

**NEGOTIATED RULEMAKING COMMITTEE  
TITLE V, P.L. 106-260**

TO: Title V Negotiated Rulemaking Committee

FROM: Merle Boyd, Tribal Co-Chair  
Paula K. Williams, Federal Co-Chair

SUBJECT: Negotiated Rulemaking Committee Process  
Handbook for Review and Comment

The Title V Coordinators and technical representatives met with the Federal Co-Chair on several occasions and have developed the enclosed Negotiated Rulemaking Committee Handbook for your review and comment. This Handbook has been developed in response to the numerous requests from other federal departments.

Comments and revisions will be addressed at the Title V Negotiated Rulemaking Committee meeting November 3 and 4 in San Diego. In addition, during that meeting, each subcommittee will be asked to review subcommittee reports for inclusion on the Title V web site.

Thank you for your attention to this request and we are looking forward to the meeting in San Diego.

Tribal Self-Governance Amendments of  
2000

Negotiated Rulemaking Committee:  
Report

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## **I. INTRODUCTION**

The negotiated rulemaking process is one that is evolving and uniquely suited to rulemaking affecting tribal governments. Traditional rulemaking under the Administrative Procedures Act (APA) was historically contentious and often ended unsuccessfully. Negotiated rulemaking, while still challenging, provides tribal representatives an opportunity to participate on an equal basis with federal representatives.

The extraordinary success of this rulemaking can be attributed to many factors, which can be replicated. First, the representatives had worked with each other previously and were familiar with the subject matter. The tribal and federal representatives participated as equals. The authorizing statute set forth time limits, after which regulations could not be adopted, so everyone shared a sense of urgency. The Committee members agreed to limit the scope of the regulations. All of the participants respected each other and were willing to work hard – holding extra meetings and working late when needed to meet the deadlines. When issues became contentious or arguments repetitive, Committee members were willing to “step back” and think about alternative approaches. In order to strengthen and further the process through tribal/federal partnership and consensus, an account of negotiated rulemaking for Title V of Public Law 106-260 follows.

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## **II. BACKGROUND**

In 1975, Congress passed the *Indian Self-Determination and Education Assistance Act (ISDEAA)*, P.L. 93-638, which authorized Indian Tribes and tribal organizations to contract and operate federal services within the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS). The ISDEAA afforded tribes the opportunity to contract for programs, functions, services, and activities or portions thereof (PFSAs) on a government-to-government basis. Tribes that chose to contract were referred to as “Contracting Tribes.” Tribes that chose continue to receive services directly from the federal government became known as “Direct Services Tribes.”

In 1988, ten tribes volunteered to participate in a Self-Governance demonstration project within the BIA. Each tribe that entered into a Self-Governance compact with the Federal Government received its full share of funds appropriated to the BIA and was allowed to manage PFSAs under the compact with less Federal oversight than under the contracting process. Tribes that chose to participate in Self-Governance became known as “Compacting Tribes” or “Self-Governance Tribes.” Compacting provided tribes greater freedom to operate and redesign PFSAs as necessary to meet the needs of tribal members.

In 1991, P.L. 102-184 required the Department of Health and Human Services (HHS) Secretary to conduct a study, in consultation with the Department of the Interior (DOI) Secretary and Indian tribal governments participating in the DOI demonstration project, for the purpose of determining the feasibility of extending the demonstration project to the Indian Health Service. The Secretary was authorized to establish an office of Self-Governance within the IHS to coordinate the activities necessary to carry out the study.

In 1994 Congress passed P.L. 103-413 "The Tribal Self-Governance Act". This Act made Self-Governance a permanent authority of the DOI.

The IHS Self-Governance Project still operated as a demonstration project. Tribes desired to provide permanent authority for the demonstration project at the IHS. In September 1996, a Title V Legislation Task Force was formed consisting of Tribal leaders, technical staff, attorneys and federal representatives.

From 1996 to 2000, the Title V Legislation Task Force consulted with interested parties, testified at Congressional hearings, and met with Congressional staff and representatives from the HHS/IHS and tribal leaders from across the country to negotiate and refine the draft legislation. These discussions and meetings took into account the previous legislation referenced and built upon those areas that needed to be addressed in the best interests of the Tribes. On August 18, 2000, the Tribal Self-Governance Amendments of 2000 was signed into law.

The Tribal Self-Governance Amendments of 2000 (the Act), Public Law 106-260, Title V, repealed Title III, Tribal Self-Governance Demonstration Project, of Public Law 93-638, as amended in P.L. 100-472, "Indian Self-Determination Amendments of 1987." It provided permanent authority for Self-Governance in the Indian Health Service. In Section 517 (b) of the Act, the Secretary was required to initiate procedures under Subchapter III of Chapter 5 of Title 5, United States Code, to negotiate and promulgate regulations to carry out Title V.  
(See Appendix 1 - Chronology for permanent legislation.)

Collaboration between American Indians/Alaskan Natives and the Federal government in the drafting of this legislation was genuinely a unique experience. During this six-year period a working partnership was established and contributed to the success of the negotiated rulemaking process. Many of the tribal and federal representatives who helped develop the legislation also participated in the negotiated rulemaking process. When issues arose in developing the regulations, these same participants knew what was intended by the statutory language.

This case study is a summary of the rulemaking process for the Title V regulations. A more detailed compendium of draft rulemaking documents is available on the website at [www.ihs.gov/NonMedicalPrograms/SelfGovernance/Index.cfm](http://www.ihs.gov/NonMedicalPrograms/SelfGovernance/Index.cfm).

### **III. REQUIREMENTS OF LAW**

Public Law 106-260 required the Secretary to initiate procedures under the Negotiated Rulemaking Act, 5 U.S.C. 565. This required the establishment of a Negotiated Rulemaking Committee to be comprised of Federal and Tribal Representatives, with a majority of the Tribal government representatives representing Self-Governance Tribes. As set out in the statute this rulemaking was to be completed within 21 months, otherwise the authority for rulemaking lapsed. The Negotiated Rulemaking Act set out the framework for the conduct of negotiated rulemaking, together with the Federal Advisory Committee Act (FACA). Under this framework, the Secretary of HHS retains the authority to oversee the activity of the negotiated rulemaking committee unless otherwise delegated. The Secretary authorized the IHS Director to appoint the Negotiated Rulemaking Committee members.

Concurrently with the designation of the Negotiated Rulemaking Committee, the Core Federal Team developed a Charter that was submitted to and approved by the Secretary. (See Appendix 2-Charter.)

### **IV. PROCESS OVERVIEW CHRONOLOGY**

#### **A. October 2000 – Selection of Core Federal Team**

The Director of IHS named the Director, Office of Tribal Self-Governance, as the Designated Federal Official (DFO) for the Negotiated Rulemaking Committee. The DFO selected a core team of federal officials. Many of the core team participated in the Title V Legislation Task Force and were later designated the federal members of the Negotiated Rulemaking Committee by the IHS Director. The federal members were:

- Chief, IHS Branch, Office of the General Counsel, HHS
- Procurement Analyst, Office of Grants and Acquisitions Management, HHS
- Senior Advisor for Tribal Affairs, Office of Inter-Governmental Affairs, HHS
- Director of Office of Tribal Self-Governance, IHS
- Director of Regulatory and Legal Affairs, IHS
- Director of Congressional and Legislative Affairs, IHS
- Principal Engineer, Office of Environmental Health and Engineering Services, Office of Public Health, IHS

The core federal team met regularly to implement the negotiated rulemaking process as outlined in the Negotiated Rulemaking Act and the FACA.

**B. December 5, 2000 - Notice of Intent to Establish Negotiated Rulemaking Committee Published in Federal Register**

The deadline for comments concerning the notice and nominations or applications for membership on the Committee was January 4, 2001. (See Appendix 3 – DRLA List.)

**C. March 15, 2001- Notice of Establishment of Negotiated Rulemaking Committee**

**1) Selection of Committee Members**

The statute directed how the Committee would be composed. The composition of tribal members on the Negotiated Rulemaking Committee consisted of representatives from Self-Governance tribes (12), Title I and direct service tribes (10), and individual tribal representatives (1). The Tribal Self-Governance Advisory Committee (TSGAC)<sup>1</sup> accepted nominations and recommended the representatives to the Secretary. The core federal team solicited recommendations for tribal representatives from each IHS Area Office. The Director of IHS accepted all the TSGAC recommendations (12 individuals) and appointed a total of 23 tribal representatives. A Tribal Chair and Co-chair were identified by consensus of the TSGAC. It was the decision of the tribes to bring forth the DOI Self-Governance Advisory Committee (SGAC) Tribal Chair as the alternate for the Tribal Co-chair.

**2) Charter**

The subcommittees worked in accordance with the charter as it defined the functions of the Committee described below:

The Committee shall, with the assistance of a neutral facilitator, attempt to reach consensus on the text or content of a proposed rule to implement P.L. 106-260, Tribal Self-Governance Amendments of 2000. Consensus is defined as a unanimous concurrence, unless a Committee agrees to a different definition. If the Committee reaches consensus on part or all of a proposed rule, the Committee will recommend that the Department adopt the Committee's consensus when publishing a proposed rule for comment in the Federal Register.

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<sup>1</sup> The IHS Tribal Self-Advisory Committee, comprised of Tribal leaders from each region, provides advice to the IHS Director and assistance on issues and concerns pertaining to Tribal Self-Governance and the implementation of Self-Governance within the IHS. The TSGAC is provided support from a technical workgroup whenever situations warrant further research and review to carry out a policy issue for the Committee.

### **3) Technical Representatives**

Anyone participating in the rulemaking process who was not a member of or alternate to the Committee served as a technical representative. Technical representatives include tribal and federal staff and legal counsel.

### **4) Facilitators**

The core federal team and Office of Tribal Self-Governance consulted with the Tribal Co-Chairs and Office of Tribal Programs (OTP), Federal Chair for Title I who led negotiated rulemaking for Title I of the ISDEAA in 1994. There were several recommendations for facilitators: 1) the OTP Title I facilitator; 2) DOI Title IV facilitator; and, Indian consultants and facilitators. Some key considerations that were applicable in the selection process were that the facilitator be culturally sensitive to tribal leaders and have experience with negotiated rulemaking.

The core federal team selected two facilitators for interview, the Federal Mediation and Conciliation Services (FMCS) and an independent facilitator. The FMCS was selected to facilitate the Title V negotiated rulemaking process based on its experience with other tribal Negotiated Rulemaking Committees and the human resources available. The Committee endorsed this selection. While it was envisioned that four facilitators would be available throughout the negotiated rulemaking process, only three were necessary.

### **5) Coordinators**

The OTSG entered into a Memorandum of Agreement with the Choctaw Nation of Oklahoma for an Administration and Coordination Support Liaison (ACSL) for the negotiated rulemaking process. It was critical in the negotiated rulemaking process to outsource these functions. The Choctaw Nation exhibited exemplary administrative and financial experience in the outsourcing arena. With input from the Tribal and Federal co-chairs of the Committee, the Choctaw Nation selected coordinators who had a background in Self-Governance. Without the benefit of first hand experience and knowledge about Self-Governance, the process could have been subjected to unnecessary cost overruns, time delays and disputes. The Coordinators complemented the process with subject knowledge, accelerated turnaround time, and professional qualifications in project management and coordination. (See Appendix 4 – Organizational Chart.)

The Self-Governance Communication and Education Project, operated by the Lummi Nation, provided logistical coordination for all meeting sites.

#### **a) Responsibilities of the Coordinators**

- Negotiated Rulemaking Committee Members Travel Coordination and Reimbursements



- Coordination with federal and tribal representatives as needed to avoid delays in Committee progress due to conflicting scheduling of technical assistance personnel. The Coordinators contacted these persons as they were identified.
- Communication Coordination: agenda building, measuring progress, and for Subcommittee discussions
- Reproduction Services (Pre-, on-site, and post-meeting)
- Retrieved as Requested by Committee Members Legislation, US Codes, Programs, Services, and Activities Pre- and Post-Self-Governance
- Information Technology Support for Negotiated Rulemaking Committee, which was important to ensure a smooth flowing process for Subcommittee work. Technology should allow for group review and changes as they are being made e.g., document projected for all to see
- Committee/Subcommittee Recorders. In addition to recording full Committee meeting minutes, the recorders were responsible for preparing the draft question and answers stages. Maintaining and updating subcommittee documents. The coordinators, as well as tribal staff, served as Committee recorders.
- Information and Meeting Minutes/Materials Distribution – This was an on-going assignment that required major dissemination at least twice a week throughout the negotiated rulemaking process
- Committee Web Page – The coordinators established a Committee website as part of the IHS Web Page. Information available on the website included the legislation, list of Committee members, meeting minutes, schedule of meeting dates and locations, as well as the Committee charter. The website was a means of communicating not only with Committee participants, but also the general public.
- Prepared Correspondence on behalf of the Committee and at the request of the Committee. Prepared Mailing to tribal leaders and organizations notifying them of the availability of the website.
- Important for support to record on-going actions of the Subcommittee
- Early in the negotiation process, tools were developed to track the status of decisions through the Subcommittees and the Committee. Tables of all issues were developed in each subcommittee and the status of regulations was tracked included the proposed language for consideration by the full Committee. A column to identify outstanding issues was important to ensuring that focus remained on the “open” items.

#### **D. March 2001 - Organizational/Initial Meeting**

This meeting set the stage for the entire rulemaking process. The Negotiated Rulemaking Committee adopted Protocols which provided the ground rules for conducting the negotiations and a schedule and locations for the remainder of the meetings. A key provision of the Committee protocols provided that: The Secretary agrees to use the Committee’s preliminary report and proposed regulations as the basis of their Notice of Proposed Rulemaking. The Negotiated Rulemaking Act and FACA provided for the Chairpersons of a Negotiated Rulemaking Committee to schedule meeting dates,

locations, and approve minutes. However, the Tribal and Federal Co-Chairs of the Title V Committee elected to have the full Committee make these decisions. (See Appendix 5 – Protocols.)

Examples of decisions made by the full Committee are:

- Any member of the Committee could call for a federal or tribal caucus at any time.
- “Open microphone” opportunity provided for public comment.
- Strategically placed microphones were available at each meeting.
- Seating at the Negotiations Table was restricted only to Committee members or their designated alternate during full Committee (30).
- Logistical provisions for resource and technical representatives were available, such as worktables and computer hook-up access.

It was very important that every member of the Negotiated Rulemaking Committee understood what the negotiated rulemaking process required and why we needed to develop regulations. A legislative overview of P.L. 106-260, Title V was provided followed by Questions and Answers.

### **1) *Schedule of the Negotiated Rulemaking Committee to Draft Regulations: Dates and Locations:***

- ) **April 2001 - Washington, DC**
- ) **May 2001 – Oklahoma, OK**
- ) **June 2001 – St. Paul, MN**
- ) **July 2001 – Seattle, WA**
- ) **August 2001 – Anchorage, AK**
- ) **Additional subcommittee meetings were required**  
(On occasion subcommittees required additional meetings to insure the timely completion of their assignments. These meetings were convened by conference call or at meeting locations other than those previously identified.)

### ***E. February 14, 2002- Notice of Proposed Rulemaking***

After the August 2001 meeting in Anchorage, the draft regulations were circulated through the agency, the Department, and the Office of Management and Budget (OMB) for review and clearance before publication. There were changes made by the Administration prior to publication but without advance consultation with the full Committee due to time constraints. Additional time would have improved advanced consultation and reduced subsequent tribal concerns with these changes. The notice of proposed rulemaking was published in the Federal Register on February 14, 2002. The deadline to make comments regarding the proposed rule was April 15, 2002.

## **F. April 15-18, 2002 – Negotiated Rulemaking Committee Convened to Review Comments, Bethesda, MD**

The Committee met April 15-18, 2002 to review the comments that were received in response to the Notice of Proposed Rulemaking. At this meeting, the Committee was also able to review the changes that had been made by the Agency, the Department and the Office of Management and Budget (OMB). The Committee considered the comments and made recommendations on whether or not to incorporate the comments. The Committee submitted the recommended final regulations to the Agency and the Secretary for publication. The Committee completed its work with three issues left unresolved. The unresolved issues are noted in the preamble to the final regulation, which was published on May 17, 2002 in the Federal Register. The publication of the final rule was completed within the statutory deadline of May 18, 2002.

### **1) Development of Subcommittees**

After an overview at the initial meeting, the Committee grouped the topics in Title V into three (3) categories that could be addressed by three (3) separate subcommittees. Each Committee representative then signed up for the subcommittee in which they wished to participate. Both tribal and federal Committee representatives had to be represented on each subcommittee. In addition, it was recognized upfront that both federal and tribal technical representatives would be needed in each subcommittee for their expertise. Both federal and tribal representatives recommended technical representatives to each subcommittee and/or smaller subgroups as appropriate, a process that continued throughout the rulemaking. Each subcommittee and subgroup operated consistent with the instructions of the whole Committee, which was to have at least one federal and tribal Committee member on each workgroup formed by the subcommittee.

The three (3) subcommittees worked on developing regulations for their assigned sections of the Act. A fourth group evolved later to refine the work products of the three (3) subcommittees. The fourth group was called the Plain English/Preamble Committee. (See Appendices 6-9.)

### **2) Membership on Subcommittees and Co-Chairs**

At each meeting the co-chairs would clearly state their expectations in terms of specific achievement by each of the Subcommittees at the initial session. There was a constant assessment of the Committee's progress at the Committee level and at the subcommittee level. Also, through the agenda the Committee Co-Chairs forecasted the progress of the Committee based on the progress achieved at the last meeting. In this way the Co-Chairs communicated to the Committee members their progress and remaining tasks needed to achieve the deadlines of the Committee. The expectation was that the Committee members would meet for additional days or have special meetings if needed in order to achieve its deadlines for the development of the draft regulations.

There was a concern that the simultaneous meetings of the three subcommittees could be an issue with some Committee members in that they may not be able to attend meetings that were crucial to their interests. On the other hand, there was not enough time in the process to hold subcommittee meetings at non-competing times. Sometimes it was necessary to request that individuals participate in different subcommittees when a topic requiring their expertise arose. Some Committee members were not officially linked to any subcommittee, however, they would work with each subcommittee as needed.

### ***3) Decision-Making/Consensus (Move from agreement to disagreement)***

This was a key strategy for the Committee. The process of working through those areas in which there were no significant disagreements allowed the subcommittee members to develop working relationships that were needed to facilitate progress through the areas of disagreement. During this time each subcommittee attendee's interests would be developed and disclosed. This process enabled the subcommittees to progress rapidly through the areas of disagreement. The natural tendency was to race to these disagreements and try to resolve them. In reality that method only provided more time to air disagreements. The use of parking lots in which to "park" issues which would have been controversial, while working those issues of less controversy, proved to be successful.

### ***4) Facilitators***

Facilitators pushed the decision making process for approval of documents as they were developed initially and even stronger when they were revised at the insistence of the full Committee. Facilitators did not allow anyone to opt out of the approval process at the subcommittee level and therefore all proposed regulations that reached the Full Committee level had many federal and tribal supporters. Few sections or portions of the proposed regulations were actually returned to the subcommittees for revision. The full Committee members fixed minor language problems during their review while items that were returned to the Subcommittees dealt with substantive conceptual problems.

### ***5) Regulation Format***

The Negotiated Rulemaking Committee developed the regulations using a question and answer format based on the Office of Federal Register guidance. In 1998, the Office of Federal Register issued a Drafting Handbook providing guidance and examples for complying with the Office of Federal Register's requirements for publication. The 1998 edition was revised to comply with a President's Memorandum, dated June 1, 1998, -- Plain Language in Government Writing, directing federal agencies to make regulations

more reader friendly. The Drafting Handbook recommends using a question and answer format as an example of a plain language technique.

### **6) Overall Review and Approval Process**

Draft regulations were approved by consensus at the subcommittee level and then by the full Committee. The Committee established the practice of returning to the author and approving subcommittee as needed for presentations on not only the actual wording of the draft regulations but also a description of the values, goals and objectives of the language. This enabled the Committee to preserve the original values, intents and goals for review at the subcommittee and full Committee level. This practice ensured there was an informed discussion of each set of questions and answers.

### **7) Technical Amendments and Future Legislation**

The Committee recognized that there were some issues that could not be resolved during this negotiated rulemaking. An example is that some sections of the Act amended sections of Title I of the ISDEAA. The legal opinion was that this negotiated rulemaking process was for Title V and could not be extended outside of Title V. The Committee recognized that these issues could be addressed by technical amendments or future legislation. This allowed the Committee to set these issues aside and complete its work on drafting the regulations.

## **V. SUMMARY**

The Title V Negotiated Rulemaking Committee negotiated and recommended the final regulations for P.L. 106-260 within the required timeframe. An important contributing factor to this successful rulemaking process was that both federal and tribal parties were active participants in drafting the legislation. Another factor was the flexibility of all participants in this rulemaking process. The participants held extra meetings, shifted the agenda and assignments, and held a multitude of federal and tribal caucuses to negotiate these regulations. All of the Committee members, alternates, federal and tribal technical representatives, facilitators, coordinators, and support staff are to be congratulated for their efforts on the Title V Negotiated Rulemaking Committee.

## Appendix 1- Chronology of PL 106-260 Legislation

- September 1996: Tribal leaders established the Title V Tribal Legislative Task Force
- October 1996: Tribal leader caucus on draft of the proposed legislation -Fall Self-Governance Conference
- April 1997: Tribal leader caucus on draft # 13 of the proposed legislation - Spring Self-Governance Conference
- May 12, 1997: The Title V Tribal Task Force presented a briefing to key IHS staff on draft # 13 of the legislation,
- June 3-4, 1997: Public Hearing in St Paul, Minnesota on the proposed legislation
- June 7, 1997: HR 1833 introduced by Congressman George Miller (Ranking Democrat on the House Resources committee) and co-sponsored by Congressman Don Young (Chairman of the House Resources Committee).
- July I, 1997: The Title V Tribal Task Force presented a briefing on HR 1833 to Assistant Secretary for Legislation and key Department of Health and Human Services (HHS) Operating Division heads and representatives.
- October 1997: Briefing and discussion on HR 1883 in general session of Fall Self-Governance Conference
- March 17, 1998: The House Resources Committee held a hearing on HR 1833.
- March 25, 1998: Mark up was conducted by the full House Resources Committee.
- April 1998: Tribal-IHS panel discussion on HR 1833 in general session of Spring Conference accompanied by an informal executive session discussion between IHS, HHS and Tribal representatives regarding specific provisions of HR1833.
- October 2, 1998: A substitute Bill was introduced by the House Resource Committee which contained several issues which had been resolved in a mutually beneficial manner by the tribal and IHS Legislative teams.
- October 5, 1998: The House passed the substitute bill.

- October 7, 1998: The Senate held a hearing on HR 1833 as passed by the House and mark up followed immediately after the hearing. Senator Gorton objected to the passing of the bill due to his impression of the bill's adverse affect on contract support cost for tribal programs. This objection led to the failure of the bill to be enacted into law.
- November 1998: Tribal/IHS Fall Conference panel discussion on the provisions of the final version of the proposed legislation and the factors which lead to its failure to be enacted into law by the 105th Congress.
- March 17, 1999: H.R.1167 introduced by Congressman George Miller and co-sponsored by Congressmen Young, Kildee, Defazio, Faleomavaega, Abercrombie, Romero-Barcelo, Underwood, Kennedy, Inslee, Hayworth, McDermott, Pelosi, Brown (CA), Oberstar, Filner, Pastor, Frank (MA), Martinez, Stabenow, Towns, Mink (HI), Pickering, Allen, Stupak, and Frost.
- May 6, 1999: S.979 introduced by Senator John McCain,
- July 28, 1999: The Senate Indian Affairs Committee held a hearing on S.979.
- November 9, 1999: S.979 reported favorably by the Indian Affairs Committee and placed on the Senate Legislative Calendar wit Senate Report 106-221.
- July 24, 2000: U.S. House passed H.R.1167.
- July 26, 2000: U.S. Senate passed H.R.1167.
- August 18,2000: H.R.1167 signed by the President. P.L. 106-260.

# Appendix 2 – Committee Charter

## CHARTER

### NEGOTIATED RULEMAKING COMMITTEE ON JOINT TRIBAL AND FEDERAL SELF-GOVERNANCE

#### PURPOSE

The purpose of the Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance is to provide advice and make recommendations to the Secretary of Health and Human Services with respect to the text or content of a proposed rule implementing the Tribal Self-Governance Amendments of 2000, Public Law (P.L.) 106-260. P.L. 106-260 amends the Self-Governance provisions of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended (Act). The establishment of this Committee shall provide a non-exclusive means of tribal participation to the Act.

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#### AUTHORITY

Public Law 106-260, Tribal Self-Governance Amendments of 2000 and Section 2(6) of the Negotiated Rulemaking Act, P.L. 101-648; 5 U.S.C. § 561-569. The Committee is governed by the provisions of P.L. 92-463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

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Deleted: In accordance with Sections 10(b) and (c) of the FACA, the Committee shall keep detailed minutes of each meeting and make available for public inspection, subject to 5 U.S.C. 552, all records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agendas or other documents made available to or prepared for by the Committee. Such materials will be available for copying and inspection at a single location in an office of the

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Deleted: In accordance with the Negotiated Rulemaking Act, if the Committee reaches a consensus on a proposed rule, at the conclusion of the negotiations, the Committee shall transmit to the Department a report containing the proposed rule, and the Committee may transmit to the

Deleted: a report specifying any areas in which the Committee has reached a consensus.

#### FUNCTION

The Committee shall, with the assistance of a neutral facilitator, attempt to reach consensus on the text or content of a proposed rule to implement P.L. 106-260, Tribal Self-Governance Amendments of 2000. Consensus is defined as a unanimous concurrence, unless the Committee agrees to a different definition. If the Committee reaches consensus on part or all of a proposed rule, the Committee will recommend that the Department adopt the Committee's consensus when publishing a proposed rule for comment in the Federal Register. The Committee may also recommend changes in the proposed rule in response to comments.

HHS

HHSThe Committee may include in a report any other information, recommendations, or materials that the Committee considers appropriate. Any Committee member may include as an addendum to the report additional information, recommendations, or materials.



**STRUCTURE**

HHS

The Committee shall be limited to no more than 30 members, unless it is determined that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. The Committee established pursuant to Section 565 of Title 5, United States Code, to carry out section 517(b) of the Tribal Self-Governance Amendments of 2000, shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this Act.

The Committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

Members shall be invited to serve for the duration of the Committee.

Subcommittees composed of members of the parent Committee may be established to perform specific functions within the Committee's jurisdiction. The Department Committee Management Office will be notified upon establishment of each subcommittee, and will be provided information on its name, membership, function and estimated frequency of meetings.

Management and support services shall be provided by Office of Tribal Self-Governance, Indian Health Service (IHS).

A quorum of the Committee shall be one more than one-half of the tribal representatives and one more than one-half of the Federal representatives designated as Committee members.

**MEETINGS**

Meetings shall be held according to a schedule agreed upon by the Committee. A government official shall be present at all meetings.

Meetings shall be open to the public except as determined in writing otherwise by the Secretary; notice of all meetings shall be given to the public.

Meetings shall be conducted, and records of the proceedings kept, as required by applicable laws and Departmental regulations.

**COMPENSATION**

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(a) .Committee Membership¶  
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Tribal Membership: The Secretary, HHS will appoint twelve members from self-governance tribes, eleven members from contracting and direct service tribes, for a total of twenty-three.¶  
¶  
Federal Government Membership: The Secretary of

**Deleted:** will appoint six representatives from the Office of General Counsel (1), the Office of the Secretary (1), and the IHS (4).¶  
Quorum¶  
¶  
A quorum of the Committee requires the presence of at least one-half of the tribal representatives designated as Committee members and one-half of the Federal Government representatives.

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A minimum of three meetings will be held. The exact name of the Committee, date, time, place, purpose, and the proposed agenda for each meeting normally will be published in the Federal Register at least 15 calendar days prior to each meeting. The Federal Register notice also will include a statement whether all or part of the meeting is open to the public. ¶  
¶  
In exceptional circumstances less than 15 calendar days notice maybe given, provided that the reasons for doing so are included in the Committee meeting notice published in the Federal Register.

HHS

Members who are not full-time Federal employees shall be responsible for their own expenses of participation in the Committee, except for members who have certified a lack of adequate financial resources to participate in the Committee and whose participation the IHS has determined is necessary to assure adequate representation of the member's interest. Such members may be paid at the rate of \$200 per day, plus per diem and travel expenses, in accordance with standard Government travel regulations.

**Deleted:** Members of the Committee shall receive no pay, allowance or benefits by reason of their service on the Committee. In accordance with the requirements of the Act and the Negotiated Rulemaking Act, 5 U. S. C. 568(c), while away from their place of residence or business and in the performance of services for the Committee, Committee members may be authorized to be reimbursed for travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Federal Government services if:¶  
¶  
<#>Such member certifies a lack of adequate financial resources to participate in the Committee; and ¶  
¶  
The

The HHS has determined in advance that the participation of the tribal committee members is necessary to assure adequate representation of tribal interests.

ANNUAL COST ESTIMATE

The estimated annual cost for operating the Committee, including compensation and travel expenses for certain members but excluding staff support, is \$248,925. The estimate of person-years of staff support is 3.0, at an estimated annual cost of \$174,280.

**Deleted:** determines that such member's participation in the Committee is necessary to assure an adequate representation of the member's interest.¶

**Deleted:** costs are estimated at

**Deleted:** and

**Deleted:** a three employee work year.

**Deleted:** The IHS shall provide technical support, copies of public comments, and logistical support services for the activities of the Committee

**REPORTS**

HHS

A report shall be submitted to the Secretary through the Director, IHS, which shall contain as a minimum a list of members and their business addresses, the Committee functions, dates and places of meetings, and a summary of Committee activities and recommendations made during the year. A copy of the report shall be provided to the Department Committee Management Office.

**Deleted:** In accordance with Sections 10(b) and (c) of the FACA, the Committee shall keep detailed minutes of each meeting and make available for public inspection, subject to 5 U. S. C. 552, all records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agendas or other documents made available to or prepared for or by the Committee. Such materials will be available for copying and inspection at a single location in an c... [1]

**Deleted:** until the Committee ceases to exist.

**Deleted: (a) Duration**¶  
¶  
The Committee will be established for a period of 18 months from the date of enactment of Public Law 106-260.¶  
¶  
... [2]

TERMINATION DATE

v

The authority to promulgate regulations shall expire 21 months after the date of the enactment of the Tribal Self-Governance Amendments of 2000.

APPROVED:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Secretary

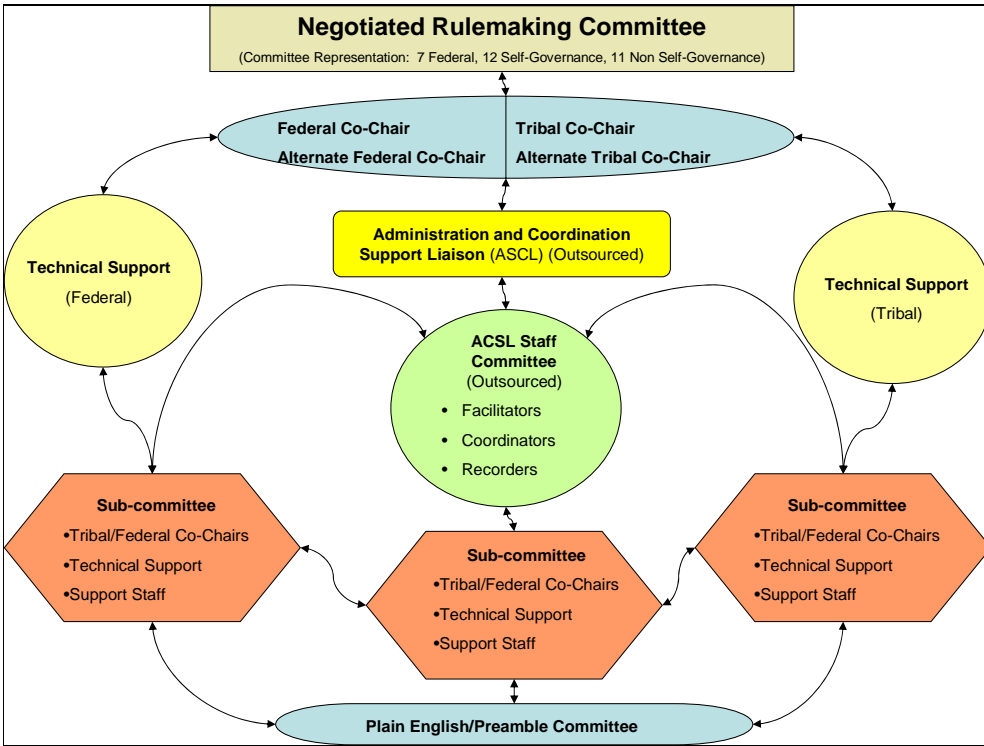
## Appendix 3 – Regulations Status List (DRLA)

### Joint Tribal & Federal Self-Governance Negotiated Rulemaking Committee 42 CFR Part 36 – G

12/5/00 - Notice of Intent to establish negotiated rulemaking committee published in Federal Register  
1/19/01 -Charter signed  
2/13/01 -Notice of Meetings published in Federal Register  
2/21/01 -Draft of Notice to Establish Rulemaking Committee sent to OTSG & OGC  
2/22/01 -Comments received from OGC  
2/23/01 -Notice of Cancelled meeting cleared IHS; sent to Federal Register for publication  
2/28/01 -Published in Federal Register (Notice of cancelled meeting)  
3/6/01 -Notice of the Establishment of the Negotiated Rulemaking Committee cleared OTSG & OGC  
3/12/01 -Notice of the Establishment of the Negotiated Rulemaking Committee cleared IHS  
3/13/01 - Sent to Federal Register for publication  
3/15/01 - Published in Federal Register  
3/22/01 -Draft Notice of Washington, D.C. & Oklahoma City Meetings of the Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance sent to OTSG & OGC  
3/29/01 -Cleared IHS  
3/30/01 -Sent to Federal Register for publication  
4/3/01 -Published in Federal Register  
5/2/01 -Draft Notice for remaining meetings sent to OTSG & OGC  
5/3/01 -OGC cleared  
5/14/01 -Cleared IHS  
5/15/01 -Sent to Federal Register for publication  
5/18/01 -Published in Federal Register  
8/6/01 -Draft of NPRM received in DRLA and edited  
8/10/01 -OMS cleared;  
OGC cleared  
8/13/01 -Cleared IHS  
8/20/01 -Comment received from ASPE  
9/06/01 -Comments received through SWIFT System from HHS Exec. Sec.  
9/10/01 -Comments incorporated into NPRM  
9/11/01 -Memorandum addressed to Exec. Sec. received from OPH and finalized  
9/12/01 -Memorandum for Secretary's signature finalized  
9/12/01 -OGC cleared  
9/13/01 -Sent to OMS for Director's signature  
9/17/01 -IHS cleared  
9/18/01 -Sent to ES/HHS for clearance  
10/24/01 -Signed by Secretary  
10/26/01 -Notified by Exec. Sec./HHS that NPRM is in OMB  
11/30/01 -Comments received from OMB

12/4/01 -Revisions made  
12/7/01 -More changes received from ES/HHS  
1/8/02 -Additional changes received from ES/HHS  
1/10/02 -Preamble language cleared by ES/HHS;  
Submitted to OMB for clearance  
1/14/02 -Preamble language cleared by OMB  
1/15/02 -Changes made  
1/16/02 -Submitted to ES/HHS  
1/17/02 -Changes made and sent to ES/HHS  
1/22/02 -Minor changes made by ES/HHS  
1/23/02 -Sent to ES/HHS  
1/24/02 -Signature page handcarried to HHH Bldg.; notified by ES/HHS NPRM cleared by  
OMB  
2/14/02 -Published in Federal Register  
3/12/02 - Draft Notice of meeting sent to RCO/DFM/OGC; OGC cleared  
3/21/02 - DFM cleared  
3/22/02 - Notice sent to OMS for Director's signature  
3/25/02 - Cleared IHS; Sent to Federal Register for publication  
3/29/02 - Published in Federal Register  
4/19/02 - Draft of Final Rule received in RRAT  
4/22/02 - Transmittal Action Memo requesting approval of Final Rule sent to OGC for review  
4/23/02 - Revisions received from OGC and made; Transmittal Action Memo signed by  
Director  
4/24/02 - Package sent to OS for Secretary's signature  
5/1/02 - Comments received from ES/HHS  
5/2/02 - Comments received from ES/HHS; Revisions made  
5/17/02 - Published in Federal Register

## Appendix 4 – Organizational Chart



Sub-Committees	Assignment Areas	Tribal Co-Chair	Federal Co-Chair	Recorder	Facilitator
I	Funding Agreements, Negotiation Issues, Finance Issues, Retrocession, Reassumption	Tribal Negotiated Rulemaking Committee Member	Federal Negotiated Rulemaking Committee Member	ACSL staff	ACSL staff
II	Budget/Reporting, Records, General Provisions, FTCA, Supplies, Secretarial Provisions, Appeals/Civil Action, Facilitation	Tribal Negotiated Rulemaking Committee Member	Federal Negotiated Rulemaking Committee Member	ACSL staff	ACSL staff
III	Construction	Tribal Negotiated Rulemaking Committee Member	Federal Negotiated Rulemaking Committee Member	ACSL staff	ACSL staff

## Appendix 5 – Committee Protocols

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
AND  
TRIBAL REPRESENTATIVES  
NEGOTIATED RULEMAKING COMMITTEE ON  
JOINT TRIBAL AND FEDERAL SELF-GOVERNANCE

### ORGANIZATIONAL PROTOCOL

#### PREAMBLE

The Negotiated Rulemaking Committee on Joint Tribal and Federal Self-Governance has been established pursuant to P.L. 106-260 and is further detailed in a Committee Charter approved by the Secretary of Health and Human Services. The Committee is charged with the development of regulations to implement amendments to the Indian Self-Determination Act.

#### 1. PARTICIPATION

- A. Attendance at meetings. Each Committee Member for each party must make a good faith effort to attend each full negotiating session. The Committee Member may be accompanied by such other individuals as that Member believes is appropriate to represent his/her interest. All Committee Members are responsible for contacting the Co-Chair, in writing, as soon as the committee member is aware of the inability to attend. The person acting as Alternate will have the full authority of the committee member. Alternates travel will be paid for by IHS (Coordinator) when they are attending in place of the committee member.
- B. Constituents' Interests. Committee Members are expected to represent the concerns and interests of their constituents.

#### 1. MEETINGS

- C. FACA. The negotiations will be conducted under the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act of 1990 (NRA).
- D. Open Meetings. Negotiating sessions will be announced in the Federal Register prior to the meeting and, consistent with FACA requirements, will be open to the public. Members of the public will be given opportunities at various times throughout each meeting to make comments, raise questions, or submit materials for the record.
- E. Minutes. The committee shall observe the requirements of the Charter regarding minutes, records, and documents. In addition, approved minutes

will be maintained and distributed to the Committee and Tribes utilizing legal/support staff and IHS website. Tribes that don't have access to website, contact Mickey Peercy, 580/924-8280, ext. 2421.

- F. Agendas. Meeting agendas will be developed by the Designated Federal Officials (DFO's) and Tribal Co-Chairs in consultation with committee members.
- G. Caucus. A break can be declared at any time by a committee member. Parties will be asked for an estimate of the time needed for the caucus. Internal procedures will be determined by each respective caucus.

## 2. DECISION MAKING

- A. Consensus. The Committee will operate by consensus as the whole.
- B. Quorum. A quorum will consist of 50% plus one of Tribal and 50% plus one of Federal Representatives.
- C. Sub-committees. Sub-committees may be formed by the Committee to address specific issues and to make recommendations to the Committee. Subcommittees are open to any Committee Members or the Member's designee, plus such other individuals the Committee believes would enhance the functioning of the Subcommittees. Subcommittees are not authorized to make decisions for the Committee as a whole. All subcommittees will report back to the committee regarding status of the assignments. All Committee Members will be notified of all Subcommittee meetings by the DFOs and Tribal Co-Chairs.

## 1. AGREEMENT

- A. Product of Negotiations. The Committee shall, with the assistance of a neutral facilitator, attempt to reach consensus on the text or content of a proposed rule to implement P.L. 106-260, Tribal Self-Governance Amendments of 2000. The Secretaries agree to use the Committee's preliminary report and proposed regulations as the basis of their Notice of Proposed Rulemaking. The Committee may also recommend changes in the proposed rule in response to comments.
- B. Final Rule. The Committee will review all comments received in response to the Notice of Proposed Rulemaking and will submit a final report with recommendations to the Secretary of HHS for promulgation of a final rule.

## 1. GROUND RULES FOR THE COMMITTEE MEMBERS

### A. Good Faith.

1. Turn off cell phones or put on silent mode
2. Everyone is entitled to have beliefs and values respected
3. One conversation in the room at a time
4. Start on time
5. Be respectful of everyone's time
6. Give everyone opportunity to participate
7. Groups responsibility to maintain flow of discussion and stay focused
8. Informal dress is encouraged at all committee meetings

### B. Information

1. The members of the Committee agree to exchange information in good faith.
2. Members of the Committee will provide information called for by this paragraph as much in advance of the meeting at which such information is to be used as possible.
3. All members of the committee agree not to divulge information shared in confidence.
4. It is the responsibility of the committee members to brief their alternates.

## 1. SCHEDULE

Negotiating sessions will be held regularly as determined by the Committee. Unless extended by Congress, the deadline for the negotiations is twelve months from the date of enactment of Public Law 106-260.

April 17-19 ,2001	Washington, D.C.
May 22-24, 2001	Oklahoma City, OK
June 11-13, 2001	Minneapolis, MN (end at noon on 13 <sup>th</sup> )
Jul 10-12, 2001	Portland, OR
Jul 30-Aug 1, 2001	Anchorage, Alaska Area

## 1. FACILITATOR

FMCS staff under the leadership of Jan Jung-Min Sunoo will serve as the facilitators and will work to ensure that the process runs smoothly. The role of the facilitator often includes developing draft agendas, facilitating Committee and select Work Group discussions, assisting the committee to resolve any impasses that may arise, and other functions the Committee requests. The facilitators will remain neutral on the issues before the Committee and serve at the will of the Committee.



1. CO-CHAIRS

The individuals identified in the Federal Register are the Federal Co-Chairs, Paula Williams and Leslie Morris and the Secretary recognizes Tribal Co-Chairs as Merle Boyd and Ron Allen. The role of the Co-Chairs usually includes developing draft agendas, chairing Committee and Sub Committee discussions, working to resolve any impasses that may arise, reviewing meeting summaries, assisting in the location and circulation of background materials, and materials the Committee develops, and other functions the Committee requests. The Tribal Co-Chairs and/or other Tribal representatives of the committee may be authorized to negotiate the Tribal positions with the DFO's and shall report the results of any negotiations to the full Committee for further action. Meetings of the Co-Chairs shall be open to the Committee members.

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Paula Williams, Federal Co-Chair      Date

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Merle Boyd, Tribal Co-Chair      Date

## **Appendix 6 – Summary of Subcommittee I**

**Issues Assigned:** Selection of Tribes, Compacts, Funding Agreements, Finance Issues, Retrocession, and Reassumption

### **Negotiated Rulemaking Committee Members:**

W. Ron Allen, Jamestown S’Klallam Tribe, Tribal  
Katherine Gottlieb, Southcentral Foundation, Tribal  
William Jones, Lummi Indian Nation, Tribal  
Don Kashevaroff, Alaska Native Tribal Health Consortium, Tribal  
Michael Mahsetky, Congressional and Legislative Affairs, IHS, Federal  
Cara Whitehead, Office of Grants and Acquisitions Management, HHS  
Jon Ross, Southcentral Foundation, Alternate Committee Member – Tribal  
Daniel Belcourt, Chippewa Cree Tribe, Alternate Committee Member – Tribal  
Kitty Marx, Division of Regulatory and Legal Affairs, IHS, Alternate Committee Member – Federal  
William Schaaf, Mille Lacs Band of Ojibwe, Alternate Committee Member – Tribal

### **Co-Chairs:**

Don Kashevaroff was elected to serve as the tribal co-chair and Michael Mahsetky was elected to serve as the federal co-chair.

### **Technical Representatives:**

Myra Munson, Sonosky, Chambers, Sachse, Miller & Munson  
Cyndi Holmes, Jamestown S’Klallam Tribe  
Carol Nuttle, Office of Tribal Self-Governance, IHS  
Tena Larney, Office of Tribal Self-Governance, IHS  
Robyn York, Division of Acquisition and Grants Management, IHS  
Crystal Ferguson, Division of Acquisition and Grants Management, IHS  
Alexandra Reagan, Division of Acquisition and Grants Management, IHS  
Sandra Maclin, Division of Regulatory and Legal Affairs, IHS  
Paul Alexander, Alexander and Karshmer  
Hankie Poafpybitty, Office of the General Counsel, HHS  
Julia Pierce, Office of the General Counsel, HHS  
Geoffrey Strommer, Hobbs, Straus, Dean and Walker  
Jan Sunoo, Federal Mediation and Conciliation Services, Facilitator  
Debra Isham, Negotiated Rulemaking Committee Coordinator, Recorder

### **Meetings:**

Subcommittee I met during regular Committee meetings beginning in April 2001, for a total of five meetings. Subcommittee I did not need to hold additional work meetings as did the other Subcommittees. However, in order to complete the regulations within the

tight timeframe, members of Subcommittee I and their technical representatives performed initial drafting and redrafting work outside regular meetings, communicating via e-mail and telephone conference calls hosted by the Committee Coordinators.

**Narrative:**

At its first meeting, the full Committee provided all three subcommittees with a list of topics on which to work. Members of Subcommittee I self-selected into three smaller workgroups to address the assigned topics. The three workgroups separately developed draft regulations for the assigned topics. The draft regulations were reviewed and approved by the full Subcommittee I and then presented to the full Negotiated Rulemaking Committee for consideration.

The sections on Retrocession and Reassumption were initially assigned to Subcommittee II; however, the sections were reassigned to Workgroup 1, Subcommittee I. Subcommittee I worked on the topics identified below by Section number of PL 106-260.

- Workgroup 1 - §503 Selection of Tribes for participation in Tribal Self-Governance, §504 Negotiating a Compact, §505 Funding Agreement, §506 (f) Retrocession, and §507(a)(2) Reassumption.
- Workgroup 2 - §507 Final Offer.
- Workgroup 3 - §508 Transfer of funds.

**Workgroup 1**

Workgroup 1 completed its assigned topics quickly and efficiently; although regulations pertaining to the inclusion of grants in Title V funding agreements took much negotiation among federal and tribal members of this group. Federal representatives consulted with Department officials regarding grants. The matter of whether provisions of Title V apply to statutorily mandated grants added to a funding agreement after award was one of three issues on which the federal and tribal representatives to the Negotiated Rulemaking Committee could not reach consensus. The Tribal and Federal positions on statutorily mandated grants are fully discussed in the preamble to the Final Rule.

**Workgroup 2**

Workgroup 2 completed regulations pertaining to “final offer,” which is a mechanism provided to Self-Governance Tribes for resolving disputes that may develop in negotiating Self-Governance compacts, funding agreements, or amendments. The regulations developed set out specific details on the process for submitting final offers, rejecting final offers, establishes the party responsible for burden of proof in rejection of final offers, and the final decision-maker after all final offer mechanisms have been exhausted.

### **Workgroup 3**

Workgroup 3 completed regulations pertaining to funding. One issue that this workgroup struggled with was funding transfers from the Secretary to funding agreements that do not correspond to the Federal fiscal year. A draft regulation was developed for 137.77 in the proposed rule, which received one comment recommending replacing the language with the holding from a case in litigation. The Tribal Committee members agreed with the comment. Because the Tribal and Federal Committee members disagreed on the application of the holding to these regulations, the Secretary decided to delete section 137.77 in the final rule.

#### **Outcomes:**

Subcommittee I negotiated the regulations, as listed by subpart below. The applicable section of PL 106-260 is noted in parentheses.

- Subpart C – Selection of Indian Tribes for participation in Self-Governance (§503)
- Subpart D – Self-Governance compact (§504)
- Subpart E – Funding Agreements (§505)
- Subpart F – Statutorily Mandated Grants (§505)
- Subpart G – Funding (§508)
- Subpart H – Final Offer (§507)
- Subpart L – Retrocession (§506 (f))
- Subpart M – Reassumption (§507(a) 2)

## **Appendix 7 – Summary of Subcommittee II**

### **Co-Chairs**

The Tribal Co-Chair was Robert Brisbois and the Federal Co-Chair was Eric Broderick. Mr. Albert Long also served as alternate Tribal Co-Chair and Eugenia Tyner-Dawson served as alternate Federal Co-Chair for this Subcommittee.

### **Committee Members**

Eric Broderick, Office of Public Health, IHS, Alternate Federal Committee Member  
Jessica Burger, Little River Band of Ottawa Indians, Tribal Committee Member  
Carolyn Crowder, Crown Consulting Management, Tribal Committee Member  
Eugenia Tyner-Dawson, Office of Inter-Governmental Affairs, HHS, Federal Committee Member  
Williams McKee, Individual Tribal Member, Tribal Committee Member  
Robert Brisbois, Spokane Tribe of Indians, Tribal Committee Member  
Albert Long, Navajo Nation, Tribal Committee Member  
Katherine Hughes, Federal Committee Member  
Barbara Hudson, Office of General Counsel HHS, Alternate Federal Committee Member  
Kelly Short-Slagley, Agua Caliente Band of Cahuilla Indians Tribal Committee Member  
Harold Brown, Tanana Chiefs Conference, Tribal Committee Member  
Tadd Johnson, Mille Lacs Band of Ojibwe Indians, Tribal Committee Member  
Tim Schuerch, Alaska Native Tribal Health Consortium, Alternate Tribal Committee Member

### **Technical Representatives**

Lloyd Miller, Sonosky, Chambers, Miller & Munson  
Cassie Temple, IHS  
Edna Paisano, IHS  
Mike Gomez, IHS,  
Bobo Dean, Hobbs, Straus, Dean and Walker  
Paula Lee, HHS, Office of General Counsel  
Kim Beg, Facilitator, Federal Mediation and Conciliation Service  
Wendy Montemayor, Recorder, Oklahoma City Area Inter-Tribal Health Board  
Barbara Karshmer, Alexander & Karshmer  
John Carney, Riverside-San Bernardino County Indian Health, Inc.

## **Sections/General Provision**

506 General Provisions - 506(a) Applicability of general provisions - 506(b) Conflicts of Interest - 506(c) Audits - 506(c)(1) Single Agency Audit Act - 506(c)(2) Cost Principles - 506(d)(1) Records – In general  
506(d)(2) Record Keeping System - 506(e) Redesign & Consolidation –  
506(g) Withdrawal - 506(h) Non-duplication-  
507(a)(1) Health status reports- 507(e) good faith  
507(f) savings - 507(g) trust responsibility - 508(e) other federal resources  
512(a) Secretarial interpretation - 512(b) regulation waiver- 512(c) Access to federal property - 512(d) Matching or cost-participation req.- 512(e) state facilitation  
512(f) rules of construction - 513(a) requirement of annual budget request  
513(a)(1) “ “ “ in general - 513(a)(2) “ “ “rule of construction - 513(b) present funding shortfalls - 514(a)(1) annual report - 514(a)(2) “ “ in general - 514(b) contents  
514(c) report on fund dist. Method - 515(a) no funding reduction - 515(b) federal trust & treaty responsibility - 515(c) obligations of US - 516(a) Mandatory application FTCA & 105(k) only - 516(b) discretionary application – 518 Appeals - Section 7 federal sources of supply - Section 8 patient records (amends sec. 105) - Section 9 Annual reports (amends sec. 106(c))  
Appeals (from workgroup I) - Civil Acts

## **Initial Organization**

The Committee working as a whole had already identified the sections assigned to Subcommittee II. Following the direction of the full Committee, the members of Subcommittee II elected a Federal Co-Chair and a Tribal Chair and alternate Co-chairs. Subcommittee II approached the work of developing the regulations consistent with the direction of the Committee Co-Chair to:

- (1) Work from agreement to disagreement to working relationship.
- (2) Develop regulatory language only when the language of the statute did not provide sufficient guidance to insure implementation consistent with the intent of the Act.
- (3) Approach the work using existing regulations as a model when appropriate. In this way the subcommittee could speed their work through those areas.

Subcommittee II prepared a detailed table listing the section/provision of the Act and four categories for actions needed for regulations. The categories are identified below.

### **Category A – No Regulations Needed**

They identified 22 sections of the Act within their assigned area of the Act for which there was no need to develop regulations. This meant that the language of the statute was sufficiently clear that it could stand alone as guidance for implementation.

### **Category B – Adapt and Adopt Existing Regulations**

They identified three (3) sections for which existing regulations could be adapted or simply adopted. This meant that existing regulations in Title I and/or Title IV Regulations were sufficiently similar that they could be used as a model and be adapted to the needs of Title V.

### **Category C - New Regulations Must Be Developed**

Subcommittee 2 identified three (3) sections that required writing new regulations and on which there was some tribal/federal agreement that formed a beginning point to develop new regulations. Most of the sections listed as Parking Lot issues also needed to have new regulations written but in the case of Parking Lot issues there was no agreement and these issues required additional discussion.

### **Category D – Parking Lot Issues**

Subcommittee II identified eighteen (18) sections that were sufficiently controversial to be placed in the Subcommittee's Parking Lot. These sections required more discussion in order to begin the regulations development process. Often these issues were the subject of position papers and/or draft Q and A's that were reviewed by the Tribal or Federal Team.

### **Development of a Subcommittee Work Plan**

Because of the multi-issue tasks, Subcommittee II members divided themselves into four (4) workgroups based on subject matter clusters. Each of the workgroups further divided into two (2) sub-workgroups, one federal and one tribal for a total of (8) sub-workgroups. It was felt that the use of several workgroups would allow the subcommittee to efficiently develop regulations on its broad range of subject matters within the limited time available.

Mirroring the organization of the overall Committee the work groups and sub-workgroups worked on their assigned areas and came together for review and eventual agreement. The division of the subcommittees required the Coordinators to attempt to address additional meeting room needs and the facilitators to try to be in many places at once. However, the use of sub workgroups was effective in bridging all disagreements.

For at least two (2) meetings the federal and tribal workgroups and/or sub-workgroups failed to reconcile their disagreements over draft regulations in the Q and A format.

### **Subcommittee 2 Challenging Regulatory Issues**

A significant area of discussion came from the development of reporting requirements for Self-Governance Tribes. The initial position of the Federal members was that the large

data sets that were required by IHS would be required of the Self-Governance Tribes. This was a reversal of the current situation in which the Self-Governance Tribes are required to select from a list of base line health care indicators for reporting to the IHS. These health care indicators were developed by representatives of Tribes and the Indian Health Service in the Baseline Measures Workgroup. The final report of the Workgroup was part of the reference materials provided to members of the Committee. Self-Governance Tribes have successfully implemented this reporting system, which is focused on the health status of the community served. This portion of the regulations reviewed the issues that had been addressed through the work of the baseline workgroup.

The Subcommittee reviewed the IHS position on data sets that are needed to complete the RPMS System. The problem of the reporting format and data sets was included in the final regulations as a format to be developed by the Tribal Self-Governance Advisory Committee.

### **Issues Related to the Scope of the Authority to Regulate**

Subcommittee II members discussed the need to develop regulations for federal sources of supply, patient records and annual reports, all topics which were technically outside of Title V but a part of ISDEAA. There were two (2) additional conference calls and one (1) additional meeting to clarify the positions of the Tribes and the Department on these issues. Where agreement could not be reached, the Subcommittee reached a consensus not to address the issue at all. These included: federal sources of supply, patient records and annual reports.

### **Shifting of Subcommittee Assignments**

Subcommittee assignments made during the first meeting were tentative based on the amount of work that was anticipated. However, due to the short time frame available to draft regulations, it was understood that specific sections could be shifted to other Subcommittees whose workload would allow. By the beginning of the Oklahoma Meeting (May 2001) subcommittee III was ready to request that another subcommittee be assigned the task of developing regulations for Appeals and Civil Actions. The full Committee agreed to this request and Subcommittee II accepted this additional assignment from Subcommittee III.



## **Appendix 8 – Summary of Subcommittee III**

### **Co-Chairs:**

The Tribal Co-Chair was Jefferson Keel. The Federal Co-Chair was Ron Ferguson.

### **Committee Members:**

Garland Brunoe, Vice-Chairman, Confederated Tribes of Warm Springs  
Valerie Davidson, General Counsel, Yukon-Kuskokwim Health Corporation  
Ron Ferguson, Principal Engineer, OEHE, Office of Public Health, IHS  
Jefferson Keel, Lt. Governor, Chickasaw Nation  
Duke McCloud, Chief, IHS Branch, Office of General Counsel, HHS  
Wanda Stone, Chairperson, Kaw Nation  
Tim Martin, Executive Director, United South and Eastern Tribes, Inc.,

### **Technical Representatives:**

Steve Aoyama, IHS  
Jocelyn Beer, Office of the General Counsel, HHS  
Lena Belcourt, Rocky Boy Reservation - Tribal Technical Support  
Kathy Block, IHS  
Tom Coolidge, IHS  
James Glaze - Sonosky, Chambers, Sachse, Endreson and Perry - Tribal Legal Support  
Ken Harper, IHS  
Melanie Knight, Cherokee Nation of Oklahoma - Recorder  
Peggy McNeive - Facilitator  
C. Juliet Pittman, SENSE, Inc.  
Jan Stevens, Sac and Fox Nation - Tribal Technical Support  
Steve Weaver, Alaska Native Tribal Health Consortium - Tribal Technical Support  
Dan Winkelman, Yukon-Kuskokwim Health Corporation

### **Identification of Issues**

The Subcommittee's goal was to develop regulations governing Title V self-governance construction project agreements that: (1) furthered Congress and the Administration's self-governance policies for Indian Tribes and tribal organizations; (2) were consistent with the language and intent of the Title V legislation; (3) were easy for federal and tribal officials to understand and apply; and (4) promoted sensible policy choices that served the best interest of Indian tribes and tribal organizations. For example, a major issue addressed by the Subcommittee arose from the National Environmental Policy Act (NEPA) provisions of the Title V legislation. From the beginning of the rulemaking process, the Subcommittee questioned the scope of federal environmental responsibilities that a tribe is required to assume to perform a construction project agreement under Title V. At the outset, federal subcommittee members expressed the view that if a tribe

assumes a construction project, then it assumes *all* responsibilities of the federal agency for NEPA, NHPA and other related activities generally, not only those directly related to the construction project being assumed. Tribal subcommittee members, on the other hand, saw the statute as requiring a tribe to elect to assume only the federal responsibilities under NEPA, the National Historic Preservation Act (NHPA), and related provisions of law that would be directly related to completion of the construction project. The Subcommittee discussed the costs that the first view would impose on the tribes, the experience of other agencies, and statutory and regulatory basis for the IHS compliance procedures. Ultimately, the Subcommittee reached agreement on the narrower view of a tribe and tribal organizations' environmental obligations. The Subcommittee also reached agreement on nearly all other issues, including allowing tribes and tribal organizations the option of adopting their own environmental review and compliance process so long as that process complied with statutory requirements.

Subcommittee III had two of the three unresolved issues in the final rule. The first unresolved issue concerns whether section 314 of Public Law 101-512 requires that the Department of Justice must provide a legal defense for Tribal certifying officials in suits brought under NEPA equivalent to that provided to a federal certifying officer performing similar environmental compliance activities. The second unresolved issue concerned the application of Davis-Bacon prevailing wage rates to construction projects funded with both federal and non-federal funds. The unresolved issues of Subcommittee III are discussed in the Preamble to the NPRM and in the Preamble to the final rule. Valerie Davidson, Jocelyn Beer and Jim Glaze represented Subcommittee III on the Preamble Committee.

### **Methodology**

At the preliminary meeting in San Diego (March 2001), the full Negotiated Rulemaking Committee went through the Title V legislation and developed a template for the regulations. The Committee then established three (3) Subcommittees and appointed Federal and Tribal Co-Chairs for each Subcommittee to address the different policy areas identified in the regulation template (see Attachment A). The Subcommittee Co-chairs decided how to resolve overlapping policy issues and other matters related to the work of the Subcommittees. The full Committee agreed that the Subcommittees would first attempt to reach agreement on draft regulations which they could recommend for adoption by the full Committee. However, it was also agreed that all issues would be brought back to the full Committee for review, discussion and final adoption. Subcommittee III was originally assigned construction, appeals/civil actions, and retrocession.

At the first meeting in Washington, D.C. (March 2001), a preliminary draft was developed of those regulations that could be adapted from the statute or other existing regulations, such as Title I or Title IV. The Subcommittee also identified and drafted positions on those issues that appeared to be non-controversial or mildly controversial, but required a new regulation. The Subcommittee identified those issues that appeared to be highly controversial, and deferred these issues by assigning them to parking lots for

discussion in the tribal and federal caucuses with a negotiation strategy or plan to be agreed to by both federal and tribal members of the Subcommittee.

The Subcommittee made progress by April 17, 2001, and drafted an outline of nine topics. Assignments were made within the Subcommittee to address critical issues before the Oklahoma City (May 2001) meeting. One of these issues was NEPA compliance: how IHS complies with NEPA and what compliance procedures would be required of the tribes, among other issues. The IHS staff gave detailed presentations on how IHS has complied with NEPA in working with tribes on sanitation and health facilities construction.

By May 22, 2001, the Subcommittee discussed the civil action section and concluded that the Subcommittee needed to concentrate on construction. A sub-sub committee was appointed for appeals and civil actions with two members from both Subcommittee III and Subcommittee II. It was decided that Subcommittee II would consider appeals and Subcommittee III would focus on construction.

The Full Committee recommended that the subcommittees complete all work by the end of the June 2001 meeting in Minneapolis so that the July meeting in Seattle and the August meeting in Anchorage could be used by the Full Committee to review and finalize the draft regulations. To meet this deadline, Subcommittee III held two additional two-day meetings and met one day earlier at the Seattle meeting. With the exception of the two unresolved issues, the Subcommittee substantially completed the draft regulations at the July meeting. The Subcommittee met again in April 2002 after the close of the comment period to review and take appropriate action on the proposed comments. Except for the two unresolved issues discussed above, the full Committee accepted the Subcommittee's recommendations for the final rule.

## **Appendix 9 – Summary of Plain English/Preamble Committee**

The Negotiated Rulemaking Committee established a Plain English Committee to review the draft regulations prepared by the three subcommittees and approved by the full Negotiated Rulemaking Committee. The members of the Plain English Committee were also charged with writing a Preamble to the draft regulations, including a definitions section. The Plain English/Preamble Committee was conscientious about making no substantive changes to the draft regulations submitted by the three subcommittees.

The Plain English/Preamble Committee was made up of two members selected by each subcommittee, one Federal and one Tribal, with two additional members, one Tribal and one Federal, selected to oversee the process as at-large representatives.<sup>2</sup>

### **Plain English**

The Plain English/Preamble Committee reviewed the draft regulations for consistency of language and drafting errors. The group also reviewed the draft regulations to ensure that they were consistent with the statute, were understandable to the reader, and were not duplicative of other provisions. To ensure an objective review of the draft regulations, members of the Committee reviewed draft regulations that were written by a subcommittee to which they were not assigned. Recommended edits and suggested language changes prepared by the Plain English/Preamble Committee were returned to the respective subcommittee for review and approval and then went to the full Negotiated Rulemaking Committee for review and approval. The full Negotiated Rulemaking Committee resolved any issues that were not otherwise resolved by the Plain English/Preamble Committee.

The Plain English/Preamble Committee also drafted a definitions section, with input from the respective subcommittees, and the full Negotiated Rulemaking Committee approved these definitions. In addition, prior to finalizing the draft regulations for clearance through the Agency and the Department, the Plain English/Preamble Committee made final edits for clerical and typographical errors, section numbering, and cross-references.

### **Preamble**

The need for a group to work on a preamble was informally recognized at the May 2001 meeting in Oklahoma City when the Committee members were developing the regulations. There was general agreement that the preamble to the Title V regulations should identify and record areas of continuing disagreement, while not being too lengthy, because lengthy preambles had been included in the Title I and the Title IV Regulations. During the rulemaking process, as both Tribal and Federal interests were identified and positions developed, these disagreements were to be noted for future consideration. The

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<sup>2</sup> Subcommittee III elected a tribal member and a tribal alternate.

goal for the Title V preamble was to record the differing tribal and federal positions in a fair and informative manner. At the same time, the Negotiated Rulemaking Committee made a concerted effort not to allow the preamble to serve as a substitute for reaching agreement on as many regulations as possible or as an excuse to avoid grappling with the more difficult issues.

At every meeting, the draft regulations were reviewed for possible areas of disagreement to be noted in the preamble. While both the Tribal and Federal Teams expected that the list of disagreements would be long, it turned out to be shorter than anyone expected. The Title V final regulations had only three issues on which the teams could not reach consensus.

**Plain English/Preamble Committee Members:**

- Myra Munson, Sonosky, Chambers, Sachse, Miller & Munson
- Kitty Marx, Division of Regulatory and Legal Affairs, IHS
- Lloyd Miller, Sonosky, Chambers, Sachse, Miller & Munson
- Cassie Temple, Division of Regulatory and Legal Affairs, IHS
- James Glaze, Sonosky, Chambers, Sachse, Endreson & Perry
- Jocelyn Beer, Office of the General Counsel, HHS
- Cyndi Holmes, Jamestown S' Klallam Tribe
- Duke McCloud, Office of the General Counsel, HHS
- Valerie Davidson, General Counsel, Yukon-Kuskokwim Health Corporation

In accordance with Sections 10(b) and (c) of the FACA, the Committee shall keep detailed minutes of each meeting and make available for public inspection, subject to 5 U. S. C. 552, all records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agendas or other documents made available to or prepared for or by the Committee. Such materials will be available for copying and inspection at a single location in an office of the

### **(a) Duration**

The Committee will be established for a period of 18 months from the date of enactment of Public Law 106-260.

**(b) Termination Date** The Committee shall terminate 18 months from the date of enactment or upon promulgation of the final rule implementing the Act, whichever occurs first. The Charter and Committee continuance may be extended if Congress enacts legislation to extend the 18-month deadline for promulgation of final rules.