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August 7, 2024

Department of the Interior
Office of Regulatory Affairs and Collaborative Action
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Albuquerque, NM 87104
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RE: Sitka Tribe of Alaska's formal comment to the PROGRESS Act's Notice of Proposed Regulation (RIN 1076-AF62-25 CFR Part 1000)

On behalf of the Sitka Tribe of Alaska (STA), the federally recognized Tribal government for more than 4,500 Tribal Citizens, located in Sitka Alaska, I am writing to provide comment with regard to the Practical Reforms & Other Goals to Reinforce the Effectiveness of Self-Governance & Self-Determination for Indian Tribes (PROGRESS) Act Regulations, as contained in the proposed rule that was published Monday, July 15, 2024 in the Federal Register.

First, STA has reviewed the draft rule – and we fully support the 95% of the rule which met consensus of the Negotiated Rulemaking Committee. This means both the Tribal and Federal Representatives on the Negotiated Rulemaking Committee worked diligently and productively with such a high percentage of negotiated agreements.

However, it is also very important to take time to increase the amount of consensus items to 100-percent as possible. With this in mind, STA submits the weight of comments to the areas on non-consensus items with the call to give serious consideration to include the language advocated by Tribal representatives, and STA joins in the advocacy address and include regulatory language supporting the following seven items:

1. **To implement the PROGRESS Act and the intent of Congress, the Regulations should empower Tribes through liberal statutory interpretations by the Department that facilitates the inclusion of federal programs in Self-Governance and maximizes Federal Self-Governance Policy.**

    - Certain parts of the Proposed Rule reflect impermissibly narrow and limited readings of statute which is expressly foreclosed by the PROGRESS Act and applicable statutory interpretation rules.
    - The PROGRESS Act requires the liberal interpretation of its provisions, and the provisions of compacts and funding agreements, to benefit Tribes and the broader interpretation of federal law to facilitate including programs in funding agreements and implementing funding agreements.
    - The Department should refrain from adopting narrow and limited statutory interpretations and instead implement Congress's language in the PROGRESS Act to empower Tribes through the Regulations.
    - When STA attempted to negotiate an annual funding agreement (AFA) with a non-BIA bureau (National Park Service), our experience was that the Department very narrowly construed statutory provisions, to limit the scope of the Tribal functions that could be performed under the AFA, and to limit the Tribe's ability to perform functions without direct federal oversight.

2. To streamline the negotiation phase, and the content of compacts and funding agreements, the **Regulations should permit written Tribal attestations of compliance with Title IV in a compact or funding agreement.**

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

3. **To establish transparency and the PROGRESS Act's requirement for the Department to negotiate in good faith, the Regulations should expressly acknowledge that inherent Federal functions are a legitimate topic during negotiations.**

- We disagree with the Department's narrow interpretation in Subpart F of the Proposed Rule that inherent Federal function determinations are not a permissible discussion topic during negotiations.
- The Department should adopt the proposed Tribal language in Section 1000.695 to expressly allow these discussions during negotiations.
- Allowing individual bureaus and individual federal managers to determine inherent federal functions, without allowing Tribal input or discussion allows for arbitrary determinations by the federal government to assert something is inherent federal without any verification. For example, when STA first approached NPS to negotiated a AFA for FY 2018, NPS asserted that almost all functions within a National Park operation were inherent federal functions, specifically disallowing STA to perform any function where an individual needed to submit information into a federal data collection system, or follow a federal standard

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

   - The Department should adopt the proposed Tribal language in Section 1000.845(a) which incorporates long-established agency guidance based on the Supreme Court's *Mazurie* decision.
   - Clarify that exercising Tribal sovereignty is not considered an inherent Federal function, as this is needed to promote uniformity within the Department. The local Superintendent asserted all of the top positions within the programs performed inherently federal functions resulting in the Tribe not being able to request those positions. We are aware of a park on the east coast that was completely turned over to a county government, no issues of inherently federal functions there. This is a perfect example of why uniform application is critical.

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

   - We disagree with the Department's choice to not calculate direct contract support costs for non-BIA programs in the same manner as for any other ISDEAA agreement.

- We are concerned that the Department's language in Subpart G could be interpreted as requiring specific congressional appropriations as a pre-requisite to non-BIA agencies paying direct contract support costs.
- Substantive non-BIA Self-Governance agreements will continue to be rare as long as the Department fails to pay the associated contract support costs.
- The Department should adopt the proposed Tribal language in Section 1000.885 which addresses non-BIA contract support costs.
- STA emphasizes the need for DOI to pay for the entire cost of Tribes doing business with and for the federal government, regardless of the funding instrument utilized. It is unclear to STA why indirect costs are fully permitted across all grant and cooperative agreements funded by DOI but expressly prohibited under an AFA. In our experience, STA was allocated from the same source of funding (NPS operating funds) to perform the same function (providing demonstrating artists) in consecutive years, and when the funding was provided to STA under a Cooperative Agreement, STA received full indirect (contract support costs), but when the same work was included in our AFA, NPS did not included any indirect costs. NPS stated that they did not receive funding for CSC and therefore could not pay them. This is an illogical distinction, which undermines Tribes ability to be fully compensated for the cost of doing business with or for the non-BIA bureaus.

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

- We disagree with the Department's position that Tribes cannot make final environmental determinations because it is an inherent Federal function.
- The Department's position goes against the statutory language, intent, and overall spirit of the PROGRESS Act.
- The Department should adopt the proposed Tribal NEPA (National Environmental Policy Act) and in Subpart K which recognizes Tribal assumption to make environmental determinations, provides a process for Tribal status as lead agency or joint lead agency status under NEPA, and includes a definition of "categorical exclusion."
- In STA's experinece, NPS not only indicated that Tribes could not make the final decision under NEPA, but also asserted that performing NEPA and National Historic Preservation Act (NHPA) activities to evaluate actions was inherently federal. This makes no sense, as the federal government often outsources NEPA and NHPA evaluations. Disallowing

tribal offiicials from making environmental determinations seems to follow the same concept that appears to be based on the federal government's determination that Tribes are not capable, or do not have the appropriate expertise, to make such determinations.

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

   - The Interior Board of Indian Appeals (IBIA) system is overburdened and causes significant delays in resolving administrative appeals.
   - The Department should adopt the proposed Tribal positions related to Sections 1000.2302 and 1000.2351 to expand the ability for Tribes to choose to pursue an administrative appeal of a pre-award dispute with a Department bureau head or Assistant Secretary as an alternate path to the IBIA.
   - In STA's experience, allowing for administrative remedy in certain circumstances (particularly Title I eligible pre-award disputes) only at the IBIA thwarts Tribes' ability to resolve disputes with federal officials in an efficient, cost-effective and timely manner. STA encourages DOI to consider provding a mechanism for informal dispute resolution similar to other provisions in the Regulations.

Further elaboration of these comments is included in Attachment A, as created by the Tribal team working on the negotiated rulemaking. While these additional comments may mirror those received by other Tribes, they are vitally important to the success of the implement regulations. As such, we respectfully ask the Department to fully consider these comments.

STA would like to take this time to thank the Secretary, the Assistant Secretary and his office, the federal team, the Tribal team, and all involved in the PROGRESS Act's negotiated rulemaking process, and for those involved in getting this work completed in the Final Published Rule by December 21, 2024. If you have any questions, please contact Lisa Gassman, Chief Executive Officer at lisa.gassman@sitkatribe-nsn.gov or 907-738-8832.

Sincerely,

Lawrence Widmark
Chairman

ATTACHMENT A

DETAILED RECOMMENDATIONS FOR THE FINAL RULE

Further, STA recommends that the Committee amend the final rule as follows:

GENERAL COMMENT

1) **Distinguishing 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 believe that in the final rule no such distinction or clarification is required. We are not aware of any analogous regulatory provision set out in 42 CFR Part 137 (DHHS Self-Governance Rule) or 49 CFR Part 29 (DOT TTSGP Rule) regarding whether anything in those regulations should be interpreted or construed to bind the Interior Department or 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.

NPRM section 1000.10(a) notes that the purpose of the Part 1000 rule: "codifies uniform and consistent rules *for the Department* implementing *title IV* of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, 25 U.S.C. 5361 et seq., as amended … ." NPRM Section 1000.10(b) further states that: "These regulations are binding *on the Secretary* [of the Interior] and on Tribes/Consortia carrying out programs, services, functions, and activities (PFSAs) (or portions thereof) *under title IV* except as otherwise specifically authorized by a waiver under 25 U.S.C. 5369(b) and this part." (Emphasis added).

It is clear from NPRM section 1000.10(a) and 1000.10(b) that the Part 1000 rule does not govern any other program of self-governance other than under title IV and does not bind any

other cabinet Secretary or agency other than the Secretary of the Interior and the Interior Department. Nothing more needs be added to the final rule on this topic.

SUBPART A – GENERAL PROVISIONS

2) § 1000.20 What is the Secretarial policy of this part?

a) The final rule at section 1000.20 should fully implement the rules of construction required by the PROGRESS Act. While NPRM section 1000.20 incorporates elements of these provisions, section 406(i), 25 U.S.C. § 5366(i), directs the Secretary, subject to section 101(a) of PROGRESS Act, 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, and any ambiguity shall be resolved in favor of the Indian Tribe.*" This interpretation is not set out with clarity in NPRM section 1000.20.

To track the statutory requirement of 25 U.S.C. § 5366(i), revise NPRM §§ 1000.20 to read as follows:

> "In carrying out Tribal Self-Governance under title IV, it is the policy of the Secretary: . . .
>
> "(g) To interpret each Federal law and regulation, including this part, in a manner that facilitates inclusion of programs in funding agreements and the implementation of funding agreements.
>
> "(h) That all bureaus of the Department will negotiate in good faith~~,~~ to maximize implementation of the Self-Governance Policy and carry out Title IV and this part in a manner that maximizes the policy of Tribal self-governance.
>
> "(i) That each provision of Title IV and each provision of a compact or funding agreement shall be liberally construed by the Department and its bureaus or offices for the benefit of the Tribe or Consortium participating in self-governance, and that any ambiguity be resolved in favor of the Tribe or Consortium ~~each applicable Federal law and regulation in a manner that will benefit Tribes and Tribal Consortia participating in self-governance and~~ to facilitate the inclusion of programs in each funding agreement authorized~~, and~~.

(j) To timely enter into ~~such~~ funding agreements under title IV, whenever possible.

~~"(i)~~(k) To afford Tribes and Tribal Consortia the maximum flexibility and discretion necessary to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious, and institutional needs. These policies are designed to facilitate and encourage Tribes and Tribal Consortia to participate in the planning, conduct, and administration of those Federal programs, included, or eligible for inclusion in a funding agreement.

"~~(j)~~(l) To the extent of the Secretary's authority, to maintain active communication with Tribal governments regarding budgetary matters applicable to programs subject to the Act, and that are included in an individual funding agreement.

~~"(k)~~(m) To implement policies, procedures, and practices at the Department to ensure that the letter, spirit, and goals of the Act are fully and successfully implemented to the maximum extent allowed by law.

~~"(l)~~(n) To ensure that Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments and any subsequent Executive Orders regarding consultation will apply to the implementation of these regulations."

The PROGRESS Act's "facilitation" provision (section 403(i) (25 U.S.C. § 5363(i)) extends to "*each Federal law and regulation,*" and includes the Part 1000 rule. The edits to NPRM section 1000.20(g) – (n) are designed to implement Congress' instruction that the Department apply the correct rule of construction when interpreting and implementing Title IV and all relevant Federal laws and regulations.

SUBPART E - COMPACTS

3) **Contents of Compacts and Funding Agreements** – Amend NPRM section 1000.510(e) to include a general attestation that a Tribe/Consortium will comply with all requirements of Title IV. Revise the proposed provision to read:

"(e) Include ~~provisions that reflect~~ a general attestation that, in implementing the compact, the Tribe/Consortium will comply with the requirements of the Act ~~in accordance with § 1000.515~~."

4) Contents of Compacts and Funding Agreements - Delete NPRM section 1000.515 as unnecessary and renumber the remaining regulatory provisions of the Subpart. Section 1000.510(a)-(e) identifies the content of a compact consistent with section 406(b) of Title IV and NPRM section 1000.501.

The Tribal changes to NPRM sections 1000.510(e) and deletion of 1000.515 are consistent with the liberal interpretation of the Act and the provisions of each compact. This also furthers the goal to reduce regulatory requirements and the unnecessary requirement to duplicate statutory requirements in a compact. NPRM section 1000.515 is inconsistent with these requirements and it is factually incorrect. It represents a fraction of every Title IV provision that references the term "compact." For these reasons, section 1000.515 should be deleted.

SUBPART F – FUNDING AGREEMENTS FOR BIA PROGRAMS

5) Content of Funding agreements for BIA Programs – Revise NPRM section 1000.610(b) by striking the NPRM text in its entirety and substituting the following in its place:

> "(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."

The change to NPRM sections 1000.610(b) is consistent with the liberal interpretation of the Act and the provisions of each funding agreement. This also furthers the goal to cut regulatory requirements and the unnecessary requirement to duplicate each statutory requirement in a funding agreement.

6) Negotiation of whether a function is an "Inherent Federal function" – Revise NPRM section 1000.695 to read as follows:

> **"1000.695 ~~Is~~ 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~~s~~ subject to negotiation?**
>
> "Yes, the Secretary's identification of an inherent federal function and calculation of such costs ~~is an~~ are appropriate subject~~s~~ during the negotiation of a funding

agreement because ~~it~~ each affects the amount of funds available for transfer to the funding agreement. If the Tribe/Consortium and the Secretary are unable to agree on whether a function is an inherent Federal function and/or 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.

The Department's position to remove from negotiations the topic of whether a function is an "IFF" is inconsistent with the statutory requirements of Title IV, amended by the PROGRESS Act, and internally inconsistent with NPRM Subpart R (Appeals), that clearly makes the issue of "IFF" an issue eligible for appeal by a Tribe as a pre-award dispute matter.

The Department's position would make a mockery of the appeal process by having no administrative record for an adjudicator (IBIA or Department Assistant Secretary or Director) to evaluate the merits of the Department's position to decline to include a program or function as eligible for inclusion in a Title IV funding agreement. It is not what good rulemaking demands.

Good regulations "promote predictability, to reduce uncertainty, and . . . use the best, most innovative, and least burdensome tools for achieving regulatory ends." (E.O. 13563). The Department's position, if carried through to the final rule, would have the opposite effect. For that reason, the Department should adopt the Tribal recommendation and harmonize Subpart F with Subpart R - Appeals.

Again, good policies are transparent and supported by evidence. The Department prefers to hide behind the "safe harbor" of IFFs and shield arbitrary and capricious decision making on functions eligible for inclusion in funding agreements by removing the topic from negotiations. We find no support for the Department's position other than it wishes to lock in a final rule its complete discretion to interpret an IFF however it sees fit. That is contrary to Congressional intent.

SUBPART G – FUNDING AGREEENTS FOR NON-BIA PROGRAMS

7) Setting out criteria for identifying inherent Federal functions – Revise NPRM section 1000.845(a) and 1000.845(c) that answers *"Are there any non-BIA programs that may not be included in a funding agreement,"* to read:

"(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;"

" . . .

"(c) The Secretary shall interpret each Federal law and regulation, including this part, in a manner that facilitates: . . . ."

Without the highlighted additional text in NPRM section 1000.845(a) and section 1000.845(c), the Department would have *unfettered agency discretion* to define a "function" as an inherent Federal function without any criteria other than: 1) the definition of an "IFF" set out in 25 U.S.C. § 5361(6) (i.e., "a Federal function that may not be legally delegated to an Indian Tribe"); and 2) 25 U.S.C. § 5363(k) (i.e., "nothing in this section [403 of Title IV] is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement with respect to functions that are inherently Federal or whether the statute establishing the existing program does not authorize the type of participation sought by the tribe").

But the statutory citations included in NPRM section 1000.845(a) ignore the fact that Congress defined the term "inherent Federal function" in the PROGRESS Act to limit the term to only those functions that may not be legally delegated to a Tribe/Consortium. That was designed to *narrow* the justifications for a non-BIA bureau to place certain functions in the "safe harbor" of "IFFs" and to require the non-BIA bureau to consider the request by a Tribe/Consortium to include a function in a Title IV funding agreement.

Only after the Department has set the playing field to its advantage in NPRM section 1000.845(a), does the NPRM add section 1000.845(c) that requires the Secretary 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." However, setting the table as the Department does in section 1000.845(a) makes section 1000.845(c) an afterthought. In our view, this does not advance the principles of self-governance or facilitate the inclusion of programs and functions in compacts and funding agreements. It is more of the same from the

Department. This is inconsistent with the mandate from Congress to "correct the bureaucratic processes and procedures" the Department has built up over the last 30 years that impede self-governance.

That is the reason Tribes seek to elaborate on NPRM section 1000.845(a) in a manner similar to the regulatory text in NPRM section 1000.845(b) that sets out factors the Department's non-BIA bureaus must consider when determining whether a statute "does not authorize the type of participation sought by" the Tribe/Consortium.

If it makes sense to set out regulatory factors in NPRM section 1000.845(b) to better ensure uniform interpretation of Title IV as to section 403(k) of Title IV, the Department should not dismiss efforts by Tribes to set out regulatory factors in NPRM section 1000.845(a) concerning the term "inherent Federal functions" and reach a compromise with Tribes as to the well-established and long-standing criteria set out in the "Leshy Memorandum."

We recommend that, if the Department cannot accept the Tribal addition to NPRM section 1000.845(a) that reads: "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," the Department should come to the Committee deliberations in September 2024 with substitute regulatory text that sets out *reasonable criteria* that guides Department bureaus and Tribes concerning IFFs. The Department should evidence its willingness to include in the final rule reasonable criteria that applies across the non-BIA bureaus concerning the issue of whether a function is an "IFF."

If the Department were to propose such criteria, it would promote predictability and reduce uncertainty using the least burdensome tools" as noted in Executive Orders 13563 and 12866. *See* fn. 2 *supra*. Proposed section 1000.845(a) does not live up to the Department's obligations under the PROGRESS Act and applicable Executive orders relevant to good agency rulemaking.

8) Calculation and payment of Contract Support Costs for Non-BIA programs – Revise NPRM section 1000.885(b)(1)(iii), that answers the question: "*What funds are included in a non-BIA funding Agreement?*," to read:

"(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~~, or upon appropriations of such funds by Congress~~."

As noted above in Part II, with passage of the PROGRESS Act, Congress set out to correct the bureaucratic processes and procedures that the Department of the Interior Self-Governance program has imposed which have discouraged, to some degree, the further compacting of Indian programs within the Department of the Interior (Department) by Indian tribes. Yet the Department would add the highest bar - requiring an Act of Congress - before the Department would pay full contract support costs to Tribes for the assumption of Federal programs eligible for inclusion in a Title IV funding agreement.

Congress amended Title I of the ISDEAA in 1988 to address the issue of full contract support cost funding when a Tribe assumed a contractible program from the BIA or IHS. Despite the statement below in the Senate Indian Affairs Committee's 1987 report, it would take decades of litigation by Tribes to vindicate their position concerning the obligation of federal agencies to fully fund Tribal indirect costs:

> *Perhaps the single most serious problem with implementing of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts*. The consistent failure *of federal agencies to fully fund tribal indirect costs* has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. *It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts*. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

S. Rpt. No. 274, 100th Cong., 1st Sess., pp. 8-9 (1987) (Senate Committee on Indian Affairs Report to accompany S. 1703). Emphasis added.

The Congressional rationale set out in 1987 for full CSC funding also applies to the non-BIA bureau programs. We do not see how promoting co-stewardship and co-management agreements with Tribes for the many non-BIA bureau programs is possible without such funding. To claim otherwise undermines the Federal government's goal in section 403(i) of Title IV (25 U.S.C. § 5363(i)) to "facilitate" the inclusion of PFSAs in funding agreements and the implementation of agreements entered into under Title IV. Tribes should not incur a financial "penalty" for assuming federal responsibilities in order to build greater capacity and capabilities.

The Department's position in Subpart G of the NPRM, vis-à-vis programs of the non-BIA bureaus, is to again to force Tribes to sue the Interior Department in Federal court or wait for Congress to once again amend the ISDEAA. The Department can do better by Tribes in the final rule by adopting the Tribal position.

SUBPART K – CONSTRUCTION

9) **Define the term "*categorical exclusion*" in the "Construction Definitions" heading and supplement the NPRM Subpart K regulatory provisions in the "NEPA" heading to permit Tribes to make and implement a final decision on a proposed action and be responsible for ensuring compliance with NEPA** – In our view, the disagreement between the Department representatives and Tribal representatives to the Committee over section 407 of Title IV (concerning construction projects and programs performed by Tribes under self-governance) is among the most serious and consequential of non-consensus issues regarding its effects on the content of the NPRM.

From a legal and policy perspective, the Federal rationale defending the Department's position concerning section 407 of Title IV is weak and does not stand scrutiny.

As we explained more fully below, we recommend that the following regulatory provisions be included in Subpart K of the final rule implementing the PROGRESS Act. These provisions are substantively similar to the regulations codified at 42 CFR Part 137, Subpart N (Construction) for the DHHS Self-Governance regulations. These regulations would supplement the NPRM Subpart K regulatory provisions relating to NEPA compliance for construction projects.

A. Define the term "*Categorical exclusion*"

We recommend that the term "*Categorical exclusion*" be defined as follows in NPRM section 1000.301 "What key construction terms do I need to know?"

> "*Categorical exclusion*" means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

The above definition is found in the DHHS Construction definitions at 42 CFR 137.280 (Construction definitions).

In the alternative, and as a compromise, the Interior Departments should consider including in the final rule the definition of "*categorical exclusion*" set out in CEQ's revised Part 1508 regulations issued on May 1, 2024. CEQ defines the term as follows:

> "*Categorical exclusion* means a category of actions that an agency has determined, in its agency NEPA procedures (§ 1507.3 of this subchapter) or pursuant to § 1501.4(c) of this subchapter, normally does not have a significant effect on the human environment."

40 C.F.R. § 1508.1(e), 89 Fed. Reg. at 35574 (May 1, 2024).[1]

B. Include supplemental NEPA regulatory provisions

For the reasons noted below, insert the following six provisions (denoted as "1000.XXX#1 – 1000.XXX#6) after NPRM section 1000.1370 and before NRPM section 1000.1375 under the NPRM's "NEPA Process" subheading of Subpart K (they are substantially similar to DHHS Construction regulations set out at 42 CFR Part 137, Subpart N):

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[1] As noted below, CEQ's revised NEPA regulations instructs that: "Federal agencies shall use these terms uniformly throughout the Federal Government." 40 C.F.R. § 1508.1; 89 Fed. Reg. 35442, 35574 (May 1, 2024).

1000.XXX#1. "If a Tribe/Consortium elects to assume Federal responsibilities under § 1000.1370, what environmental considerations must be included in the construction project agreement?"

Where a Tribe elects to assume Federal responsibilities under § 1000.1370, the construction project agreement must include:

(a) Identification of the Tribal certifying officer for environmental review purposes,

(b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in § 1000.1370,

(c) Identification of the environmental review procedures adopted by the Tribe/Consortium, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Tribe/Consortium's adopted procedures.

1000.XXX#2. "Is a Tribe/Consortium required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under § 1000.1370?"

Yes, but only as provided in this section. Unless a Tribe/Consortium consents to the jurisdiction of a court, it is immune from civil lawsuits. A Tribe/Consortium electing to assume Federal responsibilities under § 1000.1370 must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Tribes/Consortia are not required to waive any other immunity.

1000.XXX#3. "Are Tribes/Consortia entitled to determine the nature and scope of the limited immunity waiver required to assume Federal responsibilities under § 1000.1370?"

(a) Yes, section 25 U.S.C. § 5367(b)(2) only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Tribes/Consortia are not required to subject themselves to suit in their own name, to subject to trial by jury or civil discovery, or to waive immunity for money damages, attorney fees, or fines.

(b) Tribes/Consortia may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying official's actions is based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities that have been assumed by the Tribe/Consortium under 25 U.S.C. § 5367(b); and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.

1000.XXX#4. "Who is the proper defendant in a civil enforcement action under section 25 U.S.C. 5367(b)?"

(a) Where the Tribe/Consortium has elected to assume Federal responsibilities under NEPA, NHPA, and related provisions of other laws and regulations, only the designated Tribal certifying officer acting in his or her official capacity is the proper defendant in a civil enforcement action may be sued. Tribes/Consortia and other Tribal officials are not proper defendants in lawsuits brought under section (25 U.S.C. § 5367(b)(2)).

(b) Where the Tribe/Consortium has not elected to assume Federal responsibilities under § 1000.1370, the Secretary is the proper defendant in a civil enforcement action and may be sued.

1000.XXX#5. "What Federal environmental responsibilities remain with the Secretary when a Tribe/Consortium assumes Federal responsibilities under § 1000.1370?"

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under § 1000.1370 remain with the Secretary. Federal agencies, including the Department, retain responsibility for ensuring their environmental review procedures meet the requirements of NEPA, NHPA, and related provisions of other laws and regulations that would apply if the Secretary were to undertake a construction project.

(b) The Secretary will provide information updating and changing Department environmental review policy and procedures to all Tribes/Consortia implementing a construction project agreement, and to other Tribes/Consortia upon request. If a Tribe/Consortium participating in Self Governance under 25 U.S.C. 5367 does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of a Tribe/Consortium, the Secretary will provide technical assistance to the Tribe/Consortium to assist the Tribe/Consortium in carrying out Federal environmental responsibilities.

1000.XXX#6. "How are Tribes/Consortia recognized as having lead agency status?"

Tribes/Consortia may be recognized as having lead agency status through funding or other arrangements with other agencies. To the extent resources are available, the Secretary will encourage and facilitate Federal, State, and local agencies to enter into agreements designating Tribes as lead agency for environmental review purposes.

We further recommend that the Department consider other regulatory provisions included in the DHHS Self-Governance regulations (42 CFR Part 137, Subpart N) that elaborate on the NHPA, Federal undertakings, and the role of the Advisory Council on Historic Preservation.

C. Legal and Policy Rationale for the Tribal Position

In the NPRM, the Department has no answer to the clear statutory text of section 407(b)(1) and (2) of Title IV (25 U.S.C. § 5367(b)(1) and (2)) that support the Tribal position that the legislation affirmatively delegates to Tribes responsibilities under NEPA to make and implement a final decision on a proposed action, especially when the statutory provision is interpreted – as directed by Congress – in accordance with Title IV's "rules of construction" noted in Part II above.

Section 407(b) permits a Tribe to assume "some Federal responsibilities" under NEPA, the National Historic Preservation Act (NHPA), and related provisions of other law and regulations that would apply if the Secretary were to undertake a construction project, only when the Tribe adopts a resolution –

> "(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.**"

25 U.S.C. § 5367(b)(1) and (2) (2024). Emphasis Added.

The Tribal argument in the NPRM is straightforward. 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** "pursuant to statute." 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 make a decision 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).

This plain reading of section 407(b), as amended by the PROGRESS Act, should be the end of the disagreement over these provisions. However, to the extent there is any ambiguity, the "rules of construction" that the Department must apply under section 406(i), should lead the Department to reconsider its position and find the PROGRESS Act does delegate such authority to a Tribe to make a final determination under NEPA and related environmental laws.

The Department's defense in the Committee report cites pre-PROGRESS Act precedent – that it has always made the final determination under NEPA – or to reference inapplicable Part 900 (Title I) regulations as authority for not being able to delegate this authority. The Department's justification for its constrained and stingy interpretation of Title IV, the PROGRESS Act, Council on Environmental Quality (CEQ) regulations at 40 CFR Part 1500 *et seq.*, and the Department's own regulations implementing NEPA (43 CFR Part 46), does not withstand scrutiny.

First, the Department reads out and ignores section 407(b)'s references to the certifying Tribal officer "**assuming the status of a responsible Federal official under those [environmental] Acts, law, or regulations**." There is no reference to or interpretation by the Department of section 407(b)'s "**assuming the status of a responsible Federal official**" in the Committee Report to AS-IA Newland, or the NPRM Federal view opposing the Tribal interpretation of this provision.

The Department also ignores the PROGRESS Act amendment of Title IV to define the term "**construction program; construction project**" 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.

25 U.S.C. § 5361(2) (2024) (definition of "construction program; construction project").

The Department further ignores the rules of construction and these clear statutory requirements by relying on other terms and provisions in section 407 (e.g., the term "some" and the "savings clause") to paper over the fact that it lacks a serious legal or policy defense to its opposition to the Tribal position. The Department makes a great deal of the fact that the savings clause denies the Department the ability to include an inherent Federal function" in a funding agreement. But the "savings clause" can be read into every provision of Title IV.

The Department also makes much of the difference between Congress' use of the word "some" in section 407(b) compared with the use of "all" in the analogous Title 5 provision, but the Department gets the import of that distinction entirely backwards. Section 407(b) allows Tribes to pick and choose "Federal responsibilities" to take on rather than Title V's all-or-nothing proposition. Nothing in the statute suggests that Congress intended to be *more* restrictive in the Progress Act than in Title V. Tribes agree that "some" means something different than "all," but the Department's insistence that "some" must therefore mean "not final determinations" ignores the plain language of the word "some," which simply means "at least one". *See, e.g.* "some" www.merriam-webster.com/dictionary/some.

Second, the crux of the Department's argument is that Tribes cannot take on these responsibilities (even when "assum[ing] the status of a responsible Federal official") because they are inherently Federal functions. But this too cannot withstand scrutiny. Congress defined IFFs as "Federal function[s] that may not legally be delegated to an Indian Tribe" (25 U.S.C. § 5361). The Federal government has been delegating these exact functions to Indian Tribes for 20 years (DHHS) and Federal regulations (including the Department's) specifically contemplate Tribes taking on such functions.

CEQ's Final rule, issued in the Federal Register on May 1, 2024 (89 Fed. Reg. 35442 -35577), overhauls regulations codified at 40 CFR Parts 1500 through 1508, and retains the long-standing definition of "*Federal agency*" used throughout CEQ's NEPA regulations. The restatement of the definition of the term "*Federal agency*" is set out in 40 CFR Part 1508 (Definitions). We note that CEQ's Final rule states:

> **The following definitions apply to the regulations in this subchapter** [Subchapter A – National Environmental Policy Act Implementing Regulations (40 CFR Parts 1500 through 1508)]. **Federal agencies shall use these terms uniformly through the Federal Government**.

40 C.F.R. § 1508.1, 89 Fed. Reg. at 35574 (May 1, 2024).

The term "**Federal agency"** is defined by CEQ to mean –

> **[A]ll agencies of the Federal Government**. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions of the President in his Executive Office. **For the purposes of the regulations in this subchapter [Subchapter A], Federal agency also includes** States, units of general local governments, and **tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute**.

40 C.F.R. § 1508.1(p); *Id.* at 35575.

CEQ further revised its NEPA regulations at 40 C.F.R. § 1506.3 (Adoption) and removed the term "Federal" before the types of documents an agency may adopt "as unnecessary and to make clear that agencies can adopt NEPA documents prepared by non-Federal entities that are doing so pursuant to delegated authority from a Federal agency. *See e.g.*, 23 U.S.C. 327."[2]

The CEQ also revised the definition of the term "*environmental assessment*" in Part 1508 to also reflect this change.

CEQ defines the term "*environmental assessment*" to mean:

> [A] concise public document, for which a *Federal agency* is responsible, for an action that is not likely to have a significant effect or for which the significance of the effects is unknown (§ 1501.5 of this subchapter), that is used to support an agency's determination of whether to prepare an environmental impact statement (part 1502 of this subchapter) or a finding of no significant impact (§ 1501.6 of this subchapter).

[2] CEQ Final rule, 89 Fed. Reg. at 35521 (May 1, 2024).

40 C.F.R. § 1508.1 (2023).

Note that in the revised CEQ definition of "environmental assessment," the phrase "for which a Federal agency is responsible," can be read as "for which a [tribal government assuming NEPA responsibilities from a Federal agency pursuant to statute] is responsible."

Since 2008, the Interior Department codified its NEPA regulations at 43 CFR Part 46 to set out its procedures to implement NEPA that the Department had previously located in its Departmental Manual (DM). In promulgating the rule, the Department made clear that 43 CFR Part 46 establishes procedures for the Department, and its constituent bureaus, to use for compliance with NEPA and the CEQ regulations. *See* 43 C.F.R. § 46.10(a) (2023).

The Department clarified that the Part 46 rule supplements, and is to be used in conjunction with, the CEQ regulations [40 CFR Parts 1500 – 1508] "*except where it is inconsistent with other statutory requirements.*" 43 C.F.R. § 46.20(a) (2023).

The Interior Department's NEPA regulations include definitions that "supplement" CEQ regulations. The Department defines the term "*Responsible Official*" as:

> [T]he bureau employee who is **delegated the authority to make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA.**

43 C.F.R. § 46.30 (2023). Emphasis Added.

From a policy standpoint, the Department's argument is quite weak. The OSG has 15 encumbered FTEs, 10 filled. The OSG recommends that it have 28 FTEs to prudently manage existing and future participating self-governance Tribes. Thus, OSG is operating in FY 2024 with nearly one-third of the total FTEs it should have.

Regional offices of the BIA and non-BIA bureaus are similarly short-staffed to efficiently manage their existing duties. Too few Regional offices maintain full-time engineers/architects and NEPA/NHPA compliance officers to timely review and approve Tribal plans, specifications and estimates (PS&Es) for construction projects and make and implement a decision on a proposed action based on the environmental reports to ensure compliance with NEPA and related environmental laws.

With the growing number of competitive and discretionary grants available to Tribes to carry out construction projects, together with Congressionally directed spending in annual appropriations of the Interior, Environment and Related Agencies spending measure, the number of construction projects eligible for inclusion in Title IV funding agreement will only increase over time. If the purpose of the PROGRESS Act was to reduce agency red tape and empower Tribes, the Department should reconsider its opposition to Tribes "assuming the status of a responsible Federal official" under NEPA.

Tribes also note that that the reach of these provisions is very limited. Section 407(b) only applies to NEPA and NHPA responsibilities that Tribes are already subject to. Nothing in the Tribes' argument that "assuming the status of a responsible Federal official" with respect to NEPA and NHPA includes making final environmental determinations would expand NEPA or NHPA compliance requirements to new or different Tribal programs.

The plain text of the statute provides Tribes with the ability to make and implement decisions on a proposed action and to be responsible for ensuring compliance with NEPA and related environmental laws. Adopting a constrained and crabbed reading of the statute to deny Tribes this avenue for self-determination does them a major disservice.

SUBPART R – APPEALS

10) Expand Alternate Administrative Appeal Options and delete "title-I eligible programs" –

A. Delete NPRM section 1000.2302 "What does 'title I-eligible programs' mean in this subpart?" and revise NPRM section 100.2351 "To Whom May a Tribe/Consortium Appeal a Decision under § 1000.2345?"

As noted below, Tribes recommend these revisions to the final rule to build capacity for an administrative appeals process with the bureau head/Assistant Secretary level to promote predictability, reduce uncertainty, and use the least burdensome tools to achieve regulatory ends as set out in E.O. 12866, as supplemented by E.O. 13563.

We recommend that the final rule revise section 1000.2351 in its entirety by striking the NPRM text and inserting in its place the following:

§ 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 paragraph (b) of this section, and instead appeal directly to IBIA.