) The date upon which such change will take place.

(f) Such statement shall be executed in duplicate by such registered agent in his/her individual name, but if such agent is a corporation, domestic or foreign, such statement shall be executed by such corporation, its president or vice-president and delivered to the Department. However, if such registered agent represents more than one corporation, he/she shall file an additional copy for such additional corporation. If the Department finds such statement conforms to law, it shall, when all fees and charges have been paid as prescribed in this chapter:

(1) Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof;

(2) File one of such duplicate originals in its office; and

(3) Return the other duplicate original to the registered agent.

(g) The change of address of such registered agent as to the domestic corporation or corporations named in such statement shall become effective upon the filing of such statement by the Department, or on the date set forth in such statement as the date on which such change of location of such registered office will take place, whichever is later.

154. REGISTERED AGENT AS AGENT FOR SERVICE; SERVICE WHEN NO REGISTERED AGENT

(a) The registered agent so appointed by a corporation shall be an agent of such corporation upon whom process against the corporation may be served, and upon whom any notice or demand required or permitted by law to be served upon the corporation may be served. Service of any process, notice, or demand upon a corporate agent, as such agent, may be made by delivering a copy of such process, notice, or demand to an officer, director or managing agent of the corporation, in lieu of the registered agent.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent within Navajo Indian Country, or whenever any such registered agent cannot with reasonable diligence be found at his/her office within Navajo Indian Country, or whenever the articles of incorporation of any domestic corporation shall be revoked, then the Department shall be an agent of such corporation upon whom any process against such corporation may be served and upon whom any notice or demand required or permitted by law to be served upon such corporation may be served. Service upon the Department of any such process, notice, or demand shall be made by delivering to and leaving with the Department, or with any clerk having charge of its office, duplicate copies of such process, notice, or demand. In the event any such process, notice, or demand is so served, the Department shall immediately cause one of such copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its principal office.

(c) The Department shall keep a permanent record of all processes, notices, and demands served upon it under this section, and shall record therein the time of such service and its action with respect thereto.

(d) Service of process upon the Department as agent, pursuant to this section shall not constitute an action against or service upon the Navajo Nation.

155. FAILURE TO MAINTAIN REGISTERED AGENT

Any corporation incorporated or reincorporated under this code which fails or refuses to maintain a registered agent within Navajo Indian Country, in accordance with the provisions of this chapter, shall be subject to a civil sanction in the amount of \$250. The Attorney General upon the recommendation of the Department shall seek the imposition of such in the Window Rock District Court.

ARTICLE VII.
FILINGS; AMENDMENTS

156. ARTICLES OF INCORPORATION; PROCEDURE FOR FILING

(a) Duplicate originals of the articles of incorporation shall be delivered to the Department. If the Department finds that the articles of incorporation conform to law, it shall, when all fees have been paid as in this chapter prescribed:

(1) Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof;

(2) File one of such duplicate originals in its office; and

(3) Issue a certificate of incorporation to which it shall affix the other duplicate original. Such certificate of incorporation may be evidenced by the signature of the Director of the Department or his/her designee on the duplicate original of the articles of incorporation.

(b) The certificate of incorporation, together with the duplicate original of the articles of incorporation affixed thereto by the Department, shall be delivered to the incorporators or their representatives.

157. AMENDMENT OF ARTICLES OF INCORPORATION; CONTENTS
RESTRICTED; PURPOSES

A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired; provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amendment, and, if a change in shares or the rights of shareholders, or an exchange, reclassification, or cancellation of shares or rights of shareholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification, or cancellation are stated.

158. PROCEDURES BEFORE ACCEPTANCE OF SUBSCRIPTION TO SHARES

Amendments to the articles of incorporation before any subscriptions to shares have been accepted by the board of directors shall be made in the following manner:

(1) Amended articles of incorporation modifying, changing, or altering the original articles of incorporation shall be signed by all of the living or competent incorporators who signed the original articles of incorporation and filed with the Department. Such amended articles of incorporation shall contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amended articles of incorporation;

(2) Such amended articles of incorporation shall be delivered in duplicate original to the Department. If the Department finds that such amended articles of incorporation conform to law, it shall, when all fees have been paid as in this chapter prescribed:

(A) Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof;

(B) File one of such duplicate originals in its office; and

(C) Issue an amended certificate of incorporation, to which it shall affix the other duplicate original. Such certificate may be evidenced in the same manner as provided in section 156 (a)(3).

(3) The amended certificate of incorporation with the duplicate original of the amended articles of incorporation affixed thereto shall be delivered to the corporation or its representative; and

(4) Upon the issuance of the amended certificate of incorporation, the amended articles of incorporation shall become effective and shall take the place of the original articles of incorporation.

159. PROCEDURES AFTER ACCEPTANCE OF SUBSCRIPTION TO SHARES

Amendments to the articles of incorporation after acceptance of any subscriptions to shares shall be made in the following manner:

(1) The board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

(2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effective thereby shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this chapter for the giving of notice of meetings of shareholders. If the meeting be an annual meeting, the proposed amendment or such summary shall be included in the notice of such annual meeting;

(3) At such meeting a vote of the shareholders entitled to vote shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote; and

(4) Any number of amendments may be submitted to the shareholders, and voted upon by them, at one meeting.

160. ARTICLES OF AMENDMENT; CONTENTS

(a) The articles of amendment shall be executed in duplicate by the corporation by its president or a vice-president and shall set forth:

(1) The name of the corporation;

(2) The amendment so adopted;

(3) The date of the adoption of the amendment by the shareholders;

(4) The number of shares outstanding and the number of shares entitled to vote;

(5) The number of shares voted for and against such amendment, respectively;

(6) If such amendment provides for an exchange, reclassification, or cancellation of issued shares, and if the manner in which the same shall be effected is not set forth in the amendment, then a statement of the manner in which the same shall be effected; and

(7) If such amendment effects a change in the amount of stated capital, or paid-in surplus, or both, then a statement of the manner in which the same is effected and a statement, expressed in dollars, of the amount of capital surplus, either stated capital or paid-in surplus, as changed by such amendment.

(b) If issued shares without par value are changed into the same or a different number of shares having par value, the aggregate par value of the shares into which the shares without par value are changed shall not exceed the sum of:

(1) The amount of stated capital represented by such shares without par value;

(2) The amount of surplus, if any, transferred to stated capital on account of such change; and

(3) Any additional consideration paid for such shares with par value and allocated to stated capital.

161. PROCEDURE FOR FILING

(a) Duplicate originals of the articles of amendment shall be delivered to the Department. If it appears to the Department that the articles of amendment conform to law, it shall, when all fees have been paid as in this chapter prescribed:

(1) Endorse on each of such duplicate originals the word "Filed" and the month, day, and year of the filing thereof;

(2) File one of such duplicate originals in its office; and

(3) Issue a certificate of amendment to which it shall affix the other duplicate original. Such certificate may be evidenced in the same manner as provided in section 156 (a)(3).

(b) The certificate of amendment with the duplicate original of the articles of amendment affixed thereto shall be delivered to the corporation or its representative.

162. EFFECT OF CERTIFICATE OF AMENDMENT

(a) Upon the issuance of the certificate of amendment, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly.

(b) No amendment shall affect any existing cause of action in favor of or against such corporation, or any pending suit to which the corporation shall be a party, or the existing rights of persons other than shareholders; and, in the event the corporate name shall be changed by amendment, no suit brought by or against such corporation under its former name shall abate for that reason.

ARTICLE VIII.

DEPARTMENT; FEES AND CHARGES

163. DEPARTMENT; DUTIES AND FUNCTIONS

(a) The Department shall be charged with the administration and enforcement of this code. Said Department is authorized to employ such personnel as may be necessary for the administration of this code.

(b) Every certificate and other document or paper executed by the Department, in pursuance of any authority conferred upon it by this chapter, and sealed with the seal of the Navajo Nation, and all copies of such papers as well as of documents and other papers filed in accordance with the provisions of this chapter, when certified by it and authenticated by said seal, shall have the same force and effect as evidence as would the originals thereof in any action or proceeding in any court and before a public officer, or official body.

(c) The Department is authorized to promulgate, upon the review and approval of the Attorney General and the Economic and Community Development Committee of the Navajo Tribal Council, regulations to effectuate the policies and purposes of this code, or to modify or vary any provision of this code incorporating by reference any Model Corporation Act. Provided, the Department shall set forth in such regulations what specific policy or purpose is purported to be furthered by such regulation.

164. FEES AND CHARGES

The Department shall impose fees and charges in accordance with schedules promulgated by regulation pursuant to section 163, provided however, the initial fee for filing of articles of incorporation shall be \$10.

165. NONPAYMENT OF FEES

(a) The Department shall not file any articles, statements, certificates, reports, applications, notices, or other papers relating to any corporation organized under the provisions of this chapter until all fees and charges provided to be paid in connection therewith shall have been paid to it or while the corporation is in default in the payment of any fees, charges, or sanctions herein provided to be paid by or assessed against it. Nothing in this section shall prevent the filing, without the payment of all such fees, charges, and sanctions, of a written notice of resignation by a registered agent of a corporation.

(b) No corporation required to pay a fee, charge, or sanction under this chapter shall maintain within Navajo Indian Country any civil action until all such fees, charges, and sanctions have been paid in full.

(c) The Navajo Nation shall have the right to offset any amounts due and owing from a corporation under this code against payments due from the Navajo Nation to such corporation.

ARTICLE IX.

FOREIGN CORPORATIONS

166. ADMISSION OF FOREIGN CORPORATION

(a) No foreign corporation shall have the right to transact business within Navajo Indian Country until it shall have been authorized to do so as provided in this chapter. No foreign corporation shall be authorized under this chapter to transact within Navajo Indian Country any business which a corporation organized under this chapter is not permitted to transact. A foreign corporation shall not be denied authority by reason of the fact that the laws under which such corporation is organized governing its organization and

internal affairs differ from the laws of this chapter, and nothing in this chapter shall be construed to authorize regulation of the organization or the internal affairs of such corporation.

(b) Without excluding other activities which may not constitute transacting business within Navajo Indian Country, a foreign corporation shall not be considered to be transacting business within Navajo Indian Country, for the purposes of this chapter, by reason of carrying on within Navajo Indian Country any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs;

(3) Maintaining checking or savings accounts;

(4) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities;

(5) Effecting sales through independent contractors;

(6) Soliciting or receiving orders outside Navajo Indian Country in pursuance of letters, circulars, catalogs or other forms of advertising or solicitation and accepting such orders outside Navajo Indian Country and filling them with goods shipped into Navajo Indian Country;

(7) Creating as borrower or lender, or acquiring, indebtedness, mortgages or other security interests in real or personal property; or

(8) Securing or collecting debts or enforcing any rights in property securing the same.

(c) The provisions of this section shall not apply to the question of whether any foreign corporation is subject to service of process and suit within Navajo Indian Country.

(d) The Department may promulgate regulations governing the registration and regulation of unincorporated associations, consistent with the policies and purposes contained herein.

167. POWERS OF FOREIGN CORPORATION

A foreign corporation authorized to transact business under this chapter shall, until withdrawal as provided in this chapter, enjoy the right to engage in any lawful activities, and shall be subject to the applicable provisions of this chapter.

168. CORPORATE NAME OF FOREIGN CORPORATION

No authority shall be given to a foreign corporation unless the corporate name of such corporation:

(a) Shall contain the word "association", or "bank", "corporation", "company", "incorporated", or "limited", or shall contain an abbreviation of one of such words, or such corporation shall, for use within Navajo Indian Country, add at the end of its name one such words or an abbreviation thereof;

(b) Shall not contain any word or phrase likely to mislead the public or which indicates or implies that it is organized for any purpose other than any specific purpose contained in its articles of incorporation;

(c) Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of the Navajo Nation, or any foreign corporation authorized to transact business within Navajo Indian Country, or a name the exclusive right to which is, at the time, reserved in the manner provided in this chapter or any trade name, except that this provision shall not apply if the foreign corporation applying for authority files with the Department any one of the following:

(1) A resolution of its board of directors adopting a fictitious name for use in transacting business within Navajo Indian Country which fictitious name is not deceptively similar to the name of any domestic corporation or of any foreign corporation authorized to transact business within Navajo Indian Country or any trade name;

(2) The written consent of such other corporation or holder of a reserved or trade name to use the same or deceptively similar name and one or more words are added to make such name distinguishable from such other name;

or

(3) A certified copy of a final decree of a court of competent jurisdiction establishing the prior right of such foreign corporation to the use of such name within Navajo Indian Country;

(d) Notwithstanding the provisions of paragraph 1 of this section, shall not include the words "bank," "trust" or "trust company" separately or in combination to indicate or convey the idea that the corporation is engaged in banking or trust business unless such corporation is to be and becomes actively and substantially engaged in banking or trust business or such corporation is a holding company holding substantial interest in companies actively and substantially engaged in banking or trust business; and

(e) Shall not contain the words "Navajo Nation" or "Navajo Tribe", nor in anyway imply that it is associated with the Navajo tribal government or a Navajo tribal entity.

169. CHANGE OF NAME BY FOREIGN CORPORATION

Whenever a foreign corporation which is authorized to transact business within Navajo Indian Country shall change its name to one under which authority would not be granted to it on application therefor, it shall not thereafter transact any business within Navajo Indian Country until it has changed its name to a name which is available to it under the laws of the Navajo Nation, or has otherwise complied with the provisions of this chapter.

170. APPLICATION FOR AUTHORITY TO TRANSACT BUSINESS

A foreign corporation, in order to procure authority to transact business within Navajo Indian Country, shall make application therefor in accordance with regulations promulgated by the Department.

171. KNOWN PLACE OF BUSINESS AND REGISTERED AGENT OF FOREIGN CORPORATION

Each foreign corporation authorized to transact business within Navajo Indian Country shall have and continuously maintain within Navajo Indian Country:

(1) A known place of business which shall be the office of its registered agent, unless otherwise designated in its application for authority; and

(2) A registered agent, which agent may be either an individual resident of the Navajo Nation, a domestic corporation, or a foreign corporation authorized to transact business within Navajo Indian Country.

(3) Notification of any change of the known place of business or registered agent of a foreign corporation shall be in accordance with regulations promulgated by the Department.

172. SERVICE OF PROCESS ON FOREIGN CORPORATION

(a) The registered agent so appointed by a foreign corporation authorized to transact business within Navajo Indian Country shall be an agent of such corporation upon whom any process, notice or demand required or permitted by law to be served upon the corporation may be served, and which, when so served, shall be lawful personal service on the corporation. Process, notice or demand may be served upon an officer, director or managing agent of the corporation in lieu of the registered agent.

(b) Whenever a foreign corporation authorized to transact business within Navajo Indian Country shall fail to appoint or maintain a registered agent at the address shown on the records of the Department, the Department shall make available to any person the last known address of such corporation, its shareholders and officers upon whom any such process, notice or demand may be served. The litigant instituting an action shall be responsible for serving the corporation with process, in accordance with the Navajo Rules of Civil Procedure.

(c) Nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law.

173. REVOCATION OF AUTHORITY

(a) The authority of a foreign corporation to transact business within Navajo Indian Country may be revoked by the Department if the corporation fails to comply with the provisions of this code or regulations promulgated thereunder.

(b) The authority of a foreign corporation shall not be revoked by the Department unless:

(1) It shall have given the corporation not less than sixty days notice thereof by mail addressed to the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business, and

(2) Specifies the violation and gives the corporation a reasonable opportunity to comply or cure said violation.

(c) Upon such revocation, the Department shall:

(1) Issue a certificate of revocation in duplicate;

(2) File one such certificate in its office; and

(3) Mail to such corporation at the address set forth on its most recently filed annual report, or if no annual report has been filed, then to its last known place of business a certificate of revocation. Upon the issuance of such certification of revocation, the existence of such corporation shall terminate.

(d) The Department shall make available to the public a list, compiled annually, of the foreign corporations for which authority to transact business within Navajo Indian Country has been revoked during the preceding year.

174. TRANSACTIONING BUSINESS WITHOUT AUTHORITY

(a) No foreign corporation transacting business within Navajo Indian Country without authority shall be permitted to maintain any action, suit or proceeding in any tribal court, until such corporation shall have been authorized to transact business. Nor shall any action, suit or proceeding be maintained in any such court by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation within Navajo Indian Country, until authority to transact business has been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets.

(b) The failure of a foreign corporation to obtain authority to transact business within Navajo Indian Country shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any tribal court.

(c) A foreign corporation which transacts business within Navajo Indian Country without authority shall be liable to the Navajo Nation, for the years or portions thereof during which it transacted business within Navajo Indian

Country without authority, in an amount equal to all fees which would have been imposed by this chapter upon such corporation had it duly applied for, and received authority to transact business within Navajo Indian Country as required by this chapter and thereafter filed all reports required by this chapter, plus all penalties imposed by this chapter for failure to pay such fees. The Attorney General shall have authority to bring proceedings to recover all amounts due the Navajo Nation under the provisions of this section.

(d) The Attorney General or any other person may bring and maintain an action to enjoin any foreign corporation from transacting business within Navajo Indian Country without authority. Upon a foreign corporation obtaining authority such action shall be dismissed but the plaintiff therein shall recover his/her costs and reasonable attorneys' fees. A determination by a court that a party to the action is a foreign corporation which was requested to, but, failed to qualify as a foreign corporation under this chapter shall be prima facie evidence against such foreign corporation in any other action brought by or against it by any other person of such requirement to and failure to qualify.

ARTICLE X. REPORTS AND FILING

175. ANNUAL REPORT OF DOMESTIC AND FOREIGN CORPORATIONS

(a) Each domestic corporation, and each foreign corporation authorized to transact business within Navajo Indian Country, shall file with the Department an annual report and accounting in accordance with regulations promulgated by the Department.

176. CIVIL LIABILITY FOR FALSE STATEMENTS

(a) If, as required by regulation, any report, certificate or other statement made, or public notice given by, the officers or directors of a corporation is false in a material representation, or if any book, record or account of the corporation is knowingly or wrongfully altered, the officers, directors or agents knowingly or wrongfully authorizing, signing or making the false report, certificate, other statement or notice or authorizing or making the wrongful alteration are in their person jointly and severally liable to a person

who has become a creditor or shareholder of the corporation upon the faith in the false, material representation or alteration therein for all damages resulting therefrom.

(b) An action for the liability imposed by this section shall be commenced within two years after discovery of the false representation or alteration and within six years after the certificate, report, public notice or other statement or the alteration has been made or given by the officers, directors or agents of the corporation.

**177. CIVIL INVESTIGATORY DEMAND OR SIGNATURE VIOLATIONS;
CORPORATE RECORDS; CLASSIFICATION**

(a) A person who knowingly fails or refuses within the time prescribed by this chapter to answer truthfully and fully any civil investigatory demand propounded to him/her by the Department in accordance with this chapter, or who signs any articles, statement, report, application or other document filed with the Department which is known to the person as false in any material respect, is guilty of a misdemeanor and is subject to a civil sanction of \$500, or a sentence not to exceed 6 months in jail, or both, and, in the case of a non-Indian is subject to such civil sanction and exclusion from Navajo Indian Country.

(b) A person who with the intent to defraud or deceive knowingly falsified, alters, steals, destroys, mutilates, defaces, removes or secretes the books, records or accounts of a corporation is guilty of a misdemeanor and is subject to a civil sanction of \$500, or a sentence not to exceed 6 months in jail, or both, and, in the case of a non-Indian is subject to such civil sanction and exclusion from Navajo Indian Country.

178. CIVIL INVESTIGATIVE DEMANDS BY THE DEPARTMENT

The Department may propound to any corporation, domestic or foreign, subject to the provisions of this chapter, and to any director, officer, shareholders or employee thereof, such civil investigative demands as may be reasonably necessary and proper to enable it to ascertain whether such corporation has complied with all the provisions of this chapter or applicable regulations promulgated thereunder. The Department may also depose

directors, officers, shareholders or employees for the same purpose. The Department by regulations shall specify the manner and method of responding to such civil investigative demands.

179. PUBLIC RECORDS; INFORMATION DISCLOSED BY ANNUAL REPORTS, CERTIFICATES OF DISCLOSURES CIVIL INVESTIGATIVE DEMANDS

Articles of incorporation, amendments thereto dissolution and certificates of incorporation, dissolution, revocation or reinstatement shall be maintained on file by the Department and available for public inspection and copying. Annual reports or information received in response to regulations or civil investigative demands propounded by the Department shall not be open to public inspection, nor shall the Department disclose any facts or information obtained therefrom, except as the same are to be made public or in the event such civil investigative demands or the answers are required for evidence in any court proceeding.

ARTICLE XI.
MISCELLANEOUS

180. JURISDICTION OF NAVAJO TRIBAL COURTS

(a) The court shall have original jurisdiction to the extent permitted by due process over any action against, or by, any domestic or foreign corporation, or for actions arising under this chapter, including actions by an aggrieved party contesting acts or omissions by the Department, under this chapter. In the case of contests of Department acts or omissions, the Department shall provide for informal hearings within 30 days of a written request. Such written request shall be filed within 10 days of the alleged act or omission giving rise to the contested issue. Timely filing of such shall be jurisdictional to any subsequent court proceeding. A decision by the Department on the contested issue shall be rendered in writing within 30 days from the date of such hearing. Failure to render such decision within 30 days shall constitute denial of the requested relief.

(b) Within 30 days of a written decision or a denial of requested relief or a failure to act on a written request after sixty (60) days of receipt of such

request an aggrieved party may bring an action de novo, either in the court where the principle place of business is located or in the court in Window Rock, to compel, by injunctive or mandamus relief, the Department to discharge its statutory obligations or to refrain from violating such party's legal rights.

(c) Nothing in this section shall be construed as an exception to or repeal of the provisions of the Navajo Sovereign Immunity Act, 1 Navajo Tribal Code, Sections 351 et seq., as may be amended from time to time.

181. CERTIFIED COPIES TO BE RECEIVED IN EVIDENCE

All copies of documents except for annual reports or responses to civil investigatory demands delivered to and filed by the Department in accordance with the provisions of this chapter when certified by it, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. A certificate by the Department under seal, as to the existence or nonexistence of the facts relating to corporations shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.

182. GREATER VOTING REQUIREMENTS

Whenever with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation or bylaws require the vote or concurrence of the holders of a greater proportion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation or bylaws shall control.

183. ACTION BY SHAREHOLDERS WITHOUT A MEETING

(a) Any action required by this chapter to be taken at a meeting of the shareholders of a corporation or any action which may be taken at a meeting of the shareholders may be taken without a meeting, if a consent in writing setting forth the action so taken, is signed by all of the shareholders entitled to vote with respect to the subject matter thereof.

(b) Such consent shall have the same effect as a unanimous vote of shareholders, and may be stated as such in any articles or document filed with the Department under this chapter.

184. UNAUTHORIZED ASSUMPTION OF CORPORATE POWERS

All persons who assume to act as a corporation without authority to do so, or who procured incorporation through fraudulent misstatements or omissions of material fact in documents filed with the Department, shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof. Ratification of preincorporation acts constitute authority to act in a corporate capacity as used herein.

185. INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS

A corporation shall have power to indemnify any person who was or is a party, or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, if he/she acted, or failed to act, in good faith and in a manner he/she reasonably believed to be in, or not opposed to, the best interests of the corporation, but, with respect to any criminal action or proceeding, the corporation shall not pay criminal fines for which a person is personally liable.

186. DEFENSE OF ULTRA VIRES

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act, or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

(a) In a proceeding by a shareholder against the corporation to enjoin the doing of any act, or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being, or is to be, performed or made pursuant to a contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the

performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

(b) In a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation; or

(c) In a proceeding by the Attorney General, as provided in this chapter, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from the transaction of unauthorized business.

Chapter 2

201. SHORT TITLE

This chapter shall be known and may be cited as the "Navajo Nation Close Corporation Act."

202. DEFINITIONS

(a) "Capital units" means the proportions of the proprietary interest in the corporation owned by the investors;

(b) "Corporation" or "close corporation" means a corporation for profit organized pursuant to the provisions of this chapter;

(c) "Good faith" or "in good faith" means an act or thing done when it is in fact done honestly, whether it be done negligently or not;

(d) "Investor" means one who is the owner of capital units in a close corporation; and

(e) "Manager" means the person or persons named in the articles of incorporation, either originally or by amendment thereto, in the capacity of manager or assistant manager, and does not include any person who is not so named.

203. MANDATORY PROVISIONS OF ARTICLES OF INCORPORATION

(a) The articles of incorporation of a close corporation shall set forth:

(1) The name of the corporation which shall contain the words "close corporation" or an abbreviation therefor;

(2) The name and address of the manager or managers of the corporation;

(3) The names, addresses and amount of initial contribution of capital units of each of the original investors. The number of original investors shall not exceed thirty (30);

(4) The aggregate amount in dollars of the initial capital units to be paid to the corporation; and

(5) The name and address of the corporation's initial registered agent.

(b) It shall not be necessary to set forth in the articles of incorporation any corporate powers or any corporate purposes.

204. OPTIONAL PROVISIONS OF ARTICLES OF INCORPORATION

The articles of incorporation of a close corporation may set forth any of the following:

- (1) The period of duration, if less than perpetual;
- (2) Any restrictions on the authority of the manager or managers of the close corporation;
- (3) Any reservations of authority to the investors;
- (4) Any restriction on the power of any investor to sell, transfer or to create a security interest in his/her capital units. No restriction on the power to sell, transfer or create a security interest shall be binding except as to persons who have actual knowledge thereof unless such restriction is set forth in the articles of incorporation;
- (5) Any restriction on the subsequent issuance of additional capital units;
- (6) Whether the corporation will have the power to acquire its capital units and if so any restrictions or limitations thereon. If no power to acquire its capital units is set forth in the articles of incorporation, the corporation may not acquire any of its outstanding capital units;
- (7) Any provisions which provide for arbitration or other non-judicial procedure seeking resolution of any dispute as provided in section 206;
- (8) Any provisions for replacement or succession of a manager inconsistent with section 205 (d);
- (9) Any provision which either relieves the manager entirely of the obligation to make accountings to investors or which modifies the period or form of such accounting in a manner inconsistent with section 205 (e);
- (10) Any provision for annual or other periodic meetings of investors. If no such provision is set forth in the articles of incorporation, there shall be no requirement for meetings for investors;
- (11) Any requirement for bond or other security to be given to the corporation by a manager to secure the faithful performance of his/her duties;

- (12) Any restrictions upon competition by investors directly or indirectly with the business of the corporation;
- (13) Any provision for delegation of his/her authority by a manager;
- (14) Any provision for a dissolution option pursuant to section 207;
- (15) Any provision for varying relationships among investors as to relative rights in capital units; and
- (16) Any other provisions consistent with law which the incorporators elect to set forth.

205. MANAGERS

(a) All managers shall be natural persons. It is the purpose of this chapter that the corporation be operated on a day-to-day basis by one manager, by managers having divided functions or by assistant managers who can serve either as alternates to the manager or assume some portion of managerial responsibility. As among the corporation, its investors, and any manager, there shall be no limitations on the authority of a manager unless specifically limited by provisions of the articles of incorporation, the written employment contract of such manager or the records of the corporation evidencing the acts of the investors. Any person other than a manager or investor who deals in good faith with the corporation will not be subject to any limitation on the authority of any manager, even though such manager's authority is expressly limited in the articles of incorporation.

(b) No manager may delegate any of his/her authority to any other agent, employee or representative of a corporation unless authority to do so is contained in the articles of incorporation or is granted by act of the investors.

(c) Any manager shall have the same rights, duties, obligations and privileges as a person who is both a director and officer of a corporation for profit under the provisions of chapter 1, except as specifically modified in this chapter.

(d) Any manager may be replaced or succeeded by a new manager at any time by a majority of the votes of the investors, unless otherwise provided by the articles of incorporation. Such replacement shall be effective when a certificate of change of manager, sworn under oath by an investor is filed with the Department stating the name of the replaced manager and the name and address of the new manager and that such new manager was elected by the required vote.

(e) Unless the articles of incorporation or vote of the investors provide otherwise, a manager shall mail to each investor an annual accounting and an annual report. Such annual accounting and report shall be mailed or delivered to the investors within thirty (30) days after the date filing is required.

206. SETTLEMENT OF DISPUTES; ARBITRATION

The articles of incorporation may provide for arbitration of any deadlock or dispute involving the internal affairs of the corporation.

207. OPTION TO DISSOLVE

(a) The articles of incorporation of any corporation may include a provision granting to any investor or investors an option to have the corporation dissolved at will or upon the performance or occurrence of any specified event or contingency. Whenever any such option to dissolve is exercised, the investor or investors exercising such option shall give written notice thereof to all other investors. After the expiration of thirty (30) days following the mailing of such notice, the dissolution of the corporation shall proceed as if the required vote had consented to the dissolution of the corporation as provided by section 139.

(b) If the articles of incorporation as originally filed do not contain a provision authorized by subsection (a) of this section, the articles of incorporation may be amended to include such provision if adopted by the affirmative vote of all investors. If the articles of incorporation as originally filed contain a provision authorized by subsection (a) of this section, such provision may be amended only by the affirmative vote of all investors.

208. PURPOSES

Close corporations may be organized under this article for any lawful purpose or purposes.

209. CAPITAL UNITS, TRANSFERS AND ENCUMBRANCES

(a) Until a statement substantially in the form set forth in subsection (b) of this section has been filed with the Department, any transfer, hypothecation, other voluntary encumbrance or security interest in, or of any capital unit or units shall be void as to creditors and subsequent purchasers for valuable consideration without notice.

(b) The statement of transfer, hypothecation or other voluntary encumbrance or security interest in or of any capital unit or units in a close corporation shall be acknowledged and be substantially in one of the following forms:

(1) Transfer:

On the _____ day of _____, _____, the undersigned (name of transferor) transferred to (name of transferee), whose address is (address of transferee) (all or a stated percentage) of the undersigned's interest in the capital units of (name of corporation), a Navajo close corporation.

(signature of transferor)

acknowledgement

(2) Hypothecation, other voluntary encumbrance or security interest:

On the _____ day of _____, _____, the undersigned (name of debtor) hypothecated and voluntarily encumbered to (name of creditor) (all or a stated percentage) of the undersigned's interest in the capital units of (name of corporation), a Navajo close corporation.

(signature of debtor)

acknowledgement

210. DEFINITION OF RELATIVE RIGHTS OF CAPITAL UNITS

"Relative rights of capital units" means all the rights, privileges, obligations and duties of the capital units and may include, but are not limited to, disproportionate variations of the following:

(1) Participation in dividends or distributions from operating income;

- (2) Participation in dividends or distributions from income other than operating income;
- (3) Participation in distributions of the proceeds of a sale of all or substantially all of the assets of the corporation with further disproportionate variation depending upon the degree of gain or loss.
- (4) Participation in distribution upon liquidation or dissolution.
- (5) Voting rights;
- (6) Restrictions or limitations on transfer;
- (7) The obligation to perform services or provide goods or other property to the corporation;
- (8) The obligation to devote time and energies which are collateral to corporate purposes; and
- (9) Assessments, if any.

211. CHANGES IN INVESTOR RELATIONSHIPS

Unless otherwise provided by the articles of incorporation, any redemption, termination or cancellation of capital units, acquisition of capital units by the corporation, issuance of additional units or any change in the relative rights of capital units other than transfers or encumbrances provided for in section 209, shall be effective only upon an amendment of the articles of incorporation. The unanimous vote of all outstanding capital units shall be required to amend the articles of incorporation to create or to change the relative rights in capital units.

212. VARIABLE RELATIVE RIGHTS

The articles of incorporation may provide for varying relationships among investors as to relative rights in capital units. It is not necessary that each close corporation provide in its articles of incorporation for variable relative rights of capital units as enumerated in this section. Only those variable relative rights of capital units set forth in the articles of incorporation shall apply to the particular close corporation. When no provision is made in the articles of incorporation concerning a particular relative right of capital units, then that particular relative right of capital units shall be proportionate to the dollar amount of the capital units.

213. LIMITATION OF LIABILITY

The investor shall not be liable for the debts, obligations or liabilities of the close corporation, except that investors will be held to the same standards as subscribers and shareholders as set forth in section 116 (c).

214. APPOINTMENT OF CONSERVATOR

(a) The court in which the known place of business or registered agent of the corporation is situated, may in an action by any investor, appoint a conservator or interim manager of the corporation if the court finds that a deadlock or dispute involving the internal affairs of the corporation impairs or threatens to impair the value of the assets or the continued conduct of the business of the corporation. Upon or subsequent to appointing such a conservator or interim manager, the court may enter orders, which, despite any contract or provision of the articles of incorporation to the contrary:

(1) Suspend, revoke or nullify the authority, in whole or in part, of any existing manager or managers or any conservator or interim manager appointed in any arbitration pursuant to section 206;

(2) Define the authority of such conservator or interim manager;

(3) Set the compensation of such conservator or interim manager to be paid by the corporation; and/or

(4) Resolve, partially resolve or aid in the resolution of any such deadlock or dispute;

(b) When any order or appointment is issued pursuant to subsection (a) of this section, the clerk of the court shall immediately supply a copy thereof to the Department.

215. INVOLUNTARY DISSOLUTION OR LIQUIDATION PURSUANT TO COURT ORDER

The court shall have full power to liquidate the assets and business of a close corporation:

(a) In an action filed by an investor when the court finds:

(1) That a deadlock or dispute involving the internal affairs of the corporation, continues to impair or threatens to impair the value of the assets

or the continued conduct of the business of the corporation, notwithstanding bona-fide attempts to utilize the arbitration provisions in the articles of incorporation if available and the provisions of section 214;

(2) That a deadlock or dispute involving the internal affairs of the corporation, impairs or threatens to impair the value of the assets, or the continued conduct of the business of the corporation, and no provision is contained in the articles of incorporation for arbitration of such disputes and that it would be a useless effort to invoke the provisions of section 214;

(3) That the investors are so divided respecting the management of the business and affairs of the corporation that either the corporation is suffering or will suffer irreparable injury, or the business and affairs of the corporation can no longer be conducted to the advantage of the investors generally, and the provisions of sections 206 and 214 are inapplicable; or

(4) That the corporation has abandoned its business and has failed within a reasonable period of time to take steps to dissolve and liquidate its affairs and distribute its assets.

(b) In an action filed by the Attorney General in the manner provided by section 141.

216. COURT RELIEF OTHER THAN DISSOLUTION, LIQUIDATION OR APPOINTMENT OF CONSERVATOR

(a) The court in an action filed by an investor seeking relief under section 215, shall have full power to make any such order or grant any such relief other than dissolution or liquidation as in its discretion it may deem appropriate including but not limited to:

(1) Canceling, altering or amending any provision contained in the articles of incorporation of such close corporation;

(2) Directing, prohibiting or enjoining any act of the corporation or other persons who are parties to the court action; or

(3) Providing for the purchase by the corporation or by other investors at their fair market value the capital units of the person bringing such action;

(b) Relief under this section may be granted even through the court does not find any of the elements prescribed for relief under section 215.

217. MERGER OF CLOSE CORPORATIONS

Any two or more Navajo close corporations may merge as may be provided for pursuant to section 139.

218. CONVERSION OF CORPORATE STATUS

(a) A close corporation may convert its status to that of a corporation organized pursuant to chapter 1 by amending its articles of incorporation to delete therefrom all reference to the term "close corporation" including its use in the name of the corporation, and to comply with section 107. Such an amendment shall be adopted by a two-thirds vote of the voting rights of the capital units unless the articles of incorporation require a greater vote to convert. The articles of incorporation as amended shall also provide for the cancellation of capital units and the basis on which shares will be issued in lieu thereof.

(b) The conversion of a close corporation is effected if there has been substantial compliance in good faith with the requirements of subsection (a) of this section.

(c) A corporation organized pursuant to chapter 1 having thirty (30) or fewer shareholders may convert its status to that of a close corporation and be subject to the provisions of this article by amending its articles of incorporation to comply with section 203. A resolution so amending its articles of incorporation shall be adopted by the unanimous vote of all shareholders whether otherwise entitled to vote or not. The resolution amending the articles of incorporation shall provide for the cancellation of all issued outstanding shares of stock and state the relative rights of capital units.

(d) No conversion pursuant to this section shall be deemed a termination or dissolution of the corporate entity or a sale or exchange of the shares of capital units.

219. APPLICATION OF GENERAL CORPORATION LAW

Close corporations organized pursuant to this chapter are subject to the provisions of chapter 1 except insofar as this chapter modifies or differs from such provisions, in which case this chapter prevails. This chapter shall be

applicable to all close corporations except as otherwise provided. This chapter shall be construed to simplify the management, structure and operations of close corporations.

Chapter 3

301. SHORT TITLE

This chapter shall be known and may be cited as the "Navajo Nation Nonprofit Corporation Act."

302. DEFINITIONS

The definitions in chapter 1 are applicable in this chapter.

303. CONVERSION OF CORPORATE STATUS PROHIBITED

No nonprofit corporation organized under this chapter may convert its status to a corporation organized for profit, either foreign or domestic, or merge or consolidate with a domestic corporation or foreign corporation organized for profit, unless the corporation surviving the merger or consolidation is a nonprofit corporation.

304. PURPOSES

Corporations may be organized under this chapter for any lawful purpose or purposes, including without limitation any of the following purposes:

- (1) Charitable;
- (2) Benevolent;
- (3) Eleemosynary;
- (4) Educational;
- (5) Civic;
- (6) Patriotic;
- (7) Political;
- (8) Religious;
- (9) Social;
- (10) Fraternal;
- (11) Literary;
- (12) Cultural;

- (13) Athletic;
- (14) Scientific;
- (15) Agricultural;
- (16) Horticultural;
- (17) Animal husbandry; or
- (18) Professional, commercial, industrial or trade associations.

305. MEMBERS

(a) A nonprofit corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or bylaws. If the corporation has no members, that fact shall be set forth in the articles of incorporation or bylaws. A corporation may issue certificates evidencing membership rights, voting rights, or ownership rights, as authorized in the articles of incorporation or bylaws.

(b) Members are not liable for the debts, obligations or liabilities of the corporation.

(c) A corporation formed under this chapter by a recognized Chapter of the Navajo Nation shall have one class of members, and any Navajo 18 years or older who is entitled to vote within said Chapter in tribal or Chapter elections shall be entitled to be a member of said corporation, and shall be entitled to vote on matters on which members are entitled to vote.

306. BYLAWS

The power to make, alter, amend, or repeal the bylaws of the nonprofit corporation shall be vested in the board of directors unless reserved to the members by the articles of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law, or the articles of incorporation.

307. MEETINGS OF MEMBERS

(a) Meetings of members may be held at such place within or without Navajo Indian Country as stated in or fixed in accordance with the bylaws. If no other place is stated or so fixed, meetings shall be held at the known place of business of the nonprofit corporation.

(b) An annual meeting of the voting members, if any, shall be held at such time as stated in or fixed in accordance with the bylaws. If the annual meeting is not held within any thirteen month period the court may, on the application of any voting member, order a meeting to be held. Failure to hold such annual meeting shall not work as a forfeiture of the corporate charter or dissolution of the corporation.

(c) Special meetings of the voting members, if any, may be called by the board of directors, the members having at least one-tenth of the votes entitled to be cast at such meeting or any other person as may be authorized in the articles of incorporation or bylaws.

308. NOTICE OF MEMBERS' MEETINGS

Unless otherwise provided in the articles of incorporation or bylaws, written notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose for which the meeting is called, shall be mailed or delivered not less than 10 nor more than 50 days before the date of the meeting by an officer of the nonprofit corporation, at the direction of the person calling the meeting, to each member entitled to vote at such meeting. If mailed, such notice shall be addressed to the member at his/her address as it appears on the records of the corporation. When a meeting is adjourned to another time or place, unless the bylaws otherwise require, notice need not be given of the adjourned meeting if the time and place of the meeting are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the corporation may transact any business which may have been transacted at the original meeting. If the adjournment is for more than thirty days, a notice of the adjourned meeting shall be given to each member entitled to vote at the meeting.

309. VOTING

(a) Except for a nonprofit corporation formed by a Chapter of the Navajo Nation, the right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or bylaws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

(b) A member entitled to vote may vote in person or, unless the articles of incorporation or bylaws otherwise provide, by proxy executed in writing by the member or by his/her duly authorized attorney in fact. No proxy may be valid after eleven months from the date of its execution.

(c) If directors or officers are to be elected, the bylaws may provide that the elections be conducted by mail.

(d) If a corporation has no members or its members have no right to vote, the directors have the sole voting power, unless otherwise provided in the articles of incorporation or bylaws.

310. QUORUM

The bylaws may provide the number or percentage of members entitled to vote, present or represented by proxy, or the number or percentage of votes entitled to be cast by members present or represented by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members, present or represented by proxy, holding one-tenth of the votes entitled to be cast shall constitute a quorum.

311. BOARD OF DIRECTORS

(a) The affairs of a nonprofit corporation shall be managed by a board of directors except as may be otherwise provided in subsection b. Directors need not be members of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors.

(b) The articles of incorporation may vest the management of the affairs of the corporation in its members or may limit the authority of the

board of directors to whatever extent is set forth in the articles of incorporation or bylaws.

312. NUMBER, ELECTION AND CLASSIFICATION AND REMOVAL OF DIRECTORS

(a) Unless the articles of incorporation provide otherwise, a nonprofit corporation may have only one director. The number of directors shall be fixed by or in the manner provided in the articles of incorporation or bylaws. The number of directors may be increased or decreased by amendment to, or in the manner provided, in the articles of incorporation or bylaws, but no decrease in number may have the effect of shortening the term of any incumbent director. If the number of directors has not been fixed by, or in the manner provided, in the articles of incorporation or bylaws, the number shall be the same as the number of initial directors.

(b) The person(s) constituting the initial board of directors shall be named in the articles of incorporation to hold office until the first annual election of directors, or for any other period as may be specified in the articles of incorporation or bylaws. Thereafter, directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or bylaws. In the absence of a provision prescribing the manner of election or appointment of directors, the members having voting rights shall elect the directors, or, if a corporation has no members or no members having voting rights, the directors are elected or appointed by the incumbent directors or by the officer, representative body of any organization or society or other person designated in the articles of incorporation or bylaws. In the absence of a provision fixing the term of office, the term of office of a director is one year.

(c) Directors may be divided into classes, and the terms of office of the several classes need not be uniform. Each director shall hold office for the term for which he/she is elected or appointed, and until his/her successor is elected or appointed and qualified, or until his/her earlier death, resignation or removal. Any director may resign at any time upon written notice to the corporation.

(d) A director may be removed from office pursuant to any procedure provided in the articles of incorporation or bylaws.

313. VACANCIES

Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum, or by a sole remaining director, and any director so chosen shall hold office until the next election of directors when his/her successor is elected and qualified. Any newly created directorship shall be deemed a vacancy. Unless otherwise provided in the articles of incorporation or bylaws, when one or more directors resigns from the board, effective at a future time, a majority of the directors then in office, including those who have so resigned, may fill such vacancy, the vote on the vacancy to take effect when such resignation becomes effective. Each director so chosen shall hold office as provided for the filling of other vacancies. If by reason of death, resignation or otherwise, a nonprofit corporation has no directors in office, any officer or member may call a special meeting of members for the purpose of electing the board of directors unless otherwise provided in the articles of incorporation or bylaws.

314. QUORUM OF DIRECTORS

A majority of the number of directors fixed pursuant to the articles of incorporation or bylaws constitutes a quorum unless otherwise provided in the articles of incorporation or bylaws, but in no event may a quorum consist of less than one-third of the total number of directors.

315. COMMITTEES OF THE BOARD OF DIRECTORS

(a) A majority of the full board of directors may designate from among the directors one or more committees each of which, to the extent provided in the article of incorporation or bylaws, may be given all the authority of the board of directors, except no such committee may exercise the authority of the board of directors in reference to the following matters:

(1) Submission to the members of any matter that requires an act of the members;

(2) Filling vacancies on the board of directors or on any committee of the board of directors;

- (3) Adoption, amendment or repeal of bylaws; or
- (4) Fixing compensation of directors.

(b) The board of directors, with or without cause, may dissolve any such committee or remove any director from the committee at any time. The designation of any such committee and the delegation of authority shall not operate to relieve the board of directors or any director of any responsibility imposed by law.

316. PLACE AND NOTICE OF DIRECTORS' MEETING

(a) Meetings of the board of directors, regular or special, shall be held at least annually either within or without Navajo Indian Country, and may be held by means of conference telephone or similar communication equipment by means of which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this section shall constitute presence in person at such meeting.

(b) Regular meetings of the board of directors may be held with or without notice as prescribed in the bylaws. Special meetings of the board of directors shall be held upon such notice as is prescribed in the bylaws. Attendance of a director at any meeting shall constitute a waiver of notice of such meeting except when a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. The business to be transacted at any regular or special meeting of the board of directors need not be specified in the notice or waiver of notice of such meeting unless required by the articles of incorporation or bylaws.

317. OFFICERS

(a) The officers of a nonprofit corporation shall consist of a president, a secretary and a treasurer, each of whom shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws. Other officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws. Any two or more offices may be held by the same person.

(b) All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as provided in the bylaws or determined by resolution of the board of directors not inconsistent with the bylaws.

(c) The articles of incorporation or bylaws may provide that any one or more officers of the corporation shall be ex officio members of the board of directors.

(d) The officers of a corporation may be designated by such additional titles as may be provided in the articles of incorporation or bylaws.

318. REMOVAL OF OFFICERS

Any officer or agent elected or appointed may be removed by the persons authorized to elect or appoint such officer or agent whenever in their judgment the best interests of the nonprofit corporation will be served by the removal, but such removal shall be without prejudice to the contract rights, if any, of the person removed. Election or appointment of an officer or agent shall not of itself create contract rights.

319. BOOKS AND RECORDS

(a) Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees of the board of directors. Each corporation shall keep at its registered agent's office, or its known place of business within Navajo Indian Country, a record of the names and addresses of its members entitled to vote. Books, records and minutes shall be in written form, or in any other form capable of being converted into written form within a reasonable time.

(b) Each member entitled to vote, upon written demand stating the purpose of the examination, may examine, in person or by agent or attorney, at any reasonable time for any proper purpose, the corporation's relevant books and records of account, minutes and record of members and may make copies of or extracts from the books, records or minutes.

(c) Nothing contained in this section shall impair the power of any court of competent jurisdiction, upon proof by a member of proper purpose, to

compel the production for examination or copying by such member of the books and records of account, minutes and record of members of a corporation.

320. SHARES OF STOCK AND DIVIDENDS PROHIBITED

A nonprofit corporation shall not have or issue shares of stock. No dividend may be paid and no part of the income or profit of such corporation may be distributed to its members, directors or officers. A corporation may pay compensation in a reasonable amount to its members, directors or officers for services rendered, may confer benefits upon its members in conformity with its purposes, and upon dissolution or final liquidation may make distributions to its members as permitted by this chapter, but no such payment, benefit or distribution may be deemed to be a dividend or a distribution or income or profit.

321. LOANS TO DIRECTORS AND OFFICERS PROHIBITED

A nonprofit corporation shall not lend money to or use its credit to assist its directors, officers or employees. Any director, officer or employee who assents to or participates in the making of any such loan shall be personally liable to the corporation for the amount of such loan together with interest at 18% per annum until the repayment of the loan.

322. INCORPORATORS

One or more persons capable of contracting may act as incorporators of a corporation by signing and delivering to the Department an original and one or more copies of articles of incorporation for such corporation.

323. ARTICLES OF INCORPORATION

- (a) The articles of incorporation shall state:
 - (1) The name of the corporation;
 - (2) The period of duration, if less than perpetual;

(3) The purpose or purposes for which the corporation is organized, which may be stated to include conducting any or all lawful affairs for which corporations may be incorporate under this chapter;

(4) A brief statement of the character of affairs which the corporation initially intends to actually conduct in this state. Such statement shall not limit the character of affairs which the corporation ultimately conducts;

(5) The name and address of its initial registered agent;

(6) The number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual election of directors or until their successor are elected and qualify

(7) The name and address of each incorporator; and

(8) Any other provision not inconsistent with law which the incorporators elect to set forth.

(b) It is not necessary to state in the articles of incorporation any of the corporate powers enumerated in this chapter.

324. FILING OF ARTICLES OF INCORPORATION

(a) When the articles of incorporation have been delivered for filing, the Department shall determine that the articles:

(1) Set forth the information required by section 323; and

(2) Do not adopt as the name of the corporation a name which is in violation of section 105.

(b) Upon making such determinations, the Department shall proceed with filing the articles.

325. EFFECT OF FILING ARTICLES OF INCORPORATION

Upon the filing of the articles of incorporation, the corporate existence begins, and the filing is conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with, and that the nonprofit corporation has been incorporated under this chapter, except as against the Navajo Nation in a proceeding for involuntary dissolution of the corporation or revocation of the articles of incorporation.

326. ORGANIZATION MEETING

(a) After delivery of the articles of incorporation for filing, an organization meeting of the initial board of directors shall be held at the call of a majority of the incorporators for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The incorporators calling the meeting shall give at least three days notice of the meeting by mail to each director so named, which notice shall state the time and place of the meeting.

(b) A first meeting of the members may be held at the call of a majority of the directors upon at least three days notice for those purposes as stated in the notice of the meeting.

327. RIGHT TO AMEND ARTICLES OF INCORPORATION

A corporation may amend its articles of incorporation in any lawful respect.

328. PROCEDURE TO AMEND ARTICLES OF INCORPORATION

(a) Amendments to the articles of incorporation shall be made in the following manner:

(1) If there are members entitled to vote on the proposed amendment, the board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of those members, which may be either an annual or a special meeting. Written notice setting forth the proposed amendment or a summary of the changes to be effected shall be given to each member entitled to vote at the meeting within the time and in the manner provided in this chapter for the giving of notice of meetings of members. The proposed amendment may be adopted only by act of the members; or

(2) If there are no members or no members entitled to vote on the proposed amendment, an amendment may be adopted by act of the board of directors.

(b) Any number of amendments may be submitted and voted upon at any one meeting.

329. ARTICLES OF AMENDMENT

The articles of amendment shall be executed by the nonprofit corporation in duplicate and shall state:

- (a) The name of the corporation;
- (b) The amendments adopted;
- (c) The date of the adoption of the amendments; and
- (d) That the amendments were duly adopted by act of the members or of the board of directors.

330. FILING OF ARTICLES OF AMENDMENT; EFFECT OF AMENDMENT

(a) When the articles of amendment have been delivered for filing, the Department shall determine that the articles set forth the information required by section 329.

(b) Upon making such determination, the Department shall proceed with filing the articles.

(c) Upon the delivery of the articles of amendment to the Department, the amendment shall become effective and the articles of incorporation shall be deemed to be amended, except that, if the determination of the requirements of this chapter for filing are not satisfied completely, the articles of amendment shall not be filed, the amendment shall not become effective and the articles of incorporation shall not be deemed to have been amended.

(d) No amendment may affect any existing claim in favor of or against the nonprofit corporation or any pending action or proceeding to which the corporation is a party or the existing rights of persons other than members. If the corporate name is changed by amendment no action or proceeding brought by or against the corporation under its former name may abate for that reason.

331. SALE, LEASE, EXCHANGE, MORTGAGE OR PLEDGE OF ASSETS

(a) A sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the assets of a nonprofit corporation may be made only upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including

shares of any corporation for profit, domestic or foreign, as are authorized in the following manner:

(1) If there are members entitled to vote on the matter, the board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge or other disposition and directing that it be submitted to a vote at a meeting of those members, which may be either an annual or a special meeting. Written notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the assets of the corporation shall be given to each member entitled to vote at such meeting within the time and in the manner provided by this chapter for the giving of notice of meetings, the members may authorize such sale, lease, exchange, mortgage, pledge or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions and the consideration to be received by the corporation. Such authorization shall require an act of the members; or

(2) If there are no members or no members entitled to vote on the matter, a sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the assets of a corporation may be authorized by act of the board of directors.

(b) If the authorization provides, the board of directors may abandon the sale, lease, exchange, mortgage, pledge or other disposition subject to the contractual rights of third parties.

332. APPLICATION OF GENERAL CORPORATION LAW

The provisions of the general corporation laws of the Navajo Nation, and all powers, rights and duties thereunder, where applicable, shall apply to nonprofit corporations organized hereunder, except when in conflict with the provisions of this chapter.

**THE
NAVAJO
NATION**

NAVAJO NATION CORPORATION CODE

Fee Schedule - to partially offset the expenses of administering and implementing the Navajo Nation Corporation Code.

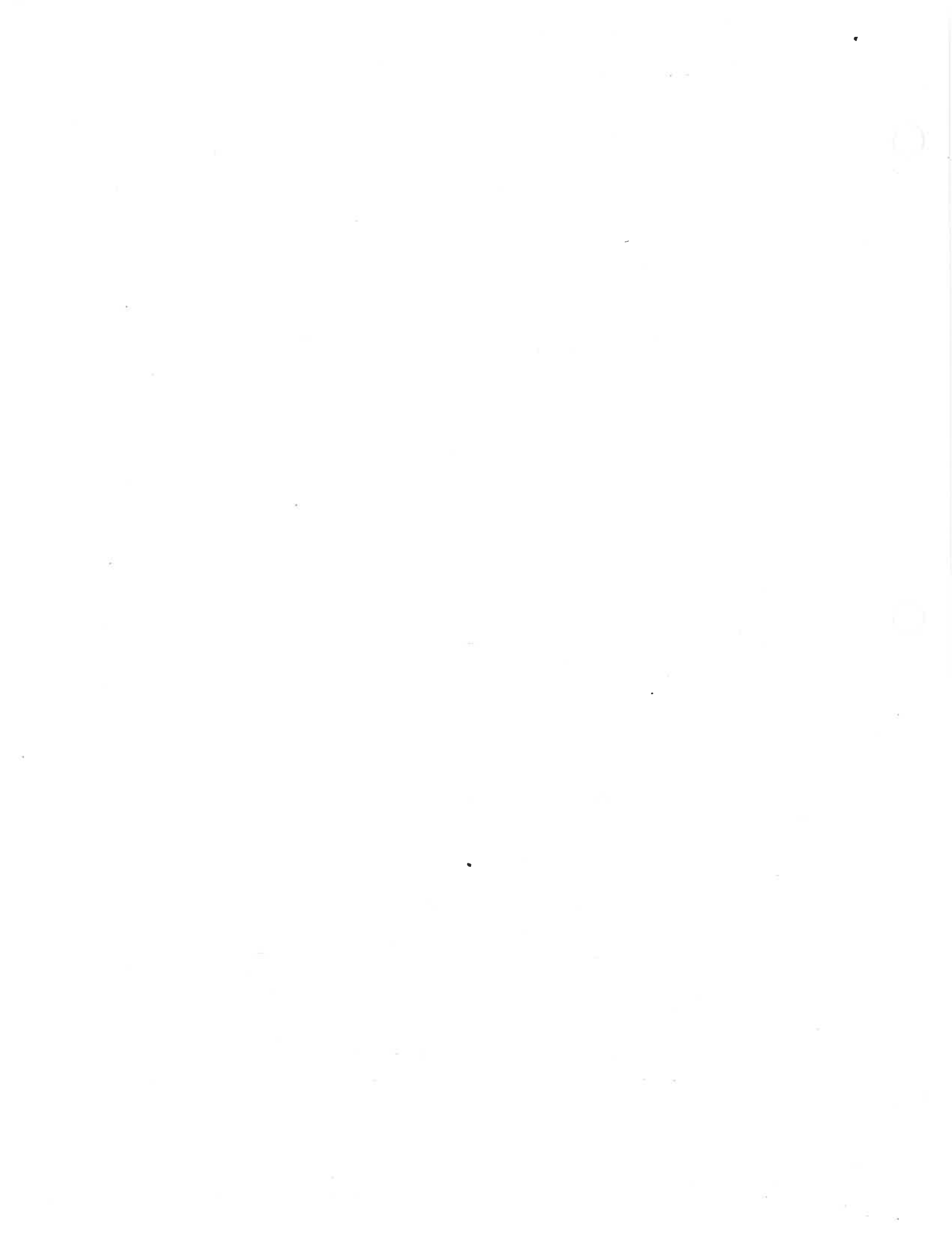
All corporations organized or registered in accordance with the Navajo Nation Corporation Code shall remit a fee to process and maintain certain corporate documents on file according to the following fee schedule:

FILING FEE SCHEDULE

1. Filing of Articles of Incorporation\$10.00
(Domestic, Foreign or Cooperatives; Profit or non-Profit)
2. Filing Annual Report\$25.00
(Domestic, Foreign or Cooperatives; Profit or non-Profit)
3. Registered Agent Filings - Change of address and/or\$15.00
Change of R.A; (no fee required for resignation of R/A)
4. Application for Amendment to Articles of Incorporation\$15.00
5. Application for Articles of Merger\$25.00
6. Application for Articles of Consolidation\$25.00
7. Transfer of Assets\$25.00
8. Reproduction of Documents25 cents/page
9. Application for Reinstatement after Revocation\$50.00
10. Certificate of Documents*\$ 5.00
11. Certificate of Good Standing\$ 5.00
12. Certification of Statements\$ 5.00
13. Statement of Intent to Dissolve\$20.00
(Domestic Corporation)
14. Application of Withdrawal of Corporation\$20.00
(Foreign Corporation)
15. Resubmission Fee (The Articles of Incorporation and\$ 5.00
Application for Certificate of Authority)
16. Copy of the Navajo Nation Corporation Code\$ 7.00
17. A Change of Registered Agent through the\$15.00/ea
Amendment Procedure shall constitute two (2) separate transactions.
*plus \$.50 per page after five (5) pages.

All fees listed above will be non-refundable. Money Orders ONLY no personal checks and make payable to Navajo Nation Corporation Code. Corporation Filing Office is located near the St. Michaels Chapter House.

DIVISION OF ECONOMIC DEVELOPMENT
BUSINESS REGULATORY DEPARTMENT
POST OFFICE BOX 663
WINDOW ROCK, ARIZONA 86515
Telephone (520) 871-6714 or 7365





NAVAJO NATION CORPORATION CODE

(Revised as of May 14, 1987)

RULES AND REGULATIONS

I. GENERAL PROVISIONS

- A. **Applicable Law** - to ensure compliance with all applicable Navajo Nation laws.
All corporate entities organized or registered under the provisions of the Navajo Nation Corporation Act are subject to and must comply with all applicable tribal laws, including, but not limited to:

1. Navajo Preference in employment Act; which provides for preference in hiring Navajo workers and employees.
2. Navajo Nation Business Preference Law, which provides for preference in the purchase of goods and services from certified Navajo owned businesses.
3. Business Activity Tax.
4. Possessory Interest Tax.
5. All other laws and regulations adopted by the Navajo Nation.

- B. **Fee Schedule** - to partially offset the expenses of administering and implementing the Navajo Nation Corporation Code.
All corporations organized or registered in accordance with the Navajo Nation Corporation Code shall remit a fee to process and maintain certain corporate documents on file according to the following schedule:

FILING FEE SCHEDULE

- | | | |
|----|--|---------|
| 1. | Filing of Articles of Incorporation
(Domestic, Foreign or Co-ops; Profit or non-Profit) | \$10.00 |
| 2. | Filing Annual Report
(Domestic, Foreign or Co-ops; Profit or non-Profit) | \$25.00 |
| 3. | Registered Agent Filing - Change of address
and/or change of R/A; (no fee required for
resignation of R/A) | \$15.00 |
| 4. | Application for Amendment to Articles
of Incorporation | \$15.00 |
| 5. | Application for Articles of Merger | \$25.00 |

6.	Application for Articles of Consolidation	\$25.00
7.	Transfer of Assets	\$25.00
8.	Reproduction of Documents	.25/page
9.	Application for Reinstatement After Revocation	\$50.00
10.	Certificate of Documents	\$ 5.00*
11.	Certificate of Good Standing	\$ 5.00
12.	Certification of Statements	\$ 5.00
13.	Statement of Intent to Dissolve (Domestic Corporation)	\$20.00
14.	Application of Withdrawal of Corporation (Foreign Corporation)	\$20.00
15.	Resubmission Fee (The Articles of Incorporation and Application for Certificate of Authority)	\$ 5.00
16.	Copy of the Navajo Nation Corporation Code	\$ 7.00
17.	A change of Registered Agent through the Amendment Procedure shall constitute two (2) Separate transactions.	\$15.00

*Plus .50 per page after five (5) pages.
All fees listed above will be non-refundable.

- C. Public Inspection of Records - to ensure public access to certain corporate records and information.
Unless otherwise specifically expressed by law, all corporate documents and information contained therein shall be available for public inspection and copying. Annual Reports and information pertaining to civil investigative demands shall not be open to public inspection, unless disclosure of the facts or information contained therein is required by court order.
- D. Official Certificate of Incorporation - the Department shall develop and maintain the following certificate for issuance upon proper application:
1. Certificate of Incorporation for Domestic Corporation.
 2. Certificate of Authority for Foreign Corporation.
 3. Certificate of Incorporation for Agricultural Cooperative.
 4. Certificate of Incorporation for Non-profit Corporation.
 5. Certificate of Copies of Documents.
 6. Certificate of Good Standing.
 7. Certificate of Consolidating.
 8. Certificate of Reinstatement.
 9. Certificate of Voluntary Dissolution.
 10. Certificate of Involuntary dissolution.
 11. Certificate of Amendment to the Articles of Incorporation.
 12. Certificate of Revocation.
 13. Certificate of Merger.
- E. Time Frame for Review of Documents - to permit the Department to thoroughly analyze the documents for compliance.
The Department shall make every effort to review the documents and respond to each applicant within 20 calendar days.

- F. Information Sheets - to provide general information to the public. The Department shall promulgate and make available to the public information sheets on requirements for incorporating as a corporation and/or cooperative under the Navajo Nation Corporation Code.**
- G. Meaning of "DUPLICATE ORIGINAL" - to simplify document preparation and submission. The requirements that duplicate originals be submitted require only original signatures. A copy of a typed original document will be accepted, so long as both the original and the copy contain original signatures.**
- H. Additional Requirements for Articles of Incorporation - to ensure the Department complete and accurate records for performance of its statutory duties. In addition to the requirements of Sections 107, 203, 323 (see Section 332) and 408 (see Section 425), the Articles of Incorporation shall include the following:**
1. The Registered Agent's exact address, if none is available, a map indicating his or her exact location within Navajo Indian Country.
 2. All corporate entities must appoint a Registered Agent within thirty (30) calendar days after the effective date of the resignation or change.
 3. Failure to maintain a Registered Agent (R/A) within the Navajo Nation may subject the corporation to penalties under Section 155, and Section 142 (a).
- I. Procedures for Articles of Incorporation - to ensure a timely and accurate processing procedure.**
1. Articles of Incorporation submitted for filing with the Department shall be processed in accordance with Section 156 of the Navajo Nation Corporation Code. If the Articles are determined not to comply with the provision of each respective Act, they shall be returned to the applicant an explanation of the reason(s) they are deemed not to comply.
 2. An applicant whose Articles are returned must refile a corrected application together with a resubmission fee of \$5.00 for each occurrence.
- J. Annual Report - to determine the nature and character of corporate operation during the preceding year; to update the Department's records. All corporations and cooperatives, in accordance with the Navajo Nation Corporation Code Section 175, shall submit and file an Annual Financial Disclosure Report with Commerce Department**
1. All corporate entities shall submit a written request to the Commerce Department for the report form.
 2. Each corporate entity shall submit its Annual Report to

- Commerce Department for filing, on or before the last day of the first quarter, after the close of their fiscal year.
3. A fee in the amount cited in the "Filing Fee Schedule". Section I.B.2, shall accompany the Annual Report.
 4. If a corporation or a cooperative is unable to file a timely Annual Report, as prescribed by this section, it may, but only on or before the due date, file its written request for an extension of time, not to exceed forty-five (45) calendar days, in which to file its Annual Report.

II. DOMESTIC PROFIT CORPORATION

- A. Definition of Domestic Profit Corporation - a Domestic Profit Corporation is a corporation organized for profit under the provisions of Chapter 1, Navajo Nation Corporation Code.
- B. Notice to Department of Change in Corporate Operations - to ensure accurate records and documents.
All Domestic Corporation will be required to submit a written notice to Commerce Department of any substantial changes or alterations of their corporate structure or operations.
 1. A written notice in duplicate originals, shall be delivered to Commerce Department on or before thirty (30) calendar days after the measure has been duly adopted by the corporation.
 2. Commerce Department shall file one of the duplicate original.
 3. Commerce Department shall send the other duplicate original to the Corporation or its Registered Agent.
- C. Annual Reports
All Domestic Profit Corporation shall submit Annual Reports under the procedure set forth in Section J of General Provisions of these regulations.

III. FOREIGN CORPORATIONS

- A. Definition - "Foreign Corporation" means a corporation for profit or not for profit organized under laws other than the laws of the Navajo Nation.
- B. Application for Certificate of Authority - To register all Foreign Corporations and to provide necessary data for the Department's records.
All corporate entities organized under the laws or authority other than Navajo Nation law must complete and submit an Application for Certificate of Authority to the Commerce Department.
 1. The Application for Certificate of Authority shall contain the following information on a form to be devised and promulgated by the Department that will be substantial equivalent to the form attached as Exhibit "A".

charter revocation, including the date, the court or agency involved, and the file number of the case;

- n. Signatures under oath of the president and secretary of the Corporation and acknowledgement of those signature before a notary public;
 - o. Such other information as the Department reasonably deems necessary to facilitate the application process and ensure compliance with the provisions of the Navajo Nation Corporation Code.
2. Certified copies of the Articles of Incorporation. Each Application for certificate of Authority shall be accompanied by duplicate copies of the Corporation's Articles of Incorporation and all amendments thereto, duly authenticated by the proper officer of the jurisdiction under the laws of which the Corporation is organized.
- C. Processing Procedures for Application for Certificate of Authority - to ensure a timely and accurate processing procedure.
1. Application for Certificate of Authority submitted for filing with the Department shall be processed in accordance with Section 156 of the Navajo Nation Corporation Code. If the Application for Certificate of Authority are determined not to comply with the provisions of each respective Act, it shall be returned to the applicant with an explanation of the reason(s) they are deemed not to comply.
 2. An applicant whose Application for Certificate of Authority are returned must refile a corrected application together with a resubmission fee of \$5.00.
- D. Notice to Department of change in corporate operations - to ensure accurate records and documents.
All Foreign Corporation will be required to submit a written notice to Commerce Department of any substantial changes or alterations of their corporate structure or operations.
1. A written notice in duplicate originals, shall be delivered to Commerce Department on or before thirty (30) calendar days after the measure has been duly adopted by the corporation.
 2. Commerce Department shall stamp "FILED" with the date, month and year on the duplicate originals.
 3. Commerce Department shall file one of the duplicate original.
 4. Commerce Department shall send the other duplicate original to the Corporation or its registered Agent.
- E. Annual Reports
All Foreign Corporation shall submit Annual reports under the procedure set forth in Section J General Provisions of these regulations.

equivalent to the form attached as Exhibit "A".

- a. The name of the Corporation, and, if the name does not comply with the provisions of the Navajo Nation Corporation Code Section 168, then the name which the Corporation will use within Navajo Indian Country to comply with that section;
- b. The date on which the corporation's fiscal year ends;
- c. The name of the jurisdiction under the laws of which the Corporation is incorporated;
- d. The date and duration (if not perpetual) of its incorporation;
- e. The address of the Corporation's principal office in the jurisdiction in which it is incorporated;
- f. The address of the Corporation's proposed known place of business within Navajo Indian Country;
- g. The name and address of the proposed registered agent within Navajo Indian Country;
- h. A brief statement of the character of business in which the Corporation initially intends to conduct within the Navajo Nation and the purposes for which the Corporation is organized;
- i. The names and address of the Corporation's directors and principal officers;
- j. Unless the Corporation is a non-profit corporation, a listing of the aggregate number of shares which it is authorized to issue, itemized by class, par value shares, shares without par value, and series, if any, within a class;
- k. Unless the Corporation is a non-profit corporation, the aggregate number of its issued shares itemized by class, par value of shares, shares without par value, and series, if any, within a class;
- l. Unless the Corporation is a non-profit corporation, the amount of the Corporation's stated capital as defined in Navajo Nation Corporation Code Section 102;
- m. A statement as to whether any person(s): (a) serving either by election or appointment as an officer, director, trustee, or incorporator of the Corporation, or (b) a shareholder controlling or holding 20% or more of the proprietary, beneficial, or membership interest in the corporation, has served in any such capacity or held any such interest in any corporation which has been placed in bankruptcy or receivership or had its charter revoked. If such is the case, the applicant must provide the following information for each such corporation:
 - (i) The name and address of the incorporation,
 - (ii) The full name, including aliases and addresses, of each person involved,
 - (iii) A list including each state in which the corporation was incorporated or authorized to transact business,
 - (iv) The dates of corporate operation,

IV. CLOSE CORPORATIONS

- A. Close Corporation Defined - a close corporation is a corporation organized for profit pursuant to the special rules of Chapter two (2) of the Navajo Nation Corporation Code.
- B. Meaning of "Duplicate Originals"
See General Provisions, Section G of these regulations.
- C. Processing of Articles of Incorporation
Articles submitted for filing will be processed in accordance with Section 156 of the Corporation Code and General Provisions, Section I of these regulations.
- D. Annual Reports
All Close Corporation shall submit Annual Reports under the procedure set forth in General Provisions, Section J of these regulations.

V. NONPROFIT CORPORATIONS

- A. Nonprofit Corporation Defined
A Nonprofit Corporation is a corporation, organized under the provisions of Chapter 3 of the Navajo Nation Corporation Code, no part of the income or profit of which is distributable to its members, directors or officers, except as otherwise provided in the Code.
- B. Meaning of "This State" in Section 323 (a) (4) - to clarify an ambiguity in the Code.
The words "this state" in section 323 (a) (4) of the Navajo Nation Corporation Code shall be deemed to mean the Navajo Indian Country.
- C. Meaning of "DUPLICATE ORIGINALS"
See General provisions, Section G of these regulations.
- D. Processing of Articles of Incorporation
Articles submitted for filing will be processed in accordance with Section 156 of the Corporation Code and General Provisions, Section I of these regulations.
- E. Annual Reports
All Nonprofit Corporations shall submit Annual Reports under the procedure set forth in General Provisions, Section J of these regulations.
- F. Special Requirements for Nonprofit Corporations Organized by Recognized Navajo Nation Chapters - to ensure proper authorization from the Chapters.
The Articles of Incorporation of a Nonprofit Corporation organized

by a recognized Chapter of the Navajo Nation, when submitted for filing, must be accompanied by a Chapter Resolution:

1. Approving the Articles; and
2. Authorizing the Incorporators to prepare and file the Articles.

VI. AGRICULTURAL COOPERATIVES

- A. Agricultural Cooperative Defined
An Agricultural Cooperative is a corporation organized for the purposes stated in, and under the provisions of, Chapter 4 of the Navajo Nation Corporation Code.
- B. Meaning of "DUPLICATE ORIGINALS"
See General Provisions, section G of these regulations.
- C. Processing of Articles of Incorporation
Articles submitted for filing will be processed in accordance with Section 156 of the Corporation Code and General Provisions. Section I of these regulations.
- D. Annual Reports
All Agricultural Cooperatives shall submit Annual reports under the procedure set forth in General Provisions, Section J of these regulations.
- E. Clarification of Section 422
The reference to "Section 407 in Section 422 of the Navajo Nation Corporation Code shall be deemed to refer to Section 408".



NAVAJO NATION CORPORATION CODE

INFORMATION ON INCORPORATING A NONPROFIT CORPORATION (NNCA, CHAPTER 3)

A corporation is formed in the Navajo Nation by filing Articles of Incorporation in **DUPLICATE ORIGINALS** with this office, together with the appropriate filing fee. The following information maybe of assistance to you.

YOU SHOULD NOT RELY SOLELY ON THIS INFORMATION SHEET. YOU SHOULD CONSULT LEGAL COUNSEL. SPECIAL REQUIREMENTS MAY APPLY TO THE TYPE OF CORPORATION YOU WISH TO ORGANIZE. FORMING A CORPORATION WILL HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES FOR YOU, WHICH SHOULD BE CAREFULLY CONSIDERED. THE INFORMATION PROVIDED HERE DOES NOT COVER THE COMPLEX LEGAL CONSEQUENCES OF OPERATING YOUR BUSINESS AS A CORPORATION. ONLY AFTER CONSULTATION WITH A KNOWLEDGEABLE ATTORNEY, ADVOCATE AND/OR ACCOUNTANT WILL YOU BE ABLE TO DETERMINE IF A CORPORATION IS APPROPRIATE FOR YOU.

Upon filing of the Articles of Incorporation and are considered in compliance with applicable rules and regulations, the Department will issue a Certificate of Incorporation.

1. The Articles of Incorporation of a nonprofit corporation must include the information contained in the sample Articles on the next page:
2. The Articles of Incorporation may include other provisions so long as they are consistent with the Corporation Act and other laws.
3. Duplicate originals must be filed - one typed original and one photocopy will suffice so long as both contain original signatures.
4. In addition to the duplicate Articles of Incorporation, a filing fee of \$10.00 by check form payable to Commerce Department must be remitted with the Articles.

Other types of corporations allowed under the code (domestic profit corporations, foreign corporations, close corporations, and agricultural cooperatives) have different requirements. Separate information sheets are available for these types of corporations.

A copy of the Navajo Nation Corporation Act may be obtained for a price of \$7.00 from Business Regulations, Commerce Department, Office of Business and Economic Development, P. O. Box 663 Window Rock, Arizona 86515. **THIS INFORMATION SHEET IS SUPERSEDED BY THE CORPORATION ACT AND ITS IMPLEMENTING REGULATIONS TO THE EXTENT THEY ARE INCONSISTENT HEREWITH. AGAIN IT IS ESSENTIAL THAT YOU CONSULT LEGAL COUNSEL.**

The following format is generally used for Articles of Incorporation. The information in brackets indicates what should be included in each Article. The Articles need not appear in the order in which they appear here. The Articles should be drafted in complete sentences, for example:

ARTICLE I

The name of the Corporation is XYZ Corporation.

The Corporation Code sections referred to in this form contain relevant information in each of the Articles of Incorporation.

ARTICLES OF INCORPORATION

OF

The undersigned natural person(s), acting as incorporator(s) of a corporation under the Navajo Nation Corporation Act, hereby adopt(s) the following Articles of Incorporation for such corporation:

ARTICLE I

[Name of the corporation. (Section 323(a)(1); 105)]

ARTICLE II

[The period of duration, if less than perpetual. (Section 323(a)(2))]

ARTICLE III

[The purpose and purposes for which the corporation is organized, which may be stated to include conducting any or all lawful affairs for which corporation may be incorporated of nonprofit organizations. (Section 323(a)(3))]

ARTICLE IV

[A brief statement of the character of affairs which the corporation initially intends to actually conduct in the Navajo Nation. Such statement shall not limit the character of affairs which the corporation ultimately conducts. (Section 323(a)(4))]

ARTICLE V

[The name and address of its initial Registered Agent. (Section 323(a)(5). By regulation, the address must be an exact street address, or if none is available, a map must be included.]

ARTICLE VI

[The number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual election of directors or until their successors are elected and qualify. (Section 323(a)(6))]

ARTICLE VII

[The name and address of each incorporator. (Section 323(a)(7))]

ARTICLE VIII

[Any other provisions consistent with the law which the incorporators elect to set forth. (Section 323(a)(8))]

ARTICLE IX

[A provision stating that the corporation will agree to abide by all criminal, civil and regulatory laws of the Navajo Nation. (Sections 332, 107(a)(10)).]

(Incorporator)

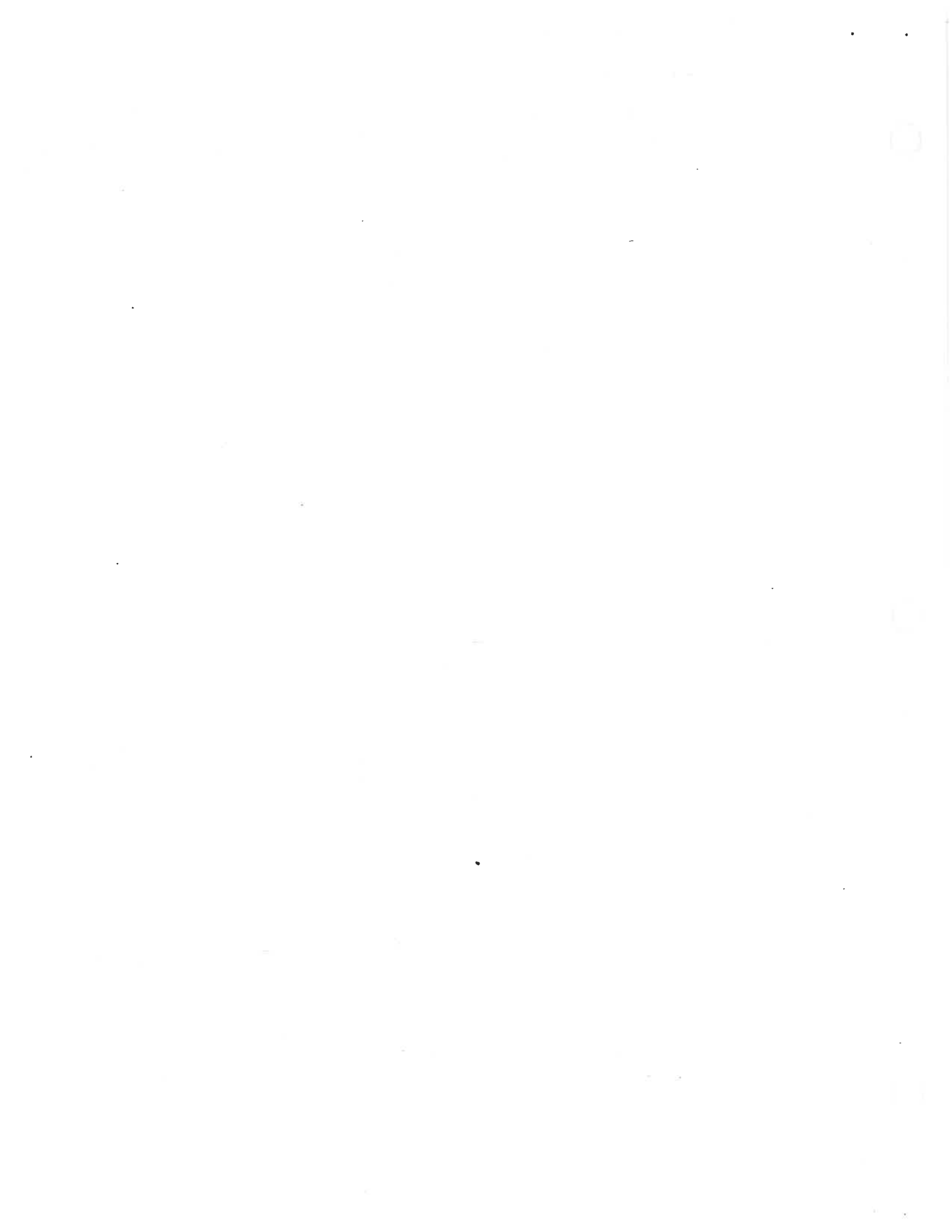
(Incorporator)

ACKNOWLEDGMENT OF THE REGISTERED AGENT

I, _____, having been designated to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Nation Corporation Act.

(Signature of Registered Agent)

(Address of Registered Agent. The address must be an exact street address. If there is no street address, a map must be included on exact location of Registered Agent.)



Navajo Nation
Division of Economic Development
Post Office Box 663
Window Rock, AZ 86515



Business Regulatory Dept
(520) 871-7365
871-6714

NAVAJO NATION CORPORATION CODE

ANNUAL REPORT

For Fiscal Year Ending

Pursuant to Navajo Nation Corporation Code, Article X, Section 175, 179, Chapter 4 Section 418, special requirements in the Rules & Regulations.

Directions: Answer all questions in each section of this Annual Report and return with your fee to:

DIVISION OF ECONOMIC DEVELOPMENT
Business Regulatory Department
Post Office Box 663
Window Rock, Arizona 86515

A. CORPORATION INFORMATION

File No.: _____
(Office Use Only)

1. Corporation Name
Street Address - Principal Office

P.O. Box (if any)
City, State, Zip Code

2. If Foreign Corporation, principal address in Navajo Indian Country
(if different from above)

3. Type of Corporation:

4. Name of Navajo Nation Registered Agent (if new, must complete change of Registered Agent Form, include fee)

Street Address (NOT P.O. BOX - if no street address, include map)

5. Fiscal Year Ends.

B. Brief statement of the character of Business in which the corporation is actually engaged in Navajo Indian Country. _____

C. Capitalization: Close Corporation - list capital units (not required for Nonprofit Corporation).

Numbers of Shares	Class	Series	Par Value Per Share or Statement That Shares are Without ParValue	Capital Units

D. Shareholders directions: Fill in name of shareholder of record holding more than 20% of any class of shares issued by the corporation. Including persons beneficially holding such shares through nominees. (If additional space is needed, attach a separate sheet. (IF NONE, SO STATE).

Shareholder Name	Shareholder Name
------------------	------------------

Shareholder Name	Shareholder Name
------------------	------------------

E. Foreign Corporation are reminded that any amendments to their Articles of Incorporation or changes of information in their Application for Certificates of Authority require filing of an amended application. (Contact Department for Form.)

F. CLOSE CORPORATION

Name of Manager	Date taking Office:
Street Address	Date term expires
P.O. Box	
City	State Zip Code

NOTE: ALL CORPORATIONS MUST LIST THEIR OFFICERS AND DIRECTORS - Attach additional sheets if necessary. Dates taking office must be included.

G. OFFICERS

Name	H. DIRECTORS
Street	Name
P.O. Box	Street
City, State, Zip Code	P.O. Box
Date taking office	City, State, Zip Code
Date when term expires	Date taking office
	Date when term expires

I. STATEMENT OF FINANCIAL CONDITION

BALANCE SHEET

The following form must be completed. If no business was conducted this fiscal year, then so state.

ASSETS	AMOUNT	TOTAL
Cash		
Trade notes and accounts receivable		
(a) Less allowance for bad debts		
Inventories		
Government Obligations:		
(a) U.S. and instrumentalities		
(b) State, subdivisions thereof, etc.		
Other current assets		
Loans to shareholders		
Mortgage and Real Estate loans		
Other investments		
Buildings/other fixed depreciable assets		
(a) Less accumulated depreciation		
Depletable assets		
(a) Less accumulated depletion		
Land (net of any amortization)		
Intangible assets (amortizable only)		
(a) Less accumulated amortization		
Other assets		
Total Assets -		
LIABILITIES AND CAPITAL		
Accounts payable		
Mtges.. Notes, bonds payable/1 yr. or less		
Other current liabilities		
Loans from Shareholders		
Mtges.. Notes, bonds payable/1 yr. or more		
Other liabilities		
Total Liabilities -		
Capital Stock: (a) Preferred Stock		
(b) Common Stock		
Paid-in-or capital surplus		
Retained earnings - Appropriated		
Retained earnings - Unappropriated		
Less cost of treasury stock		
Total Capital -		
Total Liabilities and Capital -		

J. **AGRICULTURAL COOPERATIVES** - per Chapter 4, Section 418. Annual Reports are required and should include the following:

1. Name of the Association
2. Principal place of business
3. General statement of its business operations during the fiscal year.
4. The amount of capital stock paid up
5. Number of members and amount of membership fee received.
6. If a non-stock association, the total expenses of operation
7. The amount of its indebtedness/liability, and its balance sheets.

K. Under penalties of Navajo Nation law, I, _____
declare that I am authorized to execute this annual report on behalf of the
Corporation, that I have examined this report and have made reasonable efforts to
verify the accuracy of the information contained herein, and I am informed and
believe thereon state that the information contained herein is true, correct and
complete.

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

REMINDER: Form must be signed, a fee of \$25.00 payable to Navajo Nation, Business Regulatory Department and the Financial Statement Completed.



THE NAVAJO NATION

PETERSON ZAH
PRESIDENT

APPLICATION FOR AMENDMENT

MARSHALL PLUMMER
VICE PRESIDENT

TO NON PROFIT

ARTICLES OF INCORPORATION

Pursuant to the provisions of Chapter 3, Section 329, the Navajo Nation Corporation Code, the undersigned Corporation adopts the attached Articles of Amendment to its Articles of Incorporation:

I. The name of the Corporation is: _____

II. The amendment(s) so adopted by the Board of Directors or voting members are:

III. The date of the adoption of the amendment is: _____

IV. The amendments were duly adopted by act of the members or the Board of Directors:

Dated: _____

By: _____

Title: _____

By: _____

Title: _____

NOTE: FOR PROFIT CORPORATIONS, COMPLY WITH ARTICLE VII, SECTIONS 156 TO 162, NAVAJO CORPORATION CODE (NO APPLICATION FORM AVAILABLE).

DIVISION OF ECONOMIC DEVELOPMENT

POST OFFICE BOX 663 • WINDOW ROCK, NAVAJO NATION (ARIZONA) 86515 • (602) 871-6544 • FAX: (602) 871-7381



NAVAJO NATION CORPORATION CODE

CHANGE OF ADDRESS FOR REGISTERED AGENT

Name of Registered Agent:

Present address, including street and number, of Registered Agent:

Names of the corporation(s) represented at this address:

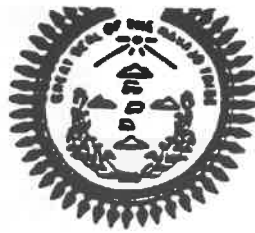
New address, street and number of Registered Agent. If no street address, must include a map of exact location of Registered Agent's Office:

Date of when change shall take effect:

This statement shall be executed in duplicate by the Registered Agent, but if Registered Agent is a corporation, domestic or foreign, the statement shall be executed by the Corporation President or Vice-president. And if the Registered Agent represents more than one corporation, he/she must file an additional copy for such additional corporation.

Reminder: Filing fee of \$15.00 should be made payable to Commerce Department, The Navajo Nation.

Note: Resignations of registered agent, refer to Section 153(d).



NAVAJO NATION CORPORATION CODE

CHANGE OF REGISTERED AGENT

Exact name of corporation:

Name and address of former registered agent:

Name and exact street address of new registered agent:

If no street address is available then you must attach a map showing the Registered Agent's exact location.

Date of when change shall take effect:

Registered Agent change was authorized by:

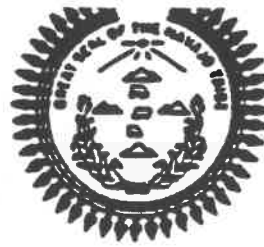
(change should be authorized by resolution duly adopted by its board of directors or should be authorized by an officer of the corporation duly empowered to make such change.)

ACKNOWLEDGEMENT OF NEW REGISTERED AGENT

I, _____, having been designated to act as Registered Agent, hereby consent to act in that capacity until removed or until a resignation is submitted in accordance with the Navajo Corporation Code.

(Signature of Registered Agent)

(Date)



NAVAJO NATION CORPORATION CODE

NAVAJO NATION CORPORATION ACT, SECTION 179, PUBLIC RECORDS; INFORMATION
DISCLOSED BY ANNUAL REPORTS, CERTIFICATES OF DISCLOSURES CIVIL
INVESTIGATIVE DEMANDS

Articles of incorporation, admendments thereto dissolution and certificates of incorporation, dissolution, revocation or reinstatement shall be maintained on file by the Department and available for public inspection and copying. Annual reports or information received in response to regulations or civil investigative demands propounded by the Department shall not be open to public inspection, nor shall the Department disclose any facts or information obtained therefrom, except as the same are to be made public or in the event such civil investigative demands or the answers are required for evidence in any court proceeding.

Date _____ Time _____

Document requested: _____

Document inspected at Commerce Department _____

Document for copying _____ Number of copies _____

Purpose of request: _____

Requested by - PRINT NAME & TITLE _____

Address & Phone Number _____

Signature of person inspecting/picking up copy of document. _____

CONCURRENCE BY DEPARTMENT:

Director

Date

CERTIFICATION CHECK LIST FOR GRANT OFFICERS FOR PUBLIC LAW 100-297 PART B SCHOOL GRANT PROCESS

This document is to be submitted to the Director, OIEP within 90 days of receipt of Grant Application.

Check List

- A. Letter of Intent to Grant is submitted by the Tribe/Tribal Organization to the Grant Officer.
- B. Letter of Intent to Grant is transmitted to the Director from Grant Officer.
- C. Education Line Officer ensures that the Grantee meets the following responsibilities:
 - (1) Complete Application to Grant - Part B is submitted with Tribal Resolutions.
 - (2) Equipment
 - (3) Bookkeeping and Accounting Procedures
 - (4) Substantive Knowledge of Operating the School
 - (5) Adequately Trained Personnel
 - (6) Any Other Necessary Components in the operation of the School.
 - A. Personnel Policies and Procedures
 - B. Financial Policies and Procedures
 - C. Procurement Policies and Procedures
 - D. Property Management System
 - E. Risk Management Programs
 - F. Submit application for all Department of Education Programs required with Submission of an Application.
 - G. Submit request to Internal Revenue of Application. A letter is sent to the Tribe by the Grant Officer.

D. _____ Within 5 Days Grant Officer Acknowledges Receipt of Application. A letter is sent to the Tribe by the Grant Officer.

E. _____ 120 Day Count down begins up on Receipt of the Application and the Tribal Resolution, on which the determination is to be made by the Director, OIEP.

Director is Immediately Notified of Receipt Date and Specific 120 Day date to Respond (Section 5206 (d) (1)). Copy should be sent to Labor Relations Specialist, Personnel Office.

Personnel Office Notifies the Union(s) of the Tribal Resolution to Grant.

F. _____ Grant Officer Submits Written Request for Reduction-In-Force (RIF) of Total Staff to the Director and Sent a Copy to the Personnel Office. Requests must include School's Organization Chart and Listing of affected staff by position. All RIF Procedures must be Followed.

G. _____ Director Reviews and Approves/Disapproves Application (180 days New School starts and/or 120 for Bureau-operated). Notification to RIF is sent to the personnel office by the Director.

H. _____ Grant Officer submits Written Request for Displacement Costs (Severance and Annual Leave) to Director. The Personnel Officer will provide assistance in determining amount to request and in Calculating Severance Pay and Lump-Sum Annual Leave Payments.

I. _____ Grant Officer meets with Area Finance Officer and Grantee (Tribal Council or School Board) to discuss procedural requirements for funding. (Tentative Allotment, Vendor Code, Bank Selection, Signatory Authority and P-638 Payment System).

J. _____ Grant Officer is responsible for insuring that the following administrative requirements are completed.

Process for payment and clear out all outstanding obligations.

Request Area Accounting Office to Deobligate Balances.

Coordinate with Area Contracting Office to Close Out All Open Service Contracts.

Coordinate with Area Property Management Office to establish New BOAC Numbers.

Coordinate with Area Property Management to Conduct Government Property and Facility Inventory.

Ensure that all Employee's Personnel Obligations are Paid.

Collect all Keys, Credit Cards, Photo ID and Other Properties of the Government (Employee Clearance Document).

If Requested, Draft MOA's for any Government Services (Boiler Repair, GTR, etc.).

Ensure Student Activities Fund Has Been Audited and Inventory Any Equipment Procured with Student Activity Funds.

K. _____ If the Grantee Request to Include Facilities Operation and Maintenance (O&M) and/or Quarters in the Grant, Facilities Management and Construction Center (FMCC) should be notified and Included in the Grant Negotiations.

AHERA Management Plan and Regulations.

An Updated Facilities Inventory.

Review of Most Recent Health/Safety Code Deficiency Report.

L. _____ If Quarters are granted the grantee is responsible to provide the following:

A Facilities plant diagram identifying building utility systems with building numbers.

M. _____ If the Application is declined, a letter to the Tribe will be sent by the Director, within 120 days of receipt of the application. The Letter will state:

Objections in Writing.

Provide Assistance to the Tribe to Overcome objectives.

Provide Tribe a Hearing according to P.L. 93-638.

Provide an Opportunity for Tribe to Appeal to Objections Raised.

N. _____ Reconsideration of an Amended Application Submitted by the grantee is to be responded to within 60 days from the date the amended application is received by the Director.

O. _____ Education Line Officer is to include language within the grant application that background checks must be completed for staff as required by P.L. 101-630.

Grant Officer

Date

Title 10

Education

CHAPTER	SECTION
1. Policy and Planning	1
3. School Boards	201
5. School Attendance	501
7. Clothing for School Children	701
9. Loans and Scholarships	901
11. Land for School Sites	1201
13. Adult Education Program	1401
15. [Repealed]	1601
17. [Superseded]	1801
19. Navajo Community College [Redesignated]	2001
21. American Indian School of Medicine	2301
23. [Deleted]	2501

CROSS REFERENCES

United States Code: Education of Indians, see 25 U.S.C. §271 *et seq.*
Contracts for Education of Indians, see 25 U.S.C. §458e.
Treaties. Education and schools, see Art. 6 of Treaty of 1868.

Chapter 1. Policy and Planning

Subchapter 1. Miscellaneous Provisions

in law. NTE Resolution
January 18, 1938
authorized appt of a Comm.
on Education; power to act
as advisor for Tribes on all
matters of education.

SECTION

1. Compliance with requirements of Navajo Nation law ^{accreditation systems.}
2. Changes in educational program or operation; discussion; approval
3. [Repealed] - ^{use of funds for construction of school facilities in peripheral communities.}
4. Size and location of facilities
5. Vocational training

Ed. Committee established
in 1957 (25-9057) Jan.

Subchapter 2. Navajo Education Policies

5 members - appt by
Chairman.

101. Short title
102. Mission statement
103. Definitions

104. Responsibility and authority of the Navajo Nation
105. Education Agency of Navajo Nation
106. School boards—Local control of schools
107. Parental involvement
108. Navajo preference and Indian preference
109. Education standards
110. Curriculum
111. Education in Navajo language
112. Education in Navajo culture and social studies
113. Professional training for educators
114. Special education
115. Education of Navajo gifted, talented and highly motivated students
116. School counseling services
117. Student code
118. School attendance
119. Substance and alcohol abuse
120. Bus routes and transportation
121. School facilities and operations
122. Vocational education and career education
123. Vocational rehabilitation and opportunities for the handicapped
124. Post-secondary education
125. Navajo Community College
126. Adult education
127. Early childhood programs

Subchapter 1. Miscellaneous Provisions

§ 1. Compliance with requirements of Navajo Nation law

All educational programs in operation on the Navajo Nation will meet the requirements of the educational laws of the Navajo Nation.

*accrual system
of the states of
the Union.*

HISTORY

CN-61-84, November 14, 1984.

1922-1951 Res. p. 114, February 20, 1947.

§ 2. Changes in educational program or operation; discussion; approval

A. It shall be the policy of the Navajo Nation that any agency, organization, or group proposing and planning a new school facility, expansion or changeover of an existing facility, a change in school site, a transfer from Bureau to public school operation, a change from

boarding school to day school operation, establishment or changes of bus routes, or any other change in educational policy or operation, which may affect the lives of local citizens, shall consult with the Navajo Nation for full discussion of such proposed changes.

B. Further, any agency, organization, or group proposing such changes shall consult and discuss such plans with appropriate Bureau of Indian Affairs' staff, with the Education Committee of the Navajo Nation Council, with local Chapter officers, with the people of the communities to be affected, either directly or indirectly, with local school boards and with the Navajo Division of Education.

C. It shall also be the policy of the Navajo Nation that official endorsement of such changes or proposals by the Navajo Nation shall be withheld until every effort has been made by the responsible agency, organization, or group to obtain the approval and endorsement of the Navajo People affected, and Navajo Nation laws regarding the planning and undertaking of such change or proposal have been complied with. Such endorsement of proposed plans or changes shall be obtained prior to the implementation of such educational programs.

HISTORY

CN-61-84, November 14, 1984.
CS-78-57, September 17, 1957.

CROSS REFERENCES

See also 2 NNC §484(B)(6).

§ 3. [Repealed] *Use of funds for construction of school facilities in peripheral communities.*

HISTORY

CN-61-84, November 14, 1984.
ACA-15-54, April 8, 1954.

(dormitories/public schools)

§ 4. Size and location of facilities

A. It is the declared policy of the Navajo Nation, in every instance and to the fullest extent possible, for its Education Committee to work closely with all relevant education providers and governmental entities on the size and location of all educational facilities to be constructed for Navajo students in order that maximum benefit can be obtained from them by the Navajo People.

B. The Education Committee is authorized to approve and recommend to the appropriate standing committee(s) of the Navajo Nation Council, the approval of site locations on the Navajo Nation for any educational facility, including school houses or buildings, residential facilities, teacher and faculty quarters including areas sufficient for power and light, gas, sewers and other necessary facilities. The Educa-

EC reported to Advisory Committee

Advisory Committee

no off-res sites

tion Committee shall refer all off-Reservation sites or facilities for Navajo children to the Navajo Nation Council.

- + C. All educational facilities constructed on the Navajo Nation or for the education of Navajo students shall be constructed in compliance with the laws of the Navajo Nation regarding school facilities, including 10 NNC §121, "School Facilities and Operations", of the Navajo Education Policies.

HISTORY

CN-61-84, November 14, 1984.

CJA-6-60, January 14, 1960.

Revision note. Reworded for purposes of statutory consistency. See generally, CD-68-89, December 15, 1989.

CROSS REFERENCES

Education Committee of the Navajo Nation Council, 2 NNC §481 *et seq.*

§ 5. Vocational training

A. It is the policy of the Navajo Nation to cooperate and collaborate with any unions desiring to participate in similar training programs which they may maintain to the end that the classification of Navajo workers in a representative number of skills, crafts, and trades becomes a reality before they become members of a union rather than to have them join unions first as common laborers and thereafter attempt to improve their classifications within the framework of the unions.

- + B. All programs providing vocational training in the Navajo Nation or for the benefit of Navajo students shall cooperate with the Navajo Nation in implementing the Navajo Education Policies, including 10 NNC §122, "Vocational Education and Career Education", of the Navajo Education Policies.

HISTORY

CN-61-84, November 14, 1984.

CA-48-58, §§1, 4, August 27, 1958.

Revision note. Former subsection (A) deleted; other paragraphs relettered.

CROSS REFERENCES

United States Code. Vocational training program, see 25 U.S.C. §309.

Subchapter 2. Navajo Education Policies

§ 101. Short title

This subchapter shall be cited as the "Navajo Education Policies".

HISTORY

CN-61-84, November 14, 1984.

origin: 1958
Report to Adv
Committee -
facilities
plan

CROSS REFERENCES

See also CAU-43-61, August 29, 1961, which provided a Navajo Education Policy Statement.

§ 102. Mission statement

The human resource of the Navajo Nation is its most valuable resource. The Navajo Nation, as a sovereign nation, has a responsibility to its people to oversee their education in whatever schools or school systems they are being educated, to assure that their education provides excellence in the academic program and high, realistic expectations for all students. An appropriate education for Navajo People is one that fosters:

- A. The formulation of age, grade and/or developmentally appropriate competencies in all basic areas of academic and cognitive skills;
- B. Competence in English language skills and knowledge of American culture;
- C. Competence in Navajo language skills and knowledge of Navajo culture;
- D. The development of Navajo and United States citizenship;
- E. Self-discipline and a positive self-concept;
- F. Preparation for lifetime responsibilities in the areas of employment, family life, recreation and use of leisure;
- G. An attitude toward education which encourages lifetime learning.

HISTORY

CN-61-84, November 14, 1984.

§ 103. Definitions

Subject to the additional definitions (if any) contained in the subsequent sections of this subchapter, and unless the context otherwise requires, in this subchapter, the following definitions shall apply:

A. "Navajo Nation" includes the Navajo Reservation and the Navajo People as a whole, considered as a distinct cultural, ethnic, geographical and political entity.

B. "Navajo Nation" also means the government of the Navajo Nation, or signifies that some power or attribute of the Navajo Nation as a government is intended.

C. "Culture" means a set of shared patterns of behavior developed by a group of people in response to the requirements of survival. These sets include: established patterns of relationships (interpersonal and kinship); values (behavior, material possessions, individual characteristics, attitudes); language; technology, acquisition and use of knowledge; planning for the future; governing structure; education; economics; and spiritual relationships.

D. "Congruent Curriculum" means a curriculum which is planned, ongoing and systematic; in which goals and objectives are clearly articulated; which brings about a match among (1) what the teacher teaches, (2) what should be taught, and (3) what students actually learn; and which reflects excellence.

E. A "School" is a place or institution for teaching and learning.

F. "Local Schools" are all schools serving kindergarten through 12th grade, or any part of that grade span, located within the Navajo Nation or serving the Navajo Nation. The term shall include bordertown residential facilities operated to facilitate attendance at public schools when the subject matter of a policy statement is applicable to residential facilities and the governing boards of residential facilities. The meaning of "local school" in regard to Navajo Nation school board elections shall be determined by the Navajo Nation laws regarding school board elections, rather than by this section.

G. "Schools within the Navajo Nation" or "schools Located within the Navajo Nation" are those local schools located within the exterior boundaries of the Navajo Nation in areas subject to Navajo Nation jurisdiction; those BIA residential facilities located near the immediate borders of the Navajo Nation and serving primarily Navajo student populations; and those schools operated on contract by authorization of the Navajo Nation.

H. "Schools Serving the Navajo Nation" are all schools within the Navajo Nation and all schools established within Navajo "Indian Country" for the education of Navajo students or receiving significant funding for the education of Navajo students such as public schools receiving Impact Aid funds.

I. A "Compelling Governmental Purpose" is a purpose which would withstand strict scrutiny in regard to the nature of the governmental interest being advanced, the means chosen to accomplish it, and the impact on the protected privacy interest of parents in choosing an appropriate education for their children.

✱ J. "School Governing Boards" or "Local School Boards" are the governing boards with responsibility for establishing policy and overseeing the operation of a local school.

K. "Cognitive Skills" are skills involved in the process of knowing, in the broadest sense, including perception, memory, judgment, analysis, conception, deduction, induction and thinking.

L. "Vocational Education" is an area of instruction designed to prepare the student to enter into an adult occupation with appropriate academic, occupational and life skills. Vocational education programs should include vocational exploration, vocational core skill development and entry level training.

M. "Career Education" consists of efforts aimed at focusing education and supportive actions of the community in ways that will help individuals acquire and utilize the knowledge, skills and attitudes necessary for each to make work a meaningful, productive and satisfying part of his or her way of living. Career education is not taught as a separate school subject. Rather, it is integrated into all subject areas at all levels, using activities that encourage students to acquire basic skills and make career decisions based upon what they learn about themselves and the world of work.

N. "Early Childhood Programs" are those developmental and educational programs operated for children at the preschool level. The term can include kindergarten programs that are operated independently of and apart from any local school.

O. "Navajo Preference" means that in the recruitment, employment, retention and promotion of personnel, preference is given to an applicant who is an enrolled member of the Navajo Nation and who is equally qualified as one or more non-Navajos for a given position. Navajo preference may mean Indian preference where such an interpretation is mandated by applicable state, federal or contract requirements.

P. "Indian Preference" means that preference is given to a Native American applicant who is equally qualified as one or more non-Indian applicants for a given position.

HISTORY

CN-61-84, November 14, 1984.

Revision note. Slightly reworded for statutory form.

§ 104. Responsibility and authority of the Navajo Nation

A. The Navajo Nation has an inherent right to exercise its responsibility to the Navajo People for their education by prescribing and implementing educational policies applicable to all schools within the Navajo Nation and all educational programs receiving significant funding for the education of Navajo youth or adults. At the same time, the Navajo Nation recognizes the legitimate authority of the actual education provider, whether state, federal, community controlled or private. The Navajo Nation commits itself, whenever possible, to work cooperatively with all education providers serving Navajo youth or adults or with responsibilities for serving Navajo students to assure the achievement of the educational goals of the Navajo Nation established through these policies and in other applicable Navajo Nation laws.

B. The laws and policies of the Navajo Nation are applicable to the maximum extent of the jurisdiction of the Navajo Nation in the operation of all local schools.

C. The Navajo Nation specifically claims for its people and relies upon the responsibility of the government of the United States to provide for the education of the Navajo People, based upon the Treaty of 1868 and the trust responsibility of the federal government toward Indian tribes. The Navajo People also claim and rely upon their rights as citizens of the states within which they reside to a non-discriminatory public education. In exercising its responsibility and authority for the education of the Navajo People, the Navajo Nation does not sanction or bring about any abrogation of the rights of the Navajo Nation or the Navajo People based upon treaty, trust or citizenship, nor does it diminish the obligation of the federal government or of any state or local political subdivision of a state.

HISTORY

CN-61-84, November 14, 1984.

§ 105. Education Agency of Navajo Nation

A. The Navajo Division of Education is the administrative agency within the Navajo Nation with responsibility and authority for implementing and enforcing the educational laws of the Navajo Nation. The Division as the Education Agency of the Navajo Nation exercises, to the extent permitted by law and agreement, functions comparable to the departments of education of the several states in regard to the schools within the Navajo Nation and other schools and educational programs serving significant numbers of Navajo youth and adults. In exercising its responsibilities, the Division shall seek to work cooperatively with local school governing boards.

B. The Division of Education is under the immediate direction of an Executive Director, subject to the overall direction of the President of the Navajo Nation. In carrying out its responsibilities the Division, through the Executive Director, is authorized and directed to:

1. Establish cooperative arrangements with other divisions and programs within the Navajo Nation and with education organizations and entities;
2. Negotiate cooperative arrangements and intergovernmental agreements with local, state and federal agencies and governmental bodies, subject where required, to the approval of the appropriate Navajo Nation governing authority;
3. Inquire into the educational situation of Navajo students in any school or educational program located within the Navajo Nation or receiving program funds for the education of Navajo youth or adults;
4. Determine the impact of educational programs on Navajo students by inquiring into areas of concern, such as achievement

data, test results, budgets, language proficiency, special educational programs, supplemental programs, staffing, social and economic variables, curriculum, health and safety, adequacy of facilities, and other areas of inquiry relevant to the educational situation of Navajo students;

5. Comply with federal and, where appropriate, state requirements regarding confidentiality of records;

6. Report the results of its inquiries to the Education Committee of the Navajo Nation Council and to the school boards, communities and other entities serving the Navajo Nation affected by the subject matter of these inquiries;

7. Make recommendations in its reports for the improvement of Navajo education;

8. Report at least annually to the Navajo Nation Council on the state of Navajo education; and

The authority to make inquiries granted to the Division in this subsection extends to all affected school sites and all appropriate records.

C. The Navajo Division of Education shall be available to work with schools, school districts, school governing boards, local communities and other appropriate entities to develop plans for the implementation of Navajo educational policies, to coordinate utilization of available resources and to assist in the development of new resources. The Division shall assure that its staff have and receive appropriate professional training in order to keep informed of current educational methodologies and techniques.

D. The Education Committee of the Navajo Nation Council has oversight responsibility for the Navajo Division of Education and for the implementation of education legislation. The Committee exercises such powers and responsibilities over Navajo education as are prescribed by its Plan of Operation (2 NNC §481 *et seq.*) and in other Navajo Nation laws. The Education Committee exercises oversight responsibility regarding the recruitment and operation of post-secondary education programs within the Navajo Nation.

E. The Navajo Division of Education is subject to and carries out laws adopted by the Navajo Nation Council.

HISTORY

CN-61-84, November 14, 1984.

§ 106. School boards—Local control of schools

A. The Navajo Nation encourages and supports local control of Navajo education. Administration of a local school shall be under the guidance and direction of the local governing board.

B. All local school boards operating schools within the Navajo Nation are subject to its educational laws to the full extent of the jurisdiction of the Navajo Nation. Local school boards are responsible for assuring the implementation of the Navajo educational policies at the local level. In addition, local school boards are responsible for establishing local educational policies and priorities. "

C. In administering the schools under their charge, local school boards shall give timely notice of their meetings and conduct their meetings at times and places convenient to the public, especially parents, and shall carry out their deliberations and decision-making in open meetings, except in such cases as disciplinary matters, individual personnel matters, discussion of litigation, where the need for privacy clearly outweighs the public's right to know.

D. School boards shall develop written policies regarding school governance, personnel matters, staff conduct, student conduct, teacher evaluation, parental involvement, residential policies, graduation requirements, academic policies and related topics, and shall assure that these policies are communicated to administration, staff, students and parents. School board policies shall be implemented in a consistent and impartial manner.

HISTORY

CN-61-84, November 14, 1984.

CROSS REFERENCES

School Boards, 10 NNC §201 *et seq.*

§ 107. Parental involvement

A. Local schools shall encourage participation by parents of students in their school programs. Parents should be involved in planning, developing and evaluating educational programs, developing curriculum, and school activities. Appropriate procedures shall be developed by each local school to facilitate parental involvement and to assist parents in inquiring and learning about the education their children are receiving.

B. Educational aspirations and cultural values of Navajo parents should be respected in the development of policies and programs within each school.

C. Parental involvement in education includes the right of parents to choose the type of school and educational program in which their minor children shall be educated. Choices of day or residential attendance and of federal, state, community controlled or private school are appropriate parental options which should be limited only by the most compelling governmental purposes. Parental action or inaction in regard to the education of children which endangers or disregards the

welfare of those children is not protected by this section. This subsection shall not justify any parent in disregarding laws concerning compulsory attendance or school transfer.

D. Parents have a responsibility to support the educational efforts of the local schools, to assure the regular attendance of their children in school, and to exercise supervision and guidance over their children.

HISTORY

CN-61-84, November 14, 1984.

§ 108. Navajo preference and Indian preference

A. The ultimate goal of the Navajo Nation is self-determination. In order to assure the survival and growth of the Navajo Nation as a people of distinct language and culture and with a domestic economic base, the Navajo Nation requires Navajo preference in employment of school and educational personnel in all schools within the Navajo Nation. In addition, whenever application of the Navajo preference policy does not result in the selection of a Navajo applicant or candidate, a policy of Indian preference shall be applied to the remaining applicants or candidates. Local school governing boards and education administrators responsible for hiring shall comply with the requirements of this policy in regard to the recruitment, employment, promotion and retention of all personnel.

B. All schools and school systems operating within the Navajo Nation shall seek the professional services of competent Navajo educators, counselors, administrators and support personnel to adequately serve the linguistically and culturally unique children of the Navajo People. In addition, all affected schools and school districts shall give preference to Navajo personnel in providing professional training opportunities, subject to the needs of the schools to obtain specialized training opportunities for staff serving particular functions. In seeking educational and support personnel, schools and school districts shall include within the position description, as a preferred qualification, a knowledge and familiarity with the Navajo language, culture and people.

C. The local governing board of a school or school district may waive the requirements of this section by a formal vote of the board. Such waiver may apply only to individual employment, retention or promotion decisions, as determined by the board on a case-by-case basis. In each case where a waiver of Navajo preference-based hiring, retention or promotion occurs, the local governing board shall make a written record of the occurrence for inclusion in the official minutes of the board.

HISTORY

CN-61-84, November 14, 1984.

§ 109. Education standards

A. The Navajo Nation shall identify the need for appropriate educational standards in various subject areas and shall develop educational standards to assure the provision of a high quality education for Navajo students in all schools serving the Navajo Nation. These standards shall in no way limit the freedom of local school systems to exceed these requirements.

B. The Navajo Division of Education shall coordinate with other governmental entities and education providers in designing and implementing educational standards appropriate to the various schools and school systems. The Division shall consider the requirements of applicable state and federal laws and the concerns of education managers, parents, community members, and teachers in the development of educational standards. Navajo educational standards shall avoid actual conflict with the requirements of state and federal or private accrediting entities having jurisdiction over the schools unless there is no practical means of implementing Navajo educational policies without such conflict or unless the conflict is permitted by the external law.

C. In implementing this policy, the Navajo Division of Education shall act with the approval of the Education Committee of the Navajo Nation Council to establish a procedure to adopt proposed standards and/or amend existing standards and present subsequent proposed resolutions to the Navajo Nation Council.

HISTORY

CN-61-84, November 14, 1984.

§ 110. Curriculum

A. Each school serving the Navajo Nation shall have a written, congruent curriculum which contains clearly articulated instructional goals and objectives. The curriculum of each school shall be based on the needs of the students served. The culture, values, and individual interests of the Navajo students shall be recognized and integrated into all curricula. The curriculum should provide all students with opportunities to broaden their interests and career objectives and promote personal and intellectual growth appropriate to their individual differences.

B. The instructional program shall reflect the special needs of these students and yet be flexible enough to allow any modifications necessary to accommodate the need of students to acquire full knowledge of basic skills, including but not limited to science, computer science, mathematics, social studies, reading, writing, language skills and cog-

nitive skills. Special programs shall be available for gifted and handicapped students and for students requiring remedial instruction.

C. The use of curriculum committees is encouraged at all levels of schools to review the validity and relevance of curricula. Curriculum content shall be reviewed on a periodic basis. The review should utilize student assessments, standardized test scores, student progress reports, and school evaluation reports. Each school shall involve the staff, parents and community in program planning, provide in-service training in curriculum development and implement a curriculum improvement approach. Any new curriculum or educational program shall be structured to meet the needs of the specific school and shall be adopted by the governing board of the school.

D. Career education shall be integrated into the basic curriculum from the preschool level to establish a working relationship between what is taught in the classroom and what is needed on the job and in professional occupations. At the secondary, vocational and post-secondary levels, the curriculum should incorporate into the basic program career exploration, career guidance, awareness of vocational and educational opportunities and occupational skills.

HISTORY

CN-61-84, November 14, 1984.

§ 111. Education in Navajo language

The Navajo language is an essential element of the life, culture and identity of the Navajo People. The Navajo Nation recognizes the importance of preserving and perpetuating that language to the survival of the Nation. Instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation. Navajo language instruction shall include to the greatest extent practicable: thinking, speaking, comprehension, reading and writing skills and study of the formal grammar of the language.

HISTORY

CN-61-84, November 14, 1984.

§ 112. Education in Navajo culture and social studies

The survival of the Navajo Nation as a unique group of people growing and developing socially, educationally, economically and politically within the larger American Nation requires that the Navajo People and those who reside with the Navajo People retain and/or develop an understanding, knowledge and respect for Navajo culture, history, civics and social studies. Courses or course content that develop knowledge, understanding and respect for Navajo culture, history,

civics and social studies shall be included in the curriculum of every school serving the Navajo Nation. The local school governing board, in consultation with parents, students and the local community, shall determine the appropriate course content for the Navajo culture component of the curriculum.

HISTORY

CN-61-84, November 14, 1984.

§ 113. Professional training for educators

A. It is the responsibility of the local schools and school districts serving the Navajo Nation to employ professional Navajo educators, to recruit those who are most qualified and competent to work with the Navajo student population, and to create incentives to improve staff performance. Local school boards and administrators shall take leadership to provide professional training opportunities for their personnel and to encourage and provide both opportunities and guidance for those individuals who desire to advance themselves in the education field, obtain or expand their professional certification, or obtain training in their specialized areas. Staff development shall include both certified and non-certified personnel. Educators of Navajo children have the responsibility to upgrade their teaching and administrative skills to maintain relevant, coherent instructional techniques at all levels of formal education.

B. All schools and school districts serving the Navajo Nation shall develop appropriate Navajo culture awareness and sensitivity programs as an integral part of their in-service training programs for all personnel. The Navajo Nation through its Education Committee shall establish general guidelines for the implementation of these programs.

HISTORY

CN-61-84, November 14, 1984.

§ 114. Special education

A. Local schools and educational programs serving the Navajo Nation shall assure that handicapped and gifted Navajo students receive educational and support services and resources that are adequate to meet their special educational needs and that are both appropriate and non-discriminatory in terms of Navajo language, learning styles and culture. The Navajo Nation supports the essential policies made explicit within the "Education for All Handicapped Act" concerning the provision of a free, appropriate public education in the least restrictive environment and the procedural rights and safeguards afforded handicapped students and their parents. No school or educational program

shall discriminate against any student or applicant for services on the basis of handicap.

B. The Navajo Nation shall coordinate with other agencies to provide personnel preparation services for special education and related service needs to increase the availability of qualified Navajo special education personnel.

HISTORY

CN-61-84, November 14, 1984.

§ 115. Education of Navajo gifted, talented and highly motivated students

All local schools serving the Navajo Nation shall identify the strengths of gifted, talented and highly motivated students and shall provide appropriate educational planning which will challenge and nurture each student's level of development to its highest potential. Students shall be provided an opportunity to work at their appropriate developmental level of ability rather than being limited to a normative level.

HISTORY

CN-61-84, November 14, 1984.

§ 116. School counseling services

All schools serving the Navajo Nation shall maintain competent, appropriately staffed counseling programs. Counseling staff shall have an awareness of Navajo culture and tradition, particularly as these relate to the individual needs and life circumstances of the students. The counseling program shall be concerned with the physical, cultural, intellectual, vocational and emotional growth of each student.

HISTORY

CN-61-84, November 14, 1984.

§ 117. Student code

Under the guidance of the local school boards, parent committees and parents, a written code of student conduct, rights and responsibilities shall be developed and maintained by each school serving the Navajo Nation. School disciplinary procedures should be corrective, based upon a disciplinary action plan incorporated into the code of student conduct. The disciplinary action plan should provide for notification and involvement of parents from the earliest stages of the disciplinary process. Each school governing board shall determine the appropriateness of corporal punishment in its disciplinary programs.

HISTORY

CN-61-84, November 14, 1984

§ 118. School attendance

A. Every person who has a Navajo child or Navajo children under his or her care between the ages of five and eighteen years shall assure the attendance of the child or children in school. For purposes of this section, a child shall be deemed to be 5 years old only if he or she has a fifth birthday prior to September first of the school year to which this policy is applied. This policy applies to attendance by children who have not yet graduated from high school. Local school governing boards shall develop programs to improve regular school attendance in compliance with this policy.

B. Any adult residing in the Navajo Nation who violates the provisions of this section shall be subject to the penalties prescribed in 17 NNC §§222 and 223 for petty misdemeanors. Any Navajo minor residing in the Navajo Nation who violates the provisions of this section shall be subject to the jurisdiction of the Family Courts of the Navajo Nation.

C. The Education Committee of the Navajo Nation Council shall develop regulations and procedures to enforce the compulsory attendance laws. The Navajo Division of Education shall work with appropriate agencies within the Navajo Nation, school boards, schools, school districts, Chapters, parent committees and state and federal governmental entities to develop appropriate and innovative measures and educational programs to decrease the dropout rate, reduce absenteeism and to meet the educational needs of students who have been unable to function effectively in the regular school setting.

D. The Navajo Nation discourages transfers from one school to another, particularly transfers which occur during the school year and jeopardize the student's academic progress. The Navajo Division of Education is directed to work cooperatively with all schools and school systems serving Navajo students to develop procedures to minimize excessive and inappropriate student movement between schools.

HISTORY

CN-61-84, November 14, 1984.

§ 119. Substance and alcohol abuse

Navajo Nation law prohibits the possession or consumption of drugs and alcoholic beverages on the Navajo Nation. 17 NNC §§390-395, §§410-412. All local schools shall discourage the utilization and consumption of drugs and alcoholic beverages through relevant academic or preventive guidance programs for all Navajo youth. Schools along

with other community resources shall encourage a positive self-concept, provide factual information and encourage personal responsibility. Schools shall work with other community service providers to seek and develop programs and resources to assist students addicted to the use of alcohol and other mind altering substances so that they may fully participate in the school program.

HISTORY

CN-61-84, November 14, 1984.

§ 120. Bus routes and transportation

Adequate bus transportation is of vital importance to the Navajo Nation to improve school attendance and increase the day attendance opportunities for Navajo students. Adequate bus transportation systems for students shall be established to ensure safe transport of Navajo students to and from school. Local school board policy governing the transportation of pupils shall meet or exceed all applicable state and federal safety regulations. The Navajo Nation, through the Education Committee and the Transportation and Community Development Committee, shall work in a joint and cooperative effort with the states in which the Navajo Nation is located and the Bureau of Indian Affairs to adopt adequate school bus routes, to avoid excessively long bus travel and to develop a comprehensive school transportation plan. The Navajo Nation may enter into agreements with the federal government, states, counties, local schools and school districts within and bordering the Navajo Nation to implement school transportation plans. In apportioning funds for road construction and maintenance, the Navajo Nation, federal, state and local (county) government shall consider school transportation needs for day attendance as a priority consideration. This section shall not justify the closure of any school nor the denial of day attendance opportunities to students within a school's day attendance area.

HISTORY

CN-61-84, November 14, 1984.

Revision note. Reference to the "Tribal Roads and Transportation Committee" changed to the "Transportation and Community Development Committee". See 2 NNC §420 *et seq.*

§ 121. School facilities and operations

A. All educational programs located within the Navajo Nation or serving significant numbers of Navajo students shall be housed in facilities that are accessible, appropriate to the purposes for which they are used, and maintained in good repair. The Bureau of Indian Affairs is responsible, either directly or through contract, to maintain in good

repair, all educational facilities owned or operated by the Bureau or operated with funding from the Bureau. This subsection shall not be interpreted to justify the closure of any school facility in a manner contrary to the provisions of subsection (B) of this policy or in violation of any Navajo Nation, state or federal law, regarding school closures.

B. The Navajo Division of Education shall establish joint planning efforts with schools and school systems in the Navajo Nation and with those educational institutions receiving federal funding to educate Navajo students to accomplish the following provisions:

1. When planning construction, expansion, consolidation, or closure of any school or school residential unit serving the Navajo Nation, the decision-making entity shall, from the initial stages, consult with the affected school boards and school board organizations, the Education Committee of the Navajo Nation Council, the Navajo Division of Education, affected Chapters and local communities and with those students, parents, and staff who use the facility; and shall incorporate the desires of these parties into their plans to the greatest extent feasible.

2. The construction, expansion, and renovation of any school facility shall conform to all applicable state and federal health and safety regulations, to established safety and building codes and to laws regarding environmental assessments and environmental impact.

3. In planning for the construction of any new educational facility, consideration shall be given to the development of an appropriate physical environment including but not limited to considerations of location, size, alternate use, and the extent to which the proposed facility will benefit unserved and inappropriately served populations, including students required to travel daily on the bus for an excessive amount of time.

HISTORY

CN-61-84, November 14, 1984.

§ 122. Vocational education and career education

A. The Navajo People have a right to education in basic, technical, employability, managerial, and entrepreneurial skills. The Navajo Nation shall advocate with federal, state and private sources for adequate funding of vocational and career education programs. The Navajo Nation shall integrate educational planning with economic planning and develop agreements and joint efforts for the sharing of vocational educational costs, facilities and programs. In order to increase the vocational opportunities available to Navajo youth and adults and to make the most efficient use of existing vocational educational resources,

the Education Committee and the Human Services Committee of the Navajo Nation Council shall coordinate, with other entities, the development of comprehensive vocational educational planning.

B. Career education shall be integrated into the basic curriculum of all schools in all appropriate content areas and at all grade levels.

C. Vocational education programs shall be realistically designed to serve the needs of individuals of secondary school age or older including those who have academic, socioeconomic, cultural, physical, attitudinal or other handicaps, and who need or can profit from the instruction. Vocational education programs should include instruction in basic skills, communication, social interaction, occupationally specific skills and responsibility skills that are required for employment. Vocational education program offerings should be determined on the basis of identified needs, employment statistics, current occupational surveys, and local, state and national labor market demands, including the demands of new and emerging occupations. They should reflect the skills needed to develop the Navajo economy.

HISTORY

CN-61-84, November 14, 1984.

Revision note. Reference to the "Labor and Manpower Committee" changed to the "Human Services Committee". See 2 NNC §601 *et seq.*

§ 123. Vocational rehabilitation and opportunities for the handicapped

A. All Navajo People are entitled to participate fully in the economic, social, cultural and political life of the Navajo Nation without regard to any handicapping condition. All public and private entities within the Navajo Nation shall cooperate with the Navajo Nation Council on the Handicapped in implementing this policy. Every public and private entity within the Navajo Nation shall:

1. Recognize handicapped Navajo People as potentially productive members of society;
2. Encourage the handicapped Navajo population to reach optimum levels of economic independence and political, societal and cultural participation; and
3. Make reasonable accommodation to the special needs of handicapped persons, including the need for site accessibility, in regard to employment, housing, public accommodations, social services, transportation, recreation, educational and training opportunities, and community services and assure the availability of these services on an equitable, non-discriminatory basis.

B. The Navajo Nation Council on the Handicapped is responsible for assuring that all Navajo People have an opportunity to realize their

potential to the extent of their physical and mental capabilities. The Council has such powers and responsibilities as are prescribed in its Plan of Operation and in other applicable Navajo Nation law. The Council shall work with other appropriate Navajo Nation governmental entities and with all service providers, public and private, to:

1. Establish coordination and joint planning for delivery of services to handicapped Navajos from birth through adulthood as close to home as possible;
2. Establish a continuum of appropriate services for all degrees of disability and all stages of the life cycle;
3. Eliminate service gaps and avoid duplication of services; and
4. Maximize available resources.

HISTORY

CN-61-84, November 14, 1984.

§ 124. Post-secondary education

A. The future development of the Navajo Nation depends upon the education and skills of the Navajo People. In exercising its responsibilities in regard to financial assistance and post-secondary program oversight, the Navajo Nation shall give attention to the social, educational, economic and other developmental needs of the Navajo Nation, as well as to the welfare and personal needs of the individual student.

B. In providing financial assistance to students in post-secondary programs, the Office of Navajo Nation Scholarship and Financial Assistance Program ("ONNSFA") shall develop policies and procedures which:

1. Provide career guidance to scholarship applicants;
2. Foster academic excellence and encourage scholarship recipients to pursue academically rigorous fields of study;
3. Encourage Navajo students to remain within their post-secondary educational programs until the completion of their degrees and to return and provide service to the Navajo Nation;
4. Encourage applicants to choose post-secondary programs which are appropriate to their career needs and to their academic preparation;
5. Make appropriate provision for the financial assistance needs of those students pursuing post-secondary vocational programs and for otherwise capable students who require remedial instruction;
6. Provide academic scholarships for students with high academic achievement;
7. Enable students to prepare, retrain and upgrade their skills for new and changing professions and occupations on a fulltime or part-time basis;

8. Encourage pursuit of graduate level degrees, particularly in fields which support the developmental goals of the Navajo Nation; and

9. Provide a range of financial assistance resources including academic scholarships, grants based on need, student loans and privately-endowed grants and scholarships.

C. Navajo Nation financial aid funds should be utilized in combination with state, federal and private resources, such as Pell grants, loans, college work study, tuition waivers, endowments, special grants and scholarships and innovative programs so that adequate financial assistance may be made to as many qualified post-secondary students as possible.

D. An Office of Academic Scholarship shall be established within the Navajo Division of Education. The Office shall:

1. Establish criteria for and oversee the provision of academic scholarships to students of high academic achievement, without regard to assessed financial need;

2. Establish criteria for and oversee the provision of graduate fellowships; and

3. Provide for the development and administration of endowed programs of academic scholarships, fellowships and grants.

E. Post-secondary educational programs which recruit and/or serve students within the Navajo Nation shall be realistically designed to serve the educational needs of Navajo students and shall comply with the laws of the Navajo Nation.

HISTORY

CN-61-84, November 14, 1984.

Revision note. References to the "Navajo Tribal Higher Education Department" in subsections (B) and (D) have been deleted and/or changed to the "Office of Navajo Nation Scholarship and Financial Assistance Program".

CROSS REFERENCES

See also the Plan of Operation for the Office of Navajo Nation Scholarship and Financial Assistance Programs within the Division of Education, and the ONNSFA Policies and Procedures.

§ 125. Navajo Community College

A. Navajo Community College is the officially chartered institution of post-secondary education for the Navajo Nation. It was established by the Navajo Nation Council, pursuant to Resolutions CN-95-68 and CJN-60-70. The College is established to provide post-secondary academic, vocational, technical and adult education programs; special and handicapped education programs; and community services in accordance with its Plan of Operation and other applicable Navajo Nation

laws. The College provides instruction leading to certification in Navajo culture, language and other related fields and serves as a training center for educators and other professionals.

B. The College is authorized to develop plans and procedures with other post-secondary institutions for the coordination of post-secondary education programs and courses offered within the Navajo Nation, including upper division and graduate academic and vocational programs, under the oversight and guidance of the Education Committee of the Navajo Nation Council.

C. The Navajo Nation shall assist and support Navajo Community College in the pursuit of its unique and special educational mission.

HISTORY

CN-61-84, November 14, 1984.

§ 126. Adult education

The Navajo adult population has a right to educational programs that meet their educational needs and aspirations, and that are accessible to them in terms of proximity to home and work, time of day and expense. The Navajo Nation recognizes the importance of adult education and encourages public and private entities to develop and offer programs of adult education including, but not limited to adult basic education, pre-GED and GED education, basic vocational education, community education, consumer education, health education, and related adult programs. The Navajo Nation shall include adult education as a permanent component within its educational planning. All administrative entities within the Navajo Nation with responsibilities for education, training, community health, and related areas shall coordinate to assure that adult education opportunities are afforded to the Navajo population consistent with Navajo Nation laws and policies, and shall seek ways of improving the number, quality and availability of adult educational offerings.

HISTORY

CN-61-84, November 14, 1984.

§ 127. Early childhood programs

Parents and persons having custody of Navajo children of preschool age are encouraged to enroll them in programs of early childhood education. Early childhood programs should employ a comprehensive developmental approach to help children achieve the social competence and pre-academic skills which are associated with positive school performance and healthy psycho-social adjustment. Early childhood programs shall work closely with parents, parent policy boards and local

communities in developing and implementing their program plans. Administrative entities within the Navajo Nation with responsibility for education, child development, licensed day care, and related areas shall coordinate to assure that early childhood programs serving Navajo children are competently and compassionately administered in accordance with Navajo Nation laws and policies.

HISTORY

CN-61-84, November 14, 1984.

Chapter 3. School Boards

Subchapter 1. Local Community School Boards

SECTION

- 201. Establishment
- 202. Membership
- 203. Composition
- 204-205. [Superseded]
- 206. Compensation
- 207. Powers, authority and duties
- 208. Officials
- 209. Meetings
- 210. [Superseded]

Subchapter 3. Agency School Boards

- 251. Establishment
- 252. Composition
- 253. Powers; duties
- 254. Officials
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Subchapter 5. Navajo Area School Board Association

- 301. Executive Board
- 302. Powers and duties
- 303. Officers
- 304. Meetings
- 305. Funding

CROSS REFERENCES

School Boards—Local Control of Schools, 10 NNC §106
 School Board Elections, Navajo Election Code, 11 NNC §1 *et seq.*

Subchapter 1. Local Community School Boards

§ 201. Establishment

The Chapters of the Navajo Nation are authorized to establish such local Navajo Community School Boards as are suitable for their respective areas. Such local community school boards shall have the governance of schools funded or operated by the Bureau of Indian Affairs for the education of Navajo students.

HISTORY

CN-61-84, November 14, 1984.
CAU-87-69, August 8, 1969.

§ 202. Membership

Any enrolled member of the Navajo Nation may serve as a member of a Local Community School Board, provided that:

- A. The member is a resident of the Chapter he or she will represent;
- B. The member is 21 years of age or over; and
- C. The member is not an employee of the school upon whose board he or she would serve.

HISTORY

CAU-87-69, August 8, 1969.

CROSS REFERENCES

Navajo Election Code, 11 NNC §1 *et seq.*

§ 203. Composition

A local Navajo Community School Board shall be composed of not less than three nor more than seven members as established by the chapter or chapters having jurisdiction over the local School Board.

HISTORY

CAU-87-69, August 8, 1969.

Exceptions to provision. CAU-37-84, August 7, 1984, specifically waived the provisions of 10 NNC §203 to permit the ten members of the local school boards of the Chuska Boarding School and the Tohatchi Boarding School to serve as a consolidated school board of the Consolidated Chuska Tohatchi Bureau of Indian Affairs Boarding School until the expiration of the terms of the current members.

Election of members - Chapter mtg - Aug.

§§ 204-205. [Superseded. CAP-23-90, April 6, 1990]

*Tenure: vacancy: 1 yr
Chapter 2 yrs
3 yrs*

§ 206. Compensation

All local Navajo Community School Board members shall receive payment for discharging their duties at rates set by the Education Committee of the Navajo Nation Council in consultation with the school boards, in accordance with regulations developed pursuant to P.L. 59-561. ** w/out compensation.*

HISTORY

CN-38-79, November 27, 1979.
CAU-87-69, August 8, 1969.

§ 207. Powers, authority and duties

A. The local Navajo Community School Boards are authorized to solicit funds from such other sources as they may choose, and such

School Boards may disburse these funds in any manner related to the performance of their duties and functions. The School Boards shall file yearly statements of account with their respective Agency School Boards.

B. In order to effectuate local control of schools on the Navajo Nation, all proposals relating to management or instruction of such schools shall be submitted to the School Boards for their consideration and consent. The School Boards shall have the authority to advise the Agency School Administrator in charge of hiring and replacement of both to grant its approval and disapproval of administrative and instructional personnel.

C. The School Boards shall work in cooperation with the principals of the schools which they serve, shall participate in the total aspect of school operation such as finance, personnel, school plant management, transfer of school facilities and educational program, shall strive to maintain constant good relations between the school and the surrounding community, shall determine policies relating to the use of school facilities after hours, shall cooperate with other local agencies for the improvement of the community generally, and shall initiate such activities involving both curricular and extra-curricular aspects of school functions, as will foster increased community participation in education.

D. A School Board shall report any disagreements either among its members or between it and school officials, to the Agency or Inter-Agency School Boards, if such disputes are incapable of resolution at the Board level.

E. The adopted operating plans of the present existing boards or groups will be utilized and incorporated under this section.

HISTORY

CAU-87-69, August 8, 1969.

§ 208. Officials

Each Local Navajo Community School Board shall elect a President, Vice-President, and a Treasurer, and such other officials as are deemed necessary.

HISTORY

CAU-87-69, August 8, 1969.

§ 209. Meetings

Meetings shall be held at least once per calendar month during the school term, and at such other times as the President of the School Boards shall deem advisable. The President, in calling any meetings of

the Board, shall give a minimum of three days notice to each member of the Board.

HISTORY

CAU-87-69, August 8, 1969.

§ 210. [Superseded] Recall by Chapter.

HISTORY

CAP-23-90, April 6, 1990.

Subchapter 3. Agency School Boards

§ 251. Establishment

A. The Chapters of the Navajo Nation, in cooperation with the Local School Boards within their jurisdiction, are authorized to establish Agency School Boards.

B. Agency School Boards shall be established in agencies having schools drawing students from more than one Chapter served by a Local School Board, including but not limited to the Chinle, Crownpoint, Many Farms, Shiprock, and Tuba City Boarding Schools.

HISTORY

CAU-87-69, August 8, 1969.

§ 252. Composition

Each Agency School Board shall be composed of members elected or appointed by the Local Boards within the Agency. Each Local Board shall appoint or elect one person to serve on the Agency Board. In no event shall an Agency Board have more members than the total number of schools within the Agency.

HISTORY

CAU-87-69, August 8, 1969.

§ 253. Powers; duties

A. The Agency School Board shall meet as necessary to request and review reports from Local School Boards relating to projects and activities carried out by these Local School Boards.

B. The Agency Board shall plan workshops and other training activities for members of Local School Boards.

C. The Agency Board shall review and approve any financial statements submitted by any Local School Board within its jurisdiction. If an Agency Board finds that any Local School Board has mismanaged or otherwise misappropriated funds available to it, the Agency Board may

require the Local School Board to submit for its approval all future disbursements of Local School Board funds, for a period at the discretion of the Agency Boards. The Agency Board shall have general powers to oversee and superintend the activities of Local School Boards, and to assure that the activities of such Local Boards comply with and implement the purposes of this chapter.

D. The Agency Boards, where it is feasible, shall handle the affairs of their respective Agency bordertown dormitories.

HISTORY

CAU-87-69, August 8, 1969.

§ 254. Officials

Each Agency School Board shall elect a President, a Vice-President, and a Treasurer, and other officials as necessary.

HISTORY

CAU-87-69, August 8, 1969.

§ 255. Meetings

Agency School Boards shall meet either monthly or at such intervals as established, but in no event shall meet less than four times per year.

HISTORY

CAU-87-69, August 8, 1969.

Revision note. Slightly reworded for purposes of statutory form.

Subchapter 5. Navajo Area School Board Association

HISTORY

1974 amendment. The name "InterAgency School Boards" as adopted by CAU-87-69, August 8, 1969, was changed to "Navajo Area School Board Association" by CF-25-74, February 14, 1974.

§ 301. Executive board

The members of the Navajo Area School Board Association shall elect 13 members from such Navajo Area School Board to act along with its officers, as an executive board. The purpose of this executive board shall be the conducting of such business as may arise between meetings of the Navajo Area School Board. This executive board shall adopt such Bylaws as it sees fit for the proper and orderly conduct of business.

HISTORY

CF-25-74, 5, February 14, 1974.

CAU-87-69, August 8, 1969.

§ 302. Powers and duties

In cooperation with the Education Committee of the Navajo Nation Council, the Navajo Area School Board Association shall have the following powers and duties:

A. A Navajo Area School Board Association shall consider programs and problems of Navajo Nation-wide significance and for off-Reservation schools such as Intermountain, Chemawa, Albuquerque, Stewart, Chilocco, Fort Sill, Phoenix, Riverside, and Sherman.

B. The Navajo Area School Board Association shall make recommendations to the Education Committee of the Navajo Nation Council concerning all Navajo Area Schools and Local School Boards.

C. The Navajo Area School Board Association shall plan such activities for Navajo Area Schools and Local School Boards as are required in order that the Navajo Area and Local School Boards may effectuate the purpose of this chapter.

D. The Navajo Area School Board Association shall take all actions necessary to provide opportunities for local school boards to share educational problems of mutual concern and to assist them in developing solutions to these problems.

E. The Navajo Area School Board Association will from time to time meet with the Education Committee of the Navajo Nation Council to review the progress of education on the Navajo Nation, and make any proposals which in the opinion of the Navajo Area School Board Association would "improve" education in the Navajo Nation.

F. The Navajo Area School Board Association shall recommend to the Education Committee of the Navajo Nation Council such policies, procedures, goals, and aims, or such workshops as are required to implement the intent of this chapter.

HISTORY

CF-25-74, February 14, 1974.
CAU-87-69, August 8, 1969.

§ 303. Officers

The Navajo Area School Board Association shall establish a President, a Vice-President, and a Treasurer, and such other officers as are required.

HISTORY

CF-25-74, February 14, 1974.
CAU-87-69, August 8, 1969.

§ 304. Meetings

The Navajo Area School Board Association shall meet at intervals set by a majority of its members, but in no event shall it meet less than four times a year.

HISTORY

CF-25-74, February 14, 1974.

CAU-87-69, August 8, 1969.

§ 305. Funding

The Navajo Area School Board Association in cooperation with the Education Committee of the Navajo Nation Council shall solicit funds as are necessary to support its activities, and any activities of Local or Area School Boards, from available sources. Any funds procured by any Area Boards in excess of cost requirements for their respective activities shall be dispersed to Local School Boards in a manner established by the Area School Board.

HISTORY

CF-25-74, February 14, 1974

CAU-87-69, August 8, 1969.

Chapter 5. School Attendance

SECTION

- 501. Annual enrollment and school attendance
- 502. Compulsory school attendance—Generally
- 503. Application of state and Navajo Nation laws
- 504. Plans and procedures for enforcement

§ 501. Annual enrollment and school attendance

A. An annual enrollment and school attendance “drive” shall be conducted between the first of August and the fifteenth of November of each year.

B. The goal of the “drive” shall be to insure the enrollment and continued attendance of all Navajo children between the ages of 6 and 16 in available schools.

C. The Education Committee and the President of the Navajo Nation shall be responsible for detailed planning, coordination and stimulation of this “drive”.

D. All Navajo Nation Council members and Chapter officers shall be responsible for disseminating information regarding the “drive” in their local communities.

HISTORY

CO-38-55, October 13, 1955.

§ 502. Compulsory school attendance—Generally

Education in Navajo schools shall be compulsory as to children between the ages of 5 and 18 years as prescribed and defined in 10 NNC §118 of the Navajo Education Policies. *as per § 118*

HISTORY

CN-61-84, November 14, 1984.

1922-1951 Res. p. 114, February 20, 1947.

§ 503. Application of state laws and Navajo Nation laws

The Navajo Nation Council consents to the application of state compulsory school attendance laws to the Indians of the Navajo Nation and their enforcement on Indian lands of the Navajo Nation wherever an established public school district lies or extends within the Navajo Nation. In addition, 10 NNC §118 of the Navajo Education Policies regarding compulsory attendance shall apply to all Navajo minors between the ages of 5 and 18 and to all persons having care and custody of such minors who are within the civil or criminal jurisdiction of the Navajo Nation.

HISTORY

CN-61-84, November 14, 1984.
CA-39-52, 1952, August 11, 1952.
Revision note. Slightly reworded.

§ 504. Plans and procedures for enforcement

A. The Education Committee of the Navajo Nation Council, after consultation with the President of the Navajo Nation, is authorized and directed to develop plans and procedures in conjunction with local schools, communities, parents and other governmental entities for the enforcement of the compulsory school attendance laws among the Navajo Nation, including, but not limited to, provision for bringing action against responsible parents in Navajo Nation Courts.

B. The Education Committee is further authorized to designate areas where such plans and procedures shall be implemented.

C. The Education Committee is directed to continue to encourage regular school attendance through all means available.

HISTORY

CN-61-84, November 14, 1984
CO-66-58, October 17, 1958.
Revision note. Slightly reworded.

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7. To prepare and recommend a Committee budget each year.

8. To serve as the oversight Committee for the Division of Health and the Division of Social Services except as delegated otherwise by Navajo Nation Council and this oversight responsibility shall include other programs designated by the Navajo Nation Council.

HISTORY

CD-68-89, December 15, 1989. Amended generally.
ACMA-35-84, March 14, 1984.

§ 455. Meetings

Regular meetings shall be held the second and fourth Tuesday of each month.

HISTORY

CMY-26-90, May 8, 1990. Subsection (B) on quorum requirements deleted. Quorum requirements for all Committees found at 2 NNC §183.
CD-68-89, December 15, 1989. Meeting dates changed and quorum requirements amended.
ACMA-35-84, March 14, 1984.

Article 6. Education Committee

§ 481. Establishment

The Education Committee is hereby established and continued as a standing committee of the Navajo Nation Council.

HISTORY

CD-68-89, December 15, 1989.
ACMA-35-84, March 14, 1984.
CJ-9-57, January 31, 1957.
CJA-13-38, Tribal Council Res. 1922-1951, p. 111, January 18, 1938.

§ 482. Purposes

The Committee's general purpose is to oversee the educational development of the Navajo Nation and to develop policies for a school system that is lastically excellent and culturally relevant education.

HISTORY

CD-68-89, December 15, 1989. Subsection (B) deleted, and remaining paragraph amended generally.
ACMA-35-84, March 14, 1984.

§ 483. Membership

The Committee shall consist of eight (8) members of the Navajo Nation Council.

HISTORY

CD-68-89, December 15, 1989. Committee membership increased from "6" to "8". Also, subsections (B), (C) and (D) were deleted. ACMA-35-84, March 14, 1984.

§ 484. Powers

- A. The Committee shall have such powers as are necessary and proper for the accomplishment of the purposes set forth above.
- B. The powers of the Committee are:
1. Promulgate regulations, policies and procedures to implement Navajo Nation education laws.
 2. Review and recommend legislation to the Navajo Nation Council.
 3. Review, sanction and authorize applications, reapplications and amendments for Self-Determination Act contracts and grants for the operation of education programs, subject to final approval by the Intergovernmental Relations Committee. Authorization of contract or recontract applications or amendments by the Education Committee shall constitute approval by the Tribal governing body.
 4. Serve as the oversight committee of the Navajo Division of Education and colleges within the Navajo Nation.
 5. Assist, support and coordinate with local communities, parent organizations and school boards and school board organizations.
 6. Represent the Navajo Nation in consultation with federal, state and local officials regarding any proposed changes in educational programs, including additions, deletions, school closures, consolidations, and the like. The Committee shall, where appropriate, seek concurrence of the Intergovernmental Relations Committee of the Navajo Nation Council or the Navajo Nation Council in framing official responses from the Navajo Nation to proposals for major changes in educational programs, such as proposals regarding major school closures or transfers of jurisdiction.
 7. Review, approve and regulate any programs offered on the Navajo Nation by off-Navajo Nation post-secondary institutions or any "nonresident" or home study post-secondary programs for which student recruitment activities are conducted on the Navajo Nation.

HISTORY

CD-68-89, December 15, 1989. Amended generally. ACMA-35-84, March 14, 1984.

CROSS REFERENCES

CJN-60-71, June 8, 1971. Established the Navajo Division of Education.

§ 485. Meetings

The Committee shall hold its regular meetings every second fourth Friday of each month.

HISTORY

CMY-26-90, May 8, 1990. Subsection (B) on quorum requirements deleted. Quorum requirements for all Committees found at 2 NNC §183. CID-68-89, December 15, 1989. Meeting dates specified and quorum requirements set.

Article 7. [Reserved]

Article 8. [Reserved]

Article 9. Judiciary Committee

§ 571. Establishment

A. The Judiciary Committee, Navajo Nation Council, was established by Navajo Tribal Council Resolution CAU-54-59 on August 14, 1959 (hereafter "Committee").

B. The Committee is hereby continued as a permanent standing committee of the Navajo Nation Council with oversight responsibilities for operation of the Judicial Branch of the Navajo Nation.

HISTORY

CD-68-89, December 15, 1989. Amended generally.
ACMA-35-84, March 14, 1984. Amended generally.
CAU-54-59, August 14, 1959.

§ 572. Purposes

The purposes of the Judiciary Committee are:

A. To improve the administration of justice and in order to serve the best interests of the Navajo Nation, the Committee shall agree upon and determine, with the approval of the Navajo Nation Council, qualifications to be required of judges and justices of the Navajo Nation. After determining the qualifications, the Committee shall thereafter screen all eligible candidates or applicants, review the performance of probationary judges and justices, and select panels for appointment of probationary judges and justices and recommend probationary judges and justices for permanent appointment. The Chief Executive officer of the Navajo Nation shall appoint probationary judges and justices of the Navajo Nation only from among those named in the panel submitted by the Committee. The Chief Executive Officer shall appoint permanent judges and justices only upon recommendation of the

O. "Ministerial action" means an action that a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to, or in the exercise of, the person's own judgment upon the propriety of the action being taken.

P. "Official discretionary action" means any official function of public office or employment, including any vote, decision, opinion, allocation, recommendation, approval, disapproval, finding, delegation, authorization, contract, commitment, settlement, disbursement, release or other action which involves the exercise of discretionary authority, for, on behalf of or in any manner affecting any interest or property of the Navajo Nation, including any governmental body, political subdivision or member thereof.

Q. "Public employee" means any employee, as defined herein, temporarily, periodically, permanently or indefinitely in the employment of the Navajo Nation, and/or any governmental body thereof as defined herein, including intergovernmental personnel.

R. "Public office" means any elected or appointed office or position of permanent or temporary employment in any governmental body of the Navajo Nation as defined herein.

S. "Public official" means any person holding an elective or appointed office in any governmental body of the Navajo Nation as defined herein, including grazing committee members.

HISTORY

CJY-23-92, July 20, 1992.

CF-11-88, February 4, 1988

CAU-40-84, August 9, 1984.

Note. Formerly §3758. The definition section of this chapter was placed at the beginning as such sections generally do not appear at the end of statutes.

CROSS REFERENCES

See generally, 11 NNC, §1 *et seq.*, Navajo Nation Election Code.

Subchapter 2. Standards of Conduct and Restricted Activities of Public Officials and Employees

CROSS REFERENCES

Note. Subchapter 2 was formerly designated §3753.

§ 3744. Conduct in conformity with applicable rules and laws

Public officials and employees shall at all times conduct themselves so as to reflect credit upon the Navajo People and government; and comply with all applicable laws of the Navajo Nation with respect to their conduct in the performance of the duties of their respective office or employment.

HISTORY

CJY-23-92, July 20, 1992.
CAU-40-84, August 9, 1984.
Note. Formerly §3753(A).

§ 3745. General prohibitions; conflicts of interest

A. No public official or employee shall use, or attempt to use, any official or apparent authority of their office or duties which places, or could reasonably be perceived as placing their private economic gain or that of any special business interests with which they are associated, before those of the general public, whose paramount interests their office or employment is intended to serve.

B. It is the intent of this subsection (B) that public officials and employees of the Navajo Nation avoid any action, whether or not specifically prohibited by the Standards of Conduct set out herein, which could result in, or create the appearance of:

1. Using public office for private gain;
2. Giving preferential treatment to any special interest organization or person;
3. Impeding governmental efficiency or economy;
4. Losing or compromising complete independence or impartiality of action;
5. Making a government decision outside official channels; or
6. Adversely affecting the confidence of the people in the integrity of the government of the Navajo Nation.

HISTORY

CJY-23-92, July 20, 1992.
CAU-40-84, August 9, 1984.
Note. Formerly §3753(B).

§ 3746. Use of confidential information for private gain

No public official or employee shall use or disclose confidential information gained in the course of or by reason of their official position or activities, to further their own economic and personal interest or that of anyone else.

HISTORY

CJY-23-92, July 20, 1992.
CAU-40-84, August 9, 1984.
Note. Formerly §3753(C).

§ 3747. Restrictions against incompatible interests or employment

A. Public officials and employees shall not:

1. Have direct or indirect financial or other economic interests nor engage in such other employment or economic activity which, as determined in accordance with the provisions of this chapter and other applicable laws of the Navajo Nation, necessarily involves inherent substantial conflict, or appears to have such substantial conflict, with their responsibilities and duties as public officials or employees of the Navajo Nation; nor

2. Engage in, directly or indirectly, financial or other economic transactions as a result of, or primarily depending upon, information obtained through their public office or employment; nor

3. Acquire any economic or other financial property, contractual or other economic interest at a time when they believe or have reason to believe, that it will directly and substantially affect or be so affected by their official actions or duties.

B. Subject to the restrictions and conditions set forth in this chapter, public officials and employees are free to engage in lawful financial transactions to the same extent as the general public. Governmental bodies and agencies of the government of the Navajo Nation may, however, adopt further approved restrictions upon such transactions or employment as authorized herein and by other applicable laws of the Navajo Nation, in light of special circumstances or their particular duties.

C. No business or other entity shall employ a public official or employee if such employment is prohibited by or otherwise violates any provision of this chapter.

D. The term "employment", within the meaning of this section, includes professional services and other services rendered by a public official or employee, whether rendered as an employee, consultant or other independent contractor.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(D).

§ 3748. Abstention from official action

A. When a public official or employee is required to take official action on a matter in which such public official or employee has a personal economic interest, they should first consider eliminating that interest. If that is not feasible nor required under §3747 above, such public official or employee shall:

1. Prepare and sign a written statement describing the matter requiring action and the nature of the potential conflict, as soon as such public official or employee is aware of such conflict and they

shall deliver copies of such statement to the responsible party for inclusion in the official record of any vote or other decision or determination and also to the Ethics and Rules Committee;

2. Abstain from voting, sponsoring, influencing or in any manner attempting to influence any vote, official decision or determination which would favor or advance such person's personal economic interest in such matter; and

3. Abstain from voting or otherwise participating in the official decision or determination of such matter, unless otherwise directed by the authorized presiding official of the governmental body making such decision or determination, or otherwise legally required by law, (such as the vote of an elected representative delegate which is cast on behalf of his or her electorate constituents), or unless such person's vote, position, recommendation or participation is contrary to their personal economic interest.

B. Unless otherwise provided by applicable law, the abstention by such person from voting or otherwise participating in the official determination or decision shall not affect the presence of such person for purposes of establishing a quorum necessary for a governmental body, agency or commission to take such action or vote upon such matter.

C. Public employees shall also deliver a copy of such statement to the Committee and to their immediate superior, if any, who shall assign the matter to another. If such employee has no immediate superior, he or she shall take such steps as the Committee shall prescribe or advise, to abstain from influencing actions and decisions in the matter.

D. In the event that a public official's or employee's participation is otherwise legally required for the action or decision to be made, such person and the presiding official or immediate superior requiring such participation shall fully report the occurrence to the Committee.

HISTORY

CJY-23-92, July 20, 1992.

CF-11-88, February 4, 1988.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(E).

§ 3749. Navajo Nation government contracts; restrictions and bid requirements

A. No public official or employee or any member of such person's immediate family shall be a party to, nor have an interest in the profits or benefits of, any governmental contract of the Navajo Nation or of any investment of funds of the Navajo Nation, unless the contract or the investment meets the following requirements:

1. The contract is let by notice and competitive bid or procurement procedures as required under all applicable laws, rules, regulations and policies of the Navajo Nation, for necessary materials or services for the governmental agency or entity involved;

2. If the continuous course of a business commenced before the public official or employee assumed his or her current term of office or employment;

3. The entire transaction is conducted at arm's length, with the governmental agency's full knowledge of the interest of the public official or employee or a member of his or her immediate family;

4. The public official or employee has taken no part in the determination of the specifications, deliberations or decision of a governmental agency with respect to the public contract; and

5. The public official or employee is not a member, office holder, employee or otherwise directly associated with the same governmental agency or entity primarily responsible for letting, performing, receiving, regulating or otherwise supervising the performance of the contract.

B. The requirements of §3749(A) shall not apply to the negotiation, execution, award, transfer, assignment or approval of mineral or non-mineral leases, permits, licenses and like transactions other than contracts involving the investment, award or payment of government funds; provided, that such leases, permits, licenses and like transactions shall be subject to all other provisions of this section and to all other applicable laws, rules and regulations of the Navajo Nation and its governmental bodies; and provided further that §3749(A) shall likewise fully apply to all contracting and other activities, conducted thereunder, which are subject to this chapter. Provisions in accordance with the purposes and intent of this chapter shall be incorporated as part of the rules, regulations and guidelines applicable to the negotiation, approval and assignment of such leases, permits, licenses and like transactions.

C. In the absence of bribery or a purpose to defraud, a public official or employee or a member of his or her immediate family shall not be considered as having an interest in a public contract or the investment of public funds, when such a person has a limited investment interest of less than ten percent (10%) of the ownership of net assets, or an interest as creditor of less than ten percent (10%) of the total indebtedness of any business or other entity which is the contractor on the public contract involved or in which public funds are invested, or which issues any security therefor.

HISTORY

CJY-23-92, July 20, 1992

CAU-40-84, August 9, 1984

Note. Formerly §3753(F).

CROSS REFERENCES

See also, 2 NNC, §223, Contracts; 2 NNC, §1013, Contracting; 5 NNC, §201 *et seq.*, Navajo Business Preference Law.

§ 3750. Restrictions on assisting or representing other interests before governmental bodies for compensation

No public official or employee except an employee of a governmental body duly established and authorized for such purposes by the Navajo Nation shall represent or otherwise assist any person or entity other than the Navajo Nation or a governmental body or political subdivision thereof, for compensation, before any governmental body where the matter before the governmental body is of a non-ministerial nature. This section shall not be construed to prohibit the duties of elected or appointed public officials to represent their constituents' interests before government agencies or entities nor the performance of ministerial functions, including but not limited to the filing or amendment of tax returns, applications for permits and licenses, and other documents or reports. It does, however, prohibit representation of such other interests for any fee or compensation in seeking to obtain any legislation, contract, payment of any claim or any other governmental benefit.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(G).

§ 3751. Restrictions on assisting or representing other interests subsequent to termination of public office or employment

A. No former public official or employee nor partner, employee or other associate thereof shall, with or without compensation, after the termination of such public office or employment, knowingly act as agent or attorney for or otherwise represent any other person or entity (except the Navajo Nation, its governmental bodies or political subdivisions) by formal or informal appearance nor by oral or written communication, for the purpose of influencing any governmental body of the Navajo Nation or any officer or employee thereof, in connection with any proceeding, contract, claim, controversy, investigation, charge or accusation, in which such former public official or employee personally and substantially participated, through approval, disapproval, recommendation, rendering of advice, investigation or otherwise, while so acting or employed.

B. With respect to any such matter which was actually pending among such former public official's or employee's responsibilities, but in which such person did not participate as set forth in subsection (A),

the prohibitions set forth hereunder shall apply for the period of two (2) years following the termination of such public office or employment.

C. Nothing in this chapter shall prevent a former public official or employee from appearing and giving testimony under oath, nor from making statements required to be made under penalty of perjury, nor from making appearances or communications concerning matters of a personal and individual nature which pertain to such former public official or employee or are based upon such person's own special knowledge of the particular subject involved, not otherwise privileged from disclosure by other applicable law; and provided further, that no compensation is thereby received other than that which is regularly provided for witnesses by law or regulation.

D. The Navajo Nation, its governmental bodies and political subdivisions shall not enter into any contract with, nor take any action favorably affecting or economically benefiting in any manner differently from members of the public at large, any person, business, governmental or other entity, which is assisted or represented personally in the matter by a former public official or employee whose official act, while a public official or employee, directly contributed to the making of such contract or taking of such action by the Navajo Nation or any governmental body or political subdivision thereof.

E. Nothing contained in this subsection shall prohibit a former public official or employee from being retained or employed by the governmental entity which he or she formerly served.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(H).

§ 3752. Unauthorized compensation or benefit for official acts

A. No public official or employee shall accept or receive any benefit, income, favor or other form of compensation for performing the official duties of their office or employment, beyond the amount or value which is authorized and received in his or her official capacity for performing such duties.

B. This section shall not be construed to prohibit the receipt of authorized compensation for the performance of other distinct and lawful public duties by public officials or employees.

C. No public official or employee, however, shall accept any benefit, income, favor or other form of compensation for the performance of the duties of any other official or employment not actually performed

or for which such official or employee is not otherwise properly authorized or entitled to receive.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(I).

§ 3753. Unauthorized personal use of property or funds of the Navajo Nation

No public official or employee shall use any property of the Navajo Nation or any other public property of any kind for other than as authorized and approved for official purposes and activities. Such persons shall properly protect and conserve all such property, equipment and supplies which are so entrusted, assigned or issued to them.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(J).

§ 3754. Staff misuse prohibited

No public official or employee shall employ, with funds of the Navajo Nation, any unauthorized person(s) nor persons who do not perform duties commensurate with such compensation, and shall utilize authorized employees and staff only for the official purposes for which they are employed or otherwise retained.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(K).

§ 3755. Anti-nepotism

No public official or employee shall employ, appoint, or otherwise cause to be employed, nor nominate, nor otherwise influence the appointment or employment to any public office or position with the Navajo Nation or any governmental or political subdivision thereof, any person or persons related by consanguinity or affinity within the third degree, nor any member of the same household as said public official or public employee. Assignment of such persons to duties, positions, governmental offices or other entities shall in all instances be made in strict compliance with the current provisions of the Personnel Policies and Procedures of the Navajo Nation, as amended from time to time.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(L).

§ 3756. Restrictions against gifts or loans to influence official acts

Except as otherwise provided herein or by applicable rule or regulation adopted hereunder by the Ethics and Rules Committee of the Navajo Nation Council, or by other applicable law, no public official or employee shall solicit or accept for himself/herself or another, any gift, including economic opportunity, favor, service, or loan (other than from a regular lending institution on generally available terms) or any other benefit of an aggregate monetary value of one hundred dollars (\$100.00) or more in any calendar year, from any person, organization or group which:

A. Has, or is seeking to obtain, contractual or other business or financial relationships or approval from any governmental office or entity with which the public official or employee is associated or employed; or

B. Conducts operations or activities which are regulated or in any manner supervised by any governmental office or entity with which the public official or employee is associated or employed; or

C. Has any interest which, within two (2) years, has been directly involved with, or affected by, the performance or non-performance of any official act or duty of such public official or employee or of the government office or entity with which the public official or employee is associated or employed or which the public official or employee knows or has reason to believe is likely to be so involved or affected.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(M).

§ 3757. Permitted gifts, awards, loans, reimbursements and campaign contributions

Section 3756 shall not be construed to prohibit:

A. An occasional nonpecuniary gift, insignificant in value;

B. Gifts from and obviously motivated by family or social relationships, as among immediate family members or family inheritances;

C. Food and refreshments customarily made available in the ordinary course of meetings where a public official or employee may properly be in attendance;

D. An award or honor customarily and publicly presented in recognition of public service; and/or

E. A political campaign contribution, in accordance with all applicable election laws and provided that such gift or loan is actually used in the recipient's political campaign for elective office of a governmental body or political subdivision thereof and provided further that no promise or commitment regarding the official duties of office or employment is made in return for such contribution.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(N).

§ 3758. Adoption of supplemental codes of conduct for official and employees of governmental entities of the Navajo Nation

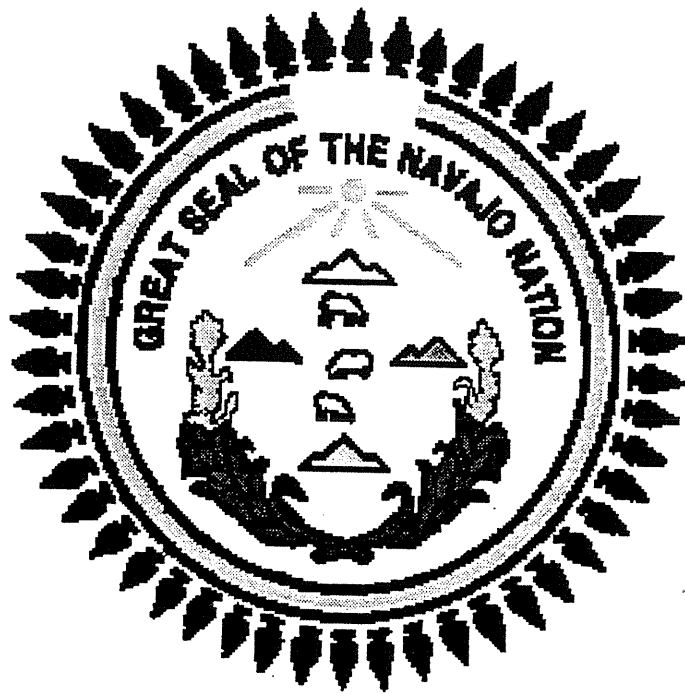
A. The chief executive or administrator of every governmental entity of the Navajo Nation which is subject to the provisions of this chapter is authorized to submit for approval and adoption by the Committee such supplemental rules, regulations and standards of conduct for the public officials and employees of such entity, which are necessary and appropriate to the special conditions relating to their particular functions, purposes and duties and not in conflict with the purposes and other provisions of this chapter. Upon adoption, such supplemental standards, rules and regulations shall be implemented in the same manner and to the extent applicable, as are all other standards, rules and regulations provided and adopted in accordance with the provisions of this chapter.

B. Other Navajo Nation Political Governing Bodies.

1. Other political governing bodies of the Navajo Nation are authorized and directed to draft, adopt, implement and administer standards of conduct, disclosure requirements and other procedures, rules and regulations in conformity with the purposes and provisions of this chapter.

2. Any lawful authorization for any sponsorship or conduct of participation or involvement in any business activity by any political subdivision of the Navajo Nation shall be conditioned upon its prior adoption of such provisions, and enforcement thereof, as approved by the Committee.

C. The Committee and the Navajo Nation Department of Justice shall provide such assistance as needed and requested by such governmental entities and political governing bodies of the Navajo Nation, in the preparation and drafting of such supplemental and implementing



NAVAJO NATION ETHICS IN GOVERNMENT LAW

2 NNC §§3741-3793 (1999 Edition)



*Chapter 6. Navajo Nation Ethics in
Government Law*

The subchapters and sections of this chapter have been redesignated for purposes of organization. Also, headings were provided at certain provisions for statutory clarity.

Subchapter 1. Title and Purpose; Definitions

SECTIONS

- 3741. Title
- 3742. Legislative purpose and intent
- 3743. Definitions

*Subchapter 2. Standards of Conduct and Restricted
Activities of Public Officials and Employees*

- 3744. Conduct in conformity with applicable rules and laws
- 3745. General prohibitions; conflicts of interests
- 3746. Use of confidential information for private gain
- 3747. Restrictions against incompatible interests or employment
- 3748. Abstention from official action
- 3749. Navajo Nation government contracts; restrictions and bid requirements
- 3750. Restrictions on assisting or representing other interests before governmental bodies for compensation
- 3751. Restrictions on assisting or representing other interests subsequent to termination of public office or employment
- 3752. Unauthorized compensation or benefit for official acts
- 3753. Unauthorized personal use of property or funds of the Navajo Nation
- 3754. Staff misuse prohibited
- 3755. Anti-nepotism
- 3756. Restrictions against gifts or loans to influence official acts
- 3757. Permitted gifts, awards, loans, reimbursements and campaign contributions
- 3758. Adoption of supplemental codes of conduct for officials and employees of governmental entities of the Navajo Nation

Subchapter 3. Repealed.

*Subchapter 4. Implementation and Compliance with
Ethics in Government Law; Duties and Responsibilities;
Investigation, Hearings, Findings, Reports and
Recommendations*

- 3766. Ethics and Rules Committee of the Navajo Nation Council -
Power and duties
- 3767. Retaliation prohibited
- 3768. Dismissals
- 3769. Statute of limitations
- 3770. Administrative hearings
- 3771. Appeals to District Courts
- 3772. recommendations to the Navajo Nation Council for certain officials
- 3773. Public employees and appointees; finality of decision
- 3774. Committee's power as quasi-judicial body
- 3775. Committee Conflict of interest
- 3776. Independent legal counsel
- 3777. Special prosecutors
- 3778. Navajo Nation Council proceedings
- 3779. Other relief not barred

Subchapter 5. Sanctions and Penalties

- 3780. Administrative sanctions
- 3781. Other civil damages
- 3782. Misdemeanor violations; punishments
- 3783. Severability
- 3784. Effective date
- 3785. Prior inconsistent law superseded

Subchapter 6. Ethics and Rules Office

- 3786. Establishment
- 3787. Purpose
- 3788. Personnel and organization
- 3789. Duties, responsibilities and authority
- 3790. Political practices prohibited
- 3791. Office location and hours
- 3792. Construction
- 3793. Amendments

*Subchapter 1. Title and Purpose; Definitions***§ 3741. Title**

This chapter may be cited as the Navajo Nation Ethics in Government Law.

HISTORY

CJY-23-92, July 20, 1992.

CF-11-88, February 4, 1988.

CAU-40-84, August 9, 1984.

Note. This section was formerly §3751.

Amended generally by CJY-23-92.

§ 3742. Legislative purpose and intent

- A. Purpose. Where government is founded upon the consent of the governed, the people are entitled to have complete confidence in the loyalty and integrity of their government. The purpose of the Navajo Nation Ethics in Government Law, therefore, is to require accountability to the people of the Navajo Nation by their elected, appointed and assigned public officials and employees in exercising the authority vested or to be vested with them as a matter of public trust, by:
1. Establishing and requiring adherence to standards of conduct to avoid such conflicts of interest as the use of public offices, employment or property for private gain, the granting and exchange of favored treatment to persons, businesses or organizations; and the conduct of activities by such officials and employees which permits opportunities for private gain or advantage to influence government decisions;
 2. Requiring public officials and employees to abstain from using any function of their office or duties in a manner which could place, or appear to place, their personal economic or special interests before the interests of the general public.
- B. Intent. It is the intention of the Navajo Nation Council that the provisions of this Navajo Nation Ethics in Government Law be construed and applied in each instance, so as to accomplish its purposes of protecting the Navajo People from government decisions and actions resulting from, or affected by, undue influences or conflicts of interest.

HISTORY

CAP-49-99, April 23, 1999.

CJY-23-92, July 20, 1992.

Note. Formerly §3752.

§ 3743. Definitions

As used in this chapter:

- A. "Business" includes any enterprise, organization, trade, occupation or profession whether or not operated as a legal entity for profit, including any business, trust, holding company, corporation, partnership, joint venture, or sole proprietorship, consultant or other self-employed enterprise.
- B. "Business with which the person is associated" includes any business in which the person or a member of the person's immediate family is a director, officer, partner, trustee or employee, holds any position of management or receives income in any form such as wages, commission, direct or indirect investment worth more than \$1,000 or holds any ownership, security or other beneficial interest, individually or combined, amounting to more than ten percent (10%) of said business.
- C. "Candidate for public office" means any person who has publicly announced such intent, authorized promotion for, or filed a declaration of candidacy or a petition to appear on the ballot for election as a public official; and any person who has been nominated by a public official or governmental body for appointment to serve in any public capacity or office.
- D. "Committee" means the Ethics and Rules Committee of the Navajo Nation Council.
- E. "Compensation" or "income" means any money or thing of value received, or to be received as a claim on future services, whether in the form of a fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital gain, or any other form of recompense or any combination thereof.
 - F. "Confidential information" means information which by law or practice is not available to the public at large.
- G. "Conflict of interest" means the reasonable foreseeability that any personal or economic interest of public official, or employee, will be affected in any materially different manner from the interest of the general public, by any decision, enactment, agreement, award or other official action or function of any governmental body or political subdivision of the Navajo Nation.

- H. "Dependent business" means any business, as defined herein, in which the person or members of the person's immediate family, individually or combined, have any direct or indirect ownership, investment, security or other beneficial interest amounting to more than twenty percent (20%) of such business.
- I. "Employee" means any person or entity working for, or rendering or exchanging any services or performing any act for or on behalf of another person, organization or entity in return for any form of pay or other compensation or thing of value received or to be received at any time temporarily, permanently or indefinitely, in any capacity; whether as agent, servant, representative, consultant, advisor, independent contractor or otherwise.
- J. "Employment" means the status or relationship existing or created by and between a person designated or acting as an "employee" as defined herein and the person, organization, group or other entity for whom or on whose behalf any such work, acts, services or other benefit has been, is being or will be rendered or performed for pay or any other form of compensation.
- K. "Economic interest" means an interest held by a person, members of the person's immediate family or a dependent business, which is:
1. Any ownership, income, investment, security or other beneficial interest in a business, or
 2. Any employment or prospective employment for which negotiations have already begun.
- L. "Gift" includes any gratuity, special discount, favor, hospitality, payment, loan, subscription, economic opportunity, advance, deposit of money, services, or other benefit received without equivalent consideration and not extended or provided to members of the public at large.
- M. "Governmental body" means any branch, entity, enterprise, authority, division, department, office, commission, council, board, bureau, committee, legislative body, agency, and any establishment of the Executive, Administrative, Legislative or Judicial Branch of the Navajo Nation, and certified Chapters of the Navajo Nation.
- N. "Immediate family" includes spouse, children and members of the household of public officials, public employees and candidates for public office, as defined in this chapter.

- O. "Ministerial action" means an action that a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to, or in the exercise of, the person's own judgment upon the propriety of the action being taken.
- P. "Official discretionary action" means any official function of public office or employment, including any vote, decision, opinion, allocation, recommendation, approval, disapproval, finding, delegation, authorization, contract, commitment, settlement, disbursement, release or other action which involves the exercise of discretionary authority, for, on behalf of or in any manner affecting any interest or property of the Navajo Nation, including any governmental body, political subdivision or member thereof.
- Q. "Public employee" means any employee, as defined herein, temporarily, periodically, permanently or indefinitely in the employment of the Navajo Nation, and/or any governmental body thereof as defined herein, including intergovernmental personnel.
- R. "Public office" means any elected or appointed office or position of permanent or temporary employment in any governmental body of the Navajo Nation as defined herein.
- S. "Public official" means any person holding an elective or appointed office in any governmental body of the Navajo Nation as defined herein, including grazing committee members.

HISTORY

CJY-23-92, July 20, 1992.

CF-11-88, February 4, 1988

CAU-40-84, August 9, 1984.

Note. Formerly §3758. The definition section of this chapter was placed at the beginning as such sections generally do not appear at the end of statutes.

CROSS REFERENCES

See generally, 11 NNC, §1 et seq., Navajo Nation Election Code.

Subchapter 2. Standards of Conduct and Restricted Activities of Public Officials and Employees

CROSS REFERENCES

Note. Subchapter 2 was formerly designated §3753.

§ 3744. Conduct in conformity with applicable rules and laws

Public officials and employees shall at all times conduct themselves so as to reflect credit upon the Navajo People and government; and comply with all applicable laws of the Navajo Nation with respect to their conduct in the performance of the duties of their respective office or employment.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(A).

§ 3745. General prohibitions; conflicts of interest

- A. No public official or employee shall use, or attempt to use, any official or apparent authority of their office or duties which places, or could reasonably be perceived as placing their private economic gain or that of any special business interests with which they are associated, before those of the general public, whose paramount interests their office or employment is intended to serve.
- B. It is the intent of this subsection (B) that public officials and employees of the Navajo Nation avoid any action, whether or not specifically prohibited by the Standards of Conduct set out herein, which could result in, or create the appearance of:
1. Using public office for private gain;
 2. Giving preferential treatment to any special interest organization or person;
 3. Impeding governmental efficiency or economy;
 4. Losing or compromising complete independence or impartiality of action;
 5. Making a government decision outside official channels; or
 6. Adversely affecting the confidence of the people in the integrity of the government of the Navajo Nation.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(B).

§ 3746. Use of confidential information for private gain

No public official or employee shall use or disclose confidential information gained in the course of or by reason of their official position or activities, to further their own economic and personal interest or that of anyone else.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(C).

§ 3747. Restrictions against incompatible interests or employment

- A. Public officials and employees shall not:
1. Have direct or indirect financial or other economic interests nor engage in such other employment or economic activity which, as determined in accordance with the provisions of this chapter and other applicable laws of the Navajo Nation, necessarily involves inherent substantial conflict, or appears to have such substantial conflict, with their responsibilities and duties as public officials or employees of the Navajo Nation; nor
 2. Engage in, directly or indirectly, financial or other economic transactions as a result of, or primarily depending upon, information obtained through their public office or employment; nor
 3. Acquire any economic or other financial property, contractual or other economic interest at a time when they believe or have reason to believe, that it will directly and substantially affect or be so affected by their official actions or duties.
- B. Subject to the restrictions and conditions set forth in this chapter, public officials and employees are free to engage in lawful financial transactions to the same extent as the general public. Governmental bodies and agencies of the government of the Navajo Nation may, however, adopt further approved restrictions upon such transactions or employment as authorized herein and by other applicable laws of the Navajo Nation, in light of special circumstances or their particular duties.
- C. No business or other entity shall employ a public official or employee if such employment is prohibited by or otherwise violates any provision of this chapter.
- D. The term "employment", within the meaning of this section, includes professional services and other services rendered by a public official or employee, whether rendered as an employee, consultant or other independent contractor.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(D).

§ 3748. Abstention from official action

- A. When a public official or employee is required to take official action on a matter in which such public official or employee has a personal economic interest, they should first consider eliminating that interest. If that is not feasible nor required under §3747 above, such public official or employee shall:
1. Prepare and sign a written statement describing the matter requiring action and the nature of the potential conflict, as soon as such public official or employee is aware of such conflict and they shall deliver copies of such statement to the responsible party for inclusion in the official record of any vote or other decision or determination and also to the Ethics and Rules Committee;
 2. Abstain from voting, sponsoring, influencing or in any manner attempting to influence any vote, official decision or determination which would favor or advance such person's personal economic interest in such matter; and
 3. Abstain from voting or otherwise participating in the official decision or determination of such matter, unless otherwise directed by the authorized presiding official of the governmental body making such decision or determination, or otherwise legally required by law, (such as the vote of an elected representative delegate which is cast on behalf of his or her electorate constituents), or unless such person's vote, position, recommendation or participation is contrary to their personal economic interest.
- B. Unless otherwise provided by applicable law, the abstention by such person from voting or otherwise participating in the official determination or decision shall not affect the presence of such person for purposes of establishing a quorum necessary for a governmental body, agency or commission to take such action or vote upon such matter.
- C. Public employees shall also deliver a copy of such statement to the Committee and to their immediate superior, if any, who shall assign the matter to another. If such employee has no immediate superior, he or she shall take such steps as the Committee shall prescribe or advise, to abstain from influencing actions and decisions in the matter.
- D. In the event that a public official's or employee's participation is otherwise legally required for the action or decision to be made, such person and the presiding official or immediate superior requiring such participation shall fully report the occurrence to the Committee.

HISTORY

CJY-23-92, July 20, 1992.

CF-11-88, February 4, 1988.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(E).

§ 3749. Navajo Nation government contracts; restrictions and bid requirements

- A. No public official or employee or any member of such person's immediate family shall be a party to, nor have an interest in the profits or benefits of, any governmental contract of the Navajo Nation or of any investment of funds of the Navajo Nation, unless the contract or the investment meets the following requirements:
1. The contract is let by notice and competitive bid or procurement procedures as required under all applicable laws, rules, regulations and policies of the Navajo Nation, for necessary materials or services for the governmental agency or entity involved;
 2. If the continuous course of a business commenced before the public official or employee assumed his or her current term of office or employment;
 3. The entire transaction is conducted at arm's length, with the governmental agency's full knowledge of the interest of the public official or employee or a member of his or her immediate family;
 4. The public official or employee has taken no part in the determination of the specifications, deliberations or decision of a governmental agency with respect to the public contract; and
 5. The public official or employee is not a member, office holder, employee or otherwise directly associated with the same governmental agency or entity primarily responsible for letting, performing, receiving, regulating or otherwise supervising the performance of the contract.
- B. The requirements of §3749(A) shall not apply to the negotiation, execution, award, transfer, assignment or approval of mineral or non mineral leases, permits, licenses and like transactions other than contracts involving the investment, award or payment of government funds; provided, that such leases, permits, licenses and like transactions shall be subject to all other provisions of this section and to all other applicable laws, rules and regulations of the Navajo Nation.

and its governmental bodies; and provided further that §3749(A) shall likewise fully apply to all contracting and other activities, conducted thereunder, which are subject to this chapter. Provisions in accordance with the purposes and intent of this chapter shall be incorporated as part of the rules, regulations and guidelines applicable to the negotiation, approval and assignment of such leases, permits, licenses and like transactions.

- C. In the absence of bribery or a purpose to defraud, a public official or employee or a member of his or her immediate family shall not be considered as having an interest in a public contract or the investment of public funds, when such a person has a limited investment interest of less than ten percent (10%) of the ownership of net assets, or an interest as creditor of less than ten percent (10%) of the total indebtedness of any business or other entity which is the contractor on the public contract involved or in which public funds are invested, or which issues any security therefore.

HISTORY

CJY-23-92, July 20, 1992

CAU-40-84, August 9, 1984

Note. Formerly §3753(F).

CROSS REFERENCES

See also, 2 NNC, §223, Contracts; 2 NNC, §1013, Contracting; 5 NNC, §201 et seq., Navajo Business Preference Law.

§ 3750. Restrictions on assisting or representing other interests before governmental bodies for compensation

No public official or employee except an employee of a governmental body duly established and authorized for such purposes by the Navajo Nation shall represent or otherwise assist any person or entity other than the Navajo Nation or a governmental body or political subdivision thereof, for compensation, before any governmental body where the matter before the governmental body is of a non-ministerial nature. This section shall not be construed to prohibit the duties of elected or appointed public officials to represent their constituents' interests before government agencies or entities nor the performance of ministerial functions, including but not limited to the filing or amendment of tax returns, applications for permits and licenses, and other documents or reports. It does, however, prohibit representation of such other interests for any fee or compensation in seeking to obtain any legislation, contract, payment of any claim or any other governmental benefit.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(G).

§ 3751. Restrictions on assisting or representing other interests subsequent to termination of public office or employment

- A. No former public official or employee nor partner, employee or other associate thereof shall, with or without compensation, after the termination of such public office or employment, knowingly act as agent or attorney for or otherwise represent any other person or entity (except the Navajo Nation, its governmental bodies or political subdivisions) by formal or informal appearance nor by oral or written communication, for the purpose of influencing any governmental body of the Navajo Nation or any officer or employee thereof, in connection with any proceeding, contract, claim, controversy, investigation, charge or accusation, in which such former public official or employee personally and substantially participated, through approval, disapproval, recommendation, rendering of advice, investigation or otherwise, while so acting or employed.
- B. With respect to any such matter which was actually pending among such former public official's or employee's responsibilities, but in which such person did not participate as set forth in subsection (A), the prohibitions set forth hereunder shall apply for the period of two (2) years following the termination of such public office or employment.
- C. Nothing in this chapter shall prevent a former public official or employee from appearing and giving testimony under oath, nor from making statements required to be made under penalty of perjury, nor from making appearances or communications concerning matters of a personal and individual nature which pertain to such former public official or employee or are based upon such person's own special knowledge of the particular subject involved, not otherwise privileged from disclosure by other applicable law; and provided further, that no compensation is thereby received other than that which is regularly provided for witnesses by law or regulation.
- D. The Navajo Nation, its governmental bodies and political subdivisions shall not enter into any contract with, nor take any action favorable affecting or economically benefiting in any manner differently from members of the public at large, any person, business, governmental or other entity, which is assisted or represented personally in the matter by a former public official or employee whose official act, while a public official or employee, directly contributed to the making of such contract or taking of such action by the Navajo Nation or any governmental body or political subdivision thereof.
- E. Nothing contained in this subsection shall prohibit a former public official or employee from being retained or employed by the governmental entity which he or she formerly served.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(H).

§ 3752. Unauthorized compensation or benefit for official acts

- A. No public official or employee shall accept or receive any benefit, income, favor or other form of compensation for performing the official duties of their office or employment, beyond the amount or value which is authorized and received in his or her official capacity for performing such duties.
- B. This section shall not be construed to prohibit the receipt of authorized compensation for the performance of other distinct and lawful public duties by public officials or employees.
- C. No public official or employee, however, shall accept any benefit, income, favor or other form of compensation for the performance of the duties of any other official or employment not actually performed or for which such official or employee is not otherwise properly authorized or entitled to receive.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(I).

§ 3753. Unauthorized personal use of property or funds of the Navajo Nation

No public official or employee shall use any property of the Navajo Nation or any other public property of any kind for other than as authorized and approved for official purposes and activities. Such persons shall properly protect and conserve all such property, equipment and supplies which are so entrusted, assigned or issued to them.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(J).

§ 3754. Staff misuse prohibited

No public official or employee shall employ, with funds of the Navajo Nation, any unauthorized person(s) nor persons who do not perform duties commensurate with such compensation, and shall utilize authorized employees and staff only for the official purposes for which they are employed or otherwise retained.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(K).

§ 3755. Anti-nepotism

No public official or employee shall employ, appoint, or otherwise cause to be employed, nor nominate, nor otherwise influence the appointment or employment to any public office or position with the Navajo Nation or any governmental or political subdivision thereof, any person or persons related by consanguinity or affinity within the third degree, nor any member of the same household as said public official or public employee. Assignment of such persons to duties, positions, governmental offices or other entities shall in all instances be made in strict compliance with the current provisions of the Personnel Policies and Procedures of the Navajo Nation, as amended from time to time.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(L).

§ 3756. Restrictions against gifts or loans to influence official acts

Except as otherwise provided herein or by applicable rule or regulation adopted hereunder by the Ethics and Rules Committee of the Navajo Nation Council, or by other applicable law, no public official or employee shall solicit or accept for himself/herself or another, any gift, including economic opportunity, favor, service, or loan (other than from a regular lending institution on generally available terms) or any other benefit of an aggregate monetary value of one hundred dollars (\$100.00) or more in any calendar year, from any person, organization or group which:

- A. Has, or is seeking to obtain, contractual or other business or financial relationship or approval from any governmental office or entity with which the public official or employee is associated or employed; or
- B. Conducts operations or activities which are regulated or in any manner supervised by any governmental office or entity with which the public official or employee is associated or employed; or
- C. has any interest which, within two (2) years, has been directly involved with, or affected by, the performance or non-performance of any official act or duty of such public official or employee or of the government office or entity with which the public official or employee is associated or employed or which the public official or employee knows or has reason to believe is likely to be so involved or affected.

as defn. formed by collection of units or particles into a body
Collective

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(M).

§ 3757. Permitted gifts, awards, loans, reimbursements and campaign contributions

Section 3756 shall not be construed to prohibit:

- A. An occasional nonpecuniary gift, insignificant in value;
- B. Gifts from and obviously motivated by family or social relationships, as among immediate family members or family inheritances;
- C. Food and refreshments customarily made available in the ordinary course of meetings where a public official or employee may properly be in attendance;
- D. An award or honor customarily and publicly presented in recognition of public service; and/or
- E. A political campaign contribution, in accordance with all applicable election laws and provided that such gift or loan is actually used in the recipient's political campaign for elective office of a governmental body or political subdivision thereof and provided further that no promise or commitment regarding the official duties of office or employment is made in return for such contribution.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(N).

§ 3758. Adoption of supplemental codes of conduct for official and employee of governmental entities of the Navajo Nation

- A. The chief executive or administrator of every governmental entity of the Navajo Nation which is subject to the provisions of this chapter is authorized to submit for approval and adoption by the Committee such supplemental rules, regulations and standards of conduct for the public officials and employees of such entity, which are necessary and appropriate to the special conditions relating to their particular functions, purposes and duties and not in conflict with the purposes and other provisions of this chapter. Upon adoption, such supplemental standards, rules and regulations shall be implemented in the same manner and to the extent applicable, as are all other standards, rules and regulations provided and adopted in accordance with the provisions of this chapter.

B. Other Navajo Nation Political Governing Bodies.

1. Other political governing bodies of the Navajo Nation are authorized and directed to draft, adopt, implement and administer standards of conduct, disclosure requirements and other procedures, rules and regulations in conformity with the purposes and provisions of this chapter.
2. Any lawful authorization for any sponsorship or conduct of participation or involvement in any business activity by any political subdivision of the Navajo Nation shall be conditioned upon its prior adoption of such provisions, and enforcement thereof, as approved by the Committee.

C. The Committee and the Navajo Nation Department of Justice shall provide such assistance as needed and requested by such governmental entities and political governing bodies of the Navajo Nation, in the preparation and drafting of such supplemental and implementing provisions as authorized and which are not in conflict with the purposes and provisions of this chapter.

HISTORY

CJY-23-92, July 28, 1992.
 CF-11-88, February 4, 1988.
 CD-93-85, December 4, 1985.
 CAU-40-84, August 9, 1984.
 Note. Formerly §3753(O).

§ 3759. Repealed.

HISTORY

CAP-49-99, April 23, 1999.
 CJY-23-92, July 20, 1992.
 CD-98-85, December 4, 1985.
 CAU-48-84, August 9, 1984.
 Note. Formerly §3754(A).

§ 3760. Repealed.

HISTORY

CAP-49-99, April 23, 1999.
 CJY-23-92, July 20, 1992.
 CD-98-85, December 4, 1985.
 CAU-40-84, August 9, 1984.
 Note. Formerly §3745(B). New subsection added statutory form and clarity.

§ 3761. Repealed.

HISTORY

CAP-49-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3754(C). New subsection added for statutory form and clarity.

§ 3762. Repealed.

HISTORY

CAP-49-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CD-93-85, December 4, 1985.

CAU-40-84, August 9, 1984.

Note. Formerly §3754(D).

§ 3763. Repealed.

HISTORY

CAP-49-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3754(E).

§ 3764. Repealed.

HISTORY

CAP-49-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CD-93-85, December 4, 1985.

CAU-40-84, August 9, 1984.

Note. Formerly §3754(F). Former subsection (D) redesignated as subsection (F) (now §3761).

§ 3765. Repealed.

HISTORY

CAP-49-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CD-93-85, December 4, 1985.

CAU-40-84, August 9, 1984.

Note. Formerly §3755.

*Subchapter 4. Implementation and Compliance with
Ethics in Government Law; Duties and Responsibilities;
Investigation, Hearings, Findings, Reports and
Recommendations*

HISTORY

Note. This subchapter was formerly §3756.

**§ 3766. Ethics and Rules Committee of the Navajo Nation Council-Powers
and duties**

In accordance with all powers and authority as provided in 2 NNC §§831-835 and in addition, the Committee shall have the specific duties, responsibilities and authority to:

- A. Adopt, amend and publish rules and regulations to implement all provisions of this chapter. Before such rules and regulations are enacted a 45-day public notice and comment period shall be allowed.
- B. Ensure that all appropriate measures are taken for protecting the confidentiality of all statements, records, documents, other materials
- C. Provide written advisory opinions to guide the conduct and address specific questions when requested by officials and employees who are subject to this chapter.
 - 1. All opinions shall be confidential and maintained on record within the Ethics and Rules Office;
 - 2. All opinions shall be binding upon the Committee, with regard to matters related to the specific request, until amended or revoked by the Committee.
- D. The Committee may initiate and/or receive, review and/or investigate complaints filed with the Ethics and Rules Office.
- E. The Committee shall conduct Administrative Hearings to determine violations or noncompliance with this chapter. All Committee hearings shall follow Rules of Procedures established and adopted by the Committee. The director shall be charged with the responsibility of representing the Navajo Nation in bringing forth all complaints filed under this chapter.

HISTORY

CAP-49-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CD-93-85, December 4, 1985.

CAU-40-84, August 9, 1984.

Note. Formerly §3756(A)(1)-(A)(10)(B). Also, new §3766(F) slightly reworded for clarity.

§ 3767. Retaliation prohibited

- A. Retaliation against any party or witness to a complaint shall be prohibited. Retaliation shall include any form of adverse or punitive action. This protection shall also be afforded to any person(s), including Ethics and Rules Office staff, offering testimony or evidence or complying with directives of the Committee.
- B. Any violations shall be subject to penalties under this chapter, as well as obstruction and contempt violations of both the civil and criminal codes of the Navajo Nation.

HISTORY

CF-11-88, February 4, 1988.

CJY-23-92, July 20, 1992.

Note. Formerly §3756(A)(10). Also heading "Retaliation Prohibited" was added for organizational purposes.

§ 3768. Dismissals

Upon recommendation of the Ethics and Rules Office, the Committee may dismiss any complaint which the Committee determines has insufficient facts to constitute a violation or noncompliance to this chapter; or if there is insufficient evidence to support the allegations; or if the Committee lacks personal and subject matter jurisdiction.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3756(A)(11). Also, heading "Dismissals" was added for organizational purposes.

§3769. Statute of Limitations

No action shall be brought under this chapter more than four (4) years after cause of action has accrued.

HISTORY

CAP-50-99, April 23, 1999.

Note. Formerly §3756(A)(12).

CJY-23-92, July 20, 1992.

§ 3770. Administrative hearings

- A. The Committee, in the capacity of a quasi-judicial body, shall conduct administrative hearings on any alleged violation or noncompliance.
- B. The Ethics and Rules Office shall act in the capacity of complainant on matters to be heard by the Committee.

- C. The Hearing body may impose or recommend any sanctions, civil damages, restitution, or other penalties provided in this chapter, or refer their findings to other appropriate entities for action.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3756(A)(13). Also, heading "Administrative Hearings" was added for organizational purposes.

§ 3771. Appeals to District Courts

- A. The Supreme Court of the Navajo Nation shall have jurisdiction to hear appeals from final decisions. Appeals shall be limited to questions of law.
- B. A notice of appeal shall be filed within ten (10) working days of the issuance of a written decision.

HISTORY

CAP-50-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3756(A)(14). Also, heading "Appeals to District Courts" was added for organizational purposes.

§ 3772. Deliberations by the Committee

In any complaint where the accused is the President, Vice-President, Chief Justice, or other judges of the Navajo Nation, chapter official or a Council Delegate, the Ethics and Rules Committee, upon completion of the administrative hearing, shall deliberate in executive session and by resolution render its findings of facts, conclusions of law and sanctions.

§ 3773. Repealed.

HISTORY

CAP-50-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3756(A)(15)(b). Also, heading "Public Employees and Appointees; Finality of Decisions" was added for organizational purpose.

§ 3774. Committee's power as a quasi-judicial body

- A. The Committee shall hold in contempt any person found disobeying any lawful order, process writ, finding or direction of the Committee.
- B. The Committee is authorized to administer oaths and issue subpoenas, to compel attendance and testimony of witnesses, or to produce any documents relevant to the matter before the Committee.

- C. The Committee shall maintain a complete record of all hearings, including all testimony and documents presented as evidence.
- D. The Committee shall not be bound by formal rules of evidence.
- E. The Committee shall conduct all hearings in open session. All records, transcripts, and other documents in the possession of the office shall remain confidential unless such information are submitted by the office as evidence
- F. The Committee shall cause a copy of any order or decision to be delivered to the appropriate branch of the government.

HISTORY

CJY-23-92, July 20, 1992
 Note. Formerly §3756(B).

§ 3775. Committee conflict of interest

No Committee member shall hear matters before the Committee which involve a member of his/her immediate family and/or personal economic interest.

HISTORY

CJY-23-92, July 20, 1992.
 Note. Formerly §3756(C).

§ 3776. Independent legal counsel

Subject to all applicable laws, the Committee may obtain independent legal counsel to assist and advise the Committee.

HISTORY

CJY-23-92, July 20, 1992
 Note. Formerly §3756(D).

§ 3777. Special prosecutors

- A. Notwithstanding any provision in this chapter, any Special Prosecutor appointed pursuant to 2 NNC §§2021-2024 shall have the following powers and authority in connection with any administrative proceeding under this chapter, exercisable in the name of the Navajo Nation, with respect to any matter within such Special Prosecutor's jurisdiction:
 - 1. To file a complaint alleging a violation of this chapter by any person subject thereto;

2. To prosecute the complaint and represent the Navajo Nation's interest in any and all proceedings thereon;
 3. To exercise an unconditional right to intervene and be substituted as the complainant in any proceeding pending under this chapter, without regard to the stage of such proceedings; and
- B. In the event of any administrative proceeding under this chapter in which the Navajo Nation, through a Special Prosecutor, is a complainant against a person, any other complaint filed against such person hereunder (whether filed before or after the date on which the Navajo Nation became complainant) shall abate and shall be dismissed without prejudice, as to any common allegation of prohibited conduct.

HISTORY

CAP-50-99, April 23, 1999.

CJY-23-92, July 20, 1992.

Note. Formerly §3756(E) and (F). Also, heading "Special Prosecutors" added for organizational purposes.

§ 3778 Repealed.

HISTORY

CAP-50-99, April 23, 1999.

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3756(G) and (H). At subsection (A), the language was slightly reworded for statutory purpose.

§ 3779. Other relief not barred

Nothing herein shall be construed as foreclosing the right of the Navajo Nation, through a Special Prosecutor or otherwise, to initiate proceedings to secure the relief and sanctions referred to in §§3781 or 3782 of this chapter.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3756(I).

CROSS REFERENCES

2 NNC §§3780(C), 3781(D) and 3782(F).

Subchapter 5. Sanctions and Penalties

§ 3780. Administrative sanctions

- A. Upon finding that there has been violation of any provision of this chapter, the Committee may impose any or all of the following penalties or sanctions:

1. Removal, discharge or termination from public office or employment in accordance with applicable Navajo Nation law and procedure.
 2. Disqualification for all elective public offices of the Navajo Nation and/or appointment to or employment in any public office of the Navajo Nation, for five (5) years from the effective date of removal, discharge or any other termination of public office or employment of the Navajo Nation.
 3. Suspension from public office or employment and forfeiture of all compensation and benefits accruing therefrom, for not less than thirty (30) days nor for more than one (1) year.
 4. Accordingly, any public employee of the Navajo Nation shall be subject to discipline, including suspension without pay or other benefits and dismissal as provided by other laws, regulations and personnel policies or procedures applicable thereto.
 5. Issuance of a written public reprimand, which shall be entered into such person's permanent record of employment or office and upon the permanent record of the public office or entity of which such person is a member or employee, according to provision of applicable Navajo Nation law and procedures.
 6. Issuance of a private reprimand to such person, with or without suspension of any or all other sanctions provided herein.
 7. Imposition of restitution or such other civil penalties as hereinafter provided under §3781.
- B. Any person who is found to have violated any provisions of this chapter shall forfeit any elective public office. This forfeiture provision shall not apply to any person against whom the only sanction imposed under section 3780(A) is for a suspension from public office, or written public reprimand, or private reprimand, or restitution of less than \$1000.
- C. No sanctions or penalty provided herein shall limit any other powers of the Navajo Nation Council, Navajo Nation Courts, Judicial, Executive or Legislative Branches of the Navajo Nation, nor of any other entity or administrative officials or employees under other applicable law, rules, regulations or procedures.

HISTORY

CAP-51-99, April 23, 1999.

CJY-23-92, July 20, 1992

CAU-40-84, August 9, 1984

Note. Formerly §3757(A).

§ 3781. Other civil damages

- A. A person found in violation of this mandate shall be further subject to, and personally liable for the following provisions, without regard to the imposition of any administrative sanction or criminal conviction:
1. Any public official or employee who violates any economic disclosure or reporting requirement of this chapter may be held liable to the Navajo Nation for civil damages in an amount not to exceed the value of any interest not properly reported.
 2. Any public official or employee who realizes an economic benefit as a result of violation of any prohibition or restriction set forth in subchapter 2 and 3 of this chapter shall be liable to the Navajo Nation for civil damages in an amount not exceeding three (3) times the amount or value of the benefit or benefits so obtained.
- B. If two (2) or more persons are responsible for any violation, each of them shall be liable to the Navajo Nation for the full amount of any civil damages prescribed herein, the full amount of which may be imposed upon and collected from each of them individually.
- C. Any civil penalties imposed hereunder shall be collected in any manner authorized for recovery of debts or obligations owed to the Navajo Nation and shall be paid into the General Fund of the Navajo Nation.
- D. No imposition of any or all civil damages provided herein shall be a bar to institution of any civil, criminal or misdemeanor action, liability, judgment, conviction or punishment otherwise applicable hereto, nor shall determination of any such civil damages be barred thereby.

HISTORY

CJY-23-92, July 20, 1992, added subsection (A) by CJY-23-92.

CAU-40-84, August 9, 1984.

Note. Formerly §3757(B).

§ 3782. Misdemeanor violations; punishments

The Navajo Nation, through the Office of the Prosecutor or Special Prosecutor shall be responsible for the enforcement of the following subsection.

- A. Any person who is convicted or found guilty of knowingly and willfully violating any provision of subchapter 2 of this chapter is guilty of a misdemeanor and for a first offense shall be fined not more than \$500.00 and may be sentenced to imprisonment for not more than 180 days, or both.
- B. Any person knowingly and willfully filing any complaint authorized under this chapter or by any other applicable law, without just cause and with malice or other improper purpose, including personal, political or other harassment or embarrassment, shall be guilty of a misdemeanor and for a first offense shall be fined not more than \$500.00 and may be sentenced to imprisonment for not more than 180 days, or both.
- C. Upon conviction of any subsequent offense prescribed in subsection (A) or (B) of this section, such person shall be fined not less than \$500.00 and shall be sentenced to imprisonment of not less than 30 days nor more than 180 days.
- D. A person convicted of a misdemeanor under this chapter shall not be a candidate for elective public office, nor be eligible for any appointive office of the Navajo Nation, nor any of its governmental entities or political governing bodies, for five (5) years following the date of conviction.
- E. A plea of *nolo contendere* shall be deemed a conviction for purposes of this chapter.
- F. No criminal or misdemeanor action, judgment, conviction or punishment hereunder shall operate to bar any action for civil damage or penalty or imposition of any administrative sanction provided hereunder, nor be barred thereby.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3757(C).

§ 3783. Severability

If any provision of this chapter or the application of such provision to any person, firm, association, corporation or circumstances shall be held invalid, the remainder of the Chapter and the application of such provision to persons, firms, associations, corporations or circumstances other than those as to which it is held invalid shall not be affected thereby.

HISTORY

CJY-23-92, July 20, 1992
 CAU-40-84, August 9, 1984.
 Note. Formerly §3759.

§ 3784. Effective date

The effective date of all provisions of this Navajo Nation Ethics in Government Law shall be October 8, 1984.

HISTORY

CJY-23-92, July 20, 1992
 CAU-40-84, August 9, 1984,
 Note. Formerly §3760.

§ 3785. Prior inconsistent law superseded

Upon the effective date of this Navajo Nation Ethics in Government Law, all prior inconsistent enactments, laws, rules, policies, ordinances and regulations of the Navajo Nation and all branches, divisions, departments, offices and political subdivisions thereof, are superseded hereby and/or amended to comply herewith.

HISTORY

CJY-23-92, July 20, 1992
 CAU-40-84, August 9, 1984.
 Note. Formerly §3761.

Subchapter 6. Ethics and Rules Office**§ 3786. Establishment**

There is hereby established the Ethics and Rules Office within the Navajo Nation government.

HISTORY

ACJA-35-89, January 26, 1989.
 ACJN-109-85, June 12, 1985.
 CAU-40-84, August 9, 1984.
 ACMA-35-84, March 14, 1984.
 CJA-1-83, January 25, 1983.
 Note. This section was redesignated as "3786" (formerly §3771).

§ 3787. Purpose

The purpose of the Ethics and Rules Office shall be to:

- A. Provide administrative assistance to the Ethics and Rules Committee of the Navajo Nation Council in ensuring adherence to legislative

- mandates under the Navajo Nation Ethics in Government Law, Ethics and Rules Committee Plan of Operation, and other applicable laws of the Navajo Nation;
- B. To represent the interests of the Navajo Nation in maintaining the highest standards of ethical conduct by the elected and appointed public officials, officers and representatives of the Navajo Nation, in the performance of their public and official duties and functions, (includes candidates and public employees);
 - C. To maintain and make available for official information, complete and current written records of all laws, resolutions, rules, regulations and other official enactments, rulings, decisions or opinions relating to requirements, prohibitions or standards of ethical conduct or disclosure by elected and appointed public officials, officers, employees and representatives of the government of the Navajo Nation; together with current and complete records of such written disclosures as may be required by the laws of the Navajo Nation; and
 - D. To protect the interest of the Navajo People in fair, honest and efficient conduct of the government of the Navajo Nation, in accordance with the laws of the Navajo Nation and the will of the Navajo People, through review, recommendation and sponsorship of projects, legislative, rules and standards in furtherance of these ends.

HISTORY

ACJN-109-85, June 12, 1985.

Note. Formerly §3772.

§ 3788. Personnel and organization

- A. There is established the position of Director of the Ethics and Rules Office and administrative/secretarial staff as may be budgeted by the Navajo Nation Council.
- B. The Ethics and Rules Committee and the Executive Director of the Office of Legislative Affairs shall have the authority to employ the Director of the Ethics and Rules Office.
- C. The Director shall have the authority to hire the administrative/secretarial staff, pursuant to Navajo Nation Personnel Policies and Procedures.
- D. All Ethics and Rules Office personnel shall be subject to the Navajo Nation personnel compensation, benefits, and policies and procedures.

- E. The Director of the Ethics and Rules Office shall be administratively responsible to the Executive Director, Office of Legislative Services, in carrying out policies authorized and directed by the Ethics and Rules Committee of the Navajo Nation Council, as provided under section 3787 of this subchapter.

HISTORY

ACJN-109-85, June 12, 1985.

Note. Reference to organizational chart omitted for purposes of statutory form; this section was formerly §3773.

§ 3789. Duties, responsibilities and authority

- A. The Director shall have the authority necessary and proper to carry out the purpose set forth in §3787 of this chapter.
- B. Under general direction, the Director of the Ethics and Rules Office shall have the duties, responsibility, and authority to assist the Ethics and Rules Committee of the Navajo Nation Council to:
1. Provide recommendations to the Ethics and Rules Committee concerning rules and regulations necessary to implement provisions of the Navajo Nation Ethics in Government Law and to publish same after proper approval;
 2. Prescribe and make available appropriate forms for economic disclosure statements and distribute such forms to all persons required to complete and file with the Ethics and Rules Committee of the Navajo Nation Council;
 3. Establish policies and procedures for completing and filing economic disclosure statements and provide training as deemed necessary;
 4. Maintain current list of all persons required to file economic disclosure statements;
 5. Provide for the preservation of economic disclosure statements filed with the Ethics and Rules Committee and ensure their confidentiality in accordance with the Navajo Nation Ethics in Government Law and all applicable rules and regulations;
 6. Audit, review and evaluate all economic disclosure statements and make available for public access those deemed public records during regular office hours;

7. Provide and maintain written advisory opinions on the requirements of the Navajo Nation Ethics in Government Law, upon request from persons whose conduct is subject thereto and who have specific need to use such opinions;
8. Receive, examine and investigate complaints and conduct such hearings, in accordance with rules and regulations lawfully adopted and authorized to determine facts of allegations or noncompliance with provisions of the Navajo Nation Ethics in Government Law;
9. Implement, facilitate and require compliance with all provisions of the Navajo Nation Ethics in Government Law in accordance with stated purposes and intent, together with lawfully adopted rules and regulations, and the provisions of the Ethics and Rules Committee, Plan of Operation; and
10. Assist in instituting and conducting hearings on any matter which cannot be resolved by voluntary compliance and/or remedial action.

HISTORY

ACJN-109-85, June 12, 1985.

Note. Slightly reworded for purposes of statutory clarity; this section was formerly §3774.

§ 3790. Political practices prohibited

The staff shall not, for the purpose of personal gain, use any information or conduct any proceedings for the intent of causing harm or injury to the political standing or reputation of any member of the Navajo Nation Council, the President and Vice-President of the Navajo Nation, or any other employee, or officer of the Navajo Nation.

HISTORY

ACJN-109-85, June 12, 1985.

Note. Formerly §3775.

§ 3791. Office location and hours

- A. The administrative office of the Ethics and Rules Office shall be located in Window Rock, Arizona. Mailing address is as follows: P.O. Box 5490, Window Rock, Arizona 86515
- B. The office shall be open Monday through Friday, between 8:00 a.m. and 5:00 p.m., in the absence of any directive to the contrary from the Director, Ethics and Rules Office.

HISTORY

ACJN-109-85, June 12, 1985.

Note. Formerly §3776.

§ 3792. Construction

Nothing contained in this Plan of Operation shall be construed to limit the authority of the Ethics and Rules Committee of the Navajo Nation Council and/or their representatives in ensuring adherence to and carrying out the legislative intent of the Navajo Nation Ethics in Government law and the Ethics and Rules Committee's Plan of Operation, and all applicable laws of the Navajo Nation.

HISTORY

ACJN-109-85, June 12, 1985.

Note. Formerly §3777.

§ 3793. Amendments

This Plan of Operation may be amended by the Ethics and Rules Committee of the Navajo Nation Council subject to the approval of Intergovernmental Relations Committee of the Navajo Nation Council.

HISTORY

ACJN-109-85, June 12, 1985.

Note. Formerly §3778. Also, reference to "Advisory Committee" deleted and substituted therein is the "Intergovernmental Relations Committee" pursuant to 2 NNC §824(B)(1). CD-68-89, December 15, 1989.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(L).

§ 3756. Restrictions against gifts or loans to influence official acts

Except as otherwise provided herein or by applicable rule or regulation adopted hereunder by the Ethics and Rules Committee of the Navajo Nation Council, or by other applicable law, no public official or employee shall solicit or accept for himself/herself or another, any gift, including economic opportunity, favor, service, or loan (other than from a regular lending institution on generally available terms) or any other benefit of an aggregate monetary value of one hundred dollars (\$100.00) or more in any calendar year, from any person, organization or group which:

A. Has, or is seeking to obtain, contractual or other business or financial relationship or approval from any governmental office or entity with which the public official or employee is associated or employed; or

B. Conducts operations or activities which are regulated or in any manner supervised by any governmental office or entity with which the public official or employee is associated or employed; or

C. has any interest which, within two (2) years, has been directly involved with, or affected by, the performance or non-performance of any official act or duty of such public official or employee or of the government office or entity with which the public official or employee is associated or employed or which the public official or employee knows or has reason to believe is likely to be so involved or affected.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(M).

§ 3757. Permitted gifts, awards, loans, reimbursements and campaign contributions

Section 3756 shall not be construed to prohibit:

A. An occasional nonpecuniary gift, insignificant in value;

B. Gifts from and obviously motivated by family or social relationships, as among immediate family members or family inheritances;

C. Food and refreshments customarily made available in the ordinary course of meetings where a public official or employee may properly be in attendance;

or for which such official or employee is not otherwise properly authorized or entitled to receive.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(I).

§ 3753. Unauthorized personal use of property or funds of the Navajo Nation

No public official or employee shall use any property of the Navajo Nation or any other public property of any kind for other than as authorized and approved for official purposes and activities. Such persons shall properly protect and conserve all such property, equipment and supplies which are so entrusted, assigned or issued to them.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(J).

§ 3754. Staff misuse prohibited

No public official or employee shall employ, with funds of the Navajo Nation, any unauthorized person(s) nor persons who do not perform duties commensurate with such compensation, and shall utilize authorized employees and staff only for the official purposes for which they are employed or otherwise retained.

HISTORY

CJY-23-92, July 20, 1992.

CAU-40-84, August 9, 1984.

Note. Formerly §3753(K).

§ 3755. Anti-nepotism

No public official or employee shall employ, appoint, or otherwise cause to be employed, nor nominate, nor otherwise influence the appointment or employment to any public office or position with the Navajo Nation or any governmental or political subdivision thereof, any person or persons related by consanguinity or affinity within the third degree, nor any member of the same household as said public official or public employee. Assignment of such persons to duties, positions, governmental offices or other entities shall in all instances be made in strict compliance with the current provisions of the Personnel Policies and Procedures of the Navajo Nation, as amended from time to time.

RESOLUTION OF
THE ETHICS AND RULES COMMITTEE
OF THE NAVAJO NATION COUNCIL

ERC-98-011

Adopting a Supplemental Code of Conduct for Navajo Nation Council Delegates. Pursuant to the Navajo Nation Ethics in Government Law, 2 NNC §3758. Entitled, "Regulations and Standards of Conduct for Delegates to the Navajo Nation Council".

WHEREAS:

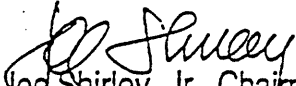
1. The Ethics and Rules Committee is established as a standing committee of the Navajo Nation Council to insure that public officials and affected employees of the Navajo Nation are held to the highest standards of ethical conduct, pursuant to 2 NNC §§ 831 and 832(A); and
2. The Speaker of the Navajo Nation Council is authorized to submit for approval and adoption by the Ethics and Rules Committee, supplemental rules, regulations and standards of conduct for Navajo Nation Council Delegates, which are necessary and appropriate to the special conditions relating to the particular functions, purposes and duties of Navajo Nation Council Delegates and not in conflict with the purposes and other provisions of the Navajo Nation Ethics in Government Law (2 NNC § 3741, et seq.), pursuant to 2 NNC §3758(A); and
3. With the assistance of the Office of Legislative Counsel, the Speaker has prepared a supplemental code of conduct for Navajo Nation Council Delegates which is entitled, "Regulations and Standards of Conduct for Delegates to the Navajo Nation Council", attached hereto as Exhibit "A"; and
4. Adoption of the "Regulations and Standards of Conduct for Delegates to the Navajo Nation Council", attached hereto as Exhibit "A", is in the best interest of the Navajo Nation.

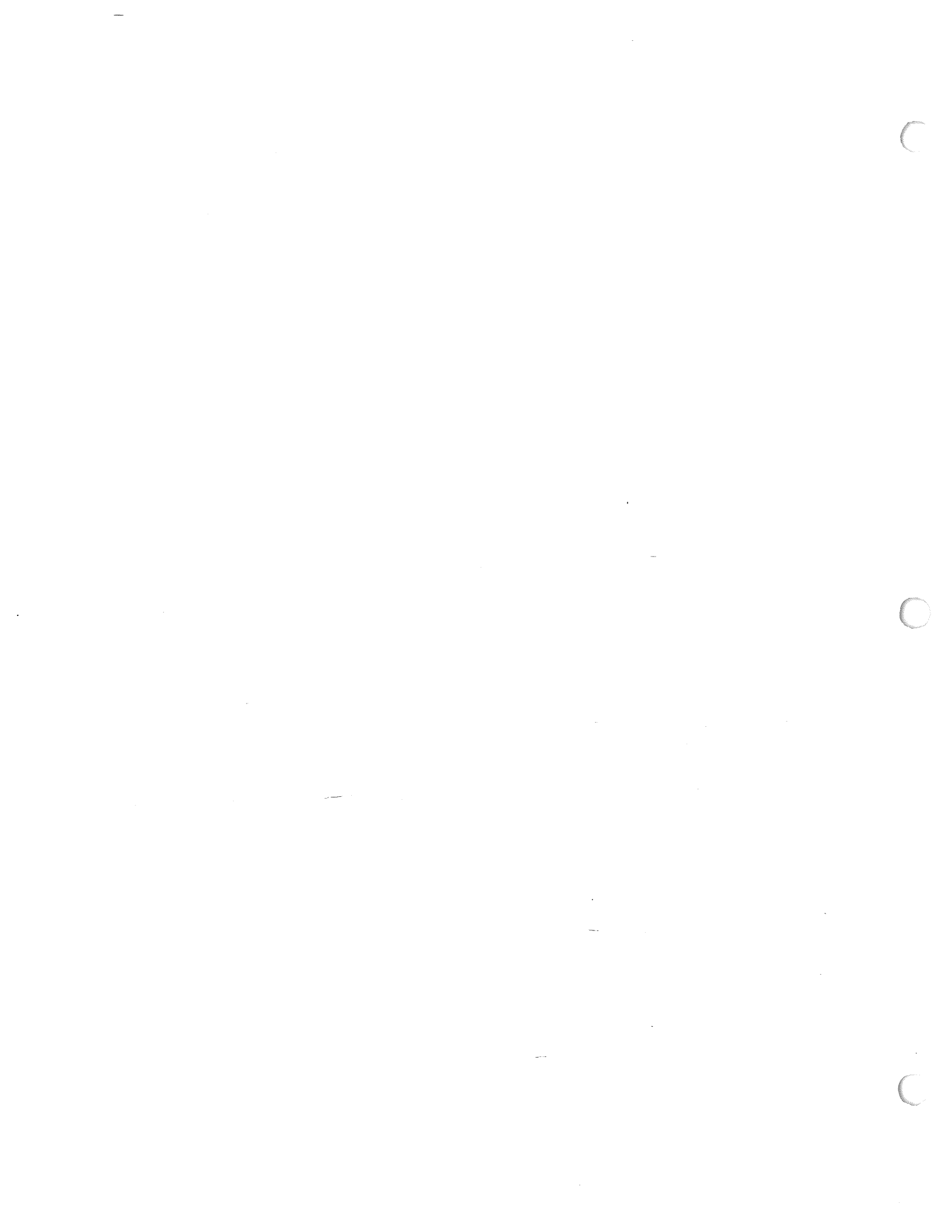
NOW THEREFORE BE IT RESOLVED THAT:

The Ethics and Rules Committee of the Navajo Nation Council hereby adopts the "Regulations and Standards of Conduct for Delegates to the Navajo Nation Council", attached hereto as Exhibit "A", to become effective immediately.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Ethics and Rules Committee of the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 06 in favor, 00 opposed and 00 abstained, this 13th day of March, 1998.


Joe Shirley, Jr., Chairman
ETHICS AND RULES COMMITTEE
NAVAJO NATION COUNCIL



REGULATIONS AND STANDARDS
OF CONDUCT FOR DELEGATES
TO THE NAVAJO NATION COUNCIL

Section One. Purpose

A. These regulations and standards of conduct for delegates to the Navajo Nation Council are submitted for authorization by the Speaker pursuant to 2 N.N. C. §3758 which permits the adoption of such supplemental codes of conduct to address issues not covered by the Ethics In Government Law, 2 N.N.C. §3741, *et seq.* The primary purpose of the Law is to address and prevent financial malfeasance by officials and employees of the Navajo Nation. As a consequence, the Law does not address many aspects of conduct by Council delegates which should be covered by a standard code of conduct. These regulations adopt such a code and make violations subject to sanction under the law. Sanctions will be the same as those for all other violations of the Law. 2 N.N. C. §§3758, 3780 - 3782.

B. Council delegates are representatives of the Navajo Nation and are therefore expected to conduct themselves in a manner which reflects creditably upon the Navajo, the Navajo people, and the Council as an institution of Navajo government. This supplemental Code is designed to ensure that Council delegates meet the high standards which are supported by these expectations.

Section Two. Use of Drugs or Intoxicating Beverages.

The provisions of the Navajo Nation Policy On Drugs And Alcohol In The Workplace shall apply to Council Delegates. No delegate shall use, or be under the influence of, alcohol or any controlled substance during the performance of any of his or her duties as a member of the Navajo Nation Council. These provisions shall apply to all sessions of the Council, meetings and hearings of standing committees of the Council, meetings and hearings of any commission, board or other entity of the Navajo Nation, Chapter meetings, meetings of any other body of which the delegate is a member by virtue of his or her status as a member of the Council, and all official travel taken as a member of the Council or one of the aforementioned entities. With respect to such official travel, these provisions shall apply to the entire duration of that travel.

Section Three. Courtesy Toward Navajo Nation Employees.

A. Delegates shall act in a courteous and respectful manner toward all Navajo Nation employees, officials, and members of the public. No delegate shall use his or her elected position to influence such persons to take any action on behalf of the delegate which is solely for the benefit of the delegate or which is contrary to Navajo Nation laws.



B. Council delegates shall not request or demand the assistance of any Navajo Nation employee or official to engage in or otherwise participate in any activity which would be an abuse of official position, a violation of trust, or otherwise in excess of authority.

Section Four. Conflict of Interest.

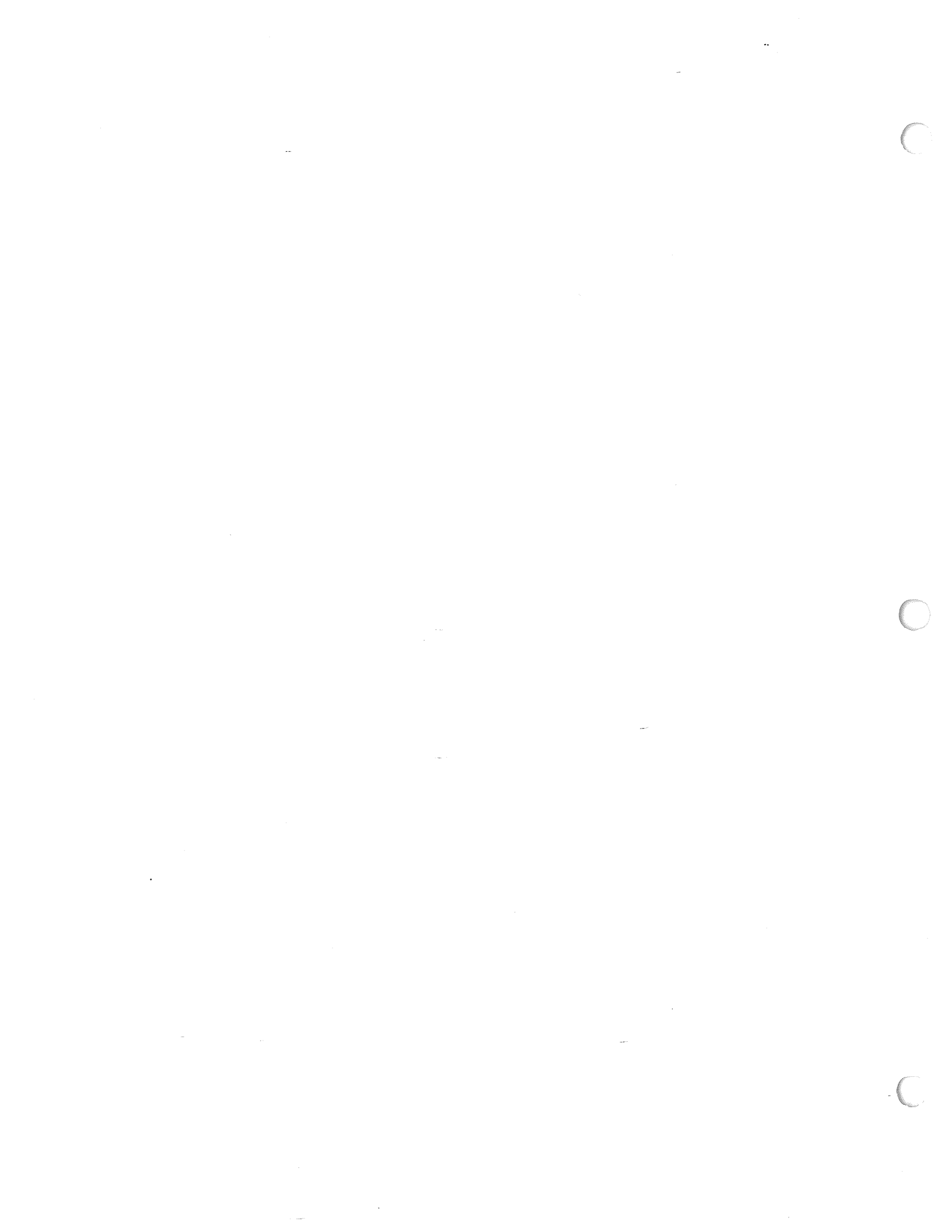
A. Council delegates shall not use their official position to improperly secure privileges for themselves or others, including but not limited to relatives and constituents, which such persons are not otherwise entitled by law to receive.

B. Conflict of Interest Defined

Conflicts of Interest arise from personal relationships, economic interests and various duties imposed upon the delegates. The following are illustrative examples, designed to provide each delegate with guidance. This is not an exhaustive list but some examples:

1. Personal Relationships give rise to a conflict of interest when family relationships are involved, such as when a person seeking to secure a contract is related (husband-wife, son-daughter, etc.), to the one awarding the contract (decision-maker). The conflict of interest can and should be avoided by the decision-maker by excluding oneself from this decision, including both debate and voting in the case of a delegate.
2. Economic Interests present conflicts when the decision maker has an economic interest, because of personal or business interests in the outcome of the decision. In the contract scenario above, if the awarding official (delegates approving) a contract can gain from the award, a conflict of interest exists. An example is where a delegate has an interest (ownership, stockholder, etc.) in a business seeking a contract, any such delegate should recuse himself from debate or voting on that contract.
3. Multiple Duties, arise to create conflicts when delegates hold other governmental or non-governmental positions that impose duties upon the delegate in the other roles. Members of Boards of Directors have duties to the entity whose board these individuals serve on. A Board Member who is also a delegate should refrain from actions involving that entity before the Delegate's Committee. For example, if a delegate on a Committee is also a Board Member on XYZ non-profit board, that delegate should refrain from voting upon or debating matters brought to the Committee by XYZ. This will avoid any sanction.

¹ In stockholder situations, the threshold may be slightly different, since one-share in a company that has three millions issued shares of stock may not be significant, the stockholder interest must be such that a delegate has a significant, material or controlling interest. It would not be a problem if an individual has a mutual funds, that invests in stock of a company when the delegate has no control over the mutual fund investments.



C. Council delegates shall not participate in debate or vote on any matter before the Council, standing committees, any entity of Navajo Nation government, or any entity of which the delegate is a member by virtue of their status as a delegate, in which the delegate has a personal, family or business interest.

D. Council delegates shall not sponsor nor seek to sue their position as a delegate to seek special consideration for any resolution in which they have a personal, family or business interest. Delegates shall not seek to influence their fellow delegates, either directly or through an agent, to take any particular action on a resolution in which they have a personal, family or business interest. Likewise, delegates shall not seek to influence their fellow delegates to take unfavorable action on any resolution which is adverse to the delegate's personal, family or business interests.

E. Council delegates shall not use their official position to intimidate or harass any person. If authorized by law to participate as a member of a hearing body and impose sanctions or penalties, Council delegates shall not sanction or penalize any person without due process of law.

Section Five.

No delegate shall disclose or use information designated by applicable law as confidential in any manner prohibited by law.

Section Six.

A. Council delegates shall not exercise any undue or improper influence upon any entity of Navajo Nation government. The exercise of oversight, directive, policy-making and all other legal authority of council delegates as set forth in Navajo Nation law shall not be deemed or determined to be an exercise of undue or improper influence.

B. Council delegates shall not engage in any activity which would be an abuse of official position or a violation of trust.

Section Seven.

A Council delegate shall not claim nor receive any form of compensation for meetings or other Council or Committee business which he or she did not attend for the minimum amount of time required by law. Delegates may claim and receive any partial compensation allowed by law.



Section Eight. Sexual Harassment

A. Navajo Nation Personnel Policies protect Navajo Nation employees - male or female - against unsolicited and unwelcome sexual overtures or conduct, either verbal or physical. Council delegates shall not engage in any conduct which would be, or could reasonably be perceived to be, a violation of the policy against sexual harassment. The policy against sexual harassment prohibits:

1. Repeated sexual flirtations, gestures, advances or demands for sexual favors.
2. Continued or repeated verbal abuse of a sexual nature, sexually-related comments and joking, degrading comments about an employee's appearance, or the display of sexually suggestive objects or pictures.
3. Any uninvited physical contact or touching such as patting, pinching, or constant brushing against another's body.
4. Any demand for sexual favors that is accompanied by either a promise of favorable job treatment or a threat concerning the individual's employment.

B. In addition to filing a complaint in accordance with the Navajo Nation Ethics in Government Law, 2 N.N.C §§3741, et seq., an employee who feels that he or she is a victim of sexual harassment by a Council delegate should immediately report the matter in writing to his or her immediate supervisor and the Speaker of the Navajo Nation Council and send a copy to the Ethics and Rules Office.



BOARD MEMBER CODE OF ETHICS

Directions: Review the following statement, then sign this code of ethics to solidify your commitment to board service in the best interests of this school.

As a member of the School Board, I will:

- Represent the interests of all people served by this school and not favor special interest inside or outside school.
- Not use my membership on this board for my own personal advantage or for the advantage of my friends, relatives or supporters.
- Keep confidential information confidential.
- Support decisions of the board.
- Do nothing to violate the trust of those who elected me to the board, or of those we serve.
- Focus my efforts on the mission of this school and not on my personal goals.
- Work with and through the designated administrators of this school to ensure that the school is well run.
- Not use nor condone the misuse of alcohol or illegal substances while involved with school business or activities.
- Refrain from participating in any manner which comes before the board which involves an interest to myself or any relative including but not limited to: Parents, spouse, children, mother or father-in-laws, siblings, aunt, uncle, grandparents, first cousin, step-children, step-parents, half brothers and sisters, or other individuals where a significant emotional or financial bond exists.
- Consider myself a "trustee" of this school and do my best to ensure that it is well maintained, financially secure, growing and always operating in the best interests of those we serve.

I have read, understand and agree to abide by this Code of Ethics.

Board Member's signature

Date

MUNILN

TITLE ELEVEN
Elections
PART 1. NAVAJO NATION ELECTIONS

Subchapter 1. General Provisions

- 11 Section 1 Application of election code
- 11 Section 2 Definitions
- 11 Section 3 Elections; election dates
- 11 Section 4 Voting; number of votes
- 11 Section 5 Ballots; official; sample
- 11 Section 6 Terms of office; oath (new Section 261)
- 11 Section 7 Number of terms (new Section 262)
- 11 Section 8 Qualifications for offices (new Section 263)
- 11 Section 9 Apportionment (old Section 16)
- 11 Section 10 Election precincts; polling places; delegates
- 11 Section 11 Composition; Apportionment for School Board Elections
- 11 Section 12 Rules and Regulations (new)
- 11 Section 13-20 - Reserved

Subchapter 2. Filing for Elections

- 11 Section 21 Declaration of candidacy
- 11 Section 22 Nomination petition; time of filing; form; consent
- 11 Section 23 Nomination petition; sufficiency; number of signatures
- 11 Section 24 Nomination petition; challenges; appeals
- 11 Section 25 Candidate withdrawal
- 11 Section 26 Filing fees
- 11 Section 27 Ballot picture

- 11 Section 28 Special elections; filing
- 11 Section 29-40 - Reserved

Subchapter 3. Primary Elections

- 11 Section 41 Primary Elections for general and chapter election; selection of candidates
- 11 Section 42 Special election primary
- 11 Section 43 Selection of candidates for Office of Vice President
- 11 Section 44-60 - Reserved

Subchapter 4. Section 61-80 - Reserved

Subchapter 5. Section 81-100 - Conduct of Elections

- 11 Section 81 Polling place supervision; appeal by person not allowed to vote
- 11 Section 82 Voting hours
- 11 Section 83 Counting of votes
- 11 Section 84 Canvass of votes; recount (old Section 21)
- 11 Section 85 Certification of election; vote required for election
- 11 Section 86 Appeal of all disputed elections (new)
- 11 Section 87 Tie votes (new)
- 11 Section 88-100 - Reserved

Subchapter 6. Section 101-120 - Reserved

Subchapter 7. (Section 121-140) - Absentee Voting

- 11 Section 121 Request for absentee ballot (old Section 91)
- 11 Section 122 Application; form; time of filing (old Section 92)
- 11 Section 123 Delivery or mailing of ballot (old Section 93)
- 11 Section 124 Marking ballot; envelope (old Section 94)
- 11 Section 125 Duty of NEA on receipt of envelope (old Section 95)
- 11 Section 126 Absentee voter may not vote in his own precinct (old Section 96)
- 11 Section 127 Counting absentee ballots (old Section 97)
- 11 Section 128 Assistance (new)
- 11 Section 129-140 - Reserved .

Subchapter 8. Section 141-160 - Reserved

Subchapter 9. Special Elections (Section 161-180)

- 11 Section 161 Vacancies resulting from death or resignation; officials pro tem (old Section 131)
- 11 Section 162 Conduct of special elections (new)
- 11 Section 163 Compensation of Election Supervisor (old Section 132)
- 11 Section 164 Votes; canvass; recount (old Section 136)
- 11 Section 165 Certification of results (old Section 137)
- 11 Section 166 Certification; Oath of Office (old Section 138)
- 11 Section 167-180 - Reserved

Subchapter 10. Reserved (Section 181-200)

Subchapter 11. Campaign Expenses; Contributions (Section 201-220)

- 11 Section 201 Report of designated financial agent; filing penalty (old Section 171)
- 11 Section 202 Statement of receipts and expenses; time of filing; preparation and distribution of forms (old Section 172)
- 11 Section 203 Failure to file statement of receipts and expenses; penalty (old Section 173)
- 11 Section 204 Report by persons not authorized to expend money for expenses of candidate's campaign; time of filing; form; penalty for failure or refusal to file (old Section 174)
- 11 Section 205 Limitation on expenditure by or on behalf of candidates; radio or television time (old Section 175)
- 11 Section 206 Penalty for exceeding campaign expenditure limit (old Section 176)
- 11 Section 207 Fraudulent report; penalty (old Section 177)
- 11 Section 208 Filing vacancy in office due to disqualification (old Section 178)
- 11 Section 209 Contributions by corporations and nonmembers of Navajo Tribe; penalty (old Section 179)
- 11 Section 210-220 - Reserved

Subchapter 12. Reserved (Section 221-239)

Subchapter 13. Removal of Officials; Placement of Officials on Administrative Leave; Recall; Filling Vacancy (Section 241-260)

- 11 Section 240 Removal and Placement of Officials on Administrative Leave
- 11 Section 241 Officials subject to recall; recall

- affidavit; recall petition (old Section 212)
- 11 Section 242 Filing of petition; sufficiency
 - 11 Section 243 Petition grievances; hearings
 - 11 Section 244 Special election for recall; resignation; ballot
 - 11 Section 245 Officials pro tem
 - 11 Section 246 Limitations on recall petition
 - 11 Section 247 Ineligibility of removed official
 - 11 Section 248-260 - Reserved

Subchapter 14. - Reserved (Section 261-280)

Subchapter 15. (Section 281-300) - Voter Registration

- 11 Section 281 Eligibility of voters; residency; change in voter registration (old Section 6)
- 11 Section 282 Registration; registration card; appeal (old Section 7)
- 11 Section 283 Cancellation of registration (old Section 8)
- 11 Section 284-300 - Reserved

Subchapter 16. - Reserved (Section 301-340)

Subchapter 17. Election Officials (Section 321-340)

- 11 Section 321 Board of Election Supervisors - Duty; authority (old Section 51)
- 11 Section 322 Authority to make rules and regulations (old Section 52)
- 11 Section 323 Composition; selection (old Section 53)
- 11 Section 324 Qualifications (old Section 54)
- 11 Section 325 Term of Office (old Section 55)

- 11 Section 326 Vacancies (old Section 56)
- 11 Section 327 Removal (old Section 57)
- 11 Section 328 Registrars; poll clerks; poll judges (old Section 58)
- 11 Section 329-340 - Reserved

Subchapter 18. - Reserved (Section 341-360)

Subchapter 19. Penal Provisions (Section 361-380)

- 11 Section 361 Bribery of electors (old Section 241)
- 11 Section 362 Coercion of elector (old Section 242)
- 11 Section 363 Intimidation of Navajo employees by employer (old Section 243)
- 11 Section 364 Interference with or corruption of election officer (old Section 244)
- 11 Section 365 Violation of duty by election officers (old Section 245)
- 11 Section 366 Illegal registration or voting (old Section 246)
- 11 Section 367 Penalties (old Section 247)
- 11 Section 368 Severability
- 11 Section 369 Effective date
- 11 Section 370-380 - Reserved

PART 2. REFERENDUM

Subchapter 1.

- 11 Section 1 - 8

TITLE TWO

- Subchapter 1. Generally
- Section 4001 Certification of Chapters
- Section 4002 Authority to make local chapter ordinances
- Section 4003 Repealed. Tribal Council Res. CMY-23-79, Section 2, passed May 3, 1979
- Section 4004 Officers - Designation and term

TITLE ELEVEN

Elections

PART 1. NAVAJO NATION ELECTIONS

Chapter 1. The Navajo Election Code of 1990 *

Subchapter 1. General Provisions

Section 1. Application of Election Code

Title 11. "The Navajo Election Code" shall apply to all elections designated by the Navajo Nation Council, or the Navajo Board of Election Supervisors, pursuant to its authority set out herein.

HISTORY

Source. Tribal Council Resolution CMY-60-66, Art. 1. Section 1A, passed May 16, 1966. Tribal Council Resolution CMA-32-74, Exhibit A, Subsection 1, passed March 20, 1974. Tribal Council Res. CAP-41-82, Exhibit A, Section 1, passed April 28, 1982. Tribal Council Res. CJA-4-86, Exhibit "A", Section 1, A, B, passed January 30, 1986.

Amendment - 1986. Section A amended generally. Section B inserted "electing" for the word "choosing". Changed title of Chapter 1. to "The Navajo Election Law of 1986."

Amendment - 1982. CAP-41-82, substituted "first" for "second" preceding "Tuesday", substituted "in 1982" for "of 1974" following "November," and inserted "or such other day designated for federal elections in" preceding "every fourth year."

Amendment - 1974. CMA-32-74, changed election time.

Preamble. CMY-60-66 contained the following preamble: "Whereas: (1) The Navajo Tribal Council, by Resolution CJA-2-66, created a permanent Board of Election Supervisors and directed that said Board make a complete review of all existing election laws and submit a draft of proposed revised election laws to this session of the Council; and

"(2) The Board of Election Supervisors was duly appointed and has submitted to the council a draft of the proposed revised election laws for general elections; and

"(3) The Navajo Tribal Council has fully discussed and debated all of the provisions of the proposed revised laws and finds that adoption of the laws is in the best interest of the Navajo People."

Adoption by Tribal Council. CMY-6-66, Section 1, adopted "The Navajo Election Law of 1966" as the laws and procedures which will govern future general elections of the Navajo Tribe.

Short title. CMY-66-60, Art. IX, Section 1, provided that this resolution, or ordinance, may be referred to as "The Navajo Tribal Election Law of 1966."

Effective Date. CMY-60-66, Art. IX, Section 2, provided that this ordinance shall be in full force and effect as soon as it is approved by the Secretary of the Interior or his authorized representative.

Secretary of the Interior, by letter dated June 28, 1966, gave a conditional approval of CMY-60-66, and the Navajo Election Law of 1966 adopted thereby, the conditions being the enactment by the Tribal Council of certain provisions set out in Tribal Council Resolution CJY-85-66, Section 1-3, passed July 14, 1966. See also, 4th par of preamble to CJY-85-66 which formerly provided for interpretation by the Navajo Tribal Council or its designates, subject to the right of appeal to the Secretary of the Interior.

Pamphlet of election on procedures and regulations. CMY-60-66, Section 4, directed the Board of Election Supervisors to prepare a pamphlet for distribution among the Navajo people, and for use by the poll judges and clerks and other election officials, setting forth the provisions of the Navajo Election Procedures and regulations as adopted herein.

Rescission of prior election procedures. CMY-60-66, Section 2B, rescinded "Revised Election Procedures for Election of the Council Officers and Delegates pamphlet adopted in 1962 and any other election pamphlets or procedures publications which may previously have been authorized or adopted by the Advisory Committee or by the Navajo Tribal Council."

Prior 1966 resolutions. Tribal Council Resolution CJA-2-66, passed Jan. 13, 1966, rescinded Sections 1 and 151 and adopted new provisions in their place. Also authorized and directed Board of Election Supervisors to make a complete review of all existing election laws and submit draft of a proposed new election law.

Tribal Council Resolution CJ-19-66, passed February 25, 1966, appointed persons to constitute Board of Election Supervisors and to serve the original terms as provided in CJA-2-66. Also amended 1966 Fiscal Year Budget to provide for personnel and other operating expenses necessary for operation of Board of Election Supervisors for balance of Fiscal Year 1966.

Election Law Revision Committee. Tribal Council Resolution

CAP-55-68, passed April 25, 1968, established a special committee called the Special Election Law Revision Committee, composed of ten members, to review and revise the Navajo Election Law of 1966.

*The use of the masculine "his" in place of "his or hers" has been used throughout this Code to denote both the masculine and feminine gender.

Section 2. Definitions

- A. Board - The Navajo Board of Election Supervisors, a general description of which appears in Subchapter 17. hereof.
- B. Canvass - Examining and counting of results at an election.
- C. Challenge - A challenge to the procedure of an election or signature of a person who purports to be a registered voter and who has signed a nominating petition.
- D. Chapter elections - Elections held for the purpose of electing Chapter Officers, Other Elected Officials, school board members, and/or for voting on a referendum.
- E. Chapter Officers - The President, Vice President, and Secretary/Treasurer of a certified Chapter.
- F. Code - The Election Code of 1990.
- G. Continually present - Being actually physically present within the Navajo Nation or living on Navajo Country in a fixed and permanent home without any significant interruption. An extended absence from Navajo Country in the course of employment or pursuit of a trade or business or for purposes as attending school and serving in the military service, is not significant interruption.
- H. Council - The Navajo Nation Council
- I. Date of Filing - See "Filing Date."
- J. Delegate - The office of or person holding the office of Delegate to or member of the Navajo Nation Council.
- K. District Grazing Committee Member - A member of a district grazing committee as defined in resolution CAU-66-85, as amended by CJN-31-86.
- L. Election Administration - The Navajo Election Administration which is the administrative office for the Board.

- M. Employer - Any natural person, association of natural persons, Navajo Nation enterprise, independent contractor, corporation, or other entity, employing one or more members of the Navajo Nation or engaging their services under contract, and any person acting as agent for such person, association of persons, Navajo Nation enterprise, corporation, or other entity.
- N. Farm Board Member - A member of the Farm Board as defined in Title 3, Section 61, et seq. of the Navajo Tribal Code.
- O. Felony - Any offense in any jurisdiction punishable by imprisonment for a term exceeding one year and by forfeiture of individual rights.
- P. Filing - The act of submitting one's name as a candidate for a primary, or special election.
- Q. Filing Date - The last day on which one may file as a candidate for a primary or special election.
- R. Financial Agent - A person authorized by a candidate to act for him to manage, solicit, accept, disburse, and obligate funds or its equivalent in connection with a political campaign.
- S. General Elections - Elections held for the purpose of electing the President of the Navajo Nation, Vice President of the Navajo Nation, and Delegates of the Navajo Nation Council, and/or for voting on a referendum.
- T. Land Board Member - A member of the board elected for the purpose of administering grazing and resolving problems attendant thereto, and representing one of the Land Management Districts in the Eastern Agency as set out at Title 3, Navajo Tribal Code, Section 231 et seq.
- U. Member - Delegate to the Navajo Nation Council.
- V. Navajo Nation Officials - The President of the Navajo Nation, Vice President of the Navajo Nation and Delegates of the Navajo Nation Council.
- W. Nomination Petition - A document designating one to run for an office as a candidate.
- X. Other Elected Officials - This is the collective term used to designate Land Board, Farm Board, and District Grazing Committee members in each precinct or Chapter.
- Y. Officials - As used in subchapter 13 hereof this term is used to designate those holding the offices of President of the Navajo Nation, Vice President of the Navajo Nation, Delegate

of the Navajo Nation Council, Chapter Officers, Other Elected Officials, and school board members.

Z. Permanent Residence - The place where a person physically lives with the intent to remain for an indefinite period of time. The permanent residence is a person's fixed and permanent home. Permanent means lasting, fixed, stable and not temporary, part-time, or transient. A person cannot have more than one permanent residence at the same time.

AA. Precincts - Those polling places designated by section 10 hereof.

BB. President - The chief executive officer of the Navajo Nation.

CC. Primary Candidates - A candidate who has filed a declaration of candidacy, a nominating petition and the necessary filing fee to place himself on the ballot of a primary election.

DD. Primary elections - Elections held for the purpose of deciding the candidates who will be placed on the ballots of general and chapter elections.

EE. School board members - Members of a local school board who are elected during chapter and/or special elections. Officers organized under the laws of the Navajo Nation charged with the administration of the affairs of the Bureau of Indian Affairs and other schools excluding private, parochial and state schools.

FF. Speaker of the Navajo Nation - The presiding chair of the Navajo Council.

GG. Special elections - Elections called by the Board in the event of vacancy in an elective office.

HH. Time - In computing any period of time prescribed or allowed by this Code, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday recognized by the Navajo Nation. Computations shall be in calendar days.

II. Vice President - The Vice President of the Navajo Nation or the Office of the Vice President of the Navajo Nation.

JJ. Voter - A voter who is registered on the Navajo Nation roll of registered voters.

KK. Window Rock - The community of Window Rock, Navajo Nation (Arizona).

Section 3. Elections; election dates

A. General elections shall be held on the first Tuesday of November 1990 and on the same day every fourth year thereafter.

B. Chapter elections shall be held on the first Tuesday in August 1992 and on the first Tuesday of August every fourth year thereafter.

C. Primary elections shall be held on the first Tuesday which precedes the date of the general election or chapter election by a minimum of ninety (90) days.

D. Special elections shall be held as required pursuant to the various provisions in this code.

Source. Tribal Council Res. CAP-24-87, Section 1a and Section B, Tribal Council Res. CJA-4-86 for Section A.

Section 4. Voting; number of votes.

A. Voting shall be by secret pictorial ballot. If a candidate fails to comply with the provisions of 11 NTC Section 27, Ballot pictures, his picture will be deleted from the ballot.

B. Each registered voter shall be entitled to cast one vote for each position that his precinct is entitled to elect in the primary, general, and chapter elections; provided, however, that no voter may cast more than one vote for any one candidate.

Source. Tribal Council Res. CJA-4-86, Exhibit "A", Section 11, passed January 30, 1986, is source for (A).

1986 Amendment. Tribal Council Res. CJA-4-86, Section 15, passed January 30, 1986. Amended generally.

Content Source. Section (B) formerly under 11 NTC Section 15. (1985 Supplement)

Section 5. Ballots; official; sample

A. Ballots shall be printed for all primary, general, and chapter elections after all candidates have been certified by the Election Administration to the Board. Ballots shall reflect the names and pictures of certified candidates running for office. Ballots shall be numbered consecutively and provided in blocks to each precinct. A space shall be provided below or on the side of each picture which each voter must fill in or "blacken" to indicate his choice.

B. An adequate supply of ballots plainly marked "SAMPLE

BALLOT" and printed on a paper of different color from that of the official ballot--shall be widely distributed and shall be posted in public places in each precinct in order to acquaint voters with the ballot and with voting procedures.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 14, passed May 16, 1966.

1978 Amendment. Tribal Council Res. CJN-49-78, Exhibit "A", Section C, passed June 5, 1978. Added subsections (c) and (d).

1986 Amendment. Tribal Council Res. CJA-4-86, Section 15, passed January 30, 1986. Amended generally.

Section 6. Terms of office; oath

A. The term of office for all offices filled by the general, special and/or chapter elections shall be four years.

B. At each general election all persons elected to the offices of President of the Navajo Nation, Vice President of the Navajo Nation and Delegate of the Navajo Nation Council shall be installed in office at noon on the second Tuesday after the first Monday of January following their election and their predecessors' term of office shall expire upon their installation in office.

C. Candidates elected to office in chapter elections shall be installed in office upon taking the oath of office, which shall be administered at the direction of the Board during the first week following the first Saturday in October, and their predecessors' term of office shall expire upon their installation. [Based on former 2 NTC 4004 (b) and (c)]

D. School Board Members shall serve staggered terms. Upon expiration of terms or upon resignation or removal, vacancy shall be declared by the Board and a special election shall be held to fill the vacancy. The staggered terms shall be fixed by the Board of Election Supervisors and the Education Committee in consultation with the School Boards.

E. All elected officials of the Navajo Nation, shall subscribe and swear to the Oath of Office in Appendix 1 to this Code. No individual shall serve as an elected official or be permitted to act as an elected official until after certification by the Election Board or an oath of office is taken or administered as prescribed by law.

Source. Tribal Council Res. CD-80-78, passed December 12, 1978. 1978 Amendment. Substituted "Second Tuesday after the first Monday" for "first Tuesday after the first Monday." Section B based on former 2 NTC 4004 (b)

Section 7. Number of terms

A. Except as otherwise provided by law, a person shall hold any one of the Navajo tribal elective offices and/or positions for two (2) consecutive terms only. Except as otherwise provided by law, a person formerly holding one of these offices may be elected to the same office after the passage of one full term. A person who has held any one of these offices and/or positions for two consecutive terms, shall not be precluded from seeking election to other offices.

B. Section 7A shall become effective in the 1990 general election and 1992 for chapter elections.

Source. Tribal Council Res. CMY-60-66, Art. I, Section IC, passed May 16, 1966.

Section 8. Qualifications for office

A. Qualifications for President and Vice President are:

1. Must have permanent residence and have been continually physically present within the Navajo Nation as defined in 7 NTC Section 254 for at least three (3) years prior to the time of election.
2. Must be a registered voter, a member of the Navajo Tribe, and be on the Agency Census roll of the Bureau of Indian Affairs;
3. Must be at least thirty (30) years of age at the time of general election;
4. Must fluently speak and understand Navajo and read and write English;
5. Must have served in an elected Navajo tribal office, other than the office of school board member, or must have been employed within the Navajo tribal organization;
6. Must not have been convicted of a felony with the last five (5) years;
7. Must not have been convicted of any misdemeanor involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and

property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five (5) years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws;

8. Must have unwavering loyalty to the Navajo Nation, and must be competent and capable of upholding the oath of office; and
9. Candidates elected, who are employed by the Navajo Nation, must resign from such employment before taking the oath of office and shall not be employed by the Navajo Nation during their term of office; and
10. Must have permanent residence and been continually physically present with the Navajo Nation as defined in 7 NTC Section 254 at least three years prior to the time of election; and
11. Must not if elected, be in the permanent employment of the United States or any State or subdivision thereof; nor be an elected official of the United States or any State or subdivision thereof.

B. Council. Qualifications for Delegate to the Navajo Nation

1. Must be at least twenty-five (25) years of age on or before the date of the general election;
2. Must be an enrolled member of the Navajo Nation on the Agency Census roll of the Bureau of Indian Affairs;
3. Must not have been convicted of a felony within the last five (5) years;
4. Must not have been convicted of any misdemeanor involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five (5) years. Must not have been found in

violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws;

5. Must maintain unswerving loyalty to the Navajo Nation and must be competent and capable of upholding the oath of office;
6. Must be a registered voter in the Chapter or precinct from which elected;
7. Candidates elected, who are employed by the Navajo Nation, must resign from such employment before taking the oath of office and shall not be employed by the Navajo Nation during their term of office;
8. Must be able to speak and understand Navajo and/or English; and
9. Must not, if elected, serve in any other elected Navajo Nation office with the exception of the office(s) of the school board(s).
10. Must have permanent residence and been continually physically present within the Navajo Nation as defined in 7 NTC Section 254 at least three years prior to the time of election; and
11. Must not be in the permanent employment of the United States or any State or subdivision thereof; or be an elected official or the United States or any State or subdivision thereof, with the exception of service on a school board or elective county office.

C. Qualifications for Chapter Officers

1. Must be registered voters of the Chapter they seek to represent and be on the census roll of the Bureau of Indian Affairs;
2. Must be 21 years of age at the time of the election;
3. Must not have been convicted of a felony within the last five (5) years;
4. Must not have been convicted of any misdemeanor in any Courts involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery,

perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five (5) years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws;

5. Must have permanent residence and been continually physically present within the Navajo Nation as defined in 7 NTC Section 254 at least three prior to the time of election;
6. Must have an understanding of the Navajo Nation governmental affairs;
7. Must not have been removed from a chapter office within the five years preceding the date of his filing for candidacy;
8. Must not, if elected, serve in any other Navajo tribal elective offices, with the exception of the office(s) of school board member(s);
9. Must be a high school graduate or must have a GED Certificate, if the candidate seeks the office of Secretary-Treasurer;
10. Must not allow employment with the Navajo Nation, federal or state governments, or any private organization to interfere with performance of Chapter officer duties; and
11. If a candidate is an employee of the Bureau of Indian Affairs or the Indian Health Service, prior to filing, the candidate shall obtain written clearance from the BIA or IHS stating that there is no conflict of interest for the candidate in the event the candidate is elected as Chapter officer. Clearance shall be provided to Election Administration Office.

D. Qualifications for Other Elected Officials

1. Qualifications for Land Board Candidates.

- (a) Must be a registered voter of the Chapter which the candidate seeks to represent and be on the census roll of the Navajo Nation;

- (b) Must be at least twenty-one (21) years of age at the time of filing;
- (c) Must not have been convicted of a felony within the last five (5) years;
- (d) Must not have been convicted of any misdemeanor in any Courts involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within five (5) years preceding the date of the elections. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws;
- (e) Must be knowledgeable in the maintenance and management of livestock operations;
- (f) Must be able to speak the Navajo language fluently, and to read and write the English language;
- (g) Must own transportation for use in carrying out the duties and responsibilities of a Land Board member;
- (h) Must have a valid driver's license;
- (i) Must have experience with and knowledge of the complex land status in the Eastern Navajo area as well as being familiar with the land use policies and procedures of the Navajo Nation and federal and state governments; and
- (j) Must not, if elected, serve in any other Navajo Tribal elective offices with the exception of the office(s) of the School Board(s). An elected official may run for Land Board if his elected office expires prior to his taking office as a Land Board member.

2. Qualifications for Farm Board Candidates

- (a) Must be an enrolled member of the Navajo Tribe of Indians;
- (b) Must be a registered voter of the Chapter to be represented;
- (c) Must be fluent in the Navajo and English languages;
- (d) Must be at least 21 years old at the time of filing;
- (e) Must have knowledge and experience of agricultural land use policies and rules and regulations;
- (f) Must not hold either the office of Delegate or any Chapter office, unless the term of the office held expires prior to taking office as a Farm Board member;
- (g) Must not, if elected, serve in any other Navajo Tribal elective offices with the exception of the office(s) of the School Board(s);
- (h) Must not have been convicted of a felony within the last five (5) years; and
- (i) Must not have been convicted of any misdemeanor in any Courts involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five (5) years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws.

3. **Qualifications for District Grazing Committee Candidates**

- (a) Must be a member of the Navajo Tribe and enrolled on the Navajo Census roll of the Bureau of Indian Affairs;

- (b) Must be a registered voter of the Chapter which candidate seeks to represent;
- (c) Must be at least twenty-one (21) years of age at the time of filing;
- (d) Should be able to read, write and speak the English language;
- (e) Must be able to converse fluently in the Navajo language;
- (f) Must have demonstrated interest or experience in livestock and range management;
- (g) Must have knowledge of grazing rules and regulations;
- (h) Must not, if elected, serve in any other Navajo Tribal elective offices with the exception of the office(s) of the School Board(s);
- (i) Must not have been convicted of a felony within the last five (5) years; and
- (j) Must not have been convicted of any misdemeanor in any Courts involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five (5) years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws.

Derived from Article IV of District Grazing Committee Plan of Operation, CAU-66-85, as amended by CJN-31-86.

4. Qualifications of Candidates for School Board

- (a) Must be an enrolled member of the Navajo Tribe and be on the Agency Census roll of the Bureau of Indian Affairs;

- (b) Must be a registered voter of the Chapter he will represent;
- (c) Must be twenty-one (21) years of age at the time of the election;
- (d) Must not be an employee of the School on whose board he would serve;
- (e) Must, if he is an employee of the BIA, obtain a clearance from the BIA before filing nomination petition stating that there is no conflict of interest for the school board candidate in the event the candidate is elected to the school board;
- (f) Must not have a conflict of interest arising from any tribal, state, or federal laws regarding his employment;
- (g) Must not have been convicted of a felony within the last five (5) years;
- (h) Must not have been convicted of any misdemeanor in any Courts involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five (5) years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws; and
- (i) Must have demonstrated interest, experience, and ability in Educational Management and must be able to communicate such to the Navajo communities.

Source. Navajo Tribal Res. CAU-87-69, Section 1, Title I-B, passed Aug. 8, 1969, 10 NTC Section 202.

Section 9. Apportionment

On or before the first Monday of May, 1975, and every 10 years thereafter, the Navajo Nation Council, with the

recommendation of the Navajo Board of Election Supervisors, shall designate the number and location of precincts. All such precincts shall be approximately equal in population.

Source. Tribal Council Res. CMA-32-74, Exhibit "A", Section 4, passed Mar. 20, 1974.

1985 Amendment. Tribal Council Res. CD-104-85, passed Dec. 6, 1985; adopted a reapportionment plan.

1986 Amendment. Tribal Council Res. CJA-4-86, Section 16, passed Jan. 30, 1986 Amendments.

1986 Amendments. Advisory Committee Res. ACAP-62-86, passed April 16, 1986, attempted to revise this section, but CJA-4-86 had earlier authorized the same revisions.

Section 10. Election Precincts; polling places; delegates.

A. The Election precincts, polling places and delegates for each election community are designated as follows:

DISTRICT #1

Coppermine/LaChae	1110 - 1 delegate
Red Lake	2064 - 1 delegate
Kaibato	1928 - 1 delegate

DISTRICT #2

Shonto	1687 - 1 delegate
Navajo Mountain/Inscription House	1787 - 1 delegate

DISTRICT #3

Bodaway/Cameron	2737 - 2 delegates
Tuba City/Coalmine Mesa	6541 - 3 delegates

DISTRICT #4

Hardrock	1796 - 1 delegate
Tachee/Forest Lake/Black Mesa	1087 - 1 delegate
Pinon/Whippoovill	4354 - 2 delegates

DISTRICT #5

Tolani Lake/Birdsprings/Laupp	3939 - 2 delegates
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DISTRICT #7

Low Mountain/Jeddite	3173 - 2 delegates
Teesto/Dilcon	5000 - 2 delegates

Indian Wells/White Cone	2068 - 1 delegate
<u>DISTRICT #8</u>	
Oljato	1463 - 1 delegate
Dennehotso	1425 - 1 delegate
Kayenta/Chilchinbeto	4273 - 2 delegates
<u>DISTRICT #9</u>	
Tsec Nos Pos	2682 - 1 delegate
Rock Point	1576 - 1 delegate
Red Mesa/Mexican Water/Sweetwater	1886 - 1 delegates
<u>DISTRICT #10</u>	
Many Farms	2446 - 1 delegate
Rough Rock	1170 - 1 delegate
Chinle	5375 - 3 delegates
Tselani/Nazlini	2638 - 1 delegate
<u>DISTRICT #11</u>	
Lukachukai/Round Rock/Tsaile- Wheatfields	4375 - 2 delegates
<u>DISTRICT #12</u>	
Aneth	3362 - 2 delegates
Beclahbeto/Cudeii	1542 - 1 delegate
Shiprock	9001 - 4 delegates
Hogback	1754 - 1 delegate
Red Valley/Cove	2103 - 1 delegate
Sanostee	2412 - 1 delegate
Two Grey Hills	1712 - 1 delegate
Newcomb/Sheepsprings	1763 - 1 delegate
<u>DISTRICT #13</u>	
Upper Fruitland/Burnham	1786 - 1 delegate
Nenahnezad/San Juan	2273 - 1 delegate
<u>DISTRICT #14</u>	
Naschitti	1354 - 1 delegate
Tohatchi/Coyote Canyon	3827 - 2 delegates
Twin Lakes/Mexican Springs	2042 - 1 delegate
<u>DISTRICT #15</u>	
Becenti/Crownpoint/Nahodishgish	2554 - 1 delegate
Torreón	1933 - 1 delegate

Pueblo Pintado/White Horse Lake	2132 - 1 delegate
Lake Valley/White Rock/Standing Rock	1508 - 1 delegate
Little Water/Casamero Lake	1224 - 1 delegate

DISTRICT #16

Thoreau	1300 - 1 delegate
Chichiltah	2376 - 1 delegate
Baca-Pravitt	1700 - 1 delegate
Mariano Lake/Smith Lake	1718 - 1 delegate
Church Rock/Breadsprings	3839 - 2 delegates
Red Rock/Rock Springs	1829 - 1 delegate
Manualito/Tsayatoh	1958 - 1 delegate
Pinedale/Iyanbito	2132 - 1 delegate

DISTRICT #17

Klagetch/Wide Ruins	3039 - 2 delegates
Kinlichee	2941 - 1 delegate
Ganado/Cornfields	1898 - 1 delegate
Greasewood	2093 - 1 delegate
Steamboat	1982 - 1 delegate

DISTRICT #18

Crystal	2067 - 1 delegate
Red Lake/Sawmill	1486 - 1 delegate
St. Michaels	3934 - 2 delegates
Fort Defiance	5481 - 2 delegates
Houck	1186 - 1 delegate
Oaksprings/Lupton	1822 - 1 delegate

DISTRICT #19

Huerfano	3059 - 1 delegate
Nageezi	1440 - 1 delegate
Ojo Encino/Counselor	1286 - 1 delegate

DISTRICT #21

Canoncito	1037 - 1 delegate
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DISTRICT #22

Alamo	1108 - 1 delegate
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DISTRICT #23

Ramah	1163 - 1 delegate
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B. Conflict between Navajo Nation and Federal and State Polling Place.

1. **General Elections** - Where a conflict exists between the Navajo Nation and Federal or State Polling Places, the Board shall designate an alternate polling place.
2. **Other Elections** - Polling places for other Navajo Nation elections shall be in the Chapter Houses pursuant to 11 NTC Section 10 (A) or as designated by the Board.

Source. Navajo Tribal Res. CMY-60-66, Appendix 1, passed May 16, 1966. There were no provisions for a District 6.

Amendments. Tribal Council Res. CJN-49-78, Exhibit A, Section A, passed June 5, 1978. Tribal Council Res. CAP-23-82, Section 1, passed April 20, 1982. Tribal Council Res. CJY-55-82, Section 1, passed July 7, 1982. Tribal Council Res. CO-71-82, Exhibit A, passed Oct. 26, 1982. Tribal Council Res. CJA-4-86, passed Jan. 30, 1986. Advisory Committee Res. ACAP-62-86, Exhibit A, passed April 16, 1986.

The first 1982 amendment. Under District 12, reduced from two to one the number of delegates for the Shiprock election community and added the Nataani Nez election community with one delegate.

The second 1982 amendment. Under District 15, substituted Crownpoint and Standing Rock election communities, each with one delegate, for Becenti election community which formerly had one delegate.

The third 1982 amendment. Changed various polling places in order that voting in state and federal elections not be conducted within fifty feet of voting in the tribal election.

1978 Amendment. Added references to delegated, and carried out reapportionment.

Prior law voided. Section 2 of CJN-49-79 provided: "All other reapportionment plans including the plan considered in Resolution CJA-14-78 and the plan adopted by the Courts of the Navajo Nation (Yazzie v. Board of Election Supervisors, WR-C-216-77, A-CV-03-78) are hereby rescinded and declared null and void."

Future reapportionments. Section 3 of CJN-49-78 provided: "The Board of Election Supervisors is directed to work with all interested parties in reaching a compromise solution for any new reapportionment and to present any compromise agreed upon to the Navajo Tribal Council for its consideration. The Board of Election Supervisors shall make its first written report to the

Navajo Tribal Council within six (6) months of the date that results of the 1980 Federal Census relating to the Navajo Nation are published."

1985 Amendment. Tribal Council Res. CD-104-85, passed Dec. 6, 1985, adopted a reapportionment plan.

1986 Amendment. CJA-4-86: Reapportionment precincts.

Section 11. Composition of School Board; Apportionment for School Board Elections.

A. A Local Community School Board shall consist of not less than three nor more than seven members based upon apportionment.

B. The Education Committee of the Navajo Nation Council shall set the size of each school board and shall apportion the number of school board seats among the Chapter or Chapters represented on each school board.

C. The apportionment plan shall be developed by the Education Committee in consultation with the Board, local school boards, chapters, school board organizations such as agency school boards, and the Navajo Division of Education and shall be presented to Navajo Board of Election Supervisors to use in the next local Chapter election.

D. The apportionment plan shall be based at a minimum on the number of students attending from one or more Chapters.

E. The Navajo Board of Election Supervisors shall arbitrate any disputes among the entities set forth in subsection C above arising from an apportionment plan. The decision of the Board shall be final.

Section 12. Rules and Regulations

A. The Navajo Board of Election Supervisors shall promulgate rules and regulations necessary and proper to carry out the purposes of the Election Code and shall publish and/or distribute rules and regulations for posting at public places pursuant to Subsection E below.

B. Rules and Regulations to be considered by Board shall be consistent with the Election Code and other Navajo Nation laws.

C. Rules and Regulations shall provide for efficient and consistent administration of Election Code and conduct of elections.

D. Format of rules; filing; distribution

1. Rules and regulation shall be considered and approved by Board Resolutions. Proposed rules and/or regulations shall be clearly stated.

2. Upon adoption copies shall be delivered to the following:

- a. The Office of the Attorney General.
 - b. Office of Legislative Services for distribution to members of the Navajo Nation Council and posting.
 - c. The Chapters Support Services to be distributed to all Chapters for Posting.
 - d. The President of the Navajo Nation.
- E. The adopted rules and regulations shall be filed at the Election Administration Office and this office shall note the hour and date of filing.

F. The rules and regulations shall be available to the public during office hours and upon a payment of a fee.

G. The Election Administration Office shall prepare and publish a listing and index of all current rules and regulations. All rules repealed or rescinded shall be noted.

H. Except for the need to make rules and regulations at the polls on election day, this section shall apply to all rules and regulations developed and approved by the Board.

Section 13-20 - Reserved

Subchapter 2. Filing For Elections

Section 21. Declaration of candidacy.

A. Candidates for general and chapter elections who meet the applicable qualifications set forth in 11 NTC Section 8 must file declaration of candidacy with the Election Administration. The declaration of candidacy shall include their nomination petition as set forth in 11 NTC Section 22 and filing fee. A candidate shall file declaration of candidacy for only one office unless that other office is that of a School Board member.

B. The declaration of candidacy form shall be in the form specified by the Board and shall contain:

1. The name of candidate as it will appear on the official ballot;

2. A notarized, sworn statement by the candidate that (a) he is legally qualified to hold the office; (b) that he meets the qualifications set forth in 11 NTC Section 8; (c) that his nominating petition is in the form and manner prescribed by law; and (d) that he may be removed as a candidate in the event his declaration contains a false statement; and

3. Any convictions for felonies and misdemeanors pursuant to Section 8, A, B, C, and D within the last five (5) years and the place, date, law violated and circumstances surrounding those convictions; and
4. The name and address of the financial agent of record for the candidate.

C. Declaration of candidacy shall be public records which shall be kept on file with the Election Administration and copies may be provided at a nominal fee to the public.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 2, B, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86, Attachment 1 to Exhibit "A", Section 5, passed January 30, 1986.

Section 22. Nominating petitions; time of filing; form; content

A. Candidates shall file a nominating petition at the time they file their declaration of candidacy. Petitions shall be filed no later than ninety (90) days preceding the primary election date.

B. The petition form shall be in a size and style specified by the Board and shall contain the signatures of voters who are registered and who support the placement of the candidate on the ballot. Each signature shall also reflect the chapter, and census number of the registered voter. Voters meeting the qualifications herein may sign more than one nominating petition.

C. Petitions shall be submitted in a form which allows all signing voters to sign only that portion of the the petition designated for the Chapter in which the voter is registered.

D. Each page of the petition shall name the candidate.

E. Petition forms shall be made available and circulated no later than one hundred eighty (180) days preceding prior to the date set for the primary election.

F. Once filed, the petition or any signatures thereon shall not be withdrawn.

Section 23. Nominating petition; sufficiency; number of signatures

A. Within thirty (30) days of receipt of a nominating petition, the Election Administration shall verify its

sufficiency pursuant to 11 NTC Section 22 and this section and shall notify the candidate in the event that his declaration of candidacy and nominating petition(s) are insufficient.

B. A petition shall be deemed sufficient signed by the requisite number of registered voters.

C. Nominating petitions shall be signed by a number of registered voters equal to five (5) percent of those who voted in the last election for that same office.

1. A candidate for President or Vice President of the Navajo Nation, and a Navajo Nation Council Delegate or School Board Member who will represent one or more Chapters, must obtain signatures equal to five (5) percent of the total number of voters registered in all Chapters which he will represent.

Section 24. Nominating petition; challenges; appeals

A. The Board shall hold all petitions which have been certified sufficient by the Election Administration for a period of (10) days during which sworn challenges may be filed with the Election Administration by any registered voter.

B. The form for challenges shall be in the size and style specified by the Board and shall specify the names of the signing voters against whom the challenge is lodged.

C. Within five (5) days of the date of filing, the Board shall review and determine whether or not the challenge meets the requirements of Section 24 (B) and whether or not the challenge, if true, would cause a change in the sufficiency of the nominating petition.

1. If the challenge will not change the sufficiency of the petition, the challenge shall be dismissed.

D. If the Board determines that the challenge meets the requirements of Section 24 (B) and (C), shall hold a hearing not less than three (3) nor more than ten (10) days after its determination that the challenge is valid. The Election Administration shall forthwith mail to the candidate, the challenged voter, the voter challenging the nominating petition and others the Board may require for a hearing, a copy of the challenge along with notice of time and place of hearing. The notice shall also contain a warning to the candidate and the challenged voter that failure to appear at the hearing may constitute just cause for removal of the signature(s) from the petition.

E. Hearings shall be conducted pursuant to such rules and regulations promulgated by the Board pursuant to Section 12.

F. The voter or voters initiating the challenge shall have the burden of proving the allegations contained in the challenge by clear and convincing evidence.

G. The Board's decision shall be certified to the voter or voters initiating the challenge and the candidate within ten (10) days of the hearing. Appeal may be made by either party to the Navajo Nation Supreme Court within ten (10) days of the date of decision. The Supreme Court shall review the appeal no later than fifteen (15) days from the date of filing. Review by the Supreme Court shall be limited to whether or not the decision of the Board is sustained by sufficient evidence on the record,

Section 25. Unopposed Candidates; Candidate withdrawal

A. In the event only one candidate files for a Tribal elective office, he shall be placed on the ballot as an unopposed candidate.

B. In order that ballots can be prepared in a timely manner, a candidate who withdraws from the election, must withdraw within twenty (20) days of filing his petition. Any votes cast for the candidate who has withdrawn shall not be tallied.

Section 26. Filing fees

A. Candidates shall remit a filing fee pursuant to the schedule set forth below at the time they file their declaration of candidacy:

President:	\$150.00
Vice President:	\$150.00
Navajo Nation Council Delegate:	\$100.00
Chapter Officers:	\$ 75.00
Other Officials:	\$ 75.00
School Board Members:	\$ 25.00

B. Filing fees shall be non-refundable.

Section 27. Ballot picture

A. On date of filing, candidates must present themselves to the Election Administration for the purpose of having a ballot picture taken.

B. Only the photo taken by the Election Administration shall be used on the ballot.

Section 28. Special elections; filing

A. Candidates for special elections for Chapter officers, Other Elected Officials and School Board Members shall comply with the provisions of this subchapter, except compliance shall be pursuant to the following time schedule:

Document	Date of Filing
Declaration of candidacy nominating petition, and filing fee	Within 14 days of declaration of vacancy in the office by the Board
Ballot picture	Candidates must present themselves to the Election Administration during business hours on the date of filing.

B. If no candidate has filed within the time required for filing under this Code, the Board may extend the time for filing for such period as it deems appropriate.

Section 29-40 - Reserved

Subchapter 3. Primary Elections

Section 41. Primary elections; selection of candidates

A. The primary election ballots for each precinct shall list the candidates for the offices of the President of the Navajo Nation, Navajo Nation Council Delegate, Chapter Officer, and Other Elected Officials and School Board Members.

B. If a primary election results in a tie vote among two or more candidates with the highest votes, all candidates with the tie votes shall be placed on the general election ballot.

C. The primary candidates receiving the highest and next highest number of votes for the office of President, Chapter Offices and Other Elected Offices shall be candidates for those offices in the general election.

D. In each election precinct represented in the Council by one Delegate, the two candidates receiving the highest number of votes in the primary election shall be candidates for Delegate in the general election. In each election precinct represented in the Council by two Delegates, the four candidates receiving highest number of votes in the primary election shall be candidates for Delegate in the general election. In each election precinct represented in the Council by three Delegates, the six candidates receiving the highest number of votes in the primary election shall be candidates for Delegate in the general

election. In each election precinct represented in the Council by four Delegates, the eight candidates receiving the highest number of votes in the primary election shall be candidates for Delegate in the general election.

E. In each election precinct represented on a school board by one member, the two candidates receiving the highest number of votes in the primary election shall be candidates for the one school board member position in the general election. In each election precinct represented on a school board by two members, the four candidates receiving the highest number of votes in the primary election shall be candidates for the two school board member positions in the general election. In each election precinct represented on a school board by three members, the six candidates receiving the highest number of votes in the primary election shall be candidates for the three school board member positions in the general election, and so forth.

F. The Board shall determine by regulation the number of votes a voter may cast for each of the above offices and positions in the primary and general, chapter, or special elections.

Source. Former 11 NTC Section 10 and Section 12.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 9, passed May 16, 1966.

1978 Amendment. Tribal Council Res. CJN-49-78, Exhibit "A", Section C, passed June 5, 1978. Amended generally. Formerly related to voting method and certification of candidates.

1986 Amendment. Tribal Council Res. CJA-4-86, Attachment 1 to Exhibit "A", Section 10, passed January 30, 1986.

Section 42. Special election primary

There shall be no primary elections for special elections. All candidates who file a petition which is certified sufficient by the Board shall be placed on the ballot for the special elections, and the candidate receiving the highest number of votes shall be declared the winner.

Section 43. Selection of candidates for office of Vice President

Candidates for the office of President chosen in the primary election shall within five days after the primary election each name a running mate for the office of Vice President. The names of the candidates for President together with each candidate's selection of a candidate for Vice President shall be placed on the general election ballot and be voted upon as a single ticket.

Source. Tribal Council Resolution CMY-60-66, Art. I, Section 12, passed May 16, 1966.

1978 Amendment. Tribal Council Res. CJN-49-78, Exhibit "A", Section D, 4, passed June 5, 1978.

1986 Amendment. Tribal Council Res. CJA-4-86, Exhibit "A", Section 13, passed January 30, 1986.

Section 14 Repealed - Tribal Council Resolution CJN-49-78, Exhibit "A", Section D, passed June 5, 1978.

Section 44-60 Reserved

Subchapter 4. Section 61-80 - Reserved

Subchapter 5. Section 81-100 - Conduct of Elections

Section 81. Polling place supervision; appeal by person not allowed to vote

A. The day before the date of an election, the Chairman of the Board shall call in all chief poll judges for necessary instructions, swearing in, the dissemination of ballots and ballot boxes and/or voting machines to be taken to the polling places for each community in the election precinct.

B. Poll judges shall guard the polls, maintain order, and instruct voters in the techniques of balloting. Poll clerks shall enter each voter in the poll books and shall issue ballots.

C. One poll judge shall be designated by the Board as the chief poll judge for each polling place, and it shall be his duty and responsibility to keep custody of and account for all ballots, the ballot box, and the poll books. He shall supervise and have supervisory authority over the other judges and poll clerks in guarding the polls, maintaining order and instructing voters.

D. A voter shall vote at the polling place where he is registered to vote.

E. Any person who is not allowed to vote may appeal to the Board immediately. The decision of the Board shall be final.

F. A Navajo Nation Police officer shall be present at each polling place during voting hours.

G. Upon an execution of an affidavit for assistance pursuant to Section 128 B, a voter may choose any person to assist him in marking the ballot. The assistant shall not

attempt to influence the voter in favor of any candidate.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 15, passed May 16, 1966.

Cross Reference. Absentee Voting, See Section 91 et. seq. of the title.

Section 82. Voting hours

Voting shall begin at 8:00 a.m. and shall end at 7:00 p.m. All voters present at the polling places and in line to vote at 7:00 p.m., will be allowed to vote.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 16, passed May 16, 1966.

Section 83. Counting of votes

At the close of the election, the poll judges at each polling place shall tabulate the results of the balloting, seal and lock the ballots, poll books and keys in the ballot boxes, and transmit the results of the balloting to the Election Administration at Window Rock by telephone or radio communication. Every candidate whose name appears on the ballot in the election may have one poll watcher present at all times during the balloting and during the counting of the votes.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 17, passed May 16, 1966.

Section 84. Canvass of votes; recount

A. Sealed ballot boxes containing all of the ballots casted in the election, all unused or spoiled ballots, data packs, keys, a written statement of the election results, on a form provided by the Board certified by the poll judges at each polling place, and the list of registered voters shall be forwarded to the Election Administration at Window Rock by each chief poll judge.

B. The Board shall canvass the written statements of election results from each polling place and shall then total the election results.

C. No recount of the ballots of any polling place shall be made unless a candidate whose name appears on the ballot at any such polling place objects. Within 10 days after the election, the candidate must pay to the Navajo Nation the sum of \$50 for the cost of recounting the election results for the one position in which the candidate was listed on the ballot. The Board may, on its own initiative, conduct a recount of any

polling place in which it believes that there may have been substantial irregularity in the voting or counting of the ballots. The Board shall use the chief poll judge to assist in canvassing and recounting ballots.

Source. Tribal Council Res. CMY-60-66, Art I, Section 18, passed May 16, 1966.

Section 85. Certification of election; vote required for election

Not less than 10 days following each election, the Board shall certify the names of all candidates elected in such election.

Source. Tribal Council Res. CMY-60-66, Art. III, Section 1, passed May 16, 1966.

Section 86. Appeal of disputed elections

A. A disputed election for any office shall be appealed in writing within 10 calendar days following the election. Appeal shall be to the Board by the aggrieved candidate.

B. The Board shall issue rules and regulations regarding how such disputes shall be handled, and shall, pursuant to such rules and regulations, issue a decision upholding or vacating the disputed election.

C. A decision of the Board upholding or vacating a disputed election may be appealed within 10 calendar days to the Supreme Court of the Navajo Nation by filing a Notice of Appeal. Review by the Court shall be limited to whether the Board's decision is sustained by sufficient evidence on the record.

Source. Advisory Committee Res. ACO-149-59, Section 5d, passed Oct. 2, 1959. Advisory Committee Res. ACMA-47-67, Section 5d, passed Mar. 27, 1967. Tribal Council Res. CMY-23-79, Exhibit "A", Section O, passed May 3, 1979.

1967 Amendment. Amended this section by changing election of officers by "standing vote" to election of officers by "color secret ballot."

1979 Amendment. This section formerly provided for voting by secret ballot.

Source Section 86: generally derived from former 11 NTC Section 407.

Section 87. Tie votes in a General Election

In the event of a tie vote among two or more candidates in general election, a runoff election shall be held within 30 days after certification of a tie vote by the Board. If the runoff election also results in a tie vote, a special election shall be called by the Board.

Section 88-100 - Reserved

Subchapter 6. Section 101-120 - Reserved.

Subchapter 7. Section 121-140 - Absentee Voting

Section 121. Request for absentee ballot.

A. Any registered voter who expects to be absent from the precinct in which he is registered on any election day, or who expects to be physically unable to go to the polls on such day, may request an absentee ballot, either by coming in person to the office of the Election Administration at Window Rock, or by sending a letter to the Board requesting application for absentee ballot. Application shall be made on a form provided by the Election Administration.

B. The purpose for absentee voting is to encourage every eligible voter to exercise his voting right.

Source. Tribal Council Res. CMY-60-66, Art. II, Section 1A, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86, passed January 30, 1986.

Section 122. Application; form; time of filing.

A. The form of application for an absentee ballot shall be as follows:

Chapter _____

Agency _____

I, _____, census number _____, do solemnly swear that I am a registered voter of the Navajo Nation registered in _____ Chapter; that I will be absent from my polling place on the day of the election.

Therefore, I hereby make application to the Navajo Board of Election Supervisors for an absentee ballot.

Voter's Signature

in person pursuant to Subsection H below or mailed pursuant to Subsections C and D above.

H. Where an applicant delivers an application in person pursuant to Subsections C and G above and the application is accepted, delivery of the absentee ballot may be immediate and casted in person pursuant to Section 124.

I. Where mailed applications are accepted, absentee ballots shall be mailed by Election Administration staff up to ten (10) days before election pursuant to Subsection C.

Source. Tribal Council Res. CMY-60-66, Art. II, Section 1 B, C, H, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86, passed January 30, 1986.

Section 123. Delivery in person or mailing of ballot.

A. Unless it is evident that applicant is not registered, the Board through the Election Administration shall immediately cause the following papers to be delivered in person or mailed to such applicants:

1. A ballot for the proposed absentee voter's Chapter;

2. An envelope labeled "Official Ballot Envelope" for the ballot to be put into after the voter has marked it;

3. An envelope with the address of the Board printed on its front, and the envelope containing the ballot shall be placed and mailed or delivered in person to the office of the Election Administration in Window Rock.

B. No absentee ballot shall be delivered or mailed to any person other than the applicant who is a qualified voter. Each qualified applicant is allowed a ballot. No request for application or absentee ballots by telephone shall be allowed. Once an absentee ballot is sent out to applicant, applicant shall not be allowed to vote at his polling place. All absentee ballots shall be returned to the Election Administration Office in Window Rock.

Source. Tribal Council Res. CMY-60-66, Art. II, Section 1A, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86, Attachment 1 to Exhibit "A", Section 91, passed January 30, 1986.

Section 124. Marking ballot; envelope.

A. A voter voting by absentee ballot in person shall mark the absentee ballot in a special voting area in the Election Administration Office, and shall fold it up and seal it in the "Official Ballot Envelope." No person shall watch how the voter marks his ballot, unless the voter is marking his ballot pursuant to Section 128. No person shall attempt to influence the voter in favor of any candidate. The voter shall then hand the sealed envelope containing the ballot to the appropriate Election Administration Staff together with the large envelope before he leaves the office.

B. Where a voter has received a ballot by mail, a witness shall assure that the person marking the ballot is the qualified voter to whom the absentee ballot is addressed. The witness shall further assure that the voter marked his ballot, folded it up and sealed it in the "Official Ballot Envelope." The witness shall not watch how the voter marked his ballot, unless the voter requests assistance pursuant to Section 128. The witness and/or assistant shall not attempt to influence the voter in favor of any candidate. The voter shall hand the sealed "Official Ballot Envelope" containing the ballot to the witness along with the large envelope.

C. The following words shall be printed on the "Official Ballot Envelope" provided for the absentee ballot:

NAVAJO NATION ELECTION

Chapter _____

Agency _____

This envelope contains a Navajo Nation Absentee Ballot for _____ Polling Place, and was casted before me this _____ day of _____, 19____ by _____, the person who requested and received the absentee ballot.

Signature _____

Official Title _____

(NOTARY SEAL)

D. The person before whom the absentee voter voted shall sign his name and title on the envelope. If such person is a notary public, he shall also impress his seal on the envelope. The voter shall not sign the envelope. The person before whom the absentee voter voted shall then place the envelope in the large envelope and shall seal the same and hand it back to the

voter to mail to the Election Administration, Post Office Box 2578, Window Rock, Arizona. Absentee ballots mailed to the Election Administration Office shall be counted if received by the Friday before the election date at the Election Office.

E. Absentee ballots marked at the Election Administration Office pursuant to Subsection A above absentee ballots may be marked in person beginning thirty (30) days before election up to the Friday before election date during regular hours of 8 a.m. to 5 p.m. of each business day at the Election Administration Office in Window Rock, Arizona.

F. The Election Administration Office shall designate a polling place for absentee voter as a convenience to the voter. Such act shall not make the Election Administration Office a polling place.

G. During absentee ballot voting, it shall be unlawful for candidates or anyone to solicit votes, display or otherwise make accessible any posters, signs, literature, or other forms of campaign whatsoever.

Source. Tribal Council Res. CMY-60-66, Art. II, Section 1 D, E, F, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86, Attachment 1 to Exhibit "A", Section 94, passed January 4, 1986. Note: Resolution CJA-4-86 deleted "shall have no right to watch how the voter is marking his ballot" in second sentence of Section A; there is no evidence this deletion was intentional.

Section 125. Duty of Election Administration on receipt of envelope application and ballot envelope.

A. The Election Administration Staff shall immediately open each absentee ballot received from any absentee voter, and shall check each ballot envelope against the register. If the voter's name appears as a registered voter and is on the absentee ballot registry as accepted, the Election Administration Staff shall immediately deposit the envelope in the designated precinct ballot box. If the registry shows that the application was rejected, the ballot shall be destroyed. A member of the Board shall be present at all times during receipt and depositing of absentee voters' ballots.

B. The Election Administration shall accept completed official mailing envelopes until 5:00 p.m. on the Friday before the election day. Any completed official mailing envelope received after that time shall not be honored and shall be invalidated by the Board.

Source. Tribal Council Res. CMY-60-66, Art. II, Section 2,

passed, etc.

1986 Amendment. Tribal Council Res. CJA-4-86, Attachment 1 to Exhibit "A", Section 95, passed January 30, 1986.

Section 126. Absentee voter may not vote in person in his own precinct.

Any person who has voted by absentee ballot shall not be permitted to vote in person in the election for which he has cast an absentee ballot.

1986 Amendment. Tribal Council Res. CJA-4-86, Attachment 1 to Exhibit "A", Section 96, passed January 30, 1986.

Source. CMY-60-66, Art. II, Section 2, passed May 16, 1966.

Section 127. Counting absentee ballots.

Poll judges and poll clerks shall open ballot envelopes and tabulate the absentee ballots with the rest of the ballots cast.

Source. Tribal Council Res. CMY-60-66, Art. II, Section 3, passed May 16, 1966.

Section 128. Assistance to voter.

A. A voter may choose another to assist him in marking the ballot upon execution of an affidavit for assistance.

B. The affidavit shall state that the voter seeking assistance is:

1. blind; or
2. physically disabled; or
3. unable to read or write.

Section 129-140 - Reserved.

Subchapter 8. Section 141-160 - Reserved

Subchapter 9. Special Elections; Official Pro Ten

Section 161. Vacancies; officials pro ten

A. Whenever a vacancy occurs in an elected office, with the exception of a vacancy resulting from recall or involving the office of Vice President, a special election shall be held to fill the vacancy. If a general or chapter election has been set

within ninety (90) days of the date of vacancy, the vacancy shall be filled during the general or chapter election.

1. Should the office of Vice President become vacant as the result of death or resignation, the President shall, no later than thirty (30) days after the date of vacancy, appoint a new Vice President.

B. Whenever there is a vacancy in a Council Delegate position, at the request of the affected Chapter, the Speaker of the House shall select a Delegate from the community until the vacancy has been filled by special election and the new Delegate takes office.

C. In the event of the death of a Chapter President, Vice President, or Secretary/Treasurer, the Board is authorized to obtain a death certificate and to declare a vacancy upon receipt of such certificate.

D. Those vacancies in Chapter Officer positions which have been declared vacant by the Board, as distinguished from those one time vacancies contemplated by 2 NTC Section 4024, and those vacancies in other elective offices and School Board Member positions, shall not be filled with officials pro tem.

E. All elected officials and School Board Members voluntarily resigning shall pay a resignation fee of \$100.00 to defray the cost of holding a special election.

Source. Tribal Council Res. CMY-60-66, Art. IV, Section 1A, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86; passed January 30, 1986.

Section 162. Conduct of special elections

A. Special elections shall be conducted as the regular election as set forth in this Code, with the following exceptions:

1. When a vacancy in the office of Delegate, Chapter Officer, Other Elected Official, or School Board Member is declared by the Board, candidates wishing to be placed on the ballot for special election shall:

a. file a nomination petition with signatures of five (5) percent of the registered voters who voted for the same office in the last election; and

- b. file a declaration of candidacy and nominating petition within fourteen (14) days after the position has been declared vacant.
2. The Election Administration shall certify each nominating petition within five (5) days of filing.
3. The special election shall be held no later than thirty (30) days from the date a vacancy has been declared; provided there are no challenges to the nominating petitions on file. In the event of a challenge, the special election shall be held as soon as practicable following the certification of the challenge petitions by the Board or in the case of an appeal, upon a decision by the Supreme Court of the Navajo Nation sustaining the Board's certification.

Section 163. Compensation of Election Supervisor for Special Election

The Board has the authority to provide compensation for Election Supervisors but within the limits of the budgeted sums available to it.

Source. Tribal Council Res. CMY-60-66, Art. IV, Section 1H, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86, passed January 30, 1986.

Section 164. Special Election Votes; canvass; recount

The Board shall have the same power of supervision over special elections as it has over general elections, and shall canvass and, if necessary, recount. The votes cast in special elections shall be canvassed in the same manner applicable to general elections.

Source. Tribal Council Res. CMY-60-66, Art. IV, Section 1E, passed May 16, 1966.

Revision note. The last sentence of this section has been rephrased for the purpose of clarity.

Section 165. Certification of results.

Following canvass of votes cast in any special election, the Board shall certify the results.

Source. Tribal Council Res. CMY-60-66, Art. IV, Section 1F, passed May 16, 1966.

Section 166. Assumption of Office.

The Board shall announce the results of the special election, as certified. The Election Administration shall make public the results of the special election as certified by the Board. The person elected shall be entitled to be sworn in and assume his office ten (10) days after the certification of the election or at the conclusion of any dispute arising from the election.

Source. Tribal Council Res. CMY-60-66, Art. IV, Section 1G, passed May 16, 1966.

1986 Amendment. Tribal Council Res. CJA-4-86, Section 138, passed January 30, 1986.

Section 167-180 - Reserved.

Subchapter 10. Reserved (181-200)

Subchapter 11. Campaign Expenses; Contributions (Section 201-220)

Section 201. Report of designated financial agent; filing; penalty

A. Before any election, each candidate, including the candidate for Vice President, shall file with the Board a report containing the names and addresses of every person authorized as his financial agent by or through whom such candidate has expended or proposes to expend money in defraying the expenses of his campaign, or a statement that he has not authorized and will not authorize any person to act for him, but that he will in person account for all money or other things of value expended in the interest of his candidacy.

B. The candidate shall file with the Board the designation of an agent by the filing date and will be allowed to amend the designation any time prior to the opening of the polls on the day set for the election.

C. Should he fail to file such report, he is guilty of an offense and shall be assessed a fine of not less than \$25 and not more than \$500.

Source. Tribal Council Res. CMY-60-66, Art. IV, Section 1, passed May 16, 1966.

Section 202. Statement of receipts and expenses; time of

filing; preparation and distribution of forms

A. Each candidate whose name appears upon the official ballot in any Navajo Nation election, either general, chapter, or special, shall, not more than 30 days after the election, file with the Board a sworn and signed itemized statement of receipts and expenses. The Board shall give the candidate an opportunity to correct any deficiency or error in his report. Thereafter, the report shall be filed in the Central Records Department of the Navajo Nation and shall be preserved in said office for at least five years, during which time it shall be a public record available for inspection and copying.

B. The statement of receipts and expenses shall set forth in detail a complete record of the candidate's receipts and expenditures in money or other things of value and cost thereof, including promises to pay, treats, presents and favors, either present or future, intended for the purpose of aiding or which could have a tendency to aid his success in such election, and shall include a like statement for each of the persons named by the candidate in any report filed under 11 NTC Section 201 and for any person not so named whom the candidate knows to have made any receipt or expenditure on behalf of his candidacy. Actual receipts for expenses shall accompany the statement.

C. A candidate shall not be required to report his filing fee.

D. The statement of expenses and the report shall be made upon forms approved by the Board. The Board shall deliver in person or by certified mail a reasonable number of such forms to each candidate.

Source. Tribal Council Res. CHY-60-66, Art. VIII, Section 2, passed May 16, 1966.

Section 203. Failure to file statement of receipts and expenses; penalty

A. The candidate receiving the highest number of votes in any Navajo Nation election shall not receive a certification of election and shall not be eligible to take office until the statement required by 11 NTC Section 202 is filed.

B. A candidate, whether elected to an office or not, who refuses or fails to file the statement required by 11 NTC Section 202 is guilty of an offense and upon conviction thereof shall be punished by a fine of not less than \$300 nor more than \$500.

Source. Tribal Council Res. CHY-60-66, Art. VIII, Section 3, passed May 16, 1966.

Section 204. Report by persons not authorized to expend money for expenses of candidate's campaign; time of filing; form; penalty for failure or refusal to file

A. If any person not named in the candidate's report required by 11 NTC Section 201 collects or expends any money or thing of value in connection with the candidacy of such candidate in any Navajo election, such persons shall within 30 days after such election file with the Board a full and complete report showing all money or other things of value collected and expended by him.

B. The form of the report shall be approved by the Board and shall be similar in form to that required of candidates.

C. A person who fails or refuses to sign or to file a report required by this section is guilty of an offense and upon conviction thereof shall be punished by fine of not less than \$300 nor more than \$500. If such person is not subject to the jurisdiction of the Court of the Navajo Nation, he may be fined or expelled from the Navajo Tribal land (17 NTC Section 1901 et. seq).

Source. Tribal Council Res. CMY-60-66, Art. VIII, Section 4, passed May 16, 1966.

Section 205 Limitation on expenditure by or on behalf of candidates; radio or television time

A. The following sums shall be the maximum amounts for both the primary and general election combined which may be expended by or on behalf of any candidate in a primary and general, special or chapter election. When anything of value other than money is expended or used by or on behalf of any candidate, it shall be considered as equivalent to money as its fair cash value. Necessary personal travel or subsistence expenses of candidate and provided by candidate shall not be included in the limitation and need not be reported.

1. For the office of the President and Vice President (combined sum) one dollar and fifty cents for each registered voter.

2. For the offices of Delegate, Chapter Officer, other Elected Officials and school board members, one dollar and fifty cents for each registered voter within the election precinct.

B. Where radio and television time is donated or offered on an equal basis to all qualified candidates for any particular office, the value of such time shall not be included in the

above limitation on expenditures but shall be reported by or on behalf of each candidate receiving the same, without assigning any cash value thereto.

Source. Tribal Council Res. CMY-60-66, Art. VIII, Section 5, passed May 16, 1966. Tribal Council Res. CMA-32-74. Exhibit "A". Section 5, passed Mar. 20, 1974. Tribal Council Res. CAP-41-82, Exhibit "A", Sections 4 and 5, passed April 28, 1982.

1974 Amendment. CMA-32-74, changed maximum expenditure figures in subsection (a).

1982 Amendment. Substituted "one dollar" for "fifty cents" preceding "for each registered voter" in subsection (a) (1) and (a) (2).

Section 206. Penalty for exceeding campaign expenditure limit

A candidate who expends more money or other things of value than is permitted by 11 NTC Section 205 either in person or through agents, or who knowingly permits any other person to expend a sum which when added to the sum expended by such candidates and his agents exceeds said limits, is guilty of an offense and upon conviction thereof shall be punished by a fine of not less than \$300 nor more than \$1,000, or by imprisonment for not more than six months, or by both such fine and prison term; and in addition he shall be barred for five years from holding any elective office of the Navajo Nation.

Source. Tribal Council Res. CMY-60-66, Art. VII, Section 6, passed May 16, 1966.

Federal law. The Indian Bill of Rights, 25 U.S.C. Section 1302 (7), provides that an Indian tribe may in no event impose a punishment of more than six months in prison, or \$500, or both. Section 1302 (7) was amended by Public Law 99-570, section 4217, to allow tribes to impose punishment of up to one year imprisonment or a fine up to \$5,000, or both. The Navajo Nation has not amended the general criminal code provisions to include the increased penalties.

Section 207. Fraudulent reports; penalty.

A candidate who makes any statement or report required by this ordinance and therein knowingly misstates the amount of money given or expended, or fails knowingly to fully disclose the facts as to any gift, promise, treat, reward, favor, or any valuable thing given or expended, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$300 nor more than \$1,000 or by imprisonment for not more than six months, or by both fine and prison term; and if such person received the highest number of votes in the election, he

shall not hold the office, and shall be barred for a period of five years from holding any elective office of the Navajo Nation.

Source. Tribal Council Res. CMY-60-66, Art. VIII, Section 7, passed May 16, 1966.

Section 208. Filling vacancy in office due to disqualification

Where any person who has received the highest number of votes for any office is disqualified from holding said office by 11 NTC Section 206 and Section 207, a special election shall be held to elect another person to hold such office, according to the procedure set out in 11 NTC Section 161 et seq.

Source. Tribal Council Res. CMY-60-66, Art. VIII, Section 7, passed May 16, 1966.

Section 209. Contributions by corporations and nonmembers of Navajo Tribe; penalty

A. It is unlawful for any corporation or nonmember of the Navajo Tribe to make any contribution of money or anything of value for the purpose of campaigning or influencing a Navajo election or for any member of the Navajo Tribe to receive such a contribution for such purposes, provided, however, that it shall not be unlawful for a radio or television station to make free time available to any candidate for Tribal Office, provided equal time is made available to all other candidates for the same office.

B. Any person or any non-Navajo Indian married to a Navajo who violates this section shall be guilty of an offense and upon conviction shall be punished by a fine of not less than \$300 nor more than \$1,000, or by imprisonment for not more than six months or by both such fine and prison term.

C. Any non-Indian who violates this section, shall be fined or expelled from Navajo Nation land by the Governmental Services Committee according to the procedure set out in 17 NTC Section 1901, as amended.

D. Any corporation or nonmember of the Navajo Tribe violating this section may upon application of the Attorney General be ordered to show cause before the appropriate Navajo Nation Committee as to why it or he should not be barred from receiving any lease, right-of-way, contract, franchise, concession of any character whatsoever thereafter from the Navajo Tribe, or excluded from the Navajo Nation. If, upon hearing of such order to show cause, it appears to the appropriate Navajo Nation Committee that the said corporation or person is guilty of violating this section, said corporation or person shall be barred for a period of not less than one year nor

more than five years from receiving any lease, right-of-way, contract, franchise, or concession of any character whatsoever from the Navajo Nation.

E. It is the intent of this section to prohibit contribution being made for the purpose of influencing a Navajo election from any source other than members of the Navajo Tribe. Violators shall be prosecuted.

Source. Tribal Council Res. CMY-60-66, Art. VIII, Section 9, passed May 16, 1966, as amended by Res. CJY-86-66, Section 2, passed July 19, 1966.

Federal law. See not under 11 NTC Section 206.

Section 210-220 - Reserved

Subchapter 12. - Reserved (Section 221-239)

Subchapter 13. Removal of Officials; Placement of Officials on Administrative Leave; Recall; Filling Vacancy

Section 240. Removal and Placement on Administrative Leave

A. The President, Vice President and delegates to the Navajo Nation Council are subject to removal for just cause.

1. Just cause shall include, but shall not be necessarily limited to:
 - a. Insanity, when judicially or medically determined.
 - b. Conviction by any Court of any felony.
 - c. Council members failing to attend Council meeting as required by law.
 - d. President or Vice President absent for three consecutive months without permission of Navajo Nation Council.
 - e. Habitual indulgence in alcoholic beverages.
 - f. Conviction of any misdemeanor involving deceit, untruthfulness, and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the

welfare of children, child abuse, child neglect, aggravated assault and aggravated battery.

g. Breach of fiduciary trust duties to the Navajo people.

h. Malfeasance or misfeasance of office.

2. Such official can be removed by at least two-thirds vote of the Navajo Nation Council.

B. The Navajo Nation Council may by majority vote of the Council, place the President, Vice President or any of its members on administrative leave, with or without pay, where there are reasonable grounds to believe that such official has seriously breached his fiduciary trust to the Navajo people and such leave will serve the best interests of the Navajo people.

Source. Tribal Council Res. CMY-60-66, Art. V, Section 1A, 1B, passed May 16, 1966. Tribal Council Res. CAP-41-82, Exhibit "A", Section 6, passed April 28, 1982.

Section 241. Officials subject to recall; recall affidavit; recall petition.

A. All elected officials may be removed from office if sixty percent of the registered voters who voted in the last election for the office in question file a petition seeking the official's removal.

B. Any five or more registered voters may begin recall by filing a notarized affidavit constituting themselves as a petitioners' committee which shall be responsible for circulating and filing a recall petition. For recall of a President, Vice President, Delegate, Chapter Officer, Other Elected Official, or school board member, members of the petitioners' committee shall be registered voters of the Chapter or Chapters, which are represented by the elected official. A single petition is required for each elected official to be removed.

C. The petitioners' affidavit shall contain the names and addresses of the members of the petitioners' committee, one address to which notices to the committee shall be sent, and the name of the elected official subject of recall.

D. No petition of recall may be circulated or signed until such affidavit is filed with the Election Administration.

E. The petition shall be in the form specified by the Board, and shall allow voters to sign only that portion of the petition designated for the Chapter in which the voter is

registered, and shall contain:

1. A general statement of not more than two hundred words setting forth the ground or grounds on which the recall is sought;
2. The name of the official whose recall is sought;
3. The signature, the chapter, and census number of each registered voter who voted in the last election for the office in question; and
4. In the event the voter signs the petition with a thumbprint, the signature of two persons who witnessed the signing, along with the Chapter and census number information for each witness.

F. The ground or grounds for recall is for the signing voters, who shall be the sole and exclusive judges of the legality, reasonableness, and sufficiency of the ground or grounds assigned for the recall. The ground or grounds shall not be subject to review.

G. When filed, the petition shall have attached a notarized affidavit of each circulator which shall state that:

1. The circulator personally circulated the petition copy;
2. All signatures were affixed in his presence and are to the best of his knowledge genuine signatures of registered voters; and
3. Each voter read, or had to read to him, and/or translated for him the full statement of the ground or grounds for recall.

H. The payment of, or promise to pay, anything of value for the circulation of a petition or for procurement of any signature shall invalidate the entire petition.

Source for Section 22 A: Original 11 NTC Section 212

Section 242. Filing of petition; sufficiency

A. A petition for recall shall be filed with the Board no later than one hundred eighty (180) days after the filing of the affidavit of the committee initiating recall proceedings. Failure to file a petition within this period shall render the recall null and void.

B. After signatures have been obtained, the committee

shall file the completed petition with the Election Administration which shall review the petition for sufficiency within not more than thirty (30) days. At least one member of the Board shall be present at all times while petition signatures are being verified. A petition shall be deemed sufficient when it appears to be signed by the requisite number of registered voters as set out in 11 NTC Section 241 (A) and each signatory has complied with the requirements of 11 NTC Section 241 (E) (3). A petition which is found to be sufficient shall be certified to the Board by the Navajo Election Administration.

C. In the event a petition is insufficient, the director shall simultaneously notify the Board and the petitioners' committee of his findings and the reasons why the petition is insufficient. The committee may withdraw the petition and within fifteen (15) days thereafter, refile the amended petition as an original petition. The fifteen (15) day period shall be in addition to the 180 day period set out at 11 NTC Section 242 (A).

Section 243. Petition challenges; hearings

A. The Board shall hold all petitions which have been certified sufficient by the Board for a period of ten (10) days during which time a challenge under oath and notarized may be filed with the Navajo Election Administration by a registered voter.

B. The petition shall be in a form specified by the Board and shall state:

1. The names of the signing voters against whom the challenge is lodged; and
2. The ground or grounds of the challenge, which may specifically include violations of 11 NTC Section 241 (E), and a short statement explaining the ground or grounds of the challenge.

C. The Board shall review the challenge to determine whether or not it meets the requirements of 11 NTC Section 243 (B) and whether or not the challenge, if true, would cause a change in the sufficiency of the recall petition.

D. If the Board determines that the challenge meets the requirements of 11 NTC Section 243 (C), it shall hold a hearing on the challenge not less than three (3) nor more than ten (10) days after its finding that the challenge is sufficient. The Election Administration shall forthwith mail to the committee, the challenged signing voter, the party or parties initiating the challenge, and others the Board may require for the hearing, a copy of the challenge along with notice of the time and place of

hearing, which notice shall also contain a warning that failure to appear at the hearing shall constitute just cause for removal of the signature from the recall petition.

E. Challenge hearings regarding recall petitions shall be conducted pursuant to rules and regulations established by the Board pursuant to Section 12.

F. The party or parties initiating the challenge shall have the burden of proving the allegations contained therein by clear and convincing evidence.

G. The hearing decision shall be certified to the party or parties initiating the challenge and the committee within ten (10) days of the hearing. Appeal may be made by either the committee or the party or parties initiating the challenge to the Navajo Nation Supreme Court within ten (10) days of the date of decision. A transcript of the hearing shall be filed within thirty (30) days of the filing of Notice of Appeal. The Supreme Court shall review the appeal no later than thirty (30) days from the date of filing of the transcript. Review by the Supreme Court shall be limited to: (1) the sufficiency of the recall petition, exclusive of the ground or grounds of the petition; and (2) whether or not the decision of the Board is supported by sufficient evidence.

Section 244. Special election for recall; resignation; ballot

A. When a petition is certified sufficient by the Board or in the event of a challenge, the Board's certification is sustained by the Navajo Nation Supreme Court, the Board shall set a date for the special election and shall notify the committee and the official whose recall is sought that the petition has been certified and the Board has set the date for a special election to be held not less than thirty (30) days from the date of final certification. If a general or chapter election is set within ninety (90) days of date the petition is finally certified, the recall special election shall be held during the general or chapter election.

B. Except in a recall involving the President or the Vice President of the Navajo Nation, if the official whose recall is sought offers his resignation prior to the recall election, the election shall be held to fill the office.

C. Special elections arising from a recall petition or a vacancy caused by a resignation resulting from a recall petition shall be conducted pursuant to the provisions of 11 NTC Section 161, et seq. Resignations resulting from recall shall be official when accepted by the Board. The name and picture of the official sought to be recalled shall be printed on the official recall election ballot, unless the official resigns twenty-one

(21) or more days prior to the recall election in which event, the official's name and picture shall be removed from the ballot. If the official resigns twenty or fewer days prior to the election, his name and picture shall appear on the ballot but votes cast for the official during the recall election shall not be counted.

D. Other candidates seeking to file for the office of the official sought to be recalled shall follow the provisions of 11 NTC Section 28, Section 161 et seq. and this Code. For purposes of 11 NTC Section 162 (A) (3), a vacancy in office sought to be recalled shall be deemed to exist on final certification of the recall petition.

Section 245 Officials pro ten

A. If the date is set for a recall election for the office of President of the Navajo Nation, he shall relinquish his office and the Vice President shall assume and exercise the office of the President.

B. If a recall special election is set for any other elective office, such offices shall be filled or remain vacant pursuant to the provisions of Section 161 (B) and (C).

Section 246. Limitations on recall petition

A. No recall affidavit shall be filed against any official until he has held office for a minimum of one hundred eighty (180) days.

B. If an official subject to recall wins the recall election, he shall continue to serve throughout the term for which he was elected.

Section 247. Ineligibility of removed official

Any official who resigns or is removed pursuant to this subchapter shall be ineligible to run for any Navajo Nation elective office for a minimum of eight (8) years from the date of resignation or the date of the recall election.

Source. Tribal Council Res. CMY-60-66, Art. V, Section 4, passed May 16, 1966.

Section 248-260 - Reserved

Subchapter 14. - Reserved (Section 261-280)

Subchapter 15 - (Section 281-300) Voter Registration

Section 281 Eligibility of voters; residency; change in voter registration

A. All persons who are enrolled on the Agency Census roll of the Bureau of Indian Affairs as members of the Navajo Tribe shall be eligible to vote in Navajo Nation elections after they have reached the age of 18 years, provided they comply with the voter registration requirements set forth in 11 NTC Section 282.

B. A voter's residence shall be determined as That place in which a person's habitation is fixed and to which, whenever he is absent, he has the intention to return.

C. Any Navajo person living outside of the Navajo Nation shall be considered a resident eligible for registration and

voting if he is a member of a Chapter or is otherwise eligible for absentee voting under Title 11 Section 121.

D. A change in registration from one Chapter to another can only be made by transfer of registration from the old Chapter to the new Chapter using the form specified by the Board. No transfer of registration will be allowed within 30 days before any election. [This was formerly B (4)].

- (1) Upon registering within a new chapter, one is not qualified to vote or be a candidate for any office in a particular chapter until the Election Code provisions have been fully complied with.

E. All members of the Navajo Tribe who have relocated as a result of the Navajo-Hopi Land Dispute shall remain eligible to vote in tribal elections in accordance with the provisions of this Code. Such persons upon presenting adequate proof of relocation to the Board may vote by absentee voting procedure before election or by appearance in person on the designated election day at the Election Administration in Window Rock. Until relocation, Navajo persons residing upon Hopi Partitioned Lands shall be eligible to vote at their designated Chapter.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 13, passed May 16, 1966. Tribal Council Res. CAP-41-82, Exhibit "A", Section 3, passed April 28, 1982.

1982 Amendment. Designated existing provisions of as subsection (a) and added subsection (b) and (c).

1974 Amendment. CMA-32-74, substituted "18" for "21".

Revision note. Slightly reworded for purposes of statutory form.

Section 282. Registration form; appeal

A. A voter registration roll listing each registered voter by Chapter shall be maintained by the Board at the Election Administration in Window Rock. The Board shall keep the register open, subject to the provisions of section (A) (1) below, during regular business hours, beginning ten (10) days after each general, chapter, or special election and continuing until 30 days prior to the next primary, general or chapter election or in the event of a special election, until the date the Board declares a vacancy.

1. In the event of a disputed election, the Board may extend the number of days during which voter registration is closed following an election from ten (10) days to no more than thirty days. The

Board may apply its discretion regarding this period during which voter registration is closed to any one, some, or all Chapters, depending upon the number of Chapters affected by the election dispute.

B. While the register is open, any unregistered member of the Navajo Tribe, upon proving to the Election Administration and any registrar that he possesses the qualifications specified in 11 NTC Section 281 shall be permitted to register.

C. Such registrar shall issue to those registered in the above period a copy of the registration bearing the name of voter's date of birth, home address, polling place at which they will be permitted to vote and other pertinent information.

D. The voter's registration form shall be in triplicates, each bearing identical information. Registrars shall retain two copies, and one shall be given to the voter. At the close of the registration period, an alphabetically arranged list of all persons registered to vote in each Chapter shall be prepared and processed by computer and shall be certified by the Board.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 4, passed May 16, 1966. Tribal Council Res. CMA-32-74, Exhibit "A", Section 3, passed Mar. 20, 1974.

Amendments 1974. CMA-32-74. Amended generally. (See 1977 Code).

Source Section A. Former 11 Section 404 (a) and (b).

Section 283 Cancellation of registration

The Board shall examine the poll lists containing the names of all Navajo voters who voted in the last general and chapter elections. Any registered voter who did not vote in the general and chapter elections consecutively shall be notified by the Election Administration that he will be removed from the poll if he does not respond by card provided to him within thirty (30) days. The registration of persons so notified who do not respond within the 30 days provided will be cancelled and their names shall be removed from the roll of registered voters. The Chairman of the Board shall indicate on the cancelled registration the date of cancellation and the reason for cancellation. Notice by regular mail shall be sent to every voter who has had his name cancelled from the register of voters. All voters whose registration has been cancelled must re-register as set forth in 11 NTC Section 282 in order to vote in a primary, a general or chapter election.

Section 284-300 - Reserved

Subchapter 16. - Reserved (Section 301-320)

Subchapter 17. Election Officials (Section 321-340)

Section 321. Board of Election Supervisors - Powers and Duties; Hearing Procedures

A. The general powers and duties of the Board of Election Supervisors are:

1. To administer, implement and enforce the Navajo Election Code.
2. To supervise generally all tribal elections.
3. To compile information regarding elections, and distribute and educate the Navajo public to include printing and publishing the Election Code and procedures in pamphlet form and distribution to all certified chapter officials, candidates, poll officials, and registrars.
4. To hear all election disputes to include the powers to subpoena witnesses.
5. To make Board and Administration policy decisions.
6. To establish rules and regulations, and interpret the Election Code consistent with Tribal laws.
7. To obtain and maintain uniformity in the application of the Election Code and Operation of the Election Office.
8. To develop and recommend to the Navajo Nation Council all apportionment plans for election purposes.
9. To hire and maintain direct authority over the Director of the Election Administration Office and confirm the hiring of the Deputy Director and maintain general supervision over all election staff to carry out authority vested in the Board.
10. To develop and submit separate annual budgets for the Board and the Election Administration to include devising and managing a revolving account utilizing filing, penalty and resignation fees for special election costs in addition to the annual appropriation for this category.

11. To coordinate with the county, state and federal election agencies efforts, including seeking and obtaining from various governmental entities and private organization funding and support to carry out the duties and responsibilities set out in the Election Code.
12. To establish sub-committees and delegate to them the authority to declare vacancies, certify elections, hear and decide election disputes and challenges, and to make rules and regulations not inconsistent with the Election Code.
13. To initiate disqualification of candidates who do not meet the requirements and to initiate recounts of ballots, where necessary.
14. To maintain the Election Administration Office and staff independent under its supervision with the Intergovernmental Relations Committee.
15. To maintain such staff and consultants including legal counsel as may be provided for in the annual Navajo Nation Budget of the Board.
16. To recommend the withdrawal of land for the establishment of a building facility which is to be separate from other entities and convenient to the public and to request funding from the Navajo Nation to erect such a public building for the operation of the Election Office.
17. To procure necessary supplies, services, equipment and furniture purchases and to enter contracts through the tribal process.
18. To delegate authority to Election Office not inconsistent with the Election Code.
19. To bring action as deemed necessary and proper for the enforcement of the Election Code through the Attorney General and report said violations/offenses to the Ethics Committee, where necessary.
20. To prepare instructions for registration drive and conduct Navajo Nation elections.
21. To instruct and advise the chapter officer, poll officials and chapter registrars as to the proper methods of performing their duties as prescribed by the Election Code.

22. To report possible Navajo Election Code offenses to the Attorney General and the Ethics Office of the Navajo Nation and recommend such action as is deemed necessary and proper for the enforcement of the Election Code.

B. The Board of Election Supervisors shall have the authority to implement procedures in resolving disputes pertaining to elections as follows:

1. Within ten days of the incident complained of or the election, the complaining person must file with the Board a written complaint setting forth the reasons why he believes the Election Code has not been complied with. If, on its face, the complaint is insufficient under the Election Code, the complaint shall be dismissed by the Board of Election Supervisors.
2. If the complaint is not dismissed, the Board shall conduct a hearing within fifteen days thereafter to determine if the allegations in the complaint are true and are supported by the law. At the hearing, the complainant and respondent may appear in person or through legal counsel. Except otherwise provided by law, the complainant shall have the burden of proving the allegations contained in the statement of dispute by clear and convincing evidence.
3. The Board shall issue a written determination after the hearing on each complaint. At the conclusion of a hearing, the Board may issue a preliminary oral determination or request briefs from the parties by a specified date.
4. A party who wishes to appeal from a decision of the Board must file a Notice of Appeal with the Supreme Court of the Navajo Nation within ten days after the decision is made. Review by the Supreme Court shall be limited to whether or not the decision of the Board is sustained by sufficient evidence on the record.

C. The Board of Election Supervisors shall have the authority to disqualify any candidate who does not meet the qualifications for the office sought.

Source. Tribal Council Res. CMY-60-66, Art. I, section 6A, passed May 16, 1966. Tribal Council Res. CMY-23-79, Section 3, passed May, 1979. Tribal Council Res. CAP-41-82, Exhibit "A",

Section 8, passed April 28, 1982.

1982 Amendment. Amended generally.

1979 Amendment. Added reference to chapter officials.

Revision note. Substituted "Board of Election Supervisors" for "Navajo Election Commission," and "Board" for "Commission" wherever such terms appeared. Tribal Council Res. CAP-41-82, passed April 28, 1982, used the term "Navajo Election Commission," but Tribal Council Res. CAU-38-84, passed August 4, 1984, reinstated the original designation of "Board of Election Supervisors."

Increase in number of Commission members. Tribal Council Res. CAP-41-82, Section 4, passed April 28, 1982, authorized an increase in the membership of the Navajo Election Commission (Board of Election Supervisors) from ten to fifteen members and provided that the additional members be named by the Navajo Tribal Council.

Cross References. Appeals generally, see Section 801 et seq. of Title 7.

1. Candidate qualifications. Board of Election Supervisors had authority to disqualify, on its own initiative, a candidate for Navajo Tribal Council seat. *Deswood v. Navajo Board of Election Supervisors* (C.A. 1978) 1 Nav. R. 306 (following decision of Navajo Supreme Judicial Council vacating order of Navajo Supreme Judicial Court vacating order of Court of Appeals in *Benally v. Lancar*, a 1978 case reported at 1 Nav. R. 312, which had held that board could not disqualify a candidate on its own initiative).

Where the Board of Election Supervisors had never attempted to disqualify a candidate for office in the past, and in election at issue it had examined at most the qualification of four candidates, board's disqualification of appellant was a selective application of its disqualification powers in violation of due process and equal protection and would be reversed. *Deswood v. Board of Election Supervisors* (C.A. 1978) 1 Nav. R. 306.

Section 322. Authority to make rules and regulations.

The Board of Election Supervisors shall have the authority to make and enforce rules and regulations not inconsistent with this chapter concerning any matter within the jurisdiction of such Board. Such regulations shall have the force and effect of laws of the Navajo Nation.

Source. Tribal Council Res. CMY-60-66, Art. VII, Section 1, passed May 16, 1966.

Section 323. Composition; selection

A. The Navajo Board of Election Supervisors shall consist of ten members, all of whom shall be elected pursuant to B, below. All members shall be residents of the Agency they seek to represent.

B. Candidates for the Board of Election Supervisors shall file Nomination Petitions on a Agency-wide basis pursuant to a procedure not inconsistent with Sections 21-42. In addition, each candidate:

1. Shall meet qualification requirements under this Section.
2. Must not hold the position of any Tribal elected office, as covered by the Election Code, including a School Board member position nor be a candidate for an elected office other than the position of a Board of Election Supervisor. Winners at the Primary Election shall consist of candidates receiving the four (4) or two (2) highest votes from the District(s) within an Agency. These four or two top candidates shall be placed on the General Election Ballot for Agency election. The two or one candidate(s) receiving highest votes shall be the winner(s) and shall represent the Agency on the Board of Election Supervisors.

C. The Chairman of the Navajo Board of Election Supervisors shall be selected by the Board from among the members of the Board.

D. The Officers will be selected by members of the Board.

Source. Tribal Council Res. CHY-60-66, Art. I, Section 6B, passed May 16, 1966. Tribal Council Res. CHY-42-78, passed May 16, 1978. Tribal Council Res. CAP 41-82, Section 5, passed April 28, 1982. Tribal Council Res. CAU-38-84, Section 1, passed August 8, 1984.

1984 Amendment. Amended generally.

1982 Amendment. Substituted "15" for "10" preceding "members" in the first sentence and substituted "commission" for "Board" wherever it appeared.

1978 Amendment. Raised membership from 5 to 10, two members to be selected from each agency, and added provision relative to nominations.

Section 324. Qualifications.

A. Board Members shall not have been convicted of a felony or any misdemeanor involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Tribal funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in government or Election Laws.

B. Must not be biased and shall be in a position to initiate nonpartisan measures to urge and facilitate each person's right to vote for his choice of candidate.

C. Must be thirty (30) years of age.

D. Must be a registered voter.

E. Must be able to understand and speak Navajo and English and write the English language.

F. Must be aware of the Navajo Nation Government.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 68, passed May 16, 1966.

Section 325. Term of Office

A. The terms of office of the members of the Navajo Board of Election Supervisors shall be for four years from date of installation. Elected Board members shall be entitled to take office ten days after certification of the election.

B. The Board members shall serve until their terms expire, they resign, or are removed. The terms shall be staggered consistent with term expiration periods in 1990 and 1992.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 6 C, passed May 16, 1966. Tribal Council Res. CAU-38-84, Section 2, passed August 8, 1984.

1984 Amendment. Amended generally.

Section 326. Vacancies.

Vacancies occurring in the Board of Election Supervisors shall be filled in accordance with Section 161-180, Special Elections. The person elected to fill any such vacancy shall serve until the normal expiration date of the term of his

predecessor.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 60, passed May 16, 1966.

Section 327. Removal.

Members of the Board of Election Supervisors may be removed from office only in accordance with Section 241 et seq., except where a board member has accumulated four (4) consecutive unexcused absences, in which case, the Board may request his resignation or recommend his removal in accordance with Section 241.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 65, passed May 16, 1966.

Section 328. Registrars, poll clerks, poll judges.

A. The Board of Election Supervisors, acting upon the recommendation of the Chapter organization, shall appoint such registrars, poll clerks, and poll judges to conduct elections at the various chapter.

1. There shall be one poll clerk at each poll who shall receive a \$65 per day stipend during elections and \$40.00 per day for training sessions.
2. There shall be two poll judges at each poll, one of whom shall be designated as the chief judge. Each poll judge shall receive \$65.00 per day stipend during elections and \$40.00 per day for training sessions.

B. No person whose spouse, parent, child, brother, sister or grandparent is a candidate on the ballot shall serve as poll clerk or poll judge within that precinct or chapter. At the discretion of the Board, a poll clerk or poll judge may be disqualified or transferred to another precinct to avoid any disputes.

C. A Chapter's recommendation for appointment of poll judges and poll clerks must be in the office of the Board of Election Supervisors at least 30 days before a general or chapter election.

Source. Tribal Council Res. CMY-60-66, Art. I, Section 7, passed May 16, 1966.

Section 329-340 - Reserved.

Subchapter 18. - Reserved (Section 341-360)

Subchapter 19. Penal Provisions (Section 361-380)

Section 361. Bribery of electors

It is unlawful to give or promise any money or other thing of value to any person for the purpose of influencing said person to vote or refrain from voting at any Navajo Nation election; or to vote for any particular candidate at such election; or to give, cause to give, or promise to be given, any money or other thing of value to any person with intent that any part of said money or thing of value shall be used for bribery in connection with any Navajo Nation election; or to knowingly give or cause to be given, any money to any person as reimbursement for money or other things of value expended by such person in whole or in part for bribery at any Navajo Nation election; provided, however, that it shall not be unlawful for any candidate personally or by agent to provide transportation to the polls to any voter.

Source. Tribal Council Res. CMY-60-66, Art. VI, Section 1, passed May 16, 1966.

Section 362. Coercion of elector.

It is unlawful to make use of force, or to request another person to use or threaten force, in order to influence any person's vote in any Navajo Nation election, or to prevent any person from voting in any Navajo Nation election.

Source. Tribal Council Res. CMY-60-66, Art. VI, Section 2, passed May 16, 1966.

Section 363. Intimidation of Navajo employees by employer

A. It is unlawful for any employer to threaten a Navajo employee with dismissal from employment, reduction of pay, loss of seniority, transfer, or less favorable working conditions, for the purpose of influencing such employee to vote or to refrain from voting or to vote for any particular person, in any Navajo Nation election.

B. It is unlawful for any employer to attempt by any means whatever upon his place of business to influence the vote of any Navajo employee beyond the employer's personnel policies.

C. It is unlawful for any employer to attempt to prohibit, limit or restrict the political activities of any Navajo employee beyond the employer's personnel policies.

D. As used in this section, the term "employer" means any

natural person, association of natural persons, Navajo Nation enterprise, independent contractor, corporation, or other entity, employing one or more members of the Navajo Tribe or engaging their services under contract, and any person acting as agent for such person, association of persons, Navajo Nation enterprise, corporation, or other entity.

E. No Tribal employee shall utilize Tribal work time, tribal funds, tribal property and other tribal employees for campaign purposes. A person running for any elected office shall do so on his own time. Violation shall warrant an investigation and appropriate action.

Source. Tribal Council Res. CMY-60-66, Art. VI, Section 3, passed May 16, 1966.

Section 364. Interference with or corruption of election officer

It is unlawful for any person to offer to give a bribe to the Chairman or any member of the Board of Election Supervisors of the Navajo Nation or to any registrar appointed by the Board of Election Supervisors of the Navajo Nation or any poll judge or any poll clerk or Special Election Supervisor; or to influence or attempt to influence any of said officers in the performance of their official duties by means of force, or threats, or promises of any nature.

Source. Tribal Council Res. CMY-60-66, Art. VI, Section 4, passed May 16, 1966.

Section 365. Violation of duty by election officers.

It is unlawful for any Chairman or members of the Navajo Board of Election Supervisors, any registrar appointed by the Board of Election Supervisors or any poll judge or poll clerk or Special Election Supervisors to knowingly and willfully fail or neglect to perform any duty under any part of this chapter in the manner prescribed by this chapter or to accept any money or other thing of value from any candidate or from anyone acting or purporting to act on behalf of any candidate.

Source. Tribal Council Res. CMY-60-66, Art. VI, Section 5, passed May 16, 1966.

Section 366. Illegal registration or voting.

It is unlawful for any person knowing he does not possess the qualifications for eligibility to vote in Navajo Nation election, to register or attempt to register to vote in such Navajo Nation election, or to vote in such election; or for any person who is not registered as a voter of the Navajo Nation to

vote or attempt to vote in any Navajo Nation election; or for any registered voter to vote in any precinct except the one he is registered as belonging to.

Source. Tribal Council Res. CMY-60-66, Art. VI, Section 6, passed May 16, 1966.

Section 367. Penalties.

A. Any Navajo or non-Navajo Indian married to a Navajo who shall violate any section of this subchapter shall be guilty of a misdemeanor as an offense against the Navajo Nation and upon conviction; hereof shall be sentenced to imprisonment for not more than six months or to a fine of not more than \$1,200, or to both such imprisonment and fine.

B. Any non-Navajo who shall violate any section of this subchapter may be fined or expelled from Tribal land by the Governmental Services Committee according to the procedure set by 17 NTC Section 1901 as amended, provided, however, that if any person who is charged with an offense under this subchapter on the ground that he is not a Navajo Indian, the Court shall receive any evidence offered on behalf of the Nation that such person has registered to vote or has voted in a Navajo Nation election, and if the Court finds that such person has so registered or has voted, he shall be conclusively presumed to be a Navajo Indian, and the Court shall have jurisdiction to try his case and to execute its sentence upon him.

C. Any association, corporation, or other entity which shall violate any section of this subchapter shall be ordered to show cause before the Economic Development Committee and the Community Development Committee why it should not be barred from receiving any lease, right-of-way, contract, franchise, or concession of any character whatsoever thereafter from the Navajo Nation. If, upon, hearing of such order to show cause, it appears to the Economic Development Committee and the Community Development Committee that the said corporation is guilty of violating such section, said association, corporation or other entity shall be barred for a period of not less than one year nor more than five years from receiving any lease, right-of-way, contract, franchise, or concession of any character whatsoever from the Navajo Nation.

Source. Tribal Council Res. CMY-60-66, Art. VI, Section 7, passed May 16, 1966.

Federal law. See note under 11 NTC Section 176.

Cross references. Other offenses and penalties, see Section 171 et seq. of this title.

Section 368. Severability

If any provision of this Code or any rule or regulation adopted hereunder or the application thereof to any person or circumstance is held invalid, the remainder of this act and of the rules and regulations adopted hereunder or the application of such provision to other persons or circumstances shall not be affected thereby.

Section 369. Effective date.

The effective date of the Code shall be immediately upon approval of the Code by the Navajo Nation Council unless specific effective dates are set out in specific provisions of the Code.

Section 370-380 - Reserved

**TITLE ELEVEN
ELECTIONS**

Part 2. Navajo Nation Elections

SUBCHAPTER 1 - Referendum

Section 1.

The referendum procedure which is provided for herein shall apply to matters which are strictly legislative and shall not include matters administrative or executive. Laws preserving peace, public health or safety and any laws determined and declared by the Navajo Nation Council to be of emergency nature shall be excluded from the referendum process. Yearly appropriations for a fiscal year budget shall also be exempt from the referendum process.

Use of Trust Funds, issuance of bonds, acquisition of property, acquisition of public utilities, the granting, extension, or enlargement of public utility franchise and rate regulation, tax measures against the Navajo Public for support of the government and public institutions, and ordinances or comprehensive plans for zoning shall not be exempted from the referendum process.

Section 2.

General

- A. Referendum measures may be referred to the people by the Navajo Nation Council where the Council determines the people should decide the referendum measure by resolution.
- B. Referendum measures may be referred by a Chapter Resolution to the registered voters of the Chapter within that Chapter Area. Such measure must effect that Chapter only.
- C. Referendum measures may be placed on ballot pursuant to petitions by the registered voters.
 1. The general public may petition to place a referendum measure on a ballot at a general or special election.
 2. Registered voters of a chapter may petition to place a chapter referendum measure on a ballot at a chapter

election or a special chapter election called specifically for an election on the measure.

3. Where a referendum measure is requested pursuant to Subsection A and B above, petition filing and circulation shall be in compliance with Section 3.

D. A referendum measure cannot be legally adopted except in conformity with the requirements of the Election Code set herein.

Section 3.

Referendum measures referred by the Navajo Nation Council and Chapters.

A. The Navajo Nation Council shall refer a measure for public vote by resolution. The resolution shall place timelines for the election which shall be no sooner than 30 days and not later than 60 days from the date of the passage of the resolution referring the enactment. The resolution shall provide the language to be placed on the ballot. Where the language is not clear, the Board of Election Supervisors shall amend the language for clarification purposes only. The Board shall also review the measure to ensure that the measure is not exempt pursuant to Section 1. The Council shall direct funding be identified and made available to conduct an election.

B. A chapter may by resolution refer a measure for vote of registered voters within the chapter(s) which fall within the scope of the measure. The resolution shall place timelines on the election of the measure to be no sooner than 30 days and no later than 60 days from the date of the passage of the resolution referring the enactment. The resolution shall provide the language to be placed on the ballot. Where the language is not clear, the Board of Election Supervisors shall amend the language for clarification only. The Board shall also review the measure to ensure that it is not exempt pursuant to Section 1. The chapter shall make funding available to conduct an election.

C. Where a resolution refers to a future

referendum election based upon a specific event, the Navajo Nation Council shall upon a foreseen or planned event refer the measure by resolution.

Section 4.

Referendum measures not referred by the Navajo Nation Council and the Chapters.

- A. Registered voters may petition to place a referendum measure on a Navajo Nation general or special election ballot where the scope of the referendum affects the entire Navajo Nation and is not limited to a chapter or chapters. Registered voters may petition to place a referendum measure on a chapter or special chapter election ballot where the measure's scope is limited to chapter or chapters.
- B. Petition requirements are as follows:
 1. Any qualified voter may petition for an election on a referendum measure consistent with provisions herein.
 2. A Petition Committee shall designate itself to draft, circulate, and file the petition. Only this committee shall have the power to withdraw the petition.
 3. A copy of the petition shall be filed with the Election Administration Office before it is circulated for signatures.
 4. This filed copy shall be verified by the petitioners that the language is the form of language to be used in the petitions thereafter circulated and the Election Administration shall review the scope of the measure to determine whether it is exempt from the referendum process.
 5. Before the petition is circulated for signatures, the Election Administration shall review the petition for sufficiency. Petitions shall be found sufficient where:
 - a. Each petition page has the title of the measure and a summary of the

- nature and purpose of the measure proposed.
- b. The petition has attached the full text of the measure proposed so signers may read the contents. The Election Administration shall notify the filing party that each petition circulated for signature shall have said attachment.
 - c. Each petition page is numbered.
 - d. Each page of the petition state a warning clause "liability may be incurred by unauthorized signing."
 - e. Each petition must require of the signer, name (in printed form), Chapter, census number, social security number, and date.
6. Each proposed measure must be submitted to the voters as an individual proposal and two or more proposals may not be joined in the same petition. A single referendum petition shall not be filed addressing two or more separate and distinct laws.
 7. The filing parties shall be informed that, for verification purposes, petitions must be kept separate according to the five agencies when the referendum measure is to be addressed to the whole Navajo Nation.
 8. The Election Administration Office shall inform the filing parties of requirements set forth above.
 9. The circulators upon obtaining signatures shall verify by making an oath and subscribing on each page that the signature, mark, or thumbprint obtained are the genuine signature, mark or thumbprint of the person whose name it purports to be and that he in fact has witnessed the execution of all the signatures on the page of the petition.

10. Those who cannot write their names shall place their mark or thumbprint in the appropriate place and it shall be signed by a witness who shall sign name, chapter and census number.
11. Thirty percent of qualified voters shall have signed the petition for a referendum measure to be placed on a ballot.
12. Filing
 - a. Petitions for the referendum measures to be voted upon shall be filed no later than 60 days before the scheduled election. Filing shall be at the Election Administration Office.
 - b. Where the petition is in response to an enactment by the Navajo Nation Council, petitions shall be filed no sooner than 30 days after enactment and no later than 60 days before the election.
 - c. Once the petition is filed with the Election Office, it may not be removed or withdrawn for the purpose of adding or changing information. Petitions removed after filing with the Election Office shall be rejected.

13. Verification; certification of sufficiency

- a. When a petition is filed, the Election Administration Office shall stamp it indicating its receipt, time and a date of receipt, name of person who filed it, names of Petition Committee members and name of official who received it. Once filed and stamped, language and content shall not be changed.
- b. The Election Administration staff shall examine, verify and certify the petitions as sufficient before

ordering an election. Petitions shall be examined to determine sufficiency as to:

- i. Name
- ii. Address
- iii. Chapter
- iv. Census number
- v. Social security number
- vi. Registration of voters
- vii. Authenticity of signatures
- viii. Witnessing of marks and thumbprints
- ix. Whether the requisite number of qualified electors signed the petition pursuant to Section 4.

c. If, within 10 days after the filing, the petition is determined insufficient, the examining officer shall set forth reasons for insufficiencies. The Navajo Board of Election Supervisors will immediately review the finding and if it is determined by the Board the petition is insufficient, the petitioning parties will be notified by letter within 5 days of the determination. A hearing shall be granted to determine the validity or sufficiency only if the petitioning parties request a hearing in writing within ten (10) days of the Board's determination. The Board of Election Supervisors shall set a hearing date to take place within a reasonable time.

d. Upon receipt of a request for hearing and upon a scheduling of a hearing date, all parties shall be notified.

e. The Navajo Board of Election Supervisors shall have the authority to call witnesses and inquire into the facts to determine authenticity of signatures. Power to call a witness shall include power to subpoena.

f. Notice of Appeal by either party may be made to the Supreme Court within 10 days. Review by the Supreme Court is limited to whether or not the decision of the Board is sustained by sufficient evidence on the record.

14. Petitions determined valid and sufficient; objections and protests.

a. Once filed, the Board of Election Supervisors shall hold the petition for 10 days. If no objections or protests are made within these 10 days, the Board shall certify the petition as sufficient.

b. Objections or protests against a petition determined valid and sufficient are allowed under the following conditions:

i. The protesting or objecting party or parties must be registered voters.

ii. Protests and objections must address only the validity and sufficiency of the petitions.

iii. Protesting or objecting parties who question the content of the measure, or merely believe measure to be unwise or difficult to execute, shall not be allowed a hearing.

iv. The protest shall be verified.

v. The protest shall be filed within 10 days of Board's determination. A hearing

shall be requested by the protesting party.

vi. Notices shall be given to all parties involved immediately by parties objecting or protesting parties.

vii. Notice of Appeal by either party may be made to the Supreme Court within 10 days. Review is limited to whether or not the decision of the Board is sustained by sufficient evidence on the record.

c. Upon final certification of a petition, the election shall be called by the Board of Election Supervisors.

Section 5. Notice by publication of election of a referendum measure

A. Once an election is set for a referendum measure, notice shall be published by the Board.

B. The notice shall contain a statement concerning the proposed measure.

C. Notice is sufficient if published at least once for two successive weeks in a newspaper of reservation wide distribution. The Board may provide other notice as appropriate.

Section 6. Vote required

A. The measure shall pass if a majority of all qualified voters vote for the proposed measure. Qualified voters within this section are not limited to qualified voters who voted in the last election.

B. A resolution or enactment may specifically states the referendum must be passed by a majority or otherwise.

Section 7. Ballots; explanatory materials

The Navajo Board of Election Supervisors shall

prepare the title and summary of each proposed referendum measure as follows:

- A. The title of the referendum measure to be voted upon shall be the same as the title referred by the Navajo Nation Council or Chapter or the title in the petition signed by the electors pursuant to Sections 4, B (4), and B (5) (a).
- B. A Summary or description of the proposed referendum shall follow the title which shall include a true and impartial statement of the purpose of the measure.
- C. Dispute of a title or summary may be determined by judicial review. Where found insufficient, a satisfactory title or summary may be prepared by the Courts. Review is limited to the decision of whether or not the Board is sustained by sufficient evidence on the record.
- D. A complete text of the proposed measure shall be included by the Navajo Board of Election Supervisors if so required.

Section 8.

Conduct of Elections

- A. Polling place supervision; appeal by persons not allowed to vote.
 1. Before the date of an election, the Chairman of the Board shall call in all chief poll judges for necessary instructions, swearing in, and transport of ballot boxes and voting machines to the polling places for each election community.
 2. The poll judges shall guard the polls, maintain order, and instruct voters in the techniques of balloting. The poll clerks shall enter each voter in the poll books and issue ballots.
 3. One of the poll judges for each polling place shall be designated by the Board as the chief poll judge for his polling place, and it shall be his duty and responsibility to keep custody of and account for all ballots, the ballot box,

and the poll books and he shall supervise and have supervisory authority over the other judges and poll clerks in guarding the polls, maintaining order and instructing voters.

4. A voter must vote at the polling place where he is registered to vote.
5. Any person who is not allowed to vote may appeal to the Board immediately, whose decision shall be final.
6. There shall be a member of the Navajo Nation Police present at each polling place during voting hours.

B. Voting shall begin at 8:00 a.m. and shall end at 7:00 p.m. All voters present at the poll places and in line to vote at 7:00 p.m., will be allowed to vote.

C. Counting of votes.

At the close of the election, the election judges at each polling place shall tabulate the results of the balloting, seal and lock the ballots, poll books and keys in the ballot boxes, and transmit the results of the balloting to the Election Administration at Window Rock by telephone or radio communication. A poll watcher will be allowed at all times during the balloting and during the counting of the votes.

D. Canvass of votes; recount

1. Sealed ballot boxes containing all of the ballots cast in the election, all unused or spoiled ballots, data packs, keys, a written statement of the election results on a form provided by the Board and certified by the poll judges at each polling place, and the list of registered voters shall be forwarded to the Election Administration at Window Rock, by the chief poll judge.
2. The Board shall canvass the written statements of election results from each polling place and shall then total the election results.

3. No recount of the ballots of any polling place shall be made unless within 10 days after the election, a registered voter who voted on the referendum objects and the Board sees sufficient reason to recount the election results. The Board may, on its own initiative, conduct a recount of the votes of any polling place if it is believed that there may have been substantial irregularity in the voting or counting of the ballots. The Board may use the chief poll judge to assist in canvassing and recounting ballots.

E. Certification of election.

Not less than 10 days following an election, the Board shall certify the election results.

F. Appeal of disputed Elections.

1. A disputed election shall be appealed in writing within 10 calendar days following the election to the Board by a qualified voter who voted in the referendum election.
2. The Board shall issue rules and regulations for the determination of any such disputes shall be handled, and shall, pursuant to such rules and regulations, issue a decision upholding or vacating the disputed election.
3. A decision of the Board sustaining or vacating a disputed election may be appealed within 10 calendar days to the Supreme Court of the Navajo Nation. The scope of review is limited to whether the Board's decision is sustained by sufficient evidence on the record.

TITLE TWO

Subchapter 1. Generally

Section 4001. Certification of Chapters

A. There shall be certified at least one Chapter organization in each precinct which elects a delegate to the Navajo Nation Council. The list of such certified Chapters is set out at 11 NTC Section 10.

B. Until increased by certification by the Navajo Nation Council, the number of certified chapters shall not exceed 109.

C. Additional Chapters may be certified only if all of the following are met:

1. Upon presentation of evidence to the Navajo Nation Council that the Chapter represents a community group which has existed and functioned as a community for four years.
2. Upon presentation of evidence that the population of the area exceeds 1,000 persons for each of the existing Chapters and that there is a need to establish others.
3. Upon presentation of evidence that the topography or the unique demography of the Chapter area makes it necessary to have more than one Chapter to allow residents access to Chapter meetings.

Section 4002. Authority to make local chapter ordinances

Certified chapters may enact local ordinances on any matter affecting the community. All such ordinances shall be submitted to the Community Development Committee and to the Navajo Nation Council for approval. All chapter ordinances shall be in writing and filed with the Central Records Department of the Navajo Nation.

Section 4003. Repealed. Tribal Council Res. CMY-23-79, Section 2, passed May 3, 1979.

Section 4004. Officers - Designation and term.

Each certified chapter shall have an elected President, Vice President and Secretary-Treasurer, and, where provisions of the Navajo Nation Council so direct, a Land Board Member, Farm Board Member and/or District Grazing Committee member.

PARALLEL TABLES

Former Law

New Code

11 Section 1	11 Section 1
	Repeals Section 1 (A)
11 Section 2	11 Section 2
11 Section 3	11 Section 3
11 Section 4	11 Section 6
11 Section 5	11 Section 7
11 Section 6	11 Section 8
11 Section 7	11 Section 21
11 Section 8	11 Section 281 (Subchapter 15)
11 Section 9	11 Section 282 (Subchapter 15)
11 Section 10	11 Section 283 (Subchapter 15)
11 Section 11	Repealed in entirety (see Subchapter 2)
	11 Section 3, Section 41, Section 22
	Repealed - see 11 Section 41, Section 35,
	Section 4
11 Section 12	11 Section 41
11 Section 13	11 Section 43
11 Section 14	Repealed by CJN-49-78
11 Section 15	11 Section 5
11 Section 16	11 Section 9
11 Section 17	11 Section 10
	 Subchapter 2
	11 Section 21
	11 Section 22
	11 Section 23
	11 Section 24
	11 Section 25
	11 Section 26
	11 Section 27
	11 Section 28
	11 Section 29
	 Subchapter 3
	11 Section 41
	11 Section 42
	11 Section 43
	 Subchapter 5
11 Section 18	11 Section 81
11 Section 19	11 Section 82
11 Section 20	11 Section 83
11 Section 21	11 Section 84
11 Section 22	11 Section 85
	11 Section 86

11 Section 87

Subchapter 3 Subchapter 17

11 Section 51
11 Section 52
11 Section 53
11 Section 54
11 Section 55
11 Section 56
11 Section 57
11 Section 58

11 Section 321 (revised)
11 Section 322 (revised)
11 Section 323
11 Section 324
11 Section 325
11 Section 326
11 Section 327
11 Section 328

Subchapter 5

11 Section 91
11 Section 92
11 Section 93
11 Section 94
11 Section 95
11 Section 96
11 Section 97

Subchapter 7

11 Section 121
11 Section 122
11 Section 123
11 Section 124
11 Section 125
11 Section 126
11 Section 127

Subchapter 7

11 Section 131
11 Section 132
11 Section 133
11 Section 134
11 Section 135
11 Section 136
11 Section 137
11 Section 138

Subchapter 9

11 Section 161
11 Section 162
11 Section 163
Repealed
Repealed; see 11 Section 5
Repealed; see 11 Section 82
11 Section 164
11 Section 165
11 Section 166

Subchapter 9

11 Section 171
11 Section 172
11 Section 173
11 Section 174
11 Section 175
11 Section 176
11 Section 177
11 Section 178
11 Section 179

Subchapter 11

11 Section 201
11 Section 202
11 Section 203
11 Section 204
11 Section 205
11 Section 206
11 Section 207
11 Section 208
11 Section 209

Subchapter 11

11 Section 211
11 Section 212

Subchapter 13

11 Section 240
11 Section 241 (A)

	11 Section 241
	11 Section 242
	11 Section 243
	11 Section 244
	11 Section 245
	11 Section 246
11 Section 213	11 Section 247
11 Section 214	Repealed

Subchapter 13

11 Section 241
 11 Section 242
 11 Section 243
 11 Section 244
 11 Section 245
 11 Section 246
 11 Section 247

Subchapter 19

11 Section 361
 11 Section 362
 11 Section 363
 11 Section 364
 11 Section 365
 11 Section 366
 11 Section 367
 11 Section 368
 11 Section 369

Chapter 3

11 Section 401	Repealed; see 11 Section 3
11 Section 402	Repealed; see 11 Section 8
11 Section 403	Repealed; see 11 Section 21 et seq.
11 Section 404	Repealed; see 11 Section 282
11 Section 405	Repealed; see 11 Section 282, Section 5, Section 81, Section 82
11 Section 406	Repealed; see 11 Section 81
11 Section 407	Repealed; see 11 Section 86
11 Section 408	Repealed; see 11 Section 85

TITLE TWO

Subchapter 1. Generally

2 Section 4001 (d)	Repealed, see 11 Section 10
2 Section 4002	2 Section 4002
2 Section 4003	Repealed by CMY-23-79
2 Section 4004 (b)	
and (c)	Repealed; see 11 Section 6
2 Section 4005	Repealed; see 11 Section 241 et seq.
2 Section 4006	Repealed; see 11 Section 161 et seq. and 11 Section 241 et seq.
2 Section 4007	Superseded by ACS-115-80 and codified as 2 Section 4009 et seq.
2 Section 4008	Superseded by ACS-115-80 and codified as 2 Section 4009 et seq.
2 Section 4009	2 Section 4009
2 Section 102	Repealed; see 11 Section 8
2 Section 105	Repealed; see 11 Section 241 et seq.

Subchapter 7

2 Section 281
2 Section 282
2 Section 283

Repealed; see 11 Section 8
Repealed; see 11 Section 8
Repealed; see 11 Section 8

EXHIBIT B

The Navajo Board of Election Supervisors recommends the passage of the Revised Code as proposed to be effective immediately except for the following, which shall become effective immediately after the General Election, 1990:

1. Title 11, Section 8, A, 1 and Section 8, B, 10, and 11, Eligibility Requirement, Title 2, Section 104, b; Qualification.

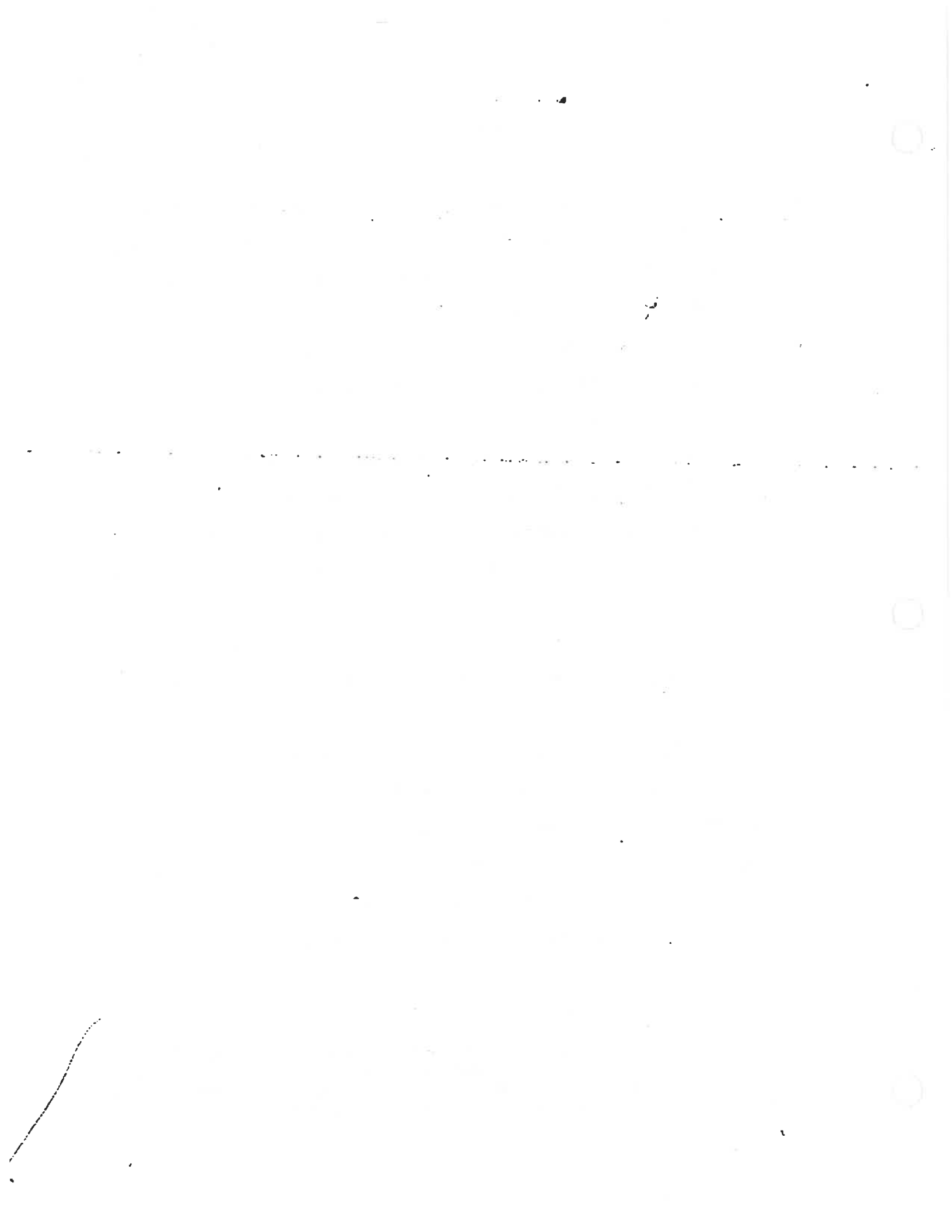
Permanent Residence, Continuing Physical Presence Requirement for President, Vice President and Council Delegate. Title 2 requires continual and physical presence for three years for the President and Vice President only.

2. Title 2, Section 104, b; Title 2 requirement that Council Delegate Candidates not be employed by the state or federal government.

3. Title 11, Sections 21 - 24; Filing Petition for President and Council Delegate.

See Attachment for discussion. The November 7, 1990 effective date of the above provisions will not preclude any elected officials from serving the term. The above provisions however will apply to filling vacancies after the General Election, 1990.

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1. Item 2 is outside the Election Code and the Navajo Nation Council may need to reassess its effect. This item is part of the Title 2 Amendments passed by the Navajo Nation Council in Resolution CD-68-89.



**RECOMMENDATIONS
TO THE
NAVAJO TRIBAL COUNCIL**

On August 3, 1988, the Election Code Revision was presented to you by the Election Administrative Office and at that time with a vote of 66 in favor, 5 opposing, and 0 abstaining, you tabled the revision. Since that time, the Code has been undergoing scrutiny by the Board and today we are presenting our product.

The cycle for this revision should have begun on February 8, 1990. We are running approximately a month behind in its implementation, should it pass. However, being one month behind in its implementation does not necessarily mean it be turned down completely. The majority of the sections consist of provisions which are needed to orderly conduct elections. With this, the Navajo Board of Election Supervisors is making recommendations regarding the passage of this Code.

The Code sets out procedures for conducting elections. Most of these procedures are left unchanged. Most of the changes in these area are language changes for clarification purposes. Below are discussed major changes some of which would have controversial effect if these changes are approved now.

I. Eligibility

A. Continually Physically Present and Permanent Residency

Major changes include requirement of the President and Council Delegates to have permanent residence and continually physically presence within the Navajo Nation, as defined in 7 NTC section 254 for at least three years. It is not the intent of the Navajo Board of Election Supervisors to place restrictions on who can run so as to eliminate large numbers of potential candidates. The eligibility criteria in the Election Code are to ensure the public that the candidates for the highest office of the Navajo Nation meet certain requirements guaranteeing they are familiar with and have interests in the concerns of the Navajo public in the Navajo Country. The goal of the Navajo Board of Election Supervisors is twofold, first, to get as many candidates as possible to run and, second, to get as many voters as possible to vote. The Board finds the definition of "continually present" as presented to be in conflict with these goals. In order to be consistent with the goals of the Board, two alternatives deserve consideration. The first is that a less restrictive definition be inserted. The second is to make the requirement proposed by the Code

effective until the day after the 1990 General Election. If the latter occurs then does the current Code go back into effect insofar as the requirement being limited to permanent residence only and what would that mean?

The current Code or the old Code which was passed by the Navajo Tribal Council in Resolution CMY-60-66 on May 16, 1966 requires that the Chairman "be a permanent resident at least four (4) years prior to election on the Navajo Country or on land controlled by the Navajo Nation."

On June 23, 1986, the Department of Justice issued an opinion regarding the meaning of permanent residency. Several factors were reviewed since there was no statutory definition.

Permanent residence requirement as an eligibility criteria was limited in the old Code to the Chairman and Vice-Chairman. No such requirement exist for the Council Delegate position. The Justice Department in the June 23, 1986 opinion interpreted this difference to be evidence of a deliberate decision by the Council to require of the candidate for the Chairman position physical presence on Navajo Country for four years prior to running as a candidate.

Also to distinguish permanent residence from domicile, the opinion made reference to language in the Election Code interpreting that the use of the word permanent residence meant more than a mere maintenance of a permanent residence and that it meant that the candidate must be a permanent resident, actually living on Navajo Country for four years.

Furthermore, about a couple of months after the enactment of CMY-60-66, which requires permanent residence, the Council took action to allow by resolution two candidates who otherwise did not meet the actual physical presence requirement to run. By Resolution the Council waived its permanent residence requirement. Thus, "physical presence" without waiver meant that a candidate must have been physically present on Navajo Country four years prior to his candidacy. The opinion states, "There would have been no need for this action if the Council did not clearly intend an interpretation of actual physically presence".

Finally, the opinion stated the following:

Determination of candidates' Residence for Purpose of 11 NTC section 4, whether a candidate does meet the residency requirement is a factual determination to be made by the Board of Election Supervisor upon review of each candidates' application. The beginning point reference then, is that "permanent resident at least four years prior to election" includes physical presence on Navajo Country. However, this does not mean physical presence 100% of the time. More than mere ownership of a home or homesite lease on the reservation is required; actual physical presence at this residence during the majority of the four years prior to the election is required. The Board will have to examine each application and determine from the facts given whether the residency requirement is met."

Thus, prior to the revision, actual physical presence and permanent residence during "the majority of the four years" were required. So even if we were to go back to the old Code, although we eliminated continuous physically presence by making it effective until the day after the 1990 General Election, the Department of Justice's opinion makes it clear that four years of living on the Navajo Country is required "at least a majority of the time." Given this, the Board finds two alternatives.

1. The Council can waive any permanent physical presence residency requirement for the upcoming election only. This would include the permanent residency requirement in the old Code.
2. The Council replace the definition in the revised Code to read:

Permanent residence and continually physically present - Being actually physically present within the Navajo Nation or living on Navajo Country in a fixed and permanent home without any significant interruption. An extended absence from Navajo Country in the course of employment or pursuant of a trade or business or for such purposes as attending school and serving in the military service, is not significant interruption. Factors to be considered in making a determination are:

1. Does person have a house on Navajo Country?
2. Do person's children attend schools on Navajo Country?
3. Does person continue to vote in County and State elections on Navajo Country?
4. Person has not purchased house outside Navajo Country?
5. Does person attend Chapter meetings?
6. Does spouse continue to live or work on Navajo Country?
7. Did person obtain job on Navajo Country in summer or during breaks?
8. If person has business, is business address on Navajo Country?
9. Does person have a homesite lease on Navajo Country?
10. Does person's current driver's license have address on Navajo Country?

Person answering yes to five or more of the above would be considered as having permanent residency and continually physical presence.

The Board recommends alternative 1., making effective the day after the 1990 General Election of any requirement for permanent residency or continuous physical presence for the upcoming election only and the eventual adoption of alternative 2..

An automatic safeguard inherent in each and every voter is the acquaintance with and personal knowledge of those candidates who each voter will assess and in whom each voter shall place his trust, confidence and support. The Board believes this will occur whether the permanent residency requirement remains intact or whether it be made effective the day after the 1990 General Election.

B. Employment with State or Federal government

Another area of concern to the Navajo Board of Election

Supervisors is Section 8, B, 11 of the eligibility criterion of Council Delegates. If a person is thinking of running as a Council Delegate position, he must not be employed by the Federal or State government. Anyone employed by a public school, a state agency office or by the BIA or PHS cannot run as a candidate. To do so, he will be required to resign from his Federal or State job. This requirement derives from Title 2 and it should be addressed by the Council. The Board is pointing this out because it conflicts with the goals of the Board as it would eliminate as candidates persons employed by a state or federal agency. The Board recommends making the effective date the day after the 1990 General Election of the requirement for the upcoming election and later resolution of the conflict with Title 2 in order to allow those state and federal employees to run for office.

- C. Convictions of serious misdemeanor; misdemeanor involving crimes of dishonesty, deceit and untruthfulness; and Felony;

Finally, the eligibility requirement which the Board supports is the requirement that the candidate not have been convicted of a serious misdemeanor, misdemeanor involving crimes of dishonesty, deceit, or untruthfulness or any felony within the last five years. Any candidate must be honest, truthful and serve as a role model.

II. The Filing System or Petitions, Sections 21 - 24.

The Board believes this system to be a truly fair system. However, because the filing system utilizing nomination petitions require time to obtain needed signatures and already the Board has lost a month's period of this implementation process, the Board finds two alternatives.

- A. Cut back in required percentage in the collection of signatures. Currently, candidates for the President and Council Delegates positions must obtain 10% of signatures, which has a cut off date of January 31, 1990. If the Council believes there is not sufficient time to obtain 10% of the voter population, then the Board recommends a decrease in the percentage requirement of about 5% to 3% for this upcoming election only.

- B. Make effective until the day after the 1990 General Election subchapter 2, sections 21-24 and use current Code and where the Board finds it necessary, Rules and

Regulations be devised and implemented. The Board further recommends that if this section is made effective until the day after the 1990 General Election, then the filing fees be raised. The rationale being that serious Candidates would be willing to pay a higher filing fee. The Election Board finds this a sufficient alternative. Prior experience of the Board determines that there are high turn overs of people who run without putting out a lot of effort. Paying a filing fee would demonstrate that effort absent gathering of signatures. The Board therefore recommends that the filing fee be changed to \$125.00 for President and Vice-President, and \$100.00, for Council Delegates should the petitioning process be made effective until the day after the 1990 General Election.

The Board recommends making the effective date the day after the 1990 General Election of the Petitioning requirement for this election only.

III. Reapportionment:

The Navajo Tribal Council by Resolution, CMA-32-74 has determined that every ten (10) years, beginning May 1975, the Navajo Nation Council designate the number and location of precincts which are to be equal in population. The Navajo Board of Election Supervisors has the authority to recommend reapportionment.

The 1985 reapportionment occurred in 1986 and it took two (2) years to complete. The figures used were based on the BIA enrollment figures at the request of the Council. The rationale being that the BIA enrollment figure was the largest. The BIA enrollment figures are based upon Chapter populations. The other two data bases used were the 1980 census and the registered voters list. Those figures may not best represent the Chapter population for the following reasons:

- A. The 1980 Census figures counted people where they were at the time of counting. This means that where people who were otherwise included in the BIA enrollment in their Chapters and who were registered to vote in their chapters were included in areas other than their chapters such as the heavily populated areas away from the Chapter where they moved for work purposes only.
- B. The registered voters list only represents registered voters excluding those persons who are not registered and those who are below the voting age.

Reapportionment is a process which established voting precincts for equal representation, based upon the 1 man - 1 vote rule. A council delegate cannot be picked out from one precinct and placed in another without affecting other precincts. Thus, the law that reapportionment occur every ten (10) years must be adhered to. The precincts as listed in sections of the Election Code must therefore not be changed before the 1995 reapportionment.

The reapportionment process as it pertains to the Navajo Nation is a long process. The last process took two (2) years. The next reapportionment is due in 1995 and it will not be too early for the preparation process to begin. Since the next election for the President and Council Delegates take place in 1994, it is possible to have the 1995 reapportionment scheduled for 1995 completed early in time for the 1994 elections, but it would not be possible to complete reapportionment before then.

IV. The Board reviewed the entire Code in terms of the current timeline and the Board recommends that the following be passed and implemented immediately.

A. Title 11, Part 1, Section 1-8 (except Sections 2.G., 8.A.1., 8.B.10 and 8 B.11.)

Sections 9-12

Sections 25-28

Sections 41-42

Sections 81-124

Sections 125-128

Sections 161-166

Sections 201-209 (Board Review 205-208)

Sections 240-245

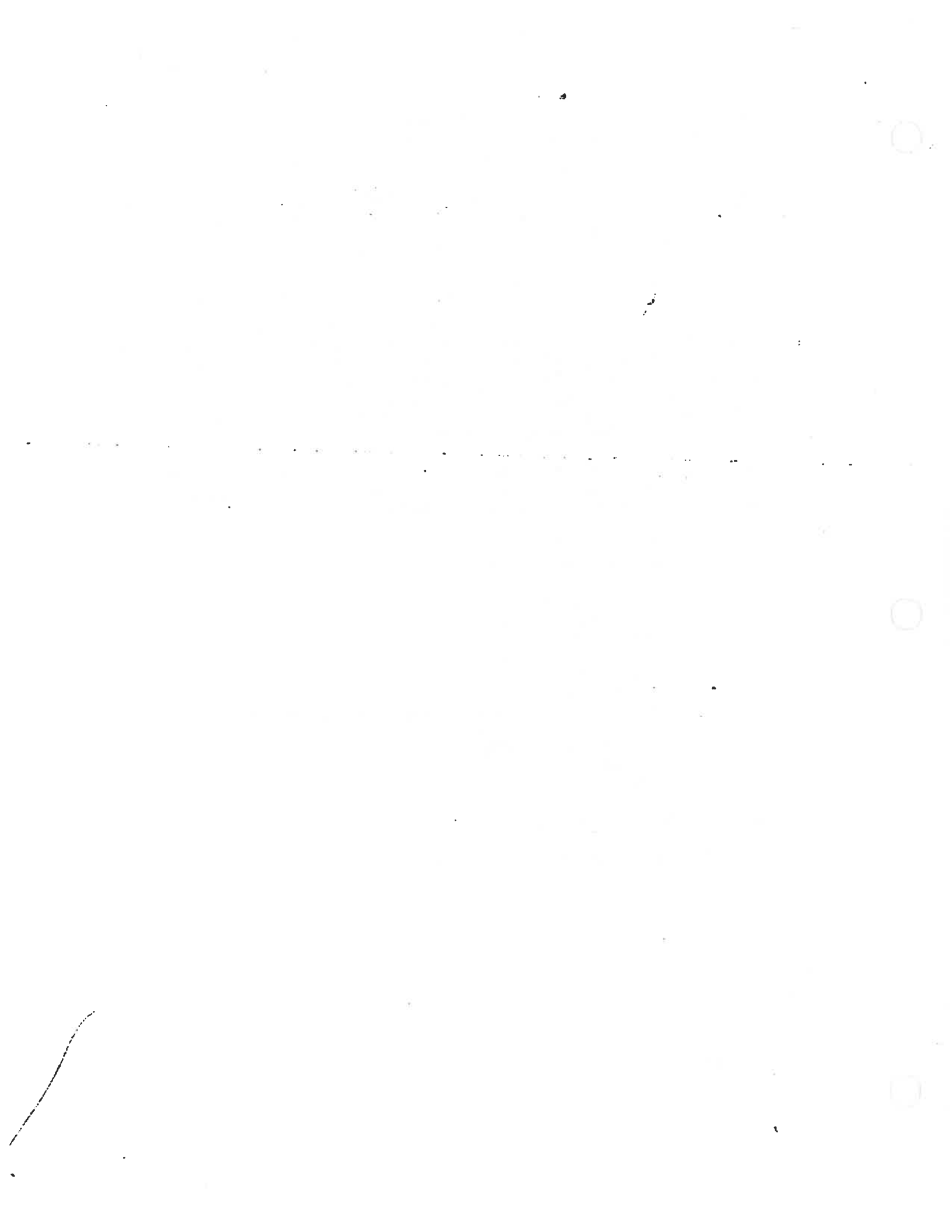
Sections 281-283

Sections 321-328

Sections 361-369

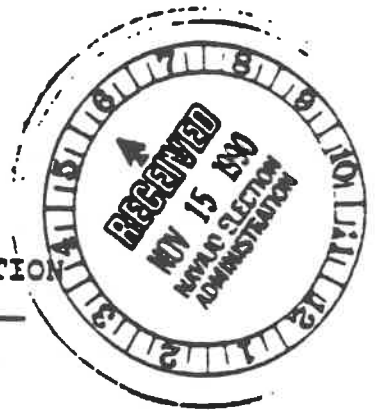
B. Title 11, Part 2, Section 1-8

C. Title 2, Sections 4001-4004



A-CV-48-90

SUPREME COURT OF THE NAVAJO NATION



The Navajo Nation, Petitioner/Appellant,

v.

Paul Redhouse, Chairman;
Members Navajo Board of Election Supervisors,
Respondents/Appellees.

OPINION

Before TSO, Chief Justice, BLUEHOUSE and AUSTIN, Associate Justices.

Appeal from the decision of the Navajo Board of Election Supervisors.

Herb Yazzie, Esq., Attorney General, for the Navajo Nation, Window Rock, Navajo Nation (Arizona); John A. Chapela, Esq., for Interveners, Window Rock, Navajo Nation (Arizona); Paul D. Barber, Esq., for the Navajo Board of Election Supervisors, Albuquerque, New Mexico.

Opinion delivered by BLUEHOUSE, Associate Justice.

In this case, the Navajo Nation appeals from a decision of the Navajo Board of Election Supervisors (Board) to prevent the Board from conducting elections for the Office of Navajo Nation Council Delegate on November 6, 1990, and elections for the Offices of President and Vice-President of the Navajo Nation on November 20, 1990.

I. FACTS

On October 23, 1990, the Navajo Nation Council (Council) passed Resolution CO-64-90. This resolution amended Title II of the Navajo Election Code to establish an order of succession for candidates to the Offices of President, Council Delegate, and Board members, Grazing Committee members, and School Board members. This resolution also amended a section in the Navajo Election Code, 11 N.T.C. § 3 (1990), by adding subsection E to section 3 as follows:

(E.) The Board of Election Supervisors is hereby authorized to postpone for a maximum of sixty (60) days any Navajo election for the purpose of printing new ballots required because of changed circumstances.

On October 24, 1990, the Board passed Resolution BOESO-030-90, which resolution provided that the Navajo Nation General Election for council delegates and president and vice-president was going to be held on November 6, 1990.

On October 30, 1990, the Council passed Resolution CO-80-90. By this resolution the Council postponed the 1990 Navajo Nation General Election for council delegates and president and vice-president to December 18, 1990, contrary to the Board's decision in Resolution BOESO-030-90. The Council further amended newly added subsection E as follows:

(E) The Board of Election Supervisors is hereby directed to postpone for a minimum of thirty (30) and a maximum of sixty (60) days any Navajo Election for the purpose of printing new ballots required because of changed circumstances. (Underlined language denotes new language.)

11 N.T.C. § 3 E. (1990).

On November 3, 1990, the Board passed Resolution BOESN-035-90. In this Resolution the Board decided to hold the General Election for Navajo Nation Council Delegates on November 6, 1990 and the General Election for Offices of President and Vice-President on November 20, 1990.

Resolution BOESN-035-90, setting election dates for November 6, 1990 and November 20, 1990, conflicts with the resolution passed by the Council postponing the election to December 18, 1990. The Attorney General noted these conflicts and the confusion the resolutions have created and, on November 5, 1990, appealed the Board's Resolution BOESN-035-90 to this Court.

This action was filed at 10:00 a.m. on November 5, 1990, and the Court accepted it, granting immediate priority under Rule 27, Navajo Rules of Civil Appellate Procedure. A hearing was conducted at 3:00 p.m., the afternoon of November 5, 1990, at which time the Navajo Nation appeared by Herb Yazzie, Esq., Attorney General, who submitted arguments. The Court permitted eleven individuals, candidates for the Offices of President, Vice-President, and Council Delegate, to appear as intervenors. They were represented by John Chapala, Esq., who argued on their behalf. The Board appeared by its chairman and members because its attorney, Paul D. Barber, Esq., of Albuquerque, New Mexico, was unable

to make a physical appearance due to the shortness of the notice. He waived a personal appearance and submitted a response by means of FAX transmission, which was accepted and considered by the Court.

The Court took the matter under advisement immediately following argument, and reconvened to deliver an oral judgment.

At the time of oral argument, the Attorney General, on behalf of the Navajo Nation; Mr. Chapela, on behalf of the eleven candidate intervenors; and the Chairman of the Board, on its behalf, stipulated that this matter should be considered as an appeal from a November 3, 1990 decision of the Board setting elections for Council Delegates on November 6, 1990 and elections for the Offices of President and Vice-President on November 20, 1990. Upon that stipulation, and the urging of the parties before the Court that it proceed to adjudicate the merits of the case, the Court entered its oral orders affirming the decision of the Board with respect to the elections.

This opinion makes the oral decision of the Court a matter of record.

II. JURISDICTION

As a preliminary matter, this Court has jurisdiction over this case under authority of its appellate jurisdiction. The parties stipulated before the Court at oral argument that the Court can accept this case as an appeal. As authority,

the parties agreed that the Navajo Nation can appeal a decision of the Board pursuant to 11 N.T.C. § 321(B)(4) (1990) and under authority vested in the Attorney General to represent the Navajo Nation in all appeals where the Navajo Nation is a party pursuant to 2 N.T.C. § 1964(f) (1990).

III. MERITS OF THE BOARD DECISION

The ultimate issue before the Court is whether the Navajo Board of Election Supervisors' decision in Resolution BOESN-035-90 is in accordance with established law.

A. Effect of Council Resolution CO-64-90.

The Board is an independent entity, responsible only to the Navajo Nation Council, pursuant to 2 N.T.C. § 871(a) (1989). It has the power to administer, implement and enforce the Navajo Election Code, and the power to oversee and supervise generally all tribal elections. 2 N.T.C. § 873(b)(1), (2). A vote of two-thirds of a quorum of the Navajo Nation Council is necessary to modify or change such powers. Navajo Nation Council Resolution CD-68-89, Res. Par. 6 (December 15, 1989). The Board carries out its powers and authority to conduct Navajo Nation elections pursuant to the Navajo Election Code of 1990, Title Eleven, Navajo Tribal Code.

On October 19, 1990, the Council enacted Resolution CO-64-90, which amended 11 N.T.C. § 3 by adding a new subsection E, giving the Board the authority to postpone elections where new ballots are required because of changed

circumstances. No arguments have been presented to show that this resolution is invalid. Thus, that resolution was a valid amendment to the Navajo Election Code.

Pursuant to such amendment, the Board considered the question of when to conduct elections for the Offices of Council Delegate, President, and Vice-President, taking into consideration grievances and protests filed by "at least" 53 individuals, as well as the ability of the Board and its Election Administration to conduct elections. The actions of the Board were consistent with the Election Code of 1990 and Board power under 2 N.T.C. § 873 (1989).

B. Effect of Council Resolution CO-80-90.

The Navajo Nation Council, in special session on October 30, 1990, adopted Resolution CO-80-90 which, among other things, fixed the date for elections for all open Navajo Nation public elective offices on December 18, 1990. The record shows, and the parties admit and stipulate, that the proposed resolution was not reviewed and signed by either the Controller or the Legislative Counsel to the Navajo Nation Council. It also was not reviewed and commented on by the Board.

2 N.T.C. § 164 (1989) provides that "no proposed resolution shall be considered" unless such persons review and sign the proposed resolution, and even when a proposed resolution not on the agenda is placed there by a two-thirds vote of a quorum of the Council, it requires the same review.

2 N.T.C. § 164 (5) (1990).

The statute, 2 N.T.C. § 164, contained in comprehensive 1989 amendments to Title 2 of the Navajo Tribal Code, which are intended to established the fundamental structure and operations of the Navajo Nation Government, is clearly mandatory rather than directive, and its procedures are a condition precedent to the enactment of valid legislation. The required procedure was not followed in the enactment of Council Resolution CO-80-90, and the same is void under the clear words and meaning of 2 N.T.C. § 164.

Given the validity of Navajo Nation Council Resolution CO-64-90 (October 19, 1990) and the invalidity of Navajo Nation Council Resolution CO-80-90 (October 30, 1990), *with a* the Board properly rendered its decision in Resolution BOESN-035-90 (November 3, 1990), in accordance with established law.

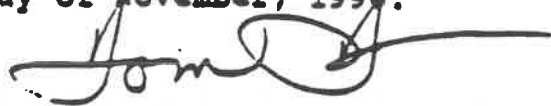
IV. DECISION

The decision of the Navajo Board of Election Supervisors in its Resolution BOESN-035-90 (November 3, 1990), with respect only to the fixing of November 6, 1990 elections for Navajo Nation Council Delegates and to the fixing of November 20, 1990 for the elections for Offices of President and Vice-President, is hereby AFFIRMED. The alternative petition for a writ of mandamus or for declaratory or injunctive relief is hereby DISMISSED.

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Filed this 14th day of November, 1999.



Chief Justice of the Navajo Nation

I hereby certify that this is a true and correct copy of the instrument on file in the Supreme Court of the Navajo Nation.


Clerk of the Supreme Court
Associate Justice
Associate Justice

TITLE FIVE

Commerce and Trade

CHAPTER	SECTION
2. Navajo Nation Business Preference Law	201
4. Navajo Private Industry Council	501

Cross References

Requirement that tribal agencies purchase materials, equipment and services from Navajo small businessmen when feasible, see 2 N.T.C. § 6.
State law. Commerce and trade, generally.
New Mexico—N.M.S.A. 1978 § 57-1-1 et seq.

Chapter 2. Navajo Nation Business Preference Law

NEW SECTION

201. Title ; legislative purpose and intent
202. Definitions
203. Jurisdiction and scope of coverage ; compliance requirements and violations
204. Required business and contracting preference priorities ; business certification, requirements
205. Navajo Business Preference procedure in bidding, procurement and negotiation
206. No waivers
207. Implementation and compliance with Navajo Nation Business Preference provisions ; specific duties and responsibilities
208. Certification of preference eligible entities
209. Monitoring and enforcement
210. Imposition of sanctions
211. Appeals
212. Other Tribal entities and associated agencies
213. Severability
214. Construction contract assessment fee
215. Effective date
216. Prior inconsistent law superseded
217. Deposit of fees and fines collected
218. Periodic review and amendments

Former Chapter 2. "Assistance to Navajo Small Businesses," former chapter 2 of Title 5, which included "Subchapter 1. Preference for Navajo-Owned Business Generally," [§§ 201-216], and "Subchapter 3. Preference for Navajo-Owned Small Business" [§ 251] was superseded by Tribal Council Res. CJY-59-85, passed July 30, 1985, enacting the Navajo Nation Business Preference Law.

§ 201. Title; legislative purpose and intent

(a) This chapter shall be known and cited as the Navajo Nation Business Preference Law; Title 5, Navajo Tribal Code, sections 201 through 218.

(b) The purpose of this chapter is to promote and support the attainment of:

- (1) Economic self-sufficiency of the Navajo Nation;
- (2) Establishment of a sound and productive local Navajo free enterprise system;
- (3) Provision of maximum employment opportunities for Navajo persons; and
- (4) Fair, reasonable, and efficient provision of quality goods and services for the benefit and needs of the Navajo people.

(c) It is the intent of this chapter to require that preference be given to qualified Navajo and other Indian-owned economic enterprises in the award of all contracts, subcontracts, grants, subgrants, general procurement contracts, and personal services contracts, including those which are let or administered by the Navajo Nation, its enterprises, Chapters, lessees, and permittees; and by all other persons, firms, enterprises, organizations and governmental or other entities conducting or in any manner participating in any business, commercial, industrial or other general, as distinguished from individual private economic activity within or otherwise subject to the jurisdiction of the Navajo Nation.

(d) The provisions of this chapter shall be observed and implemented by all contracting and procuring entities subject hereto, as an affirmative action law of the Navajo Nation, according to its purposes and provisions, together with other properly applicable laws of the Navajo Nation and of the United States and other competent jurisdictions recognized by the Navajo Nation as appropriate in each instance. This shall include the affirmative obligation of every contracting and procuring entity subject hereto to provide prior notice of accurate contract and procurement specifications and required qualifications; and to make prior determinations of maximum feasible cost or price, based upon applicable prototype estimate and current market conditions.

(e) In all instances hereunder, the Navajo Tribe reserves the right to determine the nature, composition and qualification of any and all entities, organizations, firms or associations applying for certification as eligible for Navajo Business Preference; and to require such proof as it deems necessary to substantiate that any such entity, organization, firm or association is actually Navajo or other Indian-owned and controlled and otherwise in compliance with the requirements of this law.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 1, passed July 30, 1985.

§ 202. Definitions

For all purposes as used in this chapter, the following definitions shall be applicable:

(1) "Navajo Indian" or "Navajo" is defined as a person who is an enrolled member of the Navajo Tribe.

(2) "Other Indian" is defined as an Indian other than Navajo who is an enrolled member of a federally recognized Indian Tribe within the United States.

(3) "Qualified Economic Entity, Firm or Organization" is defined to include all lawful business enterprises organized and operated for profit, recognized by and under the jurisdiction, laws and regulations of the Navajo Nation, whether by a designated individual or associates and whether an incorporated or an unincorporated entity. Definition of more common forms of business activities and organizations for purposes of this chapter is not intended to exclude other lawfully organized and recognized forms of business enterprise which otherwise comply with the requirements of this chapter for eligibility for Navajo Nation Business Preference. "Qualification" of such entities for performance specified in each case shall be determined by demonstrable capability for such performance, and compliance with all other requirements therefor, under the laws of the Navajo Nation and other competent jurisdictions recognized or adopted by the Navajo Nation.

(4) "Owned and Controlled" is defined as at least fifty-one percent (51%) or more ownership of any commercial, industrial, or other economic entity, firm or organization, provided that such ownership shall encompass active decision-making operations, profit-sharing and actual management control.

(5) "Established Business" is defined as an economic entity, firm or other organization, engaged in business activities with owner-

ship or custody and control of an existing adequate inventory and/or personally providing services and making significant contributions to the Navajo economy, with a substantial portion of its business principally located within the jurisdiction of the Navajo Nation.

(6) "Substantial Portion of Business" shall be determined by Commerce Department from such factors as percentage of total business activity, prior business activity, dollar amount of business activity, and similar appropriate factors.

(7) "Principal Business Location" shall require the continuous maintenance and staffing of a place or office of business with currently published address and telephone number readily accessible to the general public during all regular business times at or through which a substantial portion of the business operations are conducted; and at or through which all information and transactions appropriate thereto may be as readily obtained and conducted, as at any other office or location of that business, so as to subject that business to the jurisdiction, laws, rules and regulations of the Navajo Nation, to the full extent of its operations and business conducted hereunder.

(8) "Navajo Tribal Enterprise" shall mean a business entity established and wholly-owned by the Navajo Nation or a duly authorized governmental body thereof, operating under a Plan of Operation as lawfully approved by the Navajo Tribal Council or by its Advisory Committee.

(9) "Prime Contractor" is defined as any party, or entity which undertakes, offers to undertake or purports to have the capacity to undertake contracting for a specified price, as the entity responsible for the satisfactory completion of the contracted project, and includes general contractors and management, consultant, professional, development, agency and other supervisory persons, entities or firms, whichever are authorized and responsible for project coordination, completion, supervision or subcontracting in each instance.

(10) "Subcontractor" is defined as any party or entity to which any contract is let by the prime contractor or its subcontractor for materials, equipment, transportation, or other goods and services on that prime contract, regardless of tier.

(11) "Broker" is defined as including buyers and sellers of goods and personal services as well as agents/negotiators between buyer

and seller, without having custody of the property or personally performing the contract to provide goods or services.

(12) "Economically Feasible" is generally defined for all purposes used in this chapter, as a cost or price which is reasonable, i.e. bears a reasonable relationship to the determinable current available market price or knowledgeable estimate of projected prototype cost.

(13) As used herein, "Conflicts of Interest" and all other terms pertaining thereto, are defined as currently set forth under the Definitions provided in the Navajo Nation Ethics in Government Act (2 N.T.C. §§ 3751-3761), as lawfully amended from time to time.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 2, passed July 30, 1985.

§ 203. Jurisdiction and scope of coverage; compliance with requirements and violations

(a) *General Jurisdiction.* The Navajo Nation has inherent jurisdiction to regulate activities including the conduct of business by Indians and/or non-Indians within the general jurisdiction of the Navajo Nation, as declared by enactment of the Navajo Tribal Council, and in accordance with applicable federal law.

(b) *Applicable to Business Activities Under Leases and Other Transactions.* The provisions of this chapter do not apply to the negotiation, execution, award, transfer, assignment or approval of mineral or nonmineral leases, subleases, permits, licenses and transactions which are governed by other applicable laws and regulations under the jurisdiction of the Navajo Nation and the United States; provided that the provisions of this chapter as amended from time to time, together with all rules and regulations lawfully adopted hereunder, shall apply to all contracting, subcontracting and procurement activities conducted thereunder; and all applicable provisions of this chapter shall be incorporated by law within all such leases, subleases, permits, licenses and transactions, whether or not expressly provided therein.

(c) *Implementing Federal Indian Preference Laws and Regulations.* To the fullest extent provided or permitted under all applicable federal Indian preference laws and regulations, this Navajo Nation Business Preference Law, together with all approved rules and regulations adopted hereunder, shall be construed as implementing laws, rules and regulations in accordance therewith.

(d) *Required Navajo Business and Employment Preference Compliance.* Every person, business or other economic entity, enterprise or organization conducting or engaging or otherwise participating in any business or other economic activity for profit under the jurisdiction of the Navajo Nation as provided herein shall comply with all applicable Navajo Nation Business and Employment Preference laws and all applicable rules and regulations properly adopted thereunder in order to maintain certification for business preference priority as provided by this chapter. The conduct or other engagement or participation in such activities in violation or noncompliance with any applicable provisions and requirements hereunder is unlawful; and any person, business or other entity subject hereto, which is lawfully determined to be in violation thereof and/or noncompliance therewith, shall also be subject to the imposition of such actions, penalties and/or sanctions which are provided by this chapter and by all other applicable laws, rules and regulations of the Navajo Nation and of any other competent jurisdiction, recognized or adopted by the Navajo Nation.

Subcontractors, brokers, agents, subsidiaries, successors and assigns shall be fully subject to all requirements and provisions of this chapter, to the same extent applicable to prime contractors and principal organizations and entities. Prime contractors or principals shall also be and remain responsible for compliance herewith by their subcontractors, brokers, agents, subsidiaries, successors and assigns, and shall also be subject to the same sanctions, penalties and conditions for their violation or noncompliance herewith. The provisions of this chapter shall apply to the extent that any branch, division or subsidiary of any entity is conducting any business activity within the jurisdiction of the Navajo Nation.

(e) *Falsification or Concealment of Information; Sanctions and Penalties.* Any person who knowingly or recklessly omits, falsifies or otherwise misrepresents any fact or matter material to any determination authorized and/or required to be made under any provision of this chapter, or of any rule or regulation lawfully adopted hereunder, and any entity authorizing or knowingly permitting such omission, falsification or other misrepresentation shall be subject to all applicable sanctions and penalties provided under this chapter and any other applicable law, regulation or procedure of the Navajo Nation and of any other competent jurisdiction pertaining thereto.

(f) *Bid-Shopping Prohibited.* All parties subject to the jurisdiction and provisions of this chapter are prohibited from engaging in bid-shopping, which is defined for all purposes herein as any practice involving the solicitation or communication of any competitor's bid prior to and after bid opening, thereby providing an opportunity to underbid any competitor. In addition to subjecting violators of this provision to all penalties and sanctions provided herein, such practice shall be grounds for nullifying and voiding any bid award obtained thereby, and subject to remedies for loss and damages sustained thereby by any party, not knowingly participating therein.

(g) *Conflicts of Interest: Disqualification.* No member of any governmental agency or entity of the Navajo Nation which is authorized or delegated to implement any provision of this chapter shall promote, approve or otherwise participate in any matter pending before that agency or entity, in which such person or any member of their immediate family has an economic or other special interest according to the definition and provisions of the Navajo Nation Ethics in Government Law and the rules and regulations duly adopted thereunder. The failure or refusal of such person or persons to abstain from such participation as required thereunder, shall render any approval or action taken by the Tribal agency or entity in which such person(s) participated, to the extent such action is favorable to the business entity in which such person or persons have such interest, voidable and subject to rescission by appropriate authority of the Navajo Nation, in addition to the imposition to all other sanctions and penalties provided therein.

(h) *Other Violation or Non-compliance With Chapter; Sanctions, Penalties and Appeals.* Any applicant for certification for any preference eligibility as required under the provisions of this chapter and the rules and regulations adopted hereunder and any person or entity otherwise subject hereto who is alleged or determined to be in violation of any provisions of this chapter or any rules or regulations duly adopted hereunder shall have the right to such hearing and/or review of any adverse determination or other official action hereunder in accordance with this and all applicable laws, rules and regulations of the Navajo Nation.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 3, passed July 30, 1985.

Revision note. Subsection (d): First paragraph added. Tribal Council Res. CJY-59-85 inadvertently omitted the first paragraph of this subsection. See Advisory Committee Res. ACJN-112-85, Exhibit B, § 3.1, and Exhibit C, which recommended an "addition to § 3.4 [§ 203(d)]", not a substitution.

§ 204. Required business and contracting preference priorities; business certification, requirements

(a) *Preference Priorities.* Application for or award of any business preference as provided under this chapter of the Navajo Nation is conditioned upon and constitutes submission by any entity, firm or other organization to the jurisdiction and laws of the Navajo Nation with respect to any business activity conducted thereby. All references to levels of Navajo Business Preference under this chapter shall refer to the following ranking of preference-eligible entities, beginning with the highest priority level:

(1) *Priority #1.* Wholly (100%) Navajo-owned and controlled private economic entity, firm or organization, which is an established business principally located, and with a substantial portion of its business activity being conducted, within the jurisdiction of the Navajo Nation.

(2) *Priority #2.* Any other (at least 51%) Navajo-owned or wholly (100%) Navajo Tribal-owned and controlled economic enterprise, firm or organization, which is an established business principally located, and with a substantial portion of its business activity being conducted, within the jurisdiction of the Navajo Nation.

(3) *Priority #3.* Any other wholly (100%) Navajo-owned and controlled private economic entity, firm or organization, which is an established business located outside of the jurisdiction of the Navajo Nation but with a substantial portion of its business activity being conducted within and under the jurisdiction of the Navajo Nation.

(4) *Priority #4.* Any other (at least 51%) Navajo or other Indian-owned and controlled private economic entity, firm or organization, which is an established business located outside of the jurisdiction of the Navajo Nation but with a substantial portion of its business activity being conducted within and under the jurisdiction of the Navajo Nation.

(b) *Required Compliance with Navajo Employment Preference Laws.* To be certified as eligible for any Navajo Nation Business Preference as provided by this chapter, any business individual, organization, firm, enterprise or other economic entity must also, as a condition to the award of such preference, demonstrate full compliance with all applicable requirements of the Navajo *Employment Preference* laws, rules and regulations of the Navajo Nation.

(c) *Required Subcontracting, Broker or Dealer Approved Plan of Compliance.* To be certified as eligible for any Navajo Nation Business Preference as provided by this chapter, for subcontracting, brokerage or dealership activities, any business individual, organization, firm, contractors, enterprise or other economic entity must, as a condition to eligibility for such preference, submit for prior approval, a current plan for such subcontracting/brokerage or dealership activity, which is determined by Commerce Department to be in accordance with all applicable preference provisions hereunder and must otherwise be and remain in compliance therewith.

(d) *Conditions and Requirements for Broker and Dealer Certification; Established Businesses.* Brokers as defined in section 202 of this chapter and dealers shall be certified only for those types of business activities for which brokers and dealers are customarily used in the ordinary course of business throughout the United States, and shall be subject to prequalification by the contract-letting, purchasing or procuring entity requiring such broker and or dealer's services, as provided herein. Certification of brokers and dealers shall further be limited to those having an established business as defined in section 202 of this chapter. Further, brokers shall be certified for Navajo Business Preference only with regard to the brokerage services being performed in each instance and the certification of any broker or dealer shall not thereby qualify any other entity, firm or organization selected or represented by the broker and/or dealer in any manner. Such other entities, firms or organizations shall in all instances remain subject to the Navajo Business Preference provisions and conditions set forth herein.

(e) *Partnership Certification.* To be certified as eligible for any Navajo Business Preference hereunder, Navajo or other Indian ownership and control must be at least fifty-one percent (51%) of the entire partnership business, as well as the project or transaction for which Navajo Business Preference is sought, regardless of the number of general or limited partners.

(f) *Joint Venture Certification.* To be eligible for any Navajo Business Preference hereunder, Navajo or other Indian ownership and control must be at least fifty-one percent (51%) of the overall combined joint venture, as well as the project or transaction for which Navajo Business Preference is sought, with profits to be divided from each venture in proportion to such respective interest.

Source: Tribal Council Res. C/JY-69-86, Exhibit C, § 4, passed July 30, 1985.

§ 205. Navajo Business Preference procedures in bidding, procurement and negotiation

All contracting, subcontracting and procurement procedures required or authorized for all Tribal, federal, state, private or other projects, contracts, subcontracts, procurement, grants or subgrants shall, to the extent subject to the jurisdiction of the Navajo Nation, incorporate and be conducted in full compliance with the Navajo Nation Business Preference provisions of this section and Commerce Department rules and regulations lawfully adopted hereunder, as amended from time to time, including appropriate prebid and prequalification requirements thereof.

(1) *Required Notice to Certified Entities of Intent To Solicit Bids and Proposals; Source Lists; Determination of Qualifications.* Every contract-letting or procuring party shall give notice of its intent to solicit bids and proposals as required by Navajo Tribal and other applicable laws, together with the specifications and qualifications applicable to any bid, procurement, purchase or contract which is subject to this chapter to all persons, business enterprises, contractors, subcontractors and other entities and organizations as listed in the Commerce Department's current available Source List as certified for Navajo Business Preference and as claiming qualification for the business or contracting classification(s) specified for each contract.

Such parties shall provide a true and correct written copy of such required notices to the Commerce Department, together with a correct and complete list of all persons and entities notified, including the dates and manner of such notices, prior to bid opening, procurement or other contract award.

(2) *Initial Determination of Qualifications by Contracting or Procuring Party.* In all such instances, the contract-letting or procuring party may, and where required by the current applicable rules and regulations of the Commerce Department, shall predetermine the qualifications of all parties submitting notification of their intent to submit bids and proposals therefor, prior to the conduct of bidding or other procurement procedures.

The contract-letting or procuring party shall in all instances initially determine whether a particular certified entity is qualified to provide the products, materials and/or services as specified by the contract-letting or procuring party, which determination shall be subject to the concurrence of the Commerce Department of the Navajo Nation as follows:

(A) By approval of the Commerce Department of prebidding or preprocurement qualification conducted as provided herein; or

(B) If no appropriate prebidding or preprocurement qualification is required or conducted, then by final approval from the Commerce Department as required by applicable law of the Navajo Nation, and

(C) Provided further, that with respect to any transaction which is subject to the provisions of this chapter, upon a determination by the Commerce Department that reasonable cause exists to believe that any contract-letting or procuring party's determination of such qualifications was arbitrary and capricious or otherwise to the detriment of, or exclusion from, participation or award to any entity certified hereunder and qualified for Navajo Business Preference, then the burden shall be upon the contract-letting or procuring entity to demonstrate that its determination was in fact reasonable and in accordance with the purposes and provisions of this chapter, prior to final approval of such contract or procurement.

(3) *Initial Determination of Maximum Feasible Price or Cost by Contracting or Procuring Party.* The determination of economic feasibility, whether an established market price or prototype cost is determinable and if so, whether it is reasonable and appropriate as the maximum feasible price or cost, in accordance with appropriate Commerce Department rules and regulations, shall be made by the contracting or procuring party; provided that upon a determination by the Commerce Department that reasonable cause exists to believe that a contracting or procuring party's determination was arbitrary and capricious or is contrary to the purposes or provisions of this chapter, the burden shall be on the contracting or procuring party to demonstrate that its decision was reasonable and in accordance with the purposes and provisions of this chapter, prior to final approval of such contract or procurement.

(4) *Required Adherence to Preference Priority.* In no event shall any contracting or procuring party subject to the provisions of this chapter award any procurement, bid or contract to a non-Indian-owned and controlled entity, at a price equal to or greater than a price offered by a qualified Navajo or other Indian-owned and controlled entity, respectively, which is certified for Navajo Business Preference eligibility hereunder.

(5) *Eligibility for Bidding and Negotiation for Prime Contracts.* The following method of providing preference shall be followed in

Any modifications to the specifications, qualifications or maximum feasible cost or price which is made subsequent to the conduct of any bid or negotiation under paragraph (A) above, and which did not result in the award of that entire contract or procurement, shall be rebid or renegotiated pursuant to the same provisions of paragraph (A) above, prior to any subsequent bid or negotiation authorized hereunder.

(C) Notwithstanding any provisions of this chapter, in the event that federal law prohibits bid or procurement preference based upon Tribal affiliation or prohibits negotiation with other than the party which submitted the lowest bid or price offer, then:

(i) First bid shall be open to all Navajo and other Indian-owned and controlled entities; and award shall be made to the entity offering the lowest price, so long as the entity's bid or price is not greater than the maximum acceptable price determined by the contract-letting or procuring party, pursuant to section 205(3) hereof.

(6) *Navajo Preference Subcontracting Requirements.* Prior to final contract award, every prime contractor shall submit to the Commerce Department a subcontracting plan which identifies all subcontractors and suppliers which will be used and the steps taken to comply with this chapter and Commerce Department regulations adopted thereunder in selecting such subcontractors and supplier.

Every subcontracting plan shall include all leasing or procurement proposals for equipment to be used in performance of the contract, to include specific justification for approval by Commerce Department, where such performance could be accomplished by subcontract, with or procurement from, a qualified and available Navajo source.

As a condition to participation when open bidding is permitted or required, any non-Indian-owned or controlled firm, entity or organization may be required to provide and conduct a training program for Navajo contractors, certified by Commerce Department as appropriate to develop such Navajo participants for qualification as general contractors.

(7) *Subcontractor Performance Security: Permitted Alternatives.* The prime contractor may determine means other than surety bonding to require of subcontractors to adequately secure their performance and wage obligations, including, but not limited to cash bonds, letters of credit and cash monitoring systems such as retention, escrow and/or assignment of construction accounts. The

all bids for prime contracts which are subject to this chapter, for which there is available one or more Navajo or other Indian-owned and controlled entity which has been certified as preference-eligible by the Commerce Department and which is qualified to perform the contract specifications:

(A) First bid shall be open to all qualified economic entities, firms or organizations which are currently certified under the provision of this chapter as established businesses entitled to a Navajo Business Preference priority as provided in section 204 hereof. Award shall first be made to the qualified economic entity submitting the lowest bid among those entities which are currently certified for the highest preference priority as provided by section 204(a) (1) hereof so long as that entity's bid, after an opportunity for negotiation, is not greater than the maximum feasible cost or price as determined by the contract-letting party pursuant to section 205(3) hereof.

If no qualified economic entity which is certified for the highest Navajo Business Preference priority as provided by section 204(a) (1) hereto submits any bid; or if no such entity, after opportunity for negotiation, submits a responsive bid which is within the established maximum feasible cost or price, then award shall be made to the qualified economic entity submitting the lowest bid among those certified for the next highest preference priority under section 204(a) (2), (3) and (4) hereof, so long as that entity's bid is not greater than the established maximum feasible cost or price and is not more than five percent (5%) higher than the lowest acceptable bid submitted.

(B) If no qualified economic entity, which is certified as eligible to participate under the provisions of paragraph (A) above, submits a responsive bid which is entitled to award thereunder, then bidding may be opened, subject to the identical specifications, qualifications and maximum feasible cost or price as in any prior bid conducted under paragraph (A) above, among all interested and qualified economic entities, whether or not certified hereunder for Navajo Business Preference priority; and provided that, to the extent permitted by applicable law, any certified entities participating therein shall be entitled to the same Business Preference priorities set forth in paragraph (A) above. To the greatest extent possible, notice and opportunity to bid shall be extended by the contract-letting or purchasing entity to qualified established business entities as defined in section 202(5), (6) and (7) of this chapter.

(1) Direct such actions, investigations and reports as authorized and as the Committee deems necessary or appropriate to determine and obtain compliance with all provisions hereunder; conduct such hearings, make such findings, determinations and decisions and impose such sanctions and conditions provided hereunder as the Committee determines most appropriate in accordance with such findings, determinations and decisions.

(2) Pending adoption of other applicable administrative laws and procedures by the Navajo Tribal Council; prepare, adopt, abide by and apply to all parties and entities involved, appropriate hearing and procedural rules in compliance with due process and due consideration for other applicable rights of all parties and suited to the fair and orderly conduct of the Committee's duties and responsibilities, in accordance with the purposes, intent and other provisions of this chapter and other applicable laws and traditional customs of the Navajo People pertaining thereto. Subject to the above requirements, such hearings and proceedings, however, need not be governed by unduly restrictive formal rules of evidence or procedure.

(3) Whenever deemed necessary or appropriate by either the Economic and Community Development Committee or by the Advisory Committee or by the Chairman of the Navajo Tribal Council, the Chairman, subject to confirmation by the Advisory Committee of the Navajo Tribal Council, shall appoint a Navajo Business Preference Hearing Board, consisting of not less than three (3) nor more than five (5) disinterested members, who shall thereupon select their Chief Hearing Officer from among their members. Such duly constituted Navajo Business Preference Hearing Board shall further be authorized by the Advisory Committee of the Navajo Tribal Council to serve in place of the Economic and Community Development Committee for the purpose of conducting such hearings and making such findings and determinations as provided in this chapter, in accordance with the rules of hearing procedures adopted hereunder; and the Advisory Committee of the Navajo Tribal Council shall further authorize said Hearing Board to either impose such appropriate sanctions and conditions as provided under section 210 hereof, or to make written recommendations therefor to the Economic and Community Development Committee based upon said findings and determinations.

(b) *Division of Economic Development.* The Division of Economic Development of the Navajo Nation shall have the following

final decision on whether an alternate form of security is sufficient shall rest with the prime contractor, provided that the prime contractor maintains guaranteed security and ultimate liability for the subcontractor's performance.

(8) *Navajo Preference Procurement Requirements.* Where not otherwise prohibited by applicable law any procurement of \$2,500 or less may be let using methods of bids, request for proposals, negotiations or assignments of open purchase orders, so long as qualified and available wholly and other Navajo-owned firms, respectively, are given reasonable notice and first opportunity.

(9) *Minimum Subcontract and Procurement Percentage Requirements.* The Commerce Department, subject to the approval of the Economic and Community Development Committee, shall have the authority to require all procurement entities and prime contractors to comply with current minimum percentages for procurement and subcontract awards to Navajo-owned and controlled entities, firms and organizations, based upon availability and qualifications of such entities to provide specific products and services.

(10) *Required Prior Approval of Modifications.* Any modification proposed by a contracting, subcontracting or procuring entity subsequent to award thereof, pursuant to the provisions of this section, which results in a higher cost or price to the contract-letting or procuring entity or which, in the opinion of the Commerce Department, substantially modifies such project, activity or transaction, shall be subject to review and approval by the Commerce Department, to ensure that such modifications are not contrary to the purposes, intent or other provisions of this chapter.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 5, passed July 30, 1985.

§ 206. No waivers

No waiver of any requirement of this chapter shall be granted except by valid resolution of the Navajo Tribal Council.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 6, passed July 30, 1985.

§ 207. Implementation and compliance with Navajo Nation Business Preference provisions; specific duties and responsibilities

(a) *Economic and Community Development Committee.* The Economic and Community Development Committee of the Navajo Tribal Council shall have the following duties, responsibilities and authority in accordance with all provisions of this chapter, and shall:

duties, responsibilities and authority in accordance with all provisions of this chapter, and shall:

- (1) Provide such support and assistance as required or appropriate to the duties and responsibilities of the Economic and Community Development Committee of the Navajo Tribal Council.
- (2) Provide such supervision and direction of all functions and activities conducted by or on behalf of Commerce and other departments of the Division of Economic Development as necessary and appropriate to accomplish the purposes, intent and other provisions of this chapter; including review and approval of all rules and regulations, together with all amendments proposed for adoption for recommendation to the Economic and Community Development Committee, as provided in paragraph (1) above.

(c) *Commerce Department.* In accordance with and subject to all provisions of this chapter and applicable Committee, Division and Department Plans of Operation and as otherwise directed by the Navajo Tribal Council or by any duly delegated Committee thereof, the Commerce Department, Division of Economic Development, shall have the following duties, responsibilities and authority to:

- (1) Develop a certification program for purposes of determining eligibility of business entities, subject to the provisions of this chapter, for any Navajo Nation Business Preference, to the extent covered by the provisions of this chapter.

- (2) Issue such rules and regulations as are appropriate and necessary for the effective implementation of this chapter. All proposed rules and regulations shall be published for public comments at least sixty (60) days prior to submission to the Economic and Community Development Committee of the Navajo Tribal Council for final review and approval.

- (3) Publish, maintain current and make available such approved rules, regulations, guidelines and forms for distribution, together with all current provisions of this chapter, as amended from time to time, to ensure that all responsible and affected Tribal, other governmental, private and other entities and the Navajo People remain fully informed of all current policies, requirements, and procedures for maintaining compliance herewith.

- (4) Regularly review such rules and regulations, in cooperation with other responsible Tribal entities and agencies authorized hereunder, for appropriate compliance with current economic and

market conditions and their current relevance to the interests of the Navajo People and the Navajo Nation business sector and government and the purposes, intent and other provisions of this chapter and any amendments, additions or deletions adopted in accordance herewith.

- (5) Implement, facilitate, monitor and enforce compliance with the Navajo Nation Business Preference provisions of this chapter, in accordance with its stated purposes and intent and the rules, regulations and guidelines adopted as provided herein. Review, determine and require applicability of Navajo Nation Business Preference provisions of this chapter to any proposed contract, subcontract or other transaction by or on behalf of the Navajo Nation, as part of required departmental clearance procedures, prior to submission for approval by the Budget and Finance Committee and signature of the Chairman or Vice Chairman; and require such prebid meetings and/or prequalification requirements as deemed appropriate for compliance with the provisions of this chapter and with the rules and regulations adopted hereunder.

- (6) Work closely with the federal agencies which have regulations requiring Indian preference of maximum utilization of minority business enterprises and seek to coordinate these requirements, monitoring efforts and sanctioning activities.

- (7) Compile and keep updated and available a published Source List of all persons, firms, enterprises, organizations or other entities currently certified by the Commerce Department for the preference priorities as provided by this chapter. By including an entity on such a Source List, the Commerce Department in no way certifies that the entity is qualified to perform in the category in which it is listed. The purpose of this Source List is to utilize such list as a source document only for contract-letting and procuring parties required to determine and notify available Navajo and other Indian-owned entities in the respective areas of commerce which are subject to the provisions of this chapter.

- (8) Provide, in accordance with its responsibilities, capabilities and available resources, in coordination with those of other responsible and appropriate Tribal departments and entities, such community, governmental and business sector educational programs, information and advice as may be necessary and appropriate from time to time, to the continued understanding and awareness by such entities of the policies, objectives, and current procedural

requirements for compliance with all provisions of this chapter and the current rules and regulations adopted hereunder.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 7, passed July 30, 1985.

§ 208. Certification of preference eligible entities

(a) *Establishment of Procedure.* The Commerce Department shall:

(1) Require timely submission of such information and documentary proof as it deems necessary and appropriate for determining certification or recertification eligibility. The Commerce Department shall deny certification to any entity which fails to provide such information in a timely manner. Certified entities shall be required to immediately submit a detailed and accurate written report disclosing the occurrence of any and all changes in that entity's financial, organizational and/or operational status or composition as previously disclosed to Commerce Department, including ownership, location, personnel, management, control or any other business affairs which may in manner effect that entity's eligibility for certification for any Navajo Business Preference priority. The failure of any entity to timely submit such information shall be subject to the provisions, sanctions and penalties set forth in section 203(e) of this chapter, and shall also constitute grounds for denial of any further recertification. All certification information shall be kept confidential and shall not be disclosed except as necessary in a proceeding under this chapter; provide for certification renewal on an annual basis; as well as temporary and/or conditional certification and suspension or decertification. Certification shall be reviewed on the basis of new information or changes in organization or operations of previously certified entities which is material to eligibility for Navajo Business Preference according to the provisions of this chapter; and shall be accomplished in such manner as to avoid any loss of eligibility status to entities entitled thereto.

(2) Develop criteria for use by the Department in determining when an entity qualifies for each preference priority under this chapter. Commerce Department shall assign preference priority pursuant to section 204(a) (1) through (4) of this chapter and in such manner as to withhold preference priority from "front" organizations which do not, in fact, reflect actual Navajo ownership and control; and to protect qualified Navajo small private businesses from unfair competition by entities with subsidies or other preferential status, such as nonprofit entities, Tribal enterprises and other

Navajo or other Indian businesses with markets outside the jurisdiction of the Navajo Nation.

(b) *Right To File Protest.* Any Navajo or Indian individual, entity, or group of such individuals or entities claiming to be adversely affected by the certification or noncertification of any economic entity, firm or organization having completed application therefor, may file a written protest with the Commerce Department. Said protest shall be acted upon within thirty (30) calendar days following receipt thereof by the Commerce Department. The Commerce Department shall either confirm certification, or deny, revoke, suspend or modify certification, as it deems appropriate under the provisions of this chapter.

(c) *Right of Appeal.* Entities adversely affected by decisions of the Commerce Department on certification may appeal such decisions within ten (10) calendar days from the date of the Commerce Department action to the Economic and Community Development Committee. The Economic and Community Development Committee shall, with or without further hearing as determined in its discretion, act on the appeal within thirty (30) calendar days. In cases of review of any Commerce Department determination regarding certification eligibility, the Committee shall issue its written determinations and may either order such certification, decertification, suspension or imposition of conditions as the Committee deems appropriate; or order such reconsideration by the Commerce Department as the Committee deems appropriate. The decision of the Economic and Community Development Committee shall be final, subject to appeal to the Navajo Tribal Courts as provided herein.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 8, passed July 30, 1985.

§ 209. Monitoring and enforcement

(a) *Tribal Review and Approval Process.* All proposed contracts, procurements, or other transactions being submitted to the Budget and Finance Committee of the Navajo Tribal Council for approval or to the Chairman or Vice Chairman of the Navajo Nation shall first be approved by the Commerce Department as meeting Navajo Nation Business Preference requirements.

(b) *Procedure Upon Allegation of Violation.*

(1) The Commerce Department shall have the authority to investigate any violation and/or complaint under this chapter.

(2) Upon finding of good cause for determination of allegations which, if true, would constitute violation of or noncompliance

with any provisions of this chapter or of any rules or regulations lawfully adopted hereunder, the Commerce Department shall investigate such allegations, compiling a complete written report of such investigation, including witness statements; and shall first seek to obtain voluntary compliance and remedial action deemed appropriate under the provisions of this chapter, to obtain voluntary compliance therewith.

(3) The complaint and hearing process shall be carried out pursuant to procedures drafted by the Commerce Department and approved by the Economic and Community Development Committee for adoption. The procedure shall provide due process but shall not be bound by the formal rules of evidence.

(4) The Economic and Community Development Committee shall have the authority to conduct hearings on the matter, and shall sit in the capacity of a quasi-judicial body, with authority to administer oaths and to subpoena witnesses and the production of documents and other objects.

(c) *Interim Project Suspension; Temporary Restraining Orders and Permanent Injunctive Relief from Navajo Tribal Court.* In any case where the Commerce Department determines the existence of a violation of this chapter which presents the great probability of continuing material and irreparable harm outweighing the likelihood of harm from suspension of performance, the Director of the Division of Economic Development shall, with appropriate assistance from the Department of Justice of the Navajo Nation, on behalf of the threatened interests of the Navajo Nation and of innocent third parties, immediately apply to the Court of the Navajo Nation for a temporary restraining order and an order to show cause why permanent injunctive relief should not be granted (including orders to permanently cease and desist such performance as determined appropriate) according to the Rules of Civil Procedure of the Navajo Court.

In the event of any Navajo Tribal Court order for suspension of performance, Commerce Department shall further take such immediate remedial action as authorized by said Court as appropriate to prevent or minimize to the greatest extent feasible, material harm and damage to innocent third parties and to the interests of the Navajo Nation resulting or likely to result from such suspensions of performance.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 9, passed July 30, 1985.

§ 210. Imposition of sanctions

Upon opportunity for hearing and determination as provided herein, the Economic and Community Development Committee may impose any and all of the following sanctions for violation of this chapter or the rules and regulations lawfully promulgated hereunder:

(1) Civil monetary fines not to exceed five hundred dollars (\$500.00) per day, per violation.

(2) Suspension or termination of a party's authorization to engage in business activity on the reservation; provided that the party shall be given a reasonable time to remove its equipment and other property it may have on the reservation and to take such measures to facilitate the satisfaction or assumption of any contractual obligations it has, as approved by the Committee.

(3) Prohibit the party from engaging in future business activity on the reservation for a specified period or permanently, in accordance with the provisions and procedures of applicable laws of the Navajo Nation.

(4) Require the party to make such changes in its performance, procedures or policies as is necessary in order to comply with these requirements.

(5) In accordance with all applicable laws of the Navajo Nation, impose such other sanctions as may be appropriate and necessary to ensure compliance and to remedy any harm done through violation of the requirements of this chapter.

(6) Navajo Tribal employees found to be deliberately in violation or noncompliance with this chapter shall be subject to disciplinary action in accordance with Navajo Tribal Personnel Policies and Procedures.

(7) Determination that Navajo Tribal entities are in violation or noncompliance with this chapter shall be referred to the Chairman of the Navajo Tribal Council together with recommendations for appropriate corrective and remedial action by the Chairman and/or Vice Chairman of the Navajo Tribal Council.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 10, passed July 30, 1985.

§ 211. Appeals

Any party complainant or respondent, not a governmental entity or employee of the Navajo Nation, shall have the right to appeal any final adverse decision of the Economic and Community Develop-

ment Committee to the Navajo Tribal Courts. Such appeal shall be limited to questions of law and the Committee's findings of fact shall not be disturbed, provided they are supported by any credible evidence upon which reasonable minds may differ. In the event that the Court finds no credible supporting evidence whatever, so that the Committee's findings are determined to be arbitrary or capricious, the Court may remand the matter for rehearing or reconsideration by the Committee as the Court determines to be appropriate. Entities and employees of the Navajo Nation shall be bound by the decisions of the Economic and Community Development Committee as provided herein except that Personnel Grievance procedures shall be available to employees of the Navajo Nation in the same manner as applicable to imposition of other disciplinary actions.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 11, passed July 30, 1985.

§ 212. Other Tribal entities and associated agencies

All Navajo Nation entities, Tribal departments and other agencies involved in any stage of the Tribal contracting, subcontracting or other procurement process shall fully comply with the provisions of this chapter and provide support and assistance in securing compliance of others within their areas of jurisdiction and regulation.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 12, passed July 30, 1985.

§ 213. Severability

If any provision of this chapter or any rule or regulation adopted hereunder or the application thereof to any person or circumstance is held invalid, the remainder of this chapter and of the rules and regulations adopted hereunder or the application of such provision to other persons or circumstances shall not be affected thereby.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 13, passed July 30, 1985.

§ 214. Construction contract assessment fee

Construction contracting activities on the Navajo Reservation are so extensive that it will require a monitoring and enforcement agency to assure overall adherence to this Navajo Nation Business Preference Law. In order to meet this obligation, the Commerce Department shall have the authority to assess a reasonable fee, not to exceed one-half (1/2) of one percent (i.e. .005) of each approved construction prime contract subject to the provisions of this chapter, from the respective construction contracting-letting entity awarding each such prime contract, wherever legally permissible. Funds received from this assessment shall be used to maintain appropri-

ate compliance activities as required by this Navajo Nation Business Preference Law. The Economic and Community Development Committee of the Navajo Tribal Council shall have the authority to periodically determine the fee rate in accordance with the provisions of this chapter and appropriate to current economic conditions.

This currently approved fee rate shall be promulgated as part of the current approved rules and regulations as authorized by this chapter.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 14, passed July 30, 1985.

§ 215. Effective date

The effective date of this Navajo Nation Business Preference Law shall be July 30, 1985; provided that contracts which are presently in the Tribal process shall be provided thirty (30) days to be finalized, notwithstanding section 215 of the chapter, otherwise all new contracts and contracts not finalized by thirty (30) days hereof shall be subject to the provisions of the chapter.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 15, passed July 30, 1985.

§ 216. Prior inconsistent law superseded

Upon the effective date of this Navajo Nation Business Preference Law, all prior inconsistent enactments, laws, policies, ordinances and regulations of the Navajo Nation are superseded hereby and/or amended to comply herewith, subject to the provisions of section 215 hereof.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 16, passed July 30, 1985.

§ 217. Deposit of fees and fines collected

Any and all fees, fines, or any cost collected or provided herein shall be revenue to the Navajo Nation and deposited into the Navajo Nation Reserve Funds.

Source. Tribal Council Res. CJY-59-85, Exhibit C, § 17, passed July 30, 1985.

§ 218. Periodic review and amendments

The Navajo Nation Business Preference Law may be amended from time to time only by the Navajo Tribal Council.

This chapter is enacted by the Navajo Tribal Council as necessary temporary affirmative action to promote and support the development of such a durable, viable and self-sufficient Navajo business and economic sector, that continuation of such affirmative ac-

tion will no longer be necessary nor appropriate. In accordance with this policy, the Advisory Committee of the Navajo Tribal Council, upon recommendation by the Economic and Community Development Committee or when otherwise deemed appropriate and not less than every five (5) years following the effective date of this chapter, shall make and submit a full and comprehensive review of this chapter and recommendations pertaining to all provisions thereof, for proposed amendment and/or rescission thereof by the Navajo Tribal Council, in accordance with the prevailing conditions of the private economic sector of the Navajo Nation and the extent of attainment of the declared purposes and goals set forth in section 201(b) of this chapter.

Source: Tribal Council Res. CJY-59-85, Exhibit C, § 18, passed July 30, 1985.

Chapter 3. Control of Businesses Within Navajo Nation

Cross References

Code of Federal Regulations. Business practices on Navajo lands, see 25 CFR 141.1 et seq.

Chapter 4. Navajo Private Industry Council

SECTION

- 501. Establishment
- 502. Purpose
- 503. Powers
- 504. Membership; selection; Chairman and Vice Chairman; term of office
- 505. Meetings; procedure
- 506. Executive committee
- 507. Amendments

§ 501. Establishment

(a) The Navajo Private Industry Council, hereinafter referred to as "NNPIC", is hereby established by the Advisory Committee of the Navajo Tribal Council pursuant to Public Law 97-300, 29 USC Sections 1512 and 1513, Job Training Partnership Act (JTPA).

(b) The NNPIC shall operate within the JTPA yearly funding cycle beginning July and ending June of each year.

Source: Advisory Committee Res. ACN-218a-85, Exhibit A, passed Nov. 14, 1985.

§ 502. Purpose

(a) The Navajo Private Industry Council (NNPIC) is established for the following purposes:

- (1) Provide advice and guidance for involvement of Job Training Partnership Act (JTPA) Programs, as administered by the Navajo Division of Labor (NDOL), in the private sector of the Navajo Nation economy;
- (2) Encourage and recommend creative uses of JTPA resources to assist in the development of the private sector;
- (3) Develop specific private sector employment and training projects in conjunction and coordination with NDOL and other Tribal department;
- (4) Advise and/or make recommendations to the Labor and Manpower Committee of the Navajo Tribal Council to examine labor policies, standards, specifications, and regulatory elements so as to eliminate burdensome procedures in the development of training activities in the private sector;
- (5) Assist in the development of economic development plans which relate to the formation of job training activities and new job creation in conjunction with NDOL and other appropriate Tribal departments;
- (6) Support local Navajo small business initiatives;
- (7) Promote both private and public development entities to become more responsible to the overall development of the private sector with the purpose of increasing on-Navajo Nation consumer expenditures;
- (8) Develop and design private sector development plans by:
 - (A) Analyze availability of private sector jobs, including information of employer, occupation, industry, and location; and
 - (B) Survey employment demands and training possibilities in the private sector, such as apprenticeships, in order to develop projections of short and long range labor needs; and
 - (C) Refining training and employment programming to accommodate current private sector labor needs; and
 - (D) Assessing and using current labor market information contained in all economic development plans; and
 - (E) Ensuring that NDOL job training plans are consistent with and complementary to programs funded by other federal

for executives who have substantial management or policy responsibility; and

(B) Representatives of educational agencies (representative of all educational agencies in the service delivery area), organized labor, rehabilitation agencies, community-based organizations, economic development agencies, and the public employment service.

(2) Each member may pick an alternate with delegated voting power to serve whenever the member is absent from meetings. The purpose of the delegated voting power shall be to promote the inclusion and optimal representation in accordance with Job Training Partnership Act (JTPA), Section 102(a) (1) and (2). The alternate shall be designated to serve co-terminus with each delegator.

(b) Selection.

(1) All members of the NNPIC shall be appointed by the Chairman of the Navajo Tribal Council. A majority of the members must represent industries or establishments in the private sector.

(2) Recommendation shall be made by the NNPIC to replace any member, including his alternate, who fails to attend for (3) consecutive scheduled meetings.

(3) Should a NNPIC member be terminated because of being unable to attend the meetings the NNPIC members may tentatively appoint that terminated members alternate as a member pending the approval of the Chairman of the Navajo Nation.

(c) Chairman and Vice Chairman.

(1) The Chairman and Vice Chairman of the NNPIC shall be elected from among its members.

(2) The Chairman of the NNPIC shall:

(A) Preside over scheduled meetings; in the Chairman's absence, the Vice Chairman shall preside; and

(B) Act as the Chief Administrator over the purpose and objectives of the NNPIC.

(d) Term of Office. The NNPIC members shall serve a term of office coincidental with the USDOL JTPA "designation" periods, which is every two years beginning on 01 July 1985. The Chairman of the Navajo Tribal Council shall appoint members for replacements two (2) months prior to the expiration date. The term shall be staggered at intervals of one (1) year.

Source. Advisory Committee Res. ACN-218a-85, Exhibit A, passed Nov. 14, 1985.

agencies and administered by other Tribal departments or non-Tribal entities; and

(F) Evaluating of NDOL/JTPA program and activities and make recommendations thereto; and

(G) Evaluating NDOL's OJT contracting activities and make recommendations in resolving various problem areas; and

(H) Reporting on NNPIC activities to the Labor and Manpower Committee of the Navajo Tribal Council on a quarterly basis.

Source. Advisory Committee Res. ACN-218a-85, Exhibit A, passed Nov. 14, 1985.

§ 503. Members

(a) The Navajo Private Industry Council (NNPIC) shall have all powers necessary and proper to carry out the purpose set forth in this Plan of Operation.

(b) The NNPIC shall:

(1) Review and recommend appropriations, allocations, cancellation and reappropriation of funds received under Job Training Partnership Act (JTPA) for private sector activities.

(2) Review and provide recommendations on all draft plans that address job training and employment services in the private sector, after consulting with federal, state, Tribal components, local organizations, institutions, and employers.

(3) Serve as the mediator in resolving any disputes regarding any contract, subcontract, agreement, or amendment between a service provider in the private sector and the Navajo Tribe (NDOL), if said dispute complaints could not be resolved by the NDOL Executive Director or his/her subordinates after review of the complaints.

Source. Advisory Committee Res. ACN-218a-85, Exhibit A, passed Nov. 14, 1985.

§ 504. Membership; selection; Chairman and Vice Chairman; term of office

(a) Membership.

(1) The Navajo Private Industry Council (NNPIC) shall consist of eight (8) members and shall consist of:

(A) Representatives of the private sector, who shall constitute a majority of the membership of the council and who shall be owners of business concerns, chief executives or chief operating officers of nongovernmental employers, or other private sec-

§ 505. Meetings; procedure

(a) *Meetings.* The Chairman of the Navajo Private Industry Council (NNPIC) shall call a regular meeting at least once every quarter. All meetings of NNPIC shall be opened to the general public.

(b) Procedure.

(1) The NNPIC shall develop its own procedures for the conduct of meetings.

(2) All meetings shall be recorded and minutes of each meeting shall be provided.

(3) All official business of NNPIC will be transacted by majority vote of those provided.

(4) Members of the NNPIC shall be reimbursed for meeting expenses for each meeting during which its assigned business was conducted.

(c) *Quorum.* A quorum shall consist of 4 members or alternates.

Source. Advisory Committee Res. ACN-218a-85, Exhibit A, passed Nov. 14, 1985.

§ 506. Executive committee

(a) The Navajo Private Industry Council (NNPIC) shall designate subcommittees when deemed necessary and appropriate.

(b) A subcommittee shall consist of no less than three (3) members, appointed by the Chairman of the NNPIC.

(c) Members of the subcommittees shall be reimbursed for expenses associated with each meeting, including per diem and mileage cost.

Source. Advisory Committee Res. ACN-218a-85, Exhibit A, passed Nov. 14, 1985.

§ 507. Amendments

This Plan of Operation may be amended from time to time by the Advisory Committee of the Navajo Tribal Council with the recommendations of the Labor and Manpower Committee and Navajo Private Industry Council (NNPIC).

Source. Advisory Committee Res. ACN-218a-85, Exhibit A, passed Nov. 14, 1985.

Chapter 5. Navajo Credit Department

SECTION

601. Definitions

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603. Purpose
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606. Loan objectives
607. Regulation and instructions
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611. Duties and responsibilities of Tribal Credit Manager
612. Staff
613. Eligibility for loans
614. Approval of loans
615. Loan application procedures
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617. Modifications
618. Type of loans
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620. Loan closing
621. Confidentiality of client records
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628. Maturity
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631. Annual inspection
632. Advances of funds
633. Depository
634. Disbursements
635. Bonding
636. Modification and termination of Plan
637. Effective date

Prior law. Former subchapters 1, 3, 5, 7 and 9 were rescinded by Advisory Committee Res. ACD-234-85, which consolidated and incorporated all resolutions regarding loan activities, and transferred administration of all loan activities to the Navajo Credit Department.

Former subchapter 1, entitled General Provisions, consisting of §§ 601-624, was derived from CJ-1-48 and ACJ-25-55, and related to Revolving Credit Fund and loans generally.



NAVAJO PREFERENCE IN EMPLOYMENT ACT
AMENDED OCTOBER 1990

Section 1. TITLE

- A. This Act shall be cited as the Navajo Preference in Employment Act and is hereby codified as Title 15 Chapter 7 of the Navajo Tribal Code.

Section 2. PURPOSE

- A. The purposes of the Navajo Preference in Employment Act are:
1. To provide employment opportunities for the Navajo work force;
 2. To provide training for the Navajo people;
 3. To promote the economic development of the Navajo Nation;
 4. To lessen the Navajo Nation's dependence upon off reservation sources of employment, income, goods and services;
 5. To foster the economic self-sufficiency of Navajo families; and
 6. To protect the health, safety, and welfare of Navajo workers;
 7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.
- B. It is the intention of the Navajo Nation that the provisions of this Act be construed and applied to accomplish the purposes set forth above.

Section 3. DEFINITIONS

1. The term "Commission" shall mean the Navajo Nation Labor Commission.
2. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.
3. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.
4. The term "Navajo" means any enrolled member of the Navajo Nation.
5. The term "ONLR" means the Office of Navajo Labor Relations.

6. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.
7. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 NTC §254.
8. The term "counsel" or "legal counsel" shall mean (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the sole purpose of co-counselling in association with a person described in clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any State of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.
9. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position, including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.
10. The term "qualifications" shall include the ability to speak and/or understand the Navajo language, and familiarity with Navajo culture, customs and traditions.
11. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees or in any other form.
12. The term "employee" means an individual employed by an employer.
13. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.
14. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

15. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.
16. The term "respondent" means the person against whom a complaint is filed by a petitioner.
17. The term "Act" means the Navajo Preference in Employment Act.

Section 4. NAVAJO EMPLOYMENT PREFERENCE

- A. All employers doing business within the territorial jurisdiction of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:
1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the tribal goal of employing Navajos in all job classifications including supervisory and management positions.
 2. Within 90 days after the later of the effective date of this Section 4(A)(2) or the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this Section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this Section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the Act. In the event of a required joint plan by an employer and associated labor organization, only the non-complying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.
 3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no Charge shall be filed hereunder with respect to alleged unlawful provisions or omissions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No Charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific Requirements for Navajo Preference

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.
2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.
3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act; provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and bona fide seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or non-Navajos.
4. The Navajo Nation when contracting with the federal or state government or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes; provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.
5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals; provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.
6. All employers shall advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation; provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.
7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.
8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.
10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.
11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the Act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.
12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and
2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates necessary qualifications.

Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

SECTION 5. REPORTS

All employers doing business or engaged in any project or enterprise within the territorial jurisdiction of the Navajo Nation or pursuant to a contract with the Nation shall submit employment information and reports as required to ONLR. Such reports, in a form acceptable to ONLR, shall include all information necessary and appropriate to determine compliance with the provisions of this Act. All reports shall be filed with ONLR not later than 10 business days after the end of each calendar quarter, provided that ONLR shall have the right to require filing of reports on a weekly or monthly schedule with respect to part-time or full-time temporary employment.

SECTION 6. UNION AND EMPLOYMENT AGENCY ACTIVITIES/RIGHTS OF NAVAJO WORKERS

- A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceable picket to secure their legal rights, shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.
- B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

SECTION 7. NAVAJO PREVAILING WAGE

- A. Definitions. For purposes of this Section, the following terms shall have the meanings indicated:
 - 1. The term "prevailing wage" shall mean the wage paid to a majority (more than 50 percent) of the employees in the classification on similar construction projects in the area during a period not to exceed 24 months prior to the effective date of the prevailing wage rate set hereunder; provided that in the event the same wage is not paid to a majority of the employees in the classification, "prevailing wage" shall mean the average of the wages paid, weighted by the total number of employees in the classification.
 - 2. The term "prevailing wage rate" shall mean the rate established by ONLR pursuant to this Section.
 - 3. The term "wage" shall mean the total of:
 - (A) the basic hourly rate; and
 - (B) the amount of (i) contributions irrevocably made by a contractor or

subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan or program for the benefit of employees and (ii) costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the employees affected. The types of fringe benefits contemplated hereunder include medical or hospital health care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits.

4. The term "area" in determining the prevailing wage means the geographic area within the territorial jurisdiction of the Navajo Nation; provided that in the event of insufficient similar construction projects in the area during the period in question, "area" shall include the geographic boundaries of such contiguous municipal, county or state governments as ONLR may determine necessary to secure sufficient wage information on similar construction projects.

5. The term "classifications" means all job positions in which persons are employed, exclusive of classifications with assigned duties which are primarily administrative, executive or clerical, and subject to satisfaction of the conditions prescribed in Sections (E)(7) and (8), exclusive of "apprentice" and "trainee" classifications as those terms are defined herein.

"Apprentice" means (a) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with an Apprenticeship Agency administered by a State or Indian Tribe and recognized by the Bureau, or (b) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State or Tribal Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

7. "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration, or (b) employed and/or receiving on-the-job training under a public employment or work experience program which is approved and funded by the Navajo Nation.

8. The term "construction" shall mean all activity performed under a contract which relates to (a) the building, development, rehabilitation, repair, alteration or installation of structures and improvements of all types, including without limitation buildings, bridges, dams, plants, highways, sewers, water mains, powerlines and other structures; (b) drilling, blasting, excavating, clearing and landscaping, painting and decorating; (c) transporting materials and supplies to or from the site of any of the activities referred to in (a) or (b) by employees of the contractor or subcontractor; and (d) manufacturing or finishing materials, articles, supplies or equipment at the construction site of any of the foregoing activities by employees of the contractor or subcontractor.
9. The term "contract" shall mean the prime construction contract and all subcontracts of any tier thereunder entered into by parties engaged in commercial, business or governmental activities (whether or not such activities are conducted for profit).

B. Establishment

1. For all construction reasonably anticipated to occur in the area on a regular basis, ONLR shall establish a general prevailing wage rate for each classification within specified types of construction. ONLR shall define classifications and types of construction in accordance with guidelines generally recognized in the construction industry. In all cases where construction is contemplated for which prevailing wage rates have not been set, the contract letting entity shall submit to ONLR a written request for a project prevailing wage scale. Such request shall be submitted not less than 60 days prior to the scheduled date for bid solicitation and shall include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR shall use its best efforts to provide a project prevailing wage scale, for each classification involved in the project construction, within 60 days after receipt of a request therefor.
2. In setting prevailing wage rates, ONLR shall conduct such surveys and collect such data as it deems necessary and sufficient to arrive at a wage determination. Wage data may be collected from contractors, contractors' associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area, including the names and addresses of contractors and subcontractors; the locations, approximate costs, dates and types of construction; the number of workers employed in each classification on the project; and the wage rates paid such workers. Wage rate data for the area may be provided, and considered in making wage determinations, in various forms including signed statements, collective bargaining agreements and prevailing wage rates established by federal authorities for federally-assisted construction projects.
3. Any classification of workers not listed in a prevailing wage rate and which is to be used under a construction contract shall be classified in conformance

with the prevailing wage determination issued and applicable to the project; provided that an additional classification and prevailing wage rate therefor will be established in the event each of the following criteria are satisfied:

- (a) The work performed by the proposed classification is not performed by a classification within the existing prevailing wage scale;
 - (b) The proposed classification is utilized in the area by the construction industry; and
 - (c) The wages set for the proposed classification bear a reasonable relationship to the wage rates contained in the existing scale for other classifications.
4. (a) Subject to the prior written approval thereof by the Director of ONLR, a general prevailing wage rate shall be effective on the date notice of such rate is published in a newspaper in general circulation in the Navajo Nation. The notice shall contain the following information:
- (i) The fact a prevailing wage rate has been set and approved in writing by the Director of ONLR;
 - (ii) The type of construction for which the rate was established;
 - (iii) The effective date, described as the date of publication of the notice or other specified date;
 - (iv) The address and telephone number of ONLR; and
 - (v) A statement that ONLR will provide a copy of the full wage determination on request, and respond to any reasonable questions regarding such determination or its application.

General prevailing wage rates shall continue in effect until such time as any modifications are adopted.

- (b) A prevailing wage rate for a particular project shall be effective on the date of issuance to the requesting party of a written wage determination approved by the Director of ONLR. The wage determination shall continue in effect for the duration of the project; provided that any such determination may be modified by ONLR in the event the period of time from the effective date of the determination to the date bids are solicited exceeds 180 days and the estimated date of completion of the project is more than one year after the effective date of the determination.

- (c) Project and general wage determinations may be modified from time to time, in whole or in part, to adjust rates in conformity with current conditions, subject to the special conditions applicable to project determinations. Such modifications become effective upon the same terms and conditions which are applicable to original determinations.
- (d) Fringe Benefits. The fringe benefit amount of wages reflected in a prevailing wage rate shall be paid in cash to the employee, and shall not be deducted from such employee's wages, unless each of the following conditions is satisfied:
 - (i) The deduction is not contrary to applicable law;
 - (ii) A voluntary and informed written consent authorizing the deduction is obtained from the employee in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining or continuing employment;
 - (iii) No profit or other benefit is obtained as a result of a deduction, directly or indirectly, by the contractor, subcontractor or any person affiliated with them in the form of a commission, dividend or other consideration; and
 - (iv) The deduction serves the convenience and interests of the employee.

- D. 1. No contract-letting entity, contractor or subcontractor shall proceed with a construction contract subject to this Section in the absence of a contractual requirement for payment of prevailing wages pursuant to a specified wage determination issued by ONLR. Violation of this obligation shall render the contract-letting entity, and the employer contractor or subcontractor, jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, together with interest thereon (or if no prevailing wage rates have been set, such wage rate as may be issued by ONLR during the course, or after the completion, of the construction project).
- 2. Failure by any employer, contractor or subcontractor to pay prevailing wages shall render such employer liable for the difference between the amount of wages actually paid and the prevailing rate, together with interest thereon.
- 3. Any deduction of fringe benefits by an employer contractor or subcontractor in violation of Section 7(C) shall render such employer liable for the amount of such deduction, together with interest thereon.
- 4. Upon written request of ONLR, a contract-letting entity or contractor, as the case may be, shall withhold from any monies payable on account of work performed by an employer contractor or subcontractor under a construction

contract such sums as may be determined by ONLR as necessary to satisfy any liabilities of such contractor or subcontractor for unpaid prevailing wages or wrongful deduction of fringe benefits.

5. If following a hearing under Section 11 a contract-letting entity (other than the Navajo Nation), contractor or subcontractor is found to have willfully violated this Section the Commission may enter a debarment order disqualifying such party from receiving any contract, or subcontract thereunder, with the Navajo Nation for a period not to exceed three years.
6. The liabilities described in this Section 7(D) shall not foreclose the Commission from awarding such other relief or imposing such other civil penalties as may be appropriate following a hearing conducted under Section 11.

E. Exemptions. This Section shall not apply to:

1. A contract associated with a construction activity which relates to the provision of architect, engineer, legal or consultant services, or, except as provided under Section 7(A)(8)(d), the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or any of its subcontractors.
2. A construction contract relating to a project having a total cost of \$2,000 or less.
3. A construction contract which is let by a natural person who is an owner or person legally authorized to let such contract, for such person's personal, family or household purposes.
4. A construction contract to the extent the work thereunder is performed by employees of the owner, or employees of the person or entity legally authorized to let the prime contract.
5. A construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act, 40 U.S.C. §§ 276a et seq. (as amended), or other federal law applicable to such project.
6. A construction contract to the extent such contract requires payment of wages pursuant to a wage scale established under a collective bargaining agreement between any contractor or subcontractor and a labor organization.
7. With the exception of the provisions of Section 7(C), an apprentice provided that the apprentice is paid not less than (a) the basic hourly rate prescribed in the registered program for the apprentice's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing

wage rate, and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of Section 7(A)(6)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

8. With the exception of the provisions of Section 7(c), a trainee provided that the trainee is paid not less than (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate and (2) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of Section 7(A)(8)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

SECTION 8. HEALTH AND SAFETY OF NAVAJO WORKERS

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

SECTION 9. CONTRACT COMPLIANCE

- A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents") which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.
- B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the

territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

SECTION 10. MONITORING AND ENFORCEMENT

- A. **Responsible Agency.** Compliance with the Act shall be monitored and enforced by ONLR.
- B. **Charges.**
1. **Charging Party.** Any Navajo may file a charge ("Individual Charge") claiming a violation of his/her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a claim that respondent is engaging in a pattern of conduct or practice in violation of rights guaranteed by the Act. An Individual Charge and ONLR Charge are collectively referred to herein as a "Charge".
 2. **Form and Content.** A Charge shall be in writing, signed by the charging party (which shall be the Director of ONLR in the case of an ONLR Charge), and contain the following information:
 - (a) The name, address and any telephone number of the charging party;
 - (b) The name and address or business location of the respondent against whom the Charge is made;
 - (c) A clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complained of;
 - (d) With respect to a Charge alleging a pattern or practice in violation of the Act, the period of time during which such pattern or practice has existed and whether it continues on the date of the Charge;
 - (e) The specific harm sustained by the charging party in the case of an Individual Charge or the specific harm sustained by specified Navajos or a class of Navajos with respect to an ONLR Charge; and
 - (f) A statement disclosing whether proceedings involving the alleged violation have been initiated before any court or administrative agency or within any grievance process maintained by the respondent, including the date of commencement, the court, agency or process and the status of the proceeding.

ONLR shall provide assistance to persons who wish to file Individual Charges. Notwithstanding the foregoing provisions, a Charge shall be deemed sufficient if it contains a reasonably precise identification of the charging party and respondent, and the action, pattern or practice which are alleged to violate the Act.

3. **Place of Filing.** Individual Charges may be filed in any office of ONLR. An ONLR Charge shall be filed in ONLR's administrative office in Window Rock.
4. **Date of Filing.** Receipt of each Individual Charge shall be acknowledged by the dated signature of an ONLR employee which shall be deemed the date on which the Individual Charge is filed. The date on which an ONLR Charge is signed by the ONLR Director shall be deemed the date of filing for such Charge.
5. **Amendment.** A Charge may be amended by filing, in the office where the Charge was first submitted, a written instrument which sets forth the amendment and any portions of the original Charge revised thereby. To the extent the information reflected in the amendment arose out of the subject matter of the original Charge, the amendment shall relate back and be deemed filed as of the filing date of such Charge. Any portion of the amendment which does not qualify for relation back treatment shall constitute a new Charge.
6. **Time Limitation.** A Charge shall be filed within one year after accrual of the claim which constitutes the alleged violation of the Act. The date of accrual of a claim shall be the earlier of
 - (a) the date on which the charging party had actual knowledge of the claim, or
 - (b) taking into account the circumstances of the charging party, the date on which the charging party should reasonably have been expected to know of the existence of the claim; provided, however, that a Charge relating to a continuing, or pattern or practice, violation of the Act shall be filed within one year after the later of
 - (i) the date of termination of such violation, pattern or practice or
 - (ii) the date of accrual of the claim to which the Charge relates. Failure to file a Charge within the time limitations prescribed herein shall bar proceedings on the related claim before the Commission or in any Court of the Navajo Nation; provided, however, that nothing herein shall be interpreted as foreclosing proceedings before any Navajo Court or administrative body (other than the Commission) on any claim which also arises

under applicable common, statutory or other law independent of this Act.

7. **Notice to Respondent.** Within 20 days after a Charge is filed, ONLR shall serve a copy thereof on respondent; provided, however, that if in ONLR's judgment service of a copy of the Charge would impede its enforcement functions under the Act, ONLR may in lieu of a copy serve on respondent a notice of the Charge which contains the date, place and summary of relevant facts relating to the alleged violation, together with the identity of the charging party unless withheld for the reason stated above. Service of any amendment to the Charge shall be accomplished within 20 days after the amendment is filed. Failure of ONLR to serve a copy of a Charge or notice thereof within the prescribed time period shall not be a ground for dismissal of the Charge or any subsequent proceedings thereon.
8. **Withdrawal of Charge.**
 - (a) ONLR may, in its discretion, withdraw any ONLR Charge upon written notice thereof to respondent and each person identified in the Charge whose rights under the Act were alleged to have been violated. Any person receiving notice of withdrawal or any other person who asserts a violation of his/her rights as a result of the violation alleged in the withdrawn ONLR Charge may file an Individual Charge which, if filed within 90 days after the issuance date of ONLR's withdrawal notice, shall relate back to the filing date of the ONLR Charge.
 - (b) Any charging party may, in his/her discretion, withdraw an Individual Charge by filing a written notice of withdrawal with the ONLR office where the Charge was submitted, with a copy thereof filed with the ONLR administrative office in Window Rock. ONLR shall, within 20 days after receiving the notice, transmit a copy to the respondent. Within 90 days after receipt of the withdrawal notice, ONLR may file an ONLR Charge relating in whole or part to the violations alleged in the withdrawn Individual Charge. Any filing of an ONLR Charge within the prescribed time period shall relate back to the filing date of the withdrawn Charge.
9. **Overlapping Charges.** Nothing herein shall be construed as prohibiting the filing of any combination of Individual Charges and an ONLR Charge which, in whole or part, contain common allegations of violations of the Act.
10. **Informants.** Irrespective of whether a person is otherwise eligible to file an Individual Charge, any such person or an organization may in lieu of filing a Charge submit to ONLR written or verbal information concerning alleged violations of the Act and may further request ONLR to file an ONLR Charge thereon. In addition to other limitations on disclosure provided in Section 10(M) and in the absence of the written consent of the informant, neither the

identity of the informant nor any information provided by such informant shall be disclosed to the respondent, agents or legal counsel for the respondent, or the public, either voluntarily by ONLR or pursuant to any discovery or other request for, or order relating to, such information during the course of any judicial or non-judicial proceeding, including a proceeding before the Commission or any subsequent appeal or challenge to a Commission or appellate decision; provided, however, that in the event the informant is called as a witness by ONLR at a Commission proceeding involving the information provided by the informant,

- (a) the informant's name may be disclosed, but his/her status as an informant shall remain privileged and confidential and shall not be disclosable through witness examination or otherwise, and
- (b) with the exception of the witness status as an informer, information provided by the informant is disclosable in accordance with the procedures outlined under Section 10(M).

C. Investigation of Charges.

- 1. **General.** ONLR shall conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the Act has been violated.
- 2. **Subpoenas.**
 - (a) The Director of ONLR shall have the authority to sign and issue a subpoena compelling the disclosure by any person evidence relevant to a Charge, including a subpoena ordering, under oath as may be appropriate:
 - (i) The attendance and testimony of witnesses;
 - (ii) Responses to written interrogatories;
 - (iii) The production of evidence, including without limitation books, records, correspondence or other documents (or lists or summaries thereof) in the subpoenaed person's possession, custody or control or which are lawfully obtainable by such person; and
 - (iv) Access to evidence for the purposes of examination and copying. Neither an individual charging party nor a respondent shall have a right to demand issuance of a subpoena prior to the initiation of any proceedings on the Charge before the Commission, in which event subpoenas are issuable only pursuant to the procedures governing such proceedings.

- (b) Service of the subpoena shall be effected by one of the methods prescribed in Section 10(O). A subpoena directed to a natural person shall be served either on the person at his/her residence or office address or, in the case of personal delivery, at such residence or office either on the person subpoenaed or on anyone at least eighteen years of age (and in the case of office service, a person who is also an employee of such office). Service of a subpoena directed to any other person shall be addressed or delivered to either the statutory agent (if any) of such person or any employee occupying a managerial or supervisory position at any office of the person maintained within or outside the territorial jurisdiction of the Navajo Nation. Personal service may be performed by a natural person at least eighteen years of age, including an employee of ONLR.
- (c) The subpoena shall set a date, time and place for the attendance of a witness, or production of or access to evidence, as the case may be, provided that the date for compliance shall be not less than 30 days after the date on which service of the subpoena was effected.
- (d) Any person served with a subpoena intending not to fully comply therewith shall, within five business days after service, serve on the Director of ONLR a petition requesting the modification or revocation of the subpoena and identifying with particularity each portion of the subpoena which is challenged and the reasons therefor. To the extent any portion of the subpoena is not challenged, the unchallenged parts shall be complied with in accordance with the terms of the subpoena as issued. The ONLR Director shall issue and serve on petitioner a decision and reasons therefor within eight business days following receipt of the petition, and any failure to serve a decision within such period shall be deemed a denial of the petition. In the event the Director's decision reaffirms any part of the subpoena challenged in the petition, the Director may extend the date for compliance with such portion for a period not to exceed 10 business days. Any petitioner dissatisfied with the decision of the ONLR Director shall either
- (1) comply with the subpoena (with any modifications thereto reflected in the Director's decision) or
 - (2) within five business days following receipt of the Director's decision or the date such decision was due, file a petition with the Commission (with a copy concurrently served on the ONLR Director) seeking modification or revocation of the subpoena and stating with particularity therein each portion of the subpoena challenged and the reasons therefor. A copy of the ONLR Director's decision, if any, shall be attached to the petition.

- (e) In the event a person fails to comply with a served subpoena, ONLR may petition the Commission for enforcement of the subpoena. For purposes of awarding any relief to petitioner, the Commission may issue any order appropriate and authorized in a case where it is established that a Commission order has been violated. A copy of the petition shall be concurrently served on the non-complying person.
- (f) Beginning on the first day of non-compliance with a subpoena served on a respondent, or any employee or agent of respondent, until the date of full compliance therewith, there shall be a tolling of all periods of limitation set forth in this Section 10.

D. Dismissal of Charges.

- 1. **Individual Charges.** ONLR shall dismiss an Individual Charge upon reaching any one or more of the following determinations:
 - (a) The Individual Charge, on its face or following an ONLR investigation, fails to demonstrate that probable cause exists to believe a violation of the Act has occurred;
 - (b) The Individual Charge was not filed within the time limit prescribed by Section 10(B)(6);
 - (c) The charging party has failed to reasonably cooperate in the investigation of, or attempts to settle, the Individual Charge;
 - (d) The charging party has refused, within 30 days of receipt, to accept a settlement offer agreed to by respondent and approved by ONLR, which accords substantially full relief for the harm sustained by such party; or
 - (e) The Charge has been settled pursuant to Section 10(G).
- 2. **ONLR Charges.** ONLR shall dismiss an ONLR Charge upon determining that
 - (a) no probable cause exists to believe a violation of the Act has occurred,
 - (b) the Charge was not filed within the time limits prescribed by Section 10(B)(6), or
 - (c) the Charge has been settled pursuant to Section 10(G).
- 3. **Partial Dismissal.** In the event a portion of a Charge is dismissable on one or more of the foregoing grounds, only such portion of the Charge

shall be dismissed and the remainder retained by ONLR for final disposition.

4. **Notice.** Written notice of dismissal, stating the grounds therefor, shall be served on respondent and the individual charging party in the case of an Individual Charge or, in the case of an ONLR Charge, on the respondent and any person known to ONLR who claims to be aggrieved by the violations alleged in such Charge. Such notice shall be accompanied by a right to sue authorization pursuant to Section 10(H).
- E. **Probable Cause Determination.** Following its investigation of a Charge and in the absence of a settlement or dismissal required under Section 10(D), ONLR shall issue written notice of its determination that probable cause exists to believe a violation of the Act has occurred or is occurring. Such notice shall identify each violation of the Act for which probable cause has been found, and copies thereof shall be promptly sent to the respondent, the charging party in the case of an Individual Charge, and, in the case of an ONLR Charge, each person identified by ONLR whose rights are believed to have been violated. Any probable cause determination shall be based on, and limited to, the evidence obtained by ONLR and shall not be deemed a judgment by ONLR on the merits of allegations not addressed in the determination.
- F. **Conciliation.** If, following its investigation of a Charge, ONLR determines there is probable cause to believe the Act has been or is being violated, ONLR shall make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion. In the event there is a failure to resolve the matter informally as to any allegations in an Individual Charge for which probable cause has been determined, ONLR shall either issue the notice prescribed in Section 10(H) or initiate a Commission proceeding under Section 10(I) concerning unresolved allegations. A successful resolution of any such allegation shall be committed to writing in the form required under Section 10(G). Nothing herein shall be construed as prohibiting ONLR from initiating or participating in efforts to informally resolve a Charge prior to issuance of a probable cause determination.
- G. **Settlement.**
1. Settlement agreements shall be committed to writing and executed by respondent, the individual charging party if any and, in the case of any Charge, by the Director of ONLR. Refusal of an individual charging party to execute a settlement agreement subjects the Individual Charge to dismissal under the conditions set forth in Section 10(D)(1)(d). Settlement agreements may also be signed by those aggrieved persons identified as having a claim with respect to an ONLR Charge.
 2. Settlement agreements hereunder shall be enforceable among the parties thereto in accordance with the terms of the agreement. Any member of a

class of persons affected by the settlement who is not a signatory to the agreement shall have the right to initiate proceedings before the Commission pursuant to the procedure in Section 10(H)(2)(a)(iii).

3. Each settlement agreement shall provide for the dismissal of the Charge to the extent the violations alleged therein are resolved under the agreement.
4. Any breach of a settlement agreement by respondent shall present grounds for filing a Charge under this Section 10. A charging party asserting a claim for breach may either seek
 - (a) enforcement of that portion of the settlement agreement alleged to have been breached, or
 - (b) in the case of a material breach as to any or all terms, partial or total rescission of the agreement, as the case may be, and such other and further relief as may have been available in the absence of settlement. A Charge asserting a breach of a settlement agreement with respect to any original allegation in the Charge covered by such agreement shall, for purposes of all time limitations in this Section 10, be deemed to arise on the accrual date of the breach.

H. Individual Right to Sue.

1. Individual Charges.

- (a) Prior to the expiration of 180 days following the date an Individual Charge was filed, ONLR, by notice to the individual charging party, shall authorize such individual to initiate a proceeding before the Commission in accordance with the procedures prescribed in Section 10(J), if:
 - (i) The Individual Charge has been dismissed by ONLR pursuant to Section 10(D)(1);
 - (ii) ONLR has issued a probable cause determination under Section 10(E), there has been a failure of conciliation contemplated by Section 10(F), and ONLR has determined not to initiate a Commission proceeding on behalf of the individual charging party; or
 - (iii) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed.
- (b) After the expiration of 180 days following the date an Individual Charge was filed, the individual charging party shall have the right to

initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination, or commenced or concluded conciliation efforts.

2. **ONLR Charges.**

- (a) Prior to the expiration of 180 days following the date an ONLR Charge was filed, ONLR, by notice to any person known to it who claims to be aggrieved by the allegations presented in such Charge, shall authorize such person to initiate a proceeding before the Commission in accordance with the procedures prescribed in Section 10(J), if:
 - (i) The ONLR Charge has been dismissed by ONLR pursuant to Section 10(D)(2);
 - (ii) ONLR has issued a probable cause determination under Section 10(E), there has been a failure of conciliation contemplated by Section 10(F), and ONLR has determined not to initiate a Commission proceeding on the Charge;
 - (iii) ONLR has entered into a settlement agreement under Section 10(G) to which such aggrieved person is not a party; or
 - (iv) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the ONLR Charge was filed.
- (b) After the expiration of 180 days following the date an ONLR Charge was filed and prior to the date on which ONLR commences a Commission proceeding, any person claiming to be aggrieved by the allegations presented in such Charge shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination or commenced or concluded conciliation efforts.

3. **Content of Notice.** A notice of right to sue shall include the following information:

- (a) Authorization to the individual charging party or aggrieved person to initiate a proceeding before the Commission pursuant to and within the time limits prescribed by Section 10(J);
- (b) A summary of the procedures applicable to the institution of such proceeding, or a copy of the Act containing such procedures;
- (c) A copy of the Charge; and

(d) A copy of any written determination of ONLR with respect to such Charge.

4. **ONLR Assistance.** Authorization to commence Commission proceedings hereunder shall not prevent ONLR from assisting any individual charging party or aggrieved person in connection with Commission proceedings or other efforts to remedy the alleged violations of the Act.

I. **ONLR Right to Sue.**

1. **Individual Charges.** ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an Individual Charge with respect to which ONLR has issued a probable cause determination under Section 10(E) and there has been a failure of conciliation contemplated by Section 10(F). ONLR shall have such right notwithstanding that the individual charging party has a concurrent right to sue hereunder which has not been exercised. ONLR's right to sue shall continue until such time as the individual charging party commences a Commission proceeding and, in that case, shall be revived in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Initiation of Commission proceedings by ONLR shall terminate the right to sue of an individual charging party, subject to revival of such right in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under Section 10(L).

2. **ONLR Charges.** ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an ONLR Charge with respect to which ONLR has issued a probable determination under Section 10(E) and there has been a failure of conciliation contemplated by Section 10(F). ONLR shall have such right notwithstanding that a person claiming to be aggrieved as a result of the allegations in the ONLR Charge has a concurrent right to sue hereunder which has not been exercised. In the event an aggrieved person first initiates a Commission proceeding in an authorized manner, ONLR's right to sue shall only expire as to such person and shall revive in the event the aggrieved person's proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under Section 10(L).

J. **Initiation of Commission Proceedings.** Proceedings before the Commission shall be initiated upon the filing of a written complaint by a petitioner with the Commission. Complaints shall satisfy each of the following conditions:

1. The petitioner is authorized to file the Complaint under the terms and conditions prescribed by this Section 10;

2. The underlying Charge was filed within the time limits prescribed in Section 10(B)(6); and
3. The complaint was filed within 360 days following the date on which the underlying Charge was filed.

Upon motion of respondent and a showing that any one or more of the foregoing conditions has not been satisfied, the Commission shall dismiss the complaint; provided, however, that no complaint shall be dismissed under (2) above as to any allegation of a pattern of conduct or practice in violation of the Act to the extent such pattern or practice continued to persist during the time limit prescribed in Section 10(B)(6); and provided further that, in the absence of dismissal or conclusion of Commission proceedings on the merits, nothing herein shall be construed as prohibiting the refiling of a Charge alleging the same or comparable pattern or practice violations of the Act which continued to persist during the time limits prescribed in Section 10(B)(6) for refiling such Charge.

- K. **Preliminary Relief.** Prior to the initiation of Commission proceedings on a Charge and notwithstanding the failure to satisfy any precondition to such proceedings, either ONLR, an individual charging party or aggrieved person may, upon notice to respondent, petition the Commission for appropriate temporary or preliminary relief in the form of an injunction or other equitable remedy on the ground that prompt action is necessary to carry out the purposes of the Act, including the preservation and protection of rights thereunder. Nothing herein shall be construed as foreclosing a petition which seeks comparable relief subsequent to the commencement of Commission proceedings.
- L. **Intervention in Commission Proceedings.** Within three business days after the date on which any complaint, or petition pursuant to Section 10(K), is filed with the Commission, other than a complaint or petition filed by ONLR, the Commission shall cause copies thereof to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene in the Commission proceeding initiated by such complaint or petition upon the timely application by motion accompanied by a pleading setting forth the claims for which intervention is sought.
- M. **Confidentiality.**
1. **Conciliation.** In the absence of written consent of the persons concerned, statements or offers of settlement made, documents provided or conduct by participants in conciliation efforts under Section 10(F) shall not be admissible in any Commission or other proceeding relating to the Charge which is the subject of conciliation, to prove liability for or invalidity of the Charge or the amount or nature of relief therefor; provided, however, that nothing herein shall be construed as requiring the exclusion of such evidence merely because it was presented in the course of conciliation if:

- (a) The evidence is otherwise discoverable; or
 - (b) The evidence is offered for another purpose, including without limitation, proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.
2. **Charge, Records and Information.** Prior to the institution of Commission proceedings thereon, and in the absence of the written consent of the persons concerned, ONLR shall not disclose as a matter of public information any Charge, response thereto, any statements or other information obtained in the course of its investigation of the Charge, except that nothing herein shall prevent earlier disclosure of such information by ONLR in its discretion:
- (a) To charging parties or their attorneys, respondents or their attorneys, witnesses or other interested persons where the disclosure is deemed by ONLR to be necessary for securing a resolution of the Charge, including appropriate relief therefor;
 - (b) To employees or representatives of the Navajo Nation or employees or representatives of federal, state or local authorities having a governmental interest in the subject matter of the Charge; or
 - (c) To persons for the purpose of publishing data derived from such information in a form which does not reveal the identity of charging parties, aggrieved persons, respondents or persons supplying the information.

Except as otherwise provided herein, any person to whom a permissible disclosure is made hereunder shall be bound to maintain the confidentiality of such information from further disclosure and shall use the information solely for the purpose for which it was disclosed.

3. **Privileged Information.** Neither ONLR, charging parties, aggrieved persons, respondents, witnesses or persons supplying information in connection with a Charge shall be compelled, either before or after commencement of Commission proceedings, to disclose any information which represents the opinions or conclusions formed by ONLR during the course of its investigation of a Charge, or any information which is protected by the attorney-client privilege, the informer's privilege referred to in Section 10(B)(10), or any other absolute or limited privilege recognized under the laws of the Navajo Nation. To the extent justice requires, the Commission may, balancing the rights of parties and affected persons, prohibit or limit the disclosure of any other information for good cause shown, including a showing that disclosure would impede enforcement of the Act, jeopardize rights guaranteed thereunder, or cause annoyance, embarrassment, oppression or undue burden or expense to parties or affected persons.

- N. **Non-retaliation.** It shall be unlawful for any employer, labor organization, joint labor-management committee involved in apprenticeship or other matters relating to employment, employment agency or other person to, directly or indirectly, take, or attempt to induce another person to take, any action adversely affecting
- (1) the terms and conditions of any person's employment or opportunities associated with such employment,
 - (2) an applicant's opportunity for employment,
 - (3) the membership of an employee or applicant for employment in a labor organization, or
 - (4) any other right, benefit, privilege or opportunity unrelated to employment, because such person has opposed an employment practice subject to this Act or has made a charge, testified, or assisted or participated in any manner in an investigation, proceeding or hearing under the Act.
- O. **Service of Documents.** Service of any notice, determination or other document required to be transmitted under this Section 10 shall be accomplished by personal delivery or certified mail, return receipt requested.

Section 11. HEARING

- A. The Commission shall schedule a hearing within sixty (60) days of the filing of a written complaint by a petitioner with the Commission. The hearing shall be held at a location designated by the Commission.
1. **Notice:** The Commission shall issue a notice of hearing. The time and place of the hearing shall be clearly described in the notice. The notice shall also set forth in clear and simple terms the nature of the alleged violations and shall state (1) the violations may be contested at a hearing before the Commission, and (2) any party may appear by counsel and cross examine adverse witnesses.
 2. Upon application by a party to the Commission, or on the Commission's own motion, the Commission may issue subpoenas compelling the disclosure by any person evidence relevant to the complaint, including a subpoena ordering, under oath as may be appropriate:
 - (a) The attendance and testimony of witnesses;
 - (b) Responses to written interrogatories;
 - (c) The production of evidence; and
 - (d) Access to evidence for the purpose of examination and copying.
 3. The Commission is hereby authorized to administer oaths ~~and~~ compel attendance of any person at a hearing and to compel production of any documents.

4. In the event a party does not make an appearance on the day set for hearing or fails to comply with the rules of procedure set forth by the Commission for the conduct of hearings, the Commission is hereby authorized to enter default determination against the non-appearing and/or noncomplying party.
- B. **Burden of Proof:** In any compliance review, complaint proceeding, investigation, or hearing, the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by clear and convincing evidence.
- C. **Hearing:** The Commission shall conduct the hearing in a fair and orderly manner and extend to all parties the right to be heard.
1. The Commission shall not be bound by any formal rules of evidence.
 2. The respondent shall have the opportunity to answer the complaint and the parties shall have the right to legal counsel, present witnesses, and cross-examine adverse witnesses.
 3. The Commission shall issue its decision by a majority vote of a quorum present and shall be signed by the Chairman of the Commission.
 4. Copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt.
 5. The proceeding shall be recorded. Any party may request a transcript of the proceeding at their own expense.
 6. The decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.

Section 12. REMEDIES AND SANCTIONS

- A. If, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall:
1. Issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, backpay, frontpay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of intentional violation, imposition of civil fines; provided that liability for backpay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which is the basis for the complaint.
 2. In the case of an individual suit initiated pursuant to Section 10(H) award costs and attorneys' fees if the respondent's position was not substantially justified.

3. Refer matters involving respondent contracts, agreements, leases and permits to the Navajo Nation Attorney General for appropriate action.
- B. In the absence of a showing of good cause thereof, if any party to a proceeding under this Act fails to comply with a subpoena or order issued by the Commission, the Commission may impose such sanctions as are just, including without limitation any one or more of the following:
- (1) In the case of noncompliance with a subpoena of documents or witnesses:
 - (a) An order that the matters regarding which the subpoena was issued or any other designated facts shall be deemed established for the purposes of the proceeding and in accordance with the claim of the party obtaining the order;
 - (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 - (c) An order striking pleadings or parts thereof, or staying further proceedings until the subpoena is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.
 - (2) In the case of noncompliance by a party or nonparty with a Commission subpoena of documents or witnesses or with any other order of the Commission:
 - (a) An order holding the disobedient person in contempt of the Commission and imposing appropriate sanctions therefor, including a civil fine;
 - (b) An order directing the disobedient person to pay the reasonable costs and/or attorney's fees caused by the noncompliance.
- C. The person or party in whose favor a Commission's decision providing for remedial action is entered shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce the remedial action; provided that the Commission itself shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce civil fines or sanctions imposed by the Commission against a person or party. In both instances the Attorney General of the Navajo Nation shall have an unconditional right to intervene on behalf of the Navajo Nation. Any attempted enforcement of a Commission order or decision directing payment of money by the Navajo Nation or any of its governmental entities shall, with respect to the extent of any liability be governed by the Navajo Sovereign Immunity Act, 1 N.T.C. § 351 et seq., as amended.

Section 13. APPEAL AND STAY OF EXECUTION

- A. Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court by lodging a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure and within ten (10) days after receipt of the Commission's decision.
- B. In the absence of a stipulation by the parties approved by the Commission, a stay of execution of the decision from which the appeal is taken shall only be granted upon written application of the appellant to the Commission and an opportunity for response by appellee. The application for a stay shall be filed within the period prescribed for appeal in Subsection (A) hereof. No stay shall be issued unless the appellant presents a clear and convincing showing that each of the following requirements has been satisfied:
1. Appellant is likely to prevail on the merits of the appeal;
 2. Appellant will be irreparably harmed in the absence of a stay;
 3. Appellee and interested persons will not be substantially harmed by a stay;
 4. The public interest will be served by a stay; and
 5. An appeal bond or other security, in the amount and upon the terms prescribed by Subsection (C) below, has been filed with and approved by the Commission; provided that no appeal bond shall be required of ONLR, the Navajo Nation or any governmental agency or enterprise of the Navajo Nation.
- C. The appeal bond shall be issued by a duly authorized and responsible surety which shall obligate itself to pay to appellee, or any other person in whose favor an award is made by the Commission decision, the amounts specified or described in the bond upon conclusion of the appeal and failure of appellant, following written demand by appellee, to satisfy the foregoing obligations. The amount or nature of liability assumed by the surety shall be specified in the bond and shall include:
1. The total amount of all monetary awards made in the Commission decision, together with such interest thereon as may be prescribed in the Commission's decision;
 2. Costs of appeal and attorneys' fees incurred by appellee in defending the appeal and which may be awarded to appellee by the Navajo Nation Supreme Court;

3. Damages sustained by appellee or other recipients of a Commission award for delay in satisfaction of the Commission decision caused by the appeal; and
4. Such other amount or liability reasonably required to be secured to protect the interests of the appellee or other award recipients.

The bond shall provide that the surety submits to the jurisdiction of the Commission and the Courts of the Navajo Nation, and irrevocably appoints the Commission as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion of the appellee filed with the Commission, with copies thereof served on the surety and appellant.

In lieu of posting an appeal bond, appellant may, with the approval of the Commission, post a cash bond and undertaking in the amount and upon the terms which are required above with respect to an appeal bond.

No appeal bond or cash bond and undertaking, nor the liabilities of the surety or appellant thereunder, shall be exonerated or released until all amounts and liabilities prescribed therein have been fully paid and satisfied.

- D. Within three business days following the filing with the Navajo Nation Supreme Court of any appeal from a Commission proceeding, the Clerk of such Court shall, in all cases other than those in which ONLR is not either the appellant or appellee, cause copies of the notice of appeal and all other documents filed in connection therewith to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene and participate as amicus in the appeal proceedings upon timely application therefor by motion lodged with the Navajo Nation Supreme Court. ONLR's right of participation shall be coextensive with that of the parties to the appeal, including the rights to file opening, answering and reply briefs, and the right to present oral argument to the Court.

Section 14. NON-NAVAJO SPOUSES

- A. When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the application for Navajo preference consideration.

- B. Upon meeting the above requirements, such consideration shall be limited to preference in employment where the spouse would normally be in a pool of non-Navajo workers. In this instance, Navajo preference would place the non-Navajo spouse in the applicant pool of Navajos for consideration. However, preference priority shall still be given to all Navajo applicants who meet the necessary job qualifications within that pool.
- C. Non-Navajo spouses having a right to secondary preference under this Section shall also have and enjoy all other employment rights granted to Navajos under the Act, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.

Section 15. LIE-DETECTOR TEST

- A. No person, shall request or require any employee or prospective employee to submit to, or take a polygraph examination as a condition of obtaining employment or of continuing employment or discharge or discipline in any manner an employee for failing, refusing, or declining to submit to or take a polygraph examination.
- B. For purposes of this section, "polygraph" means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test, or question individuals for the purpose of determining truthfulness. This provision shall not apply to federal or state government employees.

Section 16. RULES AND REGULATIONS

Human Services Committee of the Navajo Nation Council is hereby delegated the authority to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act. The Commission is hereby delegated the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under Section 11 of the Act; provided only that such rules are consistent with the provisions of the Act.

Section 17. ALL PRIOR INCONSISTENT LAW IS REPEALED

All prior Tribal laws, rules, regulations, and provisions of the Navajo Tribal Code previously adopted which are inconsistent with this Act are hereby repealed.

Section 18. EFFECTIVE DATE AND AMENDMENT OF THE ACT

- A. The effective date of this Act shall be 60 days after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.
- B. Any amendment or repeal of the Act shall only be effective upon approval of the Navajo Nation Council, and shall not be valid if it has the effect of amending,

modifying, limiting, expanding or waiving the Act for the benefit or to the detriment of a particular person.

- C. Any amendment to the Act, unless the amendment expressly states otherwise, shall be effective 60 days after the passage thereof by the Navajo Nation Council.
- D. The time limits prescribed in Section 10 relating to filing a Charge and subsequent proceedings thereon were added by amendment adopted by the Navajo Nation Council subsequent to the effective date of the original Act. Notwithstanding an actual accrual date for any alleged violation of the Act which is prior to the effective date of the amendment which added the time limits in Section 10 hereof, such alleged violation shall be deemed to accrue on the effective date of the foregoing amendment for purposes of all time limits set forth in Section 10.

Section 19. SEVERABILITY OF THE ACT

If any provision of this Act or the application thereof to any person, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications thereof.



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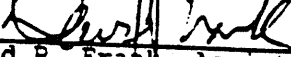
Navajo Nation Department of Justice

Post Office Drawer 2010
Window Rock, AZ 86515
(602) 871-6343 - 6348

CIL

MEMORANDUM

- TO: Herb Yazzie, Attorney General
- : Eric N. Dahlstrom, Deputy Attorney General
- : Britt E. Clapham, Assistant Attorney General
Human Services Unit
- : Stanley M. Pollack, Assistant Attorney General
Natural Resources Unit
- : Violet A. P. Lui, Assistant Attorney General
Tribal Government Unit
- : Pamela S. Williams, Assistant Attorney General
Economic Development Unit

FROM: 
David P. Frank, Assistant Attorney General
Labor Unit

DATE: July 28, 1989

SUBJECT: Proposed Amendments to the Navajo Preference in Employment Act

Attached are proposed amendments to the Navajo Preference in Employment Act and related analysis of the Navajo Labor Investigative Task Force. As noted, the Task Force recommends that the Council approve distribution of the materials for public comment, with a view to submitting final proposals during the Fall session.

I would appreciate any comments you or other staff within your Units might have.

Thanks.

Attachments

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(Tab 1)

**PROPOSED RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL**

Recommending that the Intergovernmental Relations Committee of the Navajo Nation Council Sanction, Approve and Authorize the (*School Name*) to Enter into Negotiations for a Grant/Contract for the Operations of Certain Education and Education-Related Programs, Under the Provisions of Public Law 100-297 or Public Law 93-638 with the Bureau of Indian Affairs, beginning (*Month/Day/Year*) and ending (*Month/Day/Year*).

WHEREAS:

1. Pursuant to 2N.N.C. §§481 and 482, the Education Committee is established and continues as a standing committee of the Navajo Nation Council for the purpose of overseeing the educational development of the Navajo Nation and to develop policies for a scholastically excellent and culturally relevant education; and
2. The Education Committee of the Navajo Nation Council is empowered to review, sanction, and authorize applications for contracts and grants for the operation of educational programs subject to final approval by the Intergovernmental Relations Committee of the Navajo Nation Council, 2 N.N.C. §484 (B) (4); and
3. The (*School Name School Board*) (hereinafter School Board) has not previously been sanctioned as a Navajo Nation tribal organization for the purpose of obtaining a grant/contract from the Bureau of Indian Affairs under Public Law 100-297 or Public Law 93-638 for the operation of education programs; and
4. The School Board is incorporated under the Corporation Code of the Navajo Nation to formalize its organization as not-for-profit corporation of the Navajo Nation; and
5. The School Board has prepared a Grant/Contract application packet which meets the requirements of the Navajo Nation attached as (**Exhibit "A"**), requesting that all education and education-related programs be transferred from the Bureau of Indian Affairs, Office of Indian Education Programs to the (*School Name School Board*) as a tribal organization sanctioned by the Navajo Nation; and
6. The School Board has obtained resolutions from all the Chapters within the attendance boundaries of the school, attached hereto as (**Exhibit "B"**), approving the (*School Name*) to convert from a Bureau of Indian Affairs operated school to a local community-controlled school, pursuant to 10 N.N.C. Education.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Education Committee of the Navajo Nation Council hereby recommends to the Intergovernmental Relations Committee of the Navajo Nation Council to approve and authorize the (*School Name School Board*) (hereafter School Board) to apply for a grant/contract to operate and administer the education and education-related programs currently operated by the Bureau of Indian Affairs, Office of Indian Education Programs at the (*School Name School Board*) for the period beginning (*Month, Day, Year*) and ending (*Month, Day, Year*).
2. The Education Committee of the Navajo Nation Council further recommends to the Intergovernmental Relations Committee of the Navajo Nation Council that the

following conditions be implemented and complied with to maintain its grant/contract with the Bureau of Indian Affairs for the education and education-related programs.

- A. The Executive Director, Division of Diné Education (DODE) has certified that the (*School Board*) grant/contract application is in full compliance with and contains all requirements outlined in the Navajo Nation "Grant/Contract Conversion/Maintenance Handbook" which shall include the following mandatory provisions:
1. The School Board at a minimum shall in the operation of their programs, meet the Commission of Accreditation and School Improvement requirements within the timeline established by the Association; and
 2. If the School Board operates a dormitory program they shall meet the criteria and requirements for a residential program contained in 25 C.F.R, Part 36, Subpart H, Residential Standards or such other residential standards which may be established by the Education Committee of the Navajo Nation Council; and
 3. The School Board shall submit an annual audit that meets the requirements of the Single Agency Audit Act as amended within nine (9) months after the end of the fiscal period, or within thirty (30) days after the entity receives its auditor's report, which ever comes first to the Navajo Nation Office of the Auditor General and DODE. The School Board, if a first year grantee, may retain the same auditor for up to six (6) years. All other grantees shall select a different Auditing Firm each time the grant/contract is re-authorized; and
 4. The School Board shall respond to all annual audit findings and observations within ninety (90) days, including the development of a Corrective Action Plan providing for the timely correction and/or resolution of all audit findings and observations; and
 5. The School Board shall request all amendments and future requests for continuation of their grant/contract authorization under this resolution through a resolution proposed to the Education Committee of the Navajo Nation Council and reviewed through the Division of Dine Education; and
- B. The School Board shall provide, after the approval of Tribal Review Process (164 SAS), fifteen (15) copies of the grant/contract application and copies of all grant/contract-related documents to the Executive Director; Division of Dine Education; P.O. Box 670; Window Rock, Arizona 86515; and
- C. The School Board shall comply with all Navajo Nation laws, including, but not limited to 10 N.N.C. Education §1 et seq. and 11 N.N.C. Elections §1 et seq.; and
- D. The School Board shall permit the Division of Diné Education and/or the Navajo Nation Office of Auditor General to conduct monitoring visits and provide access to all grant/contract records upon request; and
- E. The continued sanctioning by the Education Committee of the Navajo Nation Council and respective School Board grant/contract is contingent and conditional upon compliance by the school with recommendations arising from any monitoring and evaluation reports; and
- F. The School Board shall provide to the Executive Director, Division of Diné Education, and the Education Committee of the Navajo Nation Council, a written

annual report regarding all activities conducted under the grant/contract for the preceding year and the year authorized herein. In addition, the School Board shall include within the report, brief descriptions of any substantial administrative, financial, and programmatic problems encountered in their operation; and

- G. No portion of any grant/contract funds received by the School Board from the bureau of Indian Affairs, or any Navajo Nation general funds received directly by the School, or any other funds not named herein, nor any interest earned from such funds shall be used to fund litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities.
- 3. The Education Committee of the Navajo Nation Council recommends to the Intergovernmental Relations Committee of the Navajo Nation Council that the sanction and authorization provided to the School Board be strictly limited to that authority to operate certain specified education and education-related programs referred to in this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly-called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of ___ in favor, ___ opposed, ___ abstained, on this ___ day of ___, 2002.

(Name of Chairperson), Chairperson
Education Committee
NAVAJO NATON COUNCIL

Motion :
Second :

RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL

Amending Resolution ECS-110-99 the Uniform Stipend Policy
for Navajo School Boards

WHEREAS:

1. The Education Committee was established as a standing committee of the Navajo Nation Council, pursuant to 2 N.N.C. §482; and

2. The Education Committee is empowered to promulgate regulations, policies and procedures to implement Navajo Nation Education laws, and to assist, support and coordinate with local communities, parent organizations and school boards and school board organizations, pursuant to 2 N.N.C. §484 (B) (1) and (5); and

3. By Resolution ECS-110-99, the Education Committee adopted a Uniform Stipend Policy; and

4. Upon implementation and the conduct of public hearings the week of November 15-19, 1999, it has become apparent that school boards had recommendations for amendments to the policy adopted by Resolution ECS-110-99; and

5. The Education Committee Subcommittee on School Board Policies, following due consideration of the recommendation for amendment made in the public hearings, has recommended the amendment to the policy, as set forth in Exhibit "A"; and


6. The Education Committee finds that it would be in the best interests of Navajo children and families, chapters, communities and school boards for the Education Committee to amend Resolution ECS-110-99.

NOW, THEREFORE, BE IT RESOLVED THAT:

The Education Committee of the Navajo Nation Council hereby amends the Uniform Stipend Policy in the manner set forth in Exhibit "A".

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 7 in favor, 0 opposed and 0 abstained, this 6th day of April, 2000.


 Andy R. Nyze, Chairperson
 Education Committee
 NAVAJO NATION COUNCIL

Motion: Christine Apache
Second: Calvin Kirk

paid regular meetings per month for executive, policy and corporate decision-making.

C. Special Meetings: All local school boards are allowed no more than four (4) special meetings per fiscal year, for which board members may receive stipends as provided in D. 2. below. Additional uncompensated Special Meetings may be held by the school boards, as determined by the school board. ~~Special school board meetings are any meetings held in addition to the regular meeting for special purposes. All special school board meetings must have prior approval from the respective BIA Education Line Officer in order to for board members to receive payment.~~

D. Stipend:

(1) Contingent upon the availability of funds, school board members shall be paid a stipend rate up to \$100.00 for a ~~duly called~~ regular meeting.

(2) Contingent upon the availability of funds, school board members may be paid a stipend rate up to \$60.00 for a special meeting.

(3) No more than one (1) stipend payment will be claimed within a twenty-four (24) hour period.

(4) Stipends paid from different sources shall be properly allocated to those sources in order that allocation may be properly made consistent with OMB Circular A-133 and the Indirect Cost proposal information.

E. Quorum: A simple majority of board members shall constitute a quorum. At times when a quorum is not achieved for a duly called school board meeting, only mileage reimbursement can be claimed at a rate of ~~thirty-one and half two~~ two cents (~~\$315.32~~) per mile by those members who attended. An authorized signature authority will need to be indicated on the Meeting Attendance sheet that only mileage is to be paid.

F. Per Diem, Lodging, and Mileage: Board members are paid per diem, lodging, and mileage for attendance at trainings, work/planning sessions, and Professional education conferences at the following rates:

(1) Per Diem may be paid at a rate of \$34.00 per day of the local area (on/near the Navajo Nation). The per diem rate may be higher if the location of the activity is within a high cost area as identified by the Federal Travel Regulation (41 CFR Chapter 301). Per Diem and lodging reimbursements will be paid on the basis of indicated time of travel and lodging receipts up to the maximum federally designated per diem rates. No claims will be reimbursed when expenses are borne by another source, school or entity.

(2) All mileage reimbursements for travel shall be paid considering the most direct or shortest route. If travel occurs by an indirect route, the extra.

RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving and Adopting the Requirement that Schools and Any Person Responsible for Providing Educational Leadership and Administrating a School/District in Accordance with Governing Board Policies, Within the Exterior Boundaries of the Navajo Nation, Be Required to Meet Certain Criteria

WHEREAS:

1. Pursuant to 2 N.N.C. §§481 and 482, the Education Committee is established and continued as a standing committee of the Navajo Nation Council with the general purpose to oversee the educational development of the Navajo Nation and to develop policies for a scholastically excellent, and culturally relevant education; and

2. Pursuant to 2 N.N.C. §484 (B)(1), the Education Committee of the Navajo Nation Council has the authority to promulgate regulations, policies and procedures to implement Navajo Nation education laws; and

3. By Resolution CAP-14-83 (**Exhibit "A"**), the Navajo Tribal Council approved and authorized the establishment of a Navajo Nation Affiliate of North Central Association with jurisdiction to provide accreditation services to all schools, public, private, and BIA-funded schools on the Navajo Nation; and

4. The Navajo Nation education statute provides that schools and school systems operating within the Navajo Nation shall seek the professional services of competent Navajo educators, counselors, administrators and support personnel to adequately serve the linguistically and culturally unique children of the Navajo People (10 N.N.C. §108 (B)); and

5. The North Central Association, a program within the Division of Diné Education, is charged with the responsibilities cited in the Plan of Operation, GSC-35-01 (**Exhibit "B"**); and

6. The North Central Association of Colleges and Schools (NCA CASI), which is now known as the NCA Commission on Accreditation and School Improvement, serves pre-kindergarten thru twelfth grade and special school populations. The NCA CASI standard is to maximize the proportion of promoted or graduated students who are self-directed learners and are prepared to make successful school-to-school or school-to-career transitions (attached and incorporated herein is the 2001 NCA/CASI Standard and Criteria for Elementary, Middle Level, Secondary, and Unit Schools (**Exhibit "C"**)); and

7. NACA CASI has specific membership and improvement criteria in place to help schools develop their capacity to achieve the standard; and

8. The Education Committee of the Navajo Nation Council recognizes that the established Educational Organizations (States of New Mexico, Arizona, and Utah, and the Office of Indian Education-BIA) serving Navajo students each have their own standards and regulations, which dictate the Curriculum, Accreditation of Teachers/Administrators, Adequacy of Facilities and others; and

9. That in the process of schooling, the school is responsible for developing educational programs that reflect the characteristics of the school community and increases the intellectual, personal, physical, social, and career development of the students it serves; and

10. It is the policy of the Navajo Nation that school boards currently operating their schools under the authority of Public Law 100-297 or Public Law 93-638 comply with all requirements outlined in the Navajo Nation "Grant/Contract Conversion/Maintenance Handbook," which include the following:

- a. The school board at a minimum shall in the operation of their programs, meet the Commission of Accreditation and School Improvement requirements within the timeline established by the Association; and

11. The Education Committee of the Navajo Nation Council has become aware of numerous and significant management problems that have existed at some schools which have resulted in substandard delivery of educational programs to Navajo children; and

12. The Education Committee of the Navajo Nation Council is committed to school systems that practice high standards and accountability, and promote employment of administrators with qualifications meeting state standards, which require knowledge of research-based instructional practices with which to achieve high performing schools that narrow the achievement gap and improve overall student achievement; and

13. The Education Committee of the Navajo Nation Council recognizes the ever-expanding responsibilities that chief school administrators have in overseeing school operations including student achievement to staff development, therefore, it is required high standards be implemented in all areas of school operation, specifically in employment of school administrators to ensure that education program funds promote research based, effective practices in the schools. It is in the best interest for the Navajo Nation to adopt standards for school administrators.

NOW, THEREFORE, BE IT RESOLVED THAT:


1. The Education Committee of the Navajo Nation Council hereby approves and adopts the requirement that schools and any person responsible for providing educational leadership and administrating the school/district in accordance with governing board policies, within the exterior boundaries of the Navajo Nation, be required to meet the following certification standards:

- A) A School Administrator must meet North Central Association or State Certification Standards; or
- B) Where no specific NCA or state certification standards exists, school administrators must have a master's degree or at least 30 semester graduate credit hours in school administration, curriculum and supervision and related fields plus two years experience in teaching; and
- C) For purposes of these standards, a school administrator is a school Executive Director, Principal, Superintendent and other positions of similar responsibilities for the day-to-day management of a school.

3. The Education Committee of the Navajo Nation Council approves and directs that schools and school administrators (as defined above) shall be in full compliance with the Requirement before or by June 30, 2002, and shall provide proof of compliance to the Division of Diné Education/NCA Office. The Education Committee of the Navajo Nation Council can deny or rescind an authorization for a school to contract or receive a grant, pursuant to P.L. 100-297 and P.L. 93-638, if the school fails to comply with the Requirement.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a dully called meeting in Window Rock, Navajo Nation (Arizona), at which a quorum was present and the same was passed by a vote of (6) in favor, (0) opposed and (0) abstained, this 12th day of February, 2002.


Andy R. Ayze, Chairperson
Education Committee
NAVAJO NATION COUNCIL

Motion: Christine Apache
Second: Frank C. Willetto, Sr.

RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving and Adopting the Requirement that Schools and Any Person Responsible for Providing Educational Leadership and Administrating a School/District in Accordance with Governing Board Policies, Within the Exterior Boundaries of the Navajo Nation, Be Required to Meet Certain Criteria

WHEREAS:

1. Pursuant to 2 N.N.C. §§481 and 482, the Education Committee is established and continued as a standing committee of the Navajo Nation Council with the general purpose to oversee the educational development of the Navajo Nation and to develop policies for a scholastically excellent, and culturally relevant education; and

2. Pursuant to 2 N.N.C. §484 (B)(1), the Education Committee of the Navajo Nation Council has the authority to promulgate regulations, policies and procedures to implement Navajo Nation education laws; and

3. By Resolution CAP-14-83 (**Exhibit "A"**), the Navajo Tribal Council approved and authorized the establishment of a Navajo Nation Affiliate of North Central Association with jurisdiction to provide accreditation services to all schools, public, private, and BIA-funded schools on the Navajo Nation; and

4. The Navajo Nation education statute provides that schools and school systems operating within the Navajo Nation shall seek the professional services of competent Navajo educators, counselors, administrators and support personnel to adequately serve the linguistically and culturally unique children of the Navajo People (10 N.N.C. §108 (B)); and

5. The North Central Association, a program within the Division of Diné Education, is charged with the responsibilities cited in the Plan of Operation, GSC-35-01 (**Exhibit "B"**); and

6. The North Central Association of Colleges and Schools (NCA CASI), which is now known as the NCA Commission on Accreditation and School Improvement, serves pre-kindergarten thru twelfth grade and special school populations. The NCA CASI standard is to maximize the proportion of promoted or graduated students who are self-directed learners and are prepared to make successful school-to-school or school-to-career transitions (attached and incorporated herein is the 2001 NCA/CASI Standard and Criteria for Elementary, Middle Level, Secondary, and Unit Schools (**Exhibit "C"**)); and

7. NACA CASI has specific membership and improvement criteria in place to help schools develop their capacity to achieve the standard; and

8. The Education Committee of the Navajo Nation Council recognizes that the established Educational Organizations (States of New Mexico, Arizona, and Utah, and the Office of Indian Education-BIA) serving Navajo students each have their own standards and regulations, which dictate the Curriculum, Accreditation of Teachers/Administrators, Adequacy of Facilities and others; and

9. That in the process of schooling, the school is responsible for developing educational programs that reflect the characteristics of the school community and increases the intellectual, personal, physical, social, and career development of the students it serves; and

10. It is the policy of the Navajo Nation that school boards currently operating their schools under the authority of Public Law 100-297 or Public Law 93-638 comply with all requirements outlined in the Navajo Nation "Grant/Contract Conversion/Maintenance Handbook," which include the following:

- a. The school board at a minimum shall in the operation of their programs. meet the Commission of Accreditation and School Improvement requirements within the timeline established by the Association; and

11. The Education Committee of the Navajo Nation Council has become aware of numerous and significant management problems that have existed at some schools which have resulted in substandard delivery of educational programs to Navajo children; and

12. The Education Committee of the Navajo Nation Council is committed to school systems that practice high standards and accountability, and promote employment of administrators with qualifications meeting state standards, which require knowledge of research-based instructional practices with which to achieve high performing schools that narrow the achievement gap and improve overall student achievement; and

13. The Education Committee of the Navajo Nation Council recognizes the ever-expanding responsibilities that chief school administrators have in overseeing school operations including student achievement to staff development, therefore, it is required high standards be implemented in all areas of school operation, specifically in employment of school administrators to ensure that education program funds promote research based, effective practices in the schools. It is in the best interest for the Navajo Nation to adopt standards for school administrators.

NOW, THEREFORE, BE IT RESOLVED THAT:

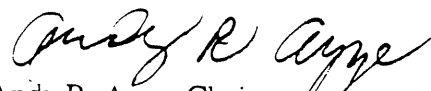
1. The Education Committee of the Navajo Nation Council hereby approves and adopts the requirement that schools and any person responsible for providing educational leadership and administrating the school/district in accordance with governing board policies, within the exterior boundaries of the Navajo Nation, be required to meet the following certification standards:

- A) A School Administrator must meet North Central Association or State Certification Standards; or
- B) Where no specific NCA or state certification standards exists, school administrators must have a master's degree or at least 30 semester graduate credit hours in school administration, curriculum and supervision and related fields plus two years experience in teaching; and
- C) For purposes of these standards, a school administrator is a school Executive Director, Principal, Superintendent and other positions of similar responsibilities for the day-to-day management of a school.

3. The Education Committee of the Navajo Nation Council approves and directs that schools and school administrators (as defined above) shall be in full compliance with the Requirement before or by June 30, 2002, and shall provide proof of compliance to the Division of Diné Education/NCA Office. The Education Committee of the Navajo Nation Council can deny or rescind an authorization for a school to contract or receive a grant, pursuant to P.L. 100-297 and P.L. 93-638, if the school fails to comply with the Requirement.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a dully called meeting in Window Rock, Navajo Nation (Arizona), at which a quorum was present and the same was passed by a vote of (6) in favor, (0) opposed and (0) abstained, this 12th day of February, 2002.



Andy R. Ayze, Chairperson
Education Committee

NAVAJO NATION COUNCIL

Motion: Christine Apache
Second: Frank C. Willetto, Sr.

RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL

Approving and Adopting Amended Policies and Procedures for Waiver of School Attendance Boundaries for Navajo Nation Bureau of Indian Affairs-Funded Schools Commencing in School Year 2000

WHEREAS:

1. The Education Committee is established and continued as a standing committee of the Navajo Nation Council, pursuant to 2 N.N.C. §481; and
2. Resolution CO-72-96, and pursuant to 2 N.N.C. §484 (B)(6), the Navajo Nation Council affirmed and recognized the authority of the Education Committee of the Navajo Nation Council to establish school attendance boundaries and related policies. In the same resolution, the Navajo Nation Council advised and requested the Education Committee of the Navajo Nation Council to establish policies and procedures related to the establishment and maintenance of school attendance boundaries and related matters; and
3. The Education Committee of the Navajo Nation Council by Resolution ECN-122-97, directed its Subcommittee on Navajo School Board Policies to establish policies and procedures for waiving school attendance boundaries. Thus, the Subcommittee submitted recommendations to the Education Committee of the Navajo Nation Council policies and procedures to waive school attendance boundaries for Bureau of Indian Affairs-funded schools; and
4. By Resolution ECJA-5-99, the Education Committee of the Navajo Nation Council approved and adopted the revised Policies and Procedures for waiving school attendance boundaries and redefining certain attendance boundaries for Navajo Bureau of Indian Affairs-funded schools for School Year 1999-2000; and
5. The Education Committee of the Navajo Nation Council has been apprised of the implementation process and related problems regarding the School Attendance Boundary Waiver applications by the Subcommittee on Navajo School Board Policies and believes that amendments of certain provisions of the Policies and Procedures is needed to more efficiently accommodate waiver applications; and
6. The Education Committee of the Navajo Nation Council has reviewed the affected provisions, which require amendments to adequately facilitate the approval process of school attendance boundary waiver applications.

NOW, THEREFORE, BE IT RESOLVED THAT:

The Education Committee of the Navajo Nation Council hereby approves and adopts the amended Policies and Procedures to clarify certain School Attendance Boundaries and to further clarify procedures for waiving attendance boundaries for Navajo Bureau of Indian Affairs-funded schools commencing in School Year 2000 as depicted in Exhibit "A", which is attached hereto.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (AZ), at which a quorum was present and the same was passed by a vote of 5 in favor, 0 opposed, and 0 abstained, this 22nd day of November, 2000.



Andy R. Ayze, Chairperson
Education Committee

NAVAJO NATION COUNCIL

Motioned: Calvin Kirk

Seconded: Christine Apache

**Policies & Procedures for
Waiving School Attendance Boundaries
For B.I.A.-Funded Schools**

I. Purpose

The purpose of these policies and procedures is to provide a basis for Navajo Nation approval of waivers of school attendance boundaries for Bureau of Indian Affairs-funded schools on the Navajo Nation and peripheral dormitories. These policies and procedures shall apply when students or their parents apply to attend a Bureau of Indian Affairs-funded school on the Navajo Nation or reside in a Bureau of Indian Affairs-funded peripheral dormitory other than the one in whose attendance boundary they reside.

Pursuant to Resolution CO-72-96, the Education Committee of the Navajo Nation Council is the governing body for approving out-of-boundary student enrollment.

II. Definitions

The following definitions shall apply to the policies and procedures for the waiver of school attendance boundaries:

1. "Off-Reservation School" means Bureau of Indian Affairs-funded schools that are located outside the exterior boundaries of the Navajo Nation, except the peripheral dormitories: Aztec Dormitory, Huerfano Dormitory, Richfield Dormitory, Flagstaff Dormitory, Winslow Dormitory and Holbrook Dormitory.
2. In regards to the Santa Fe Indian School the enrollment boundary shall be limited to the Eastern Navajo Agency and the school must obtain an approved waiver from the affected Eastern Navajo Agency School Board.
3. "Receiving School" means the school that accepts the transfer of the student from a school that is located outside the school attendance boundary in which the student resides.
4. "School Attendance Boundary" means designated areas from which B.I.A.-funded schools can draw its students and which CN-64-84 and reaffirmed by the Education Committee Resolution ECJA-05-98.
5. "Releasing School" means the school that is located within the school attendance boundary from which a student desires to transfer.

III. Policies

1. Contingent on available space, all schools shall serve students residing within the school attendance boundary set by Resolution CN-64-84 and reaffirmed by Resolution ECJA-05-98 for B.I.A.-funded schools on the Navajo Nation.
2. No schools shall transport students from outside the established boundary without an approved Navajo Nation School Attendance Boundary Waiver Application.
3. Consideration of out-of-boundary school attendance shall be made by the affected local school boards, based on a Navajo Nation School Attendance Boundary Waiver Application. The affected schools board shall consider the Navajo Nation School Attendance Boundary Waiver Application that specifies the name of the student, the students' chapter affiliation, the releasing school and the school year the student will attend the out-of-boundary school.
4. All student transfers shall be approved no later than two weeks prior to the I.S.E.P. student count week. Transfers of students after the student count will be discouraged except where the situation is beyond the control of the parent(s) or student(s). Students that received a waiver for the last school year shall not be required to receive another one for subsequent years unless they have moved into a different attendance area.
5. During the period when action on a student's waiver application is being considered, the student shall be enrolled in the school where the parents wish that student be enrolled as long as it is in the best interest of the child to enroll in the receiving school.
6. B.I.A.-O.I.E.P. shall fund only properly approved out-of-boundary student enrollment, per U.S.C. 2001 (b)(1) and (b)(2) regarding tribal approval for students attending schools outside their established school attendance boundaries.
7. The responsible school officials will ensure that I.S.E.P. and other student-generated funds follow the student(s) who have been properly authorized by respective local school boards to enroll in a school outside of their established school attendance boundaries. For waiver applications approved after the I.S.E.P. student count week, the I.S.E.P. and other student-generated funds shall be transferred to the receiving school on a prorated basis.
8. The Navajo Preparatory School, Inc., Rough Rock Community School, St. Michaels Special Education, Tohatchi Special Education and Training

Center, Shiprock Alternative Schools, Inc. (K-12 Special Education) and the Special Education programs at Nenahnezad Community School and Greyhills Academy High School, are permitted to recruit and draw students from within the entire Navajo Nation, provided that students who are recruited meet eligibility criteria established for enrollment by the respective local school boards.

9. Effective School Year 1996-1997, there will be no new Navajo students enrolled in off-reservation schools. Those students who are currently enrolled in off-reservation schools will be allowed, at the student's discretion, to graduate from the off-reservation schools where they are enrolled. This policy does not apply to post-secondary institutions.
10. Navajo families residing within the Hopi Reservation will be allowed to have their child(ren) attend B.I.A.-funded schools within the Hopi Reservation. Navajo families residing outside of the Hopi Reservation boundary must enroll their child(ren) in schools situated in the Navajo school attendance boundary area where the family resides.
11. No school staff shall be authorized to approve waivers for out-of-boundary school attendance. However, the respective school board may delegate this authority to school board officials. Waiver requests will be considered and acted upon by the affected school boards under such procedures as they may develop consistent with these Policies and Procedures.
12. The local school boards may approve the waiver of school attendance boundaries for the following reasons; provided that space is available; further provided that out-of-boundary attendance does not violate applicable Navajo Nation and Federal laws; and further provided that the wishes of the parents are considered in the decision-making process.
 - a) Grade level not offered;
 - b) The Receiving School offers a special curriculum and the releasing school does not have such curriculum;
 - c) The Receiving School is near the child(ren)'s home;
 - d) The child(ren) is/are referred by the Navajo Nation, Federal and/or State Social Services agency and/or courts;
 - e) No available space at the Releasing School;
 - f) Excessive distance to the Releasing School from the student's home and adverse road conditions;

- g) **Health and safety deficiencies at the sending school; or**
 - h) **The releasing and receiving schools mutually agreed to exchange, send and/or receive students.**
13. **The Pinon Dormitory will be permitted to recruit and draw students from within the entire Chinle Agency boundary who desire to reside in the Pinon Dormitory; however, students, 1st through 6th grade, who want to reside in the Pinon Dormitory, will be subject to the original school attendance boundary established in 1984.**
 14. **The Santa Fe Indian School enrollment boundary shall be limited to the Eastern Navajo Agency and for each Navajo student enrolled an approved waiver shall be granted by and obtained from the affected Eastern Navajo School Board.**
 15. **Waivers are not required to situations where students were previously enrolled in public or Mission/private School, unless such students are seeking to attend a Navajo B.I.A.-funded school, which is outside the student's attendance area.**

IV. Procedures

1. **Only the parent(s) or legal guardian of a child can submit a Navajo Nation School Attendance Boundary Waiver Application for his/her child to attend a school outside their established boundary (Application Form attached). A student who is 18 years old or older can submit an application on his or her own behalf.**
2. **The B.I.A.-funded schools to be affected by student placement must be specifically identified on the Navajo Nation School Attendance Boundary Waiver Application Form.**
3. **The completed Navajo Nation School Attendance Boundary Waiver Application shall be filed with the administrators of the schools to be impacted, i.e., the school that is releasing the student and the school that will receive the student. The School Boundary Waiver Application will proceed through the following steps:**
 - a) **Application form(s) completed by parent or student shall be submitted to releasing school.**
 - b) **The releasing School Board should consider request, render a decision, and document its decision. If request is disapproved by the releasing School Board, the parent has the option of filing an appeal with the Education Committee of the Navajo Nation Council.**

- c) If the application(s) is approved by the Releasing School, it will be transmitted to the School Board of the Receiving School.
 - d) The School Board of the Receiving School will consider the application and render a decision to approve or disapprove request, and document its decision.
- 4. The authorized signatory for the releasing and receiving School Board shall sign the approved waiver application.
 - 5. The parents or legal guardian shall have the right to be present to justify the request to the school boards during the school board meetings or other sessions when the application is being addressed. Parents shall be given proper notification of school board meetings when the application is to be addressed.
 - 6. The school board shall render its decision on the application during the same meeting that the application is deliberated. The appropriate Education Line Officer will be informed about the school board's decision.

The appropriate Education Line Officer will be informed about the school board's decision.

- 7. Faxed School Attendance Boundary Waiver Applications that are completed will be accepted by all the appropriate schools.
- 8. All recommended Navajo Nation School Attendance Boundary Waiver Applications with the Releasing and Receiving School Boards' resolutions shall be submitted to the Division of Diné Education for the preparation of annual report to the Education Committee of the Navajo Nation Council on the implementation of these Policies and Procedures.

V. Disputes

When disputes arise involving school attendance boundary waivers, the affected local school boards must first attempt to jointly resolve the disputes. If the affected school boards are not able to resolve the disputes, then the matter shall be brought before the Division of Diné Education for mediation. If the Division of Diné Education is not able to mediate a resolution to the disputes, then the matter shall be brought before the Education Committee of the Navajo Nation Council for a final decision.

VI. Amending the Policies and Procedures

These policies and procedures may be amended from time to time by the Education Committee of the Navajo Nation Council upon the recommendation of the Division of Diné Education.

**PROPOSED RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL**

Recommending that the Intergovernmental Relations Committee of the Navajo Nation Council Sanction, Approve, and Re-authorize the (School Name) to Continue Grant/Contract Operation of All Education and Education-Related Programs, Pursuant to the Provisions of Public Law 100-297 or Public Law 93-638, (Beginning Month, Day, Year) and Ending (Month, Day, Year).

WHEREAS:

1. Pursuant to 2N.N.C. §§481 and 482, the Education Committee is established and continues as a standing committee of the Navajo Nation Council for the purpose of overseeing the educational development of the Navajo Nation and to develop policies for a scholastically excellent and culturally relevant education; and
2. The Education Committee of the Navajo Nation Council is empowered to review, sanction, and authorize applications for contracts and grants for the operation of educational programs subject to final approval by the Intergovernmental Relations Committee of the Navajo Nation Council, 2 N.N.C. §484 (B) (4); and
3. The (*School Name School Board*) (hereinafter School Board) has previously been sanctioned as a Navajo Nation tribal organization for the purpose of obtaining a grant/contract from the Bureau of Indian Affairs for the operation of education programs; and
4. The School Board is incorporated under the Corporation Code of the Navajo Nation as not-for-profit corporation; and
5. Approval and re-authorization by the Navajo Nation is required for the School Board to continue its grant/contract with the Bureau of Indian Affairs for the operation of all their education programs; and
6. The School Board has obtained resolutions from all the Chapters within the attendance boundaries of the school, attached hereto as (**Exhibit "A"**) approving the School Name to re-authorize the School Board grant/contract for the period beginning on (*Month, Day, Year*) and ending (*Month, Day, Year*).

NOW THEREFORE BE IT RESOLVED THAT:

1. The Education Committee of the Navajo Nation Council hereby recommends to the Intergovernmental Relations Committee of the Navajo Nation Council to re-authorize the (*School Name School Board*) (hereinafter School Board) to continue grant/contract operation of all education and education-related at their respective school for the period beginning (*Month, Day, Year*) and ending (*Month, Day, Year*).
2. The Education Committee of the Navajo Nation Council further recommends to the Intergovernmental Relations Committee of the Navajo Nation Council that the following conditions be implemented and complied with to maintain their grant/contract with the Bureau of Indian Affairs for the education and education-related programs.

- A. The Executive Director, Division of Diné Education (DODE) shall review the contents of the School Board grant/contract to insure it includes all the requirements contained in the Navajo Nation "Grant/Contract Conversion/Maintenance Handbook" which shall include the following mandatory provisions:
1. The School Board at a minimum, shall in the operation of their programs, meet the Commission of Accreditation and School Improvement requirements within the timeline established by the Association; and
 2. If the School Board operates a dormitory program they shall meet the criteria and requirements for a residential program contained in 25 C.F.R, Part 36, Subpart H, Residential Standards or such other residential standards which may be established by the Education Committee of the Navajo Nation Council; and
 3. The School Board shall have an annual audit that meets the requirements of the Single Agency Audit Act and shall be submitted within nine (9) months after the end of the fiscal period, or within thirty (30) days after the entity receives its auditor's report, which ever comes first to the Navajo Nation Office of the Auditor General and DODE for verification and monitoring. The School Board shall select a different Auditing Firm each time the grant/contract is re-authorized; and
 4. The School Board shall respond to all annual audit findings and observations within ninety (90) days, including the development of a Corrective Action Plan providing for the timely correction and/or resolution of all audit findings and observations; and
 5. The School Board shall request all amendments and future requests for continuation of their grant/contract authorization under this resolution through a resolution proposed to the Education Committee of the Navajo Nation Council and reviewed through the Division of Dine Education; and
- B. The School Board shall provide, after the approval of Tribal Review Process (164 SAS), fifteen (15) copies of the grant/contract application and copies of all grant/contract-related documents to the Executive Director; Division of Diné Education; P.O. Box 670; Window Rock, Arizona 86515; and
- C. The School Board shall comply with all Navajo Nation laws, including, but not limited to 10 N.N.C. Education §1 et seq. and 11 N.N.C. Elections §1 et seq.; and 2 N.N.C.; and
- D. The School Board shall permit the Division of Dine Education and/or the Navajo Nation Office of Auditor General to conduct monitoring visits and provide access to all grant/contract records upon request; and
- E. The continued sanctioning by the Education Committee of the Navajo Nation Council and respective School Board grant/contract is contingent and conditional upon compliance by the school with recommendations arising from any monitoring and evaluation reports; and

- F. The School Board shall provide to the Executive Director, Division of Diné Education, and the Education Committee of the Navajo Nation Council, a written annual report regarding all activities conducted under the grant/contract for the preceding year and the year authorized herein. In addition, the School Board shall include within the report, brief descriptions of any substantial administrative, financial, and programmatic problems encountered in their operation; and
 - G. No portion of any grant/contract funds received by the School Board ~~from~~^{from} the Bureau of Indian Affairs, or any Navajo Nation general funds received directly by the School, or any other funds not named herein, nor any interest earned from such funds shall be used to fund litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities;
3. The Education Committee of the Navajo Nation Council further recommends to the Intergovernmental Relations Committee of the Navajo Nation Council that this sanction and re-authorization provided to the School Board be strictly limited to that authority granted to operate certain specified education and education-related programs referred to in this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly-called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of ___ in favor, ___ opposed, ___ abstained, on this ___ day of ___, 2002.

(Name of Chairperson), Chairperson
Education Committee
NAVAJO NATON COUNCIL

Motion :
Second :

**PROPOSED RESOLUTION OF THE
EDUCATION COMMITTEE
OF THE NAVAJO NATION COUNCIL**

Recommending the Education Committee of the Navajo Nation Council to Sanction, Approve and Authorize the (School Name) to Amend Its Public Law 100-297 or Public Law 93-638 (Grant/Contract Number) to Include Improvements and Repairs, and Designs and Construction of Construction Activity with the Bureau of Indian Affairs, for the period beginning (Month/Day/Year) and ending (Month/Day/Year).

WHEREAS:

1. Pursuant to 2 N.N.C. §§481 and 482, the Education Committee of the Navajo Nation Council is established and continues as a standing committee of the Navajo Nation Council for the purpose of overseeing the educational development of the Navajo Nation and to develop policies for a scholastically excellent and culturally relevant education; and
2. The Education Committee of the Navajo Nation Council is empowered to review, sanction, and authorize applications for Self Determination Act contracts and grants for the operation of educational programs subject to final approval by the Intergovernmental Relations Committee of the Navajo Nation Council, 2 N.N.C. §484 (B) (4); and
3. The approval and authorization of the Navajo Nation for the proposed amendment of the (School Name School Board) (hereinafter School Board) grant/contract is required for the amendment of (Grant/Contract Number); and
4. The Education Committee of the Navajo Nation Council approves and authorizes to amend (School Board Grant/Contract Number) to include improvements and repairs, designs and construction of Construction Activity under certain conditions set forth; and
5. The School Board by resolution herein attached as (EXHIBIT "A"), to amend (Grant/Contract) under the conditions established by the Education Committee of the Navajo Nation Council is in the best interests of the Navajo students to be served by the School Board.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Education Committee of the Navajo Nation Council hereby sanctions, approves and authorizes the (School Name School Board) (hereinafter School Board), to amend its Public Law 100-297 or Public Law 93-638 (Grant/Contract Number) to include improvements and repairs, and designs and construction of Construction Activity and to authorize amendment of (Grant/Contract Number) for the period beginning (Month, Year) and ending (Month, Year).
2. The Education Committee of the Navajo Nation Council requires the following conditions be placed on the approval for the School Board, to amend (Contract Number) with the Bureau of Indian Affairs and the Navajo Nation to include improvements and repairs, and designs and construction of Construction Activity as specified herein:

- A. The School Board shall make a summative report of the proposed terms and conditions and make a recommendation to the Education Committee of the Navajo Nation Council for approval or disapproval of proposed terms and conditions, which shall include the following mandatory provisions:
1. The School Board shall in the operation of the above noted functions, meet the Bureau of Indian Affairs minimum standards for design and new school construction referenced in the Grant/Contract Application, required by 25 U.S.C. §2005 (a), or such other minimum standards which may be established by the Education Committee of the Navajo Nation Council; and
 2. The School Board shall make all reasonable efforts to expend all appropriated facilities and improvement funds during the multi-year timeline in which they are made available; and
 3. The School Board shall incorporate this project within their base grant, audits will be in conformance with the Single Audit Act of 1984, as amended, and audit findings shall be submitted to the Navajo Nation Office of the Auditor General for verification and monitoring; and
 4. The School Board shall respond to all audit findings and observations within ninety (90) days and, if applicable, including the development of a Corrective Action Plan providing for timely correction and/or resolution of all audit findings and observations; and
 5. No portion of any grant/contract funds or interest generated from funds received by the School Board from the Bureau of Indian Affairs, or any Navajo Nation general funds received directly by the School Board shall be used to fund litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities; and
- B. At the request of the School Board, the Executive Director of the Division of Diné Education shall appoint one (1) staff person from the division to provide guidance and technical assistance to the School Board in the negotiation of the terms and conditions of this grant/contract amendment with the Bureau of Indian Affairs; and
- C. The School Board shall hire a qualified Project Manager who will be on-site daily to oversee the compliance by the contractor/contractors with the facilities improvement project specifications attached herein as (EXHIBIT "B"), and
- D. The grantee will comply with all federal requirements for pre-construction award including an Organizational Capacity Review and comply with the Navajo Nation Preference Laws. The School Board will also include requirements of the Navajo Nation Business Activity Tax in all contracts (EXHIBIT "C").
3. The Education Committee of the Navajo Nation Council states that this resolution authorizing the grant/contract amendment is strictly limited to improvements and repairs, and designs and construction of Construction Activity under the conditions set forth, except as specifically amended by this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly-called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of ___ in favor, ___ opposed, ___ abstained, on this ___ day of ___, 2002.

(Name of Chairperson), Chairperson
Education Committee
NAVAJO NATON COUNCIL

Motion :
Second :

**Minimum Qualification Standards
For
Project Manager Employed
Under P.L. 93-638 Contracts or P.L. 100-297 Grants**

“EXHIBIT B”

A. Purpose

The following qualification standards have been established to:

1. Ensure tribes and tribal organizations hire qualified individuals for the management of construction projects, under P.L. 93-638 contracts or P.L. 100-297 grants.
2. Ensure that individuals who have the requisite experience and education are hired to manage a project of the scope, nature, and complexity anticipated under the contract or grant managed projects.

B. Background

The Bureau of Indian Affairs makes sizable investments in the planning, design and construction of multi-million dollar construction projects ranging from schools, detention facilities, offices, dormitories, and houses. Prudent management of public funds dictate that tribes and tribal organizations use qualified individuals to manage BIA funded projects.

C. Qualification Standards for projects expected to cost \$10 million dollars or more:

1. Experience

- a. Fifteen (15) or more years of employment with an Architect or Engineering firm or firms where the primary duties of employment included management of projects for the planning, design, and construction of buildings; or
- b. Fifteen (15) or more years of employment with a construction company or construction management firm where the primary duties include the management of construction projects with an A-E firm and construction contractor;
- c. Fifteen (15) or more years of employment with a public agency (Federal, State, Tribal, or local) where the primary duties included the management of projects for planning, design, and construction of buildings; or
- d. Any combination of 1.a. through 1.c. which totals fifteen (15) or more years; and

2. Education

- a. Bachelor's degree in Engineering or Architecture from an accredited college or university; or
- b. Associates of Arts Degree in Construction of Building Technology or related field; and

D. Qualification Standards for project less than 10 million dollars

1. Experience

- a. Eight (8) or more years of employment with an Architect or Engineering firm or firms where the primary duties of employment included the management of the planning, design, and construction of buildings; or
- b. Eight (8) or more years of employment with a construction company or construction management firm which included management of building construction projects with an A-E firm and construction contractor; or
- c. Eight (8) or more years of employment with a public agency (Federal, State, Tribal, or local) where the primary duties of employment included management of projects for the planning, design, and construction of buildings; or
- d. Any combination of 1.a. through 1.c. which totals eight (8) or more years; and

2. Education

- a. At least thirty (30) credit hours or more in Engineering or Architecture courses from an accredited college or university; or
- b. Associates of Arts Degree in Construction Technology or related field; and

E. Salary Range

1. For persons meeting Standard B above: Salary Schedule, Step 1 through 10, depending on the extent of experience and education; or
2. Persons meeting Standard C above: Salary Schedule, Step 1 through 10 depending on the extent of experience and education.

“EXHIBIT C”

ATTACHMENT A

(to be included in construction contracts only)

The Navajo Nation shall withhold from each payment to Contractor three percent (3%) of the total invoice amount; this amount reflects the Business Activity Tax due on such invoice amount. This three percent (3%) shall be transferred to the Office of the Navajo Tax Commission for the account of the contractor. The contractor may then indicate on the quarterly return required under the Business Activity Tax that this amount has previously been paid to the Office of Navajo Tax Commission. It is hereby acknowledged that withholding amounts pursuant to this section in no way removes responsibility from the taxpayer for timely filing of tax returns and timely payment of any amounts, which may be owed taxes.

ATTACHMENT B
(to be included in all contracts)

The amount to be paid under this contract may be reduced by any current or past due Navajo taxes owed by the contractor on this or any other activity within the Navajo Nation. This action is taken pursuant to 15 N.N.C. §1507, which states:

If the applicant entity in its present form or any other identifiable capacity as an individual, business, corporation, partnership, or other entity, has an outstanding money judgment against it in favor of the Navajo Nation or a delinquent accounts receivable debt which is due and owing to the Navajo Nation, upon due notice the Navajo Nation may offset its money claim against any amount it owes to or has an account payable to the individual, business, corporation, partnership, or other entity.

The Navajo Nation shall notify the contractor as to what amounts, if any, have been offset pursuant to this section.

**PROPOSED RESOLUTION OF THE
INTERGOVERNMENTAL RELATIONS COMMITTEE
OF THE NAVAJO NATION COUNCIL**

Sanctioning, Approving and Authorizing the *(School Name)* to Enter into Negotiations for a Grant/Contract for the Operations of Certain Education and Education-Related Programs, Under the Provisions of Public Law 100-297 or Public Law 93-638 with the Bureau of Indian Affairs, beginning *(Month, Day, Year)* and ending *(Month, Day, Year)*.

WHEREAS:

1. The Intergovernmental Relations Committee is established and continues as a standing committee of the Navajo Nation Council whose general purpose is to coordinate all federal, county, and state programs with other standing committees and branches of the Navajo Nation Government to provide the most efficient delivery of services to the Navajo Nation, 2 N.N.C. §822 (A); and
2. The Intergovernmental Relations Committee of the Navajo Nation Council is empowered to authorize, review, approve and accept any and all grants, contracts, and associated budgets with the United States, its departments and agencies for the implementations of the Indian Self Determination and Education Assistance Act, Public Law 93-638 and 100-297 education grants as amended, upon the recommendation of the standing oversight committee, 2 N.N.C. §824 (B) (4); and
3. The *(School Name School Board)* (hereinafter School Board) has not previously been sanctioned as a Navajo Nation tribal organization for the purpose of obtaining a grant/contract from the Bureau of Indian Affairs under Public Law 100-297 or Public Law 93-638 for the operation of education programs; and
4. The School Board is incorporated under the Corporation Code of the Navajo Nation to formalize its organization as not-for-profit corporation of the Navajo Nation; and
5. The School Board has prepared a Grant/Contract application packet which meets the requirements of the Navajo Nation attached as **(EXHIBIT "A")**, requesting that all education and education-related programs be transferred from the Bureau of Indian Affairs, Office of Indian Education Programs to the *(School Name School Board)* as a tribal organization sanctioned by the Navajo Nation; and
6. The School Board has obtained resolutions from all the Chapters within the attendance boundaries of the school, attached hereto as **(EXHIBIT "B")** approving the School Name to convert from a Bureau of Indian Affairs operated school to a local community-controlled school, pursuant to 10 N.N.C. Education.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Intergovernmental Relations Committee of the Navajo Nation Council hereby sanctions, approves, and authorizes the request by the *(School Name School Board)* (hereinafter School Board) to apply for grant/contract to operate and administer the education and education-related programs currently operated by the Bureau of Indian

Affairs, Office of Indian Education Programs at the (*School Name School Board*) for the period beginning (*Month, Day, Year*) and ending (*Month, Day, Year*).

2. The Intergovernmental Relations Committee of the Navajo Nation Council further requires that the following conditions be implemented and complied with to maintain its grant/contract with the Bureau of Indian Affairs for the education and education-related programs.
 - A. The Executive Director, Division of Diné Education (DODE) has certified that the School Board grant/contract application is in full compliance with and contains all requirements outlined in the Navajo Nation "Grant/Contract Conversion/Maintenance Handbook" which shall include the following mandatory provisions:
 1. The School Board at a minimum, shall in the operation of their programs, meet the Commission of Accreditation and School Improvement requirements within the timeline established by the Association; and
 2. If the School Board operates a dormitory program they shall meet the criteria and requirements for a residential program contained in 25 C.F.R, Part 36, Subpart H, Residential Standards or such other residential standards which may be established by the Education Committee of the Navajo Nation Council; and
 3. The School Board shall submit an annual audit that meets the requirements of the Single Agency Audit Act as amended within nine (9) months after the end of the fiscal period, or within thirty (30) days after the entity receives its auditor's report, which ever comes first to the Navajo Nation Office of the Auditor General and DODE for verification and monitoring. The School Board, if a first year grantee, may retain the same Auditor for up to six (6) years. All other grantees shall select a different Auditing Firm each time the grant/contract is re-authorized; and
 4. The School Board shall respond to all audit findings and observations within ninety (90) days, and if applicable including the development of a Corrective Action Plan providing for the timely correction and/or resolution of all audit findings and observations; and
 5. No portions of any grant/contract funds or interest generated from funds received by the School Board from the Bureau of Indian Affairs, or any Navajo Nation General funds received directly by the School Board shall be used to fund litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities; and
 - B. At the request of the School Board, the Executive Director of the Division of Diné Education shall appoint one (1) staff person from the Division to provide guidance and technical assistance to the School Board in the negotiation of the terms and conditions of this grant/contract amendment with the Bureau of Indian Affairs; and

- C. The School Board shall hire a qualified Project Manager who will be on-site daily to oversee the compliance by the contractor/contractors with the facilities improvement project specifications attached herein as (EXHIBIT“C), and
 - D. The grantee will comply with all federal requirements for pre-construction award including an Organizational Capacity Review and comply with the Navajo Nation Preference Laws. The School Board will also include requirements of the Navajo Nation Business Activity Tax in all contracts (EXHIBIT “D”).
3. The Intergovernmental Relations Committee of the Navajo Nation Council states that this resolution authorizing the grant/contract amendment is strictly limited to improvements and repairs, and designs and construction of Construction Activity under the conditions set forth, except as specifically amended by this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly-called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of ___ in favor, ___ opposed, ___ abstained, on this ___ day of ___, 2002.

(Name of Chairperson), Chairperson
Intergovernmental Relations Committee
NAVAJO NATON COUNCIL

Motion :
Second :

**Minimum Qualification Standards
For
Project Manager Employed
Under P.L. 93-638 Contracts or P.L. 100-297 Grants**

“EXHIBIT C”

A. Purpose

The following qualification standards have been established to:

1. Ensure tribes and tribal organizations hire qualified individuals for the management of construction projects, under P.L. 93-638 contracts or P.L. 100-297 grants.
2. Ensure that individuals who have the requisite experience and education are hired to manage a project of the scope, nature, and complexity anticipated under the contract or grant managed projects.

B. Background

The Bureau of Indian Affairs makes sizable investments in the planning, design and construction of multi-million dollar construction projects ranging from schools, detention facilities, offices, dormitories, and houses. Prudent management of public funds dictate that tribes and tribal organizations use qualified individuals to manage BIA funded projects.

C. Qualification Standards for projects expected to cost \$10 million dollars or more:

1. Experience

- a. Fifteen (15) or more years of employment with an Architect or Engineering firm or firms where the primary duties of employment included management of projects for the planning, design, and construction of buildings; or
- b. Fifteen (15) or more years of employment with a construction company or construction management firm where the primary duties include the management of construction projects with an A-E firm and construction contractor;
- c. Fifteen (15) or more years of employment with a public agency (Federal, State, Tribal, or local) where the primary duties included the management of projects for planning, design, and construction of buildings; or
- d. Any combination of 1.a. through 1.c. which totals fifteen (15) or more years; and

2. Education

- a. Bachelor's degree in Engineering or Architecture from an accredited college or university; or
- b. Associates of Arts Degree in Construction of Building Technology or related field; and

D. Qualification Standards for project less than 10 million dollars

1. Experience

- a. Eight (8) or more years of employment with an Architect or Engineering firm or firms where the primary duties of employment included the management of the planning, design, and construction of buildings; or
- b. Eight (8) or more years of employment with a construction company or construction management firm which included management of building construction projects with an A-E firm and construction contractor; or
- c. Eight (8) or more years of employment with a public agency (Federal, State, Tribal, or local) where the primary duties of employment included management of projects for the planning, design, and construction of buildings; or
- d. Any combination of 1.a. through 1.c. which totals eight (8) or more years; and

2. Education

- a. At least thirty (30) credit hours or more in Engineering or Architecture courses from an accredited college or university; or
- b. Associates of Arts Degree in Construction Technology or related field; and

E. Salary Range

1. For persons meeting Standard B above: Salary Schedule, Step 1 through 10, depending on the extent of experience and education; or
2. Persons meeting Standard C above: Salary Schedule, Step 1 through 10 depending on the extent of experience and education.

“EXHIBIT D”

ATTACHMENT A

(to be included in construction contracts only)

The Navajo Nation shall withhold from each payment to Contractor three percent (3%) of the total invoice amount; this amount reflects the Business Activity Tax due on such invoice amount. This three percent (3%) shall be transferred to the Office of the Navajo Tax Commission for the account of the contractor. The contractor may then indicate on the quarterly return required under the Business Activity Tax that this amount has previously been paid to the Office of Navajo Tax Commission. It is hereby acknowledged that withholding amounts pursuant to this section in no way removes responsibility from the taxpayer for timely filing of tax returns and timely payment of any amounts, which may be owed taxes.

ATTACHMENT B
(to be included in all contracts)

The amount to be paid under this contract may be reduced by any current or past due Navajo taxes owed by the contractor on this or any other activity within the Navajo Nation. This action is taken pursuant to 15 N.N.C. §1507, which states:

If the applicant entity in its present form or any other identifiable capacity as an individual, business, corporation, partnership, or other entity, has an outstanding money judgment against it in favor of the Navajo Nation or a delinquent accounts receivable debt which is due and owing to the Navajo Nation, upon due notice the Navajo Nation may offset its money claim against any amount it owes to or has an account payable to the individual, business, corporation, partnership, or other entity.

The Navajo Nation shall notify the contractor as to what amounts, if any, have been offset pursuant to this section.

**PROPOSED RESOLUTION OF THE
INTERGOVERNMENTAL RELATIONS COMMITTEE
OF THE NAVAJO NATION COUNCIL**

Sanctioning, Approving and Re-authorizing the (School Name) to continue Grant/Contract Operation of all Education and Education-Related Programs, Pursuant to the Provisions of Public Law 100-297 or Public Law 93-638, Beginning (Month, Day, Year) and (Ending Month, Day, Year).

WHEREAS:

1. The Intergovernmental Relations Committee is established and continues as a standing committee of the Navajo Nation Council whose general purpose is to coordinate all federal, county, and state programs with other standing committees and branches of the Navajo Nation government to provide the most efficient delivery of services to the Navajo Nation, 2 N.N.C. §822 (A); and
2. The Intergovernmental Relations Committee of the Navajo Nation Council is empowered to authorize, review, approve and accept any and all grants, contracts, and associated budgets with the United States, its departments and agencies for the implementations of the Indian Self Determination and Education Assistance Act, Public Law 93-638 and 100-297 education grants as amended, upon the recommendation of the standing oversight committee, 2 N.N.C. §824 (B) (4); and
3. The (School Name School Board) (hereinafter School Board) has previously been sanctioned as a Navajo Nation tribal organization for the purpose of obtaining a grant/contract from the Bureau of Indian Affairs for the operations of education programs; and
4. The School Board is incorporated under the Corporation Code of the Navajo Nation as not-for-profit corporation; and
5. Approval and re-authorization by the Navajo Nation is required for the School Board to continue its grant/contract with the Bureau of Indian Affairs for the operation of all their education programs; and
6. The Education Committee of the Navajo Nation, by (Resolution Number), attached hereto as (Exhibit "A"), recommends to the Intergovernmental Relations Committee of the Navajo Nation Council to re-authorize the School Board grant/contract for the period beginning on (Month, Day, Year) and ending (Month, Day, Year).

NOW THEREFORE BE IT RESOLVED THAT:

1. The Intergovernmental Relations Committee of the Navajo Nation Council hereby sanctions, approves, and re-authorizes the request by the (School Name School Board) (hereinafter School Board) to continue to operate and administer the education and education-related programs pursuant to Public Law for the period beginning (Month, Day, Year) and ending (Month, Day, Year).
2. The Intergovernmental Relations Committee of the Navajo Nation Council further requires that the following conditions be implemented and complied with as a

contingent to maintain their grant/contract with the Bureau of Indian Affairs for the education and education-related programs currently operated by the School Board:

- A. The Executive Director, Division of Diné Education (DODE) shall review the contents of the School Board grant/contract to insure it includes all requirements contained in the Navajo Nation "Grant/Contract Conversion/Maintenance Handbook", which shall include the following mandatory provisions:
1. The School Board at a minimum, shall in the operation of their programs, meet the Commission on Accreditation and School Improvement requirements within the timeline established by the Association; and
 2. If the School Board operates a dormitory program they shall meet the criteria and requirements for a residential program contained in 25 C.F.R, Part 36, Subpart H, Residential Standards or such other residential standards which may be established by the Education Committee of the Navajo Nation Council; and
 3. The School Board shall submit an annual audit that meets the requirements of the Single Agency Audit Act of 1984, as amended shall be submitted within nine (9) months after the end of the fiscal period, or within thirty (30) days after the entity receives its auditor's report, which ever comes first to the Navajo Nation Office of the Auditor General and DODE for verification and monitoring. The School Board shall select a different auditing Firm each time the grant/contract is re-authorized; and
 4. The School Board shall respond to all annual audit findings and observations within ninety (90) days, including the development of a Corrective Action Plan providing for the timely correction and/or resolution of all audit findings and observations; and
 5. The School Board shall request all amendments and future requests for continuation of their grant/contract authorization under this resolution through a resolution proposed to the Education Committee of the Navajo Nation Council and reviewed through the Division of Diné Education; and
- B. The School Board shall provide, nineteen (19) copies of the grant/contract application and copies of all grant/contract-related documents to the Executive Director; Division of Diné Education; P.O. Box 670; Window Rock, Arizona 86515; and
- C. The School Board shall comply with all Navajo Nation laws, including, but not limited to 10 N.N.C. Education §1 et seq. and 11 N.N.C. Elections §1 et seq.; and 2 N.N.C.; and
- D. The School Board shall permit the Division of Diné Education and/or the Navajo Nation Office of Auditor General to conduct monitoring visits and provide access to all grant/contract records upon request; and
- E. The continued sanctioning by the Intergovernmental Relations Committee of the Navajo Nation Council and respective School Board grant/contract is contingent and conditional upon compliance by the school with recommendations arising from any monitoring and evaluation reports; and

- F. The School Board shall provide to the Executive Director, Division of Diné Education, and the Education Committee of the Navajo Nation Council, a written annual report regarding all activities conducted under the grant/contract for the preceding year and the year authorized herein. In addition, the School Board shall include within the report, brief descriptions of any substantial administrative, financial, and programmatic problems encountered in their operation; and
 - G. No portion of any grant/contract funds received by the School Board from the bureau of Indian Affairs, or any Navajo Nation general funds received directly by the School, or any other funds not named herein, nor any interest earned from such funds shall be used to fund litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities.
- 3. The Intergovernmental Relations Committee of the Navajo Nation Council sanctions and approves the re-authorization provided to the School Board Grant/Contract be strictly limited to that authority granted to operate certain specified education and education-related programs referred to within the (*Education Committee Resolution No.*) attached hereto as (**Exhibit "B"**).
 - 4. The Intergovernmental Relations Committee of the Navajo Nation Council approves and re-authorizes the School Board grant/contract be strictly limited to that authority granted to operate certain specified education and education-related programs referred to in this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly-called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of ___ in favor, ___ opposed, ___ abstained, on this ___ day of ___, 2002.

(Name of Chairperson), Chairperson
Intergovernmental Relations Committee
NAVAJO NATON COUNCIL

Motion :
Second :

**PROPOSED RESOLUTION OF THE
INTERGOVERNMENTAL RELATIONS COMMITTEE
OF THE NAVAJO NATION COUNCIL**

Sanctioning, Approving, and Authorizing (School Name) to Amend Its Public Law 100-297 or Public Law 93-638, (Grant/Contract Number) to Include Improvements and Repairs, and Designs and Construction of Construction Activity with the Bureau of Indian Affairs, beginning (Month/Day/Year) and ending (Month/Day/Year).

WHEREAS:

1. The Intergovernmental Relations Committee is established and continues as a standing committee of the Navajo Nation Council whose general purpose is to coordinate all federal, county, and state programs with other standing committees and branches of the Navajo Nation government to provide the most efficient delivery of services to the Navajo Nation, 2 N.N.C. §821 and §822 (A); and
2. The Intergovernmental Relations Committee of the Navajo Nation Council is empowered to authorize, review, approve and accept any and all grants, contracts, and associated budgets with the United States, its departments and agencies for the implementations of the Indian Self Determination and Education Assistance Act, Public Law 93-638 and 100-297 education grants as amended, upon the recommendation of the standing oversight committee, 2 N.N.C. §824 (B) (4); and
3. The approval and authorization of the Navajo Nation for the Proposed Amendment of the (*School Name School Board*) (hereinafter School Board) grant/contract is required for the amendment of (*Grant/Contract Number*); and
4. The Education Committee of the Navajo Nation, by (*Resolution Number*), attached hereto as (**Exhibit "A"**), recommends to the Intergovernmental Relations Committee of the Navajo Nation Council that the School Board be authorized to amend Grant/Contract Number to include improvements and repairs, designs and construction of Construction Activity under certain conditions set forth in the Education Committee resolution; and
5. The Intergovernmental Relations Committee of the Navajo Nation Council approves and authorizes the School Board to amend (*Grant/Contract Number*); and
6. The School Board by resolution herein attached as (**Exhibit "B"**), to amend (*Grant/Contract Number*) under the conditions established by the Education Committee of the Navajo Nation Council is in the best interests of the Navajo students to be served by the School Board.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Intergovernmental Relations Committee of the Navajo Nation Council hereby sanctions, approves and authorizes the (*School Name School Board*) (hereinafter School Board), to amend its Public Law 100-297 or Public Law 93-638 (*Grant/Contract Number*) to include improvements and repairs, and designs and construction of Construction Activity and to authorize amendment of Grant/Contract Number for the period beginning (*Month, Year*) and ending (*Month, Year*).

2. The Intergovernmental Relations Committee of the Navajo Nation Council requires the following conditions be placed on the approval for the School Board, to amend Grant/Contract Number with the Bureau of Indian Affairs and the Navajo Nation to include improvements and repairs, and designs and construction of Construction Activity as specified herein:
 - A. The School Board shall make a summative report of the proposed terms and conditions and make a recommendation to the Education Committee of the Navajo Nation Council for approval or disapproval of proposed terms and conditions, which shall include the following mandatory provisions:
 1. The School Board shall in the operation of the above noted functions, meet the Bureau of Indian Affairs minimum standards for design and new school construction referenced in the Grant/Contract Application, required by 25 U.S.C. §2005 (a), or such other minimum standards which may be established by the Education Committee of the Navajo Nation Council; and
 2. The School Board shall make all reasonable efforts to expend all appropriated facilities and improvements funds during the multi-year timeline in which they are made available; and
 3. The School Board shall incorporate this project within their base grant, audits will be in conformance with the Single Audit Act of 1984, as amended, and audit findings shall be submitted to the Navajo Nation Office of the Auditor General for verification and monitoring; and
 4. The School Board shall respond to all annual findings and observations within ninety (90) days, including the development of a Corrective Action Plan providing for the timely correction and/or resolution of all audit findings and observations; and
 5. No portion of any grant/contract funds or interest generated from funds received by the School Board from the Bureau of Indian Affairs, or any Navajo Nation general funds received directly by the School Board shall be used to fund litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities; and
 - B. At the request of the School Board, the Executive Director of the Division of Dine Education shall appoint one (1) staff person from the division to provide guidance and technical assistance to the School Board in the negotiation of the terms and conditions of this grant/contract amendment with the Bureau of Indian Affairs; and
 - C. The School Board shall hire a qualified Project Manager who will be on-site daily to oversee the compliance by the contractor/contractors with the facilities improvement project specifications attached herein as (**Exhibit "C"**), and
 - D. The grantee will comply with all federal requirements for pre-construction award including an Organizational Capacity Review and comply with the Navajo Nation Preference Laws. The School Board will also include requirements of the Navajo Nation Business Activity Tax in all contracts (**Exhibit "D"**).

3. The Intergovernmental Relations Committee of the Navajo Nation Council states that this resolution authorizing the grant/contract amendment is strictly limited to improvements and repairs, and design and construction of Construction Activity under the conditions set forth, except as specifically amended by this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly-called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of ___ in favor, ___ opposed, ___ abstained, on this ___ day of ___, 2002.

Edward T. Begay, Chairperson
Intergovernmental Relations Committee
NAVAJO NATION COUNCIL

Motion :
Second :

**Minimum Qualification Standards
For
Project Manager Employed
Under P.L. 93-638 Contracts or P.L. 100-297 Grants**

“EXHIBIT C”

A. Purpose

The following qualification standards have been established to:

1. Ensure tribes and tribal organizations hire qualified individuals for the management of construction projects, under P.L. 93-638 contracts or P.L. 100-297 grants.
2. Ensure that individuals who have the requisite experience and education are hired to manage a project of the scope, nature, and complexity anticipated under the contract or grant managed projects.

B. Background

The Bureau of Indian Affairs makes sizable investments in the planning, design and construction of multi-million dollar construction projects ranging from schools, detention facilities, offices, dormitories, and houses. Prudent management of public funds dictate that tribes and tribal organizations use qualified individuals to manage BIA funded projects.

C. Qualification Standards for projects expected to cost \$10 million dollars or more:

1. Experience

- a. Fifteen (15) or more years of employment with an Architect or Engineering firm or firms where the primary duties of employment included management of projects for the planning, design, and construction of buildings; or
- b. Fifteen (15) or more years of employment with a construction company or construction management firm where the primary duties include the management of construction projects with an A-E firm and construction contractor;
- c. Fifteen (15) or more years of employment with a public agency (Federal, State, Tribal, or local) where the primary duties included the management of projects for planning, design, and construction of buildings; or
- d. Any combination of 1.a. through 1.c. which totals fifteen (15) or more years; and

2. Education

- a. Bachelor's degree in Engineering or Architecture from an accredited college or university; or
- b. Associates of Arts Degree in Construction of Building Technology or related field; and

D. Qualification Standards for project less than 10 million dollars

1. Experience

- a. Eight (8) or more years of employment with an Architect or Engineering firm or firms where the primary duties of employment included the management of the planning, design, and construction of buildings; or
- b. Eight (8) or more years of employment with a construction company or construction management firm which included management of building construction projects with an A-E firm and construction contractor; or
- c. Eight (8) or more years of employment with a public agency (Federal, State, Tribal, or local) where the primary duties of employment included management of projects for the planning, design, and construction of buildings; or
- d. Any combination of 1.a. through 1.c. which totals eight (8) or more years; and

2. Education

- a. At least thirty (30) credit hours or more in Engineering or Architecture courses from an accredited college or university; or
- b. Associates of Arts Degree in Construction Technology or related field; and

E. Salary Range

1. For persons meeting Standard B above: Salary Schedule, Step 1 through 10, depending on the extent of experience and education; or
2. Persons meeting Standard C above: Salary Schedule, Step 1 through 10 depending on the extent of experience and education.

“EXHIBIT D”

ATTACHMENT A (to be included in construction contracts only)

The Navajo Nation shall withhold from each payment to Contractor three percent (3%) of the total invoice amount; this amount reflects the Business Activity Tax due on such invoice amount. This three percent (3%) shall be transferred to the Office of the Navajo Tax Commission for the account of the contractor. The contractor may then indicate on the quarterly return required under the Business Activity Tax that this amount has previously been paid to the Office of Navajo Tax Commission. It is hereby acknowledged that withholding amounts pursuant to this section in no way removes responsibility from the taxpayer for timely filing of tax returns and timely payment of any amounts, which may be owed taxes.

ATTACHMENT B
(to be included in all contracts)

The amount to be paid under this contract may be reduced by any current or past due Navajo taxes owed by the contractor on this or any other activity within the Navajo Nation. This action is taken pursuant to 15 N.N.C. §1507, which states:

If the applicant entity in its present form or any other identifiable capacity as an individual, business, corporation, partnership, or other entity, has an outstanding money judgment against it in favor of the Navajo Nation or a delinquent accounts receivable debt which is due and owing to the Navajo Nation, upon due notice the Navajo Nation may offset its money claim against any amount it owes to or has an account payable to the individual, business, corporation, partnership, or other entity.

The Navajo Nation shall notify the contractor as to what amounts, if any, have been offset pursuant to this section.

**PROPOSED RESOLUTION OF THE
INTERGOVERNMENTAL RELATIONS COMMITTEE
OF THE NAVAJO NATION COUNCIL**

Sanctioning, Approving, and Authorizing (School Name) to Amend Its Public Law 100-297 or Public Law 93-638, (Grant/Contract Number) to Include Improvements and Repairs, and Designs and Construction of Construction Activity with the Bureau of Indian Affairs, beginning (Month/Day/Year) and ending (Month/Day/Year).

WHEREAS:

1. The Intergovernmental Relations Committee is established and continues as a standing committee of the Navajo Nation Council whose general purpose is to coordinate all federal, county, and state programs with other standing committees and branches of the Navajo Nation government to provide the most efficient delivery of services to the Navajo Nation, 2 N.N.C. §821 and §822 (A); and
2. The Intergovernmental Relations Committee of the Navajo Nation Council is empowered to authorize, review, approve and accept any and all grants, contracts, and associated budgets with the United States, its departments and agencies for the implementations of the Indian Self Determination and Education Assistance Act, Public Law 93-638 and 100-297 education grants as amended, upon the recommendation of the standing oversight committee, 2 N.N.C. §824 (B) (4); and
3. The approval and authorization of the Navajo Nation for the Proposed Amendment of the (*School Name School Board*) (hereinafter *School Board*) grant/contract is required for the amendment of (*Grant/Contract Number*); and
4. The Education Committee of the Navajo Nation, by (*Resolution Number*), attached hereto as (**Exhibit "A"**), recommends to the Intergovernmental Relations Committee of the Navajo Nation Council that the School Board be authorized to amend *Grant/Contract Number* to include improvements and repairs, designs and construction of Construction Activity under certain conditions set forth in the Education Committee resolution; and
5. The Intergovernmental Relations Committee of the Navajo Nation Council approves and authorizes the School Board to amend (*Grant/Contract Number*); and
6. The School Board by resolution herein attached as (**Exhibit "B"**), to amend (*Grant/Contract Number*) under the conditions established by the Education Committee of the Navajo Nation Council is in the best interests of the Navajo students to be served by the School Board.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Intergovernmental Relations Committee of the Navajo Nation Council hereby sanctions, approves and authorizes the (*School Name School Board*) (hereinafter *School Board*), to amend its Public Law 100-297 or Public Law 93-638 (*Grant/Contract Number*) to include improvements and repairs, and designs and construction of Construction Activity and to authorize amendment of *Grant/Contract Number* for the period beginning (*Month, Year*) and ending (*Month, Year*).

2. The Intergovernmental Relations Committee of the Navajo Nation Council requires the following conditions be placed on the approval for the School Board, to amend Grant/Contract Number with the Bureau of Indian Affairs and the Navajo Nation to include improvements and repairs, and designs and construction of Construction Activity as specified herein:
 - A. The School Board shall make a summative report of the proposed terms and conditions and make a recommendation to the Education Committee of the Navajo Nation Council for approval or disapproval of proposed terms and conditions, which shall include the following mandatory provisions:
 1. The School Board shall in the operation of the above noted functions, meet the Bureau of Indian Affairs minimum standards for design and new school construction referenced in the Grant/Contract Application, required by 25 U.S.C. §2005 (a), or such other minimum standards which may be established by the Education Committee of the Navajo Nation Council; and
 2. The School Board shall make all reasonable efforts to expend all appropriated facilities and improvements funds during the multi-year timeline in which they are made available; and
 3. The School Board shall incorporate this project within their base grant, audits will be in conformance with the Single Audit Act of 1984, as amended, and audit findings shall be submitted to the Navajo Nation Office of the Auditor General for verification and monitoring; and
 4. The School Board shall respond to all annual findings and observations within ninety (90) days, including the development of a Corrective Action Plan providing for the timely correction and/or resolution of all audit findings and observations; and
 5. No portion of any grant/contract funds or interest generated from funds received by the School Board from the Bureau of Indian Affairs, or any Navajo Nation general funds received directly by the School Board shall be used to fund litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities; and
 - B. At the request of the School Board, the Executive Director of the Division of Dine Education shall appoint one (1) staff person from the division to provide guidance and technical assistance to the School Board in the negotiation of the terms and conditions of this grant/contract amendment with the Bureau of Indian Affairs; and
 - C. The School Board shall hire a qualified Project Manager who will be on-site daily to oversee the compliance by the contractor/contractors with the facilities improvement project specifications attached herein as (**Exhibit "C"**), and
 - D. The grantee will comply with all federal requirements for pre-construction award including an Organizational Capacity Review and comply with the Navajo Nation Preference Laws. The School Board will also include requirements of the Navajo Nation Business Activity Tax in all contracts (**Exhibit "D"**).

3. The Intergovernmental Relations Committee of the Navajo Nation Council states that this resolution authorizing the grant/contract amendment is strictly limited to improvements and repairs, and design and construction of Construction Activity under the conditions set forth, except as specifically amended by this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Education Committee of the Navajo Nation Council at a duly-called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of ___ in favor, ___ opposed, ___ abstained, on this ___ day of ___, 2002.

Edward T. Begay, Chairperson
Intergovernmental Relations Committee
NAVAJO NATION COUNCIL

Motion :
Second :