UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSAGE NATION, Plaintiff, v. DEPARTMENT OF INTERIOR, et al., Defendants.	Civil Action No. 24-0679 (PLF)

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants respectfully file this reply in further support of their motion to dismiss this action pursuant to Federal Rule of Civil Procedure ("Rule") 12(h)(3) or, in the alternative for summary judgment. For the reasons set forth in the motion and below, the Court should grant Defendants' motion (ECF No. 15).

INTRODUCTION

Plaintiff's Opposition ("Opp'n," ECF No. 17) and its Response to Defendants' Statement of Material Facts ("Pl.'s Stmt of Facts," ECF No. 17-2) do not dispute that Plaintiff failed to complete negotiations regarding any of the programs, services, functions and activities that it sought to assume in its October 23, 2023, Letter, as required by the Indian Self-Determination and Education Assistance Act (the "Act") and its implementing regulations. As Defendants argued, completion of negotiations is a precondition to submitting a "final offer," which, in turn, is ultimately a precondition to filing an action in federal court because a tribe can bring such an action only if "[i]f the Secretary rejects a final offer." 25 U.S.C. § 5366(c)(6)(A), (c)(6)(A)(iii); *see* Defs.' Mot. at 3–6, ECF No. 15 (explaining statutory and regulatory framework).

Plaintiff maintains that it can bring this action despite this admitted failure to negotiate for two reasons. First, Plaintiff posits that its deliberate failure to follow the negotiation process required by duly promulgated regulations (*see* 25 C.F.R. §§ 1000.160–182) is "immaterial," Opp'n at 8 n.4, because the waiver of sovereign immunity in a separate provision of the Act, 25 U.S.C. § 5331(a), is so broad that it gives the Court jurisdiction over any objection to any dispute whatsoever related to the Act. That section, however, requires a "civil action or claim against the appropriate Secretary arising under this chapter," which, in turn, requires that a tribe submit and the Secretary reject a proper final offer. 25 U.S.C. § 5331(a); 25 U.S.C. § 5366(c)(6)(A).

Second, in the alternative, Plaintiff argues that the negotiation process is no longer required because the relevant federal regulations were "superseded" by amendments to the Act passed by Congress in 2020. *See* Opp'n at 1–2 (claiming that the PROGRESS for Indian Tribes Act, Pub. L. 116-180, 134 Stat. 857 (2020) (hereafter, "PROGRESS Act"), "superseded" the existing regulations). Plaintiff seemingly believes that there are no criteria whatsoever for the submission of the final offer, asserting that the new law "did not establish any prerequisites for submitting such an offer." Opp'n at 12. To the extent Plaintiff articulates any requirements for a final offer, Plaintiff points to proposed regulations that it admits cannot apply here. *See* Opp'n at 15. Because no new regulations have displaced the existing regulations, Plaintiff is not arguing that the regulations were superseded. Its actual argument is actually that the existing regulations have been impliedly repealed, which is disfavored.

Plaintiff's argument that the PROGRESS Act impliedly repeals the existing regulations fails for three reasons. First, Plaintiff ignores the requirement to negotiate and that the parties being unable to agree before submitting a final offer is a statutory requirement—not just a regulatory one. The PROGRESS Act did not remove the negotiation requirement. Indeed, its use of "final

offer" dovetails with the existing regulations. Second, the federal regulations providing for the negotiation process have not been impliedly repealed because the existing regulations do not conflict with the statute. Finally, the proposed regulations to implement the statute as amended would maintain the negotiation process, which, to the extent they bear on this case at all, strongly suggests that the existing processes are fully consistent with the statute as amended.

Because negotiation remains a statutory and regulatory precondition to the submission of a "final offer" and, in turn, the Act's waiver of sovereign immunity, Defendants' motion should be granted.

ARGUMENT

I. Plaintiff Does Not Dispute that It Failed to Negotiate

In their motion, Defendants detailed the negotiation process between the two parties. The history of the negotiation process shows that Plaintiff requested to negotiate only a very small portion of the programs, services, functions, and activities that its October 23, 2023, Letter sought to assume. *See* Defs.' Mot at 6–21. To the extent that Plaintiff began negotiations with respect to that small portion, Plaintiff abandoned them. *See id.* at 13–16. The parties never reached a point where they were "unable to agree" as required for the submission of a final offer. 25 U.S.C. § 5366(c)(1). Instead, Plaintiff refused to clarify its intentions, and then, after months of silence, sent the October 23, 2023, Letter. *See*. Pl.'s Stmt. Facts ¶¶ 34–45 (agreeing with Defendant's discussion of negotiations in material respects); Compl. Ex. 1, ECF No. 1-1 at 23–24 (showing the long period of silence prior to the October 23, 2023, Letter).

Specifically, Plaintiff does not dispute that it did not even request to negotiate most of the programs, services, functions, and activities included in Plaintiff's October 23, 2023, Letter, including Executive Direction, Trust Services, and Regional Office programs. Pl.'s Stmt. of Facts ¶ 12; 25 U.S.C. § 5363(a) ("The Secretary shall, on the request of any Indian Tribe or Tribal

organization, negotiate and enter into a written funding agreement[.]"). While Plaintiff now "disputes any implication that it conceded" that the Probate program consisted of inherent Federal functions, it admits that it wrote, "We understand that remedial legislation is most likely necessary to accomplish the Nation's goal with respect to the Probate program" and then stopped negotiating the Probate program. Pl.'s Stmt. of Facts ¶¶ 14–16; *see also* Defs.' Ex. 8 (Sept. 2, 2022, Probate Letter) at 2, ECF No. 35-10. Plaintiff further concedes that, with respect to the Minerals program, it requested to assume only the Branch of Field Operations; that Plaintiff canceled further negotiations about Field Operations; and that, when asked directly, it declined on multiple occasions to clarify its intentions until it submitted the October 23, 2023, Letter. *See* Pl.'s Stmt. of Facts 17–18, 30–31, 34–35, 37–38. Plaintiff now argues that it "initially discussed the entire Minerals program . . . and then focused on Field Operations as an initial step" (Pl.'s Stmt. of Facts ¶ 39), but does not point to any evidence showing that it ever sought to assume any function of any other branch of the Minerals program until the October 23, 2023, Letter.

Plaintiff contends that "the details of the negotiations are immaterial" because the requirement to negotiate has been superseded by the PROGRESS Act. Opp'n at 8 n.4. Plaintiff's litigation position is at odds with the October 23, 2023, Letter, which indicated that a final offer is appropriate because "[t]he Osage Nation and the Department have been unable to reach agreement after extensive negotiations, discussions, and exchanges of information[.]" Compl. Ex. 1, ECF No. 1-1, at 1. In support of that argument, the letter included a detailed exhibit meant to create the appearance that negotiations were initiated and completed. *See* Compl. Ex. 1, ECF No. 1-1 at 23–24; *see also* Pl.'s Stmt. of Facts at 29 (not disputing Defendants' quotations from the letter and the contents of Exhibit B).

In any event, Plaintiff's argument that the PROGRESS Act displaced the requirement to negotiate fails.

II. Sovereign Immunity Is Not Waived when Plaintiff Fails to Meet the Preconditions for a "Civil Action or Claim" Under the Act

Plaintiff first argues that the waiver of sovereign immunity in 25 U.S.C. § 5331(a) is so broad that the United States waived sovereign immunity for any dispute related to the Act in any way. The first part of the first sentence of 25 U.S.C. § 5331(a) states, "The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this chapter[.]" 25 U.S.C. § 5331(a).[1] *See* Opp'n at 1, 2, 3. As is clear from the statute's plain language, Plaintiff is required to show that it brought a "civil action or claim . . . arising under this chapter" to make use of the waiver. 25 U.S.C. § 5331(a); *cf. Tanana Chiefs Conf. v. Becerra*, Civ. A. No. 20-2902 (RDM), 2022 WL 4245487, at *4 (D.D.C. Sept. 15, 2022) (explaining that "the ISDEAA contains a limited waiver of sovereign immunity"). As Defendants explained, that question turns on whether Plaintiff has submitted a "final offer" such that Defendants were required to make a determination to reject it, entitling Plaintiff to "directly proceed to initiate an action in a United States district court" to appeal Defendants' rejection. 25 U.S.C. § 5366(c)(6); Defs.' Mot. at 1–2.

Section 5331(a) does not allow a Plaintiff to run to Court whenever it has any dispute that touches the Act. "A waiver of the United States's sovereign immunity must be unequivocally expressed in statutory text." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005). "[T]he 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction

[1] If Plaintiff is relying on this waiver of sovereign immunity, then it is unclear why Plaintiff brought suit against the Department of the Interior in addition to the Secretary, who is the sole defendant invoked in that section.

to entertain the suit.'" *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Thus, when a statute contains a condition precedent for the waiver of the government's sovereign immunity, compliance with that condition is "mandatory, not optional." *Env't Integrity Project v. EPA*, 160 F. Supp. 3d 50, 62–63 (D.D.C. 2015) (quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 26 (1989)).

Plaintiff contends that it has brought an action under the Act because it "challenge[d] a rejection" of a "final offer." Opp'n at 11. Here, there was no rejection because there was no final offer. Under the final offer provision of the Act, a Tribe may submit a final offer "[i]f the Secretary and a participating Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement." 25 U.S.C. § 5366(c)(1). Only then is the Secretary required to "make a determination with respect to the final offer." 25 U.S.C. § 5366(c)(2). If the Secretary rejects the final offer, the Tribe may "directly proceed to initiate an action in a United States district court under [§ 5331(a)]." 25 U.S.C. § 5366(c)(6)(A)(iii). Thus, before the Secretary is required to make a determination on a final offer and before a cause of action regarding a rejection of a final offer "arises under" the Act, the Secretary and Tribe must "negotiate" and have been "unable to agree . . . on the terms of a . . . funding agreement[.]" 25 U.S.C. §§ 5363(a), 5366(c)(1).

Plaintiff cites several cases in support of its argument that 25 U.S.C. § 5331(a) resolves this dispute, but its cases stand for the unremarkable proposition that the Act waives the United States' sovereign immunity from a cause of action challenging the declination or rejection of a final offer. None address whether sovereign immunity is waived if a Tribe has not negotiated before submitting a purported final offer. If anything, these cases support Defendants' position because in each one the Secretary and the Tribe had negotiated the programs, services, functions

and activities that were the subject of the final offer and reached a point where they were unable to agree.

For example, *Three Affiliated Tribes of Fort Berthold Indian Reservation v. United States*, 637 F. Supp. 2d 25, 28 (D.D.C. 2009), noted that "[t]he [Indian Health Service] and [Tribes] held negotiations . . . to resolve [their] dispute" and the Indian Health Service's declination letter was "consistent with their negotiations." In *Red Lake Band of Chippewa Indians v. Department of Interior*, 624 F. Supp. 2d 1 (D.D.C. 2009), "the Tribe and Defendants completed bilateral negotiations" on the funding agreement, *id.* at 8, and the claim for specific performance related to terms included in the negotiated funding agreement to which both parties had agreed, *id.* at 10, 23–26. *Manilaq Ass'n v. Burwell*, 72 F. Supp. 3d 227, 230, 237 (D.D.C. 2014), is legally inapposite because the parties did not argue that insufficient negotiations were completed and because the issue addressed a different set of regulations, and *Manilaq* is factually inapposite because the parties engaged in "several months of negotiations" before they reached "an impasse in negotiations" and determined they "could not come to an agreement." In *Fort McDermitt Paiute & Shoshone Tribe v. Azar*, Civ. A. No. 17-0837 (TJK), 2019 WL 4711401, at *1–2 (Sept. 26, D.D.C. 2019), *aff'd in part and rev'd in part*, 6 F.4th 6 (D.C. Cir. 2021), the parties did not dispute whether the Tribes submitted a final offer, which makes sense because the Tribes "negotiated with [the Indian Health Service] to take over operations of two health programs that the agency had been providing" and "the parties reached an impasse on several issues."

Thus, none of the cases cited by Plaintiff address a situation where, as here, a plaintiff refused to negotiate and then submitted an offer before meeting the statutory and regulatory prerequisites to file a final offer. Instead, as noted above, those parties first negotiated the programs, services, functions, and activities that were the subject of the final offer. Plaintiff asserts

that "there is not a single reported case in which the United States has argued that a federal court lacks jurisdiction under [the Act] to adjudicate a dispute because the final offer at issue was premature or defective." Opp'n at 12. But Plaintiff also failed to point to a case in which a Court assumed jurisdiction over a cause of action in which a Tribe submitted a purported final offer without engaging in negotiations.

III. The Existing Regulations Still Apply

Plaintiff next argues that it does not need to negotiate programs, services, functions, and activities because the negotiation requirement was exclusively a creature of federal regulations that have since been "superseded" by the amendments to the Act contained in the PROGRESS Act. Opp'n at 1–2 (arguing that the there is no required negotiation process because the "regulations promulgated in 2000 . . . were superseded by the 2020 statutory amendments").

Plaintiff is wrong for two reasons. First, the negotiation requirement is found in the text of the Act itself, not exclusively in the federal regulations. Second, the PROGRESS Act did not supersede the negotiation process found in the federal regulations because it only superseded *conflicting* regulations. The mandatory "Negotiation Process" (25 C.F.R. part 1000, subpart G (Title)) found in the federal regulations is consistent with and implements the statute's terms.

A. The requirement to negotiate is statutory.

1. The Statutory Language Requires Negotiation

Plaintiff argues that any negotiation requirement is not tied to the submission of the final offer because, it contends, the new final offer provisions of the PROGRESS Act "did not establish any prerequisites for submitting such an offer." Opp'n at 12. Plaintiff's argument that the statute does not require the completion of negotiations is erroneous.

The requirement to negotiate a funding agreement before being allowed to submit a final offer is grounded in the Act itself. The Act makes clear that a funding agreement must be

negotiated: Before the Tribe and the Secretary "enter into a written funding agreement," the Secretary "shall . . . negotiate" "on the request of [the] Tribe." 25 U.S.C. § 5363(a); *see also* 25 U.S.C. § 5363(b)(2) (funding agreements shall, "subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof"); 25 U.S.C. § 5363(p)(4) ("An Indian Tribe may[] . . . negotiate with the Secretary for a funding agreement with a term that exceeds 1 year."); 25 U.S.C. § 5363(c), (d) (referring to "funding agreement[s]" that are "negotiated"); 25 U.S.C. § 5363(p)(3)(B) (new funding agreements must be "negotiate[d] . . . in a manner consistent with this title").

This negotiation requirement is a condition precedent to submitting a final offer because a party can submit a final offer only "[i]f the Secretary and [Tribe] are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels)." 25 U.S.C. § 5366(c)(1). Without negotiation, the parties cannot determine whether they are "unable to agree."

Plaintiff argues, selectively quoting an out-of-circuit case, that "any annual funding agreement that reaches a federal district court has . . . been 'negotiated.'" Opp'n at 13 (quoting *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 220 F. Supp. 3d 1190, 1260 (D.N.M. 2016)). *Navajo Health* is not controlling here. That case interpreted an entirely different set of regulations: those that implement contracts under Title I of the statute, not compacts and funding agreements under Title IV. *See* 25 C.F.R. § 900.2(a) ("These regulations codify uniform and consistent rules for contracts by the Department of Health and Human Services [ ] and the Department of the Interior [ ] in implementing title I of the Indian Self–Determination and Education Assistance Act[.]"); *see also* 25 C.F.R. § 900.6; 25 C.F.R.§ 900.33. The regulations implementing Title I do not contain a "negotiation process" as is found in the regulations

implementing Title IV. *Cf. Navajo Health*, 220 F. Supp. 3d at 1257–58 (parsing the reference to "the negotiated agreement" in 25 C.F.R. § 900.6). *Compare* 25 C.F.R. Part 900 with 25 C.F.R. Part 1000. Instead, the *Navajo Health* Court relied heavily on a flowchart in the Indian Health Service's internal handbook for Title I agreements that characterized a final offer as part of a "post-negotiation" step of the process. *Navajo Health*, 220 F. Supp. 3d at 1259. Conversely, the most recent guidance for negotiating Bureau of Indian Affairs' programs says that "during negotiations . . . [i]f the negotiation agreement cannot be completed, the [Office of Self Governance] Negotiator will complete with the Tribe a draft agreement that includes the items that are in agreement and set a date to resolve the remaining issue(s). If there is an inability to agree on the funding agreement terms, the tribe may submit a final offer pursuant to 25 U.S.C. § 5366(c)." *See* 2023 Self-Governance Negotiation Guidance for BIA Programs, http://osgdb.org/OSG/InformationFiles/FileLibrary/Broadcasts/FY2022_Broadcast%20News/FINAL%20-%202023%20Self-Governance%20Negotiation%20Guidance%2009.15.22.pdf. Thus, the Court's conclusion that "any annual funding agreement that reaches a federal district court has, by [Indian Health Service's] own definition and practice, been 'negotiated'" was based on the "[Indian Health Service's] own definition and practice" and is inapposite here. *Navajo Health*, 220 F. Supp. 3d at 1260.

Under Plaintiff's reading, a party can simply submit a "final offer" with no warning—let alone negotiation—and then file suit in federal court based on the Secretary's refusal to entertain an improper offer. This argument improperly renders statutory and regulatory language void. *See Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017) (describing the "surplusage canon—the presumption that each word Congress uses is there for a reason"); *id.* at 478 ("Our practice . . . is to 'give effect, if possible, to every clause and word of a statute.'" (quoting W*illiams*

v. Taylor, 529 U.S. 362 (2000))). Plaintiff assumes that any time the Tribe submits an offer then, by definition, the parties are "unable to agree." But in virtually every negotiation, the parties start off with different positions. It is only through the negotiation process that they can determine that they are "unable" to bridge that gap. Moreover, Plaintiff's reading renders the numerous references to "negotiate" and "negotiated" in 25 U.S.C. § 5363 without meaning. That language was included in the Act, and Congress declined to change it. *See* PROGRESS Act, § 101(d)(1), 134 Stat. at 862 ("The Secretary shall, on the request of any Indian Tribe or Tribal organization, negotiate and enter into a written funding agreement with the governing body of the Indian Tribe or the Tribal organization[.]"). If anything, the PROGRESS Act strengthened the requirement to negotiate by adding the language "on the request of any Indian Tribe or Tribal organization" to modify the Secretary's duty to negotiate, *id.*, emphasizing that tribes have a duty to request to negotiate any programs, services, functions, and activities they want to assume in a funding agreement.

Finally, Plaintiff argues that there cannot be any negotiation requirement because 25 U.S.C. § 5366(c)(6)(A) lists "six reasons for which a final offer can be rejected, none of which relates to the status of negotiations between the parties before the offer was submitted." Opp'n at 5. As with many of Plaintiff's other arguments, this argument mistakenly assumes Plaintiff's conclusion—that an offer submitted before the completion of negotiations is a "final offer" that the Secretary must act upon because Plaintiff wants it to be. The statute is clear that a final offer can only be submitted, and the Secretary is only required to "make a determination" with respect to that final offer, if the parties are "unable to agree." 25 U.S.C. § 5366(c)(1), (c)(2)

Plaintiff's argument that the Defendant must use only the rejection criteria for any document styled as "final offer" means that all language setting forth preconditions for a final offer also would be void. For instance, this would render meaningless the requirements in the proposed

regulations that a final offer "be separate from the compact, funding agreement or amendment and [be] clearly identified as a 'Final Offer'" and "must contain a description of the disagreement between the Secretary and the Tribe/Consortium, the Tribe's/Consortium's final proposal to resolve the disagreement." *Self-Governance PROGRESS Act Regulations*, 89 Fed. Reg. 57,524, 57,556 (July 15, 2024); *see also* Opp'n at 6–7 (pointing to these proposed requirements). After all, in Plaintiff's view, a Secretary could not reject an offer because of failure to meet those procedural requirements. Plaintiff's argument that "final offer" cannot be given any meaning sweeps too broadly.

2. The Legislative History Does Not Show an Intent to Eliminate the Negotiation Requirement

Because the plain text of the Act and the PROGRESS Act do not show any intent to lessen or eliminate the negotiation requirement, Plaintiff relies heavily on legislative history. *See* Opp'n at 14, 15, 16 (quoting S. Rep. 116-34); Opp'n at 14 (quoting H.R. Rep. No. 116-422); *see also* Opp'n at 14 (quoting H.R. Rep. No. 106-477); Opp'n at 14 (quoting S. Rep. No. 103-374 (1994)). This is a heavily disfavored method of interpreting statutes when their text is clear. *See, e.g.*, *FAA v. Cooper*, 566 U.S. 284, 290 (2012) ("Legislative history cannot supply a waiver that is not clearly evident from the language of the statute."); *see also Grant Thornton, LLP v. Off. of Comptroller of Currency*, 514 F.3d 1328, 1334 (D.C. Cir. 2008) ("[T]he text of the statute is clear enough that resort to legislative history is unnecessary.").

Even if the Court considers the legislative history, the cited congressional reports do not suggest that Congress sought to eliminate the process of negotiating funding agreements. Plaintiff relies on general language in the legislative history about improving the Act or making the process easier for tribes, but fails to tie that language to any statutory change that eliminates the negotiation

process. Instead, as with the statutory language of the PROGRESS Act, the congressional reports that Plaintiff cited both agreed that there was a need to negotiate.

As is most relevant here, Senate Report 116-34 states, "Section 101(d) amends Section 403 of the Act and directs the Secretary to negotiate and enter into a funding agreement with the governing body of an Indian tribe or tribal organization." S. Rep. 116-34 at 7. While Senate Report 116-34 notes that Congress wished to reform aspects of the self-governance program, it did not seek to eliminate the negotiation process. The Senate said the purpose of the bill was to "provide greater certainty and more guidance from Congress on issues relating to decision-making timeframes, re-assumption of programs by the Department, construction projects, and timing of funding transfers." S. Rep. 116-34, at 1–2. The only issue related to negotiations specifically noted here was that tribes "contend[ed] the Secretary has held back funding as leverage in compact negotiations" and therefore the bill created "an expedited process for funding transfers from the Secretary to the tribes." S. Rep. 116-34, at 5–6; *see* PROGRESS Act, § 408, 134 Stat. at 873 (codified at 25 U.S.C. § 5368(g)) (prohibiting the Secretary from failing to transfer, withholding or reducing the funding to which the Tribe is entitled). That issue about payment addressed by the statute has no bearing on the dispute here. Otherwise, the Senate Report does not discuss any aspect of the negotiation process found in the current regulations.

As Plaintiff noted, House Report 116-422 said that the bill "establishes clear 'final offer' processes and timelines for situations when DOI and a tribe are unable to agree on particular terms of a compact or funding agreement, or when DOI delays approval unreasonably." H. Rep. 116-422, at *3. But those processes and timelines are found at 25 U.S.C. § 5366(c), *see* H. Rep. 116-422 at 51—the same provision requiring that the parties first be "unable to agree" on which Defendants rely. That report also said the bill would "amend the process for negotiating agreements between

the tribes and Bureau of Indian Affairs," H. Rep. 116-422, at 9, by adding a final offer mechanism, but did not suggest any intent to eliminate the negotiation requirement or to allow the Tribe to invoke the final offer process without any negotiation.

B. The Regulations' Mandatory Negotiation Process Was Not Displaced by the PROGRESS Act

1. There Was No Implied Repeal of the Existing Regulations

Defendants explained the detailed regulations that set forth the negotiations process and how Plaintiff failed to start that process for many programs, services, functions, and activities and did not finish that process for the few that it started properly. *See* Defs.' Mot. at 4–6, 25–35. Plaintiff declares it to be "chutzpah" to insist Plaintiff adhere to those duly promulgated regulations that were negotiated among the government and the tribes[2] because the PROGRESS Act "superseded" those regulations. Opp'n at 2. But the PROGRESS Act did not expressly repeal the existing regulations and no new regulations have actually displaced the existing regulations.

When, as here, a party argues that a statutory amendment impliedly repealed regulations, its "argument encounters head-on the cardinal rule that repeals by implication are not favored." *Fisher v. Pension Benefit Guar. Corp.*, 468 F. Supp. 3d 7, 26 (D.D.C. 2020) (cleaned up; quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)), *aff'd*, 994 F.3d 664 (D.C. Cir. 2021); *see also St. Agnes Hosp. v. Sullivan*, 905 F.2d 1563, 1567 (D.C. Cir. 1990) (applying the "repeal by implication" framework when determining whether a statutory change affected a previously promulgated regulation).

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[2] *See Office of the Assistant Secretary – Indian Affairs; Tribal Self-Governance*, 65 Fed. Reg. 78,688, 76,688 (Dec. 15, 2000) ("A negotiated rulemaking committee established pursuant to section 565 of Title 5 to carry out this section shall have as its members only representatives of the Federal Government and Tribal government."); *see also* 25 C.F.R. § 1000.1 ("This part is prepared and issued by the Secretary of the Interior under the negotiated rulemaking procedures in 5 U.S.C. 565.").

> When the repeal by implication framework applies, there are only two exceptions:
>
> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute . . . [I]n either case, the intention of the legislature to repeal must be clear and manifest.

Kremer v. Chem. Const. Corp., 456 U.S. 461, 468 (1982) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)).

Neither situation is present here, nor is there any intent—let alone "clear and manifest" intent—to repeal the existing negotiations regulations here. There is no "irreconcilable conflict" between the PROGRESS Act and the negotiations regulations. *Kremer*, 456 U.S. at 468; *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two [laws] are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard to each as effective."); *Consumer Fin. Prot. Bureau v. Commonwealth Equity Grp., LLC*, 554 F. Supp. 3d 202, 207 (D. Mass. 2021) (holding that a statute did not impliedly repeal a rule because it was not "impossible to comply with both the statute and the regulation").

The closest Plaintiff comes to explaining the implied repeal is when Plaintiff points to general statements in the legislative history, but those statements do not have the force of law and, in any event, do not express an intent to eliminate the negotiations requirement. *See* Opp'n at 5, 14, 16. Plaintiff also points to a 1994 amendment that limited the government's ability to promulgate regulations contrary to the statute's intent. Opp'n at 13–14. The regulations at issue were promulgated after that amendment.

Plaintiff also implies that the attempt to model Title IV of the Act on Title V means that Congress must have wanted the exact same regulatory regime from Title V to apply to Title IV. In other words, Plaintiff argues that incorporating specific "'improvements' from Title V" somehow wipes the entire slate on Title IV regulations. Opp'n at 5 (quoting H.R. Rep. No. 116-422 at 2).

Plaintiff's premise is wrong because Title V contains its own negotiation requirement. *See*, *e.g.*, 42 C.F.R § 137.130 (explaining that the "final offer process" applies when "disputes . . . develop in negotiation of . . . funding agreements"). Even if Title V's regulations did not require negotiation before the submission of a final offer, it does not follow that Title IV's regulations must be the same. In fact, the current negotiated rulemaking shows that neither tribes nor the Department believe that Congress mandated the wholesale adoption of the Title V regulations. *See Self-Governance PROGRESS Act Regulations*, 89 Fed. Reg. 57,524, 57,556 (July 15, 2024). As discussed in more detail below, the proposed regulations largely keep the same negotiation process found in the existing Title IV regulations. *See id.* Plaintiff's arguments about Title V fail to show an "irreconcilable conflict" between the existing Title IV regulations and Title IV of the Act as amended.

Plaintiff suggests the existing regulations have been repealed because the PROGRESS Act requires the Secretary to negotiate and promulgate new regulations. *See* Opp'n at 6 (quoting PROGRESS Act § 413, 134 Stat. at 877). This merely assumes that the existing regulations are in conflict with the Act as amended. Plaintiff's observation that new regulations have not been promulgated only serves to demonstrate the point. *See* Opp'n at 5 ("[N]o regulations had yet been promulgated."); Opp'n at 12–13 ("[T]here are not yet any final regulations[.]"). Unless and until the Secretary expressly repeals or replaces the existing regulations, the parties must follow them. *See AFGE, Local 3090 v. Fed. Labor Rels. Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[U]nless and until it amends or repeals a valid legislative rule or regulation, an agency is bound by such a rule or regulation." (citing *U.S. v. Nixon*, 418 U.S. 683, 694-96 (1974))).

At bottom, Plaintiff simply assumes that the PROGRESS Act superseded the existing regulations wholesale. *See* Opp'n at 2 (asserting, without citation, that the "regulations

promulgated in 2000 . . . were superseded by the 2020 statutory amendments"). Plaintiff's assumption is unsupported by the text of the PROGRESS ACT. Had Congress intended to entirely repeal the existing regulations, it would have done so expressly. *See, e.g.*, *Adams v. FAA*, 550 F.3d 1174, 1175 (D.C. Cir. 2008) ("The Act expressly repeals the regulation that was the Age 60 Rule, stating '[o]n and after the date of enactment of this section, section 121.383(c) of title 14, Code of Federal Regulations, shall cease to be effective.'" (quoting 49 U.S.C. § 44729(d))). The PROGRESS Act only superseded "conflicting" regulations. *See* PROGRESS Act, § 413(d)(2), 134 Stat. at 878 (codified at 25 U.S.C. § 5373(d)(2)); Opp'n at 6 (quoting this provision). Plaintiff has not identified any irreconcilable conflict, nor is there one.

Nor does the other exception to implied repeals apply here. The PROGRESS Act amends only portions of the Act—it shows no intention to "cover[] the whole subject" of the Act. *Kremer*, 456 U.S. at 468. As explained above, the Act, even as amended by the PROGRESS Act, continues to require that the Secretary and Tribe "negotiate" a written funding agreement. *See* 25 U.S.C. § 5363(a). The only change to this section strengthens the negotiation obligation by requiring that Tribes affirmatively "request" to negotiate. *Id.* Other statutory language added to the Act by the PROGRESS Act references the negotiation requirement. *See* PROGRESS Act, § 402, 134 Stat. at 864 (codified at 25 U.S.C. § 5363(p)(4)) ("An Indian Tribe may[] . . . negotiate with the Secretary for a funding agreement with a term that exceeds 1 year."); *id.* (codified at 25 U.S.C. § 5363(p)(3)(B)) (new funding agreements must be "negotiate[d] . . . in a manner consistent with this title").

2. The Proposed Regulations Have Neither Displaced the Existing Regulations nor Disproven the Existence of a Negotiation Requirement

Plaintiff relies heavily on proposed regulations (*see Self-Governance PROGRESS Act Regulations*, 89 Fed. Reg. 57,524 (July 15, 2024)) to make two different points. *See* Opp'n at 6–7

(discussing proposed regulations); *id.* at 13 n.7 (similar); *id.* at 15 (arguing that it has the power to issue a final offer when it determined that the parties were unable to agree based on the text of the proposed regulations).

First, at times, Plaintiff seems to argue that its offer was a proper final offer because it would be a proper final offer under the proposed regulations. *See* Opp'n at 15 (arguing that a tribe can submit a proposed offer that "when a tribe has determined that the parties are unable to agree" in reliance on proposed regulations (underlining omitted)); Opp'n at 13 n.7 (arguing that Plaintiff's purported final offer "satisfies" the proposed regulations as well as a different set of inapplicable regulations). But Plaintiff has already correctly disavowed that the proposed regulations have any effect because, as Plaintiff admitted, "they are inapplicable here." Meet & Confer Stmt. at 2 n.1, ECF No. 12; *accord* Opp'n at 13 n.7. It is uncontested that the regulations in effect at the time of the suit apply and not any merely proposed regulations. *Cf. St. Agnes Hosp. v. Sullivan*, 905 F.2d 1563, 1567 (D.C. Cir. 1990) ("This lawsuit was filed in February of 1986, at which time there was one—and only one—regulation in effect[.]").

Second, Plaintiff points to the new "final offer" regulations as evidence either that the existing regulations "conflict" with the PROGRESS Act or that the existing regulations do not address the issue about when a final offer may be submitted. *See* Opp'n at 3 (arguing that the current regulations did not "ma[k]e any reference to a 'final offer[]'"). This argument lacks merit because the PROGRESS Act itself included the statutory precondition for a final offer that the parties be "unable to agree, in whole or in part, on the terms of a compact or funding agreement." 25 U.S.C. § 5366(c)(1). The detailed, mandatory negotiation process in the existing regulations explains how the parties reach the point where they "are unable to agree." Far from showing that

the existing regulations undermine Defendants' position or conflict with the statute, the proposed regulations emphasize the way in which the negotiations flow directly into the final offer.

The summary of the proposed regulations stresses that there remain negotiation rules. *See Self-Governance PROGRESS Act Regulations*, 89 Fed. Reg. 57,524, 57,528 (July 15, 2024) ("The negotiation phase establishes detailed timelines and procedures for conducting negotiations with Tribes that have been selected into the self-governance program, including the minimum issues that must be addressed at negotiation meetings. . . . This subpart also establishes proposed rules for the negotiation process for subsequent funding agreements."). The proposed regulations do not discard or replace the negotiation process found in the existing regulations; they largely recodify the negotiation process, moving it from subpart G to subpart H. *Id.* (describing proposed changes to negotiation regulations). The broad outlines of the negotiation process under existing regulations and the proposed regulations are nearly identical. *Compare* 25 C.F.R. § 1000.166 ("There are two phases of the negotiation process: (a) The information phase; and (b) The negotiation phase."), *with* 89 Fed. Reg. at 57,553 (proposed § 1000.1005) (same). *Compare* 25 C.F.R. § 1000.173(a) ("To initiate the negotiation phase, an authorized official of the newly selected Tribe/Consortium submits a written request to negotiate[.]"), *with* 89 Fed. Reg. at 57,554 (proposed § 1000.140) ("A Tribe/Consortium initiates the negotiation phase by sending to the Secretary a written request clearly identified as a Request to Initiate the Negotiation Phase."). *Compare* 25 C.F.R. § 1000.176(a)–(g) (listing seven minimum issues to be addressed at negotiation meetings), *with* 89 Fed. Reg. at 57,555 (proposed § 1000.1060(a)-(g)) (listing the same seven minimum issues).

The proposed regulations make clear that the "final offer" process does not exist independently of or contradict the negotiation process but "follow[s]" from it. 89 Fed. Reg. at 57,528. The summary explains that "[t]he new subpart"—i.e., about final offers—"is proposed to

be inserted at [Subpart I] to immediately follow the proposed amended subpart H for the negotiation process. Doing so allows the reader to move sequentially from the negotiation process to determine options for next steps if those negotiation efforts do not result in agreement." *Id.* The proposed regulations further show the connection and consistency between the statute, the negotiations requirement, and the final rule by deploying the statutory language—"unable to agree"—as a condition precedent for the final offers subpart of the regulations:

> What happens if the Tribe/Consortium and bureau negotiators fail to reach an agreement on a compact or funding agreement?
>
> If the bureau and Tribe/Consortium are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels) then the final offer process in subpart I of this part shall apply.

89 Fed. Reg. at 57,555 (proposed § 1000.1070). This makes clear that whether the parties are "unable to agree" comes from the negotiations process and, only after that process, can a final offer be made.

Plaintiff cites a provision of the proposed rule that it would be the Tribe's discretion to determine when it and the Secretary are unable to agree. *See* Opp'n at 15 (citing 89 Fed. Reg. at 57,555 (proposed § 1000.1105)). Again, this proposed regulation is not in effect. And even if it were, it would not obviate the requirement to negotiate. Plaintiff's position reads out of both the Act and the regulations the entirety of the negotiation process. That cannot be correct, and it demonstrates why the proposed regulations explain that the final offer process is the "process provided by the Act for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof." *Id.* at 57,555 (proposed § 1000.1101).

IV. Plaintiff's Policy Arguments Are Self-defeating

Plaintiff makes two policy arguments against the utility of a negotiation process, but Plaintiff's arguments ultimately show that requiring a negotiation process makes sense. First, Plaintiff argues that "Tribes that are engaged in productive negotiations with [the Bureau of Indian Affairs] or [the Indian Health Service] have no motive to invoke the final offer process." Opp'n at 13. Of course, under Plaintiff's position, tribes would have a motive to invoke the final offer process prematurely if they believed that they could force the Bureau to respond substantively within 60 days or default and allow a Tribe to obtain funding it would not otherwise obtain. But even if Plaintiff's surmise were correct, it is irrelevant here where the Tribe simply declined to negotiate and therefore never even tried to see whether "productive negotiations" were possible.

For example, Plaintiff does not contest that it did not even request to negotiate Executive Direction, Trust Services, or Regional Office programs, services, functions, and activities. *See* Pl.'s Stmt. of Facts ¶¶ 51–52; *see also* Ex. 7, ECF No. 15-9 (Aug. 17, 2022, Negotiations Confirmation). Because of Plaintiff's failure to engage, the October 23, 2023, Letter is not just procedurally deficient but substantively unintelligible. For example, Plaintiff requested a "portion" of the Regional Office programs, services, functions, and activities but does not specify what portion. *See* Compl. Ex. 1, ECF No. 1-1 at 17. The Secretary cannot intelligently accept or reject such a half-baked proposal. If Plaintiff's final offer were to be deemed accepted, the Bureau would have no idea what programs, services, functions, and activities to retain and which to transfer to Plaintiff. This is plainly contrary to the Act which otherwise requires funding agreements to "specify . . . the responsibilities of the Indian Tribe and the Secretary under the funding agreement." 25 U.S.C. § 5363(m)(2); *see also* 25 C.F.R. § 1000.87(a) ("The [funding agreement] must specify in writing the services, functions, and responsibilities to be assumed by the

Tribe/Consortium and the functions, services, and responsibilities to be retained by the Secretary."); 89 Fed. Reg. at 57,549 (proposed § 1000.650) (similar).

Similarly, the Probate dispute is murky. Plaintiff's own position was that the Probate program entailed some inherently Federal functions that would require remedial legislation to authorize Plaintiff to assume them. *See* Defs.' Ex. 8 (Sept. 2, 2022 Probate Letter) at 2, ECF No. 35-10. Plaintiff's new claim in litigation that it "disputes that it conceded during these negotiations that any particular functions of the Probate program are inherent Federal functions" (Pl.'s Stmt. of Facts ¶¶ 14, 23) illustrates the necessity of negotiations. Plaintiff is disagreeing with its own written statement—not Defendants. If the parties had actually negotiated the Probate program, a dispute could have been identified, and either resolved or demonstrated that the parties were unable to agree and file a final offer.

Finally, with respect to the Minerals program, Plaintiff concedes that it requested to assume only the Branch of Field Operations. *See* Pl.'s Stmt. of Facts ¶ 17. It was Plaintiff who terminated negotiation over that branch while the parties were working out details of transferring it to Plaintiff. *See, e.g.*, Defs.' Ex. 10, ECF No. 15-12 at 3 (Sept. 1, 2022, "Osage Negotiations" Email) ("We have had internal discussions and would like to schedule a brief (1 hour) meeting with the Osage Nation regarding the proposal to transfer operations mid-year (6months on April 1)."). Plaintiff sought information about other parts of the Minerals program but never had negotiations meetings about them. *See* Defs.' Mot. at. 14–17. Once again, there was not a dispute on which the parties were "unable to agree."

Second, Plaintiff argues that there cannot be any hurdles to filing a final offer because "[t]he final offer provision is meant to flesh out and bring closure to substantive disputes about a compact or funding agreement, not to generate additional procedural disputes about whether a final

offer is permissible." Opp'n at 16. This is a self-defeating argument. Plaintiff cannot "bring closure to substantive disputes" if it does not engage in negotiations that would identify such disputes. While Plaintiff may now argue that this is a "pointless collateral dispute[]," it is a dispute that Plaintiff created by purporting to submit a "final offer" with respect to programs, services, functions, and activities that the Tribe either did not even request to negotiate or abandoned negotiating.

As discussed above, without the substantive negotiation envisioned by the Act and its regulations, the parties cannot work through whether it is possible to obtain the tribe's goals and avoid a rejection. Thus, rather than limit "pointless" litigation (Opp'n at 15), Plaintiff's preferred outcome would prematurely bring disputes to court that the Act and its regulations state should be identified and resolved at the bargaining table.

V. Plaintiff's Objection to Defendants' Alternate Argument Is Inefficient

In Defendants' motion, Defendant argues that, if the Court deemed the negotiations requirement to be non-jurisdictional, the Court should grant summary judgment to Defendants. Plaintiff contends that Defendants cannot question the merits of Plaintiff's cause of action because the Court "permit[ted] the government to file a motion for summary judgment limited to jurisdictional issues." July 30, 2024, Min. Order; Opp'n at 9–10.

Defendants submit that, if the negotiation process were non-jurisdictional, it would be efficient to grant Defendants' motion. Plaintiff does not suggest how it could be prejudiced by granting this motion because it has not indicated that it needs discovery on the negotiations issue, and nothing would be gained by allowing Plaintiff to engage in discovery on a futile claim. *See* Fed. R. Civ. P. 56(d); *see also* Fed. R. Civ. P. 56(b) ("Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.").

CONCLUSION

For the reasons stated above and in Defendants' motion (ECF No. 15), the Court should grant Defendants' motion.

Dated: October 16, 2024
Washington, DC

Respectfully submitted,

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