

CODE OF FEDERAL REGULATIONS

TITLE 25—INDIANS

**CHAPTER V—BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR,
AND INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN
SERVICES**

**PART 900—CONTRACTS UNDER THE INDIAN SELF-DETERMINATION AND
EDUCATION ASSISTANCE ACT**

Current as of April 1, 2012

Subpart L—Appeals

**APPEALS OTHER THAN EMERGENCY REASSUMPTION AND SUSPENSION,
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APPEALS OF EMERGENCY REASSUMPTION OF SELF-DETERMINATION CONTRACTS OR
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APPLICABILITY OF THE EQUAL ACCESS TO JUSTICE ACT

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AUTHORITY: 25 U.S.C. 450f et seq.

Subpart L—Appeals

APPEALS OTHER THAN EMERGENCY REASSUMPTION AND SUSPENSION,
WITHHOLDING OR DELAY IN PAYMENT

§ 900.150 What decisions can an Indian tribe or tribal organization appeal under this subpart?

- (a) A decision to decline to award a self-determination contract, or a portion thereof, under section 102 of the Act;
- (b) A decision to decline to award a construction contract, or a portion thereof, under sections 105(m) and 102 of the Act;
- (c) A decision to decline a proposed amendment to a self-determination contract, or a portion thereof, under section 102 of the Act;
- (d) A decision not to approve a proposal, in whole or in part, to redesign a program;
- (e) A decision to rescind and reassume a self-determination contract, in whole or in part, under section 109 of the Act except for emergency reassumptions;
- (f) A decision to refuse to waive a regulation under section 107(e) of the Act;
- (g) A disagreement between an Indian tribe or tribal organization and the Federal government over proposed reporting requirements;
- (h) A decision to refuse to allow an Indian tribe or tribal organization to convert a contract to mature status, under section 4(h) of the Act;

(i) All other appealable pre-award decisions by a Federal official as specified in these regulations, whether an official of the Department of the Interior or the Department of Health and Human Services; or

(j) A decision relating to a request for a determination that a law or regulation has been superseded by the Act.

§ 900.151 Are there any appeals this subpart does not cover?

This subpart does not cover:

(a) Disputes which arise after a self-determination contract has been awarded, or emergency reassumption of self-determination contracts or suspension of payments under self-determination contracts, which are covered under § 900.170 through § 900.176 of these regulations.

(b) Other post-award contract disputes, which are covered under subpart N.

(c) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 43 CFR 2 for the Department of the Interior and 45 CFR 5 for the Department of Health and Human Services; and

(d) Decisions relating to the award of discretionary grants under section 103 of the Act, which may be appealed under 25 CFR 2 for the Department of the Interior, and under 45 CFR 5 for the Department of Health and Human Services.

§ 900.152 How does an Indian tribe or tribal organization know where and when to file its appeal from decisions made by agencies of DOI or DHHS?

Every decision in any of the ten areas listed above shall contain information which shall tell the Indian tribe or tribal organization where and when to file the Indian tribe or tribal organization's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 25 CFR 900.154, or appeal this decision under 25 CFR 900.158 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.158 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.153 Does an Indian tribe or tribal organization have any options besides an appeal?

Yes. The Indian tribe or tribal organization may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. The Indian tribe or tribal organization may also choose to sue in U.S. District Court under section 102(b)(3) and section 110(a) of the Act.

§ 900.154 How does an Indian tribe or tribal organization request an informal conference?

The Indian tribe or tribal organization shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian tribe or tribal organization may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Indian tribe or tribal organization mails the request, it will be considered filed on the date the Indian tribe or tribal organization mailed it by certified mail.

§ 900.155 How is an informal conference held?

(a) The informal conference shall be held within 30 days of the date the request was received, unless the Indian tribe or tribal organization and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian tribe or tribal organization's office. If the meeting cannot be held at the Indian tribe or tribal organization's office and is held more than fifty miles from its office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(c) The informal conference shall be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Indian tribe or tribal organization, or authorized by the Secretary of Health and Human Services or by the appropriate agency of the Department of the Interior, are allowed to make presentations at the informal conference.

§ 900.156 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference shall prepare and mail to the Indian tribe or tribal organization a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference shall contain the following language:

Within 30 days of the receipt of this recommended decision, you may file an appeal of the initial decision of the DOI or DHHS agency with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.158. You may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.158 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.157 Is the recommended decision always final?

No. If the Indian tribe or tribal organization is dissatisfied with the recommended decision, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian tribe or tribal organization does

not file a notice of appeal within 30 days, or before the expiration of the extension it has received under § 900.159, the recommended decision becomes final.

§ 900.158 How does an Indian tribe or tribal organization appeal the initial decision, if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Indian tribe or tribal organization decides to appeal, it shall file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision.

(b) The Indian tribe or tribal organization may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian tribe or tribal organization mails the Notice of Appeal, it will be considered filed on the date the Indian tribe or tribal organization mailed it by certified mail. The Indian tribe or tribal organization should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203.

(c) The Notice of Appeal shall:

(1) Briefly state why the Indian tribe or tribal organization thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian tribe or tribal organization wants a hearing on the record, or whether the Indian tribe or tribal organization wants to waive its right to a hearing.

(d) The Indian tribe or tribal organization shall serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian tribe or tribal organization shall certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary of Health and Human Services or the authorized representative of the Secretary of the Interior will be considered a party to all appeals filed with the IBIA under the Act.

§ 900.159 May an Indian tribe or tribal organization get an extension of time to file a notice of appeal?

Yes. If the Indian tribe or tribal organization needs more time, it can request an extension of time to file its Notice of Appeal within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian tribe or tribal organization shall be in writing, and shall give a reason for not filing its notice of appeal within the 30-day time period. If the Indian tribe or tribal organization has a valid reason for not filing its notice of appeal on time, it may receive an extension from the IBIA.

§ 900.160 What happens after an Indian tribe or tribal organization files an appeal?

(a) Within 5 days of receiving the Indian tribe or tribal organization's notice of appeal, the IBIA will decide whether the appeal falls under § 900.150(a) through § 900.150(g). If so, the Indian tribe or tribal organization is entitled to a hearing.

(1) If the IBIA determines that the appeal of the Indian tribe or tribal organization falls under § 900.150(h), § 900.150(i), or § 900.150(j), and the Indian tribe or tribal organization has requested a hearing, the IBIA will grant the request for a hearing unless the IBIA determines that there are no genuine issues of material fact to be resolved.

(2) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian tribe or tribal organization, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(b) If the IBIA decides that the Indian tribe or tribal organization is not entitled to a hearing or if the Indian tribe or tribal organization has waived its right to a hearing on the record, the IBIA will ask for the administrative record under 43 CFR 4.335. The IBIA shall tell the parties that the appeal will be considered under the regulations at 43 CFR 4, subpart D, except the case shall be docketed immediately, without waiting for the 20-day period described in 43 CFR 4.336.

§ 900.161 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer the Indian tribe or tribal organization's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

- (1) A briefing and discovery schedule;
- (2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;
- (3) The simplification or clarification of issues;
- (4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;
- (5) The possibility of agreement disposing of all or any of the issues in dispute; and
- (6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 900.162 What happens when a hearing is necessary?

(a) The ALJ shall hold a hearing within 60 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the government agency shall file and serve the Indian tribe or tribal organization with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian tribe or tribal organization's office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.163 What is the Secretary's burden of proof for appeals from decisions under § 900.150(a) through § 900.150(g)?

For those appeals, the Secretary has the burden of proof (as required by section 102(e)(1) of the Act) to establish by clearly demonstrating the validity of the grounds for declining the contract proposal.

§ 900.164 What rights do Indian tribes, tribal organizations, and the government have during the appeal process?

Both the Indian tribe or tribal organization and the government agency have the same rights during the appeal process. These rights include the right to:

- (a) Be represented by legal counsel;
- (b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;
- (c) Cross-examine witnesses;
- (d) Introduce oral or documentary evidence, or both;
- (e) Require that oral testimony be under oath;
- (f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;
- (g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;
- (h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and
- (i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.165 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian tribe or tribal organization has the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.166. An appeal to the Secretary under 25 CFR 900.166 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC, 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.166. An appeal to the IBIA under 25 CFR 900.166 shall be filed at the following address: Board of Indian Appeals, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 900.166 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections shall be served on all other parties. The recommended decision shall become final 30 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final.

§ 900.167 If an Indian tribe or tribal organization objects to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary of Health and Human Services or the IBIA has 20 days from the date it receives any timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary of Health and Human Services or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or the IBIA shall:

- (1) Be in writing;
- (2) Specify the findings of fact or conclusions of law which are modified or reversed;
- (3) Give reasons for the decision, based on the record; and
- (4) State that the decision is final for the Department.

§ 900.168 Will an appeal hurt the Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.169 Will the decisions on appeals be available for the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

APPEALS OF EMERGENCY REASSUMPTION OF SELF-DETERMINATION CONTRACTS OR
SUSPENSIONS, WITHHOLDING OR DELAY OF PAYMENTS UNDER A SELF-DETERMINATION
CONTRACT

§ 900.170 What happens in the case of emergency reassumption or suspension or withholding or delay of payments?

(a) This subpart applies when the Secretary gives notice to an Indian tribe or tribal organization that the Secretary intends to:

- (1) Immediately rescind a contract or grant and reassume a program; or
- (2) Suspend, withhold, or delay payment under a contract.

(b) When the Secretary advises an Indian tribe or tribal organization that the Secretary intends to take an action referred to in paragraph (a)(1) of this section, the Secretary shall also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 801 North Quincy Street, Arlington, VA 22203.

§ 900.171 Will there be a hearing?

Yes. The Deputy Director of the Office of Hearings and Appeals shall appoint an Administrative Law Judge (ALJ) to hold a hearing.

(a) The hearing shall be held within 10 days of the date of the notice referred to in § 900.170 unless the Indian tribe or tribal organization agrees to a later date.

(b) If possible, the hearing will be held at the office of the Indian tribe or tribal organization. If the hearing is held more than 50 miles from the office of the Indian tribe or tribal organization, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Indian tribe or tribal organization.

§ 900.172 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian tribe or tribal organization has the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.173. An appeal to the Secretary under 25 CFR 900.173 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC

20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.173. An appeal to the IBIA under 25 CFR 900.173 shall be filed at the following address: Board of Indian Appeals, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 900.173 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. You shall serve a copy of your objections on the other party. The recommended decision will become final 15 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 900.174 If an Indian tribe or tribal organization objects to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary or the IBIA has 15 days from the date he/she receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or of the IBIA shall:

- (1) Be in writing;
- (2) Specify the findings of fact or conclusions of law which are modified or reversed;
- (3) Give reasons for the decision, based on the record; and
- (4) State that the decision is final for the Department.

§ 900.175 Will an appeal hurt an Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.176 Will the decisions on appeals be available for the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

APPLICABILITY OF THE EQUAL ACCESS TO JUSTICE ACT

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

Yes. EAJA claims against DOI or HHS will be heard under 43 CFR 4.601 through 4.628. For HHS, appeals from an EAJA award will be according to 25 CFR 900.165(b).