FLATHEAD
SALISH KOOTENAI
NATION

A Confederation of the Salish,
Pend d' Oreille
and Kootenai Tribes

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THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

A People of Vision

Comment of the Confederated Salish and Kootenai Tribes re: Notice of Proposed Rule for Tribal Self-Governance PROGRESS Act Regulations RIN 1076-AF62 - 25 CFR Part 1000

submitted August 21, 2024 via consultation@bia.gov

The Confederated Salish and Kootenai Tribes (CSKT) submit this comment in response to the above-referenced Notice of Proposed Rulemaking published by the Bureau of Indian Affairs in the July 15, 2004 Federal Register. We appreciate the Interior Department's (DOI, or Department) consideration of this comment in negotiating the final rule for implementation of the "Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes Act of 2019" (PROGRESS Act).

CSKT hereby adopts, and incorporates by reference in this comment, all of the positions taken by the Tribal Caucus of the Negotiated Rulemaking Committee (Committee) in the "Self-Governance PROGRESS Act Negotiated Rulemaking Committee Final Federal Report", dated April 12, 2024 (Final Committee Report). CSKT extends our appreciation to the Committee and to the entire Federal team for the constructive negotiations and discussions that resulted in those portions of the proposed regulations for which the Committee's Federal and Tribal Caucuses are largely in consensus. As a whole, the fact that the majority of the Proposed Rule represents a consensus position is a positive step forward in the evolution of Tribal Self-Governance policy.

In this comment, CSKT focuses on the several overarching issues of greatest concern that remain in non-consensus (disagreement). If Secretary Haaland does not address these issues in the final rule, they will have - or will continue to have - material impacts on how the regulations may impede Tribal autonomy and basic Self-Governance policy objectives in the decades ahead. CSKT believes that the Tribal Caucus positions on the remaining non-consensus issues are firmly grounded in two of the Department's guiding authorities: President Biden's Executive Order No. 14112 (particularly §§ 5(a), 5(c), and (f); and Solicitor John Leshy's May 17, 1996 memo concerning "inherently Federal" functions within the meaning of Tribal Self-Governance.[1]

[1] Interior Office of the Solicitor Memorandum titled "Inherently Federal Functions under the Tribal Self-Governance Act" (May 17, 1996)(often referred to as the "Leshy Memo").

As a threshold matter pertaining to each of the non-consensus issues, CSKT agrees with the comment submitted by the Sonosky law firm on behalf of our sister Tribes, stating that

> [it] is the Tribal representatives' unanimous view that all the non-consensus issues arise from a single root. And that root is the Department's constrained, narrow and incorrect interpretation of the applicable law and regulations."[2]

If the Department were to comply with the rules of construction and interpretation mandated by the PROGRESS Act and Title IV of the Indian Self-Determination and Education Assistance Act (ISDA), as discussed in this comment, such compliance would address or otherwise moot each of these non-consensus items.

I. As a Policy Matter, the Departmental Position on Environmental Determinations Would Both Hinder Tribal Autonomy and Create Litigation Risk for our Trustee

In the negotiated rulemaking discussions and the Proposed Rule, the Department has thus far insisted on taking the regressive position that making environmental determinations is somehow an "inherently Federal" function for purposes of Title IV of ISDA and is therefore unavailable for Tribal contracting.[3] Specifically, the Department has taken the position that, for construction projects under Subpart K ("Construction") of the proposed regulations, final determinations made under the National Environmental Policy Act (NEPA) and similar statutes are "inherently Federal" and Tribes are therefore unable to make those decisions - even though the Department concedes that Tribes can make these exact same determinations under Title V of ISDA (*see pp. 28-34 of Final Committee Report*).[4] CSKT believes that the Department's position is unmoored from the PROGRESS Act and fails to comply with that Act's required rules of construction and interpretation.

The Departmental interpretation runs counter to Federal Self-Governance policies. CSKT believes that the Department's position would not withstand litigation, and could actually invite it. Since the Department is the trustee for Tribes in these matters, and since any court precedent would have impacts on all Self-Governance Tribes, we would have a direct stake in such litigation. CSKT encourages the Department to re-evaluate its position and, instead, adopt the Tribally-proposed text for Subpart K of the proposed regulations (*see pp. 30-33 of Final*

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[2] *See* comment, dated August 1, 2024, in response to this proposed rule, submitted by the law firm of Sonosky, Chambers, Sachse, Endreson & Perry, LLP, on behalf of the Central Council of the Tlingit and Haida Indian Tribes of Alaska, Citizen Potawatomi Nation, Copper River Native Association, Fort Belknap Indian Community, Kenaitze Indian Tribe, Little River Band of Ottawa Indians, Puyallup Tribe of Indians, Sitka Tribe of Alaska, and Tanana Chiefs Conference, at p. 4.

[3] 89 Fed.Reg. 57524, 57532 (July 15, 2024). CSKT notes that Title IV of ISDA refers to "inherently Federal" functions at 25 U.S.C. § 5363(k), while the PROGRESS Act refers to "inherent Federal" functions" at 25 U.S.C. § 5361(6). There is no functional difference, and CSKT uses the terms interchangeably in this comment.

[4] The Choctaw Nation of Oklahoma, for example, makes these environmental determinations under NEPA pursuant to its Title V Self-Governance agreement with the Indian Health Service. *See*, Choctaw Nation of Oklahoma comment on the Proposed Rule, via letter, dated August 21, 2024, from Chief Gary Batton, at p. 3 ("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.").

Committee Report). The Tribally-proposed regulations are consistent with the text of both the PROGRESS Act and Title V of ISDA. Further, and relevant to the prospect of litigation, the Tribally-proposed regulations are well-moored in the rules of construction and interpretation that Congress mandated in the PROGRESS Act and Title IV.

A. CSKT Has Direct Experience with How the Departmental Position on Environmental Determinations Would Undermine Tribal Autonomy

The Confederated Salish and Kootenai Tribes have an extensive history of working with Federal, Tribal, State and local governments on conservation, land-use, and other resource-based projects. CSKT has long been recognized as having highly professional natural resource managers and programs.[5] As reflected in both Title V and the PROGRESS Act, Tribal governments are as able as the Department to issue environmental determinations under, for example, NEPA. The Department's current position would prohibit CSKT from exercising its option under Title IV to assume NEPA responsibilities up to and including environmental determinations. As a practical matter, such an outcome would impact our, and other Tribes', Self-Governance efforts in several ways, including:

1) Delayed NEPA Process and Determinations, Including Federal Agency Delays Used as Leverage Against Tribes. Upon a Tribe exercising its option to assume the role of a responsible Federal official for construction projects, if the Department were to prohibit Tribes from issuing final environmental determinations, it would take the process entirely out of the Tribe's control and create, or contribute towards, costly delays. CSKT, like many Tribal governments, has had to wait long periods of time for Federal agencies to issue NEPA decisions.

   One such example took place when we unsuccessfully waited over three years in 2012-2015 for the U.S. Fish & Wildlife Service (FWS, or Service) to issue an Environmental Assessment (EA) under NEPA in association with the third Self-Governance agreement we had negotiated for the National Bison Range.

   From the beginning, CSKT had to expend months of time, money, and political capital just to convince FWS to move forward with NEPA compliance through use of an EA rather than through use of a much riskier Categorical Exclusion (riskier due to anticipated litigation expected to follow prior successful litigation). We had to engage a costly legal consultant to help make this case to FWS and its solicitors, which also necessitated travel to Denver and Washington, D.C. We ultimately convinced our Federal counterparts to develop an EA that would better withstand anticipated litigation, but the effort was expensive and time-consuming.

   FWS' work on developing the draft EA began in 2012 and continued through 2015 with the agency never issuing a final EA. The length of this time opened the door for the Service to change its mind, before it even completed a draft EA, about

[5] *E.g.*, September 3, 2003 New York Times editorial ("Yet virtually no one disputes the excellent management and conservation record of the Salish and Kootenai."); National Wildlife Federation's 2012 Conservation Achievement Award given to CSKT's Natural Resources Department; and U.S. Fish & Wildlife Service Regional Director Mitch King stating "I have worked directly with the CSKT's Wildlife Program and I rank them among the best in Tribal Programs and as good as many State Fish and Wildlife agencies." (*King September 15, 2006 email to Dale Becker*).

the terms of the agreement that it had negotiated with us. As stated in a November 14, 2013 letter from the CSKT Tribal Chairman to the FWS Regional Director:

> As you know, this is the fourth time over the last two years that FWS has delayed and extended the EA process. It has now been more than three years since a federal court rescinded our last AFA after finding that FWS had not complied with the National Environmental Policy Act. While we have consistently, and patiently, supported a quality process over a quick one for the EA, we believe that further delays are neither acceptable nor necessary for preparing an effective and comprehensive document. Over the last few months, our patience has turned to frustration as well as concern over our perception that the delays in EA development may be due to changes in FWS' position regarding the draft AFA upon which we had jointly agreed.[6]

Consequently, after years of frustrating discussions, and after three years had passed without FWS having issued a final EA, CSKT ultimately felt forced to pause entirely its Self-Governance efforts with FWS. We could not spend more time, money, and political capital to ensure that FWS completed a constructive NEPA process that could withstand the anticipated litigation over the negotiated National Bison Range agreement - especially since the Service had already shown that it was not committed to honoring the terms of our negotiated Self-Governance agreement.[7]

This experience shows that, when Federal agencies are making the decisions about whether and when to move forward with a NEPA process, the process itself can be used as leverage against Tribes. If a Tribe does not agree to make further concessions or re-open completed negotiations, a Federal agency can slow-walk the NEPA process or even stop it entirely.

While this situation did not involve construction, it shows how Tribal efforts and projects can be taken hostage by Federally-controlled processes for making environmental determinations. These dynamics are equally applicable to such determinations for construction projects under the PROGRESS Act and represent the antithesis of Tribal Self-Governance.

2) Undermining Tribal Autonomy. The example above illustrates how Federal agencies, when they control environmental determinations, can undercut Tribal autonomy. If CSKT had been able to make its own environmental determination, CSKT could have

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[6] November 14, 2013 letter from CSKT Tribal Council Chairman Joe Durglo to FWS Regional Director Noreen Walsh (*copy attached to this comment*).

[7] CSKT wants to commend FWS for working collegially with us in development of this draft EA, including by incorporating a number of Tribal suggestions intended to strengthen the draft EA and ensure that it could withstand anticipated litigation. Unfortunately, these collaborative efforts were against the backdrop of the larger themes expressed in this comment: repeated unilateral agency delays in the process, and exploiting the delay to unilaterally revisit the completed negotiations by seeking further concessions from CSKT. We also want to make clear that, once this frustrating chapter had closed, CSKT and FWS were able to work collaboratively on issues, including restoration of the National Bison Range to CSKT beneficial ownership and management. While CSKT currently enjoys a very constructive relationship with FWS, if the Department maintains its current position under the Proposed Rule the institutional concerns described in this comment would continue to be issues for other Tribes, and potentially could occur again for CSKT with FWS or other Interior agencies.

timely issued either an EA or Environmental Impact Statement, and a third Self-Governance agreement may have gone into effect at the National Bison Range.

3) Creating Economic, Opportunity, and Political Costs for Tribes. In the situation involving FWS, CSKT repeatedly incurred material costs by having to spend limited funds and political capital just to move the process forward for securing an environmental determination by a Federal agency. In those pre-zoom days before virtual meetings were common, CSKT had to spend thousands of dollars for its elected officials and staff to travel repeatedly to Denver and Washington, D.C. for meetings with regional and senior FWS/Interior officials about this environmental determination process. CSKT Tribal citizens routinely demanded that elected Tribal officials, as well as staff, justify these expenditures over the years - placing Tribal officials in a difficult position when they cannot point to tangible results from the Federal agency in the form of an environmental determination.

   CSKT should have been able to instead direct this money, political capital, and time towards resolving other important issues such as wildland fire fighting, irrigation infrastructure, wildlife management, or housing efforts for our citizens with greatest need. Again, while this particular situation did not involve a construction project, it very much illustrates how Federal agency control over environmental determinations has real-world costs that materially affect Self-Governance projects and, by extension, Tribal communities.

As a policy matter, the current Departmental position on environmental determinations would damage basic Self-Governance objectives of increasing and facilitating Tribal autonomy, as illustrated by CSKT's above-described experience.

B. The Departmental Position Increases Litigation Risk by Running Afoul of Rules of Construction and Interpretation

The Tribal Caucus has outlined the legal infirmities of the Department's position on environmental determinations in some detail in both the Final Committee Report (*at pp. 28-34*) and in an April 25, 2025 letter to Assistant Secretary Newland and Deputy Solicitor Williams (*see pp. 7-9*). Fundamentally, the Department's position does not comply with PROGRESS Act and ISDA requirements of construction and interpretation. This is not an idle matter, as such rules were repeatedly raised by Supreme Court Justices during oral arguments in a recent case. Justices Jackson and Sotomayor asked questions centering on Title IV rules of construction and interpretation during March 24, 2024 oral arguments in the *Becerra v. San Carlos Apache* and *Northern Arapaho* cases, demonstrating Court concerns over ensuring adherence to the rules.[8]

CSKT does not believe that the Department's position would fare well under such questioning, whether in front of the Supreme Court or a federal district court. To the extent that the Department has centered its position regarding environmental determinations on dubious statutory construction, it faces legal obstacles on several fronts:

[8] *See* lines pp. 30-32 of the March 25, 2024 oral argument transcript marked "Official - Subject to Final Review", available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-250_8mjp.pdf.

1. Congress Made Clear its Intent for the PROGRESS Act to Mirror Title V, Including the Construction Provisions. The legislative history for the PROGRESS Act specifically recognizes the Tribal and Congressional objective to have Title IV more closely mirror Title V. The authorizing committees of both houses of Congress recite this purpose in their respective committee reports, closely followed by noting the construction project changes made in Title IV. In neither report is there indication of any sort that Tribes or Congress intended the PROGRESS Act to prohibit Tribal authority for making environmental determinations.

   The Senate Indian Affairs Committee Report accompanying the legislation states that it

   > is intended to mirror the IHS self-governance program in several respects. . . . A few of the key sections . . . are summarized below:
   >
   > . . . Section 407 authorizes, for construction contracts for buildings, roads, or infrastructure, tribes to assume some Federal responsibilities under the National Environmental Policy Act . . . .[9]

   If the Senate Committee had intended for the PROGRESS Act to materially deviate from Title V in authorizing Tribes to assume the roles of responsible federal officials for purposes of NEPA, it would undoubtedly have said so in this passage - located a mere ten lines after emphasizing that the legislation is "intended to mirror the IHS self-governance program".

   Similarly, the House Natural Resources Committee Report states that the legislation "conforms Title IV to Title V in order to create consistency and administrative efficiencies for Tribes now operating under two compacting regimes".[10] Nine lines below that passage, the Report says the legislation "clarifies tribal and federal oversight roles in construction to ensure fiscal prudence and public safety." Read together, these portions of the House Report support the Tribal Caucus interpretation that, consistent with the rules of construction, the legislation's use of the word "some" rather than "all" simply preserves to Tribes the choice of what portions of NEPA responsibility they may opt to include in their contracts.

   The Department's interpretation of the PROGRESS Act's use of the word "some" to prohibit Tribal authority to make environmental determinations, is not supported by either the statutory provision itself or the language in the House and Senate Committee Reports – especially given the strict rules of construction and interpretation.

2. The Department Lacks Justification for Ignoring Rules of Construction and Creating a Conflict with Environmental Determinations Under Title V. In its Notice of Proposed Rule, the Department notes that the PROGRESS Act authorizes Tribes to assume "some" Federal responsibilities under NEPA, while Title V of ISDA authorizes Tribes to assume "all" Federal responsibilities under NEPA.[11] The Department says that it interprets

[9] Senate Report No. 116-34 at 5.
[10] House Report No. 116-422 at p. 3.
[11] 89 Fed.Reg. 57524, 57532 (July 15, 2024).

"Congress's use of the term *some* to mean something different than when Congress uses the term *all*."[12]

Such a proposition is a reasonable starting point. The problem arises when the Department, in seeking to give meaning to that wording difference between Title IV and Title V, imputes to Congress a non-existent intent to preclude Tribal governments from making, under the PROGRESS Act, the exact type of environmental determinations as they make under Title V. Despite being repeatedly pressed, the Department has never been able to explain why it chooses such a restrictive interpretation rather than a liberal interpretation supporting Tribes, with ambiguities resolved in the Tribes' favor, as required under Sections 406(i) and 409(a)(1) of the PROGRESS Act.[13] The Act is unambiguous in its requirement for liberal construction/interpretation and equally unambiguous in authorizing tribes to assume the role of "responsible Federal officials" for purposes of environmental determinations.[14]

Tribes have offered a much simpler and more logical explanation for this difference in statutory wording between Titles IV and V. The Tribal Caucus asserts that Congress and Tribes did not intend for Tribes to only have the 'all or nothing' option contained in Title V for assuming the status of a "responsible federal official" under NEPA. Instead, under the PROGRESS Act, Congress provides the option for Tribes to choose their level of Self-Governance contracting participation for NEPA purposes - up to, and including, issuance of environmental determinations.

In other words, unlike Title V, the PROGRESS Act authorizes Tribes to choose to contract various portions of the NEPA process that – at the Tribe's option - may or may not include, for example, the authority to issue environmental determinations. This statutory interpretation is not only consistent with Title V and gives meaning to the difference in wording between the statutes, but it also complies with the rules of construction and interpretation required under the PROGRESS Act. The Department has not explained why it chooses to reject this interpretation.

3. Statutory precedents cited by the Department are incomplete and are not construed liberally in favor of Tribes. The Department, in support of its interpretation, claims an "unambiguous approach" on the part of Congress towards authorizing Tribes to make NEPA determinations. The Department cites as support the Bipartisan Infrastructure Law (BIL), and a non-Tribal provision in the SAFETEA-LU Act.[15] The BIL provision only authorizes the Secretary to delegate to Tribes the specific authority to make Categorical Exclusion determinations under NEPA, so is somewhat inapposite to the broader PROGRESS Act language concerning NEPA yet it still does not preclude the Tribal interpretation of environmental determinations under the PROGRESS Act. The Federally-cited text in the SAFETEA-LU statute does not address Tribes at all and also in no way precludes the Tribal interpretation of the PROGRESS Act.

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[12] *Id.* at 57532.

[13] Nor has the Department cited any PROGRESS Act or ISDA legislative history that could support its current position.

[14] As noted in the Choctaw Nation of Oklahoma's comment on the Proposed Rule, *supra* at n.4, the Department itself recognizes that a "responsible official" refers to the authority to make and implement a decision under NEPA. *See* Choctaw comment at p. 4 (citing 43 C.F.R. § 46.30).

[15] Final Committee Report at p. 34.

> More critically, the Department fails to mention, distinguish, or otherwise address other directly relevant statutes that undermine its interpretation. One prominent and recent example is the 2018 Farm Bill. There, as part of statutory provisions involving ISDA contracting for forestry projects, Congress explicitly stated that the Agriculture or Interior Secretaries, as applicable, "shall make any decisions required to be made under . . . . the National Environmental Protection Act".[16] In contrast, when addressing NEPA determinations under the PROGRESS Act, Congress provided no such clear reservation of Secretarial authority for NEPA determinations; instead, it provided for the opposite by specifically authorizing Tribes to assume the role of responsible Federal official for purposes of NEPA, mirroring Title V.
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> The Department has neither addressed this discrepancy nor explained the inconsistency between its interpretation regarding environmental determinations and the statutory provision in the 2018 Farm Bill. Using the Department's logic of examining how Congress has earlier addressed NEPA determinations when authorizing Tribal ISDA contracting, the 2018 Farm Bill supports the Tribes' position.

The Department's failure to credibly ground its position in statutory construction, especially when combined with its failure to adhere to the required rules of construction and interpretation, makes its position regarding environmental determinations especially vulnerable.

C. The Tribally-Proposed Text is Consistent with the Council on Environmental Quality's Revision of NEPA Regulations

The Notice of Proposed Rule mentioned that, as of July 1, 2024, new implementing regulations for NEPA promulgated by the Council on Environmental Quality (CEQ) took effect.[17] The Department invited comment on whether it should revise its Proposed Rule to ensure consistency with the new CEQ regulations. CSKT does not believe that the Proposed Rule needs any such further revisions in light of the recent CEQ action. The Tribal position regarding environmental determinations under the PROGRESS Act is consistent with the revised CEQ regulations.

D. The Departmental Position Represents a Step Back for Self-Governance

The current Departmental position regarding NEPA authority and environmental determinations is fundamentally at odds with the most basic tenets of Tribal Self-Governance policy and, if maintained in the final rule, would be a step back for Self-Governance. CSKT is concerned that this step back would have further ripple effects in future negotiations or discussions regarding inherently Federal functions. Given the clear intent of the PROGRESS Act to move Self-Governance policy ahead and better harmonize Title IV with Title V, the Departmental position here is disquieting to Tribes.

As a policy matter, the Tribally-proposed language in this matter is consistent, and the Department's current position is inconsistent, with § 5(f) of President Biden's Executive Order No. 14112. CSKT further believes that sound policy considerations counsel that the Department

[16] Public Law No. 115-334, § 8703(b)(2)(A).
[17] *Id.* at 57529.

should promulgate a final rule that decreases, rather than increases, its litigation risk and the attendant ramifications for Tribes. CSKT respectfully recommends that the Department revisit its position on this issue and adopt the Tribal position as stated in the Final Committee Report.

II. The Final Rule Should Foster Transparency and Consistency in Classifying Functions as "Inherently Federal"

As reflected in other Tribal comments on the Proposed Rule, assertions of what programs, services, activities and functions are "inherently Federal" for purposes of the Tribal Self-Governance Act often arise in negotiations between Tribes and Federal agencies. The PROGRESS Act regulations are a generational opportunity to help clarify these often difficult discussions while leveling the playing field for Tribes. It is important for all negotiators - Federal and Tribal - to remember that the "inherently Federal" restriction found in 25 U.S.C. § 5363(k) is a narrower and different term than the "inherently governmental" descriptive that is more commonly addressed in Federal law and Federal contracting.

Current Departmental guidance, in the form of Solicitor John Leshy's 1996 memo, recognizes this key distinction and emphasizes that determinations of what may, or may not be, "inherently Federal" should be guided by the Supreme Court's decision in *United States v. Mazurie*, which the Solicitor found to "relax the non-delegation doctrine in the tribal context.[18] The Department's final rule should transparently reflect this essential principle.

A. CSKT Experience has Shown that Tribes Would Benefit from a Policy of Transparency in How Agencies Determine What May be "Inherently Federal"

CSKT has had repeated experiences at Self-Governance negotiation tables with Federal representatives who have taken unduly restrictive, and legally unsupportable, positions on what program activities are "inherently Federal functions" within the meaning of Title IV. For example, we were told by FWS representatives that maintenance foreman duties, biologist duties, recreation planner duties, and handling cash at a visitor center were all "inherently Federal" functions and not available for contracting. Such assertions would be laughable but for the fact that regional Federal officials not only tolerated those arguments by some of its staff, but sometimes supported them or otherwise forced us to provide legal opinions disputing the Federal assertions. When we asked for the legal authority that FWS officials relied upon in taking such positions, we received conclusory statements citing the National Wildlife Refuge Administration Act (which does not address this topic) but we never received any explanations, analyses or case law authority in support of the Federal assertions.

While CSKT was able to overcome those assertions through the expenditure of much time and treasure, some Tribes may not be as persistent or fortunate in their own efforts. Forcing Tribes

[18] Leshy Memo at p. 12; *United States v. Mazurie*, 419 U.S. 544 (1975). During negotiations, Tribal representatives asked Federal representatives whether the Department was planning to change or otherwise revisit the Leshy Memo. Federal representatives indicated that there were no such plans, and they affirmed that the Leshy Memo remained Departmental guidance.

to rebut and beat back such overreaching claims of what is "inherently Federal" undermines core Self-Governance objectives by:

1) **Wasting Tribal time in countering, and Federal time in defending, such assertions.** CSKT has had to spend weeks and months to overcome Federal overreach in identifying functions as "inherently Federal". This time and effort by our Tribal officials and staff equates to lost dollars and time that could have been spent on other issues important to our Tribal citizenry and the general public. Federal officials, either at the Regional or Central Office levels, were forced to spend their time on looking into these claims and ultimately overruling the unsupportable positions taken by Federal negotiators;
2) **Forcing Tribes to spend political capital.** Responding to Federal overreach in claiming activities as "inherently Federal", CSKT had to schedule meetings or discussions with officials who are higher up the Departmental chain of command. This has had the effect of further delaying our negotiations, incurring the above-referenced economic and opportunity costs, and decreasing political capital that could otherwise be used for other CSKT priorities.
3) **Forcing Tribes to prepare for litigation.** In addressing conflicts regarding what may be an inherently Federal function, CSKT staff had to spend much time researching and preparing litigation positions, and CSKT officials have had to spend time in briefings, in order to effectively prepare for: A) negotiations with field-level and regional Federal officials; B) discussions with Federal policy-makers, solicitors, and officials at the central office level; and C) the contingency of having to, if necessary, litigate the matter.

There may sometimes be thorny questions of whether a function is indeed "inherently Federal" within the meaning of Title IV, and therefore legitimately warrants the expenditure by a Tribe of the above-described time and resources. However, CSKT's experience of being forced to make those expenditures in order to overcome assertions that, for example, routine cash handling at a visitor center is "inherently Federal", implicates no such legitimately thorny questions.

Our experience is not an outlier, as other Tribes have reported similar occurrences. By way of example, in its comment on the Proposed Rule, the Sitka Tribe of Alaska recounts its encounters regarding Federal assertions of what the agency considers "inherently Federal".[19]

Federal negotiators for Self-Governance agreements often - not always, but often - take as expansive of an interpretation as they are able regarding what functions are "inherently Federal", often with the objective of preserving work and jobs for their Federal "team" at the expense of Tribal autonomy and Self-Governance objectives. This dynamic was perhaps most memorably captured decades ago by Arizona Senator John McCain when he said that "[o]ne of the ways I measure the success of self-governance is to see how hard the Federal bureaucracy will fight to maintain the old ways."[20]

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[19] "Sitka Tribe of Alaska's formal comment to the PROGRESS Act's Notice of Proposed Regulation", dated August 7, 2024, submitted by Sitka Tribal Chairman Lawrence Widmark, at pp. 2-3 (reporting that the National Park Service "asserted that almost all functions within a National Park operation were inherent federal functions, specifically disallowing [the Sitka Tribe] to perform any function where an individual needed to submit information into a federal data collection system, or follow a federal standard.").

[20] 139 Cong. Rec. 32425-32426 (1993).

Unfortunately, the dynamic that Senator McCain described is still an impediment to many tribes today. If the Department fails to transparently convey to its officials or employees that they are required to adhere to the rules of construction and interpretation, as well as core principles reflected in existing Solicitor guidance, Tribes will continue to feel the impact in the form of Federal resistance to contracting programs consistent with Self-Governance policies.

B. Continued Absence in Self-Governance Regulations of Basic Guidance on What is "Inherently Federal" Would be a Policy Choice Disadvantaging Tribes

Under the position it has taken in Subpart G of the Proposed Rule, the Department would foster, rather than reduce, recurrence of CSKT's above-described experiences. Specifically, Departmental rejection, in the final rule, of the Tribally-proposed language for §1000.845(a) would have real-world consequences for Self-Governance negotiations. The Tribal proposal for §1000.845(a) includes a single line from longstanding Department legal guidance for what activities may be deemed "inherently Federal" for purposes of Self-Governance. This line would guide Federal and Tribal negotiators by making clear 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."[21]

Inclusion of this text would provide a critical tool for Tribes to use in avoiding CSKT's above-described experiences because it would allow Tribal negotiators to both: 1) operate under the same legal guidance as the Federal negotiators; and 2) ensure that Federal negotiators are negotiating under this Departmental guidance.

In CSKT's experience, few people are aware of this Departmental guidance and, as a result, negotiations regarding what may be "inherently Federal" are often needlessly conducted in a vacuum - by Federal and Tribal negotiators alike. Consequently, Tribal negotiators are typically in a worse negotiation position by not being able to discuss with their Federal counterparts, within the proper legal framework, issues of what may be "inherently Federal". While some Tribes employ attorney negotiators who are aware of this Solicitor guidance, some Tribes will not have attorney negotiators who are likely to access the guidance. Non-attorney negotiators are more likely to be solely dependent on the Federal regulations to guide their negotiations.

The Tribally-proposed text would create no new guidelines, nor would it alter in any way the Department's existing guidance. As a policy matter, the Department should level the playing field through transparent inclusion of core principles for making determinations of when a function may be "inherently Federal".

[21] Notice of Proposed Rule, 89 Fed.Reg. 57524, 57531 (July 15, 2024).

C. The Department Cites No Valid Basis for its Arguments in Opposition to the Tribally-Proposed Text

In opposing the Tribally-proposed text for §1000.845(a), the Department rests its position on: 1) an apparent claim that the text is "taken out of context from legal guidance issued by the Department's Solicitor"; and 2) an assertion that the Tribal text "would create an administrative process by which an applicant Tribe asks a bureau or office of the Department to opine on the Tribe's sovereignty".[22] Neither assertion is true, nor did the Department provide explanation or reasoning for either claim.

1. Tribally-Proposed Text Reflects Solicitor Guidance Nearly Verbatim

The language proposed by Tribes for §1000.845(a) is almost verbatim from the Solicitor's memo and is couched in exactly the same context as the memo: how to analyze whether an activity may be deemed to be "inherently Federal" within the meaning of the Tribal Self-Governance Act. The proposed language captures a central principle of the Solicitor guidance, which states the following:

> In addressing tribal requests for Self-Governance agreements, then, Departmental agencies should consider requests in relation to the extent of tribal sovereignty over the nature and scope of the functions sought to be delegated. 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) [of the Tribal Self-Governance Act] does not apply. This is so, moreover, even in circumstances where the OMB guidance would counsel against delegation.[23]

The Tribally-proposed language for §1000.845(a) is entirely within the same context as the above Solicitor guidance, leaving no grounds for Departmental opposition on this basis.

2. The Tribally-Proposed Text, Like the Longstanding Solicitor Guidance, Creates no Administrative Process

Neither the Department's existing Solicitor guidance nor the nearly-identical Tribally-proposed language for §1000.845(a) purport to create an administrative process, much less one that would result in obligations under the Administrative Procedures Act. Instead, both the current Solicitor guidance and the Tribally-proposed language simply inform how Federal officials should go about determining whether a function may be "inherently Federal" within the meaning of the Tribal Self-Governance Act. The Tribal proposal only makes this guidance transparent to Self-Governance negotiators.

The Department has used this guidance for almost thirty years without any apparent claims that it has necessitated the new "administrative process" that the Department now claims is implicated

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[22] *Id.* at 57532, and Final Committee Report at pp. 24-25.

[23] Interior Office of the Solicitor Memorandum titled "Inherently Federal Functions under the Tribal Self-Governance Act" (May 17, 1996) at p. 12.

by the Tribally-proposed language. From a policy perspective, the unsupported claim that this decades-old guidance would suddenly create a new administrative process is a red herring.

III. Departmental Policy Should Foster Parity for Non-BIA Contracts Support Costs

CSKT applauds the Department's policy of promoting co-stewardship and co-management arrangements with Tribal governments, including Secretary Haaland's Joint Secretarial Order prioritizing co-stewardship and promoting "Tribal self-government".[24] The United States has long lagged behind Canada and Australia when it comes to co-managing Federally-protected lands with Indigenous governments. Tribal representatives with the Negotiated Rulemaking Committee have repeatedly pointed out that providing contract support costs for non-BIA agreements is integral to achieving the Secretarial objectives regarding co-management and co-stewardship. The extensive legislative history regarding the need for contract support costs under ISDA is equally relevant to Self-Governance contracts with non-BIA agencies.[25]

As a policy matter, the reality is that substantive Self-Governance agreements with non-BIA agencies, particularly those involving levels of true co-management, will continue to be rare as long as the Department fails to pay the necessary contract support costs associated with those agreements. The question is whether non-BIA agencies support changes in this status quo.

Recognizing the Department's funding landscape, and acknowledging the Department's limited appropriations, the Committee's Tribal Caucus proposed to keep existing regulatory language requiring that non-BIA agreements under 25 U.S.C. § 5363(c) include funding for allowable indirect costs, while separately addressing direct contract support costs. The Tribal proposal for § 1000.885(b)(1)(iii) simply includes language clarifying that the starting baseline for negotiating direct contract support costs should be the same as for any other Self-Governance agreement: § 106(a) of ISDA. This Tribally-proposed text retains the existing regulation's provision that direct contract support costs would be included only "as the Tribe/Consortium and the Secretary may negotiate" – in other words, only if the Department were to agree.

Despite this retention of Secretarial discretion as to whether or not to provide direct contract support costs, Federal negotiators did not agree to the Tribally-proposed language and, instead, included language in § 1000.885(b)(1)(iii) of the Proposed Rule 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."

As a policy matter, CSKT does not support including language that one could interpret as linking payment of direct contract support costs to limited Congressional appropriations. The Department's language in § 1000.885(b)(1)(iii) of the Proposed Rule would foster belief by Federal negotiators that they should not provide funds for direct contract support costs unless there is a specific Congressional appropriation for those costs. Such specific appropriation is not required and the Department has, in the past, included contract support costs for non-BIA Self-

[24] Interior Secretary Deb Haaland and Agriculture Secretary Thomas J. Vilsack, Joint Secretarial Order No. 3043 (November 15, 2021) at Sections 5 and 6.
[25] *E.g.*, Senate Report 100-274 (1987) at pp. 8-13.

Governance agreements even without specific Congressional funding, such as in our own agreement for the National Bison Range.[26]

We believe that Departmental co-stewardship and co-management policies, particularly in light of § 5(f) of President Biden's Executive Order No. 14112, would best be supported by including the Tribally-proposed language for § 1000.885(b)(1)(iii) in the final rule.

IV. The Department Can Easily Resolve the Remaining Non-Consensus Items through Application of the Rules of Construction and Interpretation

In addition to the above issues, CSKT believes that rules of construction and interpretation require the Department to resolve the remaining non-consensus issues in favor of the Tribal Caucus' positions. Specifically, Sections 406(i) and 409(a)(1) of the PROGRESS Act apply to the Tribal proposals for the following issues:

A. **Minimum Required Text.** CSKT believes that §§ 1000.510(e), 1000.515, and 1000.610(b) of the Proposed Rule would require Tribes to include needless and burdensome repetition of the statute (25 U.S.C. § 5365(a)) when we can instead satisfy the PROGRESS Act by simply including a general statement that we will carry out our agreement in accordance with the requirements of Title IV. The Federal interpretation fails to liberally construe this statute for the benefit of Tribes. The result would be to burden agreements with unnecessary provisions - exactly the kind of bureaucracy and paperwork that Self-Governance was designed to eliminate.

B. **Inherent Federal Functions as Topic of Negotiations.** As noted earlier in this comment, the issue of whether a program, service, function or activity (PSFA) is an "inherent Federal function" is often the subject of negotiations because it affects activities eligible to be contracted and the amount of funds available for transfer under an agreement.

In the Proposed Rule, the parties 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 (IBIA) or the appropriate Bureau head/Assistant Secretary under Subpart R ("Appeals") of the proposed regulations. Similarly, the Negotiated Rulemaking Committee agreed that the amount of funding withheld to cover the cost of inherent Federal functions is subject to pre-award negotiations. Consequently, the Department's position of excluding the issue of inherent Federal functions as a negotiation topic would create inconsistency within the regulations.

The Departmental position conflicts with Tribes' experiences in negotiations, as well as with the Department's longstanding practices. In Self-Governance negotiations, it has long been common for Federal representatives to assert that various PSFA's are inherently Federal functions. As noted earlier in this comment, such claims are often overly broad and do not comport with the legal definition of

[26] *See* FY 2009-2011 Self-Governance Agreement between the Confederated Salish and Kootenai Tribes and the U.S. Fish & Wildlife Service for the National Bison Range Complex, at § 13.D.

inherent Federal functions. Consequently, Tribes often disagree and the activities asserted to be inherently Federal functions may be pared down during negotiations.

In light of the above-described negotiation experiences, CSKT recommends adopting the Tribally-proposed text for § 1000.695 to create consistency amongst the above-referenced regulations by clarifying that identification of inherent Federal functions may be a topic of negotiation.

C. **Administrative Appeal Options.** CSKT believes that the proposed regulations should empower Tribes with options for administrative appeals. While changes to the IBIA are outside the scope of this rulemaking, these regulations should advance Self-Governance objectives by providing greater flexibility for appeals.

Tribes should have the option to pursue administrative appeals with a bureau head or Assistant Secretary, instead of through the IBIA, for all pre-award dispute decisions falling within the proposed § 1000.2345. This option, as proposed by the Tribal Caucus, would create two separate paths from which Tribes could choose – furthering Tribal autonomy and Self-Governance policies.

Having experienced the delays commonly associated with IBIA appeals, CSKT recommends the Department incorporate the Tribal proposal into the Final Rule.

V. Comment Sought Regarding Other Departments

In its Notice of Proposed Rule, the Department stated that "it is not the intent of this proposed rule to define or regulate any term or process that is applicable to HHS [Department of Health and Human Services] or DOT [Department of Transportation], even where such terms or processes are common between the agencies."[27] This issue was not discussed in any detail with the Tribal Caucus, and the context in which it has arisen is not clear to CSKT. Many Federal agencies promulgate regulations that share terms or processes common to other agencies so, as an initial matter, it is not clear why the Department now raises the issue in the Proposed Rule.

The Department states that "[t]he proposed rule should not be construed to bind HHS or DOT to any particular interpretation of a term or process."[28] Generally, the scope of an agency's regulations is self-evident and any party claiming that one agency's regulation somehow binds a different agency is left to his or her arguments for such proposition. With respect to its specific references to HHS and DOT, the Department has not stated whether HHS or DOT have made reciprocal accommodations in their regulations with respect to the Interior Department. As the issue has been presented, CSKT does not believe the Department should address this issue in the final rule for the PROGRESS Act. In any event, this late question should not further delay adoption of a final rule given the limited time that Congress has provided for this effort.

VI. Conclusion

The Confederated Salish and Kootenai Tribes again express our appreciation for the work of the Negotiated Rulemaking Committee and our Federal and Tribal partners in this effort. We greatly appreciate the largely consensus-based portions of the Proposed Rule, and we respectfully

[27] Notice of Proposed Rule, 89 Fed.Reg. 57524, 57525 (July 15, 2024).
[28] *Id.* at 57525.

request the Department to re-evaluate its positions on the few remaining non-consensus issues in light of the policy and legal concerns outlined in Tribal comments. CSKT does not believe that Departmental adoption of the Tribal Caucus positions on these unresolved issues would have any negative impacts on the Department. Conversely, it would greatly advance Tribal Self-Governance policy and objectives as intended by Tribes and Congress. Such Departmental adoption would comply with § 5 of Executive Order No. 14112, which Tribes are eager to see implemented.

Attachment: November 14, 2013 letter from CSKT Tribal Council Chairman Joe Durglo to FWS Regional Director Noreen Walsh

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A People of Vision

A Confederation of the Salish, Pend d' Oreilles and Kootenai Tribes

November 14, 2013

Ms. Noreen Walsh, Regional Director
Mountain-Prairie Region
U.S. Fish & Wildlife Service
134 Union Blvd.
Lakewood, CO 80228

Via facsimile no.: (303) 236-8295 original to follow by U.S. mail

Dear Ms. Walsh,

I am writing to express the Tribal Council's disappointment with the latest timeline that FWS recently provided us concerning preparation of an Environmental Assessment (EA) for the draft Annual Funding Agreement (AFA) which we had negotiated with the U.S. Fish & Wildlife Service (FWS) regarding the National Bison Range Complex. This most recent draft timeline now anticipates the completion of the EA process, and a subsequent decision, in late October 2014 at the earliest.

As you know, this is the fourth time over the last two years that FWS has delayed and extended the EA process. It has now been more than three years since a federal court rescinded our last AFA after finding that FWS had not complied with the National Environmental Policy Act. While we have consistently, and patiently, supported a quality process over a quick one for the EA, we believe that further delays are neither acceptable nor necessary for preparing an effective and comprehensive document. Over the last few months, our patience has turned to frustration as well as concern over our perception that the delays in EA development may be due to changes in FWS' position regarding the draft AFA upon which we had jointly agreed.

I have extended an invitation to Will Meeks to meet with the Tribal Council next month. We hope to find a mutually-agreeable path forward, but we request that you revisit the latest draft timetable developed by FWS. I would appreciate your response and, as always, we welcome any opportunity to discuss this issue with you.

Sincerely,

Joe Durglo, Chairman
Tribal Council

cc: Dan Ashe
Will Meeks
Jeff King