

Effect of Federal Status

While engaging in partnership activities, Department employees must keep in mind that their status as employees of the Federal government carries with it a general responsibility to act in the national public interest in accomplishing the Department's mission. It also implicates a number of specific requirements under Federal law. This section discusses those requirements in broad terms. Remember, the Primer is intended only to be an introduction to these requirements to allow employees to become aware of possible limitations on their activities and to alert employees of potential areas of concern.

Inherently Governmental Activities (OMB Circular A-76). Employees must be careful not to engage in a partnership activity that provides any partner with the authority to perform any inherently governmental activities. Although the concept of inherently governmental activities is most commonly used in the process that determines whether a particular Federal function may be contracted out, its principles are applicable in the partnership arena, as partners are analogous to contractors when carrying out Federal activities. The crux of this principle is that employees must retain inherently Federal functions when they deal with private parties. In other words, employees must take care not to transfer official responsibility inappropriately to third parties when entering into partnerships.

As defined in OMB Circular A-76, an "inherently governmental activity" is "[a]n activity that is so intimately related to the public interest as to mandate performance by Government personnel." These functions include those activities that require the exercise of substantial discretion in applying Government authority and/or in making decisions for the Government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves:

(1) binding the United States to take or not to take some action by contract, policy, regulation, or otherwise;

(2) determining, protecting, and advancing the United States' economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(3) significantly affecting the life, liberty, or property of private persons; or

(4) exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible) including establishing policies or procedures for the collection, control, or disbursement of appropriated or other Federal funds.

The "inherently governmental activity" limitation sets an outside boundary on what functions may be given up in support of a partnership. For example, a partnership that allows an outside group to make the final decision whether to grant or deny a permit or application would be an improper delegation of an inherently Federal activity. Similarly, a choice to set the operating hours of a park or refuge must remain with a Government official. Also, allowing an outside group to determine to whom a parcel of Federal land may be sold would violate the restriction on delegations of inherently Governmental activity.

Nonetheless, a significant amount of latitude remains in which partnerships may appropriately support Government operations without involving an inappropriate transfer of Government authority. For instance, the inherently governmental activity limitation would not prohibit a partnership from developing an exhibit on geological sites within a BLM National Monument to be placed in the Monument's visitor center. It also would not violate the inherently government activity limitation if a partner determines, consistent with USGS guidelines, the precise location of a USGS stream gage station.

Doctrine of unlawful subdelegation ("non-delegation doctrine"). This doctrine, related to the inherently governmental activity limitation, prohibits an agency from completely shifting a responsibility that has been placed on the agency by statute to a non-Federal party (unless Congress clearly indicates that such responsibility is to be given to such non-Federal party). Nonetheless, delegations by Federal agencies to private parties are valid so long as the Federal agency or official retains final reviewing authority. The "final reviewing authority" must be more than the option to withdraw from the relationship granting authority to the non-Federal entity; it must be a meaningful retention of control over the activity of the private party, through oversight, veto, or otherwise. In this way, the Federal agency may ensure that the actions it takes support the National interest, and that the Federal role is not subordinated inappropriately to parochial interests. The non-delegation doctrine, for example, would prohibit the National Park Service from turning over the management of a National Scenic River to a local council of private persons, even though the National Park Service retained the ability to terminate the council.

Provisions should be included in partnership agreements to ensure that they do not inadvertently run afoul of non-delegation requirements. For example, partnership agreements must make clear that partner agencies are ultimately responsible for making decisions affecting resources under their charge. Also, all agreements should contain provisions granting the Federal partners authority to review and approve all partner activities affecting agency resources or programs. As part of this review, the agencies should evaluate whether proposed partner actions comply with the agency's legal and policy obligations. Further, all partner activities must meet standards that would apply if the responsible agency were to conduct the activity itself. Agencies should create an appropriate record documenting its review and approval decisions. It is important to note that the incorporation of a provision granting an agency the right to terminate an agreement for cause or convenience is unlikely to cure an agreement that is otherwise invalid under non-delegation principles

Administrative Procedure Act ("APA") (Rulemaking). The Administrative Procedure Act ("APA") requires Federal agencies to follow certain steps in rulemaking (i.e. formulating, amending, or repealing a "rule"). The APA defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." In other words, for purposes of this Primer, a rule is essentially an agency action that regulates the future conduct of the public. The APA also imposes procedural requirements on adjudications that result in "orders," which are essentially determinations of past and present rights or liabilities.

Partnership activities have the potential to result in both rules or adjudications, even if unintentional. For example, a partnership between local users of BLM rangelands and the BLM field office that develops rules of use for the rangeland, such as access times and permissible activities, may be simultaneously creating a rule under the APA. Similarly, a

determination by the same partnership that an individual had violated the local rules and should be denied access to the rangeland may be an adjudication under the APA. Both circumstances would require adherence to the procedural steps of the APA.

Department employees engaging in partnerships should continually evaluate the specifics of the activity to determine whether the partnership is in fact engaging in rulemaking or adjudication. Note that the negotiated rulemaking procedures at 5 U.S.C. §§ 561-570 may be a helpful way to engage outside parties in developing rules, and should be used when appropriate.

Administrative Procedure Act (Challenges to Department Actions). The APA provides a procedure by which Federal agency actions may be challenged in court. Although there are several potential bases for a challenge to agency action, the most commonly employed is the claim that an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard applies equally to the Department's partnership activities as to its other activities. As a result, the decision to enter into a partnership (particularly when a perceived benefit is to be conferred on a partner to the exclusion of similar groups), and the substantive activities of the partnership, may ultimately be reviewed by a court. To survive a court challenge, partnership decisions must therefore be rational, reasonable, and able to be articulated. The APA may also provide the basis for challenges under the National Environmental Policy Act ("NEPA"), the Endangered Species Act, and other statutes.

A final consideration is that APA challenges are usually decided on the basis of the administrative record (the materials upon which the Department relied in taking action). Challenges to partnership activities are no different. Department employees must therefore ensure that their partnership decisions and actions are based on, and supported by, a fully documented administrative record.

National Environmental Policy Act (Environmental Analysis). The NEPA requires a detailed statement (Environmental Impact Statement or "EIS") of the environmental consequences of any proposed "major Federal actions." An EIS must include analysis of alternatives to the proposed action. The activities resulting from a partnership may rise to the level of a major Federal action requiring an EIS, and will, in any event, need to be analyzed for NEPA compliance. For example, a partnership between the BLM and an environmental nonprofit that purports to allow the nonprofit to conduct habitat improvement for a protected species may be a major Federal action. Because Federal actions may be challenged in court over NEPA compliance, it is imperative that partnership activities that result in a Federal action covered by NEPA appropriately comply with NEPA's requirements. Additionally, to the extent possible, partners should be made aware of the possibility of litigation inherent in Federal actions.

Antideficiency Act (Control of Federal Funds). The Antideficiency Act contains a series of controls over the use of Federal appropriated funds, which all result in the general requirement that Federal agencies have to “pay as they go.” Government officials are prohibited (without specific authority) from making payments, or committing the United States to make payments, at some future time, unless there is enough money currently available in their agency’s funds to cover the cost in full. The Antideficiency Act applies to partnerships as it does to all other Federal activities. Employees should be mindful that their partnership activities need to stay within the bounds of fiscal year funding. Therefore, no partnership agreement should be entered into that purports to bind the Department to the payment of funds in the future, in advance of any appropriations available in terms of time, purpose, and amount. For example, a partnership agreement that says that the Department commits to provide \$100,000 in grant funds to a particular organization for each of the next five years will probably be improper under the Antideficiency Act, unless there are sufficient funds that are specifically available for more than one year.

Federal Advisory Committee Act (“FACA”)(Receiving Advice). (5 U.S.C. App.) Under FACA, Department officials may not receive advice from a group (as a group) that the Department has established or that it utilizes, i.e. manages or controls, unless the Department complies with the FACA. The FACA is a procedural statute that requires certain actions to set up and operate a committee or similar group to provide group-based (rather than individual) advice to Federal officials. These actions include filing a charter, providing public notice in the *Federal Register*, and making advisory committee information publicly available.

Department officials who receive advice from partners should be aware of the FACA’s potential applicability. However, the FACA does not apply to every situation in which a Department official receives advice, only to those situations in which the advice comes from a group (as a group) that the Department has established or utilized. This means that FACA does not apply to advice received from individuals, even in a group setting (such as “town hall” meetings); to advice received from preexisting groups; or advice from groups that the Government neither manages nor controls. It also does not apply to groups that simply exchange facts or information; groups consisting of only Federal, state, local, and tribal government employees exchanging views, information, or advice on programs with shared intergovernmental responsibilities; or to groups that are authorized to carry out operational functions. For more information on FACA, employees should consult the FACA regulations at 41 C.F.R. Part 102-3.

Lobbying Activities. Under 18 U.S.C. § 1913 and related authorities, most Department employees may not expend appropriated funds to generate “grass roots” lobbying designed to influence a Member of Congress or official of any government (Federal, state, local, tribal) regarding his or her position on legislation, that is, they may not engage in lobbying. This restriction covers encouraging a partner to undertake lobbying activities in support of the Department. The [Ethics section](#) of this website provides more information.

Governmental Integrity. In carrying out partnership activities, Department employees should act in an unbiased, fair, and equitable manner to insure that the public will not have cause to question the integrity of the Federal government. Accordingly, employees should always consider whether there is an appearance of impropriety raised by a partnership situation. The decision to partner with a particular organization should be based on a fair and rational evaluation of the

strengths of the organization and the benefits it may bring to the partnership, especially when similarly situated organizations exist. Employees should endeavor to act impartially and to avoid giving preferential treatment, or the appearance of such preferential treatment, to any private entity. As noted above, partnership decisions may be challenged and overturned if they are arbitrary and capricious, so the Department must ensure that such decisions are supportable.