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# Federal Register

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or loan programs or the rights and obligations of recipients thereof.

*Regulatory Flexibility Act:* In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the agency has evaluated the effects of this action on small entities. Based on the evaluation, we certify that this action will not have a significant impact on a substantial number of small entities. States are the recipients of any funds awarded under the Section 405 program, and they are not considered to be small entities, as that term is defined in the Regulatory Flexibility Act.

*Paperwork Reduction Act:* This final rule contains information collection requirements, as that term is defined by the Office of Management and Budget (OMB) in 5 CFR Part 1320. Accordingly, these requirements have been submitted previously to and approved by OMB, pursuant to the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*). These requirements have been approved under OMB No. 2127–0600, through February 28, 2002.

*National Environmental Policy Act:* The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that it will not have any significant impact on the quality of the human environment.

*The Unfunded Mandates Reform Act:* The Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires agencies to prepare a written assessment of the costs, benefits and other effects of final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. This final rule does not meet the definition of a Federal mandate, because the resulting annual expenditures will not exceed the $100 million threshold. In addition, this incentive grant program is completely voluntary and States that choose to apply and qualify will receive incentive grant funds.

*Executive Order 13132 (Federalism):* This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and it has been determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Accordingly, the preparation of a Federalism Assessment is not warranted.

**List of Subjects in 23 CFR Part 1345**

Grant programs—Transportation, Highway safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, the interim final rule published in the **Federal Register** of October 1, 1998, 63 FR 52592, adding a new Part 1345 to chapter II of Title 23 of the Code of Federal Regulations, is adopted as final, with the following changes:

## PART 1345—INCENTIVE GRANT CRITERIA FOR OCCUPANT PROTECTION PROGRAMS

1. The authority citation for Part 1345 continues to read as follows:

**Authority:** Pub. L. 105–178; 23 U.S.C. 405; delegation of authority at 49 CFR 1.50.

2. Section 1345.3 is amended by adding a new paragraph (f) to read as follows:

**§ 1345.3 Definitions.**

* * * * *

(f) *Targeted population* means a specific group of people chosen by a State to receive instruction on proper use of child restraint systems.

3. Section 1345.4 is amended by revising paragraph (a)(1)(iv) to read as follows:

**§ 1345.4 General requirements.**

(a) * * *

(1) * * *

(iv) It will maintain its aggregate expenditures from all other sources, except those authorized under Chapter 1 of Title 23 of the United States Code, for its occupant protection programs at or above the average level of such expenditures in fiscal years 1996 and 1997 (either State or federal fiscal year 1996 and 1997 can be used);

* * * * *

4. Section 1345.5 is amended as follows:

a. A new paragraph (c)(4) is added;

b. Paragraph (d)(2) is amended by removing the word ''police'' and adding in its place ''law enforcement officials''; and paragraph (d)(5) is amended by removing the word ''police'' and adding in its place ''law enforcement'';

c. Paragraph (e)(1)(iv) is revised; paragraphs (e)(1)(ii) and (e)(2)(ii) are amended by removing the term ''police officers'' each time it appears and adding in its place ''law enforcement officials''; and paragraph (e)(2)(i) is amended by removing the word ''targeted'' and adding in its place ''State's''.

The addition and revision read as follows:

**§ 1345.5 Requirements for a grant.**

* * * * *

(c) * * *

(4) If a State has in effect a law that provides for the imposition of a fine of not less than $25.00 or one or more penalty points for a violation of the State's child passenger protection law, but provides that imposition of the fine or penalty points may be waived if the offender presents proof of the purchase of a child safety seat, the State shall be deemed to have in effect a law that provides for the imposition of a minimum fine or penalty points, as provided in paragraph (c)(1) of this section.

* * * * *

(e) * * *

(1) * * *

(iv) The States's public information program must reach at least 70% of the State's total population. The State's clinic program must reach at least 70% of a targeted population determined by the State and States must provide a rationale for choosing a specific group, supported by data, where possible.

* * * * *

Issued on: July 13, 2001.

**L. Robert Shelton,**

*Executive Director.*

[FR Doc. 01–17993 Filed 7–25–01; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### 25 CFR Part 84

**RIN 1076–AE00**

## Encumbrances of Tribal Land—Contract Approvals

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Interior, Bureau of Indian Affairs (BIA), is issuing a Final Rule that states which types of contracts or agreements encumbering tribal land are not subject to approval by the Secretary of the Interior under the Indian Tribal Economic Development and Contract Encouragement Act of 2000. The regulation also provides, in accordance with the Act, that Secretarial approval is not required (and will not be granted) for any contract or agreement that the Secretary determines is not covered by the Act. Finally, for contracts and agreements that are covered by the Act, the regulation sets out mandatory conditions for the Secretary's approval.

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**EFFECTIVE DATE:** September 24, 2001.

**FOR FURTHER INFORMATION CONTACT:** Duncan L. Brown, Department of the Interior, Office of the Secretary, 1849 C Street, NW., MS 7412 MIB, Washington, DC 20240, telephone 202/208–4582.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Under subsection (e) of the Indian Tribal Economic Development and Contract Encouragement Act of 2000 (25 USC 81) (referred to commonly and herein as ''Section 81''), the Secretary is required to enact regulations establishing which types of agreements are not covered by Section 81. The preamble to the Proposed Rule, 65 FR 43874 (July 14, 2000), provides further background on the history of Section 81, including the contents of the 2000 amendments. The Final Rule was developed with attention to Secretarial Order 3215, ''Principles for the Discharge of the Secretary's Trust Responsibility,'' of April 28, 2000, which was converted to and made permanent in the Departmental Manual on October 31, 2000. See 303 DM 2.

In a significant departure from past practice, the BIA distributed the preliminary drafts of the proposed regulation to the National Congress of American Indians (NCAI) and to tribes through BIA regional directors, with a request for comments and recommendations. Several subsequent meetings were held with an NCAI policies and procedures working group to discuss the evolving draft regulation prior to publishing the proposed regulation. These meetings included the Assistant Secretary—Indian Affairs, the Deputy Commissioner of Indian Affairs, staff of the Trust Policies and Procedures (TPP) project, trust program managers, and trust program attorneys from the Solicitor's Office. Notably, tribal representatives from each BIA region and BIA managers participated in a three-day meeting in Mesa, Arizona, in April 2000, to discuss the draft regulation.

The regulation was published in the **Federal Register** on July 14, 2000, (65 FR 43874) with a 90-day public comment period to solicit comments from all interested parties. The BIA received 19 written comments from tribes, tribal representatives, and tribal organizations. During the comment period, the BIA discussed the regulation and received oral comments on the record at seven formal tribal consultation sessions with tribal leaders, individual Indians, and other interested parties: Aberdeen, SD (August 7–8, 2000); Oklahoma City, OK (August 10, 2000); Bloomington, MN (August 17, 2000); Albuquerque, NM (August 21 and 22, 2000 [two separate consultation meetings]; Billings, MT (August 24, 2000); and Reno, NV (August 28–29, 2000). Transcripts were made of these sessions in order to ensure that both oral and written comments were considered. Following the consultation meetings, several BIA regional and agency offices established informal local working groups with tribes to encourage discussion of the proposed regulations and submission of written comments. Throughout the comment period the BIA met on an informal basis to discuss the regulations with interested organizations, including the NCAI working group and the Inter-Tribal Monitoring Association. In sum, tribes and individual Indians have had an extraordinary opportunity to provide meaningful input on the proposed regulation through informal consultations on the early drafts, formal consultations, and the public comment period.

Comments were forwarded to a clearinghouse for compilation. The comments and compilation documents were carefully reviewed by the regulation drafting team, made up of BIA employees from the Central Office and trust program attorneys from the Solicitor's Office. Depending upon their merit, the Department accepted, accepted with revision, or rejected particular comments made on each part of the rule. Substantive comments and responses by the BIA are summarized below.

## II. Response to Comments

As noted in the section-by-section analysis below, in direct response to comments the regulations have been clarified. No sections were deleted from the Proposed Rule to the Final Rule. One new section was added in the Final Rule at section 84.007 and the proposed section 84.007 was renumbered to section 84.008.

### *General Observations Regarding Changes From Proposed Rule*

Overall, respondents recommended that we provide clarifications as to the types of agreements that do not require approval under Section 81. Therefore, in response to these comments, we revised definitions and language to make clearer the types of agreements that are not subject to Section 81. These revisions included corrections to the treatment of corporations under 25 USC 477 and contracts under 25 USC 450f or compacts under 25 USC 458aa. Several respondents recommended that we develop specific procedures for the submission and review of contracts covered under this Part. The BIA does not intend to prescribe any particular format for submission of requests for approval. Additionally, internal procedures for BIA review are not appropriate for rulemaking, but will be addressed in the Indian Affairs Manual.

We also received comments concerning Section 81's repeal of our authority to approve tribal attorney contracts, except for those entered into by the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek, and Seminole) in Oklahoma. As noted in the preamble to the Proposed Rule, BIA will now only approve attorney contracts if required to do so under a tribal constitution. The criteria, if any, for approval of such contracts will be those in the tribal constitution and any relevant Federal law. As is its policy, BIA will defer to the tribe's interpretation of its own law regarding such approvals. Consistent with the repeal of our statutory authority for approval of tribal attorney contracts, we are today repealing relevant portions of the regulations for such approvals at 25 CFR Part 89.

### *Section-by-Section Analysis*

Section 84.001 What Is the Purpose of This Part?

*Summary of Section.* Section 84.001 states the purpose of the rule as being the implementation of the Indian Economic Development and Contract Encouragement Act of 2000, Pub. L. 106–179.

*Comments.* We received no comments on this section and no changes were made.

Section 84.002 What Terms Must I Know?

*Summary of Section.* Section 84.002 contains terms necessary for understanding the rule. The term ''encumber,'' which Congress did not define in the Act, refers, consistent with the Act's legislative history, to the possibility that a third party could gain exclusive or nearly exclusive proprietary control over tribal land. The ''third party'' in this definition refers to any party outside of the tribe who, under the terms of the contract or agreement, could gain exclusive or nearly exclusive proprietary control over tribal land, such as a lender or the holder of a secured interest in any improvements for a transaction involving a tribe and a potential lessee. We have defined ''Indian tribe'' as it is defined in the Act. The definition of ''tribal lands'' in the rule is the same as the definition of ''Indian lands'' in the

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Act. We have used ''tribal lands'' to make it clear that the provisions of the Act and this rule do not apply to individually owned lands.

*Comments.* We received comments to revise the definitions of ''encumber '', ''Indian tribe'', and ''tribal lands''. We modified the definition of ''encumber'' to clarify that the terms of the contract or agreement will determine whether the contract or agreement encumber tribal lands. We did not accept the recommendations to change the definitions of ''Indian tribe'' and ''tribal lands''. These definitions are those provided by Congress. We did, however, modify the definition of ''Indian tribe'' to reflect the actual language of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450b(e), as directed by Congress.

Section 84.003 What Types of Contracts and Agreements Require Secretarial Approval Under This Part?

*Summary of Section.* Section 84.003 indicates that, unless otherwise exempted, those contracts and agreements that encumber tribal lands for a period of seven or more years require Secretarial approval under this rule. As noted in the preamble to the Proposed Rule, the legislative history of Section 81 states, for example, that, if the default provision in a contract or agreement allows a third party (e.g., a lender) to operate the facility, that contract or agreement would ''encumber'' tribal land within the meaning of Section 81. If, however, the lender is only entitled to first right to the revenue from the facility, the contract or agreement would not ''encumber'' tribal land.

*Comments.* No comments were received for this section and no changes were made.

Section 84.004 Are There Types of Contracts and Agreements That Do Not Require Secretarial Approval Under This Part?

*Summary of Section.* Section 84.004 indicates that the following types of contracts or agreements are not subject to this rule:

• Contracts or agreements otherwise reviewed and approved by the Secretary under this title or other federal law or regulation. Congress did not repeal any other requirement for Secretarial approval of encumbrances, nor did it state that the Act imposed an additional approval process, separate from existing statutory requirements. This exemption is also consistent with previous opinions of both the Department of the Interior and the Department of Justice, judicial decisions, and legislative history of the Indian Mineral Development Act, all of which consistently state that the requirements of Section 81 do not apply to leases, rights-of-way, and other documents that convey a present interest in tribal land. Note, however, that contracts and agreements that are similar to those approved under other federal law or regulation, but are not subject to that approval, such as a contract between a tribe and another party to least a tract of tribal land at a future date, may be subject to approval under this Part.

• Leases of tribal land that are exempt from approval by the Secretary under 25 U.S.C. 415 or 25 U.S.C. 477. Currently, this exemption only applies to certain leases by the Tulalip Tribes, the Navajo Nation, and tribes with a corporate charter authorized by 25 U.S.C. 477.

• Subleases and assignments of leases of tribal land that do not require approval by the Secretary under Part 162 of this title. This provision will ensure maximum consistency with BIA policies concerning different types of leases.

• Contracts or agreements that convey temporary use rights assigned by tribes, in the exercise of their jurisdiction over tribal lands, to tribal members. Such assignments are internal tribal matters. We must approve any encumbrances of the assigned tribal land under this Part or another relevant regulation (e.g., 25 CFR Part 162).

• Contracts or agreements that do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of seven years or more. By definition, such contracts or agreements do not encumber the land under the Act. Such contracts or agreements may include contracts for personal services; construction contracts; contracts for services performed for tribes on tribal lands; and bonds, loans, security interests in personal property, or other financial arrangements that do not and could not involve interests in land.

• Contracts that are exempt from Secretarial approval under the terms of a corporate charter authorized under 25 U.S.C. 477.

• Tribal attorney contracts. However, as noted above, although the Act repealed the federal statutory requirements for approval of most attorney contracts, the BIA will still do so if required under a tribal constitution.

• Contracts or agreements entered into in connection with a contract under the Indian Self-Determination Act, 25 U.S.C. 450f, or a compact under the Tribal Self-Governance Act, 25 U.S.c. 458aa. This is to conform to the exemption of these contracts from approval by the Secretary under 25 U.S.C. 4501(c)(15)(A).

• Contracts or governments that are subject to approval by the National Indian Gaming Commission. The Act specifically exempts these contracts and agreements from its provisions, and the National Indian Gaming Commission will continue to review and approve contracts that provide for management of a tribal gaming activity.

• Contracts or agreements under the Federal Power Act (FPA) relating to the use of tribal lands that meet the definition of a ''reservation'' under the FPA, with certain conditions. The FPA already provides for review of such contracts or agreements by the Secretary.

*Comments.* Several comments recommended that the rule provide specific examples of contracts that do not encumber tribal land. These comments were partially accepted and clarifications were provided in this section concerning certain types of agreements such as hydropower projects and assignments of tribal land to tribal members.

The preamble to the Proposed Rule stated that Section 81 did not apply by its terms to any contracts or agreements entered into by corporations chartered under 25 U.S.C. 477. Commenters noted that there was no support in either Section 81 or its legislative history for such a statement. We agree, and have narrowed the exemption to only those contracts or agreements entered into by those corporations that do not otherwise require Secretarial approval. Conversely, commenters stated that the exemption in the Proposed Rule limited to attorney contracts entered into by Self-Governance tribes was too narrow, ignoring the broad exemption from Secretarial approval under 25 U.S.C. 4501(c)(15)(A) for any contract or agreement entered into under the Indian Self-Determination Act, 25 U.S.C. 450f, or a compact under the Tribal Self-Governance Act, 25 U.S.C. 458aa. We accepted the comments and broadened the exemption accordingly.

We rejected comments that recommended that the rule contain an exhaustive list of contracts or agreements that do not encumber tribal land. Such a list is not practicable because the determination of encumbrance is conducted on a case-by-case basis. For example, a restrictive covenant or conservation easement may encumber tribal land within the meaning of Section 81, while an agreement that does not restrict all economic use of tribal land may not. An agreement whereby a tribe agrees not to interfere with the relationship between

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a tribal entity and a lender, including an agreement not to request cancellation of the lease, may encumber tribal land, depending on the contents of the agreement. Similarly, a right of entry to recover improvements or fixtures may encumber tribal land, whereas a right of entry to recover personal property may not.

Section 84.005 Will the Secretary Approve Contracts or Agreements Even Where Such Approval Is Not Required Under This Part?

*Summary of Section.* Section 84.005 makes it clear that the Secretary will return to the submitting tribes those contracts and agreements that do not require his or her approval. Therefore, we will no longer issue ''accommodation approvals.''

*Comments.* We received several comments recommending that the regulation specify a specific time frame when the Secretary will return contracts and agreements with a statement explaining why Secretarial approval is not required. We accepted these comments and added a time frame in this section that states that within thirty days after receipt of final, executed documents, the Secretary will return such contracts and agreements with a statement explaining why Secretarial approval is not required. We also received comments requesting provisions for appeal of determinations under this section. These comments were not accepted because Part 2 of this Title applies to all decisions made by the Secretary, including those under this section.

Section 84.006 Under What Circumstances Will the Secretary Disapprove a Contract or Agreement That Requires Secretarial Approval Under This Part?

*Summary of Section.* Section 84.006 establishes the criteria for disapproval of a contract or agreement under this rule. Specifically, the Secretary must disapprove those contracts or agreements that would violate federal law or those that do not contain provision(s) regarding the exercise of tribal sovereign immunity. As noted in the preamble to the Proposed Rule, consistent with the legislative history of the Act, these are the only criteria for Secretarial disapproval under this rule.

*Comments.* Many respondents provided comments that recommended that the Secretary consult with tribes prior to disapproving a contract or agreement so that tribes may have an opportunity to correct elements that may lead to disapproval. We accepted these comments and added subsection (b) to this section to identify that the Secretary will consult with tribes for this purpose. We also received comments asking whether the Secretary will require particular kinds of remedies for a contract or agreement. Consistent with the purposes of Section 81, the Secretary will only identify whether remedies are addressed but will not disapprove a contract or agreement based on the types of remedies used.

Section 84.007 What Is The Status of a Contract or Agreement That Requires Secretarial Approval Under This Part But Has Not Yet Been Approved?

*Summary of Section.* This section provides that a contract or agreement that requires Secretarial approval under this Part is not valid until the Secretary approves it.

*Comments.* This section was added to the Final Rule in response to several comments. We also received comments recommending that we determine in the rule whether contracts can be approved retroactively by the Secretary. Decisions as to whether a particular contract or agreement may be approved retroactively will be made on a case-by-case basis. Such retroactive effect may be approved if the Secretary is satisfied that the consideration for the contract or agreement was adequate; that the tribe received the full consideration bargained for; that there is no evidence of fraud, overreaching, or other illegality in the procurement of the contract or agreement; and that the conditions of section 84.006 of this Part are met. *Wishkeno* v. *Deputy Assistant Secretary—Indian Affairs (Operations),* 11 IBIA 21 (1982).

Section 84.008 What Is the Effect of the Secretary's Disapproval of a Contract or Agreement That Requires Secretarial Approval Under This Part?

*Summary of Section.* Section 84.008 states, consistent with section 2(b) of the Act, that the effect of disapproval of a contract or agreement under this Part (as opposed to return of a contract or agreement under section 84.005 of this rule) is that the contract or agreement is invalid.

*Comments.* There were no comments on this section. The section was renumbered from § 84.007 in the Proposed Rule to this section of the Final Rule.

## III. Procedural Requirements

### *A. Review Under Executive Order 12866*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the BIA must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations or recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a ''significant regulatory action'' from an economic or policy standpoint. This rule is pursuant to a statutory mandate and is consistent with the Department's policy of encouraging tribal self-determination and economic development. The rule reduces the number of contracts the Department has to review each year. Prior to the amendments enacted under Pub. L. 106–179, tribes had to submit certain contracts for approval by the Secretary of the Interior for which Secretarial approval has now (through enactment of Pub. L. 106–179) been deemed unnecessary. Those tribes having contracts or agreements covered under the new law, however, must include a statement regarding their sovereign immunity or remedies. This is an intergovernmental mandate; however, it would not affect the rights of either party under such contracts and agreements, but would only require that these rights be explicitly stated. The cost burden on the tribes for including this provision would be minimal. Otherwise, the rule has no direct or indirect impact on any other agency, does not materially alter the budgetary impact of financial programs, or raise novel legal or policy issues.

### *B. Review Under Executive Order 12988*

With respect to the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements:

(1) Eliminate drafting errors and ambiguity;

(2) Write regulations to minimize litigation; and

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(3) Provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section (b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation:

(1) Clearly specifies the preemptive effect, if any;

(2) Clearly specifies any effect on existing Federal law or regulation;

(3) Provides a clear legal standard for affected conduct while promoting simplification and burden reduction;

(4) Specifies the retroactive effect, if any;

(5) Adequately defines key terms; and

(6) Addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department of the Interior has determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

*C. Review Under the Regulatory Flexibility Act*

A Regulatory Flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is not required for this rule because it applies only to tribal governments, not State and local governments.

*D. Review Under the Small Business Regulatory Enforcement Act of 1996 (SBREFA)*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more. This rule will not result in a major increase in costs or prices. In fact, it is estimated that the Department will save time and resources through the rule because the number of contracts submitted for Secretarial approval will be reduced. Therefore, no increases in costs for administration will be realized and no prices would be impacted through the streamlining of the contract approval process within the Department and the BIA. The effect of the rule is to encourage and foster tribal contracting and, consequently, strengthen tribal self-determination and economic development. This rule will not result in any significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets. The impact of the rule will be realized by tribal governments in the economy of administration accorded contract negotiation between tribes and third parties. Unless the contracts contemplate an encumbrance of Indian lands or by their terms could otherwise lead to the loss of tribal proprietary control over such lands, the Department would not require such contracts and agreements to be submitted to the BIA for approval. The Department anticipates, therefore, that the impacts to small business or enterprises and the tribes themselves will be positive and, indeed, allow for greater flexibility in contracting for certain services on Indian lands.

*E. Review Under the Paperwork Reduction Act*

No information or record keeping requirements are imposed by this rule. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

*F. Review Under Executive Order 13132 Federalism*

This rule will not have substantial direct effects 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.

*G. Review Under the National Environmental Policy Act of 1969*

This rule is categorically excluded from the preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq., because its environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and the Federal actions under this rule (i.e., approval or disapproval of contracts or agreements that could encumber Tribal lands for a period of seven years or more) will be subject at the time of the action itself to the National Environmental Policy Act process, either collectively or case-by-case. Further, no extraordinary circumstances exist to require preparation of an environmental assessment or environmental impact statement.

*H. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the Act, the Department generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. This rule will not result in the expenditure by the state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. The Department does take notice, however, that the rule (in response to Pub. L. 106–179) requires that a tribe entering into a covered contract include a specific statement regarding its sovereign immunity or remedies. This is an additional enforceable duty imposed on the tribes, and so would constitute an intergovernmental mandate under the Unfunded Mandates Reform Act. However, the cost of this mandate would be minimal.

*I. Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of May 14, 1998, ''Consultation and Coordination with Indian Tribal Governments'' (63 FR 27655) and 512 DM 2, we have evaluated any potential effects upon Federally recognized Indian tribes and have determined that there are no potential adverse effects. No action is taken under this rule unless a tribe voluntarily enters into a contract or agreement that could encumber tribal land for seven years or more. As noted above, tribes were asked for comments prior to publication of this Final Rule.

*J. Review Under Executive Order 13211—Energy*

In accordance with the President's Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355), we have determined that this rulemaking is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rulemaking simply clarifies those types of contracts or agreements encumbering tribal land that are not subject to the approval of the Secretary

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of the Interior under the Indian Tribal Economic Development and Contract Encouragement Act of 2000. This is, therefore, an administrative clarification and would not otherwise have any impact on the Nation's energy resources.

**List of Subjects in 25 CFR Part 84**

Administrative practice and procedure, Indians—lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends 25 CFR chapter I by adding Part 84 to read as follows:

## PART 84—ENCUMBRANCES OF TRIBAL LAND—CONTRACT APPROVALS

Sec.

84.001 What is the purpose of this part?
84.002 What terms must I know?
84.003 What types of contracts and agreements require Secretarial approval under this part?
84.004 Are there types of contracts and agreements that do not require Secretarial approval under this part?
84.005 Will the Secretary approve contracts or agreements even where such approval is not required under this part?
84.006 Under what circumstances will the Secretary disapprove a contract or agreement that requires Secretarial approval under this part?
84.007 What is the status of a contract or agreement that requires Secretarial approval under this part but has not yet been approved?
84.008 What is the effect of the Secretary's disapproval of a contract or agreement that requires Secretarial approval under this part?

**Authority:** 25 U.S.C. 81, Pub. L. 106–179.

### § 84.001 What is the purpose of this part?

The purpose of this part is to implement the provisions of the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Public Law 106–179, which amends section 2103 of the Revised Statutes, found at 25 U.S.C. 81.

### § 84.002 What terms must I know?

The *Act* means the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Public Law 106–179, which amends section 2103 of the Revised Statutes, found at 25 U.S.C. 81.

*Encumber* means to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.

*Indian tribe*, as defined by the Act, means any Indian tribe, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act, which is recognized as eligible for special programs and services provided by the Secretary to Indians because of their status as Indians.

*Secretary* means the Secretary of the Interior or his or her designated representative.

*Tribal lands* means those lands held by the United States in trust for an Indian tribe or those lands owned by an Indian tribe subject to federal restrictions against alienation, as referred to Public Law 106–179 as "Indian lands."

### § 84.003 What types of contracts and agreements require Secretarial approval under this part?

Unless otherwise provided in this part, contracts and agreements entered into by an Indian tribe that encumber trial lands for a period of seven or more years require Secretarial approval under this part.

### § 84.004 Are there types of contracts and agreements that do not require Secretarial approval under this part?

Yes, the following types of contracts or agreements do not require Secretarial approval under this part:

(a) Contracts or agreements otherwise reviewed and approved by the Secretary under this title or other federal law or regulation. See, for example, 25 CFR parts 152 (patents in fee, certificates or competency); 162 (non-mineral leases, leasehold mortgages); 163 (timber contracts); 166 (grazing permits); 169 (rights-of-way); 200 (coal leases); 211 (mineral leases); 216 (surface mining permits and leases); and 225 (mineral development agreements);

(b) Leases of tribal land that are exempt from approval by the Secretary under 25 U.S.C. 415 or 25 U.S.C. 477;

(c) Sublease and assignments of leases of tribal land that do not require approval by the Secretary under part 162 of this title;

(d) Contracts or agreements that convey to tribal members any rights for temporary use of tribal lands, assigned by Indian tribes in accordance with tribal laws or custom;

(e) Contracts or agreements that do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of seven years or more;

(f) Contracts or agreements that are exempt from Secretarial approval under the terms of a corporate charter authorized by 25 U.S.C. 477;

(g) Tribal attorney contracts, including those for the Five Civilized Tribes that are subject to our approval under 25 U.S.C. 82a;

(h) Contracts or agreements entered into in connection with a contract under the Indian Self-Determination Act, 25 U.S.C. 450f, or a compact under the Tribal Self-Governance Act, 25 U.S.C. 458aa.

(i) Contracts or agreements that are subject to approval by the National Indian Gaming Commission under the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq., and the Commission's regulations; or

(j) Contracts or agreements relating to the use of tribal lands for hydropower projects where the tribal lands meet the definition of a "reservation" under the Federal Power Act (FPA), provided that:

(1) Federal Energy Regulatory Commission (FERC) has issued a license or an exemption;

(2) FERC has made the finding under section 4(e) of the FPA (16 U.S.C. 797(e)) that the license or exemption will not interfere or be inconsistent with the purpose for which such reservation was created or acquired; and

(3) FERC license or exemption includes the Secretary's conditions for protection and utilization of the reservation under section 4(e) and payment of annual use charges to the tribe under section 10(e) of the FPA (16 U.S.C. 803(e)).

### § 84.005 Will the Secretary approve contracts or agreements even where such approval is not required under this part?

No, the Secretary will not approve contracts or agreements that do not encumber tribal lands for a period of seven or more years. Within thirty days after receipt of final, executed documents, the Secretary will return such contracts and agreements with a statement explaining why Secretarial approval is not required. The provisions of the Act will not apply to those contracts or agreements the Secretary determines are not covered by the Act.

### § 84.006 Under what circumstances will the Secretary disapprove a contract or agreement that requires Secretarial approval under this part?

(a) The Secretary will disapprove a contract or agreement that requires Secretarial approval under this part if the Secretary determines that such contract or agreement:

(1) Violates federal law; or

(2) Does not contain at least one of the following provisions that:

(i) Provides for remedies in the event the contract or agreement is breached;

(ii) References a tribal code, ordinance or ruling of a court of competent

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jurisdiction that discloses the right of the tribe to assert sovereign immunity as a defense in an action brought against the tribe; or

(iii) Includes an express waiver of the right of the tribe to assert sovereign immunity as a defense in any action brought against the tribe, including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action.

(b) The Secretary will consult with the Indian tribe as soon as practicable before disapproving a contract or agreement regarding the elements of the contract or agreement that may lead to disapproval.

**§ 84.007 What is the status of a contract or agreement that requires Secretarial approval under this part but has not yet been approved?**

A contract or agreement that requires Secretarial approval under this part is not valid until the Secretary approves it.

**§ 84.008 What is the effect of the Secretary's disapproval of a contract or agreement that requires Secretarial approval under this part?**

If the Secretary disapproves a contract or agreement that requires Secretarial approval under this part, the contract or agreement is invalid as a matter of law.

Dated: July 9, 2001.

**Neal A. McCaleb,**

*Assistant Secretary—Indian Affairs.*

[FR Doc. 01–18475 Filed 7–25–01; 8:45 am]

**BILLING CODE 4310–02–M**

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

### 25 CFR Part 89

**RIN 1076–AE18**

## Attorney Contracts With Indian Tribes

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Final Rule.

**SUMMARY:** We are issuing a final rule removing the text of certain sections and thereafter reserving those sections of the regulations pertaining to approval by the Secretary of the Interior of tribal attorney contracts, except for those entered into by the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek and Seminole) in Oklahoma. Congress repealed our statutory authority for such approvals of tribal attorney contracts as part of the Indian Tribal Economic Development and Contract Encouragement Act of 2000.

**EFFECTIVE DATE:** July 26, 2001.

**FOR FURTHER INFORMATION CONTACT:** Duncan L. Brown, Department of the Interior, Office of the Secretary, 1849 C Street, NW., MS 7412 MIB, Washington, DC 20240, telephone 202/208–4582.

**SUPPLEMENTARY INFORMATION:**

### Background

In 1871, Congress enacted section 2103 of the Revised Statutes, codified at 25 U.S.C. 81 (Section 81). It placed several restrictions, including a requirement for approval by the Secretary of the Interior, on contracts between any person and any Indian tribe or individual Indians for

> the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States.

Section 81 reflected Congressional concern that Indian tribes and individual Indians were incapable of protecting themselves from fraud in their financial affairs. To that end, it also required that the Secretary approve any contracts for legal services between an Indian tribe and an attorney. Congress later confirmed the requirement for Secretarial approval of tribal attorney contracts with the passage of section 16 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. 476 (Section 476 does not apply to the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek, and Seminole) in Oklahoma. The Secretary has separate authority for approval of attorney contracts for the Five Civilized Tribes under section 1 of Pub. L. 82–440, 25 U.S.C. 82a.)

In March 2000, Congress enacted the Indian Tribal Economic Development and Contract Encouragement Act of 2000 (the Act), Pub. L. 106–179. The Act generally replaces Section 81 with a new provision that does not include the requirement to approve tribal attorney contracts. (We are publishing final regulations today at 25 CFR part 84 implementing the Act.) Subsection (f) of the Act repeals the portion of 25 U.S.C. 476 concerning approval of tribal attorney contracts. The Act does not address the separate requirement that attorney contracts by the Five Civilized Tribes must be approved by the Secretary.

Because the Act repealed much of our statutory authority for approval of tribal attorney contracts, we are today repealing the corresponding regulations in 25 CFR part 89. We are not repealing the regulations concerning approval of tribal attorney contracts for the Five Civilized Tribes, since Congress left our authority for those approvals in place. We will, however, issue a separate proposed rule, in consultation with the Five Civilized Tribes, to revise these regulations, especially 25 CFR 89.30, in light of the amendments to section 81. We are also not repealing our regulations in part 89 for the payment of tribal attorneys fees.

Consistent with the long-standing principle that the federal trust obligation may not be unilaterally terminated, the Act does not alter those tribal constitutions that require federal approvals for specific tribal actions, such as attorney contracts. Thus, the Secretary must still approve or disapprove attorney contracts if a tribal constitution so requires. The criteria, if any, for approval of such contracts will be those in the tribal constitution and any relevant Federal law. As is its policy, BIA will defer to the tribe's interpretation of its own law regarding such approvals.

### Notice and Public Procedure on This Final Rule

As noted above, this final rule is effective on the publication of this notice. Under 5 U.S.C. 553(b)(3)(B), notice and public comment on this final rule are impracticable, unnecessary, and contrary to the public interest. In addition, we have good cause for making this rule effective immediately under 5 U.S.C. 553(d)(3). Notice and public procedure would be impracticable and unnecessary because this rule is merely repealing regulations for which we now have no statutory authority.

Waiting for notice and comment on this final rule would be contrary to the public interest. Some of the comments on the proposed part 84 regulations expressed confusion as to the status of the part 89 regulations that we are repealing today. By making this a final rule effective immediately, we end such confusion.

### Procedural Requirements

*A. Review Under Executive Order 12866*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the BIA must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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