

BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
CONGRESS OF THE UNITED STATES

Statement of Charles R. Barnes
Acting Director
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on

S. 2097 - INDIAN TRIBAL CONFLICT RESOLUTION, TORT CLAIMS, AND RISK
MANAGEMENT ACT OF 1998

July 15, 1998
485 Russell Senate Office Building

Mr. Chairman and Members of the Committee:

Good morning, Mr. Chairman and members of the Committee. Thank you for the invitation to comment on Title I of the recently introduced legislation, S. 2097, *to encourage and facilitate the resolution of conflicts involving Indian tribes*. The Federal Mediation and Conciliation Service is a federal agency which was established by Congress in 1947 to mediate labor disputes and provide facilities for arbitration to avoid interruptions in interstate commerce. Its responsibilities and expertise, however, have expanded over the years as we have been called upon to use the techniques of dispute resolution in other fields, to provide training in conflict resolution to labor, management, and others, to help form mediation services in other countries and host visits by foreign delegations to see how disputes are resolved here. Today, not only does FMCS offer dispute resolution services to labor and management in the Federal government, to companies and unions in the private sector (except railroad and airline industries which have their own special board), and to states which do not have their own mediation services but to government agencies for the resolution of contract, Equal Employment Opportunity, personnel,

and other disputes. It was under the Administrative Dispute Resolution Act and the Negotiating Rulemaking Acts of 1990, and their successor legislation, the ADRA of 1996, that FMCS provides mediators to facilitate disputes and assist in the formulation of rules and regulations through negotiations. A brief account of some of these experiences is attached to this statement.

Description of FMCS Dispute Resolution and ADR Services

FMCS has 300 employees situated throughout the United States, five regional offices, and 200 staff mediators who are available to facilitate and mediate labor disputes, provide training in partnerships and labor-management cooperation, as well as a form of “systems design” to help parties analyze their conflict mechanisms and see how they can be improved. FMCS also administers a roster of 1500 arbitrators who are private citizens who render awards in contract interpretation and formation disputes.

Dispute resolution by the government is not a new idea, the FMCS provided some of these services when its conciliators were part of the U.S. Department of Labor in 1913 and became independent in 1947 by the Taft-Hartley Act. The National Mediation Board provides some of these services for the railroad and airline industry; and the Community Relations Service (CRS), a part of the U.S. Justice Department, provides mediation of certain race and ethnic conflicts. FMCS, however, has increasingly been asked to assist in the expansion of mediation and dispute resolution to other fields. FMCS has been involved in alternative dispute resolution services (ADR) programs for nearly three decades. Indeed, In 1970, Congress, through ad hoc legislation, asked FMCS to appoint a mediator to assist in the resolution of a long-standing land dispute between the Navajo and Hopi Indian tribes. FMCS moved into the arena of regulatory

negotiations in the early 1980s working with the Federal Aviation Administration and since then has become increasingly involved in this activity.

Through the FMCS alternative dispute resolution (ADR) program, mediators assist federal agencies and others in institutionalizing mediation and other forms of conflict resolution as an alternative to costly litigation. After consultation with federal agencies, FMCS provides such services as conflict resolution systems design and evaluation, education, training, and mentoring. Through our “train the trainer” programs, FMCS educates agency personnel in conflict resolution skills so they, in turn, can train others. FMCS mediates disputes both within agencies (e.g. age discrimination and other fair employment complaints, whistleblower complaints) and between agencies and their regulated public (e.g. public policy, regulatory, or environmental disputes). FMCS has even helped design “peer mediation” programs for school children and teachers to assist in reducing violence in school. It has also assisted Congress in providing public policy dialogues about controversial issues.

Besides mediating labor disputes which may involve Indian tribes, FMCS has extensive experience in working with Indian tribes on a number of ADR projects. In twenty months, through facilitated negotiations, Indian tribes and the federal government were able to resolve issues that had been unresolved for over twenty years. The Indian Self Determination Regulatory Negotiation in 1996 involved 63 people representing 48 Indian tribes over ten federal agencies and offices, and resulted in the largest negotiated rulemaking ever conducted. By adhering to a consensus process, the participants designed a regulatory framework that years of typical negotiating had failed to accomplish. The process became a model for future dialogues with Indian tribes. The result was an easy to understand set of procedures for tribes and tribal

organizations who wish to contract with the federal government to provide health services, education, and construction projects. A detailed account of this project is attached to this statement. Another example of a negotiated rulemaking involved Native American Housing, to produce, by consensus, a comprehensive regulation that deals with the implementation of the Native American Housing Assistance and Self-Determination Act of 1996, which changed the method of providing housing assistance to Indian families living on reservations and in other traditional Indian areas by providing grants directly to Indian tribes or their tribally designated housing entities.

In those efforts, we have used a team of mediators, who have worked throughout the United States—and have built up some experience and expertise in this area. Indeed our agency's efforts with tribal self-determination, self-governance, housing, and other issues, shows that through negotiations and facilitation, tribal leaders, concerned parties, and those affected by the actions of tribal governments, can find common ground and develop innovative solutions, rules, and regulations.

General Comments and Recommendations on the Legislation

We salute the application of alternative dispute resolution to resolving the issues of state/tribal negotiations and federal mediation of tax disputes. We have seen the increase use of these processes to avoid costly litigation, come out with better solutions, and enhance the negotiation process. FMCS generally supports the model proposed for establishing intergovernmental negotiations procedures and the establishment of an intergovernmental alternative dispute resolution panel. We do, however, have some concerns about the structures and procedures as proposed in the legislation which we have articulated below. Our

recommendation for creating an appropriate design would be to convene a body of affected stakeholders (tribal, state and federal representatives) to jointly create both the process and the structures needed for resolving these issues through negotiated rulemaking, or some similar process. FMCS would certainly be willing to facilitate such proceedings.

Under Section 101 of S.2097, FMCS would provide the mediation and other dispute resolution services to assist negotiations, and under Section 103, would assist the newly formed Intergovernmental Alternative Dispute Resolution Panel. We have a few questions for clarification about this legislation but in general support the goal and mission and would look forward to working on this project.

Specifically, there should be some clarification in the negotiation process; is it binding or non-binding in nature? It appears that negotiated agreement would be binding if the parties so agreed, but the language in Section 102 (c)(2)(A) and Section 102(e) may be confusing. We also wonder if the mediation in the negotiation stage mandatory or optional? We recommend mediation remain optional because mandatory mediation tends to be ineffective. We also recommend that other processes such as fact finding and early neutral evaluation be made available in the negotiation stage. Clarification is also needed on how the process of negotiation is actually convened. We recommend the parties notify the Secretary of Interior of the dispute, and the Secretary would then inform the parties of the options available under the negotiation phase including mediation/facilitation. If the parties so choose to use mediation, then the Secretary would request a panel of three mediators from FMCS. If the parties chose alternatives, FMCS would assist in securing those services.

Clarification is also needed in the process of mediator selection by the Secretary. It appears that each party may strike one candidate, thereby leaving only one remaining for the Secretary to choose. However, the language is ambiguous in that it states the Secretary will then choose a remaining mediator from the list. This implies more than one mediator is left to choose. FMCS recommends the wording be changed to "...the Secretary shall *appoint the remaining unchallenged mediator?*" Section 102(c)(3)(C).

We have a concern over the period allowed for the negotiation process to continue. Currently, the proposed legislation allows for a one year period followed by extensions at the parties discretion. Should a maximum length be instituted? FMCS recommends limits be placed on how many extensions should be allowed, otherwise parties have no incentive to settle in a timely fashion, and mediators ability to leverage deadlines is compromised.

As to the Panel process, it appears the process as described would allow for mediation to occur both in the negotiation phase and the panel phase of the process. Mediation is most effective when it is offered at an appropriate and timely moment in the life of a dispute. However, because every dispute is different, the most appropriate timing for mediation may vary from situation to situation. If the parties are required to go to mediation prior to approaching the panel, it may render mediation in-effective. We recommend the process be flexible enough to allow the parties to choose the appropriate time for mediation to occur, and then for it to be offered once. On a case by case basis, the Secretary could then determine if a second attempt would be appropriate.

Clarification may also be needed on how long panel members would be expected to serve. We would also ask, is it mandatory that a case at impasse in the negotiation phase go before the panel? FMCS would recommend that parties be allowed to present before the panel only those

issues which the parties could not agree on in negotiations. Also, the process for making panel decisions is unclear. How would they make a determination? Is this by majority vote? Consensus process? Is it envisioned that the panel would request FMCS to provide mediation services for their own deliberations?

Lastly, for clarification purposes, all references to the Administrative Conference of the United States (ACUS) should be stricken as it no longer exists.

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Conclusion

FMCS would be pleased to assist in this dispute resolution effort and would be pleased to work with the committee to deal with any dispute systems design issues. We think that there should be some clarification about the finality of the decision of the Panel and the role of the new Commission. Since our Agency primarily provides mediation and has a roster of arbitrators, we would need to create an internal mechanism to oversee the services of factfinders, early neutral evaluators, and others to provide the full panoply of dispute resolution services. I am enclosing materials about our work for the benefit of the Committee and would be pleased to answer any questions now or at a future time.

• **APPENDIX A**
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•Alternative Dispute Resolution Services
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FMCS has been involved in alternative dispute resolution (ADR) programs for nearly three decades. The agency was first involved in an ADR program in the early 1970s when it was asked to mediate a land dispute between the Navajo and Hopi Indian tribes. FMCS moved into the arena of regulatory negotiations in the early 1980s working with the Federal Aviation Administration and since then has become increasingly involved in this activity.

Through the FMCS alternative dispute resolution (ADR) program, mediators assist federal agencies in institutionalizing mediation and other forms of conflict resolution as an alternative to costly litigation. After consultation with client agencies, we provide such services as conflict resolution systems design and evaluation, education, training and mentoring. Through our "train the

trainer" programs, we educate agency personnel in conflict resolution skills so they, in turn, can train others. We mediate disputes both within agencies (e.g., age discrimination and other fair employment complaints, whistleblower complaints) and between agencies and their regulated public (e.g., public policy, regulatory or environmental disputes).

ADR SERVICES TO CLIENTS

Consultation

Initial assessment of a client agency's needs.

System Design

Analysis of existing mechanisms and design of appropriate methods and strategies for implementing ADR.

Education, Training, Mentoring

Programs for educating the general user of ADR Services, training in mediation skills for potential mediators, and actual mentoring of mediator trainees through active cases.

Mediation/Facilitation and Convening Services

Available on contract to agencies to provide mediation, facilitation and convening services for all types of disputes, depending on FMCS resource availability.

Evaluation and Follow-up

Assessment of ADR programs and continuing involvement to improve ADR initiatives.

APPENDIX B

Examples of some of the major ADR projects FMCS has undertaken involving tribes and others:

1. Indian Self Determination Regulatory Negotiation

In 1996, 63 people, representing 48 Indian tribes and over 10 federal agencies and offices, completed the largest negotiated rulemaking ever conducted since that time. By adhering to a consensus process, the participants designed a regulatory framework that years of typical negotiating had failed to accomplish. In addition, the process became a model for future dialogues with Indian tribes.

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- **Historical Background**
- In 1975 Congress passed the Indian Self-Determination and Education Assistance Act, Pub.L. 93-638. This Act gave Indian tribes authority to contract (known as "638 contracts" after an abbreviation of the Act, Pub L 93-638 (emphasis added)) with the federal government to operate federal programs such as schools, health facilities, construction projects, etc. serving their tribal members and other eligible persons. The Act's purpose was to gradually

shift the responsibility of delivery for such services from the government to each tribe or tribal organization so that they would have improved service and also become more independent. However, by 1988 Congress determined that instead of 638 contracts improving services to the tribes, the federal government had created a complicated bureaucratic maze, making it more efficient for the government to continue to operate contractible programs. For example, the government took an average of 6 months to processing a “638” contract proposal, instead of the 60 days required by the Act. To correct these problems, Congress revised the Act and directed the Departments of the Interior and Department of Health and Human Services to develop regulations over a 10-month period with the active participation of tribes and tribal organizations.

- Despite the 10-month deadline, the two Departments and the Indian tribes did not reach agreement on draft regulations until 1990. During this time, the Departments sponsored several regional negotiation sessions throughout the country. Tribal representatives were offered an opportunity to present their issues to a panel of federal employees. However, these employees did not always have the full negotiating authority of their agencies. In several instances, agreements the federal team reach with the tribal representatives were overturned by superiors in Washington, DC More importantly, after the 1990 compromise had been reached, the Departments continued to work on the proposed regulations without tribal input. When a new administration took over in 1993, a decision was made to publish the draft regulations. On January 20, 1994, 5 years after the original deadline, the draft regulations were published. In the preamble, the new administration noted the lack of tribal participation since 1990.

Tribal reaction to the proposed regulations was extremely negative. Tribes, tribal organizations and national Indian organizations criticized both the content of the 1994 proposed regulations and its length, running over 80 pages in the Federal Register. In response to this criticism, the Departments began holding regional meetings. Because the tribes had been excluded from the decision making process leading to the proposed regulations, the Departments agreed to form a formal advisory committee under the Federal Advisory Committee Act of 1990.

While the tribes and the Departments discussed formation of the committee, Congress began its own investigation into the rulemaking and administration of the Act. In October of 1994, Congress, skeptical of the Departments’ rulemaking efforts and management of the 638 contract programs, decided, again, to amend the Act. However, this time, Congress severely limited the areas subject to regulation and required the Departments to develop any regulations jointly and with the active participation of Indian tribes under the guidance of the Negotiated Rulemaking Act of 1990. In addition, Congress required final regulations to be published within 18 months or the Departments would lose their rulemaking authority. The deadline was May 25, 1996.

By the time the October 1994 amendments passed, the two Departments and the tribes had come to agreement on the membership process for the Advisory Committee. Because of the Act’s recent amendments, the tribes and the Departments agreed that this committee would be responsible for recommending to the Departments what regulations, if any, should exist. To ensure that the tribes had adequate representation on the Committee, the Departments and the

tribes agree to allow two tribal representatives from each Bureau of Indian Affairs and Indian Health Service Area (organizational subunits of the Departments) for a total of 48 tribal representatives. To avert past negotiating problems with federal officials, the Departments agreed that it would be represented by individuals with full and binding negotiation authority for their agency or office. The Department of the Interior chose 9 negotiators and the Department of Health and Human Services chose 6 negotiators. In late January 1995, pursuant to the Federal Advisory Committee Act (FACA), the Departments published the proposed list of tribal and federal negotiators in the Federal Register.

- **Outcomes of the Indian Self-Determination Negotiated Rulemaking**

- *These negotiations achieved in twenty months, what tribes and the federal government had tried unsuccessfully for over twenty years to accomplish.*

- The negotiations ended on time with all but four issues resolved. The four issues did not hold up the overall implementation of the regulations. The entire Committee of 63 members had successfully consented to thirty-four pages of very detailed regulations written in “Plain English” that would now guide tribes and tribal organizations and federal contractors in negotiating contracts between the Departments of Interior and the Health and Human Services. Tribes and tribal organizations who wished to contract with the federal government to provide health services, education, and construction projects for Native peoples would now have an easily comprehensible set of procedures to follow that was consistent for two federal agencies and clear both to novice Indian contractors as well as to new federal administrators.

- **Significant Outcomes:**

- Largest negotiated rulemaking to date. Sixty-three committee members-each with full veto power.
- First negotiated rulemaking binding two Departments (Department of the Interior and Department of Health and Human Services) to the same regulations.
- Full consensus used on all decisions.
- Created a model for future dialogues with the tribes
- Became the benchmark against all future negotiated rulemaking for Department of the Interior and Department of Health and Human Services.
- Positive relationships between the negotiators has persisted, which affect the resolution of other problems that they face as advocates for tribes and tribal organizations and Federal agencies.
- In interviews with tribal and Federal agency representatives using these regulations, overall satisfaction is expressed with the clarity and usefulness of the document.

2. Native American Housing Negotiated Rulemaking

In 1996, Congress enacted the Native American Housing and Self-Determination Act as part of the U.S. government’s move to give Indian tribes and Alaska Native Villages more autonomy in administering their housing programs. The implementation of this legislation and other measures requires the development of regulations and procedures to govern tribal oversight.

The negotiating committee included 48 tribal members representing 570 Indian Tribes and Alaskan Native Villages, and 10 representatives from the U.S. Department of Housing and Urban Development. The committee successfully negotiated more than 200 separate issues involving the administration and distribution of \$600-million in federal funds.

Through ten months of negotiations, FMCS Commissioners facilitated, mediated and coordinated 49 general meetings, 600 work group sessions and countless sidebars. Working with committee co-chairs, mediators helped establish protocols, set meeting agendas, chaired caucuses and made arrangements for meeting facilities.

Working in partnership through long, tedious hours of work, the committee resolved the 216 identified issues, each with its own history and rationale, to produce by consensus a final comprehensive regulation that departs dramatically from the past while carrying out the federal government's responsibilities to Native American citizens.

1. Tribal Self Governance Negotiated Rulemaking

FMCS was also engaged in the Tribal Self Governance Rulemaking which had its origins in the The Indian Self-Determination Act Amendments of 1988 (Pub. L. 100-472). This act authorized the Tribal Self-Governance Demonstration Project for a 5-year period and directed the Secretary to select up to 20 tribes to participate. The purpose of the demonstration project was to transfer to participating tribes the control of, funding for, and decision making concerning certain federal programs, services, functions and activities or portions thereof. In 1991, there were 7 annual funding agreements under the project, and this expanded to 17 in 1992. In 1991, the demonstration project was extended for an additional 3 years and the number of tribes authorized to participate was increased to 30 (Pub. L. 102-184). The number of Self-Governance agreements increased to 19 in 1993 and 28 in 1994. The 28 agreements in 1994 represented participation in self-governance by 95 tribes authorized to participate.

After finding that the Demonstration Project had successfully furthered tribal self-determination and self-governance, Congress enacted the "Tribal Self-Governance Act of 1994," Public Law 103-413 which was signed by the President on October 25, 1994. The **Tribal Self-Governance Act of 1994** made the Demonstration Project a permanent program and authorized the continuing participation of those tribes already in the program.

A key feature of the 1994 Act included the authorization of up to twenty tribes per year in the program, based on their successfully completing a planning phase, being duly authorized by the tribal government body and demonstrating financial stability and management capability. The Act was amended by Public Law 104-208 on September 30, 1996, to allow up to 50 tribes annually to be selected from the applicant pool. In 1996, the Act was also amended by Public Law 104-109, "An Act to make certain technical corrections and law related to Native Americans". The number of annual funding agreements grew by one to 29 in 1995 and grew to 53 and 60 agreements in 1996 and 1997, respectively, to include 180 and 202 tribes, respectively, either individually or through consortium of tribes.

The Act also authorized the formation of a negotiated rulemaking committee if so requested by a majority of the Indian tribes with Self-Governance agreements. Such a request was made to the Department of the Interior and a rule making committee was formed. Pursuant to section 407 of the Act, membership was restricted to federal and tribal government representatives, with a majority of the tribal members representing tribes with agreements under the Act. Eleven tribal representatives joined the committee. Seven tribal representatives were from tribes with Self-Governance agreements and four were from tribes that were not in Self-Governance. Formation of the rulemaking committee was announced in the Federal Register on February 15, 1995.

To date, FMCS has facilitated dozens of meetings of the full committee which were held in different locations throughout the country, with two more scheduled in July and September, 1998. In addition, FMCS mediators facilitated numerous workgroups and other meetings during this period that were used to develop draft material and exchange information in support of the full committee meetings.