

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

CONSULTATION ON THE PROGRESS ACT (DOI TITLE IV AMENDMENTS)
Tribal Talking Points
(July 15 – August 22, 2024)

Solely on behalf of the Tribal representatives on the Negotiated Rulemaking Committee for the PROGRESS Act, we offer Tribal leaders the following proposed talking points in response to the Department of the Interior's proposed rule amending its self-governance regulations at 25 CFR Part 1000. Tribal leader comments in support of the Tribal position on these issues is critical because the new regulations are likely to be in place for decades.

- 1. To implement the PROGRESS Act and the intent of Congress, the Regulations should empower Tribes through liberal statutory interpretations by the Department that facilitates the inclusion of federal programs in Self-Governance and maximizes Federal Self-Governance Policy.**
 - Certain parts of the Proposed Rule reflect impermissibly narrow and limited readings of statute which is expressly foreclosed by the PROGRESS Act and applicable statutory interpretation rules.
 - The PROGRESS Act requires the liberal interpretation of its provisions, and the provisions of compacts and funding agreements, to benefit Tribes and the broader interpretation of federal law to facilitate including programs in funding agreements and implementing funding agreements.
 - The Department should refrain from adopting narrow and limited statutory interpretations and instead implement Congress's language in the PROGRESS Act to empower Tribes through the Regulations.

- 2. To streamline the negotiation phase, and the content of compacts and funding agreements, the Regulations should permit written Tribal attestations of compliance with Title IV in a compact or funding agreement.**
 - We disagree with the Department's interpretation in Subparts E and F that a compact or funding agreement must contain provisions based on certain statutory headings in the PROGRESS Act.
 - The Department should adopt the proposed Tribal language for Sections 1000.510(e), 1000.515, and 1000.610 to accept Tribal attestations to reflect the requirements of Title IV.

- 3. To establish transparency and the PROGRESS Act's requirement for the Department to negotiate in good faith, the Regulations should expressly acknowledge that inherent Federal functions are a legitimate topic during negotiations.**
 - We disagree with the Department's narrow interpretation in Subpart F of the Proposed Rule that inherent Federal function determinations are not a permissible discussion topic during negotiations.

- The Department should adopt the proposed Tribal language in Section 1000.695 to expressly allow these discussions during negotiations.

4. To promote uniform application of Title IV and the Regulations across all Department bureaus, the Regulations should set out criteria on how Tribal sovereignty impacts inherent Federal functions determinations by the Department.

- The Department should adopt the proposed Tribal language in Section 1000.845(a) which incorporates long-established agency guidance based on the Supreme Court's *Mazurie* decision.
- Clarify that exercising Tribal sovereignty is not considered an inherent Federal function is needed to promote uniformity within the Department.

5. To facilitate and maximize the self-governance policy across all Department bureaus, the Regulations should provide the same baseline for determining direct contract support costs for non-BIA programs as applies to BIA programs.

- We disagree with the Department's choice to not calculate direct contract support costs for non-BIA programs in the same manner as for any other ISDEAA agreement.
- We are concerned that the Department's language in Subpart G could be interpreted as requiring specific congressional appropriations as a pre-requisite to non-BIA agencies paying direct contract support costs.
- Substantive non-BIA Self-Governance agreements will continue to be rare as long as the Department fails to pay the associated contract support costs.
- The Department should adopt the proposed Tribal language in Section 1000.885 which addresses non-BIA contract support costs.

6. To empower Tribes and build needed infrastructure in Indian country, the Regulations should recognize that Tribes can make environmental determinations in the same manner as provided under Title V.

- We disagree with the Department's position that Tribes cannot make final environmental determinations because it is an inherent Federal function.
- The Department's position goes against the statutory language, intent, and overall spirit of the PROGRESS Act.
- The Department should adopt the proposed Tribal NEPA and in Subpart K which recognizes Tribal assumption to make environmental determinations, provides a process for Tribal status as lead agency or joint lead agency status under NEPA, and includes a definition of "categorical exclusion."

7. To improve the administration of the Department's self-governance policy, the Regulations should enhance flexibility for Tribal administrative appeal paths within DOI.

- The Interior Board of Indian Appeals (IBIA) system is overburdened and causes significant delays in resolving administrative appeals.
- The Department should adopt the proposed Tribal positions related to Sections 1000.2302 and 1000.2351 to expand the ability for Tribes to choose to pursue an administrative appeal of a pre-award dispute with a Department bureau head or Assistant Secretary as an alternate path to the IBIA.