

U.S. Department of Transportation Tribal Consultation

Tribal Transportation Self-Governance Program Proposed Rule: 49 CFR part 29

*National Congress of American Indians (NCAI)
76th Annual Convention & Marketplace
Albuquerque Convention Center
October 21, 2019*



Consultation Agenda

8:30-8:45	Welcome and Introductions
8:45-9:00	FMCS Overview of the Process
9:00-10:00	Preamble and Subparts A and B
10:00-10:15	Break
10:15-11:30	Subparts C, D, and E
11:30-11:45	Break
11:45-12:30	Subparts F, G, H, I, J, and K
12:30-12:55	Questions/Comments
12:55-1:00	Closing Remarks and Adjournment





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**FEDERAL MEDIATION &
CONCILIATION SERVICE**

Tribal Transportation Self-Governance Program(TTSGP)

Negotiated Rulemaking & the Mediation Process

**Tribal Consultation @ NCAI National Conference
Albuquerque, NM
21 October 2019**

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**Federal Mediation & Conciliation Service
United States Government**





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We'll Discuss (Briefly!) Today...

- 1) What is Federal Mediation, and what do we do?
- 2) Federal Mediation assistance to Tribal & DOT negotiators for TTSGP, and why it matters
- 3) Mediation Process for TTSGP Negotiated Rulemaking
- 4) Questions?



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FMCS CORE MISSION

Sound & Stable

INDUSTRIAL RELATIONS

Mediation of large-scale
collective bargaining
conflict (strikes &
lockouts)

Conflict management
programs for employers
and their labor unions

Taft Hartley Act (1947)

Public Policy

NEGOTIATED RULEMAKING

Facilitation/Mediation
of
large-scale public
policy negotiation
processes

Negotiated Rulemaking Act (1990)

Administrative

DISPUTE RESOLUTION

Systems design +
implementation
Employment mediation
IAAs w/other Feds
Agreements w/other orgs

*Administrative Dispute Resolution Acts
(1992 & 1996)*



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What is "Mediation"? Why FMCS?

- Assisted negotiation
- *Not* arbitration – we do *not* tell you what to do
- Proud history of assistance to employers & unions (all sectors), community disputes, Native Americans (usually workplace issues, plus negotiated rulemaking), any large-scale public policy negotiation



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Federal Mediation Process

- Federal Mediators join negotiation process to create level playing field
- Mediators set agendas for meetings
- Mediators introduce interest-based process as the new norm – not simply “here is our proposal...”, rather, “here’s *why* we’re proposing this...”
- Combination of “joint session” and “private caucus” as needed
- Mediators continually make process adjustments all the way



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All Parties Continued to Show High Level of Dedication to Joint Mutually-Acceptable Outcome

- Frequent private consultation with Federal Mediators by both Tribal Committee Leaders and Tribal attorneys/drafters
- Frequent private consultation by DOT team with Federal Mediators
- Acceptance of Mediators insistence on managed participation to level the playing field for plenary negotiation sessions
- Agreed with Mediation suggestion to develop Drafters subcommittee – with exactly equal number of Tribal Drafters and DOT Drafters – to do the following work:
 - Research, investigate and recommend on specific topics
 - Make consensus or non-consensus recommendations to Committee
 - No decisions made in Drafters – these are reserved for the Committee



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What Mediation Looked & Felt Like

- Carefully managed plenary negotiation meetings with full TTSGP Committee; Technical Advisors called upon as needed; Mediators function as secretariat
- Federal mediators also convene (and participate in) separate Drafters group sessions
- At all meetings: a safe space to express strongly-held opinions in a way that helped move the parties – and the process – forward
- Mediators work hand-in-hand with Tribal Leaders & DOT leadership *at all times*



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Going Forward...

- Federal Mediators participate at all in-person Tribal Consultation meetings
- Mediators will re-convene Drafters group to review public comments and propose revisions to the draft rule (Winter 2020)
- Mediators will convene full plenary committee to negotiate Drafters suggested revisions and approve draft for submissions to the Secretary (Winter 2020)



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Questions or Comments about Federal Mediation @ TTSGP?

We welcome your contact!

**Federal Mediation & Conciliation Service
United States Government**

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Why are we here?

- **The Fixing America's Surface Transportation (FAST) Act required the U.S. Department of Transportation (DOT) to establish a Tribal Transportation Self-Governance Program (TTSGP)**
 - Incorporates select provisions of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638 (ISDEAA)
 - Requires negotiated rulemaking process to develop proposed regulations
- **Program Purpose**
 - Transfer Federal funding for transportation-related programs to eligible Tribes through a single funding agreement
 - Facilitate Tribal control over the delivery of Tribal transportation programs, services, functions, and activities (PSFAs)
- **Program Benefits**
 - Greater Tribal control and decision-making authority
 - Reduced administrative burdens for Tribes
 - Chief Self-Governance Official



Preamble

- Explains the purpose of the rulemaking
- Summarizes the negotiated rulemaking process
- Summarizes each subpart of the proposed regulations, 49 CFR part 29
 - Largely a product of consensus
- Explains Tribal and Departmental views on key areas of disagreement
- Summarizes the regulatory analyses and notices



Preamble

- Subpart A: General Provisions
- Subpart B: Eligibility and Negotiation Process
- Subpart C: Final Offer Process
- Subpart D: Contents of a Compact and Funding Agreement
- Subpart E: Rules and Procedures for Transfer of Funds
- Subpart F: Program Operations
- Subpart G: Withdrawal
- Subpart H: Retrocession
- Subpart I: Termination and Reassumption
- Subpart J: Dispute Resolution and Appeals



Preamble

- **Non-Consensus Topics**
 - Office of Self-Governance and Self-Governance Advisory Committee
 - Contract support costs
 - Facility support costs (Section 105(/) costs)
 - Exhaustion of administrative remedies for pre-award decisions except final offers
- **Proposed rule text reflects Departmental view**



Subpart A: General Provisions

- Purpose and Authority
- Departmental Policy
- Effect on existing Tribal rights
- Applicability of Departmental circulars, policies, manuals, guidance, or rules
- Responsibilities under the Program
- Consultation
- Existing Tribal Transportation Program (TTP) Agreements
- Circumstances where more than one party purports to be the authorized representative of a Tribe
- Definitions



Subpart B: Eligibility and Negotiation Process

- **Three Statutory Requirements for Eligibility**
 - A Tribal resolution or other official action requesting participation
 - Financial Stability and Financial Management Capability
 - Transportation Program Management Capability



Subpart B: Eligibility and Negotiation Process

Three Way to Demonstrate Financial Stability and Financial Management Capability

○ **Conclusive Evidence**

- Tribe subject to Single Audit Act
- For the prior three years, no uncorrected significant and material audit exceptions in the required annual audit of the Tribe's 93-638 contract or self-governance agreement with any Federal agency

○ **Sufficient Evidence**

- Tribe subject to Single Audit Act and has a TTP Agreement or DOT grant agreement
- For the prior three years, no uncorrected significant and material audit exceptions in the required annual audit



Subpart B: Eligibility and Negotiation Process

- **Discretionary Determination**
 - Tribe not subject to the Single Audit Act
 - Independent audit that for the prior three years, no uncorrected significant and material audit exceptions on a 93-638 contract, self-governance agreement with any Federal agency, TTP Agreement, or DOT grant agreement; AND
 - Evidence of financial management systems and standards that meet or exceed those set forth in the rule (§§ 29.506–29.508)
- DOT will provide technical assistance, if feasible, to Tribes that do not meet the Financial Stability and Financial Management Capability eligibility criterion



Subpart B: Eligibility and Negotiation Process

Transportation Program Management Capability

○ Discretionary Standard

- Documentation showing:
 - The Tribe previously or is presently carrying out transportation services, programs, or projects under 93-638, self-governance, TTP Agreements or DOT grant agreements
 - The extent the Tribe has previously received Federal funding and carried out management responsibilities relating to planning, design, delivery, construction maintenance, or operation of transportation-related projects and whether completed
 - The Tribe has established and maintains a staffed and operational transportation or transit program
 - The completion of one or more transportation projects or operation of a program related to the PSFA that the Tribe requests to include in a funding agreement.
- Other Documentation: DOT may consider evidence of non-transportation management capability of similar complexity, size, staffing and budget.



Subpart B: Eligibility and Negotiation Process

Eligibility Determinations

- Rule sets forth timeframes for an eligibility determination
- Provides a process for supplementing applications with additional evidence
- Determination of eligibility is a final agency action subject to appeal to U.S. District Courts



Subpart B: Eligibility and Negotiation Process

Negotiation Process

- Negotiations begin after DOT determines a Tribe is eligible
- Goal is cooperation between DOT and the Tribe
- Rule outlines a flexible process and best practices



Subpart C: Final Offer Process

- **Describes the final offer process**
 - How and where a Tribe submits
 - Requires Department to confirm receipt and provides timing limitations for response by DOT
 - Technical assistance
- **Rejection of a final offer**
 - Four grounds on which the Department may reject
 - May be administratively appealed to a hearing official or directly appealed to U.S. District Courts



Subpart D: Contents of a Compact & Funding Agreement

- **Compacts**
 - General terms that govern from year-to-year
 - Must be in place before or signed at the same time as funding agreement
- **Funding Agreements**
 - Typically annual agreements
 - Certain terms are required, for example:
 - Funds to be transferred
 - Responsibilities of the Department and the Tribe
 - Health and safety requirements that apply to the funds
 - Other terms may be negotiated
- **Tribe may redesign, consolidate, reallocate, or redirect funds except where a statute specifies a specific purpose**
 - Special rules apply to competitive and discretionary funds



Subpart E: Rules and Procedures for Transfer of Funds

- **Funds Eligible for Inclusion in a Funding Agreement**
 - Tribal Transportation Program (TTP) funds
 - Tribal Transit Program funds
 - DOT discretionary and competitive grant awards
 - Funds transferred pursuant to 23 U.S.C. 202(a)(9) and credited to the TTP
- **Tribes are responsible for administering their Tribal PSFAs using these funds**



Subpart E: Rules and Procedures for Transfer of Funds

- **Provides numerous similar benefits to Title V of ISDEAA**
- **Timing**
 - DOT must transfer funds in a lump sum within 30 days of apportionment, including partial transfers when there is a continuing resolution (CR)
 - DOT must transfer discretionary and competitive grant awards within 30 days of signing the grant agreement



Subpart E: Rules and Procedures for Transfer of Funds

- **Sets forth rules that apply to funds received in a funding agreement**
 - Tribes may retain and expend interest on such funds
 - Remaining funds may be carried over except different rules apply to discretionary and competitive grants
 - Funds included in a funding agreement are considered non-Federal funds for cost-matching purposes
 - Prompt Payment Act applies
 - Prudent investor standard applies



Subpart E: Rules and Procedures for Transfer of Funds

- **Contract Support Costs (CSCs)**
 - Tribes are not entitled to CSCs for:
 - Apportioned funds
 - Discretionary and competitive grants
 - 202(a)(9) State funds
 - Overhead and administrative expenses may be an eligible and allowable use of funds received in a funding agreement
- **Facility Support Costs**
 - Tribes are not entitled to enter into leases with DOT and receive facility support costs
 - Such costs may be an eligible and allowable use of funds received in a funding agreement



Subpart F: Program Operations

- Audits and Cost Principles
- Management Systems and Standards
- Records
- Procurement
- Reporting
- Property
- Technical Assistance
- Prevailing Wages
- Tribal Preference
- Environmental and Cultural Resource Compliance
- Federal Tort Claims Act
- Waiver of Program Regulations



Subpart F: Program Operations

Audit and Cost Principles

- **Audits**
 - Annual audit required consistent with 2 CFR part 200 (Super Circular)
 - Tribe submits to Audit Clearinghouse and provides notice to the Department
 - Tribe retains records for three years for Department review
 - Any cost disallowance subject to procedures under the Contract Disputes Act
- **Cost Principles**
 - Cost principles of 2 CFR part 200 (Super Circular) apply except as modified by ISDEAA (25 U.S.C. 5325(k))



Subpart F: Program Operations

Management Systems and Standards

- **Financial management systems and standards**
 - Includes standards for financial reports, accounting records, internal controls, budget controls, and allowable costs
- **Procurement standards**
 - Minimum requirements for contracts carried out using funds included in a funding agreement
- **Property management systems and standards**



Subpart F: Program Operations

- **Records**
 - Sets forth minimum record keeping requirements
- **Procurement**
 - Applicability of Tribal procurement standards
 - Minimum procurement standards
 - Use of Federal sources of supply
- **Reporting**
 - Clarifies reporting requirements: only statutorily required reports as set forth in the funding agreement and reports required in the regulation
 - For discretionary and competitive grants, additional reporting is subject to negotiation



Subpart F: Program Operations

- **Property**
 - Use of existing DOT facilities, equipment, or property
 - Surplus or excess Federal property
- **Technical Assistance**
 - At the request of the Tribe, DOT will provide technical assistance, to the extent feasible
- **Prevailing Wages**
 - Davis-Bacon Act wage and labor standards do not apply to the Tribe, but do apply to contractors
- **Tribal Preference**
 - Indian preference applies, to the greatest extent feasible, to any contract, subcontract, grant, or subgrant under a compact and funding agreement



Subpart F: Program Operations

- **Environmental and Cultural Resource Compliance**
 - Tribes must assist DOT with compliance with all applicable environmental and cultural resource laws
- **Federal Tort Claims Act (FTCA)**
 - FTCA applies to Tribes under a compact and funding agreement
 - Regulation sets forth process for addressing FTCA claims
- **Waiver of Program Regulations**
 - Sets forth process for requesting a waiver of a regulation in 49 CFR part 29
 - Includes criteria for the Department to reject a waiver request
 - Waiver decisions are a final agency action subject to judicial review



Subpart G: Withdrawal

- **Addresses circumstances where a Tribe withdraws from a consortium or the TTSGP**
 - Effective date of withdrawal
 - Distribution of remaining funds

Subpart H: Retrocession

- Tribe may elect to retrocede all or part of a PSFA
- Retroceded PSFAs may be carried out by the Department of the Interior (DOI) if DOI determines that that it provides the transportation services
- If DOI does not carry out the transportation service, the Tribe must return all associated funds
- A decision to retrocede will not affect future funding



Subpart I: Termination and Reassumption

- **Two statutory criteria for termination**
 - Imminent Jeopardy
 - Gross Mismanagement

- **Provides a process before termination and reassumption may occur**
 - Notice to the Tribe and opportunity for corrective action
 - Hearing on the record
 - Exception for immediate termination in limited circumstances

Subpart J: Dispute Resolution and Appeals

- **Provides for informal or formal dispute resolution instead of a formal appeal**
- **Two types of appeals**
 - Pre-award disputes
 - Post-award disputes



Subpart J: Dispute Resolution and Appeals

- **Pre-award disputes**
 - Terms that would go into a compact, funding agreement, or amendment
 - Final offers
 - Eligibility
- **Appealed to a hearing official**
 - Regulation sets out process and timing



Subpart J: Dispute Resolution and Appeals

- **Post-award disputes**
 - Disputes that arise after the compact and funding agreement are executed
 - Governed by the Contract Disputes Act
 - Examples include cost disallowance, disputed terms in the funding agreement
- **Regulation sets out process and timing**
 - Initial decision by chief self-governance official
 - Three options for appeal:
 - Civilian Board of Contract Appeals
 - U.S. Court of Federal Claims
 - U.S. District Courts



Additional Consultations

- **Tuesday, November 5, 2019, 8:30 a.m.-12 p.m. (CST), Choctaw, Mississippi**
United Southern and Eastern Tribes (USET)/IJSET Sovereignty Protection Fund (SPF) Annual Meeting, Pearl River Resort, 13541 Hwy 16W, Choctaw, MS 39350
- **Tuesday, November 19, 2019, 9:00 a.m.-1:00 p.m. (PST), Seattle, Washington**
Federal Aviation Administration, Northwest Mountain Region, 2200 South 2 16th Street, Des Moines, Washington 98198
- **Thursday, November 21, 2019, 1 p.m.-5 p.m. (EST), Virtual listening session**
Webinar: <https://connectdot.connectsolutions.com/lsr500ausdot/>
Conference Call: 800-683-4564; Access Code: 027757



How to Submit Comments

- **Electronically** through the Federal eRulemaking Portal: *www.regulations.gov*. Follow the online instructions for submitting comments.
- **Mail:** U.S. Department of Transportation, Docket Operations, M– 30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- **Fax:** 1–202–493–2251.



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Questions and Feedback

