

PROGRESS for Indian Tribes Act

Geoffrey D. Strommer
October 2020

PROGRESS Act Signed Into Law

- The PROGRESS Act, Pub. L. No. 116-180, was signed into law on October 21, 2020.
- The bipartisan legislation has been a top legislative priority of tribes for over 17 years to advance and promote tribal self-governance.
- Senator John Hoeven (R-ND), Chairman of the Senate Committee on Indian Affairs, said the bill was “long overdue” and “reduces unnecessary red tape, allowing for Indian Tribes to become more self-reliant by taking over and administering federal programs.”
- Representative Deb Haaland (D-NM) called the legislation a “common-sense bill” and described the bill as one of the most important pieces of Indian legislation in history.

PROGRESS Act Amendments to the ISDEAA

- The PROGRESS Act amends several provisions in Titles I and IV of the Indian Self-Determination and Education Assistance Act (ISDEAA).
- Importantly, the PROGRESS Act amends Title IV of the ISDEAA, the self-governance law for the Department of the Interior (DOI) to conform with Title V, the self-governance law for the Department of Health and Human Services (DHHS). Most tribes manage programs within both DHHS and DOI, and the PROGRESS Act creates administrative efficiencies by enabling tribes to operate under a more similar statutory framework.
- The Act also amends Title I, the self-determination contract law, by clarifying reporting requirements, establishing rules of interpretation, and providing for technical assistance to tribes.

PROGRESS Act – Amendments to Title I

- The PROGRESS Act's 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. (Sec. 102(f))
 - **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. (Sec. 102(g))
 - **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. (Sec. 105(p))

PROGRESS Act – Amendments to Title I

- The PROGRESS Act's amendments to Title I include:
 - **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. (Sec. 105(q))
 - **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 PFSA's are reasonable and allowable. (Sec. 106(a)(2)(3))

PROGRESS Act – Amendments to Title IV

- The PROGRESS Act's amendments to Title IV include:
 - **Inherent Federal Function**. Defining the term to mean a federal function that may not legally be delegated to an Tribe. (Sec. 401(6))
 - **Tribal Share**. Defining the term to include all funds and resources not required by the Secretary for the performance of an inherent Federal function. (Sec. 401(12))

PROGRESS Act – Amendments to Title IV

- The PROGRESS Act’s 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. (Sec. 406(e))
 - **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. (Sec. 406(c))

PROGRESS Act – Amendments to Title IV

- The PROGRESS Act's amendments to Title IV include:
 - **Reasons for Rejecting Offer**. Clarifying and limiting the reasons for which the agency may reject the terms of a final offer. (Sec. 406(c)(5))
 - **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. (Sec. 403(n))
 - **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. 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. (Sec. 406)

PROGRESS Act – Amendments to Title IV

- The PROGRESS Act’s amendments to Title IV include:
 - **Oversight Roles**. Clarifying tribal and federal oversight roles in construction to ensure fiscal prudence and public safety. (Sec. 407(h))
 - **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. (Sec. 406(c))
 - **Carryover of Funds**. Providing significant discretion to Tribes, including the provision for carryover of funds to be (1) “available until expended” and (2) “shall not diminish the amount of funds the Indian Tribe is entitled to receive under a funding agreement in that fiscal year or any subsequent fiscal year.” (Sec. 408(k))
 - **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. (Sec. 408(i))

PROGRESS Act – Amendments to Title IV

- The PROGRESS Act's amendments to Title IV include:
 - **Limitations on Authority of the Secretary.** Providing that the Secretary must not (fail to transfer to an Indian Tribe its full share; (2) withhold any portion of such funds; or (3) reduce the amount of funds required. (Sec. 408(g))
 - **Report on Non-BIA Programs.** Providing the opportunity to include non-BIA programs in agreements by the Secretary's review. (Sec. 412(c))
 - **Report on Central Office Funds.** Requiring the Secretary to develop a funding formula to determine individual tribal shares for inclusion in compacts. (Sec. 412(d))
 - **Reports.** Establishing the Secretary's reporting requirements and requiring the Secretary to report on non-BIA programs (to optimize opportunities) and to report on central office funds. (Sec. 412)

PROGRESS Act – Amendments to Title IV

- The PROGRESS Act's amendments to Title IV include:
 - **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. (Sec. 404(a))
 - **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. (Sec. 402(b)(4))

Negotiated Rulemaking Process

- The PROGRESS Act requires the Secretary of the Interior to initiate negotiated rulemaking within 90 days of enactment (January 19, 2021).
- The negotiated rulemaking committee will be comprised of federal and tribal representatives who will work to reach a consensus on the text of a proposed rule to implement and carry out the PROGRESS Act.
- Nominations for the appointments of tribal representatives to the rulemaking committee will be solicited.
- Proposed regulations to implement the PROGRESS Act are required to be published not later than 21 months after the Act's enactment (July 21, 2022).

Questions?

Geoff Strommer

gstrommer@hobbsstraus.com

503-242-1072