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FEDERAL MEDIATION &  
CONCILIATION SERVICE

“Negotiating with Governments” and

Mediation of the  
Tribal Transportation Self-Governance Program Negotiations

*Mediation of the Largest Federal-Tribal Negotiations in a Generation*

Case Study Presentation for Greater NY Chapter, Association for Conflict Resolution  
01 June 2023

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# Setting the Stage: Negotiating With Governments

(1) Negotiated Rulemaking

(2) Tribal Self-Governance

(3) TTSGP Case Study, including Adaptive Mediation



# “Traditional” Rulemaking



Passes a law



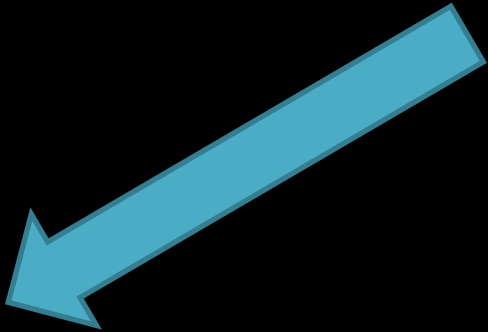
FOR MOST LAWS

Instructs Federal Department or Agency to write a RULE to implement the law



DETAILS MATTER!

The rule contains hundreds or thousands of specific details – all of which carry the full force of law!



UNHAPPY WITH LAW?

Litigation follows, sometimes all the way to the U.S. Supreme Court



LAW IS IMPLEMENTED



# “Negotiated” Rulemaking



Passes a law

FOR MOST LAWS

Instructs Federal Department or Agency to write a RULE to implement the law

FOR *SOME* LAWS

Instructions include stipulation to use “negotiated rulemaking” to write the RULE

**LAW IS IMPLEMENTED**

Challenges in courts unsuccessful...

NEGOTIATORS GET TO WORK

Negotiate entire text of the rule, now known as NEGOTIATED RULE

CONVENING OF NEGOTIATION STAKEHOLDERS

Industry, business, advocacy groups, citizen groups, states, Tribes, municipalities, etc.



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# Federal Negotiated Rulemaking Act

(Pub. L. 101-648, Nov. 29, 1990)

## Premise

Face-to-face negotiations  
and cooperation

*plus*

Participation of parties who  
will be significantly affected  
by a rule

## Yields

Increased acceptability and  
improved substance of rules

*plus*

Decreased risk of lawsuits

*plus*

Shortened timeframe to  
implementation



# Negotiated Rulemaking Act @ FMCS

- FMCS was directed by statute to provide the Federal government with the full range of assistance to agencies conducting negotiated rulemaking
- Includes convening, facilitation, mediation if needed, and training



# Indian Self-Determination & Education Assistance Act (ISDEAA) (1975; PL 93-638)






- Rooted in Native American activism of the 1960s
- Tribes assume control over programs and services using Federal funds with some federal oversight
- “638 contracts”, “self-governance Tribes”



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# Self-Governance Negotiated Rulemaking Examples

		
<p>Tribal judiciary systems          School systems          Wildlife management          Environmental conservation          ...and more</p>	<p>Native American Housing Assistance and Self-Determination Act (1996; "NAHASDA")</p>	<p>Self-Governance Demonstration Project (1992)          -extended 18 years          -made permanent in 2002 via a new negotiated rulemaking</p>



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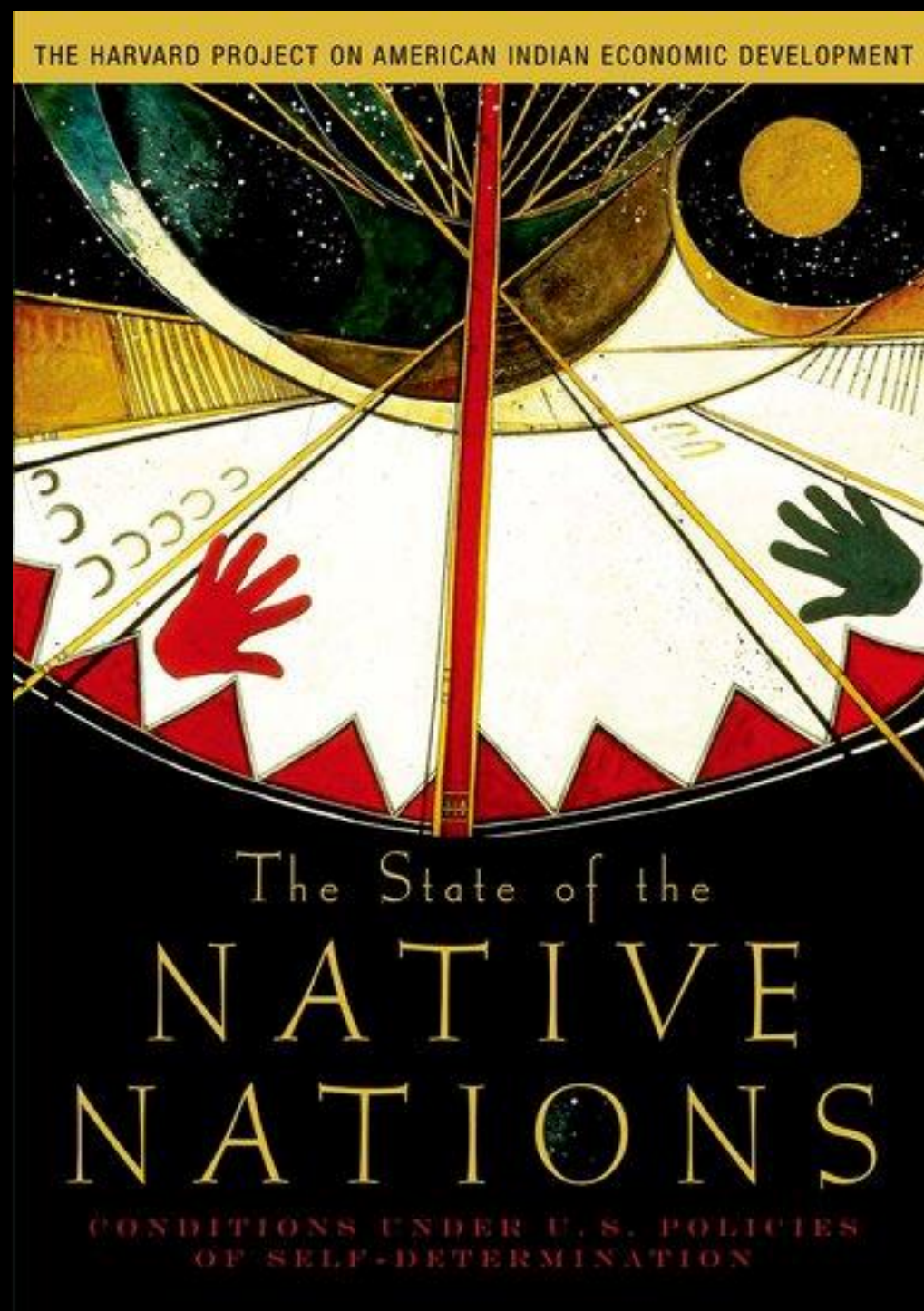


# ISDEAA Strengthened Over the Years by Statute



- Each Federal agency is responsible for building its own self-governance program
- Congress directs when the time comes: i.e., FAST Act (2015) to direct US DOT





*Published May 2007 by the Harvard Program on American Indian Economic Development, Henson, Eric, Taylor, Jonathan B., Curtis, Catherine, Cornell, Stephen, Grant, Kenneth W., Jorgensen, Miriam, Kalt, Joseph P. and Lee, Andrew J.*



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# The Challenge of the Tribal Transportation Self-Governance Program (TTSGP) Negotiations



- “FAST” Act (2015) – Section 207
- Largest potential application of ISDEAA to date

The challenge: How will one of the largest Federal bureaucracies and 574 federally-recognized Indian tribes negotiate the largest, newest Self-Governance program to date and apply it across the board to the entire US DOT with 19 distinct “modal” administrations??



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# Extreme Process & Tactical Moves to Prevent Mediation Failure

- Control the room by controlling the seats
- Introduce a mechanism to separate the people from the problem
- Build a new group of negotiators to do substantive work



# TTSGP Actual Rule Text

Pages - Intranet Portal x 2020-11618.pdf x +  
https://www.govinfo.gov/content/pkg/FR-2020-06-01/pdf/2020-11618.pdf  
CCMS3 Concur eRoom FacilitatePro FMCS Intranet Portal FMCS Language Taft-... Google Maps Regulations.gov LII Taft-Hartley Act US Bank OSD Landing Page Google Maps RingCentral Portal FMCS Resource Center MS Forms  
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## 33494 Federal Register / Vol. 85, No. 105 / Monday, June 1, 2020 / Rules and Regulations

### DEPARTMENT OF TRANSPORTATION

#### Office of the Secretary

#### 49 CFR Part 29

[Docket No. DOT-OST-2018-0104]

RIN 2105-AE71

#### Tribal Transportation Self-Governance Program

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Transportation (DOT or Department) is issuing this final rule to establish and implement the Tribal Transportation Self-Governance Program (TTSGP or Program) pursuant to section 1121 of the Fixing America's Surface Transportation (FAST) Act. Representatives of Tribes and the Federal Government negotiated the rule in accordance with the Negotiated Rulemaking Act. The Program will afford Tribes participating in the Program greater control and decision-making authority over their use of certain DOT funding for which they are eligible recipients while reducing

to implement the Program pursuant to the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*, adapting the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Tribes. The purposes of Section 207 are to establish the TTSGP to transfer eligible Federal funding for transportation-related programs to participating Tribes and to facilitate Tribal control over the delivery of Tribal transportation programs, services, functions and activities (PSFAs). Section 207 incorporates by reference select provisions of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638, as amended, 25 U.S.C. 5301 *et seq.* (ISDEAA).<sup>1</sup> Congress enacted ISDEAA to promote effective and meaningful participation by Tribes in the planning, conduct, and administration of Federal programs and services for Tribes. ISDEAA authorizes Tribes to enter into self-determination contracts and self-governance compacts with the Departments of the Interior and Health and Human Services to assume operation of direct services for Tribes

#### *B. Negotiated Rulemaking Process*

##### 1. Development of the Proposed Rule

Section 207(n) directs the Secretary to develop the regulations consistent with the Negotiated Rulemaking Act and to adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian Tribes. Section 207(n) restricts membership of the TTSGP negotiated rulemaking committee ("Committee") to Federal and Tribal government representatives. The Federal Highway Administration (FHWA), on behalf of the Department, published a **Federal Register** notice (81 FR 24158) on April 25, 2016, announcing the intent to establish the Committee and soliciting nominations for membership on the Committee. The Department published a **Federal Register** notice (81 FR 49193) on July 27, 2016, announcing the formation of the Committee, and identifying 23 Tribal representatives and 7 Federal representatives.

The first Committee meeting was held in Sterling, VA on August 16-18, 2016, during which the Committee negotiated protocols, a set of written procedures

# TTSGP Actual Rule Text

Pages - Intranet Portal 2020-11618.pdf  
https://www.govinfo.gov/content/pkg/FR-2020-06-01/pdf/2020-11618.pdf

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conditions that must be met before the Tribal representatives would agree to resume negotiations. To meet the statutory time frame for publication of a draft and final rule, the Department declined the request of Tribal representatives to delay publication of the draft rule. However, Committee negotiations resumed after enactment, on August 14, 2018, of Public Law 115-235, which extended the statutory deadline for the Department to issue the proposed rule and final rule.

At the request of the Tribal representatives, the Department retained the services of the Federal Mediation and Conciliation Service (FMCS), a neutral third party, to facilitate subsequent negotiations. The Department and the Tribal representatives subsequently worked through their differences with the assistance of FMCS, including the disagreement issues.

In October 2018, the Tribal representatives submitted to the

<sup>4</sup>The letter is available in the docket.

provisions of the draft rule for the Committee's consideration. After consulting with the DFO and the Tribal Co-Chairs, FMCS convened the Committee in Scottsdale, AZ on June 3-6, 2019. At the meeting, the drafting subcommittee presented the proposed regulatory text to the Committee, identified a limited number of areas of disagreement that remained outstanding, and provided recommendations and preferred language addressing these areas of disagreement, whether in regulatory text or in draft preamble text for the proposed rule. The Committee reached tentative agreement on most of the rule and provided additional direction to the drafting subcommittee on the outstanding provisions. The Committee authorized the drafting subcommittee to complete the draft rule for the Committee's review and agreement.

The drafting subcommittee met in Washington, DC on June 25-26, 2019, to complete its work. On June 26, 2019, FMCS facilitated the subcommittee's briefing of the Committee on the draft

consultations are posted in the docket. On November 21, 2019, the Department held a virtual listening session via webinar. The closed captioning record of the virtual listening session is posted in the docket. Finally, after the comment period closed, on December 5, 2019, a Department representative held an information listening session at the 29th Annual Bureau of Indian Affairs (BIA) Tribal Providers Conference in Anchorage, AK.

### 3. Development of the Final Rule

At the direction of the Committee, the drafting subcommittee reconvened on February 3-6, 2020, in Washington, DC. The drafters reviewed the public comments and developed recommended changes to the proposed rule for consideration by the Committee. The Committee reconvened in Cabazon, CA on March 3-5, 2020. The drafting subcommittee presented the proposed final rule for the Committee's review, and the Committee reached consensus on the final rule.

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# FMCS Statutory Mission

Sound & Stable

## INDUSTRIAL RELATIONS

*for the Private Sector  
for the Federal Sector*

Collective Bargaining Mediation  
Relationship Development & Training  
Grievance Mediation  
Education, Advocacy & Outreach  
Roster of Approved Arbitrators

*Taft Hartley Act (1947)  
Civil Service Reform Act (1978)  
Labor Management Cooperation Act (1978)*

Public Policy

## NEGOTIATED RULEMAKING

Mediation & Facilitation  
of large-scale, high stakes  
public policy negotiations

*Negotiated Rulemaking Act (1990)*

Administrative

## DISPUTE RESOLUTION

Systems Design & Implementation  
Employment Mediation  
IAAs with Federal Agencies  
Dispute Resolution Assistance  
Training  
Provision of Neutrals  
Services to Other Organizations

*Administrative Dispute Resolution Acts  
(1990 and 1996)*



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