

Office of the Assistant Secretary, Interior

§ 1000.228

To the maximum extent practical, the parties should identify these regulations in the AFA.

§ 1000.221 Can the Secretary grant a waiver of regulations to a Tribe/Consortium?

Yes, a Tribe/Consortium may ask the Secretary to grant a waiver of some or all Department of the Interior regulation(s) applicable to a program, in whole or in part, operated by a Tribe/Consortium under an AFA.

§ 1000.222 How does a Tribe/Consortium obtain a waiver?

To obtain a waiver, the Tribe/Consortium must:

- (a) Submit a written request from the designated Tribal official to the Director for BIA programs or the appropriate bureau/office director for non-BIA programs;
- (b) Identify the regulation to be waived and the reasons for the request;
- (c) Identify the programs to which the waiver would apply;
- (d) Identify what provisions, if any, would be substituted in the AFA for the regulation to be waived; and
- (e) When applicable, identify the effect of the waiver on any trust programs or resources.

§ 1000.223 When can a Tribe/Consortium request a waiver of a regulation?

A Tribe/Consortium may request a waiver of a regulation:

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

§ 1000.224 How can a Tribe/Consortium expedite the review of a regulation waiver request?

A Tribe/Consortium may request a meeting or other informal discussion with the appropriate bureau officials before submitting a waiver request.

- (a) To set up a meeting, the Tribe/Consortium should contact:
 - (1) For BIA programs, the Director, OSG; or
 - (2) For non-BIA programs, the designated representative of the bureau.
- (b) The meeting or discussion is intended to provide:
 - (1) A clear understanding of the nature of the request;

- (2) Necessary background and information; and

- (3) An opportunity for the bureau to offer appropriate technical assistance.

§ 1000.225 Are meetings or discussions mandatory?

No, a meeting with the bureau officials is not necessary to submit a waiver request.

§ 1000.226 On what basis may the Secretary deny a waiver request?

The Secretary may deny a waiver request if:

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

§ 1000.227 What happens if the Secretary denies the waiver request?

If the Secretary denies a waiver request, the Secretary issues a written decision stating:

- (a) The basis for the decision;
- (b) The decision is final for the Department; and
- (c) The Tribe/Consortium may request reconsideration of the denial.

§ 1000.228 What are examples of waivers prohibited by law?

Examples of when a waiver is prohibited by Federal law include:

- (a) When the effect would be to waive or eliminate express statutory requirements;
- (b) When a statute authorizes civil and criminal penalties;
- (c) When it would result in a failure to ensure that proper health and safety standards are included in an AFA (section 403(e)(2));
- (d) When it would result in a reduction of the level of trust services that would have been provided by the Secretary to individual Indians (section 403(g)(4));
- (e) When it would limit or reduce the services, contracts, or funds to any other Indian Tribe or Tribal organization (section 406(a));

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(f) When it would diminish the Federal trust responsibility to Tribes, individual Indians or Indians with trust allotments (Section 406(b)); or

(g) When it would violate Federal case law.

§ 1000.229 May a Tribe/Consortium propose a substitute for a regulation it wishes to be waived?

Yes, where a Tribe/Consortium wishes to replace the waived regulation with a substitute that otherwise maintains the requirements of the applicable Federal law, the Secretary may be able to approve the waiver request. The Tribe/Consortium and bureau officials must negotiate to develop a suggested substitution.

§ 1000.230 How is a waiver approval documented for the record?

The waiver decision is made part of the AFA by attaching a copy of it to the AFA and by mutually executing any necessary conforming amendments to the AFA. The decisions announcing the waiver also will be posted on the Office of Self-Governance web site and all such decisions shall be made available on request.

§ 1000.231 How does a Tribe/Consortium request reconsideration of the Secretary's denial of a waiver?

(a) The Tribe/Consortium may request reconsideration of a waiver denial. To do so, the Tribe/Consortium must submit a request to:

(1) The Director, OSG, for BIA programs; or

(2) The appropriate bureau head, for non-BIA programs.

(b) The request must be filed within 30 days of the day the decision is received by certified mail (return receipt requested) or by hand delivery. A request submitted by mail will be considered filed on the postmark date.

(c) The request must identify the issues to be addressed, including a statement of reasons supporting the request.

§ 1000.232 When must DOI respond to a request for reconsideration?

The Secretary must issue a written decision within 30 days of the Department's receipt of a request for recon-

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sideration. This decision is final for the Department and no administrative appeal may be made.

Subpart K—Construction

§ 1000.240 What construction programs included in an AFA are subject to this subpart?

(a) All BIA and non-BIA construction programs included in an AFA are subject to this subpart. This includes design, construction, repair, improvement, expansion, replacement or demolition of buildings or facilities, and other related work for Federal, or Federally funded Tribal, facilities and projects.

(b) The following programs and activities are not construction programs and activities:

(1) Activities limited to providing planning services, administrative support services, coordination, responsibility for the construction project, day-to-day on-site management on site-management and administration of the project, which may include cost management, project budgeting, project scheduling and procurement except that all project design and actual construction activities are subject to all the requirements of subpart K, whether performed by a Tribe/Consortium, subcontractor, or consultant.

(2) Housing Improvement Program or road maintenance program activities of BIA;

(3) Operation and maintenance programs; and

(4) Non-403(c) programs that are less than \$100,000, subject to section 403(e)(2) of the Act, other applicable Federal law, and § 1000.256 of this subpart.

§ 1000.241 Does this subpart create an agency relationship?

No, a BIA or non-BIA construction program does not automatically create an agency relationship. However, Federal law, provisions of an AFA, or Federal actions may create an agency relationship.