

Draft minutes , pending Workgroup approval

FAST Act DOT Negotiated Rule Making Minutes/Notes – Admin. Work Group

Executive Summary

Date: 10/18/16 through 10/20/16 | Meeting location Grand Hotel – Shawnee, OK

Meeting called by:	Neg-Reg Committee
Type of meeting	Admin. Work Group
Chairperson:	Jody Clark
Recorders	Howard Mermelstein & Lesa Shaw

The Administration Workgroup began it's session following lunch on Tuesday 10/18/16.

Workgroup Chair Ms. Clark started off by briefly sharing the status of the Operations Workgroup via an email from their Chair Ms. Michaels. It was suggested to look at an edit to 207(b) that was sent in, but was tabled until the federal team had a chance to review everything already provided through this meeting by the November meeting.

Sections were then reviewed starting with some appeals language that the Tech group was working on through some conference calls prior to the meeting. Sections were then reviewed in order beginning with 207 (d) starting where the workgroup left off in Sept, and continuing through 207(l)(3), Please note that 207(i) is being covered by the Operations Workgroup.

Administration Workgroup meeting minutes from September meeting in Sterling were approved. Bob was asked to post on website.

The previously reviewed parts 207 (a, b, c,) along with sections d, e, f, g, h, j, 11, & 19 were resent with current revisions to all Workgroup members following Wednesday's session.

Work to be done on the reviewed sections is as follows:

Parts a, b, & c, were previously reviewed at the last meeting and no changes have been made to those(although there is a small edit for (b) that was received from Matt).

Parts d, e, f, g, h, j, & l(1)(9)) were reviewed Tuesday & Wednesday, and below were items that needed further attention from the tech drafters and/or federal reps.

part (e) bottom of page 6 & page 7 top need further discussion page 9 bottom 137.239 and page 10 need work/comments

part (f) page 5/6 .611 equipment return does this apply

part (g) back to Adam for revision/review

part (h) see comments page 2/3 whole section parked for now Homework for Bob S / feds

part (j) Back to Matt for last paragraph changes (return to sender per Jim Glaze)

part (l) (9) appeals language and flow chart .

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We continued Thursday morning reviewing sections k, l(2) & l(3)
Revisions done to k & l(2) stopped at page 5 of l(3) sending this item to the parking lot.

The final action item was that the federal team would go through all the sections reviewed to date and return comments ahead of the November 15-17 meeting in ABQ (now MSP).

Full details of the discussions as well as the daily participants are in the notes below.

DAY ONE: 10/18/16

Meeting date | time 10/18/2016 2:15 PM | Meeting location Grand Hotel – Shawnee, OK

Meeting called by	Neg-Reg Committee	Attendees:
Type of meeting	Admin. Work Group	Adam Bailey, Hobbs, Straus, Dean & Walker
Chair	Jody Clark	Jonah Begay, Navajo Nation
Recorders	Howard Mermelstein & Lesa	John Bioff, Kawerak, Inc.
	Shaw	Dean Brouchard, Redlake
Timekeeper	N/A	Edwina Butler-Wolfe, Absentee Shawnee Tribe
		Andy Callum, BIA Solicitors Office
		Edgar Kent, Iowa Nation
		Jody Clark, Seneca Nation
		Wynona Coon, Absentee Shawnee Tribe (Visitor)
		Leonard Cox, (Visitor)
		Mary Beth Frank-Clark, Nez Perce
		Molly Franks, (Visitor)
		Gerry Hope, Sitka Tribe of Alaska
		Howard Mermelstein, Tetlin, Anvik, Holy Cross, Atmaultluak, & Kasigluk Native Villages
		Palmer Mosely, Chickasaw Nation
		Vivian Philbin, FHWA
		Kay Rhoads, Sac and Fox Nation
		Leroy Gishi, BIA
		Lesia Shaw, Absentee Shawnee Tribe
		Robert Sparrow, DOT/FHWA
		Constance(Connie) Thompson, - Ft Peck Tribes
		Karen Woodard, Morango Band of Mission Indians
		Ada Valaitis - OST
		Tarpe Yarge, (Visitor)
		Anthony Broncho – Shoshone-Bannock Tribes
		Charlisa Attla (Visitor)- TCC
		Rob Endicott , Cherokee Nation Oklahoma

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Agenda topics

Time allotted | *Open* | Agenda topic *Operations Work Group Info.* | Presenter *Jody Clark*

Discussion - Chair asked that the information provided by the Operations Work Group be reviewed. The Chair indicated this information would not be covered at this time but encouraged Work Group members to review at a later time.

Conclusion – Not covered

Action items

	Person responsible	Deadline
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Review Operations Work Group Minutes/Notes	Work Group	N/A
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Time allotted | *Open* | Agenda topic *207(b) Provision Revision* | Presenter *Adam Bailey*

Discussion:

Howard: Suggested reviewing a change in language in 207 (b) provided by Matt. until Bob Sparrow came to the Work Group. Jody felt we could get back to that when we hear back from the feds on that section (reviewed at last meeting)

Time allotted | *Open* | Agenda topic *207appeals language provisions* | Presenter *Adam Bailey*

Adam: began review of the Appeal language. Adam indicated they mirrored the language based on the appeals. There are a few different types. The first looks at the burden of proof. This looks at whatever the Secretary deems. This is directly from Title V.

This next one looks at Section 1121 (9). This included part 5 and is based on post award. The next provision deals with the bulk of it. Pre-Award Disputes. It deals with rejection of final offer, etc.

This provision (f) was left here as tribes didn't want to leave this out. Dennis indicated this may or may not be construction. Certainly the tribal transportation part is. But from the administrative side then it would be based on the use of those funds.

Howard: Agreed this would follow 25 CFR. This language is just a placeholder.

Rob: Indicated that there could be an issue between the Department and the tribe. Adam agreed. These discussions could be brought up.

Gerry: Isn't this where the language may come up?

Rob: There could be larger issues that need to be considered. This could be due to other things going on within the tribe that could create eligibility issues. There are times when the BIA has to approve a BIA official and these may be the times when the eligibility comes into question.

Added language from 207(b) in section (f).

...2004 (b) - just slated that word in here that matches statutory language. Base language grants have been struck here.

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...2006 - opted to leave language in as the pre-award dispute. The question is where does this language need to be at? The regulations in item #5 allow for this. Need to consider language.

...2007 What authority does the ___ have under ...?

Third option is create an office under self governance in OST

Rob: Isn't the DOI Interior Board of Appeals the correct board to consider this?

Andy: This is a decision that still needs to be considered.

Palmer: Isn't that usually the case for these?

Andy: Generally.

Gerry: Is there another option out there that might be a better fit and is more tailored?

Jody: Setting up other processes may mean it may be more slow and there needs to be authority there to look at it.

Anthony: You want to look at what is already there. Have all your facts there as it is a lengthy process.

Andy: There is potential anti-deficiency issues.

Adam: Could be right, this may need to be considered under that. The IBIA is different from the Civilian Court of Appeals and this has to do with the Secretarial decision. DOT has several existing ones.

John: Isn't there several that are already existing under the IBIA?

Adam: The appeals decisions are incorporated by statute. This may be a concrete issue.

Andy: Statute simply changes the name of the Secretary.

Gerry: Once up and running we could argue that the process could be faster. It could be achievable. Couldn't current systems be adjusted? Maybe do some wordsmithing to make the process faster.

Jody: If we had a side by side to list the pro's and con's on each of them - that would be helpful. It may be something due to the nature of this particular thing that we want national input on it.

Howard: Where would a pre-award dispute go to now? Say if it was a state.

Vivian: It's just not going to happen. States get apportioned funds. The age for alcohol consumption and speed limit all went to legislation. Any FAR contract is appealable to Board of Contract Appeals. She, personally, would like something less than federal court.

Howard: This would be after meeting the eligibility criteria.

Vivian: I would like to know more about this Office of Appeals. They are all AOJ's. This is limited jurisdiction.

Adam: The office of hearings has three AOA's.

Vivian: It could be a logical source.

Palmer: I believe it should stay with the funding source.

Gerry: Identifying pro's and cons and perhaps with Adam's list of pro's and con's that could be massaged with this may need to be moved onto the PARKING LOT for now. Adam indicated that he could create a side by side document of pro's and con's and have it ready by tomorrow.

John: Do we want to have DOT's input first before we put this together?

Vivian: If there is anything she can state with surety is that it will need to have appeal language in it. She recommended that tribes put language into place that they want and that they see as needed.

Gerry: Stated lets have it go to 'tribal courts'. (Joking)

John: Language here should include what tribes see as needed?

Vivian: The appeal ability of the Compact through TTSGP language needs to be included. First thought is for it to go to Office of the Secretary and that would be her recommendation.

Ada: She agreed. She thought it would probably be best to go through the Office of the Secretary.

Jody: If there is to be a preference she would like to know what that is? Right now there seems like there are so many options that it is confusing.

Palmer: Indicated he thought keeping it where the Department is most familiar with it.

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Conclusion:

Jody: Asked that Adam be allowed to create a side by side document and to provide it to the Work Group by 1:00 p.m.

Action items

**Person
responsible**

Deadline

Side by Side Document of Pro's & Con's of Appeals.

Adam Bailey

10/19/2016 1:00 PM

Time allotted | *Open* | Agenda topic 207(d) | Presenter Adam Bailey

Discussion:

Jody: Can we continue rolling out on (d) or should the Admin Work Group wait on (a), (b), (c) input?

Vivian: I think it is okay to move to the next one. We are agreeing that (a), (b), and (c) are still under our review?

Jody: How many individuals need copies? 6 copies are needed. All other Work Group members indicated they had the copies.

Lesha Shaw stepped out to advise the Hotel support staff that copies were needed.

Page 12 (started where we left off in Sterling)

Adam: Consent of Indian Tribes - based on statutory language; Part 137.67 - language change made due to discussions on interest. How to use the interest or whether it can be used for alternate projects?

-Interest earned can be used how a tribe wants to use it and it not stay specific to that area.

-Tribal language in Compact should reflect how the tribe would like to use that interest. The whole point of SG is to allow for the tribe to use it at their discretion.

Jody: Sometimes it is nice to see when funds are earmarked for specific programs that they be retained in that area.

Jody: If a state earns interest funds are they restricted to how they are used? No.

Rob: The interest earned on those dollars are tribal dollars. They are not program specific.

Leroy: This question has come up for a number of years. When we have an agreement with a tribe then it is for a specific deliverable. BIA encourages it be used in that area but they cannot state how a tribe uses those funds that interest is generated from.

Vivian: Like Leroy we like the idea of it going back (into DOT) but they cannot be mandated to go back into that program unless a tribe determines that need.

Gerry: Most tribes recognize the merit of placing funds back into programs but tribes have the right and authority to set those.

Darryl: -It's about priorities and setting those. I would agree that they need to stay close to the program.

Jody: When closing out programs not one program asked where did the interest go?

Howard: Tribes could use the interest earned for other programs if a tribe deemed it necessary. The tribe is the one who makes that decision.

Adam: If the language is going to change here with tribe's using these funds then we will need to change the language.

Jody: Based on what she believes tribe's will say, she suggested a language change indicating that the funds earned from interest be left at the discretion of the tribe. Most agreed to this

Page 14

Adam: Discussed language in the DRAFT TTS GP Proposed regulations and comments. Section 137.70-72.

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Darryl: If money goes to state and tribes wants to add to it then they send it back to DOT.

Jody: Yes, as she understands it. Funds can be put it back into a project.

Mary Beth: (did not capture this comment)

Jody: How does a transit program go under it? Especially if you get transit funds under the state.

Andy: What we have said under the 202 (9)(a) provisions discussions and in the 202 (9)(a) process is the most fluid process. Do we actually have the fluidity to take on more responsibility?

Howard: Got notice that funds were transferred into the TIP agreement. I think the concern here is the wording under 70. Leave it as 'accept as is provided' then we are stuck in following that reporting requirement. Then, until we get those actual limited agreements, we will limit ourselves.

Adam: May want to enjoin 70 with 71 to strengthen it.

Jody: This may fit one tribe but not another. We may need to just leave that option there.

Adam: Let's place this into the **PARKING LOT**.

Adam: Went over .219 and 220 and indicated that language is included as a placeholder.

Vivian: Asked Andy 'where do tort claims go to'? Response: BIA - then it is tendered to the awarding official or technical representative who moves them on forward.

Howard: His understanding is that when something comes in that it is to be moved into fed court.

Palmer: I'm not following what is going on.

Vivian: There are tort claim procedures in 25 CFR. Are those procedures acceptable to the TTSGP? It was stated 'yes'.

Gerry: You are just saying that you want to understand it?

Bob: Yes, we are just trying to ensure that we understand and follow provisions agreed to.

Vivian: Part 900 provisions are more acceptable than Part 1000 is.

Gerry: So you just want to make a note that Bob will need to review?

Bob: We will need to review all documents submitted, not just one part.

Gerry: In reviewing everything as we work on this are you having an internal review over these revisions?

Vivian: We had that discussion this week and will be working on reviewing them.

Bob: We are looking at it being an overarching document. It is intended to be looked at from the 30,000 foot level and specific language can be placed in a tribe's annual funding agreement. But reference can be made to those in the overarching agreement. Ex. NEPA can be made subject to.... Now when language is being developed then those discussions can be held. It is not for this group to look at the NEPA regulations but to have discussion on those issues that may need to be addressed. The Operations Work Group has developed a number of Q&A items that he recommended they be incorporated into the provisions that the Admin. Work Group is working through.

Jody: Indicated she wanted something simple. To her those items that aren't identified specifically should be in this document. Bob said they are identified. Jody stated there are only 10 and she advised that she may not have the right list. Some items may not be addressed in 170 that needs to be.

Bob: We need to be cognizant that we are developing language for a Compact and we need to not delve into the weeds. He is trying to keep the Q&A's at a higher level and that these are the issues that have to be addressed when the funding is received. The Office of Self-Governance is the ones who will be having those discussions.

Gerry: Moved to make him (Bob Sparrow) the designated 'federal' official.

Vivian: Stated 'I like that'.

Jody: Can we mark this as finished by the Admin. Work Group?

Bob: I wasn't certain what was to be included.

Jody: It is important that everyone agrees.

Howard: Are we supposed to be having discussion over this with the full Committee?

Bob: We have some comments but they are not complete. These are piece meal.

Vivian: We would like to come back with real comments. Not just piece meal comments.

Jody: I get that. Is there a projected timeline as to when this can be discussed by the full work group?

Howard: Suggested – 'Maybe (a), (b), and (c)?'

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Vivian: It will be more meaningful if we can do them all together.

Bob: We will do everything we can to review those items discussed through this Thursday, and be ready to provide comments back at November meeting

Gerry: It could be a first review.

Vivian: This is a first blush of the provisions.

Time allotted | Open | Agenda topic Approve September meeting minutes of workgroup | Presenter Jody Clark

Gerry: Moved that the September minutes be accepted as was provided. Seconded by Dean. This will be placed on the website.

AT Tribal Chairman: When you say 'tribe' what is meant by that? This is just my opinion. Group responded. Discussions were held over the minutes taken.

Bob: Is Howard the Recorder?

Jody: There are co-recorders: Lesa and Howard. These are very complete notes.

Jody: You should be sitting next to Lesa as she is constantly taking notes.

Howard: Went over the minutes taken during the last meeting.

Gerry: Stated my name is not correctly spelled.

Howard: It was not me.

Gerry: These are very detailed notes. It is a credit to how much work was done by our group and Howard & Lesa

Howard: Read a few comments from the minutes. He asked Bob if he was standing by his comments?

Adam: I didn't recall that detail.

Bob: The issue is if it is retained funds then it has to get back to the tribe. This is an internal mechanism.

Howard: I wasn't certain what a crosswalk was. (referring to the side by sides prepared by Matt & Adam

Adam: Stated that was our document.

Howard: I was just being funny.

Anthony: This is like a court proceeding. (Laughingly stated.) Jody - asked for an approval with a thumb's up. Consensus was given from Work Group by a 'thumbs up'.

These approved minutes from 2nd meeting in Sterling, will be posted as the Final on the website.

Bob: I will get them out there.

Conclusion:

Federal Representatives will review 207 (b) and (d) at same time as they review other provisions previously discussed with them.

Section 170.70-72 Funding language was moved to PARKING LOT.

Action Items

Person responsible

Deadline

Discuss PARKING LOT item Sec. 170-70-72.

[Presenter]

Next Meeting

Special notes [Type additional notes here]

Discussion:

Jody: We need to go over section (e). How do you will run the screen projector for this section as well?

Howard: Yes I am pulling it up now

Jody: Has everyone signed the Administration Work Group sign in sheet?

John: Has everyone got a copy of (e)? He indicated that in some ways this is pretty straight forward. If people have things they want to bring forward then they can. The reason it is redundant to 207(l) is that it is like the general provisions. (l)(1) has the general provisions and was done by Hobbs, Straus, Dean & Walker. Mine are 207(e). Redesign and Retrocession are 207(e) and the others are 207(l) and were taken almost verbatim. The question is where do we want to place them?

Howard: They may need to be included in both.

Adam: It might be cleaner.

Gerry: Cross reference sections. This could be done once we are finished wordsmithing this.

John: It was discussed about why there was the need to place them like that. I couldn't find why. I don't see why (o) was placed as an operational issue. If there wasn't a reason why then I don't see the necessity. The language you are looking at here is straight out of Title 5. A tribe can redesign and you can read that language. He stated that he wasn't going to read each line unless someone has a question.

Howard: I have a question for Vivian is this going to come back from legal on that section.

Vivian: Reallocation has to follow the funds. It could be my lack of familiarity with this but I think that is how it will work.

Bob: I don't see that. The answer has to be more direct.

Jody: Maybe its not a one part answer. It may be to where we may decide to look at it differently.

John: If the statute on the left states that it then the language could be added into it from the Title V language.

Bob: Yes, I think it could.

Adam: We could look at editing in the middle paragraph in Subpart E, Redesign - answer is changed to read:to be in the best interest of the Indian community being served. In accordance with 23 USC 207(e)(1)(a)(ii)...

Adam: A new question could be created in 137.185: Question: Whether this should be elsewhere in operational regs.

John: I'm going to keep moving us on. This is not anywhere else. I plagiarized this from Hobbs, Straus, Dean & Walker. This is transplanted from 207(l)(l)

Bob: Conflict of Interest - Language change needed....'How does the Secretary address a perceived conflict...'

John: When does a tribe not find it favorable?

Jody: Is there every a time when a tribe doesn't seek 'most favorable'?

Gerry: The un-favored tribe loses.

Jody: It would become part of the standards that are used and those may not be the most favorable for me.

John: We are trying to stay at the 30,000 level like what Bob said.

William: I think the language of the provision would still stand.

Jody: Okay, then it works.

John: I'm continuing to move on till stopped. Read the next part of the drafted provision.

Adam: This was to focus it on this specific area.

Howard: Is this going to be reviewed now?

Gerry: We will do this globally later on.

John: Under our Tribe are we required to address potential conflicts of interest? (Note: Did not capture all language.) Language change is to read: Yes. Tribes participating in self-governance under TTPSG must ensure that internal measures are in place to address conflicts of interest in the administration of self-governance PSFA's.

Bob: After the word measures add the word 'and controls'.

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John: Do we want to just do 'records' and stop there? The next 3 are about record keeping. Provisions are already in health. 1205 will need to be cleaned up.

Language change:

Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act? See Draft provision change.

Howard: Vivian, does it have to be carried over or can it be like it is?

Vivian: To the extent we would have the record. For example: the TIP, the distribution of funds. Some is publicly available and unless it was proprietary information the tribe is releasable under FOIA.

Andy: Say there is a program review then to the extent that it's not proprietary information.

Howard: Like sacred sites.

Andy: Yes, like sacred sites. It is based on other things.

Adam: What about program records and reviews?

Andy: I don't know. To that extent maybe yes.

John: How does this apply to patient records?

Adam: It is pretty bare bones.

Andy: I would think to the extent that where federal funds are expended then the general record of how the tribe used the funds then that might be subject to FOIA but not necessarily emails. It would come down to how the funds were used.

John: Does it loose its tribal nature when it's used?

Leroy: It takes a lot of effort to not use this information for things other than what it is meant to.

Andy: There may be some huge controversial issues and we give the tribe an opportunity, after consulting with them, to tell us how it was done.

Gerry: I think we have gone as far as we can go on this.

John: Read the next question and read the Draft language. (Note: Did not capture all language here.)

Lesha Shaw stepped out to check on events for the evening.

Leroy: The agency uses discretion in distributing the information when requested by FOIA

Administrative Work Group concluded for the day at 4:42 p.m.

DAY TWO: 10/19/16

Meeting date | time 10/19/2016 8:30 AM | Meeting location Grand Hotel – Shawnee, OK

Meeting called by Jody Clark

Type of meeting Admin. Work Group

Facilitator Jody Clark

Note taker Howard Mermelstein & Lesha

Shaw

Timekeeper N/A

Attendees:

Adam Bailey, Hobbs, Straus, Dean & Walker

Jonah Begay, Navajo Nation

John Bioff, Kawerak, Inc.

Dean Brouchard,

Edwina Butler-Wolfe, Absentee Shawnee Tribe

Andy Callum, BIA Solicitors Office

Edgar Kent, Iowa Nation

Jody Clark, Seneca Nation

Wynona Coon, Absentee Shawnee Tribe (Visitor)

Mary Beth Frank-Clark, Nez Perce

Molly Franks, (Visitor)

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Gerry Hope, Sitka Tribe of Alaska
Howard Mermelstein, Tetlin, Anvik, Holy Cross,
Atmautluak, & Kasigluk Alaska Native Villages
Palmer Mosely, Chickasaw Nation
Vivian Philbin, FHWA
Kay Rhoads, Sac and Fox Nation
Leroy Gishi, BIA
Lesia Shaw, Absentee Shawnee Tribe
Robert Sparrow, DOT/FHWA
Constance(Connie) Thompson, Ft Peck Tribes
Karen Woodard, Morango Band of Mission Indians
Anthony Broncho, Shoshone-Bannock Tribe
Charlisa Attla, Tanana Chiefs Conference
Rob Endicott, Cherokee Nation Oklahoma
William Norman, Hobbs Straus

Agenda topics

Time allotted | *Open* | Agenda topic 207(e), 137.237-239 | Presenter John Bioff (Continued)

Discussion:

Retrocession

Lesia stepped out – Howard took notes here.

Bob: can we add a Q/A what is redesign?

Howard made a placeholder on pg 1 207 (e).

John: moving on, went through language , no further comments through page 4.

Howard: ask about the property under obligation, property/equipment is owned by tribe

Bob: Leave in for now including previous reference

Lesia returns

Discussion was held on 'Withdrawal'.

First change reads: Noted on draft.

Bob: Is there a statutory clause here?

John: Stated that he wasn't aware of a statutory provision.

Bob: Stated that he needed a moment. Asked Howard to go back. He indicated it was fine. It was the one year thing that was part of that. A&D.

Adam: It's in the Retrocession area.

Bob: Yes. (Note: There was confusion over which clause language was being considered.)

137.237 – Funds Redistributed...

John: Indicated Hobbs, Straus, Dean & Walker had put it into their document and that was the reason it had been placed in this document.

137.238 – Funds Distributed...

John: Discussed language and need for a distinction to be made between language of BIA and DOT.

Adam: This needs to allow for change.

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Bob: Suggested that it just be returned to the DOT.

LeRoy: funds that are returned only from withdrawal apply here

Vivian: The DOT is just not in the position to be handling this.

Bob: Instead of getting into the details Adam is saying that it be returned to DOT.

Vivian: We don't need to let this dangle.

Gerry: Do you have a recommendation, Vivian?

Vivian: No, just something.

John: So what is the suggestion?

Bob: We need to have language or whatever in there.

Vivian: For determination on funding and responsibilities.

Language drafting was done with changes incorporated into the Draft side by side. Howard included language given to him through discussions.

137.239 – Withdrawing Indian Tribe...

John: Under Title V or I it speaks about a Mature contract. It does speak about a Mature contract.

Rob: What purpose does that even have? Can someone tell me what purpose that serves?

LeRoy: What does a mature contract mean for a Tribe is the question

Bob: What is definition

John: If you are looking to me then...when I was looking at this I struggled with the language. He read the language in question.

Rob: That is part of the eligibility requirements. This doesn't apply.

Adam: I wouldn't go that far.

Rob: Part of recognizing a mature contract is to indicate that the contractor is ready to move from a Self-Determination to Self-Governance contract. I don't see this as needed here.

Adam: I disagree. This is here to allow for tribe to move without having to go through having to meet the eligibility requirements.

Palmer: I am looking at the federal law and the more mature contracts a tribe has then the better off the tribe is. It is more the federal side that is looking at meeting the eligibility needs. It gives the tribe better federal standing. I don't see the harm in it.

Bob: The resulting contract in one department to go to another level of contract hasn't got anything to do with DOT. We don't distinguish between a Title I or Title V.

Leroy: What are we looking at as the intent here.

Palmer: We are looking at 3 more years here. He discussed audit needs and referred to what John said.

Howard: Spoke on the requirements of meeting the standards of the Single Audit Act of \$750,000. The threshold needs are important.

Gerry: (Note: Did not capture comment.)

Jonah: I agree with John. If the tribe comes to being a mature contractor then it would need to be considered as having no significant findings.

Jody: Do we need to come back to that then if it comes back to audit findings?

Leroy: We have to look at audit analysis. BIA looks at how the contractor performed.

Lesia stepped out to find collated copies. Howard was recording.

John: Is there an on the ground reason that contracts can't meet a mature contract status?

Howard: There is no mature contract status with DOT.

Adam: This is when a tribe is moving out of a contract.

Gerry: Suggested placing this in the parking lot for now.

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Howard: It is all identified consortia.

John: Indicated that he would place this as an area that requires discussion.

John: Re-read the draft provision and cited Reg and provision.

Bob: Re-read the provision.

Howard: so the answer is 'yes'.

John: the answer is 'no'.

Bob: Indicated that the question can be read in different ways.

Jonah: So it can co-exist at the same time?

John: Yes, with certain things being met. Can't do the same thing in two separate agreements being funded with the same funds.

Leroy: There are tribes that may still have funds under the TIP for planning and may have funds under a different agreement doing a similar or same function. So it is possible they can be doing that.

John: You can't have two separate agreements doing the same thing at the same time with the same funds.

Leroy: It doesn't look at the funds and it can be performance of the PSFA's. This happens and this is prohibiting tribes from doing that. We want the tribes to have that flexibility to do that.

Howard: I interpret it like you say, Leroy. We need that ability.

Jody: So are we asking the right question?

Adam: But carryover funds aren't considered the same funds.

John: So what would be your solution?

Gerry: So we may need to keep in mind the language you are saying in looking at the funds.

Howard: So we do we need to ask the question in a different way?

Leroy: It is nasty but it works. He gave example. It retains its funds identity but may be moved into a different agreement. These are the options that are out there.

John: So, we are all in agreement - can't use the same funds, for the same thing in two different agreements during the same time frame but that tribes needs to have the most flexibility.

Bob: We need to review it case by case.

Gerry: We need to keep this. Maybe we could have Bob wordsmith the answer.

John: We can't have the same funds, for two separate agreements, during the same year. So language needs to be considered.

Gerry: We need to look at what needs to be first and what needs to be last.

Jody: We will assign to Bob with an additional question. The first review has been completed.

Howard: It is done.

John: Expressed concern on stating the word 'done'.

Conclusion: Wordsmithing to be done on 137.239 for purposes of clarity.

Action items

Person responsible

Deadline

Wordsmithing to be done on 137.239

Bob Sparrow

N/A

Time allotted | Open | Agenda topic 207(l)(1)Provision Revision | Presenter Adam Bailey

Jumped to here because of it's direct relation with 207(e)

Discussion:

Draft minutes , pending Workgroup approval

John: Hopefully we can knock this out pretty quickly. Hobbs, Straus, Dean and Walker drafted this. So a more global question is here. Where does this need to be here or does it need to be in both (e) and (l)? Discussed draft language. Everything we just did in (e) could be moved here.

Howard: Let's take this per change.

John: Began reading draft changes.

1. Read changes ...1200

...1201...(see (e))

...1202... (see (e))

...1203...(see (e))

Jonah: Is there a timeframe for a facility to keep records?

Adam: It could be 6 or maybe 10 based on the type of record being kept.

Gerry: Do we want to do a cross reference to the length of time?

Howard: Why?

Gerry: He (meaning Jonah) brought it up. I am just going through what was stated.

Jonah: It may be irregardless.

Gerry: It may not be needing to be cited here.

Jody: It could make it more complicated.

John: Continued reading draft changes.

...1204...(see (e))

...1205...(see (e))

...1206...(see (e))

...1207...(see (e)) - no changes based on statute ...1208...(see (e)) - no changes ...1209...(see (e)) - changes in question and response.

...1210...(see (e)) - tentatively deleted

Gerry: what was the reason for tentativeness?

John: We need time to think about it and the rational for it.

Gerry: Have we thought through this?

John: No.

...1211...(see (e)) - changes made

John: So do we want to keep this?

Jody: Let's put it in the PARKING LOT and have discussion in tribal caucus. We don't want to move any out without discussion.

Bob: Housekeeping item. The copier was broke yesterday. So these documents are having to be collated by hand. So if these copies don't really have to be made then I suggest that I just post them on the website.

Jody: Asked that a watermark be placed on copies with the date set on it.

Vivian: Indicated that it would be good to have documents being worked on.

Bob: I would rather you tell the group.

Jody: You did say that you would have these available 5 days prior to the next meeting?

Bob: Yes, I can put a blast email out there. I will talk to you, Jody, before then.

Jody: I will not be at the November meeting and someone else will need to Chair that meeting for me so if thought can be given by the Work Group on that. – Kay will chair workgroup in Jody's absence.

BREAK at 9:55 a.m.

Conclusion:

Draft provision language was read and discussions held. Item 1211 was placed in the PARKING Lot with discussions to be held in Tribal Caucus.

Draft minutes , pending Workgroup approval

Action items

Person responsible

Deadline

Item 1211 – to be discussed in Tribal Caucus.

Jody Clark

10/19/2016 1:00 PM

Time allotted | *Open* | Agenda topic 207(f) | Presenter *Adam Bailey 10:30 am*

Discussion: (See Side by Side Reference Document)

Adam: So this talks about final agency decision.

...600... this basically restates Title V regulations again. The first provision is from Title V. See Draft provision language. Language discussed. Committee has the opportunity to decide what dispute language to put into their agreements. It may make sense that whoever the Committee decides to handle pre-award to handle post-award.

...601... Draft provision language discussed. Based on statute.

...602...Draft provision language discussed. Added language here based on role of Secretary. This will relief jeopardy.

Howard: So if funds are being used from TTP or bridge making funds will this limit them from being spread.

Adam: the idea is not to affect your TTP but to narrow it.

John: Read language from the Draft language. So is this good enough or should it be more specifically clear or should it speak to the narrowest portion of it?

Adam: I think either of them. Maybe 'only terminate that portion of it'.

Gerry: Or you could wordsmith that part of it.

John: I mean the one that deals with 601, a(1) and (2).

Adam: I think it only speaks to the Secretary and specific portion.

Vivian: I have no problem with it and will leave it for the Work Group to word smith it.

...603...Draft language was read. No discussion.

...604...Draft language was read. No discussion.

...605...Draft language was discussed. Note: This is to occur within 45 days.

...606...Draft language was read. No discussion.

...607...Draft language was read.

...608...Draft language was read. Discussion held.

John: Language in 601 and 602 are about imminent danger.

Adam: This is a higher standard.

John: Will there be a definition on imminent danger? These are different from 601 and 602?

Adam: Yes, may need to make that **note**.

Jonah: The question is on imminent danger. What if it is a natural disaster?

Adam: This is in relation to gross mismanagement not a natural disaster.

Connie: So who will be the one to assume it if there is a disaster?

Vivian: We don't have direct service capability.

Adam: We may need to change that language and place it back to the department.

Howard: So add a Q&A here?

Adam: Yes. Question added here: 'What happens to funding based upon termination of PSFA's Compact or Funding Agreement?' (Adam will draft language here)

John: So, Howard, maybe reference here to (e). John read language. Howard inserted into side by side.

Jody: Let's move on.

Draft minutes , pending Workgroup approval

...609...Draft language was read. No discussion.

...610...Draft language was read. No discussion.

...611...Draft language was read. Discussion.

Jody: Can this be confused with other draft language? Any opinions or ideas?

Adam: I would like to park this issue. This enters the realm of hypothetical.

Gerry: I don't think there is a clear response to this. Its a 'depending on' situation. We should put it into a parking lot.

Jody: If we put this into the parking lot then when will it be brought up again?

Gerry: It will come up after Adam does this.

Adam: I can do this.

John: I think both the sections in (e) and (l) may need to mirror each other. They are similar and language should mirror each other.

Adam:

...612...Draft language was read. He said 'yes' to the question. This walks to the process. We may want to re-use this language from (e).

John: Do we want to re-phrase it.

Adam: No, I think the question already used will reference this. This looks at reassuming funding.

John: Read language and asked if that was what was meant.

Adam: Yes, they will reassume the funding.

Jonah: Can you clarify 612(b)?

Adam: This gets into the issue brought up by Vivian and Bob. It relates to PSFA's and the law. So the Secretary gives back the funds to the DOI.

Leroy: DOI is the ultimate agency that handles these work products from agencies and tribes but these funds are under the DOT.

Howard: These are direct service funds and there needs to be some type of reference giving direction.

Adam: we just broke it into sections.

John: There are two things, Howard, I want to make note of. In ...611...suggested language and reference to 207(e). Should this be in that paragraph using the vague language or the clear language? So the language can be removed or?

Adam: The language can be removed.

Howard: Did I get all the language out that you suggested?

Adam: Yes. Language draft change was made and inserted into side by side by Howard.

Adam: ...613...

Gerry: So if other changes get made then I don't think we need to necessarily stay restricted to DOI.

Howard: there are 11 modal administrations.

Gerry: My recommendation is to remove DOI.

Howard made the change on the draft provision.

Jody: She noted that PSFA's are stated redundantly and this may need to be looked at.

Discussion began on which agency is appropriate agency.

Andy: Keep in mind that is Secretary of Interior. When we are doing reassumption we are looking at what an agency already does, right? This includes the Secretary of Interior. An exception may be writing an FTA grant doing bus stops. Certain parts of the project can be done that directly relate to that agency yet others may be done by others. Some are contractible, some may not be. The capacity is what is looked at, right? What do you do with other aspects of it that isn't under the Secretary. There will be aspects of this that the Secretary can do.

Gerry: So, as I read it, we are talking about the funds being re-assumed under the narrow scope of the DOI but we need to talk about what is not currently under the TTP and other agencies within the DOT that fits into the realm of self-governance.

Howard: I have a bit of difference of opinion as we need to add to it with agency.

Draft minutes , pending Workgroup approval

Gerry: By adding appropriate agency.

Rob: But is that the way we want to handle this? Is that right, Vivian?

Vivian: Robert makes some good points.

Andy: I think what happened is if the tribe's Compact is reassumed then it will go back to the program, then the DOT funding agency, then those funds would go to the agency's within DOT that administers those funds. DOT would then re-administer those funds and it would be based on tribe's being eligible to receive them after that point. Gave an example of running Ferry and contracting it out. How are those agencies to move those funds out to the Tribe. How are those done right now, Vivian? This is the question that once it gets back to the modal agency where does it go then?

Howard: Based on how it was dispersed like funding agency.

Gerry: He suggested we may be getting down to far. Stated that let's go back to my original edit.

Andy: So does it state DOI?

Bob: Yes, based on applicable law.

Andy: So that gets us out of a specific conundrum. Maybe a (c) could be put in here.

Howard: So funds associated with... (read proposed language and inserted into side by side)

Jody: But not necessarily DOI and what about those that aren't necessarily agreed upon.

Andy: So currently it goes to specific programs

John: Discussed revised language and sought clarification.

Andy: Not all money should go to DOI. He suggested referencing DOI. This shouldn't be just TTP funds, right? It should be what we do already. This is an interpretation of statute and can be looked at in a broader view.

John: So it leaves it open.

Andy: Discussed revised language.

Adam: I agree that we need to include the removed language back to the PSFA's. Drafted language added to cross walk.

Gerry: Howard had a point about 'shall'. I would hate to have funds evaporate outside of the tribe.

Adam: The problem with 'shall' is that the Secretary may re-assume the funds.

John: I agree. Is it possible any funds that go to DOI not go to DOT?

Jody: I have that same question. Example - law enforcement.

John: Could it say to go to 'administrator'.

Andy: It is going to Administrator of Federal Highway or an Administrator.

Adam: For the benefit of the tribes.

Andy: Department of Interior - that language is a little funky. Is that taken directly out of the statute?

Adam: yes.

Bob: Need to stare at it for awhile.

Andy: I'm trying to get to a point and capture the other angle. It's not just one agency, right? There may be other funding streams. I am trying to capture here where it gives us leeway. I'm trying to get to of: Is DOT willing to let Tribes use these funds or what will the process be?

Bob: ...613...there needs to be: (a) and a (b) under the answer.

Jody: Do we have any other questions or discussion on what has just been reviewed or read?

Vivian: I like 613(b).

Jody: She advised that she was certain this would be reviewed again. For now is this good?

Vivian: We need to look at (a).

Bob: There may be another ARRA and we are trying to stay at the 30,000 foot level.

Andy: We could look at the agency.

Bob: We don't want to use funding for something the funds aren't meant for.

Jody: We have comparisons to look at on the different appeals that Adam has put together for us. We will look at other provision changes. We will see everyone else after lunch.

Broke for LUNCH at 11:46 till 1:00 p.m.

Draft minutes , pending Workgroup approval

Conclusion: Discussion was held with revisions made on Draft provisions.

Action Items	Person responsible	Deadline
None.	No assignments.	Next Meeting

Time allotted | Open | Agenda topic Pre-Award Disputes | Presenter Adam Bailey

Discussion:

Meeting assumed at 1:15 p.m.

Pre-Award Dispute(s)

Jody: We had requested Adam to discuss the Pro's and Con's on Disputes.

Adam: The contract review board wouldn't have jurisdiction over this. We looked at the IBIA. We had a discussion on the pro's and con's of the appeals process.

Adam reviewed the document he had prepared on the Pro's and Con's.

Jody: We wanted to put the Pro's and Con's before the Work Group and have it available for participant tribes.

John: A couple of questions. Under the new DOT process I'm not familiar with the past is this more of a structure? Is it a person making a command decision?

Adam: This would be a formal process.

Howard: I think it would be kind of best to keep it internal. I don't think using the Civil Board would be the best way of resolving these either.

Vivian: Arbitrary or capricious concerns aren't what we want by this.

John: What are we looking for in this?

Adam: We have heard the frustration with the IBIA due to backlog and this is one of the reason's we are looking at a new process.

Gerry: One of the things we are talking about is the new DOT office and this may take awhile to get it set up.

Jody: We probably need to do a second page to highlight that fact. Is there any of these 3 we may eliminate any of these based on statutory authority?

Vivian: I'm not here to eliminate any of these. Using one of these - the ALJ. This is an intermediate step and it gives it some real authority.

Kenneth: My answer is I agree with Vivian. We want to say what has been said and we may want to explore some options but should keep within the department.

Jody: I'm just trying to think of what we are wanting to do to move this forward. Do you want us to wait till next month, Ken, or what are we looking at?

Kenneth: I would like to do some homework on what is being done and will need some time in order to look into this. I don't necessarily know at this time whether we will have a Self-Governance office or not.

Kenneth: I'm just looking at a model not necessarily replacing this.

Jody: Unless there are some other issues or questions. Let's place this as a **PARKING LOT** item.

Draft minutes , pending Workgroup approval

Bob: This provides us with information back at DOT and will give us the opportunity to discuss it with folks at the DOT. We need this document sent back to Ken and I for us to take a look at.

Adam: Will modify the language.

Bob: This is pre-award right?

Adam: Yes.

John: So you will send this forward to us right?

Adam: Yes.

Palmer: There are several agencies that will need to be considered during this. And its up to a tribe to make the decision on which process we may want to take. The Tribe will decide the route and I agree with Vivian as well. 5 options are provided to the Tribe under Part 1000.

Adam: This is a bit different. This allows for a 'lower' process. The Contracting Board is not available through this.

Jody: Adam, do you want to add or do another part to this?

Adam: It's not necessarily a part of this.

Jody: I think when its sent to tribes we need to make that available. Can you do that?

Adam: Yes.

OPS Work Group

Jody: I wasn't certain about the material sent by the Operations Work Group. I haven't had the time to review it yet.

Howard pulled up the information.

Kenneth: I think this is based on what was discussed earlier and on the need for a consortium definition.

Jody: So we figure this will go into 207(i)?

Howard: I think that is what they were working at.

Gerry: So are we just looking at this for review purposes.

Kenneth: I think so. They also wanted to add that definition into the list.

Gerry: I think the language around the Indian tribe was one area that needed to be looked at.

Jonah: This no right of way will this trigger other laws. Like NEPA. Would it need some type of reference on this?

Jody: I think I know where your going on this.

Kenneth: Keep going it is in there.

John: I think this may be like what we do - an FYI. It seems like it might be a bit confusing for all. Do we want to wait till it has been vetted by DOT or what?

Jody: I think we are coming to the end of what is known.

Gerry: Do we have more? What about if we place this into the **PARKING LOT** till such time as you and Denise have visited on this. Our intent should be stated and we, as two working groups, need to develop a procedural process for the Work Group.

Kay: This is part of the Rulemaking Committee to dispute it or not. We need documents to stay aligned with our Committee procedures about documents being received within the 5 days.

Jody: We don't have anything as a full Committee yet to decide or move forward yet.

Kay: I'll visit with Joe to see where they are and then make that decision.

Jonah: Let me ask this. Who has the liability here - DOT, BIA or who?

Gerry: If there are 'legitimate' questions that need to be discussed then maybe we could have those shared within the other Work Group.

Rob: Maybe its time for a tribal caucus.

Jody: That may not be a bad idea in the near future.

Rob: I don't mean right now but soon.

Draft minutes , pending Workgroup approval

John: I like the Co-Chair's idea of her visiting with Joe on the PARKING LOT and related items.

Gerry: That is good for the Co-chairs to get together. I still think that if someone has a concern that they believe need to be shared then they could share that with the other Work Group.

Jody: I think we need to be careful and not get them off-topic.

Gerry: The group could be asked to place that on their work list.

Jody: I think we can get a list together and give it to the Co-Chairs.

Howard showed the Operations Work Group list on screen

Time allotted | Open | Agenda topic 207(g)Provision Revision Presenter Adam Bailey 2 pm

Adam: began discussing the revised provisions.

207(g)

...702...read the draft provision language.

...703...read the draft provision language.

...704...read the draft provision language.

...705...read the draft provision language.

...706...read the draft provision language.

Jody: I get the question a lot on whether it is 365 business or calendar days.

Adam: Calendar days.

...707...read the draft provision language.

...708...read the draft provision language. Yes.

John: Do I have this right in my mind - pre-award, post award, and allocation.

Adam: It's pre-award. I will double check to see.

Jody: Any other comments on this section?

Bob: Are you going to double check that language in the corner? Where is 106(f)?

Adam: It is incorporated.

Howard asked for a break for a 10 minute break. Section (h) is more complex. Time 2:25 pm

Action items	Person responsible	Deadline
Draft provision on Pre-Award disputes placed in PARKING LOT.	Jody Clark	N/A
Pre-Award Q&A to be written.	Adam	11/15/16

Time allotted | Open | Agenda topic 207(h) | Presenter Adam Bailey 2:40 pm

Discussion:

Subpart - Funding

This is about what the Secretary needs to include in a Funding Agreement.

Adam:

Read (a) provision. No discussion.

Read (b) provision. No discussion. (as there hasn't been for the past 10 years)

Draft minutes , pending Workgroup approval

137.76 - Read provision.

Howard: Is that language out of statute or Title V?

Adam: Out of Title V.

Rob: I'm sure in your discussions there has been discussions about apportionments. This should be part of this piece right here.

Jody: Do we have anyone from Transit here?

Rob: Does this payment provision here, does it, automatically include apportionment language (from Chapter 43, part 59) in it?

Jody: We are addressing Transit funds here. We have language from TTP in it?

Eldridge DOT Transit Counsel: Are you asking if a tribe can be reimbursed or ...?

Rob: I'm saying that it should be paid up front instead of reimbursed in these agreements.

DOT Transit Counsel: Apportionment language is included. Whether tribes might still want to make or incur some expenses as an alternative to having the funds available is a question that is one to be considered.

Rob: We want those funds to be made available up front and in advance. This gives the tribe the ability to receive interest and to use as tribe wants.

Gerry: We may need to look at maybe a Q&A for later on.

Jody: If it is a formula based fund then there shouldn't be any reason it shouldn't be provided up front.

DOT Transit Counsel: I agree. There shouldn't be any reason why these funds can't be received if that is the case.

Rob: Is there suggested language so that we don't lose anything?

Bob: There is no way that can be done before 10 days.

Rob: That is what the statute states right?

Bob: Yes. It goes towards tribal apportionments.

DOT Transit Counsel: They are formula funds.

Leroy: Is this looking at notice of award or what?

Bob: It is based on non-discretionary funding.

DOT Transit Counsel: The formula funds are based on the data submitted to the national Transit database. This is how a formula amount is arrived at.

Jody: Whatever funding methodology language is used then we need to be realistic on which process.

DOT Transit Counsel: Each Agency has to look at formula and OMB funding requirements.

Jody: We need to have some type of timeline established.

Rob: What does the statute state? Howard showed the draft provision language.

Gerry: Frontloading is a common practice at the BIA in Compacting. IHS is familiar with this too. This is new to DOT. This is a system that we have to look at. That is a big benefit and is an advantage for tribes to be able to front load. We need to look at general provision language.

Jody: Do we have that language?

Adam: It is based on statutory and is based on 25 CFR.

Rob: There was an initial amendment in the FAST Act that talks about when the payment is available. There should be a payment method listed in there. It makes the FTA funds applicable. I think it was codified in 23.

Adam: Yes, it is 30 days.

Vivian: Are those discretionary funds listed?

Kay: Can be distributed as available under a formulary method. (Read from FAST Act)

Gerry: So do we state after FAST Act certain, specific language? (ss 137.76 - answer to question.)

Gerry: Based on the CR and if it is continued on in 7 day increments is it even enough to be concerned with?

Bob: Remember it takes about 45 days for it to get to a tribe and that can be a problem.

Sonosky (Jim): It is all advanced funding. I thought Title V already had a good regulation in it. Is that being used?

Jody: That is being considered.

Draft minutes , pending Workgroup approval

Sonosky (Jim): Does that make any sense? It's not impossible if they have the funding available. You can't get the funds until they are available.

Adam: Apportionment language is there.

Howard: Rob just brought up 23 USC 207(e)(bb)

Jody: Is that something we want just put into the notes?

Gerry: Yes.

Bob: It's more technical than that. It is about getting the notice, getting the letter out. We are looking at 30 days at the most. That is doable.

Sonosky (Jim): Regardless of the modal administration if there is a change order (we are talking about TTP) there then

Bob: It can't just be stated they are there it all comes down to the mode. This is just not reasonable.

Sonosky (Jim): It is up to the Tribes/Committee here if other agencies are doing it then can't DOT learn from them and do that?

Bob: I here you and its not that we don't want to do that.

Andy: Are the funds going to be transferred onto the tribe? Even then one of the challenges is the agency not having control over the funds. This is part of the reason why it can't be dispersed readily as it is the fundamental differences between the accounting system and the availability of funds.

Lesia left the room.

Rob: Is it easier for certain agency's or is it the language or what is the fix?

DOT Counselor:

Jody: It would be helpful to us all to see the different funding streams. Until I actually see it laid out step by step then I can't fully understand it. Is it possible for the funding agency to lay that process out?

***John:** What is the impact going into this? Had two other questions. (Note: Did not get the two questions)

Sonosky (Jim): What is an actual work activity in each step?

Gerry: Don't know why we are raising hands anymore. I don't think we should charge ourselves to do this right here and right now. I think we need to move this to the PARKING LOT and that we should have more discussion on this. There are things that are procedurally challenging that need further discussion. It can possibly be moved from 30 to 29.5 days (joke). We just need to recognize this is the first discussion on this.

DOT Counselor: We need to keep in mind that on one of our federal grantees that we worked to get a certain waiver. This may become a problem with this type of apportionment. Tax indebtedness can not be claimed on FTA funds

Sonosky (Jim): The good thing is that now that you are SG that there is now language available for this. Can you include in the flowchart tasks along the funding stream and the funds available to them? Tribes need to be made aware there are differences available to them as a SG tribe under the FAST Act.

Wynona: Asked the question on existing funding structures. Isn't that already existing?

Bob: It takes authority and limitation. We know the Transit authority is now able under the FAST Act based on funding formulas, authority level of the tribe, distribution methods - this formula is so complicated that it is November before we know what the amount is. The problem is it is a complicated thing. He won't know what is available for tribes. He doesn't have money. He has Limitation. There is a lot of stuff her that make funds not available. We can explain it at the next meeting.

Jody: this is the exact reason we are asking for the flowchart.

Adam: What I am hearing Bob say is that we have '0' funds available. Second I would remove the non-discretionary language from this.

Gerry: Is this transfers?

Gerry: So will this be a **PARKING LOT** issue?

Draft minutes , pending Workgroup approval

Jody: Yes.

Palmer: is it possible to have Tribal Self-Governance here?

Adam: So we are parking this right?

Jody: Yes.

Action items

Person responsible

Deadline

Draft All of 207(h) placed in PARKING LOT.

Jody Clark

N/A

See comments on pg 2 & 3 of 10/19 version of 207(h)

Time allotted | *Open* | Agenda topic 207(j) | Presenter Adam / Jim

Discussion:

Jody: Please pull up (j). This should be relatively short.

Adam: Read draft provisions.

Bob: The last paragraph I'm not certain why this is needed?

John: Is this statutory or regulatory?

Sonosky (Jim): You are not authorizing the state.

Adam: Congressional policy.

Sonosky (Jim): What is the question:

Jody: Language here needs clarified.

Sonosky (Jim): We have not authority to assert Congressional Policy. It would have to be drafting of Secretarial policy.

John: Can it state that it is interpreting Secretarial policy.

Sonosky (Jim): Need to reference Secretarial policy. A lot of these are from existing policy.

Jody: Do you have any problem with tribes encouraging states?

Bob: It's that it just doesn't apply. We don't dictate to states.

Jody: We, the Seneca, are trying to get a buy-in by states.

Sonosky (Jim): offered language. Put it into the context of what the Secretary will do not the states.

Bob: Suggest this language be placed in Compacts and/or Funding Agreements.

Jody: Let's put this into the **PARKING LOT** and let Matt work on this.

Jim G – Return to Sender -- Matt for revisions

Jody: Move it to the comment section and re-work it.

Kay: States are going to attack that language from the perspective of obligation.

Jody: If we are changing it from the Secretarial policy then it should be framed around guidance and what the joint understanding is.

Jonah: States want that sovereign immunity. Tribes should be careful when looking at that language.

Jody: It is about getting the language out there that looks at the Secretarial responsibility and the policy.

Anthony: We had over 200 recently at a state/tribe consultation to work through consulting concerns.

Kay: EO12612 - this is 2004 language.

Leroy: States may look at this and say this is language that derives them of sovereign immunity and be obligated.

Jody: By citing the Congressional policy doesn't that shift that concern?

Bob: Yes, that fits under the DOT Tribal consultation policy.

Draft minutes , pending Workgroup approval

John: There is also the law that speaks to the tribal consultation policy.

Gerry: With us being a PL 280 state we have to look at referencing things other than certain modals. This is a higher challenge. They are used to having those funding streams.

Jody: Howard will be forwarding the watermarked DRAFT version of 207 (a) to (j) that will have the date on it.

Rob: What if they changed their consultation policy is? Is that necessary. Just a question.

Jody: We have to look at this policy. It is titled 'Secretarial Policy'.

Palmer: At the end of the day - tribal consultation policy is not enforceable. Cannot get judicial relief.

Gerry: Under current language seems limited.

Jody: I almost think that whole first line should go and that we should have some other language.

Howard: Let us leave it for Matt to revise first as suggested

Gerry: Let's give Matt a larger task and ask for a legislative fix.

Adjourned at 4:22 p.m.

Action items	Person responsible	Deadline
Draft provision in 207(j) placed in PARKING LOT.	Matt Jaffe	N/A

DAY THREE: 10/20/16

Meeting date | time 10/20/2016 8:30 AM | Meeting location Grand Hotel – Shawnee, OK

Meeting called by Jody Clark

Type of meeting Admin. Work Group

Facilitator Jody Clark

Note taker Howard Mermelstein & Lesa

Shaw

Timekeeper N/A

Attendees:

Adam Bailey, Hobbs, Straus, Dean & Walker

Jonah Begay, Navajo Nation

John Bioff, Kawerak, Inc.

Dean Brouchard,

Edwina Butler-Wolfe, Absentee Shawnee Tribe

Andy Callum, BIA Solicitors Office

Jody Clark, Seneca Nation

Wynona Coon, Absentee Shawnee Tribe (Visitor)

Leonard Cox, (Visitor)

Mary Beth Frank-Clark, Nez Perce

Molly Franks, (Visitor)

Gerry Hope, Sitka Tribe of Alaska

Howard Mermelstein, Tetlin, Anvik, Holy Cross,

Atmautluak, & Kasigluk Native Villages

Palmer Mosely, Chickasaw Nation

Vivian Philbin, FHWA

Kay Rhoads, Sac and Fox Nation

Leroy Gishi, BIA

Lesa Shaw, Absentee Shawnee Tribe

Robert Sparrow, DOT/FHWA

Constance(Connie) Thompson, Ft Peck Tribes

Karen Woodard, Morango Band of Mission Indians

Tarpe Yarge, (Visitor)

Draft minutes , pending Workgroup approval

Anthony Broncho, Shoshone-Bannock Tribe
Charlisa Attla, Tanana Chiefs Conference
Rob Endicott, Cherokee Nation Oklahoma
William Norman, Hobbs Straus

Agenda topics

Time allotted | *Open* | Agenda topic 207(k) | Presenter Jonah Begay/Howard Mermelstein

Discussion:

Jody: Advised Work Group that next meeting that Kay Rhoads will Chair Administrative Work Group next time, as she has previous commitments and can not attend November meeting.

Jody: Shared that she appreciated the notes being taken by Howard and Lesa.

John: We have gone from (a) to (j) and (i)(9) and appeals language.

Howard: We also did parts of (l) as well (1) & (9) John, you got 12 documents as part of Tech group, the rest of workgroup got 11 documents via email last night

Jody: Section (k) - you drafted this Jonah.

Jonah: Indicated he made the initial draft and then changes made by Matt and Howard added to it.

Howard: Stated the changes made were to turn into Q/A's in reg format. So this is Section (k) and we cover disclaimers. This is out of statute. He discussed the draft provision change language.

...1...Read draft provision language...

Bob: This is out of statute. He may wordsmith it a bit. Its fine.

Howard: It's pretty direct.

...2...Read draft provision language..

No comment.

...3...Read draft provision language.

No comment.

John: That last question - so they can enter into a separate agreement and after yesterday's discussion then...

Bob: Separate agreements. You have to add language in here that one is ended or terminated and the other is active.

John: So this will be in accordance with the language of yesterday?

Howard: I will add this in today.

John: Let's go back to that language then.

Rob: What if a tribe wants to have a Roads agreement and a highway agreement.

Jody: Those are two separate agreements. That I think is allowable.

John: Could just reference

Bob: The language discussed yesterday was 207(e).

John: So this will language will be cited in it.

Howard: Give me the information and I will type it in here.

John: '...provided the tribe...'

Bob: '..something as in accordance with...' - clean up later.

John: Can you just highlight that phrase on the end?

Howard: No problem.

Jody: Carry on.

Howard: That is it.

Conclusion: Draft provision reviewed and changes made as discussed.

Draft minutes , pending Workgroup approval

Action items	Person responsible	Deadline
No additional action needed.	Not assigned.	N/A

Time allotted | Agenda topic 207(1)(2) Provision Revision | Presenter Adam Bailey

Discussion:

Jody: This is Adam's. This is Final Offer.

Adam: Yes. So these provisions discuss the Final Offer. This discusses the process for that. This can be folded into the Secretarial discussions as for (f). This will stay pretty close to regulations.

...1301...Provision was read.

...1302... Provision was read. Inserted Deputy Assistant Secretary.

Jody: Is this something we should have discussion on.

Adam: Yes, if we are going to have a DOT SG office.

Jody: Let's highlight that area.

John: Asked if this was a DOT function?

Palmer: The separations is the appeal and the Secretarial role.

Gerry: So the Deputy Assistant Secretary aren't compromised here?

Palmer: How?

Bob: It has to be a higher level. The statute says that. Candice and I are discussing the hierarchy of that office. If this goes to the Deputy Assistant then we got to make sure that the order is maintained.

Gerry: I knew that is what John was getting at.

John: So if we wanted the Deputy Assistant Secretary to be the one to decide on the Final Offer then we would need this. Will this be the Senior Contracting Officer?

Adam: Your point is a good one. We need to know who will make the decision and who the Final Offer is to be appealed to. Let's highlight that item.

Howard: Ok.

...1303...Read draft provision. This is generally pretty clear.

Howard: Is DOT or the Tribe making this offer?

Adam: Tribe.

...1304... Read draft provision. No comment.

...1305... Read draft provision. No comment.

...1306...Read draft provision. No comment.

...1307...Read draft provision. No comment.

...1308...Read draft provision. No comment.

...1309...Read draft provision.

Howard: So are we going to highlight this 10 day period?

Palmer: Lets remember we are not talking about funds here.

John: We are just adding it into the Funding Agreement.

Gerry: So, Bob, the 10 day amount is okay.

Bob: I have it circled.

Draft minutes , pending Workgroup approval

John: This isn't adding funds in there.

Kay: So it wasn't clear yesterday whether this was the Final Offer if it is your first Compact.

Howard: I agree with Kay in that we

Adam: So, I reiterate that the 10 day period is totally appropriate.

John: I got lost. So I'm not certain where we are. This isn't the initial Compact so where does this language go?

Jody: Someone explain the Final Offer process of where this fits in here.

Adam: This happens after you have been negotiating and is a fairly rare process. It comes at the break down of negotiations.

John: In 1309 it has to be shown that one doesn't specifically have anything to come back with. The drafters of the statute put this into place that makes it similar to the IHS system. I don't understand how this works with a 10 day timeframe.

Jonah: It is an inroad. There is no dollars attached to this. It is at the end of the agreement and the timeframe.

Jody: Okay, now I believe I can participate in this discussion.

Vivian: We envision a template. Then there would be an Annual Funding Agreement.

Adam: Each tribe would have their own Compact. No template.

Howard: I think a base template for all Tribes to at least look at is good, and then negotiate individual terms as needed.

Vivian: I understand the general provisions and the statute and how it's entered into.

Palmer: Under the AFA tribes have that template Compact available but tribes don't generally go by it.

Vivian: Are tribes still actually negotiating annual agreements ?

John: We, in Alaska, we do this by phone, but there are still annual negotiations.

Howard: For, both HIS compacts & DOI compacts we still negotiate

Vivian: I went to the SG and visited with Sherry and they each have very specific functions.

Adam: We meet with regional representative and sometimes it is very easy and may not take a face to face. It is up to the tribe.

Vivian: These are obviously things we haven't really set.

Palmer: I don't see DOT as a really complicated process.

Gerry: I don't see that the 10 days as being a real concern here.

Bob: I don't really either.

Jody: Is this provision for regulatory or grant?

Adam: Should be easy for grants to be placed in this. It would be based on the grant language and the inherent function.

Wynona: Not everybody is going to take everything out of at one time.

Adam: It may be hard to take all things out. Each tribe will have different needs.

Vivian: What is typical negotiation items?

Howard: Could be reporting....

John: Could be what is considered inherent federal function and any number of things under that.

Vivian: That is something I will need to become familiar with.

Gerry: So we really don't have to highlight that item then.

Howard: I highlighted

John: I don't see that as a requirement to have that 10 days.

Howard: Should I leave it highlighted?

Jody: Yes.

...1310...Draft provision was read. Suggested removing health and safety. Language was revised. Howard made provision change on document.

John: Is that the way you want it to read 'public health and safety' or...?

Bob: No matter what I say it may be removed.

...1311...Draft provision was read.

John: What is the specific concern in relation to health and safety? Is that Public Health standard within IHS?

Draft minutes , pending Workgroup approval

Bob: Is there anything in BIA?

Leroy: In Title 23 they talk about Health & Safety. That is what it is referencing here.

Jody: So that is something you will provide additional information on?

Leroy: Yes.

Jody: Asked that Howard add that to the provision draft.

John: Spoke on PSFA's and Public Health.

Adam: That is actually not the right section. It should be (a)(2)(c). (c) is rejection of the Final Offer.

Bob: In Title 23 it states 'Applicable Health & Safety Standards.'

Howard: Should we incorporate 'Standards'.

John: So we do we change the title here?

Howard: Do you mean the question or title?

John: Maybe that is a minor significant point here but it isn't following the statute here.

Gerry: Health & Safety is one of the major standards. We do need to recognize the expansion here into the DOT.

Bob: I believe we just need to recognize the standards as is cited in Title 23 here.

Jody: With those remarks and the homework to be done by Leroy we can move on here.

...1312...Draft provision language was read.

...143 is to be moved from this section where it didn't belong.(append to (h))

Jody: So we are going to open this item up for discussion again.

Adam: Let's move it and strike it.

Jody: Let's move it to 207(d).

Bob: and (h).

...1313...Draft provision language was read.

Bob: So how is Final Offer requested by the Tribe?

Adam: The language does not read well.

Language change was made to clarify item.

...1314...Draft provision language was read.

Adam: So highlight some part of this to show where subpart will go.

Howard highlighted draft area and added it.

...1315...Draft provision language was read.

No comment.

....1316...Draft provision language was read.

No comment.

...1317...Draft provision language was read.

Bob: So what do those statutes say?

Adam: They can be incorporated. Ref. 207.2.

...1318...Draft provision language was read. These are repeated in multiple sections.

Howard: Do these need to be repeated?

Palmer: I like it when they are repeated.

Jody: Okay, that concludes this section. A 20 minute break was given. (mid morning)

Return from Break. Time not cited.

Bob: Read list of attendee's he currently had going to Alabama meeting.

Kay: Asked again for those attending meeting in Alabama, and to highlight their name on the lists that Wesley sent around the committee members.

...1400...

Adam: Read Draft provision language.

Bob: The continuations are authorization or CR's.

Howard added language into Draft provision.

Draft minutes , pending Workgroup approval

...1401...

Adam: Read Draft provision language. Language was added.

Howard added language into Draft provision.

...1402...

Adam: Read Draft provision language.

Bob: I have no problem with this language at all.

...1403...

Adam: Read Draft provision language. This is a 'must'.

...1404...

Adam: Read Draft provision language. It is funds equal to what the tribal shares are through the PSFA's. Drafted to include the universe of all funds.

Vivian: Is this code for Contract Support Cost here?

Palmer: No, You will know, when it's CSC related

John: Asked for clarification on item 6 lines down.

Adam: Read the line. This may need to refer to 23 USC Chapter 1.

...1405...

Adam: This provision is new. Read the language.

Bob: This is a total contrast to the last line of the language we just read.

Adam: That is true.

John: Could we take out 'no'. No, I guess not.

Howard: Should we highlight it?

Adam: We could make it subject to the same language as in that line.

Howard added the language in the draft.

John: Is this what you wanted?

Adam: It makes it subject to either/or.

Bob: Those funds may be included in the Funding Agreement. It is two different operations here. Make the change in 1404.

Adam: I would like to keep the 'MUST' in there.

Bob: You already have must in there.

Gerry: Is it too 'Musty'.(joking)

Bob: Put a semi-colon in there and make it Items - A, B, C, D.

Howard made provision changes. Gerry and Howard asked where these items should begin at.

Bob: I don't know. He then read his recommendations.

Howard made provision changes on side by side i(notes in comment area)

Bob: I don't know what this says.

Adam: This is what the department will be spending.

Bob: Spending for what?

Adam: Services. This is not referring to TTP. Suggested adding 'services' to draft provision.

Howard made the provision changes.

Revisions continued on Item's A-D.

Bob: I'm just asking what for. Add semi-colon and 'and'. Start with 'Funds'. Read recommended language. Howard continued to make changes.

Jonah: Is that the HUR funds come into play?

Bob: Those don't come to us they go straight to tribe.

Jonah: What about the HUR state funds?

Adam: Suggested language. Howard made provision change. Added language: 'Any other funds as agreed to by the Secretary and the Tribe'.

Draft minutes , pending Workgroup approval

...1405...

Adam: Read the draft provision. No changes recommended.

...1406...

Adam: Read the draft provision.

Bob: I don't think you can say that. You are going to far down in the weeds.

Adam: Okay. Suggested taking it all out.

Kay: And add what.

Bob: Basically we will be in compliance with 202(a)(9). Read suggested language. Howard made provision changes. Asked for Leroy to help him.

Leroy: Made suggested language change. Howard made changes.

...1407...

Adam: Read the draft provision. We will need to change this item.

Kay: We will need to highlight this one?

Adam: Yes.

Howard highlighted this item.

Adam: We will need to re-word that one. It will take some finessing.

Kay: Needs re-worded. No one is happy with wording.

Gerry: Place in the PARKING LOT area.

...1408...

Adam: Read the draft provision.

Connie: So they are saying that SG funds are coming off the top like other SG funds?

Bob: No.

Connie: So, where will they be coming from?

Bob: Excellent question. The Assistant Secretary asked that. This question has come up at the highest levels.

Howard: Won't it come out of the 5-6% off the top?

Bob: This was raised at a level way above Kenneth.

Kay: Tribes have heard the comment. It has been noted.

...1409...

Adam: Read the draft provision.

Kay: Why?

Howard: Why would your funds be reduced? A lot of us use those for other eligible projects. As long as it is within budget.

Bob: It's apples and oranges. The whole question needs to be looked at.

Kay: So we need to change.

Bob: Basically we say what needs to be funded: tribal shares, discretionary funds and these are renewed each year and is based on available funding. I don't see the purpose of this question.

Adam: What we have upon before is that department's have dwindled.

Bob: I don't understand it.

Adam: If it is reduced then it would be through Congress.

Jody: Sometimes it is based on formula changes based on tiers.

Gerry: I guess the point you are trying to make, Adam, is may the Secretary reduce funds and the answer is 'no'. And your basing this on previous experiences.

Jody: Arbitrarily.

Gerry: This is stop gap measure and is a security blanket for tribes.

Howard: My concern is (e).

Bob: If you get a discretionary grant for \$1 million does that mean I can't reduce your AFA by that \$1 million? Where does the award of a discretionary project come in here?

Draft minutes , pending Workgroup approval

Adam: In (d).

Bob: We need to keep in mind that these funds are formula based or grant.

Kay: This is to ensure we don't lose funds.

Bob: I understand the need to not lose funds on services but DOT is different.

Gerry: Suggested Parking Lot this item.

Jonah: A one-time TIGER grant then it wouldn't have to be removed as its discretionary.

William: If the tribes could come up with language here then will you be okay with keeping it here?

Bob: I have a problem with the question and answer. It is already covered with what we must provide. I think you can add language on rescission, obligation and other to make it more clear.

John: Just so that I might understand - you are saying that this isn't service driven but it is formula driven?

Bob: It is not driven by services.

Leroy: These are specific projects and activities and the TTP, which is what Bob is referring to, is already covered.

Adam: I am glad to hear that TTP funds are not to be reduced.

Bob: I don't agree with that statement at all.

Jody re-joined the Work Group.

Adam: This is to prevent the Secretary from making that decision.

Bob: I have a problem with this language. It is already covered.

Jody: At least some of the other BIA agencies are charging tribes RFDS Is that something that might happen here?

Bob: TTP funds will be provided as is allowed for.

Jody: Tribes are being charged for RFDS then what is the next thing tribes will be charged for?

Andy: That is a legitimate concern. We have to adjust to how we do business. One of the things is the RFDS entry. This doesn't make it part of the inherent federal function. This is clearly a contractable function thus, the reason why it's not inherent and the reason why it is being charged for.

Gerry: I don't think this is a stopper. If we need some edits in (e) and there should be no harm in including it with some edits.

Howard: I have been waiting 9.5 years for RIFDS access. Alaska has been waiting to charge. This is difficult for the region and tribes.

Andy: It is not the region but the BIA IT.

Howard: I am talking about the RFDS.

Jonah: We have gone through this sort of thing with our 638 contracts. We assumed they would update our inventory. The system does the updates and uploads into RFDS.

Jody: At some point, unless the rule changes, someone is going to have to offer new tribes compensation for the equipment costs they have lost out on. This would have an impact on funding formula.

Leroy: There are approximately 5 tribes since the passage of Map 21. They do get population funds. There is testimony to different committee's on this very issue. It is being ignored. Numerous times since 2012 this has been brought up and ignored.

Howard: This could be a big issue. Inventory numbers do need to be updated. This could be a system issue. We saw 8 years later the impact of this. In 1993 through an act of Congress Alaska was allowed to add inventory (The Juneau Area Transportation Plan) one road per village

Adam: We have gone far astray. The structure of the DOT and its functions is something the tribes his firm represents that could be at issue with. This may need to be a Parking Lot item.

Vivian: There is no extra funds, at the moment, for this. And these are items that are above me.

Jody: So, to the **PARKING LOT** it goes. This will soon be a garage.

Vivian: Asked for short break.

Andy: When you think about authorizations then you look at authority, right?

Broke for lunch at 11:45 a.m. till 1:00 p.m. At (l)(3). Page 5 1410

Conclusion:

Draft minutes , pending Workgroup approval

Jody: Asked that Adam be allowed to create a side by side document and to provide it to the Work Group by 1:00 p.m.

Action items

***Person
responsible***

Deadline

Draft provision was placed in PARKING Lot.

Jody Clark

Not Indicated.

This concluded Administration workgroup meetings for this 3rd Neg-Reg meeting. No teleconferences were scheduled between now and the November 15th meeting in ABQ now Minneapolis.