

**Listening to Tribal  
Voices:** Extending  
Self-Governance to  
the Department of  
Transportation - How  
Tribal Nations  
Advanced Principles  
of Self-Governance in  
the 2016-2019 TTSGP  
Negotiated  
Rulemaking Process

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National Transportation in Indian Country  
Conference 2019  
Big Sky, Montana  
September 17, 2019

If the Department of Transportation publishes the draft rule (NPRM) as presented to it by the Negotiated Rulemaking Committee, the proposed rule:

- sets a strong *precedent* for extending self-governance to non-DOI, non-DHHS agencies;
- uses familiar Question & Answer format for self-governance regulations;
- includes established definitions (PSFAs, Indian Tribe, compact, funding agreement) and a strong reaffirmation of self-governance, and a commitment to meaningful consultation with Tribes;
- establishes program eligibility criteria that reflect the broad spectrum of Tribal financial stability and financial management capabilities and transportation program management experiences;
- provides best practices for Tribes and USDOT officials to follow during the negotiation stage (content of compacts and funding agreements and the final offer process, if required);
- streamlines program delivery by Tribes by reducing unnecessary regulations while ensuring public safety standards, and facilitates the timely transfers of Federal funds, saving Tribes money;
- helps Tribes build strong working relationships with State, county, and other local officials through joint partnerships, and cooperative agreements with other public authorities; and
- further empower Tribes in the transportation, transit and highway safety arena.

The “Fixing America’s Surface Transportation Act” (FAST Act) was signed into law as Pub. L. 114-94 by President Obama on December 4, 2015.

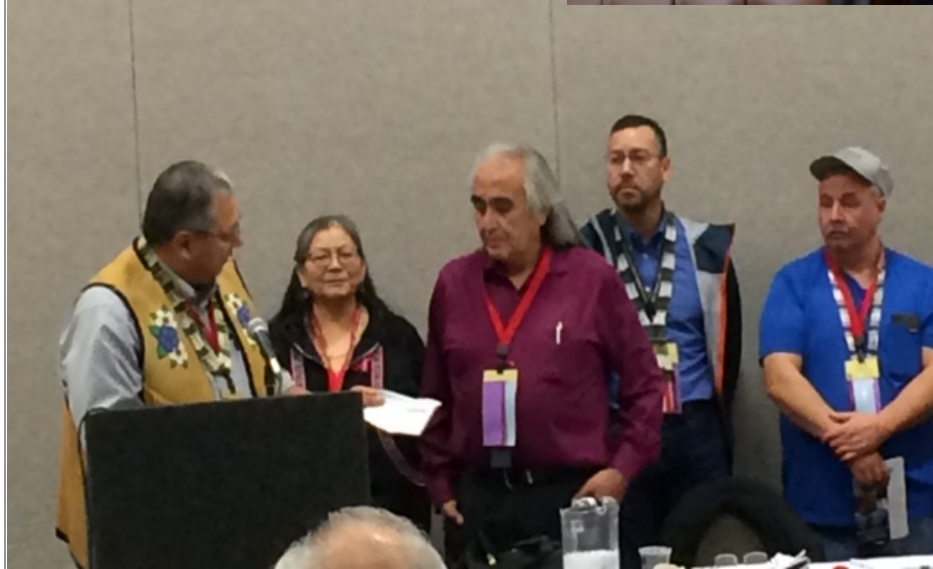
Section 1121 of the FAST Act created a new section of title 23 of the U.S. Code; the “**Tribal Transportation Self-Governance Program (TTSGP).**”



Section 1121 of the FAST Act was not the first effort by Tribes to extend the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, to USDOT.







The indigenous peoples of the United States are a patient, persistent peoples; and their dreams – while often delayed – cannot be denied.

Extending Self-Governance to the Department of Transportation fulfills a decades-long effort by Tribal Nations to push the boundaries of Self-Governance beyond the Department of the Interior and the Department Health and Human Services.

Tribal leaders have long recognized the importance of empowering Tribal governments and building Tribal capacity in the transportation construction, transit, and highway safety arenas.





- Tribes are determined to alter the woeful state of transportation infrastructure in Indian Country;
- Unsafe road and bridge conditions contribute in part to the highway fatality and pedestrian fatality statistics among AIANs that persist in Indian Country.





The TTSGP legislation, codified at 23 USC 207:

1. Establishes the TTSGP at USDOT;
2. Sets out a two-prong eligibility requirement for Tribes to participate in the Program:
  - (i) Financial stability and financial management capability; and
  - (ii) Transportation program management capability
3. Omits the “planning” stage of Titles IV and V;

## The legislation:

4. Establishes general parameters for the content of a TTSGP compact and funding agreement;
5. Identifies the DOT formula and discretionary/competitive grant programs eligible for inclusion in a DOT compact;
6. Includes the “final offer” process of Title V;
7. Sets out criteria for the transfer of funds;

## The legislation:

8. Includes standard retrocession (voluntary return by a Tribe/consortium) and Secretarial reassumption (termination by the Secretary) provisions;
9. Identifies dispute and appeal procedures;
10. Provides for waiver of the regulations;
11. Provides for the incorporation of title I and title V ISDEAA provisions into a TTSGP compact and FA;



The legislation:

12. Includes standard cost principles used by Tribes;

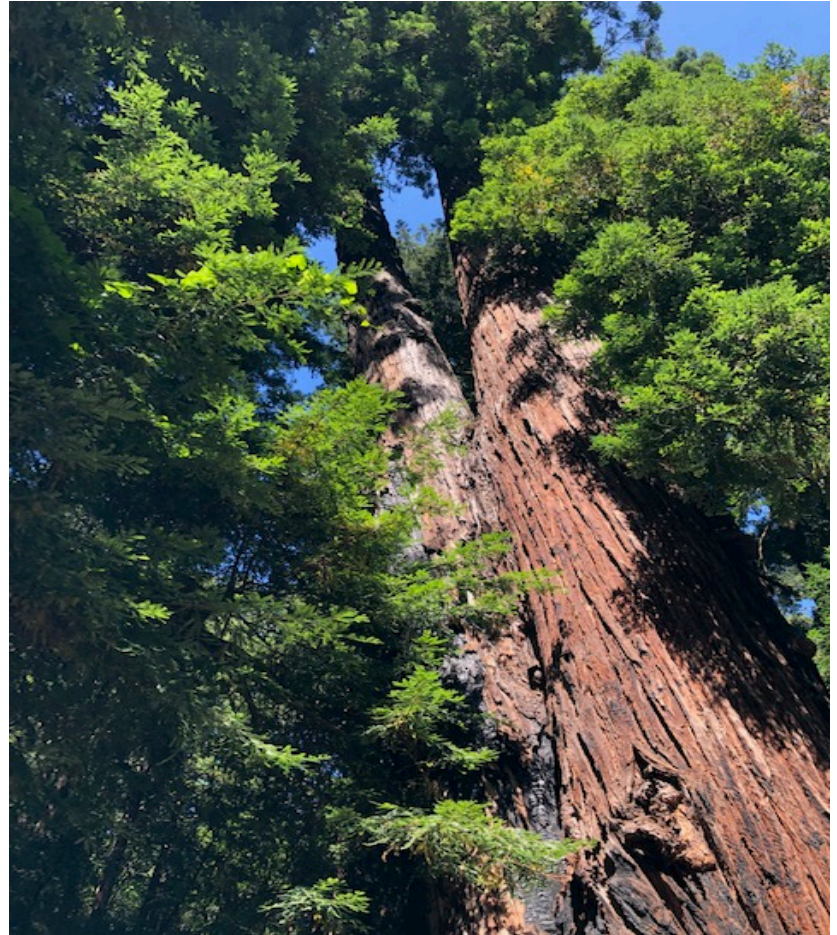
13. Requires the Secretary of Transportation to liberally interpret federal laws and regulations; and

14. Mandates the creation of a Tribal-Federal rulemaking committee to prepare the draft and final regulation for the TTSGP.

Under the FAST Act, Congress expressly directed USDOT:

- to undertake the rulemaking process using the Negotiated Rulemaking Act, not traditional APA rulemaking;
- to establish a Negotiated Rulemaking Committee with only Federal and tribal government representatives;
- to “adapt the rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the U.S. and Tribes.”

What is the  
nature of  
Tribal Self-  
Governance  
today?





“The nature of Self-Governance is rooted in the inherent sovereignty of American Indian and Alaska Native tribes. . . .”

“The tribes’ sovereignty *predates the founding of the United States* and its Constitution and forms the backdrop against which the United States has continually entered into relations with Indian tribes and Native villages. . . .”

The rulemaking process began in April 2016 –

- FHWA solicited Tribal nominees to be named to the Department's TTSGP Negotiated Rulemaking Committee, 79 Fed. Reg. 24158 (April 25, 2016).
- FHWA distinguished interest-based negotiating from regular agency rulemaking.
- FWHA estimated about 10 meetings, 10–12 months of work, and a committee of 25 members.
- A key principle of negotiated rulemaking is that the rulemaking committee operates by consensus.

The Department named the Committee representatives -

- USDOT Secretary Foxx announced his proposed nominees to the Department's TTSGP Negotiated Rulemaking Committee, 81 Fed. Reg. 49193 (July 27, 2016).
- First meeting scheduled for August 16-18, 2016 (Eastern Federal Lands Highway Division, Sterling, VA).
- Appointment of Department's Designated Federal Official (DFO), Robert W. Sparrow, the then-Manager of the TTP at FHWA.
- The Secretary nominated 18 Tribal committee members representing geographically diverse small, medium, and large tribes, self-governance tribes, tribes with title 23 TTP agreements, diverse concerns of transportation and management, and 7 Federal representatives. Two additional Tribal representatives were added by the second meeting of the Committee in September 2016.



## Tribal Committee Representatives

- Denise Michels
- Wesley Woodruff
- Palmer Mosely V
- Ron His Horse Is Thunder
- David Conner
- Darryl Bradley
- **Timothy Ballew II**
- Michael Hostler
- John Smith
- **Beverly Edwina Butler Wolfe**
- **Joe Garcia** (Tribal Co-Chair)
- Jennifer Lynn Jack
- Mickey Peercy
- Jody Clark
- Gerry Hope
- Karen Woodard
- **Elizabeth Kay Wallace Rhoads**  
(Tribal Co-Chair)

- Royce Gchachu
- Lindsay Earls
- David Kelly
- Jonah Begay
- Mary Beth Frank
- Octavio Machado
- Dean Branchaud
- Connie Thompson
- *Clyde M. Romero, Jr.*

## Federal Committee Representatives

- **Robert Sparrow** (DFO), FHWA
- Vivian Philbin, Assoc. Chief Counsel, FHWA
- Basharat Siddiqi, FHWA
- **Kenneth Martin**, DAS Tribal Government Affairs
- Elan Flippin, FTA
- LeRoy Gishi, BIADOT
- **Anthony Bedell**, DAS Governmental Affairs, OS
- *Erin Kenley*
- *Colleen Vaughn*
- *Chris Mitton*
- *Ron Jackson*

- Five Committee meetings in 2016
- Committee progress
- November 2016 Presidential election
- Picking up the rulemaking in 2017

## 2017 CALENDAR

January	February	March	April
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May	June	July	August
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September	October	November	December
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- At the Tribal Committee representatives' request, USDOT invoked the 180-day extension authorized in Sec. 207(n) and notifies Congress on September 1, 2017.
- The Administration reconvenes the TTSGP Negotiated Rulemaking Committee in January 2018.
- USDOT sets out new ground rules.

The USDOT General Counsel came to the January 2018 Committee meeting in Sterling, VA:

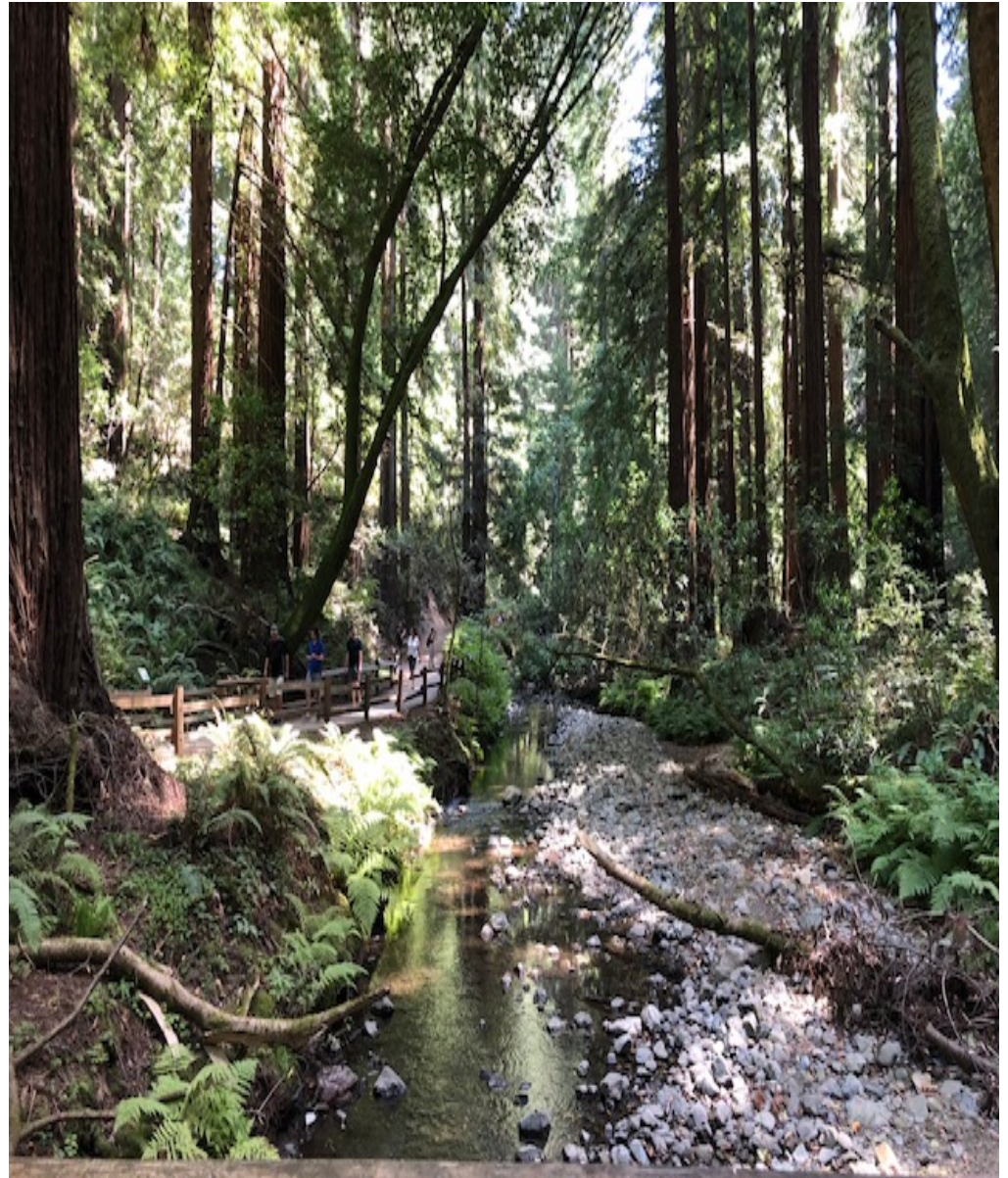
- Revised NPRM format;
- Condensed draft rule; and
- A different Department interpretation of the TTSGP and PSFAs.

- A February 2018 Committee meeting
- A lack of consensus
- The Department determined that circumstances required it to draft the proposed rule independently



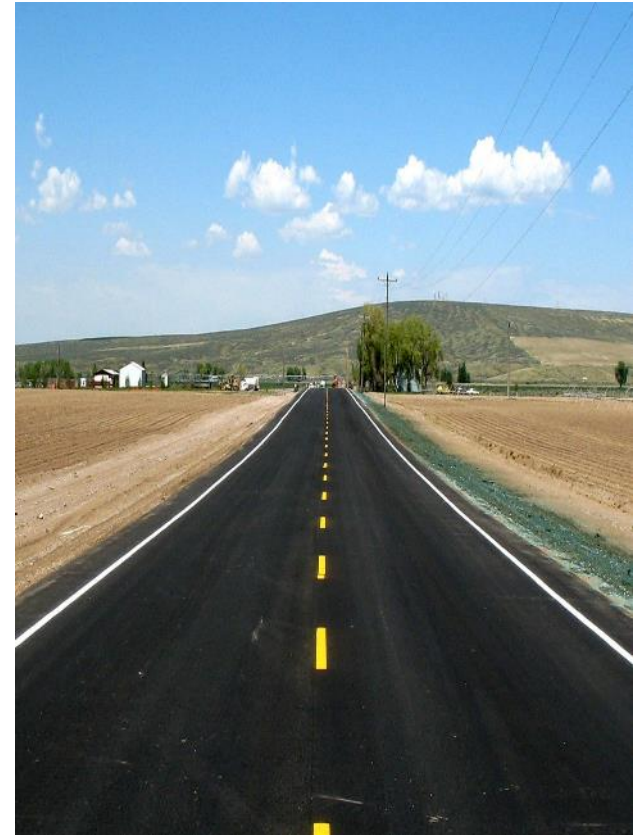


- Consensus rulemaking unravels
- Impasse
- Walkout



## Tribal Committee representatives' recommendations to USDOT:

1. Extend the Rulemaking Process - Work with Tribes and Congress to extend the rulemaking;
2. Add Committee meetings - Schedule 3 in-person meetings to develop the NPRM;
3. Use Neutral FMCS Mediators – Bring into the rulemaking FMCS professionals to facilitate interest-based, good faith negotiations;
4. Bring agency decision-makers to the table – Bring USDOT decision makers into the rulemaking process; and
5. Budget meetings in Indian Country - Develop a Committee Budget for Indian Country meetings of the Committee.



- Tribal Nations went to Congress to extend the rulemaking process;
- Congressman DeFazio introduced H.R. 6414 on July 18, 2018;
- The House unanimously passed H.R. 6414 on July 25, 2018;
- The Senate passed the bill by unanimous consent on August 1, 2018;
- President Trump signed H.R. 6414 on August 14, 2018 becoming Pub. L. 115-235.





- After the enactment of the DeFazio/Young extension, the Tribal Co-Chairs and USDOT DAS arranged conference calls to come together and jointly discuss and decide next steps:
- FMCS Mediators – In September, USDOT completed an intergovernmental agreement with FMCS at the Tribal Committee members' request, allowing FMCS' professional neutral facilitators to help set the stage for, and attend, future meetings of the TTSGP Negotiated Rulemaking Committee.
- Indian Country Meeting Locations - Parties jointly collaborated on the dates and locations in Indian Country for future Committee meetings.
- The October 29 – November 1, 2018 Meeting – Despite Congress passing a short-term CR for FY 2019, Tribal Committee members traveled at their own expense to Washington, D.C. for the first reconvened meeting of the Committee at USDOT offices.

The Oct. 29 – Nov. 1, 2018 meeting was critical:

- Established a way forward for the rulemaking process;
- Built trust;
- FMCS taught Committee representatives and support staff the *language* of interest-based bargaining versus adversarial positional bargaining;
- FMCS facilitators urged the Committee to identify “interests” and “concerns” rather than stating “positions” concerning the Committee’s list of regulation topics (eligibility, audits and reporting, procurement);
- FMCS encouraged the Committee to establish a small drafting committee to take Committee-generated interests and concerns and translate them into regulatory text;
- The Committee then jointly discussed future meetings, locations and agendas with FMCS facilitators.

## The process bogs down (December 2018 – January 2019):

- Bi-weekly conference calls of the Drafting committee and other Federal and Tribal officials in November and December, despite FMCS assistance, fail to yield tangible results;
- The 35-day Federal Government shutdown of December 22, 2018 – January 25, 2019 brings all rulemaking work to a halt;
- Committee meetings scheduled for January and February 2019 in Indian Country are cancelled as the shutdown and short-term extension create uncertainty of appropriations and the possibility that Federal officials cannot travel to meetings.



## The February Breakthrough (February 2019):

- The Tribal Co-Chairs write to the USDOT DAS asking for a facilitated meeting with the Department General Counsel. The Co-Chairs also write to Transportation Secretary Chao, who plans to speak at NCAI in February 2019. The Tribal Co-Chairs ask the Secretary to:
- Align the Department's rulemaking efforts with the tenets of Tribal Self-Governance;
- Use Secretarial prerogatives to maximize flexibility for Tribes in the delivery of Federal transportation, transit and highway safety programs;
- Join Tribes in their effort to draft a long-lasting, forward-looking rule.
- Ensure agency negotiators have authority to bind the Department.

- Department and Tribal leaders agreed for the Committee's drafters to hold a face-to-face meeting at FMCS offices in Washington, D.C. February 20-22, 2019 to start anew on joint regulatory text;
- Tribal and Federal drafters, with FMCS, craft consensus text concerning eligibility, procurement, FTCA coverage, audits and reports, and environmental review standards (proposed for Committee review);
- The Tribal Co-Chairs and Department DAS arrange a March 18-21, 2019 meeting in Shawnee, Oklahoma of the full Rulemaking Committee;
- FMCS works out the meeting agenda among USDOT and Tribal representatives, always reporting to the full Committee;
- The stage is set for a breakthrough.

The Committee, FMCS, and technical/legal staff meet in Shawnee, Oklahoma (Citizen Potawatomi Nation):

- Successful two-day plenary session of the full Committee;
- The Committee identifies 18 regulatory topics and engage in detailed discussion and identification of “interests” for each topic (e.g., final offers, transfer of funds, appeals, waivers, Congressional and Secretarial policy, definitions, retrocession, PSFAs, contract support costs, Tribal preference, negotiation phase, etc.);
- The Drafting committee meets March 20-21 to continue work as assigned by the full Committee. Develop joint statement of process and transparency which FMCS shares with the Committee;
- The Drafting committee and FMCS arrange three meeting dates at FMCS for on-going regulatory drafting (Apr. 1-4, Apr. 23-26, and May 20-23, 2019);

## Success builds confidence:

- The USDOT/Tribal Drafting committee made steady progress at three, face-to-face meetings held at FMCS offices;
- Each meeting was reported to the full Committee by FMCS along with the proposed, preliminary text for the Committee representatives to review;
- Over meetings spanning 17 days (Feb. – May 2019), a preliminary draft rule begins to take shape for the Committee’s review;
- The Tribal Co-Chairs and DAS arranged for a full Committee meeting in Scottsdale, AZ (Salt River Pima Maricopa Indian Community’s “Talking Stick” facility) June 3-7, 2019.



- By June 2019, trust and tangible progress had replaced suspicion and frustration;
- At Talking Stick on June 3-6, 2019, USDOT, DOI and Tribal Committee representatives became joint problem solvers, working collaboratively on the proposed rule;
- The full Committee gave the Drafting committee additional time at Talking Stick to work through the remaining, tough issues, including the non-consensus issues and develop revised regulatory text to address USDOT, DOI and Tribal Committee representative interests;
- The Committee agreed to the Drafting; committee's unanimous recommendation to extend the time for the draft rulemaking by 120-days (Oct. 2, 2019) to allow sufficient time for vetting and publication;

- The Committee approved the draft rule text presented and revised at Talking Stick and directs the Drafting committee to complete the remaining work at a June 25-26, 2019 meeting at FMCS offices (preamble, definitions, appeals, etc.) and to brief the Committee representatives in separate Tribal and Federal briefings to secure final agreement on the proposed rule text and preamble;
- At the June 25-26, 2019 meeting, the Drafting committee resolved outstanding issues, including presentation of the non-consensus issues (contract support costs, lease payments, exhaustion of administrative remedies, and timing of establishing an office of self-governance) and recommended Committee approval of the proposed rule;
- On July 1, 2019, the Tribal Co-Chairs delivered the Committee's work product to USDOT DFO Ronald Jackson; the Department begins the vetting process to finalize the draft and publish the NPRM in the Fed. Reg. for a 60-day comment period with 3 planned Tribal consultations.



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