

1 **Series:** Intergovernmental Activities

2 **Part 512:** Indian Tribes

3 **Chapter 5: Negotiation of Annual Funding Agreements with Tribes**

4 **New**

5
6 **5.1 What is the purpose of this chapter?** This chapter provides guidance for the Fish and
7 Wildlife Service to respond to and negotiate requests for annual funding agreements (AFA). It
8 establishes the parameters we need for a good faith effort to implement the provisions of Title IV
9 of the Indian Self-Determination and Education Assistance Act (ISDEA) (Pub. L. 93-638, as
10 amended) so that we can build strong and lasting partnerships with tribes and consortia.

11
12 **5.2 What is the scope of this policy?** This policy applies to the negotiation, development, and
13 administration of AFAs with tribes/consortia for conducting Service programs, functions,
14 services, or activities, including those located on any unit of the National Fish Hatchery System
15 or the National Wildlife Refuge System. This policy does not apply to tribal requests under Title
16 I of the ISDEA to carry out the services and programs the Federal Government provides to
17 Native Americans.

18
19 **5.3 What is the relationship between this policy and Department of the Interior (DOI)**
20 **regulations (25 CFR part 1000) concerning AFAs?** This policy complies with and
21 supplements DOI regulations in 25 CFR part 1000. It provides us with a uniform and consistent
22 approach to negotiating and administering AFAs that furthers the interests of our programs and
23 units of the Refuge and Hatchery System. The policy incorporates the regulations in 25 CFR part
24 1000 and refers to them throughout. To effectively represent the interests of the Service and the
25 Department, Service employees engaged in AFA issues must have access to, and develop a
26 working knowledge of, both the regulations and this policy.

27
28 **5.4 What are the authorities for this policy?**

29
30 **A. Indian Self-Determination and Education Assistance Act (Pub. L. 93-638), as amended**
31 **by the Tribal Self-Governance Act of 1994 (Pub. L. 103-413) (ISDEA).** Provides authority for
32 entering into an AFA.

33
34 **B. National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C.**
35 **668dd-668ee).** Provides authority for establishing policies and regulations for management of
36 the National Wildlife Refuge System.

37
38 **C. Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a-742j).** Directs the Secretary of
39 the Interior (Secretary) to provide continuing research, extension, and information services and
40 to take necessary steps to develop, manage, protect, and conserve fishery and wildlife resources.

41
42 **D. Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661-667e).** Authorizes
43 assistance to Federal, State, and other agencies in developing, protecting, rearing, and stocking
44 fish and wildlife.

45
46 **E. Native American Policy of the U.S. Fish and Wildlife Service (National Policy Issuance**
47 **94-10).** This policy states that the Service is committed to entering into contracts, cooperative

48 agreements, or grants with Native American governments at their request under the terms of the
49 ISDEA. We will work with Native American governments to develop effective policies, plans,
50 and operating standards consistent with our obligations and mission and give them opportunities
51 to participate in our decisionmaking processes.

52

53 **5.5 What do these terms do you need to know to understand this chapter?**

54

55 **A. Annual Funding Agreement (AFA).** A legally binding and mutually enforceable agreement
56 between the Service and a self-governance tribe or consortium of tribes to perform Service
57 programs. The AFA includes all associated terms and conditions under which the tribe or tribal
58 consortium will perform Service programs negotiated under Title IV of the ISDEA .

59

60 **B. AFA Assessment.** An assessment the Service's AFA negotiation team completes that
61 considers the opportunities for entering into an AFA with a tribe/consortium. The team considers
62 many factors (see section 5.8) when completing this assessment.

63

64 **C. AFA Evaluation.** An annual review and evaluation by the Service of AFA functions that the
65 tribe/consortium performs to ensure that the functions are completed in a timely manner and in
66 accordance with operational standards. The AFA prescribes the elements and methodology for
67 the AFA evaluation.

68

69 **D. AFA Negotiation Team.** One or more Service employees designated by the Regional
70 Director or California/Nevada Operations Office (CNO) Manager to represent Service interests
71 when negotiating with a tribe/consortium. This team is comprised of:

72

73 (a) The Service representative and a lead negotiator for the AFA (may be the same individual). The
74 project leader of the Service unit affected most often serves in one or both of these capacities unless
75 the Regional Director/CNO Manager directs otherwise.

76

77 (b) Other Service employees, including Assistant RDs, Assistant CNO Manager, and
78 Regional/CNO Native American Liaisons, as necessary, to represent Service interests.
79 At a minimum, this team should be comprised of the Service representative (section 5.5V) and
80 lead negotiator (section 5.5J).

81

82

83 **E. Applicant Pool.** Tribes or consortia that the Director of the Office of Indian Self-Governance
84 determines are eligible to participate in self-governance in accordance with 25 CFR 1000.16.

85

86 **F. Awarding Official.** Regional Director/CNO Manager who makes the decision about entering
87 into an AFA with a tribe/consortium and signs the agreement.

88

89 **G. Consortium.** An organization of Indian tribes that member tribes authorize to participate in
90 self-governance and that is responsible for negotiating, executing, and implementing AFAs and
91 compacts.

92

93 **H. Indian Country.** As defined in 18 U.S.C. 1151: (a) all land within the limits of any Indian
94 reservation under the jurisdiction of the United States Government, notwithstanding the issuance
95 of any patent, and, including rights-of-way running through the reservation; (b) all dependent

96 Indian communities within the borders of the United States whether within the original or
97 subsequently acquired territory thereof, and whether within or without the limits of a State, (c)
98 all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-
99 way running through the same.

100
101 **I. Inherently Federal Functions.** Inherently Federal functions are those involving, among other
102 things, the interpretation and execution of U.S. laws (see Office of Management and Budget
103 (OMB) Letter 92-1, Inherently Governmental Functions (September 23, 1992)). Other examples
104 of inherently Federal functions include, but are not limited to:

105
106 (1) Binding the United States to take or not take some action by contract, policy, regulation,
107 authorization, order, or otherwise;

108
109 (2) Determining, protecting, and advancing its economic, political, territorial, property, or other
110 interest by military or diplomatic action, civil or criminal judicial proceedings, contract
111 management, or otherwise;

112
113 (3) Significantly affecting the life, liberty, or property of people;

114
115 (4) Commissioning, appointing, directing, or controlling officers or employees of the United
116 States;

117
118 (5) Exerting ultimate control over the acquisition, use, or disposition of the property,
119 real or personal, tangible or intangible, of the United States, including the collection, control, or
120 disbursement of appropriated and other Federal funds.

121
122 **J. Lead Negotiator.** A Service employee the Regional Director/CNO Manager designates to
123 serve in a leadership role to represent our interests when negotiating an AFA with a
124 tribe/consortium. The project leader usually serves in this position.

125
126 **K. Letter of Interest.** A document that the tribe/consortium submits to inform us of its interest
127 to negotiate performing one or more of our programs. The letter typically requests information
128 about our programs and available funding, Exhibit 2 and 25 CFR 1000.170 summarize the
129 suggested contents of the letter. The tribe/consortium may submit the letter to our National
130 Native American Liaison (identified in the Secretary's annual section 405(c) listing in the
131 Federal Register) or to any Service office.

132
133 **L. Native American.** American Indians in the contiguous United States and Alaska Natives
134 (including Aleuts, Eskimos, and Indians) who are members of federally recognized tribes.

135
136 **M. Operational Standard.** A written guideline or procedure that sets the Service standard for
137 performing or completing functions or programs that an AFA covers.

138
139 **N. Parties.** The tribal government or consortium and the Service as signatories to an AFA.

140
141 **O. Periodic Service Reviews.** A periodic review and evaluation the project leader performs to
142 determine if the tribe/consortium is completing the Service program consistent with the annual

143 work plan and our operational standards. These reviews may be either formal or informal, and
144 the AFA prescribes the elements and methodology for them.

145

146 **P. Program or Programs.** All or part of a Service program, service, function, or activity.

147

148 **Q. Project Leader.** The manager of a unit of the National Fish Hatchery System, unit(s) of the
149 National Wildlife Refuge System, or another Service program.

150

151 **R. Reassumption.** The process we use to reassume a program covered in an AFA without the
152 consent of the tribe/consortium.

153

154 **S. Retrocession.** The process the tribe/consortium uses to return the responsibilities for a
155 program covered in an AFA prior to the expiration of the agreement.

156

157 **T. Secretary's Annual Section 405(c) Listing.** A Federal Register notice that lists DOI Bureau
158 programs eligible for inclusion in AFAs with self-governance tribes during the following year.

159

160 **U. Self-Governance Tribe.** A tribe or consortium that participates in permanent self-governance
161 through application and selection or has participated in the tribal self-governance demonstration
162 project. Native Hawaiians and Pacific Islanders are not eligible to participate in self-governance
163 and are not covered by this policy.

164

165 **V. Service Representative.** A Service employee the Regional Director/CNO Manager
166 designates to respond to letters of interest and associated correspondence from tribes/consortia
167 interested in pursuing an AFA with us.

168

169 **W. Service Unit.** A unit of the National Wildlife Refuge System or National Fish Hatchery
170 System.

171

172 **X. Special Cultural Significance.** Programs, sites, or activities defined by individual tribal
173 traditions that have special importance to the participating tribe, individually or as members of a
174 consortium. Examples include, but are not limited to:

175

176 (1) Sacred and medicinal sites;

177

178 (2) Gathering of medicines or materials, such as grasses for basket weaving; and

179

180 (3) Other traditional activities, including, but not limited to, subsistence hunting, fishing, and
181 gathering.

182

183 **Y. Special Geographical Significance.** Lands on or near an Indian reservation and all other
184 lands within Indian Country. In addition, the term includes:

185

186 (1) Lands that were formerly reservations;

187

188 (2) Lands on or near those conveyed or that will be conveyed under the Alaska Native Claims
189 Settlement Act;

190

191 (3) Aboriginal lands of a tribe or consortium member either judicially established or verified by
192 the Secretary; and

193

194 (4) Lands and waters that a treaty or other applicable law provides or protects because they are
195 relevant to Indian rights in natural resources, hunting, fishing, gathering, and subsistence
196 activities.

197

198 **Z. Special Historical Significance.** Programs or lands having a particular history that is relevant to
199 the tribe. For example, we may consider particular trails, forts, significant sites, or educational
200 activities that relate to the history of a particular tribe to have special historical significance.

201

202 **AA. Successor AFA.** A funding agreement negotiated after a tribe's initial AFA so the tribe can
203 continue to perform a Service program.

204

205 **BB. Tribe.** Any Indian tribe, band, nation, or other organized group or community, including pueblos,
206 rancherias, colonies, and any Alaska Native village or regional or village corporations as defined in or
207 established by the Alaska Native Claims Settlement Act that is recognized as eligible for special
208 programs and services provided by the United States to Indians because of their status as Indians.

209

210 **5.6 Who is responsible for the AFA policy?**

211

212 **A.** The **Director** ensures the Service complies with DOI regulations (25 CFR part 1000) concerning
213 ISDEA and this policy.

214 **B.** The **Regional Director (RD)/CNO Manager** oversees the discussions and negotiations with
215 tribes/consortia concerning the development of AFAs. After receiving a letter of interest or a written
216 request to negotiate an AFA from a tribe/consortium:

217

218 (1) Designates the Service representative responsible for responding to the tribe's/consortia's letter of
219 interest and ensures timely responses (see 25 CFR 1000.172 and section 5.9).

220

221 (2) Establishes an AFA negotiation team for each letter of interest he/she receives.

222

223 (3) Makes the final decision for the Service to enter into an AFA or a successor AFA with a
224 tribe/consortium.

225

226 (a) If through successful negotiations an opportunity for an AFA exists, serves as the awarding official
227 for the AFA and signs the agreement.

228

229 (b) If Service programs the tribe/consortium requests are unavailable for negotiation, sends a letter to
230 the tribe/consortium informing them of his/her decision. The letter includes a written explanation of
231 his/her reasoning.

232

233 **C. The AFA Negotiation Team:**

234

235 (1) Reviews letters of interest and requests to negotiate an AFA received from tribes/consortia and acts
236 in good faith to provide timely responses (see section 5.8).

237

- 238 (2) Assembles information the tribe/consortium requests consistent with 25 CFR part 1000, Subpart G
239 – Negotiation Process for Annual Funding Agreements.
240
- 241 (3) Works with National and/or Regional/CNO Native American Liaison(s) to determine
242 tribe's/consortium's eligibility to participate in tribal self-governance programs.
243
- 244 (4) Works with National and/or Regional/CNO Native American Liaison(s) to determine if our
245 programs are of special, geographic, historical, or cultural significance to participating tribes/consortia.
246
- 247 (5) Completes AFA assessments and submits the reports and recommendation to the Regional
248 Director/CNO Manager for consideration.
249
- 250 (6) If there is an opportunity to negotiate an AFA with a tribe/consortium, represents our interests
251 throughout the negotiations.
252
- 253 (7) Works with the Assistant RDs/CNO Assistant Manager for External Affairs and the
254 tribe/consortium to develop an outreach plan for each AFA. The plan must be consistent with the
255 process prescribed in 25 CFR part 1000, Subpart I – Public Consultation Process. If necessary, we may
256 release the draft AFA to the public for review and comment by publishing a notice of availability in
257 the Federal Register.
258
- 259 (8) Represents our interests during negotiations for successor AFAs.
260
- 261 (9) Participates in periodic reviews and AFA evaluations, as necessary.
262
- 263 (10) As necessary, monitors the overall AFA process and recommends RD/CNO Manager actions
264 consistent with 25 CFR part 1000 – Annual Funding Agreements Under the Tribal Self-Governance
265 Act Amendments to the Indian Self-Determination and Education Act.
266
- 267 (11) Develops and sends a recommendation to the RD/CNO Manager for the reassumption of any
268 Service program, if necessary. A finding of imminent jeopardy prompts this action consistent with 25
269 CFR part 1000, Subpart M – Reassumption.
270
- 271 (12) In the case of retrocession, negotiates with the tribe/consortium for the effective date of
272 retrocession and the amount of funding that it must return to the Service.
273
- 274 **D. The Assistant RD/CNO Assistant Manager, External Affairs** works with the AFA negotiation
275 team and assists in the development of an outreach plan for each AFA.
276
- 277 **E. The National Native American Liaison Officer:**
278
- 279 (1) Receives letters of interest and requests to negotiate an AFA from tribes/consortia and sends them
280 to the appropriate RD/CNO Manager.
281
- 282 (2) Provides support and assistance to any Region/CNO engaged in negotiations for an AFA when
283 they request support.
284
- 285 **F. Regional/CNO Native American Liaison Officer:**

286

287 (1) If designated by the RD/CNO Manager, serves as a member of an AFA negotiation team.

288

289 (2) Works with the AFA negotiation team to determine tribe's/consortia's eligibility to participate in
290 tribal self-governance programs.

291

292 (3) Works with the AFA negotiation team to determine if our programs are of special, geographic,
293 historical, or cultural significance to participating tribes/consortia.

294

295 **G. Project Leader:**

296

297 (1) Unless the RD/CNO Manager directs otherwise, serves as the Service representative
298 responsible for responding to a tribe's/consortia's letter of interest and request to negotiate an
299 AFA.

300

301 (2) Unless the RD/CNO Manager directs otherwise, serves as the lead negotiator for negotiating
302 the AFA.

303

304 (3) Serves as the point of contact with the tribe/consortium for daily operation issues associated
305 with an AFA or successor AFA.

306

307 **5.7 What programs may we include in an AFA?**

308

309 **A.** Before January 1, consistent with sections 403(b)(2) and 403(c) of the ISDEA, the Secretary
310 lists programs in the Federal Register that may be eligible for inclusion in an AFA during the
311 following year . This list contains a broad array of Service programs and activities that occur
312 both on and off Service units. In general, we may negotiate activities that support the operation
313 of Service units and other Service programs.

314

315 **B.** Consistent with section 403(c) of the ISDEA, we may also negotiate for activities whether or
316 not they are on the Secretary's annual list.

317

318 **C.** We may not negotiate for Service activities we consider inherently Federal functions as
319 described in section 5.5I. They are also excluded from 403(c).

320

321 **5.8 What factors should the AFA negotiation team consider before recommending Service** 322 **activities eligible for an AFA or during any subsequent AFA negotiations?**

323

324 **A. Impacts to Existing Service Employees.** Service employees are our most valuable resource,
325 and any actions taken through an AFA that negatively impact their employment can have lasting
326 effects. We should avoid entering into AFAs that result in involuntary separation or
327 reassignments unless the agreement clearly demonstrates budgetary or operational efficiencies.

328

329 **B. Direct, Indirect, and Total Costs for Administering an AFA.** We should consider all costs
330 identified in 25 CFR 1000.137-142 associated with the development and administration of an
331 AFA before finalizing it. We should not enter into an AFA if the cost of the agreement exceeds
332 that of completing activities using Service employees. However, if the costs of entering into the

333 AFA are equal to the costs when using Service employees, the intangible benefits may justify
334 entering into the AFA (see section 5.8E below for more information on intangible benefits).

335

336 **C. Impacts on Service Capabilities or Operational Efficiencies.** The AFA negotiation team
337 should advocate the establishment of AFAs with tribes/consortia where such agreements enhance
338 our capability to deliver our programs. The team should also advocate AFAs where they have the
339 potential to enhance our operational efficiencies. In general, the team should not advocate an
340 AFA if it would result in significant reductions in our capabilities or operational efficiencies.

341

342 **D. Impacts on Volunteer Activities of Service Unit.** Prior to and during AFA negotiations, the
343 AFA negotiation team should acknowledge volunteer contributions to a Service unit and assess
344 the potential impacts of an AFA on volunteer activities. To the degree possible, the AFA should
345 avoid negatively impacting the volunteer program of a Service unit. If we cannot avoid these
346 impacts, the AFA negotiation team and the tribe/consortium should identify mechanisms during
347 negotiations to mitigate any negative impacts to volunteer programs.

348

349 **E. Intangible Benefits of an AFA with a Tribe/Consortium.** The AFA negotiation team
350 should consider the intangible benefits associated with an AFA. For example, the development
351 of a strong and lasting partnership with a tribe/consortium may outweigh other factors. The
352 benefits of Native Americans performing Service activities with which they have a historical or
353 cultural nexus may substantially improve the effectiveness of a program.

354

355 **F. Tribe/Consortium Capacity to Perform Service Programs through an AFA.** One of the
356 intangible benefits of an AFA is to build a long-term working relationship between the Service
357 and a tribe/consortium and their tribal members. If the tribe/consortium lacks the capability or
358 staff expertise to perform the requested programs, the AFA negotiation team may advocate for
359 an agreement limited in scope. This limited agreement may provide the tribe/consortium the
360 opportunity to build capacity and expertise over time. On the other hand, an AFA may not be in
361 the best interest of Service and tribe/consortium relationships if the tribe/consortium does not
362 have capacity or expertise and only plans to complete Service programs by using non-tribal
363 members or private subcontractors.

364

365 **G. State Coordination Issues.** The AFA negotiation team should be sensitive to existing State-
366 Service relationships and any specific AFA issues that may be of concern to a State conservation
367 agency. We should closely coordinate with States on AFAs that potentially impact fish and
368 wildlife surveys or wildlife-dependent recreational use programs prior to finalizing the AFA.

369

370 **H. Public Comments Expressed During Public Consultation Process.** Following the public
371 consultation process, the AFA negotiation team should consider comments and suggestions they
372 receive from the public before finalizing an AFA with a tribe/consortium.

373

374 **5.9 What are the major steps in the development of an AFA?** Sections A through C below
375 and Exhibit 1 summarize the major steps for developing an AFA. Detailed information
376 concerning these steps is provided in 25 CFR part 1000, Subpart G – Negotiation Process for
377 Annual Funding Agreement, and 25 CFR part 1000, Subpart I – Public Consultation Process.
378 The AFA negotiation team should strive to comply with the timeframes for responses to
379 tribes/consortia.

380

381 **A. Information Phase.** The information phase is the first step in developing an AFA. The
382 tribe/consortium usually initiates it with a letter of interest. (Exhibit 2 contains suggested
383 contents of the letter of interest.) Although this step is not mandatory, we encourage the
384 tribe/consortium to use it. The information phase is an opportunity for both parties to clarify their
385 positions, desires, needs, and concerns. By effectively using this phase, we may shorten time
386 spent in negotiations.

387

388 (1) Within 15 days of the receipt of the letter of interest, we must respond to the tribe/consortium
389 and provide the name of the Service representative.

390

391 (2) Within 30 days of the receipt of the letter of interest, we must take one of two actions:

392

393 (a) **Program Available for Negotiation.** If an opportunity exists to negotiate an AFA for a
394 Service program, we are obligated to provide the tribe/consortium any information requested in
395 their letter of interest plus additional budgetary and staffing information as described in 25 CFR
396 1000.172. Exhibit 3 contains the list of information we provide to the tribe/consortium at this
397 stage of the process. If the information is not available within 30 days, we must provide the
398 tribe/consortium with the date we will give them the information.

399

400 (b) **Program Unavailable for Negotiation.** If we determine the program is unavailable for
401 negotiation, we are obligated to provide the tribe/consortium with a written explanation of our
402 reasoning.

403

404 **B. Negotiation Phase.** We initiate the negotiation phase when the tribe/consortium submits a
405 written request to negotiate an AFA (25 CFR parts 173-179). Within 15 days of receiving this
406 request, the Service representative schedules a pre-negotiation meeting with the tribe to decide if
407 the program is available for negotiation. Within 10 days after convening the pre-negotiation
408 meeting, we must take one of two actions:

409

410 (1) **Program Available for Negotiation.** If the program is available for negotiation, we identify
411 the lead negotiator(s) and awarding official(s). Within 30 days of receiving the written request to
412 negotiate, the Service and the tribe/consortium agree to a date to hold an initial negotiation
413 meeting. We hold subsequent meetings with reasonable frequency and at reasonable times.
414 Exhibit 4 lists issues that we must address during negotiations (also see 25 CFR 1000.176). In
415 preparation for these negotiations, lead negotiators should develop a working knowledge of this
416 policy and 25 CFR part 1000. Once negotiations have been successfully completed, the Service
417 and the tribe/consortium prepare and either execute or disapprove an AFA within 30 days or by a
418 mutually agreed upon date.

419

420 (a) **State Coordination.** The Service and the State conservation agencies are full partners in the
421 management of fish and wildlife resources and wildlife-dependent recreational opportunities on
422 and near national wildlife refuges. States also have a vested interest in the administration of
423 national fish hatcheries. In recognition of our partnerships, we must fully coordinate the
424 development of an AFA with a tribe/consortium with State conservation agencies. This
425 coordination should take place early in the negotiation phase of the AFA.

426

427 (b) **Public Participation Process.** As part of the negotiation process, the Service and the
428 tribe/consortium should cooperatively develop an outreach plan to facilitate the public

429 participation process. The outreach plan should be consistent with and supplemental to 25 CFR
430 1000, Subpart I – Public Consultation Process. When the Service or the tribe/consortium, or
431 both, believe it is necessary, we should release the draft AFA to the public for review and
432 comment locally and/or through publication of a notice of availability in the Federal Register.
433 We should incorporate specific elements of the outreach plan, such as plans for releasing the
434 draft AFA for public comment, into the AFA.

435

436 **(2) Program Unavailable for Negotiation.** If, after discussion, we determine the program is
437 unavailable, we will provide the tribe/consortium with a written explanation of our reasoning.

438

439 **C. Execution and Distribution of the Final AFA.**

440

441 **(1)** After all parties have signed the AFA, the Regional Director/CNO Manager sends a copy of
442 the AFA to the tribe/consortium and to the Director.

443

444 **(2)** The Director sends a copy to the Secretary, who in turn sends copies of the AFA to the House
445 Committee on Resources, Subcommittee on Native Americans and Insular Affairs, and the
446 Senate Committee on Indian Affairs.

447

448 **(3)** The effective date of the AFA must be no earlier than 90 days after the Secretary sends the
449 AFA to the congressional committees.

450

451 **5.10 What funds can the Service make available for an AFA and what are their limitations?**

452 The information in sections A and B below is only a brief summary. The negotiation team should
453 also refer to the detailed guidance about AFA funding found in 25 CFR 1000.137-142 during
454 AFA negotiations.

455

456 **A. Types of Funds.** In general, both direct and indirect costs of administering a Service program
457 are eligible for AFA funding. We are not required to include management and support funds
458 from the Regional/CNO or Washington offices unless the tribe/consortium is planning to
459 complete the work of those offices.

460

461 **B. Funding Limitations.**

462

463 **(1)** The amount of funding is subject to the availability and level of congressional appropriations
464 to the Service for the program or activity the AFA covers. In addition, the AFA may not exceed
465 the amount of funding we would have spent for direct operations, indirect support, and
466 management of those programs and activities for that year;

467

468 **(2)** The AFA must not include funding for programs we still perform;

469

470 **(3)** AFA funds may only be spent for costs associated with programs in AFAs with self-
471 governance tribes/consortia; and

472

473 **(4)** All AFAs must include a prohibition against using AFA funds to lobby Congress or others.

474

475 **5.11 What happens if the Service and tribe/consortium cannot reach agreement on an** 476 **AFA?**

477

478 **A.** Within 30 days of the mutually agreed upon date for completing negotiations, the Service and
479 the tribe/consortium may each make a last and best offer to the other party.

480

481 **B.** If we do not reach agreement within 15 days of the last and best offer, the Regional
482 Director/CNO Manager must provide a written explanation to the tribe/consortium explaining
483 the reasons for not entering into an AFA. The explanation should include a statement regarding
484 appeal or review rights under 25 CFR part 1000, Subpart R- Appeals.

485

486 **C.** The tribe/consortium has 30 days from receiving our written explanation to file an appeal.

487

488 **5.12 What are the major components of an executed AFA?** Exhibit 5 lists the major
489 components of an executed AFA. Since each AFA is a legally binding document, it must be
490 thorough and address all the issues associated with its administration. Our contract specialists
491 and Regional/CNO Solicitors also should review the AFA. Since each situation is different, the
492 actual components of individual AFAs will vary to some degree.

493

494 **5.13 How can the Service ensure quality and timeliness in the performance of Service
495 programs in an AFA?** We can assure quality and timeliness by developing operational
496 standards, using an AFA annual work plan, performing periodic service reviews, and conducting
497 a thorough annual AFA evaluation (see sections A through D below). The development of these
498 four components to an AFA allows us to provide periodic constructive feedback to the
499 tribe/consortium. We need these instruments to accurately assess the tribe's/consortium's overall
500 performance during the annual AFA evaluation.

501

502 **A. Operational Standards.** To ensure quality, activities tribes/consortia complete under an AFA
503 should meet professional or industry standards. Where professional or industry standards exist
504 for AFA activities, we should adopt and incorporate them into the AFA. Where professional or
505 industry standards do not exist for AFA activities, the AFA negotiation team, in consultation
506 with the tribe/consortium, should develop and incorporate them into the AFA.

507

508 **B. AFA Work Plan.** The AFA negotiation team should develop an AFA work plan in
509 cooperation with the tribe/consortium and incorporate it into the AFA. This work plan is
510 designed to provide good quality guidance to the tribe/consortium and help ensure both the
511 timeliness and completion of the various elements of AFA activities.

512

513 **C. Periodic Service Reviews.** Over the course of the year, the Service unit project leader should
514 conduct periodic reviews to ensure that the tribe/consortium is completing our programs on time
515 and in a quality manner. These reviews may be informal, or the project leader may establish a
516 formal process. The negotiation team should prescribe the timing and methodology of these
517 periodic reviews with the tribe/consortium in the AFA.

518

519 **D. AFA Evaluation.** At least 90 days before an AFA expires, the AFA negotiation team should
520 convene with tribe/consortium representatives to evaluate the previous year's accomplishments.
521 The team should negotiate the methodology for this evaluation with the tribe/consortium prior to
522 finalizing an AFA, and prescribe the elements of the evaluation in the AFA. The AFA
523 negotiation team and the tribe/consortium can use the results of this evaluation when entering
524 into negotiations for a successor AFA.

525

526 **5.14 What happens if an AFA expires before the effective date of the successor AFA?**

527 Whenever possible, the effective date of a successor AFA should be on or before the expiration
528 date of the current AFA. If that is not possible, the tribe/consortium may continue to carry out
529 the program(s) authorized under the current AFA to the extent resources permit. At the time we
530 negotiate the AFA or in a subsequent amendment, we should work with the tribe/consortium to
531 agree to terms to follow in these circumstances. During this extension period, the current AFA
532 remains in effect. Nothing in this section authorizes us to continue an AFA beyond the
533 completion of the program(s) the AFA or amended AFA authorize.

534

535 **5.15 What is the process for negotiating a successor AFA?** Although not mandatory, we
536 prefer a written request to initiate the negotiation of a successor AFA because it is in the best
537 interest of all parties. A written request documents the precise date of the request. If either party
538 anticipates a significant change in an existing program in the AFA, it should notify the other
539 party of the change in writing at the earliest possible date so that the other party may plan
540 accordingly. The Service and tribes/consortia should generally use the terms of the existing AFA
541 to expedite and simplify both the exchange of information and the negotiation process. The
542 process for negotiating a successor AFA should be the same process described in 25 CFR part
543 1000 and in sections 5.9 – 5.11.

544

545 **5.16 What modifications may the Service and tribes/consortia make to an AFA or to a**
546 **successor AFA?**

547

548 **A. Amendments to an AFA.** We can amend the terms and conditions of an AFA any time
549 during the year as long as both the Service and the tribe/consortium agree. When both parties
550 accept the language of the amendment, the Service will send it to the signatories of the original
551 agreement for execution.

552

553 **B. Waiver of Regulations.** In addition to requesting a waiver of regulations during the
554 negotiation process, the tribe/consortium may request a waiver of DOI regulations applicable to
555 the Service program, in whole or in part, as a modification to an existing or a successor AFA.
556 Regulations at 25 CFR part 1000, Subpart J – Waiver of Regulations, specify the procedures the
557 tribe/consortium must follow to request a waiver.

558

559 **5.17 If the tribe/consortium is not performing the program as planned, what actions may**
560 **the Service or the tribe/consortium take following the execution of an AFA or successor**
561 **AFA?**

562

563 **A. Retrocession.** The tribe/consortium may voluntarily return a program to us prior to the
564 expiration date of the AFA. Following this action, we must negotiate with the tribe/consortium
565 on the date of the return and the amount of funding they should return to us for the operation of
566 the retroceded program. Regulations at 25 CFR part 1000, Subpart N – Retrocession, provide
567 specific procedures for retrocession.

568

569 **B. Reassumption.**

570

571 **(1)** Upon a finding of imminent jeopardy to a trust resource or a natural resource, we may
572 reassume the program without the consent of the tribe/consortium.

573

574 (2) Upon a finding of imminent jeopardy to public health and safety, we must immediately
575 reassume the program with or without the consent of the tribe/consortium.

576

577 (3) Specific procedures for reassumption are found in 25 CFR part 1000, Subpart M –
578 Reassumption.

579

580 **5.18 How are disputes between the tribe/consortium and the Service concerning AFAs**
581 **resolved?** Regulations at 25 CFR part 1000, Subpart R – Appeals, govern the resolution of
582 disputes during negotiation and implementation of AFAs. To the extent possible, the Service and
583 the tribe/consortium should seek all means of dispute resolution before the tribe/consortium files
584 an appeal.

585

586 **5.19 Is there a contracting preference for programs of special geographic, historical, or**
587 **cultural significance?** Yes. The ISDEA gives us the discretion to award eligible AFAs on a
588 noncompetitive basis for programs of special geographic, historical, or cultural significance.

589

590 **5.20 What happens if more than one tribe is eligible to enter into an AFA for programs on**
591 **a Service unit?** If we receive requests from different tribes/consortia for the same program(s) on
592 a Service unit, we may allocate the program(s) among the eligible tribes/consortia or select a
593 single tribe/consortium with whom to negotiate an AFA.

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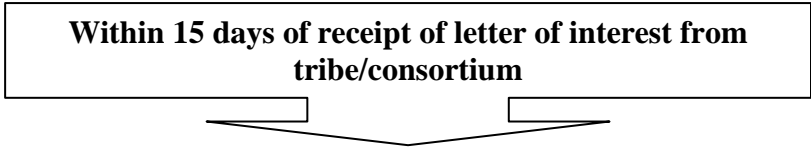
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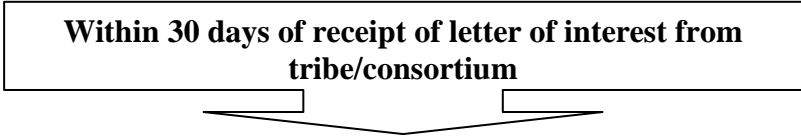
**Negotiation Steps for
Annual Funding Agreements
With Native American Tribes or Consortia**

**Information Phase
(Optional on Behalf of Tribe/Consortium)**

- Step 1.** Before January 1, the Secretary of the Interior publishes a list of programs eligible for inclusion in annual funding agreements during the following year.
- Step 2.** We receive the letter of interest from tribe/consortium. Any office, ranging from field stations to the Director’s Office, may receive the letter.
 - A. Letter is immediately sent to appropriate Regional Director/CNO Manager.
 - B. Regional Director/CNO Manager appoints Service representative and AFA negotiation team.
 - C. AFA negotiation team notifies any other Bureau requiring notification and participation in this negotiation.



- Step 3.** Regional Director/CNO Manager notifies tribe/consortium in writing of name of Service representative.



- Step 4.** AFA negotiation team completes AFA assessment and forwards subject assessment and recommendation to Regional Director/CNO Manager.
- Step 5.** Regional Director/CNO Manager provides the tribe/consortium information they requested in their letter of interest and information prescribed by this policy;

OR

638 Regional Director/CNO Manager provides the tribe/consortium a written explanation of
639 why the information is not available or why we are not providing it, and the date by
640 which we will send the tribe/consortium the information.

641

642

OR

643

644

Regional Director/CNO Manager provides the tribe/consortium a written explanation
645 why the program is unavailable for negotiation.

646

647

Negotiation Phase

648

649 **Step 6.** Service receives request to negotiate from tribe/consortium. Any office ranging from
650 field stations to the Director's Office may receive the letter.

651

652

A. Send request immediately to appropriate Regional Director/CNO Manager.

653

654

B. If not completed in information phase, Regional Director/CNO Manager appoints
655 Service representative and AFA negotiation team.

656

657

C. AFA negotiation team completes preliminary AFA assessment and sends the
658 assessment and preliminary recommendation to Regional Director/CNO Manager.

659

**Within 15 days of receipt of request to negotiate from
tribe/consortium**



660

661

662 **Step 7.** If the requested program is contained on the Secretary's list (section 405(c)) and if the
663 preliminary AFA assessment concludes that it is available for negotiation, the Regional
664 Director/CNO Manager notifies the tribe/consortium in writing of names of Service
665 representative, lead negotiator(s), and the awarding official(s);

666

667

OR

668

If the program is potentially of a special geographic, cultural, or historical significance
669 to a tribe/consortium, the Service representative schedules a pre-negotiation meeting
670 with the tribe/consortium as soon as possible.

671

Within 10 days of convening pre-negotiation meeting



672

673

674 **Step 8.** Based on information obtained at pre-negotiation meeting, AFA negotiation team
675 finalizes AFA assessment and sends the assessment and recommendation to Regional
676 Director/CNO Manager.

677 **Step 9.** If the program is available for negotiation, the Regional Director/CNO Manager
678 notifies tribe/consortium in writing of the names of Service representative, lead
679 negotiator(s), and the awarding official(s);
680

681 **OR**

682
683 If the program is unavailable for negotiation, the Regional Director/CNO Manager
684 provides the tribe/consortium with a written explanation of why the program is
685 unavailable for negotiation.
686

Within 30 days of receipt of "letter to negotiate" from tribe

687
688

689 **Step 10.** If the program is available for negotiation, the Service representative and the
690 tribe/consortium agree to a date to conduct an initial negotiation meeting. Subsequent
691 meetings will be held with reasonable frequency and at reasonable times.
692

**Within 30 days of completing negotiations (or by mutually agreed
upon date which provides for public review of the draft AFA)**

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696

Step 11. The Service and tribe/consortium prepare and execute or disapprove an AFA.

697 If both parties reach an agreement, the Regional Director/CNO Manager sends the final
698 AFA with original signatures to the tribe/consortium, the Director, and the Secretary.
699 Ninety days prior to its effective date, the Secretary provides copies of the AFA to the
700 House Committee on Resources, Subcommittee on Native Americans and Insular
701 Affairs, and the Senate Committee on Indian Affairs.
702

703 **OR**

704
705 If both parties do not reach an agreement, the Service and tribe/consortium may each
706 make a last and best offer to the other party.
707

Within 15 days of last and best offer

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709

710 **Step 12.** If both parties reach an agreement, the negotiation team sends the final AFA with
711 original signatures to the tribe/consortium, the Director, and the Secretary. Ninety days
712 prior to its effective date, the Secretary provides copies of the AFA to the House
713 Committee on Resources, Subcommittee on Native Americans and Insular Affairs, and
714 the Senate Committee on Indian Affairs.
715

716 **OR**

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If the Service or the tribe/consortium does not accept the last and best offer, the Regional Director/CNO Manager provides a written explanation to the tribe/consortium describing our reason(s) for not entering into an AFA for the requested program that includes a statement regarding appeal or review rights per 25 CFR part 1000, Subpart R-Appeals.

Within 30 days of receipt of Service's written explanation

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Step 13. Tribe/consortium must file an appeal according to 25 CFR part 1000, Subpart R-Appeals.

**Suggested Contents for
Letter of Interest
AFA Negotiations**

- 731
- 732
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- 734
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- 736
- 737
- 738
- 739
- 740 **A.** Program or programs the tribe/consortium is interested in negotiating under an AFA;
- 741
- 742 **B.** Preliminary brief explanation of the cultural, historical, or geographic significance to the
- 743 tribe/consortium of the program, if applicable;
- 744
- 745 **C.** The scope of activity that a tribe/consortium is interested in including in an AFA;
- 746
- 747 **D.** Other information that may assist the Service in identifying the program or programs that
- 748 are included or related to the tribe/consortium's request;
- 749
- 750 **E.** A request for information that indicates the type of program and/or description of
- 751 information that will assist the tribe/consortium in pursuing the negotiation process;
- 752
- 753 **F.** Naming a designated tribal contact;
- 754
- 755 **G.** A request for information on any funds that may be available within the Service or other
- 756 known possible sources of funding for planning and negotiating an AFA;
- 757
- 758 **H.** A request for information on any funds available within the Service or from other sources
- 759 of funding that the tribe/consortium may include in the AFA for planning or performing
- 760 programs or activities; and
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- 762 **I.** Any requests for technical assistance the Service will provide in preparing documents or
- 763 materials that may be required for the tribe/consortium in the negotiation process.
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**Service Information We Provide
to Tribe/Consortium in Response to
Letter of Interest**

A. Information regarding program, budget, staffing, and locations of the offices administering the program and related administrative support program identified by the tribe/consortium;

B. Information contained in the previous year's, present year's, and next year's budget proposed by the President at the national program level and the Regional/local level;

C. If appropriate, when the Service will be available to meet the tribal representatives to explain the budget information provided;

D. Information used to support budget allocations for the programs identified (e.g. full-time equivalents and other relevant factors);

E. Information used to operate and/or evaluate a program, such as statutory and regulatory requirements and program standards;

F. If applicable, information regarding how a program is administered by more than one Bureau, including a point of contact for information for the other Bureau(s); and

G. Other information requested by the tribe/consortium in its letter of interest.

H. Naming a designated contact.

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**Issues That Must Be Addressed
during
AFA Negotiations**

- A.** The specific tribe/consortium proposal(s) and intentions;
- B.** Legal or program issues that the Service or the tribe/consortium identifies as concerns;
- C.** Options for negotiating programs and related budget amounts, including mutually agreeable options for developing alternative formats for presenting budget information to the tribe/consortium;
- D.** Dates for conducting and concluding negotiations;
- E.** Protocols for conducting negotiations;
- F.** Responsibility for preparing a written summary of the discussions; and
- G.** Responsibility for preparing an initial draft of the AFA.

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**Major Components of an
Executed Annual Funding Agreement**

Title of Document

Purpose of Agreement

Authorities

Legislative

Code of Federal Regulations

Other

Definitions

Description of Activities Covered

Monitoring, Evaluation, and Quality Control

Operational Standards

AFA Annual Work Plan

Periodic Service Reviews

Annual AFA Evaluation

Administration of Funds

Use of Service Facilities and Equipment (if applicable)

AFA Outreach Plan

Other Administrative Provisions

Regulations that Govern the Agreement

Federal Tort Claims Act

Trust Responsibility and Sovereign Immunity

Retrocession, Reassumption, and Expiration

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868 **Amendments and Correction**

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870 **Effective Date and Term**

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872 **Signatories**

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