



2120 L Street, NW, Suite 700  
Washington, DC 20037

T 202.822.8282  
F 202.296.8834

HOBBSSTRAUS.COM

June 18, 2010

## GENERAL MEMORANDUM 10-081

### Federal Agencies Unilaterally Amend Indian Self-Determination Act Appeal Regulations

The Department of the Interior and the Department of Health and Human Services have jointly published a final rule amending the regulations on appeal procedures under Titles I and IV of the Indian Self-Determination and Education Assistance Act (ISDEAA).<sup>1</sup> A copy of the FEDERAL REGISTER notice announcing the changes is attached. The amendments are technical and do not change the substantive appeal standards or procedures. Nonetheless, we are concerned that the Departments did not consult with tribes, as required by the ISDEAA, before finalizing the new rules.

The rules contain three sets of amendments. First, references to the defunct Interior Board of Contract Appeals have been changed to the Civilian Board of Contract Appeals, the board that has been hearing post-award ISDEAA disputes since 2007. Second, the Equal Access to Justice Act (EAJA) regulations applicable to Title I appeals have been amended to clarify that EAJA claims for attorney fees will be heard first by the administrative law judge who decided the merits of the case rather than by the agency appeals board (the Interior Board of Indian Appeals or the HHS Departmental Appeals Board). Third, the rule corrects a number of cross-references in the Title I regulations.

Substantively these changes are fine, but the agencies' disregard for the procedures prescribed in the ISDEAA for amending regulations is cause for concern. Both the Title I and Title IV regulations were promulgated through a negotiated rulemaking process, as mandated by the ISDEAA, so that tribal input would not be ignored as it had in the past. The ISDEAA further requires that when revising any regulations, the Secretaries must "confer with, and allow for active participation by, representatives of Indian tribes, tribal organizations, and individual tribal members."<sup>2</sup> For technical amendments such as those described above, the agencies arguably did not need to convene a negotiated rulemaking committee, but in our view they did have to

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<sup>1</sup> *Indian Self-Determination Act Contracts and Annual Funding Agreements—Appeal Procedures*, 75 Fed. Reg. 31699 (June 4, 2010).

<sup>2</sup> 25 U.S.C. § 450k(d)(2).

comply with the express statutory consultation and participation requirement. (See our attached letter to the Departments.) Their failure to do so sets a bad precedent.

If you have any questions about this memorandum or the attached letter, please do not hesitate to contact us.

# # #

Inquiries may be directed to:

Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com)),

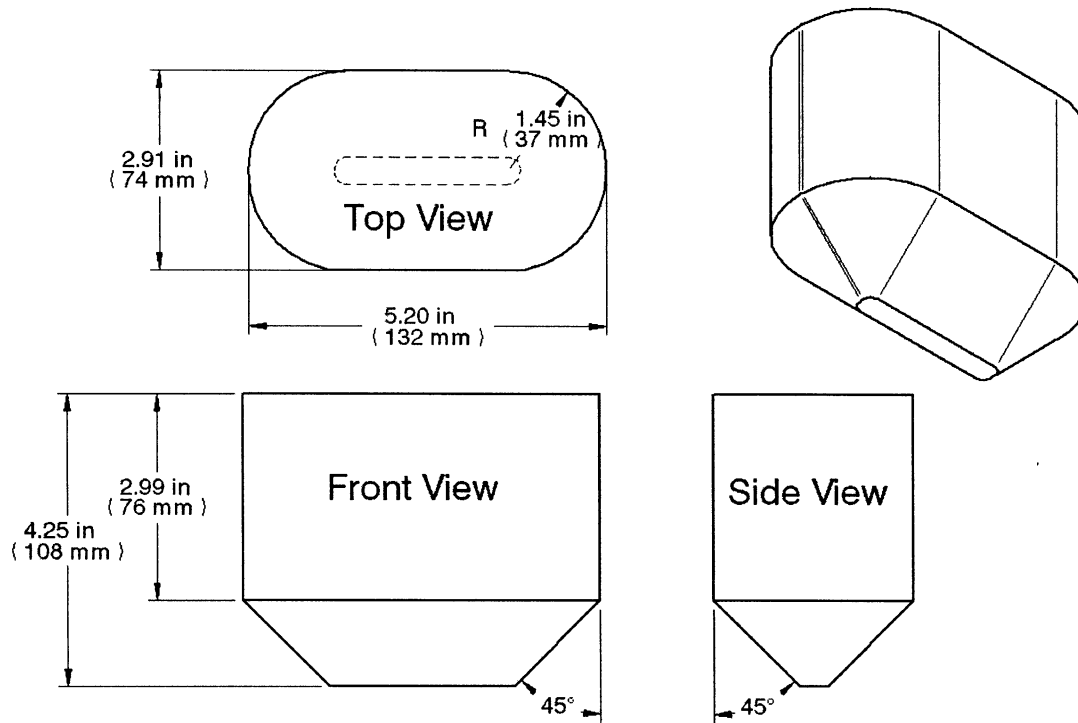
Bobo Dean ([sdean@hobbsstrauss.com](mailto:sdean@hobbsstrauss.com)), or

Steve Osborne ([sosborne@hobbsstrauss.com](mailto:sosborne@hobbsstrauss.com))

(i) 7.7.2 With the bath seat in each of the manufacturer's recommended use position(s), insert the tapered end of the

Bath Seat Shoulder Probe (see Fig. 6) in all orientations into each opening.  
\* \* \*

(ii) [Reserved]  
(8) Instead of Figure 4 of ASTM F 1967-08a, use the following:



**Figure 4: Modified Bath Seat Torso Probe**

(9) Instead of complying with section 8.1.1 of ASTM F 1967-08a, comply with the following:

(i) 8.1.1 The safety alert symbol, the signal word, and all other words that are all capital letters shall be in sans serif type face with letters not less than 0.4 in. (10 mm) in height, with all remainder of the text not less than 0.2 in. (5 mm) in height. Specified warning(s) on both the product and the package shall be distinctively separated from any other wording or designs and shall appear in the English language at a minimum. They shall also be highly visible and in a contrasting color to the background on which they are located.

(ii) [Reserved]

(10) In addition to complying with section 8.2 of ASTM F 1967-08a, comply with the following:

(i) 8.2 \* \* \* The specified warnings may not be placed in a location that allows the warning(s) to be obscured or rendered inconspicuous when in the manufacturer's recommended use position.

(ii) [Reserved]

Dated: May 25, 2010.

**Todd Stevenson,**

*Secretary, U.S. Consumer Product Safety Commission.*

[FR Doc. 2010-13073 Filed 6-3-10; 8:45 am]

**BILLING CODE 6355-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**25 CFR Part 900**

**DEPARTMENT OF THE INTERIOR**

**25 CFR Part 1000**

**Bureau of Indian Affairs**

**25 CFR Part 900**

**Indian Health Service**

**25 CFR Part 900**

**RIN 1076-AE86**

**Indian Self-Determination Act Contracts and Annual Funding Agreements—Appeal Procedures**

**AGENCIES:** Bureau of Indian Affairs, Interior; Indian Health Service, Health and Human Services.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI) and the Indian Health Service (IHS) in the Department of Health and

Human Services (HHS) are making limited technical amendments to their joint regulations governing contracts and annual funding agreements under the Indian Self-Determination and Education Assistance Act to update the appeals procedures.

**DATES:** This rule is effective July 6, 2010.

**FOR FURTHER INFORMATION CONTACT:**

—Terrence Parks, Acting Chief, Division of Self-Determination, Office of Indian Services, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, NW., Mail Stop 4513, Washington, DC 20240, telephone 202–513–7616;

—Sharee M. Freeman, Director, Office of Self-Governance, Office of the Assistant Secretary—Indian Affairs, Department of the Interior, 1951 Constitution Avenue, NW., Mail Stop 355, Washington, DC 20240, telephone 202–219–0240;

—Betty Gould, Regulations Officer, Indian Health Service, Department of Health and Human Services, 12300 Twinbrook Parkway, Suite 450, Rockville, MD 20857, telephone 301–443–7899.

Persons who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Board of Contract Appeals*

In 25 CFR parts 900 and 1000, BIA and IHS have promulgated regulations governing contracts and annual funding agreements with Indian tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f–450n, 458aa–458aaa–18. Included in those regulations are procedures allowing for appeals to the Interior Board of Contract Appeals, pursuant to 25 U.S.C. 450m-1(d), 458ff(c), and the Contract Disputes Act, 41 U.S.C. 601–613.

Effective January 6, 2007, Congress abolished the Interior Board of Contract Appeals (IBCA) and transferred its functions—including appeals under 25 CFR Parts 900 and 1000—to a new Civilian Board of Contract Appeals (CBCA) within the General Services Administration (GSA). Public Law 109–163, section 847, 119 Stat. 3391 (2006); see 71 FR 65825 (Nov. 9, 2006). BIA and IHS are therefore revising their regulations to substitute references to CBCA for IBCA in three sections in Part 900 and five sections in Part 1000. Procedures applicable to appeals to

CBCA were published by GSA at 48 CFR part 6101, 72 FR 36794 (July 5, 2007), and are referenced in revised 25 CFR 900.216(b) and 1000.430.

IHS previously published its own final rule amending 25 CFR 900.222 to change the name and address of the appeals board from IBCA to CBCA and amending 25 CFR 900.229 to change references to IBCA to CBCA. 71 FR 76600 (Dec. 21, 2006). However, the IHS rule failed to change references to “U.S. Department of the Interior” and “IBCA” in § 900.222(e), and it did not amend §§ 900.6 and 900.216, which continue to refer to IBCA. This rule completes the changes to Part 900 that IHS initiated with its December 2006 rule, and it makes similar changes to Part 1000.

*B. Equal Access to Justice Act*

Additional technical changes are being made to the regulations in Parts 900 and 1000 dealing with the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. First, section 900.177 currently provides that EAJA claims against either DOI or HHS will be heard by the Interior Board of Indian Appeals (IBIA) under 43 CFR 4.601 through 4.619. This is only partially correct. While some EAJA claims against DOI are heard by IBIA, most are heard initially by administrative law judges (ALJs) within DOI, with a right of appeal to IBIA. Most EAJA claims against HHS are also heard initially by ALJs within DOI, with a right of appeal to the HHS Departmental Appeals Board.

To eliminate the apparent inconsistency between section 900.177 and the referenced DOI EAJA regulations over who initially decides EAJA claims, this rule removes the phrase “by the IBIA” from § 900.177. As a result, EAJA claims against either DOI or HHS will be heard initially by the adjudicative officer who decided the merits, whether an ALJ or IBIA, consistent with DOI’s EAJA regulations. For claims against DOI, appeals from an ALJ’s decision will be decided by IBIA under 43 CFR part 4, subpart D, as provided in 43 CFR 4.626(a). For claims against HHS, appeals from an ALJ’s decision will be decided by the HHS Departmental Appeals Board under 45 CFR part 13.

In a future rulemaking, HHS will propose applying its EAJA regulations at 45 CFR part 13 to an EAJA claim against HHS, so that the HHS regulations apply to both the claim and the appeal. Additionally, the future rule would delete the reference in § 900.177 to 25 CFR 900.165(b) because that paragraph merely refers to the statement of the appeal option that must be contained in the recommended decision.

Second, this rule updates the references to DOI’s EAJA regulations in § 900.177 from 43 CFR 4.601 through 4.619 to 43 CFR 4.601 through 4.628 to reflect amendments to those EAJA regulations published in 2006. See 71 FR 6364 (Feb. 8, 2006).

Third, this rule updates the references in § 900.216(c) to the applicable EAJA regulations. Now that CBCA, rather than IBCA, will be deciding EAJA claims in post-award disputes, the CBCA procedural regulations at 48 CFR 6101.30 and 6101.31 will apply. But since those regulations do not contain provisions regarding eligibility for an award, the standards for an award, and allowable fees and expenses, the substantive EAJA regulations at 43 CFR 4.602 and 4.604 through 4.606 (DOI) and 45 CFR 13.4 through 13.7 (HHS) will continue to apply. See *Tidewater Contractors, Inc. v. Department of Transportation*, No. CBCA 982–C, 2008 WL 2718917 (Civilian B.C.A.) (July 10, 2008), slip op. at 5 (CBCA looked to Department of Transportation regulations for allowable attorney fee rate).

Corresponding revisions are made to 25 CFR 1000.431.

*C. Cross References*

Finally, this rule corrects a number of cross references in Part 900. The notice of appeal rights in section 900.156(b) refers in two places to 25 CFR 900.157, when the correct reference is 25 CFR 900.158 (compare section 900.152). The notices of appeal rights in section 900.165(b) and (c) both contain meaningless references to those sections, when the correct reference is 25 CFR 900.166.

The notices of appeal rights in § 900.172(b) and (c) repeat the references from § 900.165(b) and (c); but § 900.172 is dealing with emergency reassumptions, while § 900.165 is dealing with non-emergency reassumptions. The correct reference in § 900.172(b) and (c) is 25 CFR 900.173.

Similarly, § 900.253(b) refers to 25 CFR 900.160 and 900.161; but § 900.253(b) is dealing with emergency reassumptions, while §§ 900.160 and 900.161 are dealing with non-emergency reassumptions. The correct reference in § 900.253(b) is 25 CFR 900.171.

**II. Procedural Requirements**

*A. Determination To Issue Final Rule Without Prior Notice and Comment.*

BIA and IHS have determined that the public notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), do not apply to this rulemaking because the changes being

made relate solely to matters of agency organization, procedure, and practice. They therefore satisfy the exemption from notice and comment rulemaking in 5 U.S.C. 553(b)(A).

#### B. Review Under Procedural Statutes and Executive Orders

BIA and IHS have reviewed this rule under the following statutes and executive orders governing rulemaking procedures: the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*; the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*; the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.*; the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*; the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*; the Information Quality Act, Public Law 106-554; Executive Order 12630 (Takings); Executive Order 12866 (Regulatory Planning and Review); Executive Order 12988 (Civil Justice Reform); Executive Order 13132 (Federalism); Executive Order 13175 (Tribal Consultation); and Executive Order 13211 (Energy Impacts). BIA and IHS have determined that this rule does not trigger any of the procedural requirements of those statutes and executive orders, since this rule merely updates the Indian Self-Determination and Education Assistance Act regulations to refer to the correct appeal entities and revised EAJA regulations and to correct various cross references.

#### List of Subjects

##### 25 CFR Part 900

Administrative practice and procedure, Buildings and facilities, Claims, Government contracts, Government property management, Grant programs—Indians, Health care, Indians, Indians—business and finance.

##### 25 CFR Part 1000

Grant programs—Indians, Indians.

■ For the reasons stated in the preamble, BIA and IHS amend their regulations in 25 CFR parts 900 and 1000 as follows:

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

■ 1. The authority citation for part 900 continues to read as follows:

Authority: 25 U.S.C. 450f *et seq.*

#### Subpart B—Definitions

■ 2. In § 900.6, revise the definition of “Contract appeals board” to read as follows:

#### § 900.6 Definitions.

\* \* \* \* \*

*Contract appeals board* means the Civilian Board of Contract Appeals (CBCA).

\* \* \* \* \*

#### Subpart L—Appeals

##### § 900.156 [Amended]

■ 3. In § 900.156(b), remove the reference “25 CFR 900.157” and add in its place “25 CFR 900.158” wherever it appears.

##### § 900.165 [Amended]

■ 4. In § 900.165(b), remove the reference “25 CFR 900.165(b)” and add in its place “25 CFR 900.166” wherever it appears.

■ 5. In § 900.165(c), remove the reference “25 CFR 900.165(c)” and add in its place “25 CFR 900.166” wherever it appears.

##### § 900.172 [Amended]

■ 6. In § 900.172(b), remove the reference “25 CFR 900.165(b)” and add in its place “25 CFR 900.173” wherever it appears.

■ 7. In § 900.172(c), remove the reference “25 CFR 900.165(c)” and add in its place “25 CFR 900.173” wherever it appears.

■ 8. Revise § 900.177 to read as follows:

##### § 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).

#### Subpart N—Post-Award Contract Disputes

■ 9. Revise § 900.216(b) and (c) to read as follows:

##### § 900.216 What other statutes and regulations apply to contract disputes?

\* \* \* \* \*

(b) If the matter is submitted to the CBCA, 48 CFR part 6101; and

(c) The Equal Access to Justice Act (EAJA), 5 U.S.C. 504 and 28 U.S.C. 2412, and regulations at 48 CFR 6101.30, 6101.31 (CBCA), 43 CFR 4.602, 4.604 through 4.628 (DOI), and 45 CFR 13.4 through 13.7 (HHS).

■ 10. Revise § 900.222(e) to read as follows:

##### § 900.222 What goes into a decision?

\* \* \* \* \*

(e) Contain the following language:

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA), 1800

F Street, NW., Washington, DC 20245. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the CBCA and provide a copy to the individual from whose decision the appeal is taken. The notice must indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the CBCA, you may bring an action in the U.S. Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

##### § 900.253 [Amended]

■ 11. Revise § 900.253(b) to read as follows:

\* \* \* \* \*

(b) A statement explaining the contractor’s right to a hearing on the record under § 900.171 within 10 days of the emergency reassumption or such later date as the contractor may approve;

\* \* \* \* \*

#### PART 1000—ANNUAL FUNDING AGREEMENTS UNDER THE TRIBAL SELF-GOVERNMENT ACT AMENDMENTS TO THE INDIAN SELF-DETERMINATION AND EDUCATION ACT

■ 12. The authority citation for part 1000 continues to read as follows:

Authority: 25 U.S.C. 458aa–gg.

#### Subpart R—Appeals

■ 13. Revise § 1000.421(b) to read as follows:

##### § 1000.421 What is the purpose of this subpart?

\* \* \* \* \*

(b) The Civilian Board of Contract Appeals (CBCA) for certain post-AFA disputes;

\* \* \* \* \*

##### § 1000.428 [Amended]

■ 14. In § 1000.428, remove “IBCA” and add in its place “CBCA”.

■ 15. In § 1000.429, revise the section heading and introductory text to read as follows:

##### § 1000.429 What statutes and regulations govern resolution of disputes concerning signed AFAs or compacts that are appealed to the CBCA?

Section 110 of Public Law 93-638 (25 U.S.C. 450m-1) and the regulations at 25 CFR 900.216 through 900.230 apply to disputes concerning signed AFAs and compacts that are appealed to the CBCA, except that any references to the Department of Health and Human

Services are inapplicable. For purposes of such appeals:

\* \* \* \* \*

■ 16. Revise § 1000.430 to read as follows:

**§ 1000.430 Who handles appeals regarding reassumption for imminent jeopardy?**

Appeals regarding reassumption of Title I-eligible PFSA's are handled by the IBIA under the procedures in 25 CFR 900.171 through 900.176. Appeals regarding reassumption of PFSA's that are not Title I-eligible are handled by the CBCA under the procedures in 48 CFR part 6101.

■ 17. Revise § 1000.431 to read as follows:

**§ 1000.431 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?**

Yes. EAJA claims against the DOI will be heard under 48 CFR 6101.30, 6101.31 (CBCA) and 43 CFR 4.602, 4.604 through 4.628 (DOI) and under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412.

Dated: October 30, 2009.

**Larry Echo Hawk,**

*Assistant Secretary, Indian Affairs, Department of the Interior.*

Dated: May 24, 2010.

**Yvette Roubideaux,**

*Director, Indian Health Service, Department of Health and Human Services.*

[FR Doc. 2010-13297 Filed 6-3-10; 8:45 am]

**BILLING CODE 4310-79-P**

**POSTAL SERVICE**

**39 CFR PART 111**

**General Information on Postal Service**

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service announces the issuance of Issue 300, dated May 11, 2009, of the Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM), and its incorporation by reference in the Code of Federal Regulations.

**DATES:** *Effective Date:* This final rule is effective on June 4, 2010. The incorporation by reference of Issue 300, May 11, 2009, of the DMM is approved by the Director of the Federal Register as of June 4, 2010.

**FOR FURTHER INFORMATION CONTACT:** Lizbeth Dobbins (202) 268-3789.

**SUPPLEMENTARY INFORMATION:** The most recent Issue 300 of the Domestic Mail Manual (DMM) was issued on May 11, 2009.

This Issue of the DMM contains all Postal Service domestic mailing standards. This issue continues to (1) increase the user's ability to find information, (2) increase confidence that users have found all the information they need, and (3) reduce the need to consult multiple chapters of the Manual to locate necessary information. Issue 300, dated May 11, 2009, set forth specific changes, such as new standards throughout the DMM to support the

pricing changes approved by the Governors of the United States Postal Service. The new prices and standards were effective May 11, 2009. Changes to mailing standards will continue to be published through **Federal Register** notices and the Postal Bulletin, and will appear in the next printed version of Mailing Standards of the United States Postal Service, Domestic Mail Manual, and in the online version available via Postal Explorer <http://pe.usps.com>.

**List of Subjects in 39 CFR Part 111**

Administrative practice and procedure, Incorporation by reference.

■ In view of the considerations discussed above, the Postal Service hereby amends 39 CFR Part 111 as follows:

**PART 111—GENERAL INFORMATION ON POSTAL SERVICE**

■ 1. The authority citation for 39 CFR Part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 13 U.S.C. 301-307; 18 U.S.C. 1692-1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001-3011, 3201-3219, 3403-3406, 3621, 3622, 3626, 3632, 3633, 5001.

■ 2. Amend § 111.3(f) by adding the following new entry at the end of the table: § 111.3 Amendment to the Mailing Standards of the United States Postal Service, Domestic Mail Manual.

\* \* \* \* \*  
(f) \* \* \*

Transmittal letter for issue publication	Dated	Federal Register
Issue 300 .....	May 12, 2008 .....	[Insert FR citation for this Final Rule].
Issue 300 .....	May 11, 2009 .....	[Insert FR citation for this Final Rule].

■ 3. Amend § 111.4 by removing "May 7, 2008" and adding "June 4, 2010".

**Neva R. Watson,**

*Attorney, Legislative.*

[FR Doc. 2010-13356 Filed 6-3-10; 8:45 am]

**BILLING CODE 7710-12-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 7**

**[EPA-HQ-OA-2004-0002; FRL-9158-9]**

**RIN 2090-AA37**

**Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action on Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency. This document sets out EPA rules for

implementing the Age Discrimination Act of 1975, as amended. The Act prohibits discrimination on the basis of age in programs or activities receiving Federal assistance.

**DATES:** This rule is effective on October 4, 2010 without further notice, unless EPA receives adverse comment by August 3, 2010. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OA-2004-0002, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
- *E-mail:* [docket.oei@epa.gov](mailto:docket.oei@epa.gov).



2120 L Street, NW, Suite 700  
Washington, DC 20037

T 202.822.8282  
F 202.296.8834

HOBBSSTRAUS.COM

June 18, 2010

***Via Federal Express***

Terrence Parks, Acting Chief  
Division of Self-Determination  
Office of Indian Services  
Bureau of Indian Affairs  
Department of the Interior  
1849 C. Street, NW.  
Mail Stop 4513  
Washington, DC 20240

Betty Gould, Regulations Officer  
Indian Health Service  
Dept. of Health and Human Services  
12300 Twinbrook Parkway, Suite 450  
Rockville, MD 20857

Sharee Freeman, Director  
Office of Self-Governance  
Office of the Assistant Secretary—Indian Affairs  
U.S. Department of the Interior  
1951 Constitution Ave. NW  
Mail Stop 355  
Washington, DC 20240

***Re: Amendments to Regulations Governing Appeals Procedures under the Indian Self-Determination and Education Assistance Act***

Dear Mr. Parks, Ms. Freeman, and Ms. Gould:

Our clients are tribes and tribal organizations that contract and compact with the Department of the Interior and the Department of Health and Human Services under the Indian Self-Determination and Education Assistance Act (ISDEAA). We write in response to the Departments' joint publication of a final rule amending the ISDEAA regulations on appeal procedures.<sup>1</sup> Specifically, we write to point out that the Departments, in issuing this final rule, have not complied with the procedural requirements imposed by the ISDEAA.

The regulations implementing both Title I and Title IV of the ISDEAA were promulgated not through the ordinary notice-and-comment rulemaking, but through a negotiated rulemaking process, as required by the statute.<sup>2</sup> Both Titles incorporate by reference the Negotiated

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<sup>1</sup> *Indian Self-Determination Act Contracts and Annual Funding Agreements—Appeal Procedures*, 75 Fed. Reg. 31699 (June 4, 2010).

<sup>2</sup> 25 U.S.C. § 450k(d)(2); *id.* § 458gg(a)-(c).

Rulemaking Act, which applies to any "agency process for formulating, *amending*, or repealing a rule."<sup>3</sup> While the technical amendments at issue here may not have warranted negotiated rulemaking, the Federal Register notice does not indicate that the Departments engaged in a deliberative process to arrive at that determination.

Nor did the Departments comply with the explicit consultation requirements of the ISDEAA. Section 107 requires the Departments to "publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties."<sup>4</sup> Further, in drafting and promulgating regulations, *including revised regulations*, the Secretaries "shall confer with, and allow for active participation by, representatives of Indian tribes, tribal organizations, and individual tribal members."<sup>5</sup> The recent Federal Register notice states that the Departments determined that public notice and comment were not required under the Administrative Procedure Act (APA) "because the changes being made related solely to matters of agency organization, procedure, and practice."<sup>6</sup> This exception does not apply, however, "when notice or hearing is required by statute."<sup>7</sup> The discretionary APA exception applicable to ordinary notice-and-comment rulemaking must cede to the express procedural requirements of the ISDEAA.

While we do not find the substance of the regulatory amendments objectionable, we believe the procedures followed by the Departments set a dangerous precedent in their failure to comply with the ISDEAA. We respectfully recommend that the Departments publish a supplemental notice explaining how and why they determined that (1) the negotiated rulemaking process was not required, and (2) the consultation requirements of Section 107 of the ISDEAA did not apply. We also recommend that future amendments proposed by the Departments, no matter how technical and "internal" they may seem to the agencies, be sent out for tribal consultation and comment as prescribed in Section 107. Otherwise, the legitimacy of the rulemaking process and the resulting regulations may be in question.

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<sup>3</sup> 5 U.S.C. § 551(5) (emphasis added), incorporated by reference in 5 U.S.C. § 562(11).

<sup>4</sup> 25 U.S.C. § 450k(c). The Departments must also present "any revision or amendment" to the House and Senate committees of jurisdiction and consult with national or regional tribal organizations on the proposed changes. *Id.*

<sup>5</sup> 25 U.S.C. § 450k(d)(1) (emphasis added).

<sup>6</sup> 75 Fed. Reg. 31699, 31701-02.


<sup>7</sup> 5 U.S.C. § 553(b)(3).

Sincerely,

HOBBS, STRAUS, DEAN, & WALKER, LLP

By:

  
S. Bobo Dean

  
Geoffrey D. Strommer

cc: Larry Echo Hawk, Assistant Secretary—Indian Affairs  
Yvette Roubideaux, Director, Indian Health Service