

Operating Protocols
For the
Department of Interior
Self-Governance PROGRESS Act Negotiated Rulemaking
Committee
[Month] 2022

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I. INTRODUCTION

This document describes the purpose of the Self-Governance PROGRESS Act Negotiated Rulemaking Committee (Committee), its operating structure and how Committee Members will communicate, make decisions and support agreements made. Upon review, revision, and approval by the Committee, the Operating Protocols will guide and direct the Committee's collaborative efforts, and any Subcommittees it establishes, to develop consensus recommendations.

II. COMMITTEE AUTHORITY

The Secretary has determined that the establishment of the Committee is in the public interest. The Committee is subject to the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2), as outlined in its Charter, filed on May 18, 2022. Authority for the Committee is under:

- Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act (Public Law 116-180)
- Negotiated Rulemaking Act of 1996 (5 U.S.C. § 561 *et seq.*) The Committee will conduct its activities in accordance with the Negotiated Rulemaking Act as adapted to the unique context of self-governance and the government-to-government relationship between the United States and Indian Tribes.

III. COMMITTEE PURPOSE

In negotiated rulemaking, a committee is convened by the Federal Government for the purpose of negotiating the terms of a proposed administrative rule. The Committee is composed of representatives of Federal and non-Federal Tribal government nominated Committee members that will be significantly affected by the rule. The Department of the Interior (DOI) has followed legally mandated rules and procedures to solicit nominees, and secure federal appointments of individuals who represent the diverse interests affected by the final rule.

The purpose of the Committee is to negotiate and advise the Secretary of the Interior (Secretary) through the Office of Self-Governance and the Assistant Secretary - Indian Affairs to develop the text of a proposed rule to implement Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) regarding the Tribal Self-Governance Program as amended by the PROGRESS Act. Other issues related to the proposed regulations that the DOI and Committee Members mutually agree to address may also be discussed. The Committee will act solely in an advisory capacity to DOI and will neither exercise program management responsibility nor make decisions directly affecting the matters on which it provides advice.

It is anticipated that the proposed rule developed by the Committee will revise the current regulations implementing the Tribal Self-Governance Program codified at 25 C.F.R. Part 1000 to amend, delete, and add provisions as appropriate to implement the PROGRESS Act. The Committee is expected to continue until the promulgation of the final rule under consideration and will not continue past that time.

IV. COMMITTEE MEMBERSHIP

- A. Selection:** FACA requires that committee membership be “fairly balanced in terms of the points of view represented and the functions to be performed.” The Secretary appointed

representatives to the Committee reflecting a geographical balance and representing a diversity of interests affected by the regulations.

B. Appointment: Members are appointed by the Secretary and serve at her discretion.

- 1) **Primary Members:** The Secretary appointed thirteen (13) Total Primary Members comprised of seven (7) Tribal, and six (6) Federal. Primary Members are voting members. In the event that a Primary Member is unable to attend a Committee meeting, advance notice should be given to the Designated Federal Officer (DFO) and the Primary's Alternate.
- 2) **Alternate Members:** The Secretary appointed thirteen (13) Alternate Members comprised of seven (7) Tribal and (6) Federal. Alternate representatives are to remain abreast of Committee discussions and to be prepared to perform the duties of the Primary member, including deliberating and voting, when the Primary is absent from a Committee meeting.
- 3) **Term:** The Primary and Alternate Members will serve a two-year term.
- 4) **Vacancy:** A vacancy on the Committee is filled in the same manner in which the original appointment was made.
- 5) **Resignation:** If a Committee Member decides to resign from the Committee, a notification must be sent to the DFO, preferably by official letter.

C. Composition:

- 1) **Tribal Members:** Fourteen (14) Tribal representatives (7 primary and 7 alternate) are appointed to the Committee and reflect a balance of interest that will be significantly affected by the final rule. Those parties are Indian Tribes and Tribal organizations as defined in section 4(l) of the ISDEAA that are currently participating in the Tribal Self-Governance Program and those that are not currently participating in, but are interested in participating in, Tribal Self-Governance Program. The individuals represent and are authorized to negotiate on behalf of Indian Tribes and Tribal organizations as defined in section 4(l) of the ISDEAA who would be affected by the final rule. Participation in the Committee in no way precludes or supersedes a Tribe's legal right to engage in government-to-government meetings and consultations with the U.S. Department of the Interior (DOI).
- 2) **Federal Members.** Twelve (12) Federal representatives (6 primary and 6 alternate) are appointed to the Committee and are authorized to negotiated on behalf of the agency and U.S. Government. They will report to, consult with, and secure approval of the agency's negotiation parameters with the Agency Lead.

D. Responsibility:

- 1) **Attendance:** Membership includes the responsibility to attend Committee meetings. Primary and Alternate members are expected to attend all meetings. DOI reserves the ability to replace any member who is unable to fully participate in the Committee's meetings.

In the event that a Primary Member is unable to attend a Committee meeting, advance notice should be given to the Designated Federal Officer (DFO) and the Primary's Alternate. If both the Primary and the Alternate Members are absent from a meeting in

which consensus will be deliberated or decided, the absences will be equivalent to not dissenting.

2) Engagement:

- a. Commit to participate in respectful and good faith negotiations and discussions to develop consensus recommendations;
- b. Regularly prepare for and attend Committee and Subcommittee meetings as applicable;
- c. Take responsibility for getting caught up on deliberations and on decisions made at any meeting the member missed;
- d. Clearly articulate and represent the interests of their constituent group(s) and bring their constituents' concerns and ideas to the deliberations;
- e. Listen to other points of view and try to understand the interests of other Committee Members;
- f. Openly discuss issues with Committee and Subcommittee Members who hold diverse views, and participate in a cooperative problem-solving procedure to resolve differences;
- g. Generate and evaluate options to address the needs expressed by Committee and Subcommittee Members; and
- h. Agree to support and abide by the content of this Operating Protocol.

E. Safeguards for Members:

- 1) Media Contact:** In the interest of promoting free and open conversation as well as collegial decision-making, contact with the media and other organizations outside the community of interest represented by the Member will generally be limited to discussion of the overall objectives and progress of the negotiations. Committee Members should refrain from characterizing the views, motives, and interest of other members during contact with the media, other organizations outside the community of interest represented by the Member, and to the general public through social media.
- 2) Document Management:** In communicating with entities outside of the Committee, a clear distinction should be made between preliminary information, concept papers, or proposals under consideration and final decisions on recommendations. It is important to differentiate between documents used for discussions and decisions. Preliminary documents will be marked "DRAFT" or "FOR DISCUSSION PURPOSES ONLY."
- 3) Adversarial or Legal Proceedings:** As a matter of courtesy, Members of the Committee agree to notify the DFO and all Committee Members verbally and in writing before initiating any adversarial or legal proceedings that may involve other Committee Members or which could adversely affect deliberations of the Committee. Notification should provide all parties adequate time to consider options and take appropriate measures to minimize potential adverse impacts on the work of the Committee or its Members.

F. Compensation and Travel:

- 1) **Federal Members:** Federal government employees serving on the Committee are not entitled to additional compensation. DOI may pay travel and per diem for Federal Members.
- 2) **Tribal Members:** Non-Federal members of the Committee serve without compensation. However, while away from their homes or regular places of business, Committee members engaged in Committee business approved by the DFO, may be allowed travel expenses, including per diem.

V. ROLE OF OFFICIALS

- A. **Committee Management Officer (CMO):** The CMO oversees the administration of all DOI advisory committees including;
 - 1) exercising control and supervision over the establishment, procedures, and accomplishments of advisory committees established by the agency;
 - 2) assembling and maintaining the reports, records, and other papers of any such committee during its existence; and
 - 3) carrying out, on behalf of the agency, the provisions of section 552 of Title 5, United States Code, with respect to such reports, records, and other papers.
- B. **Designated Federal Officer (DFO):** The DFO serves as the government's agent for all matters related to the Committee's activities. The DFO and Facilitator(s) will enforce the Committee's operating protocols. The DFO is required by FACA and must:
 - 1) ensure compliance with FACA, and any other applicable laws and regulations;
 - 2) approve agendas;
 - 3) call, attend, and adjourn Committee meetings;
 - 4) adjourn the meetings when such adjournment is in the public interest;
 - 5) chair meetings of the Committee as directed by the Agency Lead;
 - 6) prepare the minutes of all meetings of the Committee's deliberations, including notes of subcommittee activities;
 - 7) maintain records of all meetings, including subcommittee activities;
 - 8) maintain required records on costs and membership;
 - 9) ensure efficient operations;
 - 10) maintain records for availability to the public; and
 - 11) prepare and handle all Committee reports to the Committee Management Officer for submission to the Library of Congress.
- C. **Alternate Designated Federal Officer (DFO):** The Alternate DFO performs the duties of the DFO in the absence of the DFO from the Committee or subcommittee meetings. The Alternate DFO also performs duties as assigned by the DFO and/or agency leadership to accomplish the mission of the Committee.
- D. **Agency Lead:** The Agency Lead works with the DFO and Alternate DFO to establish priorities, identify issues which must be addressed, determine the level and types of staff and financial support required, and serves as the focal point for the Committee's membership. In addition, the Agency Lead is responsible for certifying the accuracy of minutes developed to document Committee meetings. The Agency Lead must be a Committee member.

- E. Tribal Lead:** The Tribal Lead assists the DFO, Alternate DFO, Agency Lead and FMCS with administrative meetings for the limited purposes of discussing administrative, operational, or logistical issues. The Tribal Lead must be a Committee member.
- F. Legal Advisor:** A representative of the DOI Office of the Solicitor has been appointed to the Committee to provide legal advice to the Committee during deliberations.
- G. Support and Facilitator(s):** The Office of Regulatory Affairs and Collaborative Action (RACA) will assist in supporting the Committee. Indian Affairs (IA) with the assistance of DOI's Office of Collaborative Action and Dispute Resolution (CADR) has contracted with Federal Mediation and Conciliation Service (FMCS) to support the Committee as a neutral and impartial facilitator. FMCS facilitators serve at the pleasure of the collective membership of the Committee as an independent process designer and meeting facilitator. FMCS facilitator(s) are not members of the Committee.

The DFO and Facilitator(s) will enforce the Committee's operating protocols approved by the Committee. The Facilitator(s) will coordinate with [the DFO] or [Leadership Team] to design the meeting agendas to address identified issues for discussion. Parties are encouraged to express any concerns about the Facilitator's role or action; first to the Facilitator directly; and then, if needed, to the DFO and/or Agency Lead.

The Facilitator(s) are accountable to the Committee as a whole and not to any one Committee Member. The Facilitator has no decision-making authority and cannot impose any solution, settlement, or agreement among any or all of the Members regarding substantive issues. The Facilitator may use any number of techniques to help ensure that everyone has the opportunity to speak, that comments are kept to a reasonable length of time, and that subjects under discussion are provided sufficient time and focus for progress.

To the greatest extent possible, the Facilitator(s) will assist Committee Members to reach and record consensus agreements. If and when consensus agreements are not possible, the Facilitator will help the Committee and Subcommittee Members to determine appropriate ways to respond to impasses and provide DOI with information on the diversity of views.

The Facilitator(s) will remain impartial toward the substance of the issues under discussion, in that she/he will work with all Committee Members to help identify and/or develop mutually acceptable solutions that meet all parties' interests to the greatest extent possible.

VI. COMMITTEE MEETINGS

- A. Administrative Meetings:** The Agency Lead and DFO may convene administrative meetings for the limited purposes of discussing administrative, operational, or logistical issues. Administrative meetings are not subject to FACA's open meeting requirements. During such meetings, only administrative, operational, or logistical issues may be discussed.

B. Leadership Team: The Leadership Team will be a subcommittee tasked with conducting administrative meetings and will be composed of the following

- 1) DFO,
- 2) Alternate DFO,
- 3) Facilitator,
- 4) Agency Lead,
- 5) Tribal Lead,
- 6) one representative selected from the Tribal Committee Members. and
- 7) one representative selected from the Federal Committee Members.

This subcommittee will make only procedural decisions, and not substantive decisions regarding the Committee's recommendations. The Leadership Team will operate by consensus. The Leadership Team will have a number of management tasks including, but not limited to:

- 1) Represent the Negotiated Rulemaking Committee as a whole to the general public.
- 2) Assist the Facilitator in approaches for addressing relevant issues and the development of the plenary meeting agendas for DFO approval.
- 3) Coordination between meetings on issues to be discussed.
- 4) Oversight, with the Facilitator, of the Subcommittee functions.
- 5) Liaison between the Committee as a whole and the Facilitator.

C. Committee Meetings: The DFO (or alternate DFO) will be present at all meetings, including any subcommittee meetings. Meetings will be called by the DFO in consultation with the Agency Lead according to the following considerations:

- 1) Schedule:** Meetings will be held according to a schedule agreed upon by the Committee. The Committee will meet approximately 5 times annually, and or as required and designated by the DFO. The Committee schedule is determined by the need to implement a final rule by [insert date]. The regulatory negotiation is scheduled to begin in [month/date] and be conducted for a period of two-years.
- 2) Agenda:** An outline of the agenda will be included with the notice of the meeting in the Federal Register. The DFO will approve the agenda for all meetings. The detailed agenda will be distributed to the Committee prior to each meeting and posted to the Committee website <https://www.bia.gov/service/progress-act> Items for the agenda may be submitted to the DFO by any member of the Committee. Items may also be suggested by non-members, including members of the public.
- 3) Quorum:** A quorum shall consist of a majority (more than one half) of the Committee's Primary Members. If a quorum is not present, the DFO should contact the DOI Committee Management Officer (CMO) immediately to discuss other meeting options.
- 4) Caucus:** A caucus, defined as a private meeting of two or more Committee Members and/or Committee staff, held to confer about issues under deliberation, may be requested of the Facilitator(s)/DFO at any time, by any Committee Member. The Facilitator(s)/DFO may call for a caucus at any time.
- 5) Technical and Subject Matter Experts** – The Committee or Subcommittee may call upon other technical expertise or assistance, upon consensus of the Committee or Subcommittee. These experts are not members of the Committee but may be invited to

subcommittee or parent committee meetings to present on specific topics as identified on the agenda. They do not deliberate, vote on committee recommendations, or count toward the quorum.

- D. Subcommittee Meetings:** With the DFO’s approval, the Committee is authorized to establish subcommittees convened to gather information, conduct research, draft position papers, and analyze relevant issues and facts. While subcommittees are not subject to FACA, their activities are covered by the charter of the parent committee. Subcommittees do not have final substantive decision-making authority on any issue. Subcommittees may not work independently of the parent committee and must report their recommendations and advice to the full Committee during an open meeting for full deliberation, discussion and potential adoption by the full Committee. Subcommittees may be composed of Committee Members, technical experts, or others designated by the Committee with knowledge and expertise relevant to topics under discussion. Meetings of subcommittees are not required to be open to members of the public. The Agency Lead or her designee will be present for all subcommittee meetings. The DFO or Alternate DFO must be present for all subcommittee activities and ensure notes of the meeting are taken. Notes should summarize the activity of the subcommittee, list attendees, and provide the date/time/location of the meeting.
- E. Public access:** Meetings will be arranged to be reasonably accessible and at convenient locations and times. Notice of meetings will be published in the Federal Register at least 15 calendar days in advance.
- 1) **Open Meetings.** All Committee meetings (but not subcommittee meetings or caucuses) are open to the public.
 - 2) **Comments:** The decision regarding when to open a Committee meeting for public comment may be made by the DFO during the development of the meeting agenda. Members of the public may submit written statements to the Committee at any time via email at comments@bia.gov. Written comments received through this address will be provided to the Committee at each meeting. The Committee is not obligated to respond to public comments.

VII. HOW THE COMMITTEE WILL MAKE DECISIONS

A. Definition of Consensus

The Committee, LT, and any Subcommittees will operate by consensus, which is defined in the NRA (5 U.S.C. 562(2)), as unanimous concurrence of the primary Members, or in the absence of the primary, his or her alternate.

Reaching a consensus requires all group members to educate each other about their important needs, interests, and concerns, and develop an integrative solution or agreement that addresses and satisfies both individual and group interests to the greatest extent possible.

A consensus decision at its best is the strongest form of agreement a group can reach. It is an outcome that *all group members can support*. However, at a minimum, a consensus agreement may be a compromise that *all group members can accept*, “live with” and will not oppose.

B. Record of Agreements

The Facilitator will maintain a clear and reliable record of tentative and final agreements reached during the negotiation process.

- C. Absence:** If both the primary and the alternate Members are absent from a meeting in which consensus will be deliberated or decided, the absences will be equivalent to not dissenting.

D. Using Consensus

If a Member disagrees with a proposed approach or solution, he/she should make every effort to offer an alternative proposal that is satisfactory to all members.

A Member who is not in agreement with the general opinion in the group may voluntarily “stand aside” and not block a consensus decision by other Committee Members. This may be done verbally noting that the individual is not in agreement with the rest of the Committee Members and stating why but will stand aside and allow the Committee to reach a decision on a recommendation.

Consensus on substantive topics will be developed using a two-step process. The Facilitator may first ask for a tentative consensus by conducting a non-binding poll of the Members’ views on the issue(s) in question. Members may voice affirmative support for or objection to a proposal or agreement; refrain from the poll or remain silent. Based on the results of the tentative consensus, Committee Members may use the input to continue their deliberations and try to reach a final consensus, or, if appropriate, voluntarily agree to recognize the degree of support or rejection of the proposal and accept the results.

All consensus agreements reached during the negotiations will be assumed to be tentative agreements until the Committee Members reach final agreement on a package of recommendations. Once final consensus is achieved on the package of recommendations, Committee Members may not thereafter withdraw from the consensus decision.

E. Representation of Committee Members’ Interests

To enhance creativity during meetings, primary Committee Members and alternate Members are expected to remain open to new options or solutions to issues being addressed that may emerge in negotiations and deliberations.

The goals of the Committee and Subcommittee(s) are to have frank and open discussions of the issues in question and develop options to address these issues. Therefore, ideas raised in the process of negotiations and prior to the development of final recommendations, will be considered “for discussion purposes only,” and will not be construed to reflect the final conclusion of a Committee or Subcommittee Member or his or her constituent group.

VIII. AGREEMENT

A. Consensus Agreement Report

As stated in the Charter, if the Committee reaches consensus on a proposal, it will submit a report to the DFO specifying any areas in which the Committee has reached a consensus. If the

Committee reaches consensus on a proposed rule at the conclusion of negotiations, the Committee, through the DFO and Agency Lead shall transmit to the Secretary, a Consensus Agreement Report containing the proposed rule. Indian Affairs will use this Report as the basis for its notice of proposed rulemaking. Prior to publication in the Federal Register, the DFO will circulate the draft to the Committee to check for consistency with the Report. The Facilitator will be available to work with the Committee to resolve any differences in opinion about consistency.

On issues where consensus is reached, Committee Members will refrain from opposing or commenting negatively on the consensus-based language and will encourage their constituents to do the same.

B. Absent a Consensus

The goal of the Committee is to develop a consensus agreement report that reflects the final consensus by the Committee. However, as provided in the Charter, if the Committee does not reach a consensus on a proposal, it will insert within the report any areas on which a consensus is not reached.

C. Other Material

Also, as indicated in the Charter, the Committee may include in the report any other information, recommendations, or materials that the Committee considers appropriate.

D. Caveats

Committee Members should note that final, formal rulemaking requires review and approval by various federal entities. These authorities include the Office of the Assistant Secretary – Indian Affairs, the Secretary of the Interior, and the Office of Management and Budget.

IX. MINUTES AND RECORDS

- A. **Minutes:** The DFO (or Alternate DFO) must ensure that detailed minutes of each advisory committee meeting are kept. Minutes will be reviewed by the Committee at the next Committee meeting. The minutes must include:
- 1) The time, date, and place of the advisory committee meeting;
 - 2) A list of the persons who were present at the meeting, including advisory committee members and staff, agency employees, and members of the public who presented oral or written statements;
 - 3) An accurate description of each matter discussed and the resolution, if any, made by the advisory committee regarding such matter; and
 - 4) Copies of each report or other document received, issued, or approved by the advisory committee at the meeting.
- B. **Certification:** The Agency Lead must certify the accuracy of all minutes of advisory committee meetings. The DFO (or Alternate DFO) must ensure that minutes are certified within 90 calendar days of the meeting to which they relate.
- C. **Distribution:** Meeting minutes will be posted to the Committee website.
- D. **Records:** All documents, reports, or other materials prepared by, or for, the Committee are official government records and must be maintained according to GSA and DOI policies and

procedures. The Freedom of Information Act (FOIA) (5 U.S.C. § 552) sets standards for determining which records held by government agencies must be made available to the public and which records may be withheld. Pursuant to section 10(b) of FACA, the records of Federal advisory committees generally must be made available for public inspection and copying and the public does not need to submit a FOIA request to access these records. However, if there is a reasonable expectation that records sought fall within the narrow exemptions set forth in 552(b) of FOIA, they may be withheld.

- E. **Public Comments:** Members of the public, organizations, and staff of agencies who are not formal representatives on the Committee will have an opportunity to provide comments. The Committee is not obligated to respond to public comments. A time for public comment will be designed at each meeting and allocated evenly among the individuals making public comment. The Committee will also accept written public comments. Comments can be emailed to Comments@bia.gov. Written comments received through this address will be provided to the Committee at each meeting.

X. ADDITIONAL INFORMATION

In 1976, Executive Order 12024 delegated to the administrator of GSA all responsibilities of the President for implementing the Federal Advisory Committee Act (FACA). Secretariat operations are directed at reporting to the President and Congress on the activities of Federal advisory committees. The Committee Management Secretariat is responsible for governmentwide oversight of advisory committees. The Secretariat will provide advice to Committees as needed to assure success. The [Federal Advisory Committee Act \(FACA\) database](#) is used by Federal agencies to continuously manage advisory committees governmentwide including this Committee. <https://www.facadatabase.gov/FACA/FACAPublicPage>