

# FAST Act DOT Negotiated Rule Making MINUTES

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Meeting date | time 9/14/2016 10:30 AM | Meeting location Eastern Federal Lands –Sterling, VA

Meeting called by	Jody Clark	Attendees
Type of meeting	Admin. Work Group	Adam Bailey, Hobbs, Straus, Dean & Walker Holly Bell, FHWA-EFL
Facilitator	Jody Clark	John Bioff, Kawerak, Inc.
Note taker	Howard Mermelstein & Lesa Shaw	Dean Branchaud, Red Lake Chippewa Indians Jody Clark, Seneca Nation
Timekeeper	N/A	Andy Caulum, BIA Solicitors Office Dave Conner, Red Lake Chippewa Indians Mary Beth Frank-Clark, Nez Perce Jim Garrigan, Red Lake Band Gerry Hope, Sitka Tribe of Alaska Michael Hostler, Hoopa Valley Tribe Matthew Jaffe, Sonosky, Chambers, Sachse, Endreson & Perry, LLP Howard Mermelstein, Native Village of Tetlin, Alaska & Others Palmer Mosely, Chickasaw Nation Vivian Philbin, FHWA Kay Rhoads, Sac and Fox Nation Lesa Shaw, Absentee Shawnee Tribe Robert Sparrow, DOT Geoff Strommer, Hobbs, Straus, Dean & Walker Karen Woodard, Morango Band of Mission Indians

## AGENDA TOPICS

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Time allotted | Open | Agenda topic Provision Review | Presenter Matt Jaffe/Howard Mermelstein

Attendees: (sign in sheet circulated)

Discussion

Work Group Chair, Jody Clark, began meeting by advising a review was to be done on the provisions with the federal representatives in the room.

Matt: Federal representatives were advised on what the work group had been working on and what had been done as-to-date. The starting point is the regulations for DHHS Title V program (42 CFR part 137).

Howard discussed the following:

207 (a) Authority – no questions. Language in subparts follows Title V part 137.

207 (b) Purpose – straight forward unless anyone has any issues. No one stated they did. Language in subparts follows Title V part 137.

207 (c) Scope – discussions held and language change defined. Language in subparts follows Title V part 137.

Vivian: Suggested we come back to this. Her statement was ‘it’s understood that unless its statutory language then it’s not accepted’.

Matt: There were so many policy guidelines that BIA stated in discussions that unless it’s agreed to then there needs to be discussion.

Geoff: Advised this is a well-worn statute and that it is the tribes option to what is agreed too.

Vivian: She stated that she didn’t believe that 207 was thoroughly vetted and that it needs to be. She doesn’t want the tribe to be put into a position of ‘take it or leave it’. She wants to have this left open for discussion.

Geoff: He would advise tribes to not agree to it not being accepted as discussions need to be held on this.

Vivian suggested: it should be placed in the parking lot for now. Jody: This regulation is being referred to federal caucus

Matt: Advised that the reference to this provision is at 42 CFR, Part 137 (a) (b) (c) (d)

Vivian: Asked that all sidebar discussions step outside.

Howard: Provision 137(d) (1) – discussed the provision. No comments.

Provision 137(d) (2) – discussion was held on provision. No comments made.

Provision 137(d) (3) – discussion was held on provision. No comments made.

Vivian: Indicated she was not disagreeing with historic language but whether it is appropriate federal language for this Rule-Making area is not certain or did it belong in Preamble language

Howard: Discussed provision on Page 4 of the subpart section.

Vivian: Requested clarification. – Is this what you want in the provision?

Geoff: There is a reason why it is in there as once these rules are promulgated then someone within the tribe negotiates them. It is important to have someone who understands this as statute, states it and the rule-making committee agrees with it.

Vivian: We understand that. Baring that in mind we want something is readily implemented and to follow.

Palmer: The Title V provisions have a long history and were part of years of discussions and negotiations.

Vivian: Title V may need clarified.

Geoff: Title IV, to be blunt, doesn't accurately fit here. Title V has had refinements and is finely tuned. It is understood that Title IV has impediments that need correction.

The question was asked 'when was Title V published?' – 16 years ago.

Andy Callum: Indicated that he noticed references were being made to 25 USC which according to a recent Federal Register notice these page numbers were going to be re-numbered in the near future and the Work Group needed to be aware of these upcoming changes..

Matt: It should be noted that tribes are trying to decide whether they want to make that first step. Tribal governments want to see these provisions refined and tribal transportation directors will need that comfort that provisions are re-affirmed and are a part of the regulation.

Jerry: The theme here is to see what the titles are and glean from that experience and implement from that this new legislation.

Vivian: It is understood that there is a lot of experience and dedicated people working on this. We just don't want to have claims. DOT doesn't want to go there.

Geoff: That is on CSC.

Vivian: That is probably right.

Geoff: Just pay CSC up front (laughing/joking) - as CSC is an issue that will require much further discussion in Tribal Caucus and with the Committee.

Vivian: We just want to avoid that claim problem.

Howard: Cited a reference for 137 (g) 25 USC 458aaa-6(e)

Matt: 207(g) suggested congressional findings be added into this act and that congressional testimony be added to assist with fleshing out this provision. Suggested adding an (h) and he has some language for consideration.

(h) Proposed language. Matt read it to Work Group.

Gerry: Is this language from the FAST Act?

Matt: Extracted this from the U.S. Code and from a 1980 Senate Indian Affairs Committee report – tied these two together for the purpose and scope of this provision.

Geoff: These are not from yesterday's Tribal caucus right?

Matt: No, these are additional.

Jody: We will need to move this to Tribal caucus.

Action items	Person responsible	Deadline
Federal Register Notice reference pages changing	Jody Clark	N/A
Discuss revisions with Tribal caucus	Jody Clark/Kay Rhoads	

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Lunch Break 12:00 p.m.

Meeting date | time 9/14/2016 1:30 PM | Meeting location DOT Training Site – Sterling, VA

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Time allotted | Open | Agenda topic Provision Review | Presenter Howard Mermelstein

## AGENDA TOPICS

### Discussion

Howard: Section 1121 207 (a)  
207(pg 4) no change.

Howard:  
207( pg 5) read the provision.

Vivian stated: she appreciated the work group's

effort and that she would take the proposed revisions back to the federal work group.

Howard: 207( pg 6) Secretarial policy. - read proposed language.

Vivian: We will need to get back on this. It will not be today or tomorrow.

Karen: Section 1121 207 (c) (137.30) This is fairly similar to what was in Title V as it defines this area. Proposed language was read.

Howard: Section 1121 (137.32; 137.33, 137.34) read the proposed language.

Howard: Section 1121 (137.35) read the proposed language. No comments.

Jody: This will need to be taken to caucuses. Section A language will need to be sent to Vivian who advised she will make copies of it. Everyone will have a chance to review the copy and there will be no further discussion on that till next month. (Vivian agreed.) There is nothing further that this caucus group has at this time with the federal group. The tribal caucus was convened.

<u>Action items</u>	<u>Person responsible</u>	<u>Deadline</u>
Copy to be given to DOT Federal Representatives	Howard Mermelstein & Matt Jaffe	9/14/2016 3:00 PM
Discussion to be held with Tribal Caucus	Jody Clark/Kay Rhoads	9/14/2016 3:00 PM

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# FAST Act DOT Negotiated Rule Making MINUTES

Meeting date | time 9/15/2016 8:30 AM | Meeting location EFL – Sterling, VA

Meeting called by	Jody Clark	Attendees
Type of meeting	Admin. Work Group	Adam Bailey, Hobbs, Straus, Dean & Walker Holly Bell, FHWA-EFL
Facilitator	Jody Clark	John Bioff, Kawerak, Inc.
Note taker	Howard Mermelstein & Lesa Shaw	Dean Branchaud, Red Lake Chippewa Indians Jody Clark, Seneca Nation
Timekeeper	N/A	Andy Callum, BIA Solicitors Office Dave Conner, Red Lake Chippewa Indians Mary Beth Frank-Clark, Nez Perce Jim Garrigan, Red Lake Band Gerry Hope, Sitka Tribe of Alaska Michael Hostler, Hoopa Valley Tribe Matthew Jaffe, Sonosky, Chambers, Sachse, Endreson & Perry, LLP Howard Mermelstein, Native Village of Tetlin, Alaska & Others Palmer Mosely, Chickasaw Nation Vivian Philbin, FHWA Kay Rhoads, Sac and Fox Nation Lesha Shaw, Absentee Shawnee Tribe Robert Sparrow, DOT Karen Woodard, Morongo Band of Mission Indians

## AGENDA TOPICS

Time allotted | Open | Agenda topic Document review & Process | Presenter Open discussion

Attendees: (sign in sheet circulated)

Discussion

Work Group Chair, Jody Clark, began meeting by advising we must develop a process

Provision 207(d)

Jody discussed the process on how to move forward.

Vivian: it was indicated that it was understood that there is condensed time constraints being worked under.

John: The concern we had was to make certain our tribal leaders had the opportunity to review it. It was suggested that a tribal caucus teleconference occur and work will be done between meetings.

Vivian: That sounds like an idea that might work. To get all this done within a timeframe is very ambitious.

Jody: She indicated she had given some thought to this. The Work Group wanted to get a work product done and that is the end goal.

Kay Rhoads: Indicated she was a visual person that requires time to ponder items as they are presented. She indicated she doesn't want to exclude feds as these are based on prior statutes.

John: Indicated that today's items was doable with feds. We still need to bring it before the tribal leaders and then bring in feds.

Gerry: We need to work in the direction to include feds and put things into the 'parking' lot that require tribal caucus.

Jody: Stated I think we are all on the same page. John, I hear your concern and that you are sensitive to these discussions.

John: No, I am okay with it and if everyone believes it should be done this way then we can move on.

Vivian was asked by Adam how she envisioned this process working? Vivian stated she would get with Bob.

Kay Rhoads: Lets not separate these discussions. Lets include the feds on all discussions and she stated, as a tribal leader, that she had no problem with feds seeing all items before even she saw them.

Vivian: Asked that the feds be asked to review and consider and provide input.

Jody: Asked that Matt be given opportunity to go over what they had come up with.

Matt: His documents follow 42 CFR subpart 137/170; these are based on Title V and negotiated rule-making done for that in 2000-2002. With that though in mind a side by side was created. Some language was imported from the FHWA that have been placed in the Federal Register. If you want to understand what the tribal perspective is then it will be based on what has occurred historically and on what discussions have occurred

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BREAK 10:00 a.m.

## AGENDA TOPICS

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Time allotted | Open | Agenda topic Provision 207 (d) Review | Presenter Matt Jaffe

Gerry: Asked that a federal representative be present at the Admin. Work Group meetings.

Jody: Asked Matt to go over 207(d).

Matt: Discussed Section 207(d). In this side by side. There is a Column on FAST Act, PL 114-94, Sec. 1121 TTSGP.

ss 137.40:

(a) See subpart sections

(b) See subpart sections

(c) See subpart sections.

(d) A funding agreement shall include Federal-Aid funds apportioned to a State or any funds received from a State when an Indian tribe for a project eligible under 23 USC ss 207(d)(2)(A)(ii) - to provide a portion of such funds to the Indian tribe for a project eligible under 23 USC 202(a).

\* (Discussion was held on 'can all funds be taken by a tribe for the project?' Matt stated this language is based on statute. It was stated there may be some legislative language that needs to be worked on. The hope for the SG area is that we flesh this out more. This can be changed through regulation.

\* Gerry: Asked for the language to be changed in reference to the State?

\* Jody: Advised that if State thinks this isn't an option its less likely to occur.

\* Gerry: This area needs to be kept on the road map of needing to amend this language.

Matt: Could a state negotiate on 202(a) funds?

Vivian: Any state funds could go to tribes, but not federal funds, on this.

Matt: Any 207(d)(2)(A)(i) - this statute allows for funds to go into these agreements right?

Vivian: Now is the time to look at that and we can certainly consider it.

Kay Rhoads: Asked for a list of items that are to be prioritized.

Howard: Suggested they go in order.

Jody: Suggested we go by what the federal representatives recommend. She indicated to share the crosswalks to the feds with parking lot issues placed separately.

SS 137.41 What PSFA's must be included in a funding agreement? Page 2 of Crosswalk.

Discussion: Need to check statutory citations. This can be modified as is liked. It could be re-stated with a statutory citation included in the first sentence.

....with the TTSGP must be included in a funding agreement....



SS 137.42 What Tribal shares may be included in a funding agreement? Page 2 of Crosswalk.  
Discussion: Maybe tribal shares could be a transit item. Strike section references was suggested.

All Tribal shares identified in the Tribal Transportation Program and the Tribal Transit program and such other programs that authorize tribal shares sections may be included...

SS 137.43 May a Tribe negotiate and leave funds with the Department for retained services?  
Page 2 of Crosswalk.

Discussion on 137.43: Can funds be left - it wasn't clear what was possible? Vivian: indicated she wasn't certain. She indicated they weren't changing 170 with this language and that was why she believed they needed an Interior presence here. Matt: Is there anything in language currently in statute about this? Vivian: No, they are not holding any funds back. Howard: Indicated that funds had been kept back for certain projects. Adam: That was a buy back. Just as an example - when we work with IHS we like to be clear on what is a buy back and is available for them. Example on Buy-Back: Electronic Medical records - leaving these with IHS to do those services and its at the tribes option. Vivian: This is why we need Interior presence here to spear head this effort. Jody: I don't want to infringe on anything but we are going to get caught here if we don't provide input. She indicated do we want to throw anything together for this? Vivian: Where it goes from here is a part of Rule-making. Is the Dept. going to be handling financials or what? I just don't know. Gerry: Indicated an area that might need to be re-visited is to have our own discussion as we move along on what that vision might be? He indicated he envisioned the possibility to have an AI/AN DOT office for this piece. This could be vetted out on this and we will need Congress to do a legislative fix on this. Howard: Might ask OSG to consider this. Vivian: Wants a mechanism in place that long outlasts our tenure and that works. What kind of staffing level does the DOT envision? Bob: Vision - He see's that there will be an Office of Self-Governance and what staffing and budget will be, hasn't been determined yet. Matt: This language was based on Compact and Funding Agreement language. Bob: This is like a buy-back. Matt: Are you making a distinction between federal and obligations to tribe? Bob: This is buy-back to me. Vivian: I know what you are saying. Do you want DOT to take that? Bob: If you want to retain services then go through BIA and that is direct service work. Adam: This is about the tribe making a decision on what they want to do. This language is to allow tribes to negotiate language in a compact and funding agreement. Matt: This is different from that. It is about certain overall functions that can be considered.

Language change suggested as follows by Matt based on thinking of the tribal shares: NONE GIVEN

...

Bob: When the funds are made available through the FAA then those are expended and the obligation of those are already committed. When we carry over money there is limitation for each year and it limits funds.

DeAno: It appears the only way to keep funds is to do buy-back.

Micheal: It seems to be a direct conflict by leaving funds on the table when you are a self-governance tribe. When we compact we may be looking at a 5 to 10 year compact.

David: In the current addendum's, in BIA compacts, finance works differently than most federal programs. Once those funds are made available then they are immediately transferred out. Tribes may want BIA to do something for them - and this essentially means BIA is competing with someone to do the work.

Adam: There is a difference between buy-back and retained services.

Matt: FHWA and the solicitors office has a different way of looking at certain things. When we get to the buy-back we can look at the terms and conditions and frame that language then.

Adam: Opportunity to determine what items a tribe wants to keep and place in their compact and funding agreement.

Jody: Suggested we push this to the parking lot to give it some more thought.

Work Group agreed to it.

SS 137.\_\_\_ May a funding agreement include Federal-aid funds apportioned to a State under Chapter 1 of Title 23 United States Code? Discussion: Notation was made to revise this like SS 137.40(d). This will refer to administration for state aid and other functions.

Andy: Might want to add Secretary to this area.

Matt: The funding agreement will include the language about those funds. This can be captured in Administration.

Vivian: Would like clarification on this. She would like to understand this better. And we are going to get a task on this.

Language change made as follows:

...under Chapter 1 or other funds for a project eligible under section....

SS 137.\_\_\_ Are other transfer arrangements available for the transfer to an Indian tribe of Federal-aid funds apportioned to a State under Chapter 1 of Title 23 United States Code?

Andy: Is there a statutory conflict in this provision?

Matt: I'm looking at 207(d) and the transfer may be done in accordance with section 207(d)(9).

Andy: As you think about this before the next meeting - we have been able to say with States, that once funds go to federal highway, then State is off the hook for oversight.

Matt: Good statement and an upcoming provision goes to that.

No more discussion on this item.

SS 137.\_\_\_ Which entity is responsible for the transferred funds?

Matt: This is just a statutory take.

Adam: Suggested a language change. See Crosswalk page 4.

Flexible Financing

SS 170.227 May a funding agreement include provision pertaining to flexible or innovative financing?

Matt: Read provision. Third paragraph certain language is based on extending 170 in it. Purposes

here is to ask the Department to extend flexible funding to tribes like it does in 170.  
No concerns indicated.

SS 170.228 Can an Indian tribe use Tribal Transportation Program funds under Section 202(a) of title 23 to leverage other funds or to pay back loans?

Discussion: No concerns noted.

SS 170.229 Can a tribe apply for loans or credit from a State infrastructure bank?

Discussion: No concerns noted.

SS 170.230 How long must a project financed through flexible financing remain on a TTPTIP?

Discussion: No concerns noted.

SS170.\_\_\_ Can an Indian tribe use other federal funds awarded under the funding agreement to leverage other funds or to pay back loans?

Discussion: No concerns noted.

Terms in a Funding Agreement

SS 137.45 What terms must be included in a funding agreement?

Discussion: No concerns noted. Matt: This is based on statutory language.

SS 137.46 May additional terms be included in a funding agreement?

Discussion: Question was asked if there was a reason why the language of self-governance was used? Matt: No, it might be cleaner to remove it.

Change:

Yes, at the Tribe's option...

and

...to which the Tribe and the Secretary agree may be included.

SS 137.47 Do provisions of Title I and Title V of the Indian Self-Determination and Education Assistance Act apply to compacts, funding agreements, and construction project agreements negotiated under 23 USC ss 207?

Include reference here when other 207(l) provisions are finalized.

No other discussion.

SS 137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?

Discussion: no changes suggested.

SS 137.49 What if a Self-Governance Tribe request such incorporation at the negotiation stage of a compact or funding agreement?

Discussion: no changes suggested.

SS 137.55 What is the term of a funding agreement?

Gerry: Do we need to do the standard PFSA or firm it up?

Matt: We can reference it like John pointed out.

SS 137.56 Does a funding agreement remain in effect after the end of its term?

Discussion: No suggestions made.

SS 137.57 How is a funding agreement amended during the effective period of the funding agreement?

Discussion: No suggestions made.

SS 137.60 May a statutorily mandated discretionary or competitive grant be added to a funding agreement?

Discussion: Matt explained the statute and the basis for its use here.

SS 137.65 May a Tribe receive statutorily mandated discretionary or competitive grant funding in an annual lump sum advance payment?

Bob: Isn't there an ambiguity there?

Vivian: There is no problem with it.

Adam: This is a direct quote from Title V.

SS 137.66 May a Tribe keep interest earned on statutorily mandated discretionary or competitive grant funds?

Discussion: no suggestions.

SS 137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated discretionary or competitive grant funds?

Discussion: See discussion issues under 137-69.

SS 137-68 May funds from a statutorily mandated discretionary or competitive grant added to a funding agreement be reallocated?

Discussion: no suggestions.

SS 137-69 May a statutorily mandated discretionary or competitive grant program or State apportioned funds added to a funding agreement be redesigned or consolidated?

Discussion occurred in reference to 137.67 and in relation to 137-69.

Matt: This is a prohibition as within statute. It was suggested that Adam provide some language.

The Tribe has to use the funds subject to the authorization they are given through.

Mary Beth: Question on interest earned. couldn't that be read to be used for the grant program - could it be considered to go back to the program?

Jody: gave an example of IRFO funds - it is specific for that project but it doesn't mean you have to spend the interest earned on that program.

Matt: It is ambiguous, Mary Beth, and it could be used as the program determines.

Adam: Cited statute.

Vivian: Indicated they don't have the same restrictions.

Howard: Stated it was in ours.

Vivian: We need to look at that.

Action items	Person responsible	Deadline
1) Administration Workgroup Teleconference 9/27/16 3 pm EDT review sections D,E,& F & discuss appeals language, for next meeting	Jody, Howard & Matt	Set up by 9/23/16
2) All Workgroup work product distributed to full Committee in word format for review	Howard, Lesa, & Technical Group	9/20/16

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