



## No Child Left Behind Negotiated Rulemaking

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### Why are we here?

In the No Child Left Behind Act of 2001 (NCLB),  
Congress directed DOI to –

- Improve education in Indian country
- Review the process for prioritizing repair and replacement of Indian education facilities
- Ensure that Indian people are involved in review of DOI's prioritizing process

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### What kind of Indian involvement does Congress require?

NCLB requires DOI to use the Federal Advisory  
Committee Act and the Negotiated Rulemaking Act  
to ensure involvement by Indian people.

- Federal Advisory Committee Act (FACA) – Governs establishing and running advisory committees.
- Negotiated Rulemaking Act (NRA) – Establishes procedures for agencies to negotiate with those affected by proposed regulations *prior* to publication in Federal Register.

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### How will Indian people provide input?

- Under FACA and NRA, DOI will establish a rule-making committee.
- Membership on the committee is limited to federal employees and representatives of tribes with Bureau-funded schools.

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### Has this been done before?

- From June to October 2003, a negotiated rulemaking committee drafted a report on regulations implementing most of NCLB.
- Final rules incorporating that committee's work were published in the Federal Register on February 25, 2004.
- Some work required by NCLB remains unfinished.

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### What is the unfinished business?

Congress required establishing a negotiated rulemaking committee to study –

- The physical conditions of Bureau-funded schools;
- The way in which construction funds are apportioned among those schools.

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### What does NCLB require us to do?

Congress mandated that the committee prepare a report containing –

- A catalog of the conditions of Bureau-funded schools;
- A school replacement and new construction report;
- A renovation and repairs report.

The report must determine –

- The needs for replacement and renovation;
- A formula for equitable distribution of funds to address these needs.

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### Are there any other requirements in NCLB?

Our committee charter includes authority to complete work that the first committee left undone.

The earlier committee revised national standards for home-living (dormitory) situations, but not the standards relating to heating, lighting, and cooling.

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### How do NRA and FACA affect our committee's work?

The Negotiated Rulemaking Act establishes procedures for negotiated rulemaking. The Act –

- Enables those interested in, or affected by, regulations to help shape those regulations before publication in the Federal Register;
- Requires that stakeholders with divergent interests – e.g., environmentalists and industry – be represented on such committees.

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### What does the NRA require?

- If a committee reaches consensus on a proposed rule, the committee submits a report containing the proposed rule.
- If the committee does not reach consensus, it may submit a report specifying any areas in which the committee reached a consensus.
- The committee may include in their report any other appropriate information, recommendations, or materials.
- Any committee member may include additional information, recommendations, or materials as an addendum.

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### What is “consensus”?

NRA defines consensus as –  
unanimous concurrence among the interests represented on a negotiated rulemaking committee, unless the committee either –

- agrees to define the term to mean a general but not unanimous concurrence; or
- agrees upon another specified definition.

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### What the purpose of FACA?

FACA –

- Allows people outside of the federal government to provide helpful input on draft regulations before publication;
- Was enacted to ensure transparency of, and congressional oversight to, agency use of outside experts.

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### What are FACA's major provisions?

- Agencies must establish uniform administrative guidelines;
- Committees must be chartered before they can meet or conduct any business;
- Membership must be fairly balanced;
- Meetings must be open to the public;
- Designated Federal Official must approve all meetings and agendas;
- Detailed minutes (not transcript) of each committee meeting must be kept;

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### Major FACA provisions, continued

- All committee documents must be available for public inspection and copying;
- Documents created by the full committee are Federal Records regardless of media or format;
- Records must be maintained;
- Advisory committees are terminated when:
  - Stated objectives have been accomplished;
  - The committee's work has become obsolete; or
  - Cost of the committee's activity is excessive.

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### The FACA Charter

- Before a committee can meet, the agency must submit a charter to Congress and the agency head.
- The charter for our "No Child Left Behind School Facilities and Construction Negotiated Rulemaking Committee" was submitted on or about January 4, 2010.

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### What must the charter include?

- The committee's official name, objectives and scope of activity;
- The period necessary for the committee to finish its work;
- The agency or official to whom the committee reports;
- The agency responsible for providing necessary support;

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### Charter requirements, continued -

- A description of the committee's duties;
- The estimated annual operating costs;
- The estimated number and frequency of committee meetings;
- The committee's termination date; and
- The date the charter is filed.

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### Who runs the Committee?

FACA requires that each committee have a 'designated federal officer' (DFO) who must --

- Chair or attend each committee meeting;
- Adjourn a meeting whenever he/she determines it to be in the public interest;
- Be present at all committee meetings;
- Call or approve each committee meeting and approve the agenda for each meeting.

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### Are there operation procedures for Committee meetings?

- A negotiated rulemaking committee may adopt its own operating procedures.
- For convenience, our DFO has sponsored the creation of draft ground rules to be submitted to the Committee for review and approval.

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### What about facilitators under NRA?

- ✓ An agency may nominate a facilitator, subject to the committee's approval by consensus.
- ✓ The facilitator does not have to be a Federal employee.
- ✓ If the committee does not approve the agency's nominee, the agency must nominate a substitute.
- ✓ If the committee does not approve any of the agency's nominees, the committee must select by consensus a person to serve as facilitator.
- ✓ A person designated to represent the agency in substantive issues cannot serve as facilitator or chair the committee.

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### What rules affect the Committee's records?

- The documents created in the course of the Committee's work are federal records.
- The records must be preserved as required by 5 U.S.C. § 552 and Federal Records schedule 26.

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### Where can I find committee documents?

- The DFO will post approved committee documents on a DOI website for viewing and printing -- <http://www.bia.gov/WhoWeAre/AS-IA/ORM/index.htm>



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### Why use Negotiated Rulemaking?

- By involving stakeholders in *drafting* the rules, we hope for better acceptance of the rules as published.
- Negotiated rulemaking maximizes compliance with federal policy of consulting with Indian people when developing regulations affecting them.
- Basically - to get better rules!

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### Questions



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