

FAST Act DOT Negotiated Rule Making Minutes/Notes – Admin. Work Group Meeting 5 Atmore, Alabama

Executive Summary

Date: 12/6/16 through 12/8/16 | Meeting location Wind Creek Casino & Hotel, Atmore, Alabama

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

*Please note that quorum could not be reached by the full Committee this week due to weather and illness so there are no official Minutes or notes for the Committee. However, the Administration and Operations Workgroups did continue with work/reviews throughout the three scheduled days.

The Administration Workgroup began its session on Tuesday 12/6/16. At 9:00 am Workgroup Chair Ms. Clark started off by briefly sharing the update from Operations. WE then moved into discussions on where the federal team was with their response to the work previously done. Opening conversations focused on what programs USDOT is including in the SG Program as well as reporting requirements. Following the morning break, on day 1 we started discussing the 46 Q&A's that Matt and Adam melded to consolidate sections (d)(h)(l) and eliminate duplication... We only got thru the 1st 4 questions of Matt/Adams document before the lunch break. Q4 centered on buyback and was much discussions. Following lunch we started on review of Bob's document. Review of federal document continued until work session adjourned at noon on Thursday the 8th of December.

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

DAY ONE: 12/6/16

Meeting date | time 12/6/2016 9:00 AM | Meeting location Wind creek Hotel & Casino, Atmore, Alabama

Meeting called by:	Neg-Reg Committee	Attendees:
Type of meeting	Admin. Work Group	Adam Bailey, Hobbs, Straus, Dean & Walker
Chair	Jody Clark	John Bioff, Kawerak, Inc.
Recorders	Howard Mermelstein	Dean Branchaud, Red Lake Nation
Timekeeper	N/A	Andy Callum, BIA Solicitors Office
		Jody Clark, Seneca Nation

Gerry Hope, Sitka Tribe of Alaska
Howard Mermelstein, Tetlin, Anvik, Holy Cross,
Atmautluak, & Kasigluk Native Villages
Vivian Philbin, FHWA
Leroy Gishi, BIA
Robert Sparrow, DOT/FHWA
Ada Valaitis - OST
Matt Jaffe- Sonosky Chambers,
Clyde Romero- Taos Pueblo
Michael Hostler, Hoopa Valley Tribe

Agenda topics

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

Discussion - Chair Clark opened the discussions by asking if Bob & Vivian were ready with the federal response on the section that the workgroup previously worked on and discussed at the 4 meetings through November.

Discussion:

Vivian: I see a lot of duplication here, needs consolidation

Matt: Adam and I tried to do that with these new 46 Q&A's

Bob: A lot of this belongs in the preamble

Andy: If something goes to court the court looks at the pre-ample first, this is the place for a lot of the wording in the 1st section.

Bob S: - We are trying to relate everything back to statute, things will follow the funds, the more we include, that we can include elsewhere, it will just slow things down.

Jody: I agree, and see that we are not going to meet the deadline, there is no time to review, and our Tribes haven't seen anything yet.

Vivian: Use federal register sections as guideline for drafts, We (Bob & I) will be driving the writing and preparing of the regulation in the end.

Bob: We will look at this with the whole workgroup in January meeting, nothing to do now except review what we have

Matt: Do we have the initial fed feedback with regard to all modals and what programs are eligible to be including in SG Program? How will reporting be? We know TTP & Transit as well as 202 A (9)

Bob S: Reporting system requires TTP report how \$ is used, jobs data, etc. Language that covers reporting for both is in statute, and not in uniform manner from program to program. Individual program/grant requirements still need to be done even as an SG Tribe.

Matt: Unified administrative duties streamline & simplify like currently in Title IV.

Bob S: Statute and regulatory requirements can not be waived just because a tribe is in the SG Program.

Vivian: We know that formula funds go there, FTA, TTP, & discretionary. Perhaps once a year all grants a Tribe are eligible for goes out on a list annually. If the Tribal Caucus agrees is that a reasonable way to identify all programs annually?

Matt: list should be overlaid to include all competitive and discretionary programs from US DOT.

Vivian: If grant is competitive like “TIGER” there’s no minimum base funding or set asides for Tribal awards.

Andy C: Does SG Statute allow Tribes to follow different reporting regimen than other Tribes?

Jody C: FTA does all electronic reporting, how will SG office know what reports done, if it is not duplicated.

Bob S: not duplicate reporting, stewardship for programs still remains with the individual modals

Gerry Hope: it’s 955 am, we’ve been on this one reporting discussion for over 50 minutes, I suggest we park this for now , good discussions to date, need to go back to getting the full federal response, & putting things on website for Tribes to review. Also really need to have that January meeting.

Bob S: In MSP we said we would review all we have to date, we are doing that now, I have prepared a federal response that we will start to review after lunch. On that premise, document should go to drafting group to clean-up and meet in January, then completed draft work could be posted as draft on website so February meeting would have comments back to review. – **(Lack of quorum NO ACTION TAKEN)**

Jody C: Let’s move forward today, share with Ops group, and look at what they have done.

Adam B: Matt & I have worked on eliminating the duplication in (d)(h) & (l) sections.

Vivian: Contract support issues 207(l)(8) and 450 by reference FURTHER discussion needed. There are no additional Contract Support Funds.

BREAK 10:30-10:55 am

After Break

Time allotted | Open | Agenda topic 207(d)(h)(l) melded provisions |
Presenter: Matt Jaffe

Matt: began review of the composite document melding the 46 Q&A’s. Regulations meant to implement statute.

Q1: Funding Agreement – Agreed to by WK

Q2:

Vivian: this is talking about final offers

Matt: Do we reference the rejection of final offers or just the statutory language?

Q3: possible deletion of this question

Q4: buyback:

Matt: Transit & TTP elements of buyback should be allowed, buyback is already in the FHWA Funding Agreements & G2G Agreements

Leroy G: some offices can do buyback, others can’t

Jody C: What services would buyback be used for? If FLH is performing services, why not separate contracts with guarantees, deadlines, scope etc?

Howard M: FLH/WFL performed several services for us on Cummings Road as well as others in Holy Cross, Tetlin

Vivian: Howard’s description of Cummings Road project is accurate WFL did provide services. Jody did EFL turn down a request for work? They do smaller projects than WFL historically. When it comes to HIS do they actually perform services?

Adam: In California, lots of Tribes buyback data info services should not cut this off at US DOT.

Leroy G: WFL does a lot of work and engineering and construction administration they are set up for that, do lots of park service work, is that correct Howard?

Howard M: yes

Jody C: We should leave this in, Tribes should have option to separate agreements for services, not in the SG Agreement.

Mike H: This doesn't keep Tribes from assuming services, outside this agreement. Buyback stems from title IV & V where the reality is services are bought back on a regular basis.

Vivian: Agree with Mike. Not use buyback to prepay services, Tribes should have ultimate discretion in choosing contractors.

Howard M: Having money withheld in the RFA for services, is not buyback it's a form of payment as getting a check to the government for payment is a near impossible task from our previous experiences with this

Clyde R: Keep options open to go back to secretary, same as Title IV & V.

Adam B: Make sure Tribes can use funding agreements to purchase services as/if needed.

Gerry H: Are we considering deleting buyback? This is not a great idea

Matt: Is the funding agreement not the right place to reflect buyback?

Vivian: Buyback is a "term of art". We should not use "terms of art" in these regulations

Clyde R: remove this altogether, then request services as needed.

Adam B: We are trying to keep it here to make it an option in future.

Andy C: This is same as how we set this for BIA as related **services**. DOT doesn't carry out programs they are a funding agency (except for FLH)

Clyde R: what model do we use so money is not lost when/if Tribe chooses to leave some behind?

Jody C: Not like buyback, but paying for services using the RFA to retain funds at DOT if needed.

Gerry H: Time to break for lunch.

LUNCH BREAK 12:10- 1:30 pm

After Lunch 1:45 pm reconvene workgroup.

Time allotted | *Open* | Agenda topic 207 federal document | Presenter: Bob Sparrow(s)

Discussion after lunch centered on reviewing the document Bob prepared in response to work done thru the Shawnee meeting.

Bob S: Let's start at the beginning and go through. Subpart (a)

Jody C: Why is the Secretary not bound in regulations and just the Tribes?

Bob S: pointed out that should be under Congressional Policy?

Matt J: Per statute if provisions of Titles I, IV, & V are not in conflict with 207 then they should be included (per statute)

Vivian: This should be in pre-amble. As it is now it appears over and over again through the draft, maybe consolidate to only once, and then reflect in pre-amble

Bob s: in regards to 207(l) we are bringing them up within text of regulation

Jody C: Still struggling with this, several conversations I've had with NY DOT, they are resistant to that, they always need all the background defined in regs and allowable clauses before they will act, otherwise it's a wait and see what happens game.

Bob S: Make sure the regs address the statute as efficiently as possible.

Vivian: We are not going into every function of every modal to find out what's assumable as PSFA's for Tribes.

Bob S: don't shut door on other programs, look at yearly programs that can be included. Want a rule that's simple not to include things not identified in statute.

John Bioff: Is US DOT so unique & specialized that we shouldn't push back on the idea of anything outside of formula, discretionary, & set asides. We should take everything we could

(grants, formula etc.). I feel we might be limiting ourselves throwing out the PSFA's from all modals.

Matt: This statute is meant to capture all funds, from all modes, that are available to Tribes.

Vivian: This reg applies to all modals that have funds that Tribes are eligible for. This is part of Title 23/49 weight given to those sections a must.

Vivian: Bob & I worked to develop the 1st & earliest agreements since 2006, always hampered by ISDEAA provisions. These 207 amendments are huge, I do not take them lightly, changes are significant not just window dressing for 202.

John B: if issue of PSFA's is of concern, vs. us not limiting this to funding, maybe a note to look at these, be sure tribal view is taken into account, these are supposed to be negotiated rules that we all live with .

Bob S: I will look at section of Congressional Policy as well as 23 USC 101(b)(3). Trying to capture the essence referred by statute in the Q&A for history, after we are no longer in program.

End day 1 of workgroup 345 pm.

Tribal Caucus started at 4 PM.

DAY Two: 12/7/16

Meeting date | time 12/7/2016 9:00 AM | Meeting location Wind Creek Hotel & Casino, Atmore, Alabama

Meeting called by Neg-Reg Committee
Type of meeting Admin. Work Group
Chair Jody Clark
Recorders Howard Mermelstein
Timekeeper N/A

Attendees:
Adam Bailey, Hobbs, Straus, Dean & Walker
John Bioff, Kawerak, Inc.
Dean Branchaud, Red Lake Nation
Andy Callum, BIA Solicitors Office
Jody Clark, Seneca Nation
Gerry Hope, Sitka Tribe of Alaska
Howard Mermelstein, Tetlin, Anvik, Holy Cross, Atmautluak, & Kasigluk Native Villages
Vivian Philbin, FHWA
Leroy Gishi, BIA
Robert Sparrow, DOT/FHWA
Ada Valaitis - OST
Matt Jaffe- Sonosky Chambers,
Clyde Romero- Taos Pueblo
Michael Hostler, Hoopa Valley Tribe
Charlisa Attla – Tanana Chiefs Conference

Time allotted | Open | Agenda topic 207federal document (cont) Presenter: Bob Sparrow

Bob S: let's pick up at subpart (d)

Vivian: Proposed Q7A for Secretary List 137.40 language with statute as in 202

Gerry H: let's not restrict ourselves, try to be all encompassing. All funds not just formula

Clyde R: if so controversial then it should stay as written per statute language

Matt: 207(d) & (h) statutory language that Tribes get funds under 23 & 49 plus tribes get a share of PMO & PRAE per the statute.

137.40 b – ok

137.40 c, d, e & f ok per group

137.41 – ok

137.42 – taken out

137.43 – PARKED

All strikeouts from the feds being reviewed by Adam & Matt.

137.228 – remove, Matt working on

137.229 – keep this in per Adam,

Gerry H: I agree with Adam

Howard M: / **Matt J:** these need to be available to mix with funds for projects as needed.

137.230:

Matt: Covered under 170, If Bob is amenable, that a loan can be repaid over the life of the loan.

137.245- 247 is ok

137.248 – stricken

137.249 – ok

137.55 & .56 – OK but Matt has issue as identified in 155

Andy C: New funding agreements needed with each new authorization (same as now)

Howard M: meld this with .55 above

137.57 – ok

137.60 – ok

XX(1) - ok

XX(2) (see document)

137.65 – Section not mixing discretionary with 202(a)(9) see note on document

137.66 – ok

137.67 – As changed on document

137.68 – ok

137.69 – see note on document)

137.XX

Mike H – 202(a)(9) excess funds returned following sets of amendments due to timelines, scopes, cost savings

Adam B: Does law require this language here?

137.70

Jody C: Can reporting be negotiated & if not why.

Bob S: are we combining 70 & 71 here?

137.71

Matt: Do these regs allow to negotiate for reporting requirements? The Secretary is allowed to waive his or her own regulations in favor of a unified reporting manner, so that it eases the burden of administration on Self Governance Tribes. Leave 70 & 71 as drafted currently, no current reports folded into current agreements. SG is greater than that and this does not fully implement statute.

Bob S: Statutorily required data can not be waived at all. Looking for regulatory relief or a specific way of submitting data. SG is more than how many miles of road, and Tribe says this is not good. What are we trying to waive here? Is it the data, or the time or system used?

Clyde R: Lots of Tribes don't have the ability to do several different reports on the same program, too burdensome

Adam B: These issues can be hashed out during discussions, keep it as broad as possible and maximize Tribal discretion.

HOMEWORK BOB SPARROW & CLYDE ROMERO: Will provide reporting terms from each perspective (Federal/Tribal)

137.72 – ok

SUBPART (e)

Howard M: stepped out for 10 mins

Retrocession: page 20 Bob Document

137.247 & .248 ok? Ended page 20 Bob's document

END of Day 2 Wind Creek, Atmore, Alabama

DAY Three: 12/8/16

Meeting date | time 12/8/2016 9:00 AM | Meeting location Wind Creek Hotel & Casino, Atmore, Alabama

Meeting called by Neg-Reg Committee
Type of meeting Admin. Work Group
Chair Jody Clark
Recorders Howard Mermelstein
Timekeeper N/A

Attendees:
Adam Bailey, Hobbs, Straus, Dean & Walker
John Bioff, Kawerak, Inc.
Dean Branchaud, Red Lake Nation
Andy Callum, BIA Solicitors Office
Jody Clark, Seneca Nation
Gerry Hope, Sitka Tribe of Alaska
Howard Mermelstein, Tetlin, Anvik, Holy Cross, Atmaultluak, & Kasigluk Native Villages
Vivian Philbin, FHWA
Leroy Gishi, BIA
Robert Sparrow, DOT/FHWA
Ada Valaitis - OST
Matt Jaffe- Sonosky Chambers,
Clyde Romero- Taos Pueblo
Michael Hostler, Hoopa Valley Tribe

Day 3 was to be a short session for workgroup going only until Lunch break. It was agreed Bob would pick-up review of his federal response document. To facilitate getting through the whole document by close of meeting it was agreed there would be no or very little discussion as Bob reviewed. Where there was consensus, it was noted on the document in the note section. Below is each subpart and notation of sections that need further discussions/refinement.

SUBPART (f)

137.603 – define termination

137.603-611- Termination issues review

137.612 – review

Subpart (g)

137.704 Bob S checking on

Subpart (h)

137.79 – Matt Homework

137.105 – from statute only

137.115 – from statute only

Subpart (j)

137.2 - ? is this needed pg 34

Subpart (l)

137.1206 - .1211 duplicative

137.1302 review

137.1924 – duplicative

This closed the working session of the Atmore, meeting.

Homework assignments –

- 1) Matt & Adam by Christmas the finished draft of melded 46 Q&A's for distribution.**
- 2) Bob Sparrow – finish federal review**
- 3) Matt subpart (h) 137.79**
- 4) Bob – subpart (g) 137.704**
- 5) Matt/Adam/Bob/Vivian – subpart (f) termination issues / review**
- 6) 6) Bob S & Clyde R – reporting terms from each perspective.**
- 7) Parked Item 137.43 subpart(d)**
- 8) Buyback of services/ leave behind funds still needs consensus**