



Mille Lacs Band of Ojibwe Indians

Executive Branch of Tribal Government

Office of the Chief Executive

Via E-mail

Virgil Wind
Chief Executive
Mille Lacs Band of Ojibwe
43408 Oodena Drive
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August 22, 2024

U.S. Department of the Interior
Office of Regulatory Affairs and Collaborative Action
1001 Indian School Road NW, Suite 229
Albuquerque, NM 87104

Re: Comments Regarding PROGRESS Act Proposed Regulations (published July 15, 2024)

Dear Sir/Madam:

I am writing as the elected Chief Executive of the Mille Lacs Band of Ojibwe (Mille Lacs Band), a federally-recognized Indian Tribal Government. The Mille Lacs Band was one of the ten initial Tribes to be selected by Congress in 1988 to participate in the Tribal Self-Governance Demonstration Project. The Mille Lacs Band was the first Indian Tribal Government to execute a Compact of Self-Governance with the U.S. Department of the Interior. Each of the Mille Lacs Band's three Chief Executives preceding me (Hon. Art Gahbow, Hon. Marge Anderson, Hon. Melanie Benjamin) actively engaged in efforts at the national level to shape federal policy toward expanded Tribal Self-Governance authority. Having taken office as Chief Executive a few short weeks ago, it is my intention to continue and expand upon their efforts, maintaining the Mille Lacs Band's leadership role in Tribal Self-Governance that spans more than three decades.

The Mille Lacs Band wishes to generally express our strong support for the proposed draft regulations published in the Notice of Proposed Rulemaking (NPRM) in the July 15, 2024 Federal Register. The NPRM is the result of many hours of hard work by the federal and Tribal members appointed by Interior Secretary Debra Haaland to serve on the Federal-Tribal Negotiated Rulemaking Committee (Federal-Tribal Neg-Reg Committee). One of those members was my predecessor in the Chief Executive office of the Mille Lacs Band.

Most of the NPRM provisions were agreed to by consensus. There are, however, several key issues on which the Federal-Tribal Neg-Reg Committee could not reach consensus. So I am writing on behalf of the Mille Lacs Band to strongly urge the Department to reconsider the federal opposition to the unified Tribal positions on these non-consensus provisions. We insist that the Department instead accept the unified Tribal positions and incorporate them in the final version of the regulations due for publication before the end of 2025.

Our request to adopt the Tribal positions on the non-consensus provisions is completely reasonable. Our request is also consistent with the Biden-Harris Administration policy, since federal acceptance of each of the Tribal positions on the non-consensus provisions will align the proposed rule with President Biden's December 6, 2023 Executive Order No. 14112 ("Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination") and with President Biden's memorandums dated January 26, 2021 ("Tribal Consultation and Strengthening Nation-to-Nation Relationships") and November 30, 2022 ("Uniform Standards for Tribal Consultation"). If the Department instead rejects the Tribal positions, it will betray the fundamental commitments made by the Biden-Harris Administration in these policy pronouncements.

For example, Executive Order No. 14112 says, in its Section 1, that:

We must ensure that Federal programs, to the maximum extent possible and practicable under Federal law, provide Tribal Nations with the flexibility to improve economic growth, address the specific needs of their communities, and realize their vision for their future. We must improve our Nation-to-Nation relationships by reducing administrative burdens and by administering funding in a manner that provides Tribal Nations with the greatest possible autonomy to address the specific needs of their people.

Moreover, in Section 5 of Executive Order No. 14112, the Department, along with all federal agencies, is ordered to take specific actions to "...increase the accessibility, equity, flexibility, and utility of Federal funding and support programs for Tribal Nations, while increasing the transparency and efficiency of Federal funding processes to better live up to the Federal Government's trust responsibilities and support Tribal self-determination..." Each of the specific actions recited in Executive Order No. 14112 requires that the Department agree with the Tribal positions on each of the non-consensus provisions; nothing in the Executive Order No. 14112 can be fairly construed to support the positions taken by the federal negotiators on the Neg-Reg Committee on the non-consensus provisions.

As you consider the comments of the Mille Lacs Band and other Tribes and reconsider the federal positions, we expect you to remain committed to the government-to-government relationship. We expect you to wholly respect Tribal self-government and sovereignty. We expect you to, above all, honor Tribal treaty and other rights and to meet your trust responsibilities to the Mille Lacs Band and other Tribes as our trustee. Accordingly, we urge the Department to address the non-consensus items in the proposed regulations in the following ways:

1. In both the Subpart E and Subpart F provisions giving shape to the negotiation and content of compacts and funding agreements, the Department should adopt the

streamlined language proposed by the Tribal representatives on the Federal-Tribal Neg-Reg Committee for Sections 1000.510(e), 1000.515, and 1000.610 (Tribal assurances are sufficient to meet the requirements of Title IV). Compacts and funding agreements are government-to-government agreements. It should be enough, in a good faith agreement, that one government assures the other that it will comply with the statute. For the federal negotiators to insist on each compact and funding agreement including paragraph after paragraph of detailed compliance requirements contravenes the intent of Congress in enacting the PROGRESS Act to streamline the negotiation and administration process and require good faith negotiations. This issue is far more than just a formatting issue that somehow requires the regulation to, as the federal negotiators say, "... match[] each of the headings set forth in 25 U.S.C. 5365." The federal position undermines the statutory deference to Tribal government autonomy in self-government and must be abandoned in favor of the Tribal position.

2. In the Subpart F provisions giving shape to the negotiation and content of funding agreements, the Department should adopt the position of the Tribal representatives that section 1000.695 must expressly allow for negotiation of what is and is not an inherent federal function. This issue is at the core of what it means for a Tribe to be self-governed as opposed to be federally-governed. The statute makes all functions subject to review and discussion in negotiations, giving the Department no unilateral authority to arbitrarily refuse to negotiate about a function proposed to be assumed by a Tribe. The narrow position of the federal representatives on the Federal-Tribal Neg-Reg Committee directly contradicts the PROGRESS Act, which after all, was intended by Congress to enhance Tribal Self-Governance authority, not to constrain it. Funding agreement negotiations are triggered by voluntary proposals made by Tribal governments to assume functions previously carried out by federal employees. Whether or not a particular function that a Tribe seeks to lawfully assume is an inherent federal function not transferrable as a matter of law is, of course, a question subject to bilateral negotiation between governments. For the federal representatives to say, "This topic is not subject to bilateral negotiation," is illogical, especially since the federal representatives on the Committee agreed that a dispute over whether a function is inherently federal is appealable under Subpart R. The Department should adopt the Tribal position because the federal representatives' position on this constitutes an ill-considered and fundamental rejection of the longstanding principle permeating every title of the Indian Self-Determination and Education Assistance Act of 1975, as amended, that negotiations involve:
 - a. a Tribe proposing to assume a function previously carried out by a federal official;
 - b. a Tribe and the Department negotiating in good faith on whether or not the law permits the Department to refuse to transfer the function; and
 - c. any Department refusal to transfer a function being subject to judicial review.

3. In the Subpart G provisions giving shape to the negotiation of agreements involving non-BIA programs, the Department should include a provision proposed by the Tribal representatives on the Federal-Tribal Neg-Reg Committee that would simply insert a single sentence from a longstanding memorandum of the Solicitor for the Department that recognizes that Tribal governments can make environmental determinations under NEPA if they choose to do so. The sentence simply states: “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 follows this rule. But the federal representatives on the Federal-Tribal Neg-Reg Committee refused to include that verbatim language in the proposed regulations, raising the specter of the Department walking back its own Solicitor’s conclusion with regard to non-BIA programs. The Department should include the Solicitor’s language as proposed by the Tribal members of the Federal-Tribal Neg-Reg Committee.
4. Likewise, in the Subpart G provisions giving shape to agreements involving non-BIA programs, in order to facilitate and maximize Tribal application of Self-Governance authority across all bureaus of the Department, the proposed regulations should include language proposed for Section 1000.885 by the Tribal members of the Federal-Tribal Neg-Reg Committee that would apply the same baseline for determining direct contract support costs for non-BIA programs that the Department uses for BIA programs. The Mille Lacs Band is concerned that the language proposed by the federal members of the Federal-Tribal Neg-Reg Committee will hinder the expanded application of Self-Governance authority to non-BIA programs if it is interpreted to require specific congressional appropriations as a pre-requisite to non-BIA agencies paying direct contract support costs.
5. In the Subpart K provisions giving shape to the provisions involving construction projects, the Department should include the language proposed by the Tribal members of the Federal-Tribal Neg-Reg Committee that, like the practice followed for decades by the U.S. Indian Health Service (IHS) under Title V of the Indian Self-Determination and Education Assistance Act of 1975, as amended, a Tribe is permitted under the PROGRESS Act amendments to Title IV to choose to assume the status and responsibilities of a federal official under the National Environmental Policy Act (NEPA) to make determinations, including approvals of NEPA documents such as categorical exclusions, environmental assessments, and environmental impact statements. These are governmental functions, and if a Tribe is ready and willing to assume them, nothing in the PROGRESS Act would support a federal objection to that transfer and the proposed regulations should be modified to reflect that fact by including the language proposed by the Tribal representatives on the Federal-Tribal Neg-Reg Committee.
6. In the Subpart R provisions governing appeals, the Department should adopt the Section 1000.2302 and 1000.2351 provisions proposed by the Tribal representatives that would

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enhance flexibility for Tribal administrative appeal paths within the DOI to improve Self-Governance policy administration.

To sum up our comment, the Mille Lacs Band commends the Federal-Tribal Neg-Reg Committee for its work in coming to a consensus on many complex issues and urges the Department to resolve the remaining non-consensus matters in favor of the way proposed by the Tribal members of the Committee. This approach of deference to Tribal government positions is consistent with the stated mandates of the Biden-Harris Administration.

Thank you for considering our comments and suggestions. The Mille Lacs Band urges the Department to quickly digest the comments submitted, turn the proposed regulations into final regulations, and publish them as a final rule in the Federal Register by early December.

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Chief Executive
Mille Lacs Band of Ojibwe