Choctaw Nation of Oklahoma

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Department of the Interior
Office of Regulatory Affairs and Collaborative Action
1001 Indian School Road NW, Suite 229
Albuquerque, NM 87104

Re: Comments & Recommendations PROGRESS Act Proposed Regulations

Halito (Hello),

On behalf of the Choctaw Nation of Oklahoma, I submit these comments and recommendations for consideration to the proposed rule for the "Practical Reforms & Other Goals to Reinforce the Effectiveness of Self Governance & Self Determination for Indian Tribes (PROGRESS) Act" that were published Monday, July 15, 2024, in the Federal Register (RIN 1076-AF62-25 CFR part 1000). The Choctaw Nation has been involved in Self-Governance for nearly 30 years and has extensive experience operating the programs, services, functions, and activities (PSFAs) we have assumed.

We applaud the work completed by the Negotiated Rulemaking Committee since August 2022, resulting in the proposed rule. The volume of consensus rules far outnumbers the remaining items of non-consensus; however, the final issues to be resolved by the Committee are very significant and go to the core of Tribal self-governance tenets.

The Department has before it all of the statutory guidance it needs to resolve these issues in the best interest of the tribes. Section 406(e) of the PROGRESS Act directs the Secretary, in the negotiation of compacts and funding agreements *"at all times [to] to negotiate in good faith to maximize implementation of the Self-Governance Policy . . . [and] carry out this subchapter [Title IV] in a manner that maximizes the policy of Tribal self-governance."* The Secretary is directed further in section 409, to *"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*."

Finally, and importantly, the Secretary must use her authority and properly interpret the PROGRESS Act and any related law reflecting the "long-established" Indian canon recognized and reaffirmed by U.S. Supreme Court decisions. Section 406(i) of the PROGRESS Act instructs the Department – and reviewing Federal courts – that *"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." Section 406(i) further directs that "*any ambiguity be resolved in favor of the Indian Tribe."*

In addition to Congressional directives that control, President Biden has expressly directed his administration to usher in a new era of self-determination and self-governance. Most recently, Executive Order (E.O.) 14112, "*Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination."* E.O. 14112 focuses on Tribal sovereignty and rights to self-govern:

> "As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they can ***make their own decisions about where and how to meet the needs of their communities***. No less than for any other sovereign, tribal self-governance is about the ***fundamental right of a people to determine their own destiny and to prosper and flourish on their own terms.***" (emphasis added)

The E.O. aims to increase flexibility by reducing administrative burdens and facilitating access to federal funding and resources. This will allow tribal nations to have greater autonomy to address the specific needs of their people. The E.O. directs that Departmental recommendations should identify any budgetary, statutory, regulatory, or other changes that may be necessary to ensure that Federal laws, policies, practices, and programs support tribal nations more effectively.

If self-governance and initiatives like co-stewardship are to flourish and succeed, the Secretary must utilize these principles and authority to resolve the remaining non-consensus issues in favor of the tribes.

The Choctaw Nation offers the following specific comments and recommendations for the proposed rule:

1. **The Choctaw Nation supports the proposed regulations developed in consensus by the Committee.**
2. **The Choctaw Nation supports the tribally-drafted language on all non-consensus issues.** Specific comments on some of these issues follow:
    a. Interpretation of Section 405(a) of the PROGRESS Act and minimum requirements for a compact and funding agreement. The federal position has misinterpreted Section 405(a), which states that each compact and funding agreement shall include provisions that reflect "…the requirements ***of this title***." (emphasis added). Section 405(a) did not say to include provisions that reflect provisions of this Section (Section 405). Federal interpretation is all provisions that follow in Section 405 must be delineated in a compact or funding agreement, which is not what the plain reading of Section 405(a) says. Finally, minimum requirements for compacts and funding agreements are defined elsewhere in the Act (Sections 404(b) and 403 respectively). Tribal negotiators have offered reasonable compromise language to avoid pages of extraneous provisions being mandatory in a compact or funding agreement. (Subparts E and F)

b. Negotiation of Inherent Federal Functions (IFFs) and guidance. The federal position contradicts historical negotiation practices and provides no parameters or guidance to federal and tribal negotiating officials on determining an IFF, other than the statutory language itself. The consensus NPRM states that "funding associated with" IFFs is an appropriate subject of negotiations, but the IFFs themselves are not included as a negotiation topic. This is neither logical nor practical. Since the beginning of the Self-Governance Demonstration, tribes have been negotiating with the Department regarding what constitutes an IFF alongside the funding that is associated with the IFF, and therefore not on the table for tribal assumption. IFFs are also a topic that may be appealed in Subpart R, so for consistency, they should also be negotiable. Finally, federal officials in the field need the consistency that IFF guidance from the regulations would provide. Tribal negotiators have prepared language on these issues (Subparts F and G).

c. NEPA final determinations. The federal position is that final NEPA determinations are not delegable to a tribe under the Act. (Subpart K)

   i. The impacts and limitations imposed upon Tribes are significant under the federal position. Tribes often assume PSFAs with which there is inadequate funding. The reasons are to have more autonomy over the function and control over its prioritization and performance. NEPA reviews are notoriously federally underfunded and construction timelines can be disastrously affected by delays. For instance, within the Choctaw Nation resides an endangered beetle that can only be baited at a certain season of the year – once that window has passed, we must hold construction for another year to test whether they are present on the proposed construction site. The Choctaw Nation has assumed all NEPA functions, including final determinations, from the Indian Health Service (IHS) under the sister Self-Governance legislation in Title V. Therefore, no NEPA function can be legally barred from delegation to a tribe because it has already been previously delegated.

   ii. Congress intended for final NEPA determinations to be delegable. Before the PROGRESS Act, tribes were able to assume all functions leading up to the final signature for NEPA reviews under DOI. The PROGRESS Act now requires the Tribe to adopt a resolution similar to that required under Title V with IHS – *"(1) designating a certifying Tribal officer to represent the Indian Tribe and to assume the status of a responsible Federal official under those Acts, laws, or regulations; and "(2) accepting the jurisdiction of the United States courts for the purpose of enforcing the responsibilities of the certifying Tribal officer assuming the status of a responsible Federal official under those Acts, laws, or regulations."* Congress expected something different from the status quo by including the language "assume the status of a responsible Federal official" and "accepting the jurisdiction of the United States courts" in the PROGRESS Act. It defies reason to assert that Congress did not intend to expand the status quo to include the option for a Tribe to make final NEPA determinations under the Act.

   iii. Congress further defined the term "construction program; construction project" in the Act to mean:"[A] tribal undertaking relating to the administration, planning, environmental determination, design,

construction, repair, improvement, or expansion of roads, bridges, buildings, structures, systems, or other facilities for purposes of housing, law enforcement, detention, sanitation, water supply, education, administration, community, health, irrigation, agriculture, conservation, flood control, transportation, or port facilities, or for other tribal purposes." Again, this is another example of clear Congressional intent that "environmental determinations" are delegable to tribes through the tribal undertaking of a construction program or construction project.

iv. BIA's very own NEPA policy and rules support the ability to delegate the function to tribes. The Interior Department defines a "responsible official" in its NEPA implementing regulations at 43 CFR Part 46 as a bureau employee delegated the authority of the Secretary of the Interior "to make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA." See 43 C.F.R. § 46.30 (2023). CEQ regulations, revised in May 2024, recognize that Federal law may delegate agency responsibilities under NEPA to State, local, and tribal governments. The term "Federal agency" includes such non-Federal entities. See 40 C.F.R. § 1508.1(p); 89 Fed. Reg. 35442, 35575 (May 1, 2024). If a Federal "responsible official" can "make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA" under 43 CFR Part 46, under section 407(b) of Title IV, a "certifying Tribal officer" who "assumes the status of a responsible Federal official" can also decide on a proposed action and be responsible for ensuring compliance with NEPA. The Tribe's "certifying Tribal officer" does so by accepting the jurisdiction of the Federal courts under section 407(b)(2).

d. Contract Support costs for non-BIA programs. (Subpart G) The Choctaw Nation supports the Tribal negotiators' proposed language including contract support costs for all non-BIA programs. If the goal is to maximize self-governance expansion, the tribes should have access to the CSC to support the federal program administration.

e. Appeal options for Self-Governance. (Subpart R) The Choctaw Nation supports adding an internal appeal option within Indian Affairs, similar to the non-BIA bureaus, as an alternative to the Interior Board of Indian Appeals.

3. **The Choctaw Nation requests exemption of all the P.L. 102-477 construction projects. (Subpart K, 1000.1305(b)(5))** The NPRM, at 1000.1305(b)(5), exempts Child Care Development Fund projects using funds transferred under an approved P. L. 102-477 plan. While this is appropriate, this provision is limited and rather short-sighted. These Part 1000 regulations are expected to stand the test of time for decades of growth in self-governance. The Choctaw Nation has a pending proposal to expand the number of programs included in its P.L. 102-477 plan, which, if approved, would add a Department of Transportation RAISE program. RAISE is a program that invests in critical freight and passenger transportation infrastructure projects. It is inefficient and would gain nothing to impose a second set of construction requirements over those already within the program and the '477 plan. To support the expansion of the '477 program, 1000.1305(b)(5) should be expanded to exempt all P.L. 102-477 projects. Further, the Committee's consensus provisions at 1000.1220 for regulation waivers defer to P.L. 102-477 authority rather than

imposing Title IV. The Choctaw Nation strongly recommends a similar policy, which would defer to P.L. 102-477 plans for any construction funded under such plans.

4. **We believe that in the final rule, no distinction or clarification is required to differentiate the Part 1000 rule from other self-governance Federal regulations.** The Department seeks comment on the NPRM's incorporation of terms and processes that may be common to self-governance at the Department of Health and Human Services (DHHS), authorized by Title V of ISDEAA, and the Department of Transportation (DOT), authorized by 23 U.S.C. § 207 (Tribal Transportation Self-Governance Program). The Interior Department states that the proposed rule – to implement the PROGRESS Act – should not be construed to bind HHS or DOT to any particular interpretation of a term or process. The Department seeks comments on how to incorporate this distinction in the final rule. We are aware of no instances where anything in each Department's regulations has been interpreted or construed to bind any other agency to "any particular interpretation of a term or process" that may be common to self-governance. Just as in those regulations, the reach of the Department's overhauled Part 1000 rule is clear from the regulatory language itself.

Thank you for the opportunity to provide comments and recommendations on the Part 1000 Proposed Rule implementing the PROGRESS Act. The Choctaw Nation, along with hundreds of other self-governance tribes, has demonstrated that we are capable and better at administrating these programs and services to improve the lives of the citizens we represent. These regulations should reflect that confidence by ensuring tribes have the greatest autonomy possible to serve their people. We look forward to upcoming good faith negotiations to resolve the outstanding issues in the coming weeks using these principles.

Yakoke (Thank You),

Gary Batton, Chief
Choctaw Nation of Oklahoma