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Introduction

This handbook is established to consolidate information pertaining to assistance agreements. The CFM Intranet helps employees determine the appropriate agreement type and legal authority. The National Endowment for the Humanities' (NEH) web page (<http://www.neh.gov/egrants/>) lists various federal agencies that have (or would like to have) e-grant systems. NEH's system will interface with Federal Commons when it becomes available.

An IRS (c)(4) organization may not be awarded an agreement. The Simpson-Craig Amendment to P.L. 104-65, Section 18, states "An organization described in Section 501 (c)(4) of the Internal Revenue Service Code of 1986 which engages in lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant, contract, loan, or any other form."

For the National Fire Plan projects (Title IV), use pseudo code 15.DAX as the CFDA (Catalog of Federal Domestic Assistance) number when filling in item 10 of form SF-424. The CFDA number 15.228 cannot be until published in the Catalog. See DOI PAM 5/2/01 memo.

Claims are to be resolved by the Contracting Officer (CO). As the HHS Board of Grant Appeals no longer addresses appeals to CO decisions, appeals will be submitted through CFM to the Assistant Director - General Law assistance for dispute resolution. Note that GAO only reviews assistance actions if there is a conflict of interest or if the action should be made pursuant to the FAR (B-207112, dated 5/28/82).

Authorized or Required by Statute - U.S. Fish and Wildlife Service

(Bolded are the ones that we use the most here in this region)

1. Alaska National Interest Lands Conservation Act (16 U.S.C. 3101) authorizes the use of cooperative agreements.
2. Anadromous Fish Conservation Act (16 U.S.C. 7571 - 757g) authorizes the use of grant and cooperative agreements.
3. Animal Damage Control Act of 1931, as amended (7 U.S.C. 426 - 426b) authorizes the use of cooperative agreements and grants.
4. Cooperative Research and Training Unit Act of 1960, as amended (16 U.S.C. 753a) authorizes the use of cooperative agreements.
5. Clean Vessel Act of 1992, as amended (16 U.S.C. 777c(b)(2)) authorizes the use of grants.
6. Coastal Wetlands Planning, Protection and Restoration Act, 16 U.S.C. 3951-3956.
7. Cooperative Research and Training Units Act (16 U.S.C. 753a-b) authorizes the use of cooperative agreements.
8. **Endangered Species Act of 1973, as amended (16 U.S.C. 1531 - 1544) authorizes the use of cooperative agreements and grants.**
9. Federal Aid in Sport Fish Restoration Act (16 U.S.C. 777 - 777k) commonly called the Dingell-Johnson Sport Fish Restoration Act, authorizes the use of cooperative agreements and grants.
10. Federal Aid in Wildlife Restoration Act (16 U.S.C. 669 - 669j) commonly called the Pittman-Robertson Wildlife Restoration Act, authorizes the use of cooperative agreements and grants.
11. Fish and Wildlife Conservation Act of 1980 (16 U.S.C. 2901 - 2911) authorizes the use of cooperative agreements and grants.
12. **Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a - 742k) authorizes the use of cooperative agreements and grants.**
13. **Fish and Wildlife Coordination Act of 1934, as amended (16 U.S.C. 661 - 666c) authorizes the use of cooperative agreements and grants.**
14. Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 7421) authorizes the use of cooperative agreements with State or other Federal agencies.
15. **Great Lakes Fishery Act of 1956 (16 U.S.C. 931 - 939) authorizes the use of cooperative agreements and grants.**
16. **Migratory Bird Conservation Act (16 U.S.C. 715) authorizes the use of cooperative agreements with local authorities in wildlife conservation to conduct investigations, publish documents related to North American birds, and to maintain and develop refuges.**
17. **National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668d 668ee) authorizes the use of cooperative agreements.**

North American Wetlands Conservation Act (NAWCA), 16 U.S.C. Chapter 64, Section 4405(a)(3) states "the Secretary may, with concurrence of the Migratory Bird Conservation Commission, grant ... Federal funds made available under this chapter and Section 669b(b) of this Title" This authority contains two restrictions: 1) "Provided the grant recipient was identified in the project description accompanying the recommendation from the Council and approved by the Migratory Bird Conservation Commission", and 2) a determination must be

made that the recipient will be "committed to undertake the management of the property ... in accordance with the objectives of this chapter."

Challenge Cost-Share Appropriation Act, P.L. 101-154, dated ?, states ??“the Bureau is authorized hereafter to negotiate and enter into cooperative arrangements with public and private agencies, organizations, institutions, and individuals, to implement challenge cost-share programs.”

Animal Damage Control Act of March 2, 1931, as amended (7 U.S.C. 426-426b) - these sections authorize the use of contracts, grants, and cooperative agreements depending upon the principal purpose of the proposed transaction and the degree of Federal involvement.

Fish and Wildlife Coordination Act of 1934, as amended (16 U.S.C. 661-666) - the following sections authorize the use of contracts, grants, and cooperative agreements depending upon the principal purpose of the transaction and the degree of Federal involvement: #661, #664, #665, and #666.

Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a-742k) - the following Sections authorize the use of contracts, grants, and cooperative agreements depending on the principal purpose of the transaction and the degree of Federal involvement: #742a, #742d, #742e, #742f, and #742g.

Cooperative Research and Training Units Act of 1960, as amended (16 U.S.C. 753a) - this Section limits the authorization to the use of cooperative agreements and implies substantial Federal involvement.

Anadromous Fish Conservation Act as amended (16 U.S.C. 757a-757g) - the following Sections authorize the use of contract, grants, and cooperative agreements depending upon the principal purpose of the transaction and the degree of Federal involvement: #757(a), #757(b), and #757(g).

Public Law 89-672 - effected October 15, 1966, as amended (42 U.S.C. 1900) - this Section authorize research contracts, grants, and cooperative agreements depending upon the principal purpose of the proposed transaction and the degree of Federal involvement.

Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-62, 1372-84, 1401-07) - the following Sections authorize the use of contracts, grants, and cooperative agreements depending upon the principal purpose of the transaction and the degree of Federal involvement: #1361, #1378, #1380, and #1382.

Endangered Species Act of 1973, as amended (16 U.S.C. 1531-43) - the following Sections authorize the use of contracts, grants, and cooperative agreements depending upon the principal purpose of the transaction and the degree of Federal involvement: #1531, #1533(b)(1) and g; #1536, 1537 and 1537(a).

Fish and Wildlife Conservation Act of 1980 (16 U.S.C. 2901-2911) - the following Sections authorize the use of grants or cooperative agreements with States for other than financial

assistance depending upon the purpose of the transaction and the degree of Federal involvement: #2901 and #2908.

Sikes Act of 1978 authorize the use of grants and cooperative agreements depending upon the purpose of the transaction and the degree of Federal involvement: #670(a)(b)(c)(d)(h)(i)

Cooperative Ecosystem Studies Units (CESU)

Federal land management, environmental, and research agencies, along with the nation's universities, share many science-based goals. A network of Cooperative Ecosystem Studies Units (CESUs) has been established to achieve these goals, delineated by geographic areas, each having a Host university to provide research, technical assistance and education. Partner institutions are listed within each Host university CESU agreement. The CESU web site is: <http://www.cesu.org/cesu/> See the CFM Intranet for further information.

Questions to Ask Non-Profit Organizations

1. Have you completed the SF-424 form referencing the assurance statement and their application to your organization? (43 CFR 12.921)
2. Is the purpose and description of the joint and separate activities contemplated in this agreement clear?
3. Has your organization received other financial assistance in the form of grants or cooperative agreements from other federal agencies? Who and what was the extent of the assistance. (OMB Circular A-133 and 43 CFR 12.926)
4. Do you have an accounting system and record keeping system in place? (43 CFR 921)
5. Does it provide current and accurate accounting system? (43 CFR 12.921(1))
6. In your financial system can you track where funds came from and where they've been spent? Source and application of funds. (43 CFR 12.921(b)(2))
7. Is there cost sharing under this agreement and how will you be meeting the matching or sharing requirement? (43 CFR 12.923)
8. What contributions are is your organization bring to this assistance relationship? (43 CFR 12.923)
9. Is there an opportunity to generate program income? (43 CFR 12.924)
10. Are you familiar with the Standard Forms which are provided for payments under the agreement? (43 CFR 12.922 (d))
11. What method of reimbursement or payment would you expect? (43 CFR 12.922)
12. Have you developed your proposed budget that shows the breakdown of direct costs and indirect costs that are anticipated under the agreement? (43 CFR 12.925)
13. Will you need to purchase supplies, materials or enter into contracts while carrying out the responsibilities of this assistance agreement? If yes above, discuss competition. (43 CFR 12.925 and .943)
14. Will your cost breakdowns and accounting system permit the accumulation of costs and relate them to performance of activities? (43 CFR 12.921(a))
15. The application form indicates that the person signing the application has the authority. Before signing the final assistance agreement would you be able to furnish a copy of the Board meeting minutes where there is a resolution or other authorization for the organization to enter into the agreement? Who will be your representative during performance of the agreement? What limits, if any, are there on their authority?

16. Financial reporting, what do we need to do to formulate reporting requirements? (43 CFR 12.952).

17. Do you have written procedures to determine the reasonableness, allocability and allowability of costs? (43 CFR 12.921(b)(6))

18. Do you have an audited indirect cost rate? (Cost Principles, A-122, Attachment A, Paragraph E, and on page 31 of 62)

19. Do you have any questions about the administrative or technical requirements and provisions of this cooperative agreement?

20. Do you have a cognizant audit agency assigned to your organization? (Cost Principles, A-122, Attachment A, Paragraph E, and on page 31 of 62)

Review procedures

This supplements the BLM 1511 Manual and Handbook to establish assistance agreement (AA) administrative policy and review procedures.

(a) The proposed Statement of Programmatic Involvement/Instrument Selection Determination (SPI/ISD) for AAs shall be reviewed by the Chief of the Contracting Office (CCO), or the CCO's designee regardless of dollar threshold. If an SPI/ISD is not required, the agreement itself shall be reviewed by the CCO. Proposed SPI/ISDs and their AAs exceeding \$100,000 require both CCO and WO review. The dollar threshold includes the maximum indefinite-delivery quantity, option, and other out-year (multi-year, incrementally funded or economic price adjustment) dollar amounts. A completed checklist, as found in "s:\952\agree\checklst.96", shall be completed by the Agreement Officer prior to submitting the SPI/ISD and AA for review.

(b) Solicitor's review is only required when competitively issuing a Request for Applications. 505 DM 2.6D requires Solicitor assistance only for implementing Bureau procedures.

(c) An SPI/ISD is not required for Cooperative Ecosystem Studies Units (CESU) or National Fire Program (NFP) AAs, as the AA procedures for these programs have been established on a Bureau-wide basis.

(d) A negotiation memorandum, with the CCO's concurrence, suffices for the review document at time of award. Negotiation memoranda are required for all AAs. These documents shall be maintained in the "Agreement Award Information" section of the AA folder.

(e) Currently, there are only two programs (Wildlife and Fisheries, and Recreation and Cultural Resources) with authority for challenge cost share AAs.

(f) In accordance with a February 24, 1995, Department memorandum, all AAs shall contain a completed DI-2010, dated June, 1995, entitled "Certifications Regarding Debarment, Suspension and Other Responsibility Matters, Drug-Free Workplace Requirements and Lobbying".

(g) Review of these procedures will be made at the beginning of each FY to insure the minimum number of reviews are performed for regulatory compliance.

Reporting (FAADS)

FWS fire agreement awards are coded "15228".

Effective March 3, 1999, all awards made under P.L. 93-638, Indian Self-Determination and Education Assistance Act are to be reported in the FAADS system.

Forms

The Application for Federal Assistance, SF-424, which must be used with all Cooperative and Grant Agreements, is in WordPerfect under forms\contract.

The SF-424 series of grant application forms is posted on OMB's home page in an "interactive-PDF" format. Potential grantees can now fill out these forms using their computer, rather than a typewriter. The financial reporting series (SF-269, SF-270, etc.) will follow shortly. The website is: <http://www.whitehouse.gov/OMB/grants/index.html>

OMB Circular No. A-110

OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, is found at

<http://www.whitehouse.gov/omb/circulars/a110/a110.html>

OMB Circular No. A-133 - Final Revision

The final revision of OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations," was published in the June 30, 1997 publication of the Federal Register (62 FR 35277-35319).

The document also includes the final rescission of OMB Circular No. A-128, and a notice of document availability of the Provisional Circular A-133 Compliance Supplement.

The revised Circular and Provisional Compliance Supplement are available on the OMB Home Page and can be accessed through the PAM Home Page as follows:

<http://www.ios.doi.gov/pam/pamhome.html>

Under the Financial Assistance portion of the Home Page, click on "Toolbox"

Click on OMB Home Page; "OMB Documents" then "Grants Management"

Sheila Conley, OMB announced during a presentation at the National Grants Management Association Training Conference on July 1, 1997, that Bob Taylor, DOT, and Charlie Gale, HHS, will be leading an effort to coordinate the publication of a "voluntary" common rule for agencies to join in the publication of a revision to the Grants Management Common Rule. This revision will make the appropriate changes needed for eliminating references to OMB Circular A-128.

BLM's regulation at 43 CFR Part 12, Subpart A, which requires that various OMB Circulars apply to awards made by the Department, states that the circulars prescribed are made a part of the regulation and include changes published in the Federal Register by OMB.

The Department of Interior will be participating in the revision of the common rule and make other changes as appropriate to various subparts within 43 CFR Part 12. BLM is not planning to publish a separate regulation to repeat verbatim the language in the revised OMB Circular A-133.

Volunteer - Employees

[http://www.opm.gov/oca/compmemo/1998/CPM98-V2.HTM#Scheduling work - OPM's Guidance on Scheduling Work and Granting Time Off to Permit Federal Employees to Participate in Volunteer Activities](http://www.opm.gov/oca/compmemo/1998/CPM98-V2.HTM#Scheduling%20work%20-%20OPM's%20Guidance%20on%20Scheduling%20Work%20and%20Granting%20Time%20Off%20to%20Permit%20Federal%20Employees%20to%20Participate%20in%20Volunteer%20Activities)

A. Scheduling Work and Time Off

3) Scheduling Time off from Work

Excused Absence (administrative leave) -- Each department or agency has discretion to excuse employees from their duties without loss of pay or charge to leave. OPM advises that the granting of excused absence for volunteer activities should be limited to those situations in which the employee's absence, in the department's or agency's determination, is not specifically prohibited by law and satisfies one or more of the following criteria: (1) the absence is directly related to the department or agency's mission; (2) the absence is officially sponsored or sanctioned by the head of the department or agency; (3) the absence will clearly enhance the professional development or skills of the employee in his or her current position; or (4) the absence is brief and is determined to be in the interest of the agency. Ultimately, it is the responsibility of each department or agency head to balance support for employees' volunteer activities with the need to ensure that employees' work requirements are fulfilled and that agency operations are conducted efficiently and effectively. Agencies should review their internal guidance on excused absence and applicable collective bargaining agreements.

Cooperative Research And Development Agreement (CRDA)

Authority is Public Law 99-502 (Oct 20, 1986), the amendment to the Stevenson-Wydler Technology Innovation Act of 1980. It is called the “Federal Technology Transfer Act of 1986.”

It is defined as “any agreement between one or more Federal laboratories and one or more non-Federal parties under which the Government, through its laboratories, provides personnel, services, facilities, equipment, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory; except that such term does not include a procurement contract or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of title 31, United States Code; and

the term ‘laboratory’ means a facility or group of facilities owned, leased, or otherwise used by a Federal agency, a substantial purpose of which is the performance of research, development, or engineering by employees of the Federal Government.”

The primary purpose of the CRDA is to spread commercialization of federally developed technology and expertise and must be performed in the public interest.

CRDAs are not procurement contracts. There are no solicitations and corporations do not in any way compete for CRDAs. A Statement of Work (SOW) is developed in close coordination between by the Federal laboratory and the non-Federal party.

The SOW outlines the tasks to be performed, contributions of the parties involved, the duration of the effort, and anticipated outcomes or accomplishments.

The deputy of the contracting office at the Rome Research Laboratory (Air Force)(Linda Reed 315-330-4747) said that contracting does not even get involved with the CRDAs since there are no funds involved. The Commander of the lab enters into the agreement with the company without contracting office involvement. The legal office is heavily involved.

Ms. Reed shared what typically happens, in very basic terms, is a company comes to the lab with an idea and the company needs the use of the test facility at the lab to develop/test their idea. If the project is successful the Government would then share in the patent rights and thus it is of benefit to the Government to enter into the agreement.

Ms. Reed recommended that if FWS were interested in samples, that the AFMC legal office be contacted. There is an “expert” in the office that might be able to assist.

Incorporation of OMB Circular A-110 into Non-Profit Organizational Bylaws

OMB Circular A-110 is hereby incorporated by reference as a bylaw of this non-profit organization, as applicable for use of funds obtained by assistance agreement with the U.S. Government or one of its agencies or bureaus. In addition, the following OMB Circulars pertain when applicable: OMB Circular A-21, Cost Principles for Educational Institutions; OMB Circular A-102, State and Local Governments; OMB Circular A-122, Cost Principles for Non-Profit Organizations; and OMB Circular A-133, Audits of Institutions of Higher Education and Other Non-Profit Organizations.

Natural Resource Damage Assessment and Restoration

1. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601-9675, provides a comprehensive group of authorities focused on one main goal: to address any release, or threatened release of hazardous substances, pollutants or contaminants that could endanger human health and/or the environment. CERCLA directs two types of activities at sites contaminated by hazardous substances: 1) cleanup and 2) natural resource damage assessment (NRDA) and restoration. When applicable, the Oil Pollution Act (OPA), 33 U.S.C. 2702-2761, may mandate similar assessments.

2. Under both CERCLA and OPA, responsibility for protection of natural resources falls with Federal, state and tribal trustees to act on behalf of the public. Trustees have two major areas of responsibility: 1) assessment of injury to natural resources and 2) restoration of natural resources injured or services lost due to a release or discharge. To meet these responsibilities, the trustees can either sue in court or conduct assessments and negotiate with the potentially responsible parties (PRPs) to obtain funds for restoration. Consent decrees result from the negotiations.

3. NRDA consent decrees specify the amount of funds and how the funds are to be used to mitigate those particular damages. Funds transferred to a Federal trustee agency account pursuant to NRDA consent decrees are considered Federal appropriated funds¹.

4. The Fish and Wildlife Coordination Act² provides broad authority for assistance agreements (grants and cooperative agreements).

5. The Natural Resource Restoration Plan, implementation of which is subject to NEPA, is developed by the Trustees to determine which parcels of land would be acceptable for land acquisition selected by the Trustees.

6. 43 CFR 11.82(e)³ states that acquisition of land for Federal management is not preferred.

7. OMB Circular A-110⁴ states FWS can provide funds to the cooperator to buy land. However, if the cooperator already owns the land in question, it would be viewed as a real property acquisition and must be acquired through the Division of Realty.

8. OMB Circular A-110⁴ requires disposition language⁵, which should be included in both the assistance agreement and in the property deed (proof of ownership) and/or abstract (history). While case law⁶ indicates title to property will revert to the Government if the property is no longer used for the purpose of the agreement, OMB Circular A-110⁷ states title may be held by an eligible third party. The deed and/or abstract must reflect this, as the assistance agreement is of relatively short duration.

9. OMB Circular A-122⁸ disallows other than incidental pre-award costs unless expressly approved in writing by the awarding agency (i.e. include in the assistance agreement). A non-construction waiver for pre-award costs exists at OMB Circular A-110⁹.

10. Need documentation from a registered professional appraiser or Government Realty Specialist stating the price paid for the property is fair and reasonable or within market value in consideration of any encumbrance on the property.

11. The National Fish and Wildlife Foundation¹⁰ can facilitate NRDA consent decrees¹¹.

¹Principles of Federal Appropriation Law 2-15 states, "...statutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, constitute continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by the Congress." CERCLA at 42 U.S.C. 9622(b)(3), states, "If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement." A July 27, 1999, WO DOI Solicitor opinion states, "if jointly-recovered monies deposited into the Fund are transferred to a Federal trustee agency account, and then paid to a non-Federal entity, it is our view that the non-Federal entity may not use those monies to satisfy a "non-Federal" match for a Federal grant program."

²Fish and Wildlife Coordination Act of 1934, as amended ([16 U.S.C. 661 - 666c](#)), Section 661 states:

"the Secretary of the Interior is authorized to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections. Section 664 specifically authorizes, "pursuant to the provisions of section 661", the Secretary to enter into "cooperative agreements ... for the conservation, maintenance, and management of wildlife, resources thereof, and its habitat thereon".

³43 CFR 11.82(e) states:

A Federal authorized official shall not select an alternative that requires acquisition of land for Federal management unless the Federal authorized official determines that restoration, rehabilitation, and/or other replacement of the injured resources is not possible.

⁴OMB Circular A-110, paragraph .32 and .32(a) state:

.32 [Real property](#). Each Federal awarding agency shall prescribe requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the Federal awarding agency.

⁵The following shall be incorporated in all NRDA-related land acquisition agreements:

Restriction: Legal title to this property may transfer only to another entity incorporated under the provisions of Section 501(c)(3) of the Internal Revenue Code or to an acceptable local government entity (e.g. state, county, or watershed district), provided the United States Fish and Wildlife Service determines in writing the entity is an acceptable successor, and provided further that the entity will manage the property in accordance with CERCLA (wetlands, uplands and associated fauna and flora, and ground water) or its successor law.

The cooperator shall register the above restriction with each applicable local government (e.g. county) having jurisdiction over property covered by the NRDA-related agreement.

⁶*Joliet-Will county Community Action Agency*, 847 F.2d 430 (7th Cir. 1988). Funds in the hands of a bankrupt recipient, and property purchased with those funds, were not assets of the bankrupt recipient but remained the property of the federal government.

⁷OMB Circular A-110, paragraph .32(c)(3) states:

The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

⁸OMB Circular A-122, Attachment B, paragraph 38, states:

38. Pre-award costs. Pre-award costs are those incurred prior to the effective date of the award directly pursuant to the negotiation and in anticipation of the award where such costs are necessary to comply with the proposed delivery schedule or period of performance. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the award and only with the written approval of the awarding agency.

⁹OMB Circular A-110, paragraphs .25(c) and .25(e):

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons.

- (1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).
- (2) Change in a key person specified in the application or award document.
- (3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.
- (4) The need for additional Federal funding.
- (5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A-21, "Cost Principles for Educational Institutions," OMB Circular A-122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74 Appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, Federal awarding agencies are authorized, at their option, to waive cost-related and administrative prior written approvals required by this Circular and OMB Circulars A-21 and A-122. Such waivers may include authorizing recipients to do any one or more of the following.

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Federal awarding agency. All pre-award costs are incurred at the recipient's risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

¹⁰The National Fish and Wildlife Foundation Establishment Act of 1984, P.L. 98-244, as amended (16 U.S. C. 3701 *et seq.*), established the National Fish and Wildlife Foundation (Foundation) as a nonprofit corporation (incorporated under the provisions of Section 501(c)(3) of the Internal Revenue Code) to conduct such activities, and to assist entities in undertaking activities, to further the conservation and management of the fish, wildlife and plant resources of the United States. Section 3703(c) of the Act gives the Foundation the power "(2) to acquire by purchase or exchange any real or personal property or interest" and "(6) to use Federal funds to make payments under cooperative agreements entered into with willing private landowners to provide substantial long-term benefits for the restoration or enhancement of fish, wildlife, plants and other natural resources on private lands."

FWS could establish a blanket cooperative agreement with the Foundation, authorizing task orders to fund projects against which the Foundation could enter into cooperative agreements with subrecipients. OMB Circular A-110 Subpart A, Section .5, requires flow down Circular compliance for institutions of higher education and other non-profit subrecipients (Note that OMB Circular A-110 does not pertain to individuals and for-profit entities.). The following clause should be incorporated into agreements with subrecipients (and possibly into the bylaw of the subrecipient) to facilitate compliance:

OMB Circular A-110 is hereby incorporated by reference, as applicable for use of funds obtained from the U.S. Government or its cooperator. In addition, the following OMB Circulars pertain when applicable: OMB Circular A-21, Cost Principles for Educational Institutions; OMB Circular A-102, State and Local Governments; OMB Circular A-122,

Cost Principles for Non-Profit Organizations; and OMB Circular A-133, Audits of Institutions of Higher Education and Other Non-Profit Organizations.

As an alternative to compliance with the Circular directives, the Foundation and a subrecipient could enter into a cooperative agreement in which neither party exchanges Federal funds with other for the particular project. The subrecipient could provide in-kind services and other items of value to the project, and the Foundation could spend Federal funds by hiring contractors, purchasing supplies, etc. for use or incorporation in that specific project without ever exchanging funds with the subrecipient.

¹¹Rather than transferring funds to FWS, where funds are considered Federal appropriated funds, NRDA consent decrees could include the Foundation as a trustee, where the funds transferred to the Foundation would be non-Federal funds (July 27, 1999, WO DOI Solicitor opinion).

NRDA Assistance Agreements more complex and take considerably longer:

1. Far more complex than other agreements – issues are unique to each particular settlement
2. Multiple partners usually involved
3. No existing guidance on agreements, other than OMB circulars
4. Small cooperators struggle with Federal requirements, e.g. OMB circulars
5. Real estate issues, e.g. Service cannot pay money to land owner
6. Issues regarding federal characteristic of funds, e.g. cannot match with other federal funds
7. Many require WO Solicitor input as well as local Solicitor input
8. May suggest modifying DOI appropriation language to allow greater latitude in NRDA fund expenditures. FY03 appropriation: http://www.doi.gov/budget/2003/data/pdf/hr_rpt108_10.pdf