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## MEMORANDUM

October 22, 2020

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***PROGRESS Act Amendments to Titles I and IV of the ISDEAA***

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On October 21, 2020 the Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act was signed into law. The PROGRESS Act is a key piece of legislation that amends several provisions in Titles I and IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) to enhance tribal self-governance for tribes, improve administrative efficiencies, further the tribes' ability to govern their own communities, and more.

Title IV of the ISDEAA authorizes tribes to administer certain programs within the Department of the Interior (DOI). The PROGRESS Act amends Title IV by conforming Title IV to provisions in Title V, the self-governance law for the Indian Health Service (IHS). Many self-governance tribes manage programs within both IHS and DOI, and the PROGRESS Act will reconcile differences, streamline administration, improve efficiencies, and strengthen tribal economies. The PROGRESS Act also makes important amendments to Title I, the self-determination contract law, including clarifying reporting requirements, establishing rules of interpretation, and providing for technical assistance to tribes.

This memorandum provides an overview of Titles I and IV of the ISDEAA, including eligibility/participation, scope of contractibility/compactibility, content of agreements, applicable standards, right to redesign programs and reallocate funds, reporting requirements, funding, reassumption, and a summary of the PROGRESS Act's amendments to Titles I and IV.

### ***I. Title I – Self-Determination Contracts***

**Eligibility/Participation.** Title I applies only to self-determination contracts with either the Secretary of the Department of Health and Human Services (DHHS) or the Secretary of the DOI for the planning, conduct, and administration of programs, functions, services, and activities (PFSAs) that are otherwise provided to tribes and their members

pursuant to federal law. All federally recognized tribes (and tribal organizations authorized by tribes) have the right to submit a contract proposal to the Secretaries for review. The Secretaries must follow a detailed process when reviewing a contract proposal. The Secretaries are required to either decline or approve a proposal within 90 days of submission using specific statutory standards. If a proposal is approved, the agencies must award a contract by the 90th day. There are certain appeal rights available to a tribe that has had its proposal declined, including a right to a formal hearing.

**Scope of Contractibility/Compactibility.** Title I provides authority for tribes and tribal organizations to plan, conduct, and administer PFSAs provided to tribes and individual Indians and Alaska Natives by DHHS or DOI under certain laws. Tribes have the right to include in contracts certain administrative functions that support the delivery of PFSAs to Indians and Alaska Natives without regard to organizational level or the “office” or “agency” of DHHS or DOI where they are performed.

Additionally, Title I provides that the scope of the contract, *i.e.*, what PFSAs may be included in a contract, is subject to the declination procedures. The federal agency may decline to include a PFSA in a contract on the grounds that it is not subject to section 102 because the PFSA cannot be lawfully carried out by the contractor. The contractor has the right to appeal this decision under the declination procedures.

**Content of Agreements.** Title I sets out a model contract containing provisions that Congress requires in all self-determination contracts. Congress mandates some of the provisions to be included in self-determination contracts, and others permit contractors to select certain options (e.g., payment method). Title I also permits agencies and contractors to negotiate and add mutually acceptable provisions to the contracts.

**Applicable Standards.** Section 102(a)(2) requires that contract proposals include the standards under which the tribe will operate the PFSAs that are included in the proposal. This provision indicates that the program standards proposed by a contractor may only be rejected by the federal agency in accordance with the declination procedures.

**Right to Redesign Programs and Reallocate Funds.** Section 105(j) gives a contractor the right to propose to redesign non-construction PFSAs included in a contract, including non-statutory program standards, to make them more responsive to the population being served. The appropriate Secretary must be notified of the tribe’s intent to redesign. A proposal to redesign must be evaluated by the Secretary under the declination criteria and procedures set forth in section 102. Section 106(o) authorizes contractors, with respect to allocations within the approved budget of the contract, to re-budget funding allocations if such re-budgeting would not have an adverse effect on the performance of the contract.

**Reporting Requirements.** Title I requires contractors to submit an annual audit report to the Secretary under the Single Audit Act (SAA).<sup>1</sup> Tribal contractors must report any additional information concerning the conduct of the contract activity that the tribe and Secretary have negotiated. Any disagreement over reporting requirements are subject to the declination criteria and procedures set out in Title I.

**Funding.** Section 106(a)(1) states that the amount of funds provided under a contract shall not be less than the Secretary would have spent on the PFSA regardless of the organizational level within the Department at which it is operated. Section 106(a)(2) requires the Secretary to add to the funding level required by section 106(a)(1) contract support costs for reasonable costs for activities that must be carried on by a contractor “to ensure compliance with the terms of the contract and prudent management,” but which normally are not carried on by the respective Secretary in the direct operation of the program or are provided by the Secretary in support of the contracted program from resources other than those under contract.

Section 106(b) provides that the amounts of funds required in Section 106(a) shall not be reduced to make funding available for contract monitoring or administration by the Secretary; to pay for federal functions, including but not limited to, federal pay costs, federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring; to pay for the costs of federal personnel displaced by a self-determination contract. The amount in Section 106(a) shall also not be reduced by the Secretary in subsequent years except pursuant to—(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted; (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution; (C) a tribal authorization; a change in the amount of pass-through funds needed under a contract; or completion of a contracted project, activity, or program.

**Reassumption.** Title I gives the Secretary authority to reassume the operation of PFSAAs that are included in a self-determination contract. The Secretary may reassume a PFSA in instances where there is a violation of the rights or endangerment of the health, safety, or welfare of any person; or when a contractor mismanages trust funds, trust lands, or interests in such lands under a contract or grant. The Secretary must follow certain procedures in reassuming a contract, including notice and a hearing on the record.

**PROGRESS Act Amendments.** The PROGRESS Act’s specific amendments to Title I include:

- **Good Faith Requirement.** Requiring the Secretary to negotiate contracts and funding agreements in good faith to maximize the policy of tribal self-determination.

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<sup>1</sup> The PROGRESS Act amends section 5(f) to require a tribal organization that expends \$500,000 or more in federal awards during a fiscal year to submit a single-agency audit report. The provision also states that this requirement “shall not take effect until 14 months after the date of enactment this Act.”

- **Rules of Construction.** Establishing that each provision of the ISDEAA and each provision of a contract or funding agreement must be construed liberally for the benefit of participating tribes and any ambiguity resolved in their favor.
- **Interpretation by Secretary.** Making clear that except as otherwise provided by law, the Secretary must interpret all federal laws, regulations, and executive orders in a manner that facilitates, to the maximum extent practicable, the inclusion in contracts and funding agreements of applicable PFSAs; funds associated with those PFSAs; the implementation of self-determination contracts and funding agreements; and the achievement of tribal health objectives.
- **Technical Assistance for Internal Controls.** Providing for technical assistance to ensure tribes have adequate internal controls in place to manage the contracted program(s) and developing a plan for assessing the subsequent effectiveness of the technical assistance.
- **Expense Reimbursement Rate.** Specifying that not less than 50 percent of the expenses for any additional administrative or other expense incurred by the governing body of the tribe or tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the PFSAs are reasonable and allowable.

## II. *Title IV – Self-Governance Program*

**Eligibility/Participation.** Title IV of the ISDEAA provides the legal framework under which tribes may assume control of DOI's programs and associated funding, and tailor those programs to the needs of their communities. Title IV applies only to self-governance compacts and funding agreements with the Bureau of Indian Affairs (BIA) and other DOI bureaus such as the Bureau of Reclamation and the National Park Service.

Title IV allows the Secretary of the Interior to select up to 50 new tribes per year who are eligible to participate in the Interior self-governance program. A consortium of tribes may participate if each member tribe requests participation. To be eligible to participate in the self-governance program, a tribe must complete a planning phase, request entry into the program, and demonstrate financial stability and financial management capability for the previous three fiscal years. The planning phase must be conducted to the satisfaction of the tribe and include legal and budgetary research and internal tribal government planning, training, and organizational preparation.

**Scope of Contractibility/Compactibility.** Title IV authorizes a tribe to plan, conduct, consolidate, and administer PFSAs, or portions thereof, administered by the BIA, without regard to the agency or office of the BIA within which the PFSAs are performed. These functions include those performed at the agency, area or central office level, and those administered by the agency.

Section 403(b)(2) permits a tribe to plan, conduct, consolidate, and administer PFSAs, or portions thereof, administered by DOI, other than through the BIA, that are “otherwise available” to tribes and Indians. This provision, however, may not be construed to provide any tribe with a preference to administer a particular PSFA unless such preference is otherwise provided by law. To date, very few non-BIA Interior programs have been included in self-governance agreements.

Additionally, the parties can agree to include in self-governance agreements other PFSAs, or portions thereof, administered by the Secretary of the Interior that are of “special geographic, historical, or cultural significance” to the Indian tribe requesting an agreement. Finally, the Secretary is directed to interpret federal laws and regulations in a manner that will facilitate the implementation of agreements and the inclusion of PFSAs in such agreements.

**Content of Agreements.** All of the terms of compacts and funding agreements must be negotiated by the parties. As a result, provisions in compacts and funding agreements may vary and be less predictable than those in the Title I model contract. Title IV allows tribes to include any provision of Title I in their agreements if they so choose.

**Applicable Standards.** For construction projects, Title IV requires that the Secretary include proper health and safety standards. Otherwise, there are no provisions in Title IV that require standards to be included in compacts and funding agreements.

**Right to Redesign Programs and Reallocate Funds.** Section 403(b)(3) authorizes a tribe, subject to the terms of the funding agreement, to redesign or consolidate PFSAs and to reallocate funds for DOI PFSAs. Reallocation, consolidation, or redesign of self-governance programs administered by the DOI other than through BIA are subject to Secretarial approval.

**Reporting Requirements.** Section 5(f) applies to Title IV self-governance and requires participants to comply with the SAA if the tribe or tribal organization expends \$500,000 or more in federal funds during the fiscal year. Section 412 requires the Secretary to submit an annual report to Congress on the administration of the self-governance program. The report is to identify the relative costs and benefits of self-governance; funds related to the provision of services and benefits to tribes and their members; the corresponding reduction in the federal employees and workload; and the funding formula for individual tribal shares of central office funds.

**Funding.** Section 403(g)(3) states that funds shall be provided in an amount equal to the amount the contractor would have been eligible to receive under contracts and grants under the Act. These funds include direct program costs, contract support costs and any funds specifically or functionally related to the provision by the Secretary of services and benefits to the tribe or its members, without regard to the organizational level within the Department. Section 403(g)(4) explains that funds for trust services to individual Indians are available under an annual funding agreement only to the extent that the same services

that would have been provided by the Secretary are provided to individual Indians by the self-governance tribe.

**Reassumption.** Section 403(d) sets out a number of provisions relating to the authority of the Secretary. The provision requires that annual funding agreements include a provision that permits the Secretary to reassume a PFSA, or portion thereof, if there is a finding of “imminent jeopardy to a physical trust asset, natural resources or public health and safety.”

**PROGRESS Act Amendments.** The PROGRESS Act’s specific amendments to Title IV include:

- **Good Faith Requirement.** Expressly requiring the Secretary to negotiate compacts and funding agreements in good faith to maximize the policy of tribal self-governance.
- **Final Offer Process and Timelines.** Establishing a clear “final offer” process and timelines for situations when DOI and a tribe are unable to agree on particular terms of a compact or funding agreement (including funding levels), or when DOI delays approval unreasonably. A final offer must be submitted to the Secretary, who has no more than 60 days (or 90 days for circumstances beyond the Secretary’s control or longer if agreed by both the Secretary and tribe) to decide the offer. If the final offer is not properly or timely rejected, it is deemed approved. The tribe may appeal the Secretary’s decision rejecting a final offer in a hearing on the record with the burden of proof on the Secretary to justify the denial. Alternatively, the tribe could proceed directly to federal district court pursuant to section 110(a). When a final offer is rejected, the Secretary must agree to all severable portions of the final offer that do not justify a rejection and provide the tribe with an option to enter into a partial compact or funding agreement, subject to any changes necessary to conform the compact or funding agreement to the severed portions. A tribe that enters into such partial agreement retains the right to appeal the Secretary’s partial rejection.
- **Reasons for Rejecting Offer.** Clarifying and limiting the reasons for which the agency may reject the terms of a final offer. In rejecting a final offer, the Secretary must include in a written notification based on a finding that clearly demonstrates, or is supported by controlling legal authority, that the funding level requested exceeds what is due; the requested program is an inherent federal function (defined in section 403(c)); the tribe cannot carry out the program without creating a risk to public health or safety, to natural resources, or to trust resources; the tribe is not eligible to participate in self-governance; the funding agreement would violate a federal statute or regulation; or the program or portion of the program is not otherwise available to tribes or Indians under section 102(a)(1)(E).

- **Unauthorized Term Protection.** Protecting tribes from DOI attempts to impose unauthorized terms in a compact or funding agreement. The Secretary must not revise, amend, or require additional terms in a new or subsequent compact or funding agreement without the consent of tribes, unless the terms are required by federal law.
- **Adverse Decision Appeal Process.** Providing a clear avenue of appeal and burden of proof for tribes to challenge adverse agency decisions, including denials of waiver requests. In an administrative action, appeal, or civil action for judicial review of any decision made by the Secretary as provided under Title IV, the Secretary has the burden of proof to demonstrate the validity of the grounds for the decision and the consistency of the decision with the requirements and policies of Title IV.
- **Oversight Roles.** Clarifying tribal and federal oversight roles in construction to ensure fiscal prudence and public safety.
- **Non-BIA Programs within DOI.** Retaining—but not expanding—the discretionary authority to compact non-BIA programs within DOI—dispelling concerns of state fish and wildlife agencies, who objected to earlier versions of the legislation.
- **Payment Schedules and Procedures.** Establishing clear payment schedules and procedures. The Prompt Payment Act, which ensures that the federal government makes timely payments, is made expressly applicable to Title IV.
- **Secretary’s Negotiation Obligations.** Making clear that the Secretary must negotiate and enter into a written funding agreement with a tribe or tribal organization in a manner consistent with the trust responsibility of the federal government, treaty obligations, and the government-to-government relationship between tribes and the United States.
- **Withdrawal Process.** Adding a detailed process in which a tribe may partially or fully withdraw its tribal share of any program in a funding agreement from a participating tribal organization.

### III. *President’s Signing Statement*

President Trump issued a signing statement asserting that the PROGRESS Act raises three “constitutional concerns”:

1. Section 408(g)(3)(B)(ii) of the ISDEAA, as amended by the Act, prohibits the Secretary of the Interior from reducing the amount of funding under Title IV of the ISDEAA from year to year except as required by, among other things, “a

congressional directive in legislation or an accompanying report.” This language is consistent with the Title V language in 25 U.S.C. § 5388(d). While agencies tend to follow directives in committee reports, they have the discretion not to.<sup>2</sup> So the statement is consistent with what is already the law. The Administration will give “appropriate consideration” to such reports, the statement says, but retain discretion *not* to reduce funding in response to them.

2. Section 105(p) of the ISDEAA, as amended by the Act, applies a rule of interpretation in favor of tribes in the administration of the ISDEAA to “all Federal laws and Executive orders.” The statement says that this provision “cannot itself amend or change the meaning of Executive Orders, any more than an Executive Order can amend or change the meaning of a statute.” The statement is correct, but the provision only requires interpretation of laws and Executive Orders in favor of tribes. This does not amend or change an Executive Order. Courts are well aware of the difference.
3. Section 407(i) of the ISDEAA, as amended by the Act, negates the application of any “law or regulation pertaining to Federal procurement (including Executive Orders)” to construction programs carried out under Title IV of the ISDEAA. The President says that “I understand this provision only to change the governing law, not to rescind or direct the withdrawal of any Executive Order or to negate the legal effect of any Executive Order insofar as it may be designed to ensure compliance with the Constitution or is otherwise an exercise of those Article II powers with which the Congress may not interfere (such as the President's power to ‘require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices’).” The statutory provision does mention Executive Orders pertaining to Federal procurement, so Executive Orders pertaining to Federal procurement are included. Whether this provision interferes with the President’s Article II powers is an issue for the courts to decide in the unlikely event that it arises during implementation of the amended Title IV.

We do not think the signing statement comments will have much, if any, impact on the Act’s implementation.

#### **IV. *Negotiated Rulemaking Process***

The PROGRESS Act requires the Secretary of the Interior to initiate negotiated rulemaking proceedings within 90 days of enactment.<sup>3</sup> The objective of the proceedings is for the designated rulemaking committee, comprised of federal and tribal representatives, to reach consensus on the text of a proposed rule to implement and carry out Title IV, as amended by the PROGRESS Act. Nominations for appointment of tribal representatives to the rulemaking committee will be solicited. The negotiated rulemaking process will be open to the public.

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<sup>2</sup> See *Lincoln v. Vigil*, 508 U.S. 182 (1993).

<sup>3</sup> The Act was enacted on October 21, 2020, so the rulemaking must begin by January 19, 2021.

Proposed regulations to implement the PROGRESS Act are required to be published not later than 21 months after enactment. The negotiated rulemaking proceedings must reflect the unique context of tribal self-governance and the government-to-government relationship between the United States and Indian tribes. Further detail on the rulemaking proceedings will become available once the Secretary of the Interior initiates the process.

***Conclusion***

If you have any questions or would like further information on the PROGRESS Act and its amendments to Titles I and IV of the ISDEAA, please contact Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745).