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August 14, 2024

Transmitted via Email
Hon. Bryan Newland
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W. MS-4660-MIB
Washington, DC 20240
Email: consultation@bia.gov

Re: Comments on Proposed Rule Amending 25 C.F.R. Part 1000 (RIN 1076–AF62—25 CFR part 1000)

Dear Assistant Secretary Newland:

We submit this letter on behalf of the following tribal clients: Jamestown S'Klallam Tribe, Aleutian Pribilof Islands Association, Inc.,[1] Association of Village Council Presidents,[2] Kawerak, Inc.,[3] Metlakatla Indian Community, Pueblo of Santa Clara, Port Gamble S'Klallam

[1] Aleutian Pribilof Islands Association, Inc.'s thirteen member Tribes include Agdaagux Tribe of King Cove, Native Village of Akutan, Native Village of Atka, Native Village of Belkofski, Native Village of False Pass, Native Village of Nelson Lagoon, Village of Nikolski, Pauloff Harbor Village, Qagan Tayagungin Tribe of Sand Point, Qawalangin Tribe of Unalaska, Pribilof Island Aleut Community of St. George, Pribilof Island Aleut Community of St. Paul, and Native Village of Unga.

[2] Association of Village Council Presidents' 56 member Tribes include Akiachak Native Community, Akiak Native Community, Village of Alakanuk, Algaaciq Native Village (St. Mary's), Yupiit of Andreafski, Village of Aniak, Asa'carsarmiut Tribe, Village of Atmautluak, Village of Bill Moore's Slough, Village of Chefornak, Chevak Native Village, Native Village of Chuathbaluk, Chuloonawick Native Village, Village of Crooked Creek, Native Village of Eek, Emmonak Village, Native Village of Georgetown, Native Village of Goodnews Bay, Native Village of Hamilton, Native Village of Hooper Bay, Kasigluk Traditional Elders Council, Native Village of Kipnuk, Native Village of Kongiganak, Village of Kotlik, Organized Village of Kwethluk, Native Village of Kwigillingok, Lime Village, Village of Lower Kalskag, Native Village of Marshall, Native Village of Mekoryuk, Native Village of Napaimute, Native Village of Napakiak, Native Village of Napaskiak, Newtok Village, Native Village of Nightmute, Native Village of Nunam Iqua, Native Village of Nunapitchuk, Village of Ohogamiut, Orutsararmiut Traditional Native Council, Oscarville Traditional Village, Native Village of Paimiut, Pilot Station Traditional Village, Pitka's Point Traditional Council, Platinum Traditional Village, Native Village of Kwinhagak (aka Quinhagak), Village of Red Devil, Native Village of Chuathbaluk (Russian Mission, Kuskokwim), Native Village of Scammon Bay, Village of Sleetmute, Village of Stony River, Nunakauyarmiut Tribe (also known as Toksook Bay), Tuluksak Native Community, Native Village of Tuntutuliak, Native Village of Tununak, Umkumiut Native Village, and Village of Kalskag.

[3] Kawerak's twenty member Tribes include Native Village of Brevig Mission, Native Village of Council, Native Village of Diomede, Native Village of Elim, Native Village of Gambell, Chinik Eskimo Community (Golovin), King Island Native Community, Native Village of Koyuk, Native Village of Mary's Igloo, Nome, Native Village of

Tribe, and Suquamish Indian Tribe. These comments are submitted in response to your July 1, 2024 Dear Tribal Leader Letter seeking input on the Department of the Interior's (the "Department") proposed rule amending 25 C.F.R. Part 1000 following the enactment of the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self-Governance & Self Determination for Indian Tribes (PROGRESS) Act.

All of our clients support the work of the PROGRESS Act Negotiated Rulemaking Committee (the "Committee") and appreciate that the Proposed Rule was largely developed through consensus by the Committee, with limited exceptions.

We urge the Department to revise the Proposed Rule to adopt the proposals and recommendations from the Tribal Committee representatives contained in the Self-Governance PROGRESS Act Negotiated Rulemaking Committee Final Federal Report (the "Report"). As addressed further below, we urge the Department to revise the language in the Proposed Rule to:

(1) Refrain from relying on the statutory headings when identifying the minimum requirements for a compact and/or funding agreement, and instead accept written Tribal attestations that the Tribe will comply with Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA);

(2) Expressly provide that the identification of inherent Federal functions is a permissible topic of discussion during the negotiation process;

(3) Incorporate language from long-standing Department Solicitor guidance to clarify all determinations of inherent Federal functions;

(4) Provide that contract support costs for non-BIA funding agreements must be calculated pursuant to the same method provided under Title I (25 U.S.C. § 5325(a));

(5) Recognize that a Tribal official may assume the responsibility to make environmental determinations, such as approving documents required under the National Environmental Policy Act and related laws, if so elected by a Tribe/Consortium pursuant to 25 U.S.C. § 5367(b);

(6) Clarify the process for a Tribe/Consortium to be recognized as having lead, cooperating, or joint lead agency status on a construction project and provide a clear definition for a "categorical exclusion"; and

(7) Enhance flexibility for pursuing an administrative appeal by allowing a Tribe/Consortium to elect to pursue their administrative appeal of *any* pre-award dispute with an

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Savoonga, Native Village of Shaktoolik, Native Village of Shishmaref, Village of Solomon, Native Village of Saint Michael, Stebbins Community Association, Native Village of Teller, Native Village of Unalakleet, Native Village of Wales, and Native Village of White Mountain.

appropriate bureau head/Assistant Secretary as an alternate path to filing an administrative appeal with the Interior Board of Indian Appeals (IBIA).

Additionally, we strongly urge the Department and Committee to swiftly promulgate a final rule revising the Part 1000 regulations before the Department's expiration of rulemaking authority on December 21, 2024. Finalizing these revised regulations is the important culmination of the long history behind amending the Department's Tribal Self-Governance Program (the "Program"). Further, we underscore that we support the content of the Proposed Rule with such changes outlined herein, and we emphasize that the timely promulgation of final regulations is vital to fully achieving the benefits of the PROGRESS Act and furthering self-governance within the Department.

COMMENTS

A. General Comments on the Proposed Rule

We appreciate the work of the Department and the Committee to develop the regulations in the Proposed Rule. We support the proposals and recommendations articulated in the Report by the Tribal representatives on the Committee. Although we generally support the Proposed Rule, we encourage the Department to adopt the proposals and recommendations articulated in the Report by the Tribal representatives on the Committee and such recommendations contained herein.

We emphasize that the Part 1000 regulations should empower Tribes/Consortia to successfully join the Program and effectively assume and deliver programs, services, functions, or activities (PSFAs) (or portions thereof) under the Program. Tribes and Consortia have demonstrated success in effectively and efficiently managing PSFAs pursuant to the Program to the benefit of Tribal communities, neighboring areas, and the Federal government. As a result, the Part 1000 regulations should streamline the Program's processes, minimize delays, and establish consistency and administrative efficiencies with other Federal self-governance programs, particularly with the Indian Health Service. Further, the Part 1000 regulations should respect Tribal sovereignty and the government-to-government relationship that exists between Tribes and the Federal government by providing participating Tribes and Consortia with the greatest flexibility allowed under law.

We urge the Department to change its position on the Committee's non-consensus issues and refrain from emphasizing unnecessarily narrow and overly cautious legal interpretations of the PROGRESS Act and Federal law when developing its final version of the Part 1000 regulations. Instead, we urge the Department to consider and fully appreciate the numerous unnecessary and avoidable challenges its positions will create for both Indian Country and the Federal government which will exist for decades to come. These unnecessary and avoidable challenges include adding confusion on key Department determinations, disincentivizing pursuing certain self-governance rights or opportunities, increasing litigation risk, and creating or exacerbating opportunities for delay in Program processes, particularly for negotiating, appeals, and construction. Creating these challenges is not sound policy because the Department's

current position would result in the inefficient use of limited resources by Program participants and the Federal government without creating comparable benefits to further Tribal self-governance.

Additionally, the Department's narrow and overly cautious legal interpretations acts in opposition to the Tribal self-governance and self-determination policies articulated throughout the Federal government. Congress and the Administration have supported the expansion and improvement of Tribal self-governance and self-determination as reflected by the PROGRESS Act and Executive Order 14112. For reasons noted herein, we are concerned that the Department's positions on the non-consensus issues will hinder the Program's development and threatens to significantly impede Tribal self-governance to the detriment of both Indian Country and the Federal government. These impacts will not advance the Tribal self-governance priorities articulated by the Federal government and arguably represent a step back in the Tribal self-governance movement in favor of overly cautious and unnecessarily narrow legal views related to self-governance.

Although there is need for improvement, we are encouraged by the overall content of the Proposed Rule and the recommendations by Tribal representatives on the Committee. The Proposed Rule and Tribal recommendations represent a significant improvement to the existing Part 1000 regulations. Therefore, we strongly urge the Department and Committee to work swiftly to timely promulgate a final Part 1000 rule. Tribes and Consortia have waited for a significant period of time in anticipation of these amended regulations, and considerable resources have been expended by Indian Country and the Federal government to reach this point. We would be severely disappointed if final regulations are not promulgated by Congress's deadline.

B. Minimum Compact and/or Funding Agreement Requirements (Subparts E and F)

The Department should allow Tribes/Consortia to provide an attestation in a compact and/or funding agreement that they will carry out the compact or funding agreement in compliance with Title IV of ISDEAA. We are concerned that the Proposed Rule's language in Sections 1000.510(e), 1000.515, and 1000.610(b) would impose onerous and unnecessary burdens on both Tribes/Consortia and the Department when negotiating a compact and/or funding agreement. As currently worded, these sections would require either a compact or funding agreement to contain numerous provisions which would essentially mirror statutory language in Title IV.

The minimum content requirements of a compact and/or funding agreement would impose significant burdens on the negotiating parties, who would need to dedicate increased resources, such as time or legal fees, to properly review and negotiate these exceedingly lengthy agreements. In our experience assisting Tribal clients, we have encountered significant delays in completing negotiations when any language is proposed to be included in the compact or funding agreement particularly in lengthy draft agreements. Additionally, this requirement will add on to existing delays in the negotiating process caused, in part, by insufficient capacity within the Office of Self-Governance. Each additional round of editing requires additional time to properly

analyze the new language's impact, inform Tribal leadership, and develop potential counter proposals. Further, additional language increases the opportunity for disagreements which can lead to costly and time-consuming dispute resolution such as litigation. The Department's legal position will exacerbate the already lengthy back-and-forth process to negotiate compacts and funding agreements by imposing a litany of provisions on all Program participants. While we can appreciate thorough agreements as a tool to educate participants on self-governance, the Department's position will place a heavy burden on all Program participants who have long demonstrated their knowledge and sophistication.

These increased burdens and delays do not justify the arguably minimal benefits of essentially mirroring statutes on the topics identified in Sections 1000.515 and 1000.610(b) of the Proposed Rule. We emphasize that Tribal resources are finite and can be better deployed elsewhere. Further, the increased potential for delays during negotiations created by the Department's position on the minimum content requirements of compacts and funding agreements defies Congress's intent behind the PROGRESS Act to minimize delays in compacting and funding as reflected in the law's legislative history.

We strongly encourage the Department to adopt the position articulated by the Tribal Committee representatives by deleting Section 1000.515 and revising Sections 1000.510 and 1000.610 of the Proposed Rule to read as follows:

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

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

Section 1000.610 What must be included in a funding agreement?

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

C. Inherent Federal Functions (Subparts F, G, and K)

Negotiating Inherent Federal Functions (Subpart F). The Department should clearly identify that inherent Federal functions (IFF) are a permissible subject of discussion during the negotiation process, particularly for funding agreements. We have concerns associated with omitting the identification of a particular IFF, beyond associated costs, as an appropriate subject of negotiation in Section 1000.695. Specifically, we are concerned that this omission could greatly expand the scope of IFFs beyond the statutory definition because this section could be viewed as foreclosing the natural back-and-forth communications between Tribes/Consortia and the Department which produce informed and precise IFF determinations.

Omitting the identification of IFFs as a permissible subject of negotiation would deprive the Department of the extensive legal knowledge throughout Indian Country, to the detriment of the Program and Tribal self-governance overall. This isolation could produce excessively broad

IFF determinations which do not align with the statutory language, intent, and spirit of Title IV as amended by the PROGRESS Act.

While Tribal legal positions on IFF determinations could be articulated in the dispute resolution process, such as litigation, it is preferential and more efficient to handle such issues early to avoid unnecessary delays and prevent creating an overwhelming volume of disputes including increased litigation that overtax the already overburdened appeals process. Further, treating IFF determinations as "out of bounds" for negotiation discussions would defy the government-to-government relationship between Tribes and the Federal government, as well as Congress's express language in the PROGRESS Act which requires the Secretary to interpret Federal laws and regulations in a manner that facilitates "the inclusion of programs in funding agreements". 25 U.S.C. § 5369.

We strongly urge the Department to adopt the positions articulated by the Tribal Committee representatives on IFF negotiations and determinations by revising Section 1000.695 as follows:

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

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

Incorporating Long-Standing Department Guidance on IFF Determinations (Subparts F and G). The Department should clarify that the Department will consider whether the delegated PSFA relates to Tribal sovereignty over Tribal citizens or territory when making IFF determinations. This clarification can be accomplished by incorporating long-standing Department guidance from a 1996 memorandum, issued by the Department Solicitor, entitled "Inherently Federal Functions under the Tribal Self-Governance Act" (the "Leshy Memorandum"). We understand that the Department currently follows the guidance provided in the Leshy Memorandum when making IFF determinations. Therefore, we support including express language in the revised Part 1000 regulations which incorporates guidance from the Leshy Memorandum, which states that "[t]he more a delegated function relates to tribal sovereignty over members or territory, the more likely it is that [the delegated PSFA is not an IFF]." Leshy Memorandum at 12.

We are concerned that failing to include such express language incorporating guidance in the Leshy Memorandum will deprive readers of the Part 1000 rule, including both Tribal and Federal officials, of key guidance on IFF determinations. Transparency on the existence of this guidance, through express regulatory language, is crucial to the successful implementation of Title IV because it would empower relevant parties to make well-informed decisions. The Department's position increases ambiguity regarding applicable IFF determination standards, risks producing misinformed IFF determinations, and creates opportunities for an increased volume of disputes, including litigation. Omitting the Leshy Memorandum's guidance is outweighed by these potential consequences which will require expending significant resources to clarify and resolve this wholly avoidable issue.

We strongly urge the Department to incorporate the substance of the Leshy Memorandum in regulations applicable to IFF determinations, and to adopt the position articulated by the Tribal Committee representatives by revising Section 1000.845 as follows:

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

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

Additionally, we strongly urge the Department to incorporate similar language in Subpart F to cover BIA funding agreements. We encourage the Department to revise Section 1000.695 in Subpart F to include language similar to that provided above.

Recognize that a Tribe/Consortium May Assume Responsibility to Make Final Environmental Determinations Under Title IV (Subpart K). The Department should clearly provide that a Tribe/Consortium may assume the Federal responsibility to make final environmental determinations under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA) and related laws. We understand that the Department has taken the position that a Tribe/Consortium cannot assume the responsibility to issue final determinations under these laws, pursuant to the authority of Title IV, because such final determinations are a non-delegable IFF. We strongly disagree with this position and support the opposite position and associated legal views articulated by the Tribal Committee representatives in the Report.

Tribes/Consortia should be empowered with the ability to choose whether or not they want to elect to assume the responsibility for issuing final environmental determinations under the NEPA and related laws. This treatment is consistent with the government-to-government relationship and aligns with the statutory language, intent, and spirit of the PROGRESS Act as articulated by the Tribal Committee representatives. We are concerned that the Department's position will significantly delay construction under Title IV and expose it to unnecessary Federal

government bureaucracy. These impacts will stymie Tribal construction projects which are vitally needed in Tribal communities and already long overdue.

Therefore, we strongly urge the Department to adopt the proposed regulatory provisions articulated by the Tribal Committee representatives on pages 31 through 33 of the Report, which are hereby incorporated in these comments. Further, we support the proposed regulatory language articulated in the Report by the Tribal Committee representatives, which would (1) provide a process to recognize a Tribe/Consortium as having lead, cooperating, or joint lead agency status on a construction project, and (2) define a "categorical exclusion" for purposes of Subpart K. These revisions would greatly improve the efficiency of Tribal construction projects under Title IV and address long-standing deficiencies in Indian Country.

D. Contract Support Costs (Subpart G)

The Department should clearly provide that contract support costs for non-BIA funding agreements must be calculated as provided under Title I of ISDEAA (25 U.S.C. § 5325(a)), and it should refrain from using language referring to the appropriation of such funds by Congress in Section 1000.885. Adequate funding for contract support costs is vital to the success of self-governance, particularly within non-BIA bureaus, and critically impacts a Tribe's/Consortium's operations. Contract support costs now play a prominent role in promoting co-stewardship and co-management arrangements between Tribes and the Federal government which the Department has sought to implement.

We are concerned that the Proposed Rule does not provide adequate contract support cost funding under non-BIA funding agreements and may condition any such contract support cost funding upon congressional appropriation. Insufficient funding of this critical funding source will hinder self-governance within the Department. Without contract support costs, Tribes will have to solely bear the costs for such activities. Forcing Tribes to bear these costs, in addition to already inadequate program funding, poses an insurmountable barrier which prevents Tribes and Consortia from pursuing non-BIA funding agreements. The gatekeeping impacts from failing to provide contract support cost funding defies the Federal government's articulated policies which favor expanding self-governance and self-determination. Therefore, we strongly urge the Department to adopt the position articulated by the Tribal Committee representatives by revising Section 1000.885 to relevantly read as follows:

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

Non-BIA bureaus determine the amount of funding to be included in the funding agreement using the following principles:
. . .
(b) 403(c) Programs (25 U.S.C. 5363(c)).
(1) The funding agreement will include:
. . .

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

E. Improving Flexibility for Administrative Appeals (Subpart R)

The Department should enable Tribes and Consortia to elect to pursue an administrative appeal with an appropriate bureau head/Assistant Secretary as an alternate path to pursuing an administrative appeal through the IBIA for any and all pre-award disputes. As previously discussed, the Department's position on several issues will increase the volume of disputes related to the Program. However, the Department's position on the non-consensus issues in Subpart R essentially continues to rely on an administrative appeals system which is already inadequate to address the existing volume of disputes in a timely manner. Therefore, we are concerned that the Proposed Rule's language in Sections 1000.2302 and 1000.2351 does not establish an adequate administrative appeals process to improve the timing for resolving disputes at their current level, let alone the potential significant influx of disputes following the final rule's promulgation.

The Department's position will contribute to, and not lessen, prolonged delays in the existing administrative appeals process, particularly for appeals through the IBIA. We are also concerned that the delays in the IBIA system combined with retaining the existing limitations on available paths for administrative appeals, as reflected in Sections 1000.2302 and 1000.2351, will effectively foreclose an administrative appeal under Subpart R as a viable path for resolving disputes, especially in light of potential alternatives such as litigation and non-binding alternative dispute resolution, which have their own disadvantages. Tribes may decide to avoid pursuing an administrative appeal entirely if they are forced to go through the IBIA based on prior negative experiences, estimated queues, or the need to resolve a dispute within a certain timeframe. This may force Tribes to settle their disputes through other means such as alternative dispute resolution or litigation and accept arrangements or agreements that do not align with the language, intent, or spirit of ISDEAA. Subpart R should afford Tribes/Consortia the greatest opportunities and flexibilities to resolve disputes in a just, efficient, and time-sensitive manner to avoid forcing Tribes to accept substandard arrangements or agreements.

Therefore, we strongly urge the Department to adopt the position articulated by the Tribal Committee representatives to expand the ability to pursue an administrative appeal with an appropriate bureau head or Assistant Secretary for any and all pre-award disputes. Expanding this option under Subpart R could alleviate the workload of the IBIA and reduce the time required to conclude an administrative appeal. We specifically encourage the Department to delete Section 1000.2302 and revise Section 1000.2351 as follows:

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

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

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

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

(ii) Eligibility to participate in self-governance;

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

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

(v) Inherently Federal functions and associated funding.

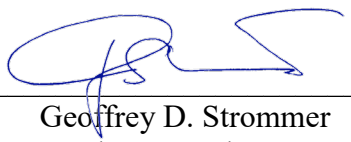
(c) IBIA appeal. The Tribe/Consortium may choose to forego the administrative appeal through the bureau or the Assistant Secretary, as described in the paragraph (b) of this section, and instead appeal directly to IBIA.

CONCLUSION

Thank you for the opportunity to comment on these important issues. We stand ready to work with the Department in our shared mission to advance Tribal self-governance through effective and efficient regulations and the successful implementation of the PROGRESS Act. Please do not hesitate to contact us with any questions.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP



By: Geoffrey D. Strommer
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cc: Tribal Clients