

DEPARTMENT OF THE INTERIOR
THE SELF-GOVERNANCE PROGRESS ACT - NEGOTIATED
RULEMAKING COMMITTEE
TRIBAL COMMITTEE MEMBERS

July 11, 2024

**Part 1000 Regulatory Language Supported by Tribal Representatives on the
PROGRESS Act Rulemaking Committee**

This document identifies regulatory language and proposals supported by Tribal representatives on the PROGRESS Act Rulemaking Committee (the “Committee”) addressing non-consensus issues. As reflected below, to streamline the regulations and empower Tribes, the Tribal representatives on the Committee would revise the language in the U.S. Department of the Interior’s Proposed Rule on 25 C.F.R. Part 1000 to:

- (1) Refrain from relying on the statutory headings when identifying the minimum requirements for a compact and/or funding agreement and instead accept written Tribal attestations that the Tribe will comply with Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA);
- (2) Expressly provide that the identification of inherent Federal functions is a permissible topic of discussion during the negotiation process;
- (3) Incorporate language from long-standing Department Solicitor guidance to clarify determinations of inherent Federal functions;
- (4) Provide that contract support costs for non-BIA funding agreements must be calculated pursuant to the same method provided under Title I (25 U.S.C. § 5325(a));
- (5) Recognize that a Tribal official may assume the responsibility to make environmental determinations, such as approving documents required under the National Environmental Policy Act (NEPA) and related laws, if so elected by a Tribe/Consortium pursuant to 25 U.S.C. § 5367(b) and the proposed regulatory provisions Tribes recommend be added to Subpart K (Construction);
- (6) Clarify the process for a Tribe/Consortium to be recognized as having lead, cooperating, or joint lead agency status on a construction project and provide a clear definition for a “categorical exclusion”; and
- (7) Enhance flexibility for pursuing an administrative appeal by allowing a Tribe/Consortium to elect to pursue their administrative appeal of *any* pre-award dispute with an appropriate bureau head/Assistant Secretary as an alternate path for filing an administrative appeal with the Interior Board of Indian Appeals (IBIA).

The regulatory language supported by the Tribal representatives on the Committee is below.

1. Minimum Required Text in a Compact and/or Funding Agreement
(For further background on this, see Committee Report [here](#) at pp. 15-17, 19-21)

A. Revise Section 1000.510(e) (Subpart E) to read:

Section 1000.510 What is included in a self-governance compact?

(e) Include a general attestation that, in implementing the compact, the Tribe will comply with all requirements of the Act.

B. Delete Section 1000.515 (Subpart E)

C. Revise Section 1000.610(b) (Subpart F) to read:

Section 1000.610 What must be included in a funding agreement?

(b) A funding agreement must include a general attestation that, in implementing the funding agreement, the Tribe will comply with all requirements of the Act.

2. Inherent Federal Functions as Subject of Negotiation
(For further background on this, see Committee Report [here](#) at pp. 20-21)

Revise Section 1000.695 (Subpart F) to read:

Section 1000.695 Are the identification of an inherent federal function and the amount of funds withheld by the Secretary to cover the cost of that inherent federal function subject to negotiation?

Yes, the Secretary's identification of an inherent federal function and calculation of such costs are appropriate subjects during the negotiation of a funding agreement because each affects the amount of funds available for transfer to the funding agreement. If the Tribe/Consortium and the Secretary are unable to agree on the amount of funds to be withheld by the Secretary to cover the Secretary's expense of carrying out inherent federal functions directly associated with the PSFAs assumed in the funding agreement, the Tribe/Consortium may exercise any of its options under 25 U.S.C. § 5366 (c), including the final offer process in Subpart I of this part.

3. Incorporate Long-Standing Department Guidance on Inherent Federal Function Determinations (For further background on this, see Committee Report [here](#) at pp. 21-25)

Revise Section 1000.845(a) (Subpart G) to read:

Section 1000.845 Are there any non-BIA programs that may not be included in a funding agreement?

- (a) Inherently Federal Functions in accordance with 25 U.S.C. §§ 5361(6) and 5363(k). When determining whether a function is inherently Federal within the meaning of the Act, the more a delegated PSFA relates to tribal sovereignty over citizens or territory, the more likely it is that the function is not inherently Federal;

4. Calculation and Payment of Contract Support Costs for Non-BIA Funding Agreements (For further background on this, see Committee Report [here](#) at pp. 21-25)

Revise Section 1000.885(b)(1)(iii) (Subpart G) to read:

Section 1000.885 What funds are included in a non-BIA funding agreement?

Non-BIA bureaus determine the amount of funding to be included in the funding agreement using the following principles:

...

(b) 403(c) Programs (25 U.S.C. 5363(c)) [programs of special geographic, historical, or cultural significance to the participating Tribe requesting a compact].

(1) The funding agreement will include:

...

(iii) Such amounts as the Tribe/Consortium and the Secretary may negotiate for pre-award, start-up and direct contract support costs calculated under section 106(a) of Pub. L. 93-638 (25 U.S.C. 5325(a)).

5. Tribal Assumption of Final Environmental Determinations For Construction Projects (For further background on this, see Committee Report [here](#) at pp. 28-34)

Add the following five new regulatory sections to Subpart K (Construction):

___. **If a Tribe/Consortium elects to assume Federal responsibilities under § 1000.1370, what environmental considerations must be included in the construction project agreement?**

Where a Tribe elects to assume Federal responsibilities under § 1000.1370, the construction project agreement must include:

- (a) Identification of the Tribal certifying officer for environmental review purposes,
- (b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in § 1000.1370.
- (c) Identification of the environmental review procedures adopted by the Tribe/Consortium, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Tribe/Consortium's adopted procedures.

___. Is a Tribe/Consortium required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under § 1000.1370?

Yes, but only as provided in this section. Unless a Tribe/Consortium consents to the jurisdiction of a court, it is immune from civil lawsuits. A Tribe/Consortium electing to assume Federal responsibilities under § 1000.1370 must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Tribes/Consortia are not required to waive any other immunity.

___. Are Tribes/Consortia entitled to determine the nature and scope of the limited immunity waiver required to assume Federal responsibilities under § 1000.1370?

(a) Yes, section 25 U.S.C. § 5367(b)(2) only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Tribes/Consortia are not required to subject themselves to suit in their own name, to subject to trial by jury or civil discovery, or to waive immunity for money damages, attorney fees, or fines.

(b) Tribes/Consortia may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying officer's actions is based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities that have been assumed by the Tribe/Consortium under 25 U.S.C. § 5367(b); and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.

___. Who is the proper defendant in a civil enforcement action under section 25 U.S.C. 5367(b)?

(a) Where the Tribe/Consortium has elected to assume Federal responsibilities under NEPA, NHPA, and related provisions of other laws and regulations, only the designated Tribal certifying officer acting in his or her official capacity is the proper defendant in a civil enforcement action may be sued. Tribes/Consortia and other Tribal officials are not proper defendants in lawsuits brought under section (25 U.S.C. § 5367(b)(2)).

(b) Where the Tribe/Consortium has not elected to assume Federal responsibilities under § 1000.1370a, the Secretary is the proper defendant in a civil enforcement action and may be sued.

___. What Federal environmental responsibilities remain with the Secretary when a Tribe/Consortium assumes Federal responsibilities under § 1000.1370?

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under § 1000.1370 remain with the Secretary. Federal agencies, including the Department, retain responsibility for ensuring their environmental review procedures meet the requirements of NEPA, NHPA, and related provisions of other laws and regulations that would apply if the Secretary were to undertake a construction project.

(b) The Secretary will provide information updating and changing Department environmental review policy and procedures to all Tribes/Consortia implementing a construction project agreement, and to other Tribes/Consortia upon request. If a Tribe/Consortium participating in Self Governance under 25 U.S.C. 5389 does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of a Tribe/Consortium, the Secretary will provide technical assistance to the Tribe/Consortium to assist the Tribe/Consortium in carrying out Federal environmental responsibilities.

6. *Lead Agency Status* (For further background on this, see Committee Report [here](#) at pp. 28-34)

Add the following new sections to Subpart K:

How are Tribes/Consortia recognized as having lead agency status?

Tribes/Consortia may be recognized as having lead agency status through funding or other arrangements with other agencies. To the extent resources are available, the Secretary will encourage and facilitate Federal, State, and local agencies to enter into agreements designating Tribes as lead agency for environmental review purposes.

7. *“Categorical Exclusion” Definition*

(For further background on this, see Committee Report [here](#) at pp. 28-34)

Revise Section 1000.1385 (Subpart K) to include the following:

Categorical exclusion means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

8. *Expand Alternate Administrative Appeal Options*

(For further background on this, see Committee Report [here](#) at pp. 37-40)

A. Delete Section 1000.2302 (Subpart R) (“What does ‘Title I-eligible programs’ mean in this subpart?”).

B. Revise Section 1000.2351 (Subpart R) to read as follow:

Section 1000.2351 *To Whom may a Tribe/Consortia Appeal a Decision Under § 1000.2345?*

(a) A Tribe/Consortium may elect to file a dispute under § 1000.2345 with either the bureau head/Assistant Secretary or IBIA in accordance with this subpart. However, the Tribe/Consortium may not avail itself of both paths for the same dispute.

(b) Bureau head/Assistant Secretary appeal. Unless the initial decision being appealed is one that was made by the bureau head (those appeals are forwarded to the appropriate Assistant Secretary—see § § 1000.2360(c) of this subpart), the bureau head will decide appeals relating to these pre-award matters, that include but are not limited to disputes regarding:

(i) Programs that are not PSFAs that the Secretary provides for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department within which the programs, functions, services, and activities have been performed;

(ii) Eligibility to participate in self-governance;

(iii) Decisions declining to provide requested information as addressed in Subpart H;

(iv) Allocations of program funds when a dispute arises between a Consortium and a withdrawing Tribe; and

(v) Inherently Federal functions and associated funding.

(c) IBIA appeal. The Tribe/Consortium may choose to forego the administrative appeal through the bureau or the Assistant Secretary, as described in the paragraph (b) of this section, and instead appeal directly to IBIA.