Self-Governance PROGRESS Act Negotiated Rulemaking Committee Final Federal Report

Submitted to:

Assistant Secretary – Indian Affairs

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I. Introduction and Context

a. Overview

In December 2000, the Office of the Assistant Secretary—Indian Affairs (AS-IA), through its Office of Self-Governance (OSG), promulgated regulations at 25 CFR Part 1000 that implement Tribal Self-Governance, as authorized by Title IV of the Indian Self-Determination and Education Assistance Act. That rule was negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the U.S. Department of the Interior (DOI). The intended goal of Part 1000 "is to transfer to participating Tribes control of, funding for, and decision making concerning certain Federal programs." 65 FR 78688 (Dec. 15, 2000).

On October 21, 2020, the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes (PROGRESS) Act was signed into law. *See* Pub. L. No. 116-180. The PROGRESS Act amends subchapter I of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5301 et seq., which addresses Indian Self-Determination, and subchapter IV of the ISDEAA, which addresses DOI's Tribal Self-Governance Program.

The PROGRESS Act called for a negotiated rulemaking committee (Committee) to be established under 5 U.S.C. § 565, with membership comprised only of representatives of Federal and Tribal governments, and OSG serving as the lead agency for the DOI.[1] The Secretary charged the Committee with developing proposed regulations for the Secretary's implementation of the PROGRESS Act's provisions regarding DOI's Self-Governance Program. The PROGRESS Act authorized the Secretary to adapt negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian Tribes.

To fulfill the requirements for negotiated rulemaking and the Federal Advisory Committee Act, representatives reflect those currently participating in the Tribal Self-Governance Program and those that are not currently participating in, but are interested in, participating in the Tribal Self-Governance Program. In addition, Tribal representatives reflect a geographical balance in terms of location and size of the Tribe. Membership consists of only representatives of Federal and Tribal governments with OSG serving as the lead agency. This Committee met fifteen times to negotiate the proposed regulations. The Committee reached consensus, as reflected by votes documented in its meeting minutes (https://www.bia.gov/service/progress-act), on Subpart A (General Provisions); Subpart B (Selection of Additional Tribes for Participation in Tribal Self-Governance); Subpart C (Planning and Negotiation Grants for BIA Programs); Subpart D (Financial Assistance for Planning and Negotiations Activities for Non-BIA Bureau Programs); Subpart H (Negotiation Process); Subpart I (Final Offer); Subpart J (Waiver of Regulations); Subpart L (Federal Tort Claims); Subpart M (Reassumption); Subpart N (Retrocession); Subpart O (Trust Evaluation); Subpart P (Reports); Subpart Q (Operational Provisions); Subpart S (Conflicts of Interest); and Subpart T (Tribal Consultation Process). The Committee did not reach consensus on Subpart E (Compacts); Subpart F (Funding Agreements for BIA Programs); Subpart G (Funding Agreements for Non-BIA Programs); Subpart K (Construction); and Subpart

[1] As used herein, "Committee" means the committee of the whole that includes Tribal and Federal representatives.

R (Appeals). Section III highlights the Committee's deliberations on the proposed regulations. The proposed regulations may be read in full in **Appendix A.** A crosswalk to current regulatory subparts is included in **Appendix B.**

The United States Department of the Interior will request comment on this proposed rule to update the Department's regulations to implement Tribal Self-Governance. This proposed rule has been negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the U.S. Department of the Interior. The intended effect is to transfer to participating Tribes control of, funding for, and decision making concerning certain Federal programs, consistent with updates contained in the PROGRESS Act.[2]

The Department has operated the Tribal Self-Governance program since the Indian Self-Determination Act Amendments of 1988,[3] which authorized the Tribal Self-Governance Demonstration Project for a 5-year period and directed the Secretary to select up to 20 Tribes to participate. In 1991, there were 7 funding agreements under the project, and this expanded to 17 in 1992. The number of self-governance agreements increased to 19 in 1993 and 28 in 1994. The 28 funding agreements in 1994 represented participation in self-governance by 95 Tribes, as some were members of consortiums. In 2000, there were 75 funding agreements with BIA covering 216 federally recognized Tribes. This number has grown exponentially for 2024, with 52 percent or 295 of the 574 Federally recognized Tribes participating across 141 funding agreements authorized by Title IV of the ISDEAA. In 1999, there were three funding agreements between Self-Governance Tribes and non-BIA bureaus and this number has expanded to 43 in 2023.

b. Report Organization

This Report is organized first to provide the Committee background, then statements from the Tribal and Federal representatives to the Committee regarding the proposed rule. The Report then continues with highlights of each of the Committee's proposed regulatory subparts. For each proposed subpart containing non-consensus proposed regulatory language, the Report provides discussion from the Tribal and Federal representatives concerning each area of disagreement. It ends with concerns and recommendations apart from, yet related to, the Committee's charge.

II. Committee Background

a. Authority

The Secretary established the PROGRESS Act Negotiated Rulemaking Committee (Committee) under the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes (PROGRESS) Act.[4] The Federal Advisory Committee Act (FACA) applies to and regulates the Committee.[5]

[2] Pub. L. No. 116-180.
[3] Pub. L. No. 100–472.
[4] 25 U.S.C. § 5373.
[5] 5 U.S.C. App'x 2.

b. Scope and Objectives

The Secretary chartered the Committee to develop proposed regulations for the Secretary's implementation of the PROGRESS Act's provisions regarding the DOI's Self-Governance Program. The proposal focuses on the regulations found at 25 C.F.R. Part 1000, Annual Funding Agreements Under the Tribal Self-Government Act Amendments to the Indian Self-Determination and Education Act. The Committee acted solely in an advisory capacity.

The final regulations will revise those regulations at 25 CFR Part 1000 to amend, delete, and add provisions as appropriate to implement the PROGRESS Act.

c. Formation and Operation

On October 21, 2020, the PROGRESS Act was signed into law.[6]

On February 1, 2021, the AS-IA published in the Federal Register a notice of intent[7] requesting nominations for a negotiated rulemaking Committee to negotiate and advise the Secretary on a proposed rule to implement the PROGRESS Act. The AS-IA requested comments and nominations by March 3, 2021.

On November 23, 2021, the AS-IA published in the Federal Register a notice of proposed membership, notification of intent to establish the committee, and request for nominations.[8]

On May 11, 2022, the Secretary signed the Committee's charter.

On May 19, 2022, the AS-IA published the final Notice of Establishment of the Committee.[9]

Thereafter, the Committee met to develop operating protocols, establish subcommittees, and phases to prioritize the work on various subparts in August, October, November, and December of 2022. In early 2023, the Committee met to approve the various proposed subparts in February, March, and April. Multiple days of subcommittee work occurred between each of these noticed meetings, and the Committee wishes to recognize the significant effort that its membership put toward the proposed regulations.

On April 20, 2023, the expiration of authority provision at Section 413 of Public Law 116-180 came into effect, leaving the Committee with no authority to continue the negotiated rulemaking.[10] On September 30, 2023, Congress extended the expiration of authority provision to expire on December 21, 2024.[11]

Once Congress restored its authority, the Committee reconvened to continue the work to approve the remaining proposed subparts in November and December of 2023. In 2024, the Committee met in January, twice in February, March, and April to conclude the approval of the proposed

[6] Pub. L. No. 116–180 (Oct 21, 2020).
[7] 86 FR 7,656 (Feb. 1, 2021).
[8] 86 FR 66,491 (Nov. 23, 2021).
[9] 87 FR 30,256 (May 19, 2022).
[10] Pub. L. No. 116-180 (Oct 21, 2020) at § 101, 134 Stat. 857, 877.
[11] Pub. L. No. 118-15 (Sept. 30, 2023) at § 2102, 137 Stat. 71, 82.

regulatory text. Multiple days of subcommittee work occurred between each of these noticed meetings.

Each meeting was open to the public and the public had the opportunity to provide comment. The Committee has received no public comments through its meetings.

d. Committee Membership

Members of the Committee included seven primary Tribal representatives, seven alternate Tribal representatives, six primary Federal representatives, and six alternate Federal representatives. The Secretary appointed Tribal representatives to the Committee upon nomination by one or more Tribal governments. Federal members of the Committee included representatives from the OSG, the Office of the Solicitor, the Bureau of Reclamation, the Bureau of Land Management, the Fish and Wildlife Service, the National Park Service, and the Office of the Assistant Secretary – Indian Affairs. The committee membership may be read in full in **Appendix C.**

The Committee established three subcommittees including:

a) Protocols - This subcommittee was assigned to draft the Committee operating protocols and comprised of six Federal members and eight Tribal members.
b) Leadership Team - This subcommittee was comprised of two Federal and two Tribal members and convened meetings as necessary for administrative and logistical coordination.
c) Drafting Subcommittee - This subcommittee was comprised of fourteen Federal and eighteen Tribal members and was tasked with the drafting of the regulations. This subcommittee also invited technical or subject matter experts during specific areas of discussion. Additionally, there were multiple separate meetings in preparation for the joint discussions. Recommendations from the Drafting Subcommittee were presented to the full Committee for discussion and consensus.

The AS-IA undertook this effort with the assistance of the Office of Regulatory Affairs and Collaborative Action in Indian Affairs and the Office of Collaborative Action and Dispute Resolution in the Office of the Secretary, which provided consensus building facilitation support to the Committee.

e. Consensus Decision Making

The Committee operated by consensus, which is defined in the Negotiated Rulemaking Act[12] as unanimous concurrence of the primary Members, or in the absence of the primary, his or her alternate. Reaching consensus required all group members to educate each other about their important needs, interests, and concerns, and develop an integrative solution or agreement that addresses and satisfies both individual and group interests to the greatest extent possible.

[12] 5 U.S.C. § 562(2).

A consensus decision represents an outcome that all group members can support. However, at a minimum, a consensus agreement may be a compromise that all group members can accept, live with, and will not oppose.

f. Timeframe for Deliberations

The DOI has authority to issue these regulations only until December 21, 2024. In order for the Committee to meet this deadline, the Committee organized a drafting subcommittee tasked with developing proposals for the full Committee's consideration and decision making.

g. Approach to Negotiations

To facilitate the Committee's deliberation of draft regulations, the drafting subcommittee developed a draft framework of regulations based upon existing language from 25 CFR Part 1000. The Committee and subcommittee used the draft language as a starting point for deliberations and negotiations.

III. Recommendations Related to Draft Regulations

This section describes key aspects of the proposed regulations, including areas of consensus and areas that lacked consensus. Tribal positions provided herein contain no revisions from federal members of the Committee.

a. Overall Position Statements

i. Tribal Position

The proposed regulations covered in this Report are, with few exceptions, the product of consensus between Tribal and Federal representatives. They will, if promulgated, implement the Progress Act in a manner that will advance Tribal self-governance and streamline the Department's procedures and processes. Of the twenty proposed regulatory subparts, only five contain non-consensus regulatory provisions. And of the approximately 350 proposed regulatory provisions, there are only around one dozen non-consensus provisions. The few areas of disagreement are, however, of critical importance to Tribes.

The primary area of disagreement between the Tribal and Federal representatives to the Committee concerns how the Department should interpret the PROGRESS Act and the ISDEAA, including ambiguous statutory provisions. In several proposed regulatory provisions, and through rejection of provisions proposed by the Tribal representatives, the Federal representatives advanced narrow and limited readings of the PROGRESS Act and the ISDEAA that are foreclosed by the statutory text and rules in place for interpreting these statutes.

It is a well-established canon of statutory construction that statutes enacted for the benefit of Indians are to be interpreted liberally, with ambiguous provisions interpreted in favor of the Indians. See *Cnty. Of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 269 (1992) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *Ysleta del Sur Pueblo* v. *Texas*, 596 U.S. 685, 703 n. 3 (2022) (Indian canon is "long established by our precedents").

Congress, by statute in 1994, required that the Indian canon be written into every self-determination contract. See 25 U.S.C. § 5329(c) (model agreement § 1(a)(2)). Each model contract since 1994 states: "[e]ach provision of [the ISDEAA] … and each provision of this Contract shall be liberally construed for the benefit of the [Indian] contractor." Tribes/Consortia participating in Title IV's Tribal Self-Governance Program have incorporated the section 108 model agreement contract clause provision into Self-Governance compacts and funding agreements.

With enactment of the PROGRESS Act in 2020, Congress amended the ISDEAA, and applied this liberal-construction statutory directive to all titles of the ISDEAA, including Title IV. See 25 U.S.C. § 5366(i) ("Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this subchapter [Title IV] and each provision of a compact or funding agreement *shall be liberally construed for the benefit of the Indian Tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian Tribe."* See 25 U.S.C. § 5321(g) ("Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this *chapter* [ISDEAA] and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.").

Congress therefore made the Indian canon a statutory and contractual requirement, in addition to being a background principle for the interpretation of all federal laws enacted for the benefit of Indians because of their status as Indians. To the extent that any provision of the Title I or Title IV, or the PROGRESS Act amending these titles, is ambiguous, the Indian canon of statutory construction requires that the provision be interpreted liberally, and that it is construed for the benefit of the Tribes/Consortia participating in self-governance and resolved in their favor.

Respect for this congressional instruction is particularly appropriate here, in the Department rulemaking to implement the PROGRESS Act, in light of Congress's primary authority over Indian affairs, *see Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 800-01 (2014), and Congress's nearly half-century focus on Indian Self-Determination. *See Olka. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 510 (1991).

In addition, the PROGRESS Act amended Title IV to require the Secretary to interpret all statutory provisions in a manner that facilitates the inclusions of programs, functions, services, and activities, or portions thereof (PSFAs) in Title IV funding agreement and facilitate the implementation of such agreements. See 25 U.S.C. § 5369. This has been the long-standing Secretarial policy regarding the Tribal Self-Governance Program since the Part 1000 rule first took effect in December 2000. *See* 25 C.F.R. § 1000(c)(5) (Secretarial self-governance policy). Such an interpretation is also consistent with the well-established canon of statutory construction noted above.

Section 413(d)(2) of ISDEAA, as amended by the PROGRESS Act, reads: "Subject to section 101(a) of the PROGRESS for Indian Tribes Act and except with respect to programs described under section 5363(c) of this title [section 403(c) programs], this subchapter [Title IV] *shall*

supersede any conflicting provision of law (including any conflicting regulations)." See 25 U.S.C. § 5373(d)(2) (emphasis added).

Despite these clear declarations by Congress making the ISDEAA the paramount expression of Congressional intent, the Federal representatives to the Committee took several positions that represent a narrow reading of ISDEAA and the PROGRESS Act, and that undermine the broad grant of authority to Tribes/Consortia to administer programs eligible for inclusion in a compact or funding agreement.

For example, with respect to Subpart K (Construction), Federal representatives advanced a narrow reading of 25 U.S.C. § 5367(b) that will, if allowed to stand, undermine the purpose and intent of Congress in amending Title IV's construction provisions as amended by the PROGRESS Act. 25 U.S.C. § 5367(b) allows a Tribe, if it follows certain procedures, to designate a Tribal official to "assume the status of a responsible Federal official" for purposes of the National Environmental Policy Act (NEPA). Because making environmental determinations is an important task of a "responsible Federal official" under NEPA, and there is nothing in ISDEAA, the PROGRESS Act, or any other provision of law suggesting otherwise, the Tribal representatives assumed that a properly designated Tribal official would be empowered to make environmental determinations and proposed several regulatory provisions facilitating and clarifying the processes for such an official to do so. Federal officials took the position that making environmental determinations is an "inherent Federal function" that may not legally be delegated to an Indian Tribe" (25 U.S.C. § 5361), despite the fact that the Federal government has been delegating this function to Tribes for years pursuant to Title V of the ISDEAA. See 25 U.S.C. § 5389(a). This narrow reading of U.S.C. § 5367(b) is foreclosed by the plain language of the statute and the Indian canons of statutory construction, and would leave 25 U.S.C. § 5367(b) with little, if any, purpose.

There was disagreement between the Tribal and Federal representatives regarding negotiations about inherent Federal functions. Federal representatives took a narrow view of the topics subject to negotiations; insisting that the identification of inherent Federal functions is not a topic of negotiations, even though (a) the long-standing practice of the Department is to negotiate with Tribes and Consortia concerning whether particular functions are inherently Federal, (b) the Federal stance introduces inconsistency between different subparts in the proposed rule, and (c) nothing in ISDEAA as amended by the Progress Act (or any other provision of law) suggests that the identification of an inherent Federal function is not a topic for negotiation. In fact, 25 U.S.C. § 5363 (a), (b), and (m)(2)(B) expressly require the Secretary to negotiate which functions are included in a funding agreement.

Federal representatives advanced a narrow and overly literal reading of 25 U.S.C. § 5365(a)'s requirement that an "Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of [Title IV]." Whereas Tribal representatives proposed that this requirement could be met with language in either a compact and funding agreement that includes a general attestation that, "in implementing the agreement, the Tribe will comply with all requirements of Title IV", Federal representatives insisted on Tribes including in the compact or funding agreement a laundry list of provisions mirroring the statutory sections.

The Department has staked out an impermissibly narrow view of the manner of calculation of pre-award, start-up and direct contract support costs for funding agreements with non-BIA bureaus in Subpart G. With regard to non-BIA programs, Federal representatives also would not agree to a Tribal proposal to clarify the criteria for determining whether a function is "inherently Federal" using language from long-standing Department guidance that has been relied on by Tribes and the Agency for decades and is consistent with the Indian canons of construction.

And finally, the Department has taken an overly narrow position regarding the scope of decisions that may be administratively appealed to the bureau head/Assistant Secretary in lieu of an appeal to the IBIA. Both Federal and Tribal representatives are well acquainted with the challenges and delays associated with pursuing an appeal before the IBIA. Therefore, Tribal representatives proposed that *all* pre-award dispute decisions that fall within section 1000.2345 should be eligible to be decided by a bureau head/Assistant Secretary, in lieu of an appeal to the IBIA, if a Tribe/Consortium so chooses. However, Federal representatives have taken the position that any dispute which is considered a "Title I-eligible program" or "Title I-eligible PSFA" dispute can *only* be administratively appealed to the IBIA.

ii. Federal Position

Self-Governance at the Department has been an unqualified success, in spite of limited updates to the Department's governing regulations. The Department engaged in a negotiated rulemaking process and promulgated its initial regulations to implement Title IV of the ISDEAA in January 2001.[13] The Department has not updated those regulations since their promulgation. Section 413 of the PROGRESS Act[14] directed the Department to convene negotiated rulemaking to propose updates to these regulations. The Department is pleased to present the recommendations of the Committee in this report.

The PROGRESS Act amended the statutory implementation of a number of sections of Title IV, including adding a requirement that the Department negotiate compacts and funding agreements in good faith, adding a final offer process that mirrors language currently in Title V and providing more detail about permissible reasons for rejection of a final offer, clarifying use of prohibited terms, specifying the appeals process for a decision that a Tribe deems adverse, clarifying oversight, reaffirming authority for non-Bureau of Indian Affairs compacts, setting payment schedules, and adding a process by which a Tribe may withdraw a Tribal share of a program. The Committee has implemented Congress's guidance through the development of a proposed rule in response to the Secretary's recommendations.

By and large, the Committee's recommendations reflect a consensus proposal for updates to 25 C.F.R. Part 1000. The majority of subparts and subsections reflect consensus, namely an outcome that all parties can support. Consensus, where reached, was the product of give and take by both the Tribal and Federal sides. The federal members of the Committee wish to express

[13] 65 FR 78,688.
[14] 25 U.S.C. § 5373.

sincere gratitude to the Tribal Committee members for their diligent negotiation and thoughtful approach which enabled the Committee to arrive at a largely consensus proposal.

For those subparts where consensus was not reached, the Committee provides a more detailed discussion below. The detailed discussion includes position statements from both the Tribal Committee members and the Federal Committee members. The Federal Committee members decline to reiterate those concerns in this preliminary statement and direct the reader to the below position statements. To the extent necessary, the Federal team incorporates those positions by reference.

b. Subpart-by-Subpart Discussion

i. Subpart A: General Provisions

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart contains the authority, purpose and scope of the rule, and the Congressional and Secretarial policies that will guide the implementation of the ISDEAA, as amended by the PROGRESS Act, by the Secretary and the various bureaus of the Department. The subpart also defines terms used throughout the rule consistent with the PROGRESS Act.

Subpart A further clarifies the effect of Part 1000 on existing Tribal rights including Tribal sovereign immunity from suit, the United States' trust responsibility, a Tribe's choice to participate in self-governance, or the issuance of awards by other Departments or agencies to Tribes. Additionally, this subpart identifies the application of any agency circular, policy, manual, guidance or rule adopted by the DOI on self-governance Tribes/Consortia.

ii. Subpart B: Selection of Additional Tribes for Participation in Tribal Self-Governance

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart describes the steps a Tribe/Consortium must take to participate in Tribal self-governance and the selection process and eligibility criteria that the Secretary uses to decide that a Tribe/Consortium may participate. Under the Act, a Tribe/Consortium is eligible to participate in self-governance if it submits documentation to OSG demonstrating: (1) successful completion of a planning phase, (2) a request to participate in self-governance by a Tribal resolution and/or final official action, and (3) financial stability and financial management capability through evidence of having no uncorrected significant and material audit exceptions in the required annual audit of its self-determination or self-governance agreements with any Federal agency for

the three fiscal years preceding the date on which the Tribe/Consortium requests participation. The rule provides that OSG must select a Tribe/Consortium to participate in self-governance upon a determination that the Tribe/Consortium has provided the required documentation. OSG must notify a requesting Tribe/Consortium if it has been selected or does not have a complete request within 45 days of receiving a request to participate.

The OSG Director may select up to 50 eligible Tribes or consortia for negotiation. If there are more Tribes selected to negotiate in any given year, the rule provides that the first 50 Tribes/Consortia who apply and are determined to be eligible will have the option to participate.

The rule also stipulates that a Tribe/Consortium may be selected to negotiate a funding agreement for non-BIA programs that are otherwise available to Indian tribes without first negotiating a funding agreement for BIA programs. However, to negotiate for a non-BIA program under 25 U.S.C. § 5363(c) for which the Tribe/Consortium has only a geographic, cultural, or historical connection, the ISDEAA requires that the Tribe/Consortium must first have a funding agreement with the BIA under 25 U.S.C. § 5363(b)(1) or any non-BIA bureau under 25 U.S.C. § 5363(b)(2). (The term "programs" as used in the rule and in this Report refers to complete or partial programs, services, functions, or activities.)

Subpart B also describes what happens when a Tribe wishes to withdraw from a Consortium's funding agreement. In such instances, the withdrawing Tribe must notify the Consortium, appropriate DOI bureau, and OSG of its intent to withdraw 180 days before the effective date of the next funding agreement. Unless otherwise agreed to, the effective date of the withdrawal will be the earlier date of one year after the date of submission of the request, or when the current agreement expires.

In completing the withdrawal, the consortium's funding agreement must be reduced by that portion of funds attributable to the withdrawing Tribe on the same basis or methodology upon which the funds were included in the consortium's funding agreement. If such a basis or methodology does not exist, then the Tribe, Consortium, appropriate DOI bureau, and OSG must negotiate an appropriate amount.

iii. Subpart C: Planning and Negotiation Grants

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

Subpart C describes the criteria and procedures for awarding various self-governance negotiation and planning grants. These grants are discretionary and will be awarded by the OSG Director. The award amount and number of grants depends upon Congressional appropriations. If funding in any year is insufficient to meet total requests for grants and financial assistance, priority will be given first to negotiation grants and second to planning grants.

Negotiation grants are non-competitive. In order to receive a negotiation grant, a Tribe/Consortium must first be selected to join self-governance and then submit a letter affirming its readiness to negotiate and requesting a negotiation grant. This subpart also indicates that a Tribe/Consortium may also elect to negotiate for a self-governance agreement if selected without applying for or receiving a negotiation grant. Planning grants will be awarded to Tribes/Consortia requesting financial assistance in order to complete the planning phase requirement for joining self-governance.

iv. Subpart D: Financial Assistance for Planning and Negotiations Activities for Non-BIA Programs

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart describes the additional requirements and criteria applicable to receiving financial assistance for planning and negotiating non-BIA programs available to any Tribe/Consortium that:

(a) applied to participate in self-governance;
(b) has been selected to participate in self-governance; or
(c) has negotiated and entered into an existing funding agreement.

Subject to the availability of funds, this subpart requires the Secretary to publish a notice in the Federal Register that includes the number of available grants, application process, award criteria, and designated point-of-contact for each non-BIA bureau. This financial assistance will support information gathering, analysis, and planning activities that may involve consulting with appropriate non-BIA bureaus, and negotiation activities. This subpart also provides requirements for communicating award decisions to applying Tribes/Consortia.

v. Subpart E: Compacts

Status of Subpart

This subpart largely reflects a consensus proposal from the Committee. However, as described below, the Committee did not reach consensus regarding language in proposed sections 1000.51 and 1000.515.

Consensus Narrative

The Committee proposes to insert this new subpart to implement section 404 of Title IV, as amended, which requires the Secretary to enter into a written compact with each participating Tribe/Consortium. The previous version of Title IV included no such requirement and compacts were negotiated and executed at the option of the participating Tribe/Consortium.

The current rule at 25 CFR Part 1000 that became effective on January 16, 2001 ("current rule"), includes provisions addressing compacts at sections 1000.161 - 1000.165. The Committee proposes to amend and move those sections to this new Subpart E and to include additional sections. The new subpart is proposed to be inserted before the respective subparts for funding agreements because compacts are applicable to funding agreements both for BIA programs and for non-BIA programs.

The current rule also includes a model format for a compact at Appendix A. The Committee proposes to omit the model format for a compact and Appendix A from the amended rule. In lieu of a model format, compacts will be negotiated and executed in accordance with Title IV, as amended, and with this rule, as amended.

This subpart describes self-governance compacts and the minimum content requirements of a self-governance compact. Unlike a funding agreement, parts of a compact apply to all bureaus within the DOI rather than a single bureau. Therefore, a Tribe/Consortium needs only to negotiate and execute one self-governance compact to participate in self-governance.

This subpart also establishes a compact's effective term and addresses how a compact may be amended. Further, the subpart clarifies that a Tribe/Consortium which has executed a compact prior to the enactment of the PROGRESS Act has the option to either retain its existing compact, in whole or in part, to the extent that the provisions are not directly contrary to any express provisions of the Act or negotiate a new compact.

Tribal Narrative

One issue of disagreement encountered by the Tribal and Federal representatives concerns the minimum contents that must be included in a compact and funding agreement in order to reflect the requirements of Title IV as required under 25 U.S.C. § 5365(a). Section 5365(a) provides that "[a]n Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this subchapter." [*i.e.,* Subchapter IV – Tribal Self-Governance -Department of the Interior]. The Tribal and Federal representatives disagree on how the contents of compacts and funding agreements can satisfy this requirement. The Tribal position is that this statutory requirement can be satisfied through simplified Tribal assurances included in a compact and/or funding agreement that the Tribe/Consortium will comply with Title IV. Such Tribal assurances would reflect the requirements of Title IV in these agreements without burdening parties to negotiate lengthy documents which may add little additional substance beyond quoting statutory provisions in Title IV.

The Tribal position is that the language in sections 1000.510(e) and 1000.515 is excessive and not properly tailored to satisfying the requirement to reflect the requirements of Title IV under 25 U.S.C. § 5365(a). The identified topics in these regulatory sections correspond with general topics set out in 25 U.S.C. § 5365. These topics include, for example, Tribal assurances that it has procedures in place to address conflicts of interest (25 U.S.C. § 5365(b)), will apply applicable cost principles under OMB circulars in performing the Title IV compact and funding agreement (25 U.S.C. § 5365(c)), and will maintain a recordkeeping system and provide the

Secretary with reasonable access to the records to permit the Secretary to meet the requirements of 44 U.S.C. §§ 3101 - 3106 (25 U.S.C. § 5365(g)).

Tribal representatives disagree with the Federal representatives' interpretation of 25 U.S.C. § 5365(a) as it relates to the minimum requirements for a compact or funding agreement. The Federal negotiators insist on including language in sections 1000.510(e) and 1000.515 which generally requires either the compact or funding agreement to include language related to various headings listed in 25 U.S.C. § 5365(b-g). Not only does this interpretation clash with the plain language of 25 U.S.C. 5365(a), which refers to the "requirements of [Title IV]", not the "requirements of" 25 U.S.C. 5365(b-g); it reflects a basic failure to apply the Indian canons of construction to interpreting the ISDEAA as amended by the Progress Act.

Tribal representatives do not dispute that Tribes/Consortia are subject to Title IV or that a compact and funding agreement should include language that acknowledges the applicability of complying with Title IV. However, it would defeat the principles of Tribal self-governance to require Tribes and Consortia participating in Self-Governance to create lengthy compacts and funding agreements that repeat statutory provisions of the Act. Tribal representatives take the view that while 25 U.S.C. § 5365(a) requires a Tribe/Consortia to negotiate a compact and funding agreement consistent with the requirements of Title IV, as amended by the PROGRESS Act, neither the compact or the funding agreement need include terms and conditions addressing every statutory requirement of Title IV.

The Tribal position is that a Title IV compact or funding agreement can include language that satisfies 25 U.S.C. § 5365(a) which states that the Tribe/Consortium will carry out the compact or funding agreement "*in accordance with the requirements of Title IV*." The language in sections 1000.510(e) and 1000.515 should be replaced with language that requires either a compact and funding agreement to "*include a general attestation that, in implementing the agreement, the Tribe will comply with all requirements of Title IV*." This language would provide for a clear and simple agreement between the Tribe/Consortium that all requirements of Title IV would apply under the compact or funding agreement, without the need to include burdensome requirements about the inclusion of particular statutory language. In addition, the Tribal proposal would further the goals of Tribal self-governance by placing the parties on more equal negotiation footing, rather than including federally mandated provisions.

Federal Narrative

The federal position on sections 1000.510(e) and 1000.515 is based on the language of 25 U.S.C. § 5365(a) providing that "[a]n Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this subchapter." The Federal committee members read this statutory language to direct that the parties include in a compact or funding agreement each of the provisions reflecting the requirements of Title IV.

The federal position is that relevant provisions of the PROGRESS Act indicate that particular language or provisions must be included in a funding agreement or a Compact. For example, 25

U.S.C. § 5366(b)(1) directs that "[a] compact or funding agreement shall include provisions for the Secretary to reassume a program and associated funding if there is specific finding relating to that program..." As another example, 25 U.S.C. § 5363(e)(2) authorizes the parities to specify an effective date for retrocession to ". . . become effective on the date specified by the parties in the compact or funding agreement." The federal position is that the best way to fulfill these statutory requirements is to include provisions matching each of the headings set forth in 25 U.S.C. 5365.

The federal position is informed by experience when encountering a problem in the execution of a Compact. In that situation, the primary question that arises involves what the agreed upon terms of the Compact provide as to a particular outcome. For example, in a dispute about retrocession, the first area which the Department reviews is what does the Compact say about retrocession. The Department's experience is that creating a uniform set of terms across Compacts will best protect both parties' expectations and interests in the execution of a Compact. This also aligns with Departmental practice since implementation of the Tribal Self Governance Act and initial self-governance regulations.

The federal position contrasts with prior discussions about including a very brief description of the provision with a statutory citation, or a general attestation. The Committee could not agree upon either of these provisions. The initial federal position contemplated including model language in a model compact, which would have been available to Tribes in preparing to negotiate and execute a compact. However, the Committee ultimately agreed to remove the model compact, thereby removing this element of the federal position.

vi. Subpart F: Funding Agreements for BIA Programs

Status of Subpart

This subpart largely reflects a consensus proposal from the Committee. However, as described below, the Committee did not reach consensus regarding language in proposed § 1000.610(b).

Consensus Narrative

This subpart describes the components of a funding agreement for BIA programs. The current rule at 25 CFR Part 1000 includes "Subpart E – Annual Funding Agreements for Bureau of Indian Affairs Programs." The Committee proposes to amend the title of the subpart and move it within the rule. The title of the subpart is proposed to be amended to "Funding Agreements for BIA Programs" because Title IV now excludes the term "Annual Funding Agreements" and in its place, "Funding Agreements." The acronym "BIA" is proposed in lieu of "Bureau of Indian Affairs" because BIA is now proposed as a defined term within subpart A. The Committee proposes to relocate the subpart from Subpart E to become Subpart F because a new subpart for compacts is proposed to be inserted at Subpart E.

A funding agreement is a legally binding and mutually enforceable written agreement between a Tribe/Consortium and the Secretary. Funding agreements must include at a minimum, but are not limited to, specifying the programs transferred to the Tribe/Consortium, providing for the

Secretary to monitor the performance of trust functions administered by the Tribe/Consortium, providing the funding amount(s), providing a stable base budget, and specifying the funding agreement's effective date.

Parties to a funding agreement can mutually agree to include additional provisions and/or include and incorporate by reference additional documents such as funding tables or construction project agreements. Additionally, Tribes/Consortiums may elect to negotiate a funding agreement with a term that exceeds one year, subject to the availability of appropriations.

This subpart also provides that a Tribe/Consortium with a funding agreement executed before the enactment of the PROGRESS Act has the option to either retain that funding agreement, in whole or in part, to the extent that the provisions are not directly contrary to any express provisions of the Act or negotiate a new funding agreement.

The subpart establishes that a funding agreement shall remain in full force and effect following the end of its term until a subsequent funding agreement is executed. When a subsequent funding agreement is executed, its terms will be retroactive to the term of the preceding funding agreement for purposes of calculating the amount of funding for the Tribe/Consortium.

The subpart states that a Tribe/Consortium may include BIA-administered programs in its funding agreement regardless of the BIA agency or office performing the program. The Secretary must provide to the Tribe/Consortium:

> (a) Funds equal to what the Tribe/Consortium would have received under contracts and grants under Title I of Pub. L. 93-638 (25 U.S.C. § 5321, et seq.);
>
> (b) Any funds specifically or functionally related to providing services to the Tribe/Consortium by the Secretary; and
>
> (c) Any funds that are otherwise available to Indian tribes for which appropriations are made to other agencies other than the DOI.

Except for construction programs or projects governed by Subpart K, or where a statute contains specific limitations on the use of funds, a Tribe/Consortium may redesign or consolidate programs and reallocate funds in any manner the Tribe/Consortium deems to be in the best interest of the Indian community being served without the Secretary's approval except for programs described in 25 U.S.C. §§ 5363(b)(2) or (c), or that involves a request to waive a DOI regulation. However, a redesign or consolidation may not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable federal law.

In determining the funding amount available to a Tribe/Consortium, this subpart identifies funds that are used to carry out inherent Federal functions that cannot be included in a funding agreement. The subpart also establishes the process for determining the funding amount to carry out inherent Federal functions, and clarifies that the amount withheld to carry out inherent Federal functions can be negotiated between the Secretary and a Tribe/Consortium.

The subpart defines Tribal shares as the amount determined for that Tribe/Consortium that supports any program within BIA, BTFA, or the Office of the Assistant Secretary for Indian

Affairs, and are not required by the Secretary for the performance of an inherent Federal function. Tribal share amounts may be determined by either:

(a) A formula that has a reasonable basis in the function or service performed by the BIA office and is consistently applied to all Tribes served by the area and agency offices; or

(b) On a Tribe-by-Tribe basis, such as competitive grant awards or special project funding.

Funding amounts may be modified during the term of a funding agreement to adjust for certain Congressional actions, correct a mistake, or if there is mutual agreement to do so.

This subpart also defines stable base budgets as the amount of recurring funding to be transferred to the Tribe/Consortium for a period specified in the funding agreement. Stable base budgets are derived from:

(a) A Tribe/Consortium's Pub. L. 93-638 contract amounts;

(b) Negotiated amounts of agency, area, and central office funding;

(c) Other recurring funding;

(d) Special projects, if applicable;

(e) Programmatic shortfall;

(f) Tribal priority allocation increases and decreases;

(g) Pay costs and retirement cost adjustments; and

(h) Any other inflationary cost adjustments.

Stable base budgets do not include any non-recurring program funds, construction and wildland firefighting accounts, Congressional earmarks, or other funds specifically excluded by Congress.

A stable base budget is established at the request of the Tribe/Consortium and will be included in BIA's budget justification for the following year, subject to Congressional appropriation. Once stable base budgets are established, a Tribe/Consortium need not renegotiate these amounts unless it wants to. If the Tribe/Consortium wishes to renegotiate, it also would be required to renegotiate all funding included in the funding agreement on the same basis as all other Tribes and is eligible for funding amounts of new programs or available programs not previously included in the funding agreement on the same basis as other tribes. Stable base budgets must be adjusted for certain Congressional actions, to correct a mistake, or if there is mutual agreement.

Tribal Narrative

The Committee reaches consensus on almost all of Subpart F. However, for the reasons explained in the Tribal Narrative associated with Subpart E, the Tribal representatives did not agree to the inclusion of proposed § 1000.610(b) concerning language which "must be included

in either a compact or funding agreement. In parallel to the replacement of proposed § 1000.515, this language should be replaced by a provision that requires either a compact and funding agreement to"*include a general attestation that, in implementing the agreement, the Tribe will comply with all requirements of Title IV*."

There was disagreement between the Tribal and Federal representatives regarding negotiations about inherent Federal functions. Both Federal and Tribal representatives agree that the identification of a particular function as an inherent Federal function is a pre-award dispute that is appealable to either the Interior Board of Indian Appeals or the appropriate Bureau head/Assistant Secretary (covered in Subpart R – Appeals). And both Federal and Tribal representatives agree that that the amount of funding withheld to cover the cost of inherent Federal functions is subject to pre-award negotiations (covered in this Subpart). Tribal representatives proposed language in § 1000.695 to create consistency between Subparts R and F by clarifying, in Subpart F, that the identification of an inherent Federal function is a topic of negotiation. However, the Federal representatives refused to agree to this language. The only reasoning provided by the Federal representatives with regard to this proposed language was that, in the Federal view, the Tribes' proposal was not a conforming technical proposal.

First, the Federal stance on this issue is problematic because it reflects a narrow reading of ISDEAA as amended by the Progress Act that is contrary to the Indian canons of construction. 25 U.S.C. § 5363(a) confers broad authority on the Secretary to negotiate funding agreements with Tribes and Consortia, subject to "the trust responsibility of the Federal Government, treaty obligations, and the government-to-government relationship between Indian Tribes and the United States" and the requirements of 25 U.S.C. § 5363(b). Nothing in 25 U.S.C. § 5363(b), or any other provision of law, suggests that Tribes and the Secretary may not negotiate regarding the identification of inherent Federal functions during the pre-award phase. 25 U.S.C. § 5366(i) requires the Act be "liberally construed for the benefit of" Tribes and Consortia, and "any ambiguity shall be resolved in favor of the" Tribes. The Federal stance is directly contrary to this statutory requirement.

Second, the Federal stance conflicts with the Departments' longstanding practices, and represents a step backward from advancing self-governance principles. In the three decades of self-governance negotiations, it has been common for Federal negotiators of self-governance funding agreements to identify initial lists of inherent Federal functions that are overly broad and do not comport with the legal definition of inherent Federal functions. Tribal negotiators then counter with arguments regarding those issues, and the initial list may be pared down over the course of the negotiations. This process is negotiation. There is no basis for the Federal stance that the Rule cannot clarify that the identification of inherent Federal functions may be a topic of negotiation.

And finally, the Federal stance on this issue creates inconsistency within the proposed rule. Tribal and Federal representatives agree that Subpart R provides that a Tribe/Consortium may appeal disputes over inherent Federal functions and their associated costs. By definition, disputes subject to appeal can involve only those matters subject to negotiation. The nature, scope, and

cost of what either party considers to be an inherent Federal function is subject to negotiation because it affects the amount of funds available for transfer to the funding agreement.

Federal Narrative

The federal position on section 1000.610(b), for reasons explained in the Federal Narrative associated with Subpart E, is based on the language of 25 U.S.C. 5365(a) providing that "[a]n Indian Tribe and the Secretary shall include in any compact or funding agreement provisions that reflect the requirements of this subchapter." The Federal committee members read this statutory language to direct that the parties include in a compact or funding agreement each of the provisions reflecting the requirements of Title IV. This position is informed by the Department's experience when encountering a problem in the execution of a funding agreement. In that situation, the primary question that arises involves what the agreed upon terms of a funding agreement provide as to a particular outcome. For example, in a dispute about reassumption, the first area the Department reviews is what does the funding agreement say about reassumption. The Department's experience is that creating a uniform set of terms across funding agreements will best protect both parties' expectations and interests in the execution of a funding agreement. This also aligns with Departmental practice since implementation of the Tribal Self Governance Act and initial self-governance regulations.

vii. Subpart G: Funding Agreements for Non-BIA Programs

Status of Subpart

This subpart largely reflects a consensus proposal from the Committee. However, as described below, the Committee did not reach consensus regarding language in proposed § 1000.845(a) and § 1000.885(b)(1)(iii).

Consensus Narrative

This subpart describes program eligibility, funding for, and terms and conditions relating to Self-Governance funding agreements covering non-BIA programs that can help further Secretarial co-stewardship objectives as set forth in Joint Secretarial Order No. 3403.

Tribal Narrative

One of the most difficult issues facing both Tribal and Federal negotiators of non-BIA Self-Governance agreements is the issue of what functions may be considered "inherently Federal" for purposes of 25 U.S.C. § 5363(k) and may therefore not be contracted to Tribes. Providing as much guidance as feasible in this area would both aid negotiators and further Self-Governance objectives. For this reason, the view of the Tribal representatives is that the Secretary should revise Section 1000.845(a) to reflect long-standing Solicitor memorandum guidance which rests on the even longer-standing holding of the U.S. Supreme Court opinion in *U.S. v Mazurie*, 419 U.S. 544 (1975).

Tribal representatives proposed to include a single sentence from Interior Solicitor guidance that has been in place for close to 30 years. Those parts of the proposed sentence that are not verbatim from the Solicitor memo are substantively identical to the statement from the memo.

The Tribally proposed sentence would state that "[w]hen 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." This sentence is substantively identical to that found on page 12 of the Memorandum from Solicitor John Leshy titled "Inherently Federal Functions under the Tribal Self-Governance Act", dated May 17, 1996.[15] The fact that this continues to be the official Departmental guidance from the Solicitor's Office for almost 30 years, and the fact that the guidance rests on the foundation of the Supreme Court's 1975 decision in *U.S. v. Mazurie*, led Tribal representatives to believe that inclusion of the sentence would not be controversial for the Secretary or the Solicitor's Office.

Federal representatives did not contest the accuracy of the Tribal representatives' proposed sentence, nor did they express a desire to wordsmith the sentence to address any concerns they may have. The Department indicated that it was unwilling to include the sentence in the regulation text because Solicitor opinions and memos may be revised or withdrawn at any point. Tribal representatives do not dispute this point, but they do not believe the sentence in question states a proposition that would or should be withdrawn or revised by the Solicitor's Office. The Tribal representatives are deeply concerned by any implication that the Department might seek to retreat from this important language in future guidance. The Tribal representatives are also concerned about the Department's reluctance to transparently embrace this fundamental Self-Governance concept for the benefit of both Tribal and Federal negotiators of future Title IV agreements.

The Tribal representatives' proposed text for Section 1000.845(a) is as follows:

> **§ 1000.845 Are there any non-BIA programs that may not be included in a funding agreement?**
>
> Yes, section 403(k) of the Act excludes from a non-BIA funding agreement:
>
> (a) Inherently Federal Functions in accordance with sections 401(6) and 403(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;

Another difficult issue facing Tribal and Federal negotiators of non-BIA Self-Governance agreements is the issue of contract support costs. In recent years, the Secretary and many other Department officials have extensively promoted co-stewardship and co-management arrangements with Tribal governments. Tribal representatives have pointed out in these

[15] The sentence from the Solicitor's May 17, 1996 memo reads as follows: "The more a delegated function relates to tribal sovereignty over members or territory, the more likely it is that the inherently Federal exception of section 403(k) does not apply." This passage follows discussion of the Supreme Court's 1975 *Mazurie* decision.

negotiated rulemaking discussions that providing contract support costs is integral to achieving those Secretarial objectives. There is extensive congressional legislative history regarding the need for contract support costs within the context of the ISDEAA. That rationale is no less applicable to Self-Governance contracts with non-BIA bureaus.

Tribal representatives believe that Self-Governance agreements with non-BIA agencies can be effective tools available to the Secretary to further her stated co-management and co-stewardship objectives. They also believe that non-BIA Self-Governance agreements will continue to be rare as long as the Department fails to pay Tribes necessary contract support costs associated with administration of the PSFAs that are transferred in these agreements.

If the Department is serious about promoting co-stewardship and co-management agreements with Tribes in the self-governance context, it must acknowledge and directly address the need to fully fund contract support costs for non-BIA Self-Governance agreements. For the past thirty years, the Department has taken the position that, because non-BIA agencies do not have specific funding allocated to pay for contract support costs of Self-Governance agreements, Tribes must either pay for these costs themselves, or pay for them by deducting from transferred program funds. This approach, which is inconsistent with the statute, has stifled tribal interest in taking over non-BIA programs and resulted in very few non-BIA Self-Governance agreements being negotiated that go beyond specific project performance agreements. Tribal representatives believe that this flawed approach must change and the Department must assume the full responsibility to fund all necessary contract support costs for non-BIA agreements.

Tribal representatives initially requested that the new regulations clarify that the Department will provide all necessary contract support costs, as calculated under Section 106(a) of the ISDEAA, for all Self-Governance agreements entered into by non-BIA Agencies. Such a regulatory commitment would create predictability, transparency, and the necessary financial footing for increasing the abysmally low level of non-BIA Self-Governance agreements. The Federal representatives did not agree to such a commitment in these regulations.

As a compromise, the Committee proposes to keep the existing regulatory language requiring that agreements with non-BIA agencies under 25 U.S.C. § 5363(c) include funding for allowable indirect costs, while separately addressing direct contract support costs. In addition though, Tribal representatives proposed language that would make it clear to Tribal and Federal negotiators that the baseline for determining such direct contract support costs should be the same as for any other ISDEAA agreement, as provided for in the statutory text found in Section 106(a) of the ISDEAA. Federal representatives ultimately would not agree to the Tribally-proposed language and, instead, proposed language that referred to funding direct contract support costs in an amount as negotiated by the Secretary and Tribe/Consortium or "upon appropriations of such funds by Congress."

The Tribes do not support including language that could be interpreted as tying payment of direct contract support costs to limited Congressional appropriations. In support of their position, the Tribal representatives pointed out that the Department has in the past paid contract support costs for non-BIA Self-Governance agreements even without specific Congressional appropriations. In

recognition of this, and in order to help provide transparency, predictability, and clarity to Tribal and Federal negotiators, the Tribally proposed text for Section 1000.885(b)(1)(iii) is as follows:

> **§ 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. (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.

Federal Narrative

The federal position on Section 1000.845(a) is that particular quotations taken out of context from legal guidance issued by the Department's Solicitor to bureaus and offices should not be codified in regulation. Furthermore, creating an administrative process by which an applicant Tribe asks a bureau or office of the Department to opine on the Tribe's sovereignty, and attendant obligation under the Administrative Procedure Act, could unintentionally create roadblocks or limitations upon the Tribe's sovereignty in a manner that the Department cannot endorse.

The ISDEAA authorizes federal agencies and Tribes to enter into self-governance compacts and funding agreements for activities so long as tribes do not assume "functions that are inherently federal." 25 U.S.C. 5363(k). ISDEAA defines that term as "a Federal function that cannot be legally delegated to a tribe." 25 U.S.C. § 5361(6). In the act's legislative history, Congress explained that inherently federal functions are "federal responsibilities vested by the Congress in the Secretary which are determined by the courts not to be delegable under the constitution." 140 Cong. Rec. S.14678-79 (daily ed. Oct. 7, 1994).

As the Tribal narrative articulates, the Department has guidance memorialized in a May 17, 1996 Solicitor's Memorandum that any determination about the "inherently federal restriction can only be applied on a case-by-case basis." The Department has re-affirmed this position in a November 2022 Report on authorities that can support Tribal stewardship and co-stewardship. The federal position is that the Solicitor's Memorandum provides a framework for bureaus and offices of the Department to utilize when making a determination. The federal position is that particular phrases of that framework should not be codified in regulation in isolation.

Furthermore, the Department has hesitation about creating a regulatory process that could, in practice, ask the Department to take a position on whether a "delegated PSFA relates to tribal

sovereignty." As a matter of administrative law, this process could create unintended consequences or roadblocks to Tribes exercising their sovereignty by subjecting that potential exercise to a federal determination. The Department does not wish to create an administrative process that might result in an outcome detrimental to Tribal sovereignty.

Finally, the Department notes that provision of Contract Support Costs is subject to Congressional appropriations. While individual bureaus and offices may support providing costs, as discussed in the Tribal narrative, the Department is unable to reallocate funds to provide those costs without Congressional authorization.

viii. Subpart H: Negotiation Process

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

The current rule at 25 CFR Part 1000 includes "Subpart G – Negotiation Process for Annual Funding Agreements." The Committee proposes to amend the title of the subpart and move it within the rule. The subpart title is proposed to be amended to "Negotiation Process" because the amended subpart addresses the process for negotiating compacts and funding agreements. The location of the subpart within the rule is proposed to be moved from Subpart G to become Subpart H because a new subpart for compacts is proposed to be inserted at Subpart E.

Sections 1000.161 - 1000.165 of the current rule address the negotiation of compacts and are proposed to be amended and moved to the new Subpart E.

This subpart establishes the process and timelines for negotiating a self-governance compact with the Secretary and a funding agreement with any bureau. Under this subpart, the negotiation process consists of two phases, an information phase and a negotiation phase.

In the information phase, any Tribe/Consortium that has been selected to participate in the self-governance program may submit a written request clearly identified as a "Request to Initiate the Information Phase," which notifies the Secretary of a Tribe/Consortium's interest in negotiating for a program(s) and requesting information about the program(s). Although this phase is not mandatory, it is expected to facilitate successful negotiations by providing for a timely exchange of information on the requested programs. The subpart establishes the information a Tribe/Consortium is encouraged to include in its Request to Initiate the Information Phase and the steps a bureau must take after receiving a request.

The negotiation phase establishes detailed timelines and procedures for conducting negotiations with Tribes that have been selected into the self-governance program, including the minimum issues that must be addressed at negotiation meetings. A Tribe/Consortium initiates this phase by submitting a Request to Initiate the Negotiation Phase. This subpart also establishes the required response that the Secretary must provide a Tribe/Consortium after receipt of a Request to Initiate the Negotiation Phase, including identifying the lead federal negotiator. Further, this subpart

establishes the process for finalizing and executing a compact and/or funding agreement when the parties are in agreement on such terms and conditions following the completion of negotiations.

This subpart also establishes rules for the negotiation process for subsequent funding agreements. A subsequent funding agreement is a funding agreement negotiated with a particular bureau after an existing agreement with that bureau. The process for negotiating a subsequent agreement is the same as the process provided in this subpart for funding agreements. The Committee expects, however, that subsequent funding agreements will build upon the prior funding agreements, resulting in an expedited and simplified negotiation process.

ix. Subpart I: Final Offer

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

The Committee proposes to insert this new subpart to implement section 406(c) of Title IV, as amended by the PROGRESS Act, 25 U.S.C. § 5366(c), that prescribes the process to be followed if the Secretary and the participating Tribe/Consortium are unable to come to agreement, in whole or in part, on the terms of a compact or funding agreement during negotiations. The previous version of Title IV included no such provisions, nor did the previous rule.

The new subpart is proposed to be inserted at this location to immediately follow the proposed amended subpart for the negotiation process. Doing so allows the reader to move sequentially from the negotiation process to determine options for next steps if those negotiation efforts do not result in agreement.

This subpart explains the final offer process provided by the Act for resolving disputes when the Secretary and a Tribe/Consortium are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels) during a negotiation. Under this subpart a Tribe/Consortium may submit a final offer to resolve these disputes. A final offer must be emailed to GROUPADDRESS@ois.gov [note: this is placeholder e-mail address] or mailed to the Director at OSG's headquarters. A final offer under this subpart must contain a description of the disagreement, the Tribe/Consortium's final proposal to resolve the disagreement (including any proposed terms for a compact, funding agreement, or amendment), and the name and contact information for the Tribe's/Consortium's authorized official.

In accordance with 25 U.S.C. § 5366(c)(6), the Secretary may reject all or part of a final offer for one of six specified reasons. If the Secretary does not act on a final offer within 60 days, the final offer is accepted automatically by operation of law for any compact or funding agreement except as to its application to a program described under section 403(c) of the Act. Final offers with respect to any program described under section 403(c) of the Act that the Secretary does not act on within 60 days are rejected automatically by operation of law. This subpart also addresses

what happens if the Secretary rejects all or part of a final offer including provision of technical assistance to overcome a rejection, the ability to appeal a rejection, and the portions of a final offer not in dispute taking effect.

x. Subpart J: Waiver of Regulations

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart implements 25 U.S.C. § 5363(i)(2)(A) that authorizes the Secretary to waive all DOI regulations governing programs included in a funding agreement, as identified by the Tribe/Consortium.

Subpart J also provides timelines, explains how a Tribe/Consortium applies for a waiver, the basis for granting or denying a waiver request, the documentation requirements for a decision, and establishes a process for resubmittal of a Tribe's/Consortium's request in the event of the Secretary's denial of a waiver request.

The basis for the Secretary's denial of a waiver request must be predicated on a prohibition of federal law.

xi. Subpart K: Construction

Status of Subpart

This subpart largely reflects a consensus proposal from the Committee. However, as described below, Tribal representatives propose to include in the regulation a definition of "categorical exclusion." Tribal representatives also proposed five additional regulatory provisions related to a Tribe/Consortium's responsibilities if it elects to assume some Federal responsibilities under NEPA, as well as one regulatory provision concerning the recognition of a Tribe/Consortium as having lead agency status for environmental determinations relating to a construction project or program performed by a Tribe/Consortium under this subpart. Federal representatives did not agree to these proposals.

Consensus Narrative

Subpart K applies to all construction programs and projects, both BIA and non-BIA. The subpart specifies which construction program activities are subject to Subpart K, such as design, construction management services, actual construction; and which are not, such as planning services, operation and maintenance activities, and certain construction programs that cost less than $100,000. All provisions of the Part 1000 rule apply to Subpart K except where such provisions are inconsistent; in such case the regulatory provisions of Subpart K will govern.

The subpart specifies the roles and responsibilities of the Tribe/Consortium and the Secretary in construction programs, including environmental determinations, performance, changes, monitoring, inspections, and reassumption. The subpart details the process by which a Tribe/Consortium, at its election and with the approval of the Secretary, designates a certifying Tribal officer to represent the Tribe/Consortium and accepts the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer in order for the certifying Tribal officer to assume the status of a responsible Federal official under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and related provisions of other laws and regulations.

Federal Acquisition Regulations provisions are specifically not incorporated into these regulations; however, they may be negotiated by the parties in the funding agreement. Also, construction project agreements, made part of a funding agreement, must address applicable federal laws, program statutes, and regulations. In addition to requirements for all funding agreements referenced in Subpart F, other provisions are added for construction project agreements and programs and funding agreements that include a construction project or program to implement the requirements of the PROGRESS Act, including health and safety standards, brief progress reports, financial reports, and suspension of work when appropriate. Building codes appropriate for the project must be used and the federal agency must notify the Tribe when federal standards are appropriate for any project.

Lastly, Subpart K provides that the Secretary may accept funds from other departments for construction projects or programs, subject to an interagency agreement between the Secretary, with Tribal concurrence.

Tribal Narrative

The Committee was unable to achieve consensus regarding several provisions within Subpart K (Construction) because of fundamental disagreements regarding whether certain responsibilities pursuant to the National Environmental Policy Act of 1969 (NEPA) and related statutes are "inherent Federal functions."

25 U.S.C. § 5367(b) provides that, "subject to the agreement of the Secretary," a Tribe or Consortium may "elect to assume some Federal responsibilities under" NEPA by (a) designating a Tribal official to "assume the status of a responsible Federal official" for purposes of NEPA and (b) issuing a limited waiver of sovereign immunity for the purposes of "enforcing the responsibilities" of that official. Because making environmental determinations, such as whether to approve NEPA documents, including categorical exclusions (CEs), environmental assessments (EAs), and environmental impact statements (EISs) is one of the responsibilities of a Federal official under NEPA, and because Tribal officials have been issuing such decisions for years under similar language in Title V, the Tribal representatives proposed several regulatory provisions to clarify the rights and responsibilities of a Tribe or Consortium that elects to assume Federal responsibilities pursuant to 25 U.S.C. § 5367(b). However, Federal negotiators take the position that—despite this statutory language— a Tribal official who has "assume[d] the status

of a responsible Federal official" would be prohibited from issuing final decisions because doing so is an "inherent Federal function." Accordingly, Federal representatives refused to agree to the inclusion of several regulatory provisions proposed by the Tribal representatives.

The Federal position on this issue is problematic because it is contrary to the plain language of the statute, incompatible with the statutory mandate that Title IV as amended by the Progress Act "shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe," and undermines the purposes of the Progress Act's amendments to the Title IV construction provisions.

As a starting matter, Congress defined the term "inherent Federal function" to mean "a Federal function that may not legally be delegated to an Indian Tribe." 25 U.S.C. § 5361. Final determinations under NEPA cannot fall into this category because the federal government has been delegating this responsibility to Tribes and Consortia for years under Title V of ISDEAA (Indian Health Service Self-Governance) (see 25 U.S.C. § 5389(a)). It makes no sense for a function to be delegable under one Title and inherently "Federal" for the purposes of a different Title of the same statute. Federal representatives also did not provide any reasoning as to how the Federal government has been delegating the authority to make decisions on NEPA documents for years if that authority "may not legally be delegated to an Indian Tribe." Tribal representatives also pointed out that the PROGRESS Act amended the term "construction program; construction project" to expressly include "environmental determination." 25 U.S.C. § 5361(2).

Nor is there any question that "status of a responsible Federal official" includes the authority to make the determinations at issue. The Department defines the term "Responsible Official" to mean "the bureau employee who is delegated the authority *to make* and implement *a decision* on a proposed action and is responsible for ensuring compliance with NEPA." 40 C.F.R. § 46.30 (definition of "Responsible Official") (emphasis added).

The Federal position during negotiated rulemaking discussions appeared to rest almost entirely upon the fact that the relevant Title V statute (25 U.S.C. § 5389(a)) authorizes Tribes to carry out construction projects "if they elect to assume *all* Federal responsibilities under the National Environmental Policy Act" (emphasis added), whereas Title IV (at 25 U.S.C. § 5367(b)), as amended by the PROGRESS Act, authorizes Tribes to carry out construction projects when such Tribes, "subject to the agreement of the Secretary, elect to assume *some* Federal responsibilities under the National Environmental Policy Act". (emphasis added). Nothing in the difference in wording between the Title V and Title IV statutes points to a conclusion that making final determinations is an inherent Federal function. Rather, the differences are explained by a simple and logical interpretation: Congress, in the PROGRESS Act, recognized that Tribes are able to decide for themselves what level of NEPA responsibilities they may want to compact. Using the word "some," rather than "all," provides clear Congressional recognition that Tribes may compact varying levels of NEPA responsibilities—up to and including the authority to render decisions on whether to approve NEPA documents. In other words, in the PROGRESS Act, Congress did not intend for NEPA compacting to be an all or nothing proposition. The Federal representatives' reliance on the word "some" rather than "all" is also misplaced because it is

inconsistent with the plain meaning of the word "some," which simply means "being at least one—used to indicate that a logical proposition is asserted only of a subclass or certain members of the class denoted by the term which it modifies." (See, e.g. https://www.merriam-webster.com/dictionary/some).

Federal negotiators also seemed to rely on the "savings clause" of 25 U.S.C § 5367(c), which provides that "[n]otwithstanding subsection (b), nothing in this section authorizes the Secretary to include in any compact or funding agreement duties of the Secretary under [NEPA] that are inherent Federal functions." Reliance on this savings clause is circular reasoning, however; the savings clause does not affect which functions are inherently Federal, or identify any such functions—much less the specific function at issue.

The Federal position is at also odds with Congress' requirement that limited waivers of statutory immunity in order to assume Federal responsibilities under NEPA. This waiver prerequisite would have little purpose or meaning in the absence of Tribes making NEPA determinations. During the negotiations for the PROGRESS Act regulations, Tribal negotiators repeatedly asked Federal negotiators what objective the Department believes Congress had sought to fulfill by the waiver of immunity if Congress had not intended Tribes to "assume the responsibility of a Federal official" pursuant to 25 U.S.C. § 5367(b), including issuance of NEPA determinations for CEs, EAs, and EISs. Federal representatives did not provide meaningful responses to these questions.

And finally, Tribal representatives point out that, even if the plain language of the statute is not clear that Tribes may elect to "assume the status of a responsible Federal official" and make decisions regarding NEPA documents, 25 U.S.C. § 5367 "shall be liberally construed for the benefit of the Indian Tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian Tribe." 25 U.S.C. 5366(i). Additionally, in 25 U.S.C. § 5369(a), Congress requires the Secretary to interpret all Federal laws as follows:

> Except as otherwise provided by law . . . the Secretary shall interpret each Federal law and regulation in a manner that facilitates--
>
> (1) the inclusion of programs in funding agreements; and
>
> (2) the implementation of funding agreements.

The Federal position on this issue turns these presumptions on their heads, stretching the statutory language to limit Tribal authority and undermine the purposes of the Progress Act's amendments to Title IV, rather than reading the statute liberally in favor of Tribal authority. The Tribal representatives to the Committee strongly disagree with this interpretation, which represents both a step backwards in the evolution of Tribal Self-Governance and a regressive Federal approach towards what Congress and Tribes have intended to be an increase in Tribal autonomy and capacity-building.

Tribal negotiators proposed the following regulatory provisions to clarify the rights and responsibilities of a Tribe or Consortium that elects to assume Federal responsibilities pursuant to 25 U.S.C. § 5367(b). These provisions were not agreed to by the Federal negotiators.

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, attorneys 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 official's actions is based upon the administrative record prepared by the Tribal official in the course of performing

the Federal environmental responsibilities that have 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 law 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 law 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.

In addition, the Committee disagreed on whether to include a regulatory provision reflecting the process by which a Tribe/Consortium is recognized as having lead, cooperating, or joint lead agency status on a project. The Tribal negotiators proposed the following language, which is similar to the Title V regulatory provision found at 42 CFR § 137.306. However, the Federal negotiators did not agree to inclusion.

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.

Last, Tribal representatives to the Committee argued that the rule should define the term "Categorical exclusion" for ease of use by Tribal and Federal officials, and because the term is used in proposed § 1000.1385. However, the Federal negotiators did not agree to inclusion.

> *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.

Federal Narrative

The federal position is that the Committee must follow the language of the PROGRESS Act, which does not provide that Tribes may assume all Federal responsibilities under NEPA. Specifically, the statutory language allowing Tribes to assume "*some* Federal responsibilities under the National Environmental Policy Act of 1969," 25 U.S.C. § 5367(b), in Title IV, differs from the statutory language allowing Tribes to assume "*all* Federal responsibilities under the National Environmental Policy Act of 1969," 25 U.S.C. 5389(a), in Title V. The Committee is duty bound to follow Congress's guidance in developing proposed regulations. The Federal representatives of the committee read Congress's use of the term *some* to mean something different than when Congress uses the term *all*. *See, e.g. Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698 (2022) (Supreme Court restating its "usual presumption that differences in language like this convey differences in meaning.").

The Federal members of the committee base this reading on several factors. First is the language of the statute that allows Tribes to assume "some Federal responsibilities under the National Environmental Policy Act of 1969." 25 U.S.C. § 5367(b). The statute does not say "all" nor does it use the term "Federal responsibilities" in an unqualified manner. The Federal committee members read the term "Federal responsibilities" to be modified by "some," which differs from "all." The title of the subpart reiterates this conclusion, as it provides that the subject of the subpart is "Tribal option to carry out certain Federal environmental activities." 25 U.S.C. 5367(b). The federal committee members decline to read Congress's direction that "some" or "certain" responsibilities may be included in an agreement as a directive that "all" responsibilities may be included.

Second, the savings clause makes unequivocally clear that the Secretary may not include in any compact "duties of the Secretary under the National Environmental Policy Act of 1969." 25 U.S.C. § 5367(c). It has been the longstanding policy of the Department of the Interior and Indian Affairs that "[c]omplying with NEPA is an inherently Federal responsibility." Indian

Affairs National Environmental Policy Act (NEPA) Guidebook, 59 IAM 3-H at § 2.3, p.6. The Department's guidebook discusses ISDEAA and it provides that "[t]he P.L 93-638 provides tribes the opportunity to contract BIA programs or projects. Under such contracts and compacts tribes may also assume the responsibility to prepare the appropriate
NEPA documents. However, compliance with NEPA remains an inherently Federal function and the scope and content of any NEPA document remains the responsibility of the appropriate BIA Responsible Official." *Id.* Thus, the savings clause of Section 5367 makes clear that the Secretary may not contract her duty to ensure compliance with NEPA.

The federal position is also supported by the unambiguous approach Congress has used when authorizing Secretarial delegation of NEPA approval authority to tribes or states. In the Infrastructure, Investment, and Jobs Act of 2021, also colloquially known as the "Bipartisan Infrastructure Law" or "BIL," Congress authorized the Secretary to enter into an "agreement that allows an Indian tribe to determine, *on behalf of the Secretary* [], whether a [Tribal Transportation Program] project is categorically excluded from the preparation of an environmental assessment or environmental impact statement under [NEPA]." *See* Pub. L. 117–58, div. A, title IV at §14003(b)(1) (Nov. 15, 2021). Sixteen years earlier, Congress in 2005 enacted a law providing that *"[t]he Secretary may assign, and a State may assume, responsibility for determining* whether certain designated activities" may be approved as a categorical exclusion under NEPA. *See* Pub. L. 109-59, the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" (SAFETEA-LU) at title VI, § 6004(a) (August 10, 2005); 25 U.S.C. 326(a)(1). SAFETEA-LU also authorized a pilot program limited to five (5) state participants providing that the "Secretary [of Transportation] *may assign, and the State may assume, the responsibilities of the Secretary* with respect to one or more highway projects within the State under [NEPA] . . . *including all or part of the responsibilities of the Secretary* for environmental review, consultation, *or other action required under any Federal environmental law pertaining to the review or approval* of a specific project." SAFETEA-LU at title VI, § 6005(a). Congress later authorized the Secretary to enter into such agreements with "all states." *See* Pub. L. 109-59, the "Moving Ahead for Progress in the 21st Century Act" (MAP-21) at div. A, title I, § 1313(c) (July 6, 2012); 23 U.S.C. 327(b)(1).

Finally, prior rulemakings implementing the ISDEAA support this outcome. The Title IV of ISDEAA rulemaking that led to 25 C.F.R. subpart 900.131(b), which implements the language quoted above from 25 U.S.C. § 5389(a), provides that "[t]o the extent the construction project is subject to NEPA or other environmental laws, the appropriate Secretary shall make the final determination under such laws. All other environmentally related functions are contractible." The federal committee members note that Section 5389(a)'s statutory directive providing that "all Federal responsibilities" under NEPA could be contracted, still require a "final determination" by the appropriate Secretary. *See* 25 C.F.R § 900.131(b). Given this approach, the federal committee members take the position that Section 5367(b)'s statutory directive providing that "some Federal responsibilities" under NEPA could be contracted must require, at a minimum, a final determination by the appropriate Secretary to be consistent with Title IV's regulations.

xii. Subpart L: Federal Tort Claims

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart explains the applicability of the Federal Tort Claims Act.

xiii. Subpart M: Reassumption

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

Reassumption is the Federally-initiated action of reassuming control of federal programs formerly performed by a Tribe/Consortium. Subpart M explains the types of reassumption authorized under Title IV, as amended by the PROGRESS Act, including the rights of a Consortium member, the types of circumstances necessitating reassumption, and Secretarial responsibilities including prior notice requirements and other procedures. The subpart explains what is meant by imminent jeopardy to trust assets, natural resources, and public health and safety that may be grounds for reassumption.

Subpart M also describes the hearing rights a Tribe/Consortium has before or after reassumption by the Secretary, the activities to be performed after reassumption has been completed, and the effect of reassumption on other provisions of a funding agreement.

xiv. Subpart N: Retrocession

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

Retrocession is the Tribally-initiated voluntary action of returning control of certain programs to the federal government. Subpart N defines retrocession, including how Tribes/Consortia may retrocede, the effect of retrocession on future funding agreement negotiations, and Tribal/Consortium obligations regarding the return of federal property to the Secretary after retrocession.

xv. Subpart O: Trust Evaluation

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

Subpart O establishes a procedural framework for the Secretary's annual trust evaluation mandated by the Act. The purpose of the Secretary's annual trust evaluation is to ensure that trust functions assumed by Tribes/Consortia are performed in a manner that does not place trust assets in imminent jeopardy.

Imminent jeopardy of a physical trust asset or natural resource (or their intended benefits) exists where there is an immediate threat and likelihood of significant devaluation, degradation, or loss to such asset. Imminent jeopardy to public health and safety means an immediate and significant threat of serious harm to human well-being, including conditions that may result in serious injury, or death, caused by Tribal action or inaction or as otherwise provided in a funding agreement.

Subpart O requires the Secretary's designated representative to prepare a written report for each funding agreement under which trust functions are performed by a Tribe. The regulation also authorizes a review of federal performance of residual and nondelegable trust functions affecting trust resources. The name of Subpart O has been changed from Trust Evaluation Review to Trust Evaluation. It was redundant to have both evaluation and review in the title.

xvi. Subpart P: Reports

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart describes the report on self-governance that the Secretary prepares annually for transmittal to Congress. It also includes the requirements for the annual report that Tribes/Consortia submit to the Secretary and other data requirements the Secretary may request of Tribes/Consortia. The issue related to the inclusion of BIE in the BIA programs for purposes of the reporting requirements surfaces in this subpart and is addressed in Subpart A, Definitions.

xvii. Subpart Q: Operational Provisions

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

The current rule at 25 CFR Part 1000 includes "Subpart Q–Miscellaneous Provisions". The Committee proposes to amend the title of the subpart to "Operational Provisions" to be more descriptive and instructive to the reader and to bring consistency with regulations promulgated at

42 CFR Subchapter M Part 137-Tribal Self-Governance under the Indian Health Service as authorized by Title V of the Act, as amended.

The proposed changes to subpart Q address many facets of self-governance not covered in the other subparts. Issues covered include the applicability of various laws such as the Freedom of Information Act (FOIA), the Privacy Act, the Prompt Payment Act, and the Single Agency Audit Act, applicable provisions of OMB circulars, how funds are handled in various situations, including carryover of funds, savings from programs, and the use of funds to meet matching or cost participant requirements under other laws.

Certain provisions of Subpart Q are proposed to be amended to become current with the Act, as amended, and with applicable regulations promulgated by OMB at 2 CFR Part 200. References to outdated OMB circulars within Subpart Q are proposed to be updated throughout. New sections within the subpart are proposed to address new provisions within the Act, as amended, such as claims against a Tribe/Consortium in relation to disallowance of costs, and limitation of costs.

The Committee notes a difference between the Act, as amended, at 25 U.S.C. § 5305(f)(1) and OMB's regulations at 2 CFR § 200.501. The amended statute requires that Tribes/Consortia expending more than $500,000 or more in Federal awards in a fiscal year must submit a single-agency audit report required by the Single Audit Act. However, the Single Agency Audit Act, 31 U.S.C. 7501, *et seq* (SAA), as implemented by 2 CFR § 200.501 currently set the threshold amount at $750,000 or more of Federal award expenditures for requiring a single audit. The Committee is aware that OMB may be considering raising the current threshold to $1,000,000 or more in Federal award expenditures. The Committee's proposed amended regulations at Subpart Q defer to the SAA and 2 C.F.R. Part 200 identified above for establishing whether a Tribe/Consortium is required to have a single audit.

xviii. Subpart R: Appeals

Status of Subpart

This subpart largely reflects a consensus proposal from the Committee. However, as described below, Tribal representatives do not agree with the inclusion of a proposed regulatory provision concerning "Title-I eligible programs" or "Title-I eligible PSFAs".

Consensus Narrative

This subpart prescribes the process Tribes/Consortia may use to resolve disputes with the DOI arising before or after execution of a funding agreement or compact and certain other disputes related to self-governance.

Tribal Narrative

The Committee was unable to reach consensus on language regarding when a Tribe/Consortium may choose to pursue an administrative appeal with the appropriate bureau head/Assistant Secretary as an alternative path to filing an administrative appeal with the Interior Board of

Indian Appeals (IBIA). Specifically, the Committee could not agree on the scope of what decisions may be administratively appealed to the bureau head/Assistant Secretary in lieu of an appeal through the IBIA.

The Tribal position is that the proposed regulations should empower, and not limit, Tribes/Consortia to have options to decide how to proceed with an administrative appeal. Tribal representatives are aware that Tribes/Consortia have encountered difficulties and delays when pursuing appeals with the IBIA. Although changes to the IBIA itself are outside the scope of this negotiated rulemaking, the Tribal representatives argue that this proposed rule should provide Tribes/Consortia with the greatest flexibility to address the realities of the IBIA appeals process. Further, the Tribal representatives emphasize that the Department and Congress should pursue all available routes to improve the IBIA appeals process to decide appeals in a just, efficient, and time-sensitive manner.

To address the realities of the IBIA system, Tribal negotiators argue that *all* pre-award dispute decisions that fall within section 1000.2345 should be eligible to be decided by a bureau head/Assistant Secretary, in lieu of an appeal to the IBIA, if a Tribe/Consortium so chooses. This position would establish two mutually exclusive paths that a Tribe/Consortium could choose from to pursue *any* pre-award dispute under section 1000.2345: either through (1) the IBIA or (2) the bureau head/Assistant Secretary. Section 1000.2345 identifies the types of decisions that may be appealed to either a bureau head/Assistant Secretary or the IBIA under certain sections in subpart R and includes decisions such as rejecting a final offer, rejecting a proposed amendment to a compact or funding agreement, determinations that a provision in a retained funding agreement and/or compact are directly contrary to Title IV, non-immediate reassumption, and certain construction-related decisions.

The Federal representatives' position in sections 1000.2302 and 1000.2351 is that any dispute which is considered a "Title I-eligible program" dispute can only be administratively appealed to the IBIA. The Federal negotiators seek to retain reliance on the defined "Title-I eligible program" which is limited to "all programs, functions, services, and activities 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."

The Federal position prevents Tribes/Consortia from seeking to pursue an administrative appeal for "Title 1-eligible program" disputes with a bureau head/Assistant Secretary in lieu of the IBIA. This position constrains Tribes/Consortia to only pursue administrative appeals in the IBIA for PSFAs performed or administered by the Office of the Assistant Secretary for Indian Affairs, BIA, BIE, and BTFA. While some Tribes/Consortia may prefer to pursue administrative appeals for these disputes in the IBIA, the Tribal position is that subpart R should provide the greatest flexibility to empower Tribes/Consortia to evaluate their unique situations and choose an administrative appeal path that best fits their situation.

Federal representatives argue that capacity limits prevent the Department from expanding appeals through a bureau head/Assistant Secretary for all types of pre-award disputes. The Tribal

representatives argue that this places an undue burden on Tribes/Consortia who must bear the challenges with the realities of the IBIA process without adequate flexibilities to pursue administrative appeals through another, and potentially more efficient, route. In addition to improving the IBIA appeal process, the Tribal position is that the Department should build capacity for an administrative appeals process with the bureau head/Assistant Secretary to distribute the workload for appeals with the IBIA.

Tribal representatives propose to delete the regulatory provision concerning "Title-I eligible programs" in section 1000.2302. Additionally, the Tribal representatives proposed the following language for section 1000.2351 to allow Tribes/Consortia to decide whether it wishes to pursue an administrative appeal with the bureau head/Assistant Secretary or IBIA for *any and all* pre-award disputes under section 1000.2345. However, this version of section 1000.2351 was not agreed to by the Federal negotiators.

§ 1000.2351 To Whom May a Tribe/Consortium 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.

Federal Narrative

The federal position on Subparts 1000.2302 and 1000.2351 is that these sections, which provide the appeals process for certain types of disputes under the current regulations—and were not otherwise changed, amended, or even addressed by the PROGRESS Act—provide an avenue for Tribes to appeal their disputes in a manner that empowers Tribes to pursue potential options beyond those available to Tribes under subpart L (Appeals) of part 900, applicable to disputes under Title I, and subpart P (Appeals) of part 137, applicable to disputes under Title V (IHS). Under Part 900, the only avenue of appeal available to Tribes after efforts at informal dispute resolution have not resolved the dispute is to file a notice of appeal with the IBIA. Likewise, part 137, which follows the appeals procedures set forth in part 900, provides for appeals to be heard only by the IBIA. By contrast, as to certain types of disputes, subpart R provides for appeals to be made to either the IBIA or a bureau head/Assistant Secretary. These types of appeals are for pre-award non-Title I eligible PSFA disputes, which encompasses a broad range of issues including, but not limited to, PSFAs transferred under section 403(c), decisions declining to provide requested information, allocations of program funds when a dispute arises between a Consortium and a withdrawing Tribe, and inherently federal functions.

The initial Tribal position was that subpart R should be amended in its entirety by striking the current regulatory appeals process by wholesale adoption of the part 900 and part 137 appeals procedure regulations in order to follow the Progress Act's goal of streamlining Title IV and Title V. This approach, however, would have had the effect of eliminating an entire avenue of appeals currently available only under Title IV. This would have had the effect of disempowering and constraining Tribes by confining all disputes to be heard by the IBIA.

The Tribal position set forth above may also disempower Tribes because potentially funneling all appeals to a bureau head/Assistant Secretary would create strain and capacity issues making these types of appeals less efficient and more costly for all parties. The realities are that the Department's bureaus are not equipped to handle an influx of appeals that are already heard by the IBIA. They lack the funding, resources, staffing, and most importantly, the institutional knowledge and direction of the IBIA. The IBIA is an appellate review body exercising the delegated authority of the Secretary to issue final decisions for the Department in appeals from decisions of agency officials in cases under the Act. The IBIA maintains significant familiarity and knowledge with the subject matter of these types of disputes, is allocated the resources and staffing for these matters, and has processes and procedures in place for hearing these disputes. Furthermore, even though certain disputes are heard by the IBIA, Tribes still possess the autonomy and the authority to determine whether to seek informal resolution or pursue non-binding alternative dispute resolution of its dispute prior to filing an appeal with the IBIA or a relevant federal court.

The federal position, therefore, is that the currently appeals structure of subpart R be maintained as it provides greater flexibility to Tribes to pursue non-Title I eligible disputes before the relevant bureau head/Assistant Secretary and continues the practice of filing those appeals with the IBIA, the body most well-equipped to hear these disputes in an efficient and practical manner, as is done under parts 900 and 137.

xix. Subpart S: Conflicts of Interest

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart sets out the minimum requirements a Tribe/Consortia must have in place, pursuant to Tribal law and procedures, to address conflicts of interest, including organizational and personal conflicts.

xx. Subpart T: Tribal Consultation Process

Status of Subpart

This subpart reflects a consensus proposal from the Committee.

Consensus Narrative

This subpart describes the process for engaging in consultations related to self-governance with Tribes/Consortia. The current rule at 25 CFR Part 1000 includes "Subpart I–Public Consultation Process. The Committee proposes to move and rename the subpart to reflect that the subpart applies to Tribal consultation, and to conform to more recent Federal and Department policy on Tribal consultation. Under this subpart, consultations related to self-governance commenced after this rule's effective date will comply with the Tribal consultation process outlined in the revised version of this subpart, and such previous regulations governing public consultation shall be superseded.

This subpart establishes when the Secretary shall consult on matters related to self-governance and identifies that consultation will occur: (1) to determine eligible programs for inclusion in a funding agreement, (2) to establish programmatic targets for the inclusion of non-BIA programs in funding agreements, and (3) on any secretarial action with Tribal implications. This subpart also establishes the applicable process for engaging in Tribal consultations, which is inspired by the President's November 30, 2022, Memorandum on Uniform Standards for Tribal Consultation and the DOI's current Departmental Manuals.

This subpart also establishes guiding principles applicable to Tribal consultation related to self-governance. Additionally, this subpart requires the Secretary to provide notice of upcoming consultations to Tribes and Consortia, allow written comments, and develop a record reflecting a Tribal consultation. Finally, this subpart establishes how the Secretary will handle confidential or sensitive information provided by a Tribe or Consortium during a consultation.

The Committee agreed to require at least 30 days' notice to Tribes/Consortia prior to any planned consultation sessions. However, the Committee recognizes that situations may occur that require the need for Tribal consultation on an expedited basis to address urgent issues. Therefore,

the Committee expects that the Secretary could waive applicable notice requirements at the request of a Tribe/Consortium pursuant to Subpart J (Waivers) in such urgent situations. However, the Committee views the requirement for 30 days' notice as the norm and expects any such waivers to be at the request of a Tribe/Consortium.

IV. Recommendations And Other Information Apart from The Committee's Charge

The Committee urges the Secretary to take all available measures to review this Report and publish a Notice of Proposed Rulemaking (NPRM) concerning these proposed regulations as expeditiously as possible. Without careful coordination by senior Interior Department, OMB, and White House officials, the success of the PROGRESS Act rulemaking will be in jeopardy. The Department's original statutory authority to promulgate regulations under the PROGRESS Act lapsed after April 21, 2023, and the Department suspended formal negotiations for six months. An act of Congress was required to restore the Department's lapsed regulatory authority under 25 U.S.C. § 5373(a)(3).

The authority for the Department to promulgate regulations under the PROGRESS Act will again expire after December 21, 2024.

Within the remaining 37 weeks between April 5, 2024 to December 20, 2024, the Department must vet and publish the NPRM in the Federal Register for notice and comment, assemble and organize all comments received, reconvene the Committee, finalize the rule by considering the public comments, and vet and publish the final rule in the Federal Register.

Tribal representatives presented the Department with the following timeline and asked Department officials to do their best to save time where it was possible, and within the Department's control, to do so. Careful management by the Department may better ensure that adequate time remains, after the close of the comment period, to reconvene the Committee and permit the Department the time required to vet and publish the final rule by no later than December 21, 2024.

The federal representatives do not object to the Tribal position as set forth below. The federal representatives note, however, that much of this schedule is not in the direct control of the Department and rests with other agencies and offices within the Administration.

Within the remaining **37 weeks**, the Department and/or Committee aims to accomplish the following:

1) April 5, 2024 – June 14, 2024 (**DOI vetting**) – **10 weeks** are estimated for internal vetting by the Interior Department, OMB, and White House and for the DOI to publish the proposed rule (NPRM) in the Federal Register for notice and comment (leaving 27 weeks remaining);

2) June 14, 2024 – August 16, 2024 (**Tribal consultation – NPRM**) – **9 weeks** are estimated for DOI to provide advance notice of Tribal consultations during the 60-day public comment period following publication of the NPRM in the Federal Register and

hold Tribal consultations concerning the NPRM in a 14-day period and allow for 30-days following the close of the consultations for comment (leaving 18 weeks remaining);

4) August 16, 2024 – August 23, 2024 (**comment assembly**) – **1 week** is estimated for DOI and/or its contractor to complete the assembly and organization of all public comments, provided that a contractor can be retained and begin categorizing comments as they are submitted to the Department, and for the Department to convene the Committee following advance notice in the Federal Register at least 15-days prior to the Committee meeting (leaving 17 weeks);

5) August 26, 2024 – October 18, 2024 (**Committee review of comments**) – **8 weeks** are estimated for the Committee complete a final recommended rule and prepare responses to comments to include in the preamble to the Final Rule and submit to DOI (leaving 9 weeks);

6) October 21 – December 20, 2024 (**DOI/OMB vetting)** – **9 weeks** are estimated for the Department, OMB, and the White House to internally vet the Final Rule and publish it in the Federal Register no later than December 20, 2024 (one day before the 50th month post-enactment of the PROGRESS Act is reached and the Department's rulemaking authority will lapse, with no additional time available to the Department).

The time remaining to complete this rulemaking leaves no room for error or delay by the Department or OMB.

The Committee therefore urges the Department, OMB, and the White House to be mindful of the short statutory time frame to complete the Rule. The Department must also consider the ramifications to the Office of Self-Governance and to the hundreds of Indian Tribes and Tribal organizations that operate Tribal Self-Governance Programs under the Part 1000 regulations if the Department should fail to issue a final rule within by the statutory deadline.

The Committee estimates that final regulations would likely be delayed up to an additional two years—to 2026—since it would require the Congress (likely the 119th Congress that convenes in January 2025) to renew and extend the Department's rulemaking authority. And that is only if Congress is of a mind to do so. The extension measure Indian Tribes advanced in 2022 and 2023, S. 1308, took a year to be enacted into law. Furthermore, the Department would need to renew the Committee charter that will expire at the end of this calendar year, and may well have to seek nominations and vet new Committee members to replace members who can no longer serve or who opt not to serve on the Committee beyond its current expiration on December 21, 2024.

For all the above reasons, Committee urges senior Department officials to coordinate closely with OMB and the White House to ensure the success of the current undertaking within the existing statutory time frame.