



THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION

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A People of Vision

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

April 25, 2024

Ms. Vickie Hanvey, Designated Federal Officer
PROGRESS Act Negotiated Rulemaking Committee
Office of Self-Governance
United States Department of the Interior
1849 C St., NW
Washington, D.C. 20240

TRIBAL COUNCIL MEMBERS:

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Jennifer Finley
Danielle Matt

Via electronic mail at: Vickie.Hanvey@bia.gov

Re: Comment Submitted for April 4, 2024 Meeting of Negotiated Rulemaking Committee for the PROGRESS Act

Dear Ms. Hanvey,

On behalf of the Confederated Salish and Kootenai Tribes (CSKT, or Tribes), I am providing this comment for inclusion in the record for the PROGRESS Act Negotiated Rulemaking Committee's meeting dated April 4, 2024. At this meeting, the Tribal Committee members provided an overview of the Committee's agreed-upon draft regulations, noting that Tribal and Federal representatives reached consensus on the vast majority of the draft proposed regulations.

However, the Tribal Committee members also provided an overview of remaining provisions for which the Federal and Tribal Committee members were unable to reach consensus. Some are of great importance to Indian country. CSKT endorses, and I incorporate by reference, all of the positions identified by the Tribal caucus of the Negotiated Rulemaking Committee during the Committee's February 29th, March 14th, and April 4th meetings – including those positions regarding items for which the Committee lacks consensus, as outlined by the Tribal Caucus at the March 14th meeting. I am addressing two of these issues here for the benefit of you, Director Freeman, Assistant Secretary Newland, and Secretary Haaland in advance of the Department's final review of the Committee Report.

Inherently Federal Functions

As you know, the Committee's Tribal Caucus has expressed great concern over the Department's positions regarding what is deemed to be an "inherently Federal function" for the purposes of Tribal Self-Governance contracting. CSKT shares these concerns. In Subpart "G" of the draft proposed regulations, governing Non-BIA Agreements, the Department has balked at the Tribal Caucus' request to include in the regulations a central tenet of the Department's own long-standing guidance in determining what may be considered an "inherent Federal function."

The Tribal Caucus requests that the proposed regulations reflect the current guidance from a May 17, 1996 Solicitor memo, titled “Inherently Federal Functions under the Tribal Self-Governance Act.” Specifically, the Tribes have proposed that Subpart G, in the proposed § 1000.845(a), read as follows (*portion in disagreement is italicized*):

(a) Inherently Federal functions in accordance with sections 401(6) and 403(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;*

CSKT believes that it is important for the regulations to reflect this guidance, which is grounded in the 1974 Supreme Court decision in *U.S. v. Mazurie*, to better guide both federal and tribal negotiators of Self-Governance agreements. It has been CSKT’s experience that not all federal negotiators are aware of this guidance.

In Subpart “K” of the draft proposed regulations, governing Construction, the Department has insisted that issuing determinations for purposes of the National Environmental Protection Act (NEPA) is an inherently Federal function and thus not contractible by tribes under the PROGRESS Act. This position not only contradicts the statutory provisions found in section 407(b) of the Act, but it also violates the construction and interpretation rules that Congress has required under sections 406(i) and 409(a) of the Act. CSKT hereby incorporates the Tribal Position and Tribal Narratives found in the Negotiated Rulemaking Committee Final Federal Report, and requests that the Department accept the Tribal positions regarding inherently Federal functions – particularly with respect to the issuance of NEPA determinations under Subpart K.

Contract Support Costs for Non-BIA Programs

CSKT disagrees with the Department’s position thus far on regulations regarding how non-Bureau of Indian Affairs agencies should calculate contract support costs. Thirty years after Congress made Tribal Self-Governance permanent, the Department has a dismal record of entering into non-BIA Self-Governance agreements for programs that reach beyond project work. CSKT endured difficult decades of experiences attempting to establish a successful Self-Governance partnership with the U.S. Fish & Wildlife Service at the National Bison Range.

Of the several reasons why non-BIA agreements are vanishingly rare (again, regarding agreements that involve a greater level of contracting than project work), one major factor is the failure of non-BIA agencies to address contract support costs. The PROGRESS Act regulations are a rare opportunity to redress this issue and, in the process, provide substantive support for the Secretary’s co-stewardship and co-management goals. CSKT urges the Department to accept the Tribally-proposed text for Subpart G’s Section 1000.845(a).

Thank you for your consideration of our views.

Sincerely,



Michael Dolson, Chairman
Tribal Council